

SUPREME COURT OF QUEENSLAND

CITATION: *Huang v Body Corporate for the Dorchester CTS 10749*
[2026] QCA 147

PARTIES: **JORDAN JAMIE HUANG**
(applicant)
v
BODY CORPORATE FOR THE DORCHESTER CTS 10749
(respondent)
QUEENSLAND HUMAN RIGHTS COMMISSION
(first intervener)
ATTORNEY-GENERAL OF QUEENSLAND
(second intervener)

FILE NO/S: Appeal No 9058 of 2024
QCATA No 226 of 2023

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Queensland Civil and Administrative Tribunal Act*

ORIGINATING COURT: Queensland Civil and Administrative Tribunal at Brisbane – [2024] QCATA 64 (Member Oliver)

DELIVERED ON: 7 August 2026

DELIVERED AT: Brisbane

HEARING DATE: 2 April 2025

JUDGES: Bond JA, Brown JA, Bradley JA

ORDERS: **1. Leave to appeal granted.**
2. Appeal dismissed.
3. The applicant and the respondent are to file any written submissions on costs, not to exceed five pages, within 14 days.

CATCHWORDS: HUMAN RIGHTS – HUMAN RIGHTS LEGISLATION – where the applicant owns a lot in a community management scheme – where the respondent is the body corporate for the scheme – where the respondent passed a resolution at an annual general meeting rescinding approval previously granted to the applicant to build an enclosed bathroom on an exclusive use area – where the applicant unsuccessfully contested the validity of the resolution before an adjudicator appointed under the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**), arguing that the respondent failed to act reasonably as required by s 94(2) of the BCCM Act – where the applicant contends the adjudicator in coming to its decision acted unlawfully under s 58(1) of the *Human Rights Act 2019*

(Qld) (**HRA**) by failing to have regard to his property rights under s 24 of the HRA – whether the adjudicator was a “tribunal” exercising “judicial power” under s 9(4)(b) of the HRA and therefore not a “public entity” to which s 58(1) of the HRA applies – whether the exercise of adjudicative or judicial functions in the resolution of a dispute between private parties is an act or decision of a “private nature” under s 58(4) of the HRA with the consequence that s 58(1) of the HRA had no application to the adjudicator’s decision

HUMAN RIGHTS – HUMAN RIGHTS LEGISLATION – where the applicant seeks leave to appeal against the decision of the appellate division of QCAT determining that an adjudicator appointed under the BCCM Act did not act unlawfully in failing to have regard to the applicant’s property rights under s 24 of the HRA – where the applicant contends that, even if the adjudicator was not a “public entity” to which s 58(1) of the HRA applies, the adjudicator was still nonetheless required by s 5(2)(a) of the HRA to have regard to his property rights under s 24 of the HRA – whether s 5(2)(a) of the HRA imposes any direct obligation on a court or tribunal to observe the rights set out in part 2, divisions 2 and 3

Body Corporate and Community Management Act 1997

(Qld), s 94(2), s 267, s 276, s 289

Human Rights Act 2019 (Qld), s 5(2)(a), s 9, s 10, s 24, s 58

Attorney-General (Cth) v Alinta Ltd (2008) 233 CLR 542;

[2008] HCA 2, cited

Beale v Chief Health Officer [\[2022\] QCA 188](#), cited

Brandy v Human Rights and Equal Opportunity Commission

(1995) 183 CLR 245; [1995] HCA 10, cited

De Simone v Bevnol Constructions & Developments Pty Ltd

(2009) 25 VR 237; [2009] VSCA 199, doubted

Huddart, Parker & Co Pty Ltd v Moorehead (1909)

8 CLR 330; [1909] HCA 36, cited

Innes v Electoral Commissioner of Queensland (No 2) (2020)

5 QR 623; [2020] QSC 293, cited

New South Wales v Wojciechowska (2025) 283 CLR 148;

[2025] HCA 27, applied

Re Kracke v Mental Health Review Board (2009) 29 VAR 1;

[2009] VCAT 646, cited

Re Monger; ex parte WMC Resources Ltd [2002]

WASCA 129, cited

Valente v The Queen [1985] 2 SCR 673; [1985] CanLII 25

(SCC), cited

Wood v The King (2022) 303 A Crim R 466; [2022]

QSC 216, cited

COUNSEL:

B W Wacker for the applicant

J J T Dudley for the respondent

P Morreau KC for the first intervener

G J D Del Villar KC SG, with K J E Blore, for the second intervenor

SOLICITORS: Ellem Warren Napa Lawyers for the applicant
Pine Lawyers for the respondent
Queensland Human Rights Commission for the first intervenor
C E Christensen, Crown Solicitor for the second intervenor

- [1] **BOND JA:** I agree with the reasons for judgment of Bradley JA and with the orders proposed by his Honour.
- [2] **BROWN JA:** I agree with Bradley JA that the appeal should be dismissed for the reasons set out by his Honour. I also agree with the orders proposed by his Honour.
- [3] **BRADLEY JA:** The applicant (**Mr Huang**) seeks leave to appeal a decision of the Queensland Civil and Administrative Tribunal (the **appeal tribunal**) constituted for the purpose of hearing and deciding an appeal against a decision of an adjudicator.¹

The underlying events

- [4] Mr Huang owns a lot in a community management scheme for The Dorchester at Surfers Paradise. The respondent is the body corporate for the scheme. Mr Huang's lot is on the top floor of the building. It has the benefit of the exclusive use of an area of common property on the rooftop. The exclusive use is pursuant to a by-law that attaches to Mr Huang's lot.² The by-law may only stop applying if the lot owner agrees in writing.³
- [5] Before 2000, Mr Huang constructed an enclosed bathroom with a toilet and shower facility (the **annexe**) on the exclusive use area. The annexe is above a mechanical ventilation duct (**MVD**), which was modified during its construction. Mr Huang was not entitled to make this improvement without the authorisation of the respondent.⁴ He did so without seeking or obtaining authorisation.
- [6] On 29 June 2000, an extraordinary general meeting of the respondent resolved to approve the construction of the annexe (the **approval resolution**).
- [7] Subsequently, the respondent obtained two reports from a consulting engineer, dated 19 August 2020 and 22 February 2022 (the **GHCE reports**). The GHCE reports found that rusted holes in the MVD on the rooftop were responsible for water ingress to the building. The respondent sought to remove the annexe to repair the rooftop waterproof membrane and gain access to utility infrastructure beneath the annexe, including the MVD.
- [8] On 17 March 2022, the annual general meeting of the respondent resolved to rescind the approval resolution (the **rescission resolution**). Since then, Mr Huang has been in dispute with the respondent about the validity of the rescission resolution.

¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (**QCAT Act**), s 165.

² *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**), s 170(1)(a).

³ *BCCM Act*, s 171(3).

⁴ *Body Corporate and Community Management (Standard Module) Regulation 2020* (Qld), s 193(3).

- [9] It is common ground that the respondent had power to authorise Mr Huang to make an improvement to the exclusive use area and had power to amend or revoke that authorisation.

The adjudication

- [10] Mr Huang applied to the Office of the Commissioner for Body Corporate and Community Management for an adjudication of the dispute.⁵ The Commissioner referred the application to an adjudicator.
- [11] In the adjudication, Mr Huang challenged the rescission resolution on the ground that the respondent did not act reasonably in making the rescission resolution, so that it was contrary to s 94(2) of the BCCM Act. Section 94 provides:

“94 Body corporate’s general functions

- (1) The body corporate for a community titles scheme must—
 - (a) administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme; ...
 - (2) The body corporate must act reasonably in anything it does under subsection (1) including making, or not making, a decision for the subsection.”
- [12] Mr Huang was obliged to provide “the grounds, in detail, on which the outcome is sought” in the adjudication.⁶ He submitted that the rescission resolution was invalid because the respondent failed to act reasonably in three respects:
- (a) by circulating to lot owners information about the proposed rescission resolution that was incomplete, inadequate, misleading, and insufficient for the lot owners to make an informed decision;
 - (b) by failing to allow Mr Huang adequate opportunity to obtain his own expert report in response to the GHCE reports; and
 - (c) by rescinding the approval for the annexe despite Mr Huang’s expressed willingness to allow access beneath the annexe on reasonable reinstatement conditions.
- [13] Mr Huang asked the adjudicator to declare that the rescission resolution was void and to order the respondent not to implement or otherwise act on the rescission resolution.
- [14] Before the adjudicator, it was not controversial that the annexe restricts or prevents access to the infrastructure beneath it, including the MVD.
- [15] The adjudicator conveniently summarised the relevant findings in the GHCE reports.
- (a) Firstly:
 - a. extensive corrosion was discovered beneath the annexe floor and is “substantially attributable to the MVD modifications associated with the [annexe]”;

⁵ BCCM Act, Chapter 6.

⁶ BCCM Act, s 239B(e).

- b. the rear face of the MVD, where the original MVD was cut to accommodate an adapter frame installed at the time of construction of the annexe, had “extreme corrosion”;
- c. there is “little evidence of corrosion on the plain galvanised plate sections of the original MVD”;
- d. “corrosion has tended to occur at folds or splices in the MVD, which is particularly evident at the junction between the original MVD and the modified MVD” installed within the annexe;
- e. “major corrosion has caused significant damage to both the original MVD and the adapter frame”;
- f. “the original MVD has corrosion induced holes at roof level that could admit a significant flow of ponded water from the roof slab to unit 2 on the first level”;
- g. “there was no apparent corrosion in the modified MVD”; and
- h. “the corrosion of the galvanised steel components, including the adapter frame, is severe along the connection/splice points while that of the colorbond modified MVD is barely noticeable, which could be due to the interaction between dissimilar metals where the modified MVD was fixed to the adapter frame with self-tapping screws.”

(b) Secondly:

- a. “to properly investigate the Hydraulic Services Shaft (**HSS**), which is also utility infrastructure that emerges onto the rooftop beneath the [annexe] and is also suspected of playing a role in water ingress to the building, “the whole of the MVD will need to be removed in addition to the floor structure, internal cladding and Southern wall of the [annexe]”;
- b. “[GHCE] had previously recommended the removal of the annexe during works, as there needed to be safe and clear access of at least 1.2 metres around the MVD and HSS, and recommended the annexe not be restored to its original footprint once repairs are complete”; and
- c. “[GHCE maintained] its previous recommendations with respect to safe working access for ongoing maintenance, inspection and emergency access to the infrastructure beneath the [annexe].”

(c) Thirdly:

“The location of the [annexe] prevents access to critical infrastructure, including high pressure lines, valves, and water supply pipes and the only legal point of drainage available for the North Tower roof. This situation cannot be tolerated if the storm water ingress and safety for North Tower Units is to be responsibly and adequately managed in the future. Hence it is my recommendation that the present [annexe] be demolished and not be permitted to be reinstated in its present location.”

- [16] On 9 June 2023, the adjudicator published findings in respect of Mr Huang’s adjudication application.
- [17] The adjudicator considered each of Mr Huang’s submissions about the material circulated to lot owners before the annual general meeting. The adjudicator found most of the information was not misleading in the respects Mr Huang asserted. The adjudicator found that in one respect information circulated to lot owners was “not strictly correct” but was “clear in context”.
- [18] The adjudicator found Mr Huang had not been denied an opportunity to obtain his own report before the rescission resolution, because:
- (a) On 6 August 2021, Mr Huang had obtained a report from “a builder and engineer” refuting the necessity of removing the annexe.
 - (b) On 21 October 2021, Mr Huang had also obtained his own consulting engineer’s report, the effect of which the adjudicator conveniently summarised:

“While the report contested Mr Huang’s responsibility for the defects in the utility infrastructure beneath the annexe, it did not deny the defects nor say that they could be repaired without removing the annexe. It said that it might be possible to rectify the waterproof membrane on the roof without removing the annexe, but acknowledged that approach would be tedious, costly, and the potential for success could only be confirmed once work was underway.”
 - (c) The annual general meeting passed the rescission resolution on 17 March 2022.
- [19] The adjudicator found that the respondent’s decision to pass the rescission resolution was reasonably open because the respondent wished to retain access to the utility infrastructure beneath the annexe after the repairs were complete, as recommended by the GHCE reports.
- [20] The adjudicator dismissed Mr Huang’s application.
- [21] In his application before the adjudicator, Mr Huang did not raise any issue about the *Human Rights Act 2019* (Qld) (the **HRA**). Neither Mr Huang nor the respondent raised any issue about the interpretation of s 94(2) of the BCCM Act. It is unsurprising that the adjudicator did not give any consideration to the application of the HRA in the reasons for decision.

Appeal to the appeal tribunal

- [22] Mr Huang appealed to the appeal tribunal from the adjudicator’s decision. He could appeal only on a question of law.⁷ Mr Huang’s grounds of appeal were:
- (a) That the adjudicator failed to construe s 94(2) of the BCCM Act in a way that is compatible with human rights;
 - (b) That the adjudicator failed to give weight, or sufficient weight, to certain matters;
 - (c) That the adjudicator took into account extraneous or irrelevant matters; and

⁷ BCCM Act, s 289(2).

- (d) That the respondent misled lot owners in a memorandum about the proposed rescission resolution.

[23] On 13 June 2024, the appeal tribunal dismissed his appeal.

[24] The appeal tribunal found against Mr Huang on the grounds summarised at [22](b) to [22](d) above.⁸ Mr Huang did not challenge these findings.

[25] Mr Huang seeks leave to appeal only in respect of the appeal tribunal's decision on the ground summarised at [22](a) above. The learned appeal tribunal member described this ground as follows:

“that the adjudicator, as a public entity, failed to have regard to the application of the [HRA] in coming to the decision to uphold the [rescission resolution]. That is because the decision involved the appellant's human right to his property, being the amenities annex on the exclusive use area, and the resolution had the effect of arbitrarily depriving him of that property.”⁹

[26] The member identified the “primary issues” as:

“whether the [HRA] applied to the adjudicator's decision-making process, and following on from that, whether the [rescission resolution] was unreasonable and contrary to the respondent's obligations under s 94(2) of the BCCM Act.”¹⁰

[27] In the appeal tribunal, Mr Huang relied on s 24 and s 58 of the HRA, which relevantly provide:

“24 Property rights

- (1) All persons have the right to own property alone or in association with others.
- (2) A person must not be arbitrarily deprived of the person's property.”

and:

“58 Conduct of public entities

- (1) It is unlawful for a public entity—
 - (a) to act or make a decision in a way that is not compatible with human rights; or
 - (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.
- ...
- (4) This section does not apply to an act or decision of a private nature.”

⁸ *Huang v Body Corporate for the Dorchester CTS 10749* [2024] QCATA (**QCATA Reasons**), [94], [95], [97].

⁹ QCATA Reasons, [7].

¹⁰ QCATA Reasons, [8].

[28] Mr Huang submitted that the adjudicator was a “public entity” undertaking an act or making a decision that was not of a private nature. He contended that the adjudicator’s decision was unlawful because it was not compatible with his human rights under s 24.

[29] A “public entity” is defined in s 9 of the HRA. Relevantly, that section provides:

“9 Meaning of public entity

(1) Each of the following entities is a *public entity*—

...

(b) a public service employee;

...

(4) However, a public entity does not include—

(b) a court or tribunal, except when acting in an administrative capacity;

...”

[30] In s 10 of the HRA, the legislature identifies circumstances in which a function is of a public nature:

“10 When function is of a public nature

(1) In deciding whether a function of an entity is of a public nature for this Act, any of the following matters may be considered—

(a) whether the function is conferred on the entity under a statutory provision;

(b) whether the function is connected to or generally identified with functions of government;

(c) whether the function is of a regulatory nature;

(d) whether the entity is publicly funded to perform the function;

(e) whether the entity is a government owned corporation.

(2) Subsection (1) does not limit the matters that may be considered in deciding whether a function is of a public nature.”

[31] The appeal tribunal found that the adjudication was not a function of a public nature and the adjudicator’s decision related to an act or decision of a private nature between Mr Huang and the respondent.¹¹ So, the member reasoned that section 58(1) of the HRA did not apply to the adjudication.¹² Mr Huang would challenge this finding, if granted leave to appeal.

¹¹ QCATA Reasons, [98].

¹² Pursuant to QCATA Reasons, [79].

Leave to appeal

- [32] Mr Huang may only appeal to this Court on a question of law. He may do so only with the Court's leave.¹³
- [33] Had Mr Huang contended before the adjudicator that the rescission resolution was not reasonable, within the meaning of s 94(2) of the BCCM Act, because it arbitrarily deprived him of his property, then the adjudicator would have had to determine whether that was so. This issue was not raised in the dispute before the adjudicator. Perhaps as a consequence, at the hearing in this Court, Mr Huang's counsel was unable to identify with certainty the nature of the property in question or how the rescission resolution might be characterised as arbitrary. This diminished the potential utility of an appeal. It does not appear that an appeal would correct any substantial injustice.
- [34] The appeal would raise a matter of general importance about the application of provisions in the HRA to the conduct of an adjudicator dealing with a dispute under the BCCM Act. It may have some relevance for other decision-makers. Something of the importance of that question may be reflected in the intervention by the Attorney-General and the Queensland Human Rights Commission (the **Commission**) in this proceeding.¹⁴ For that reason, the Court should give Mr Huang leave to appeal.

Grounds of appeal and contention

- [35] In this Court, Mr Huang's grounds of appeal were:
- (a) That the member erred in concluding the dispute was of a private nature; and ought to have concluded that the adjudicator was obliged to act in accordance with s 58(1) of the HRA in acting or making a decision in relation to the dispute;
 - (b) That the member erred in concluding that the HRA does not fall within the "context" of the community titles scheme and Chapter 6 of the BCCM Act;¹⁵
 - (c) That the member erred in failing to conclude that, properly construed, s 58(4) of the HRA focuses attention on whether the act or decision of the public entity is of a private nature,¹⁶ not whether the substance of the dispute being determined by the public entity is of a private nature;
 - (d) That the member ought to have concluded that it was unlawful for the adjudicator to fail to give proper consideration to Mr Huang's right not to be arbitrarily deprived of his property as a human right relevant to the adjudicator's decision,¹⁷ and ought to have allowed the appeal against the adjudicator's decision and remitted the matter back to the adjudicator for determination in accordance with s 58(1) of the HRA; and
 - (e) That the member erred in failing to conclude that the right not to be arbitrarily deprived of property applied to the adjudication, pursuant to s 5(2)(a) of the

¹³ QCAT Act, s 150(3)(b).

¹⁴ The interveners did not oppose the Court granting leave to appeal.

¹⁵ And ought to have concluded that s 58(1) of the HRA applied to the adjudicator in acting and making the decision.

¹⁶ i.e. whether the public entity is acting or deciding in his or her own private or personal capacity.

¹⁷ HRA, s 24(2).

HRA, to the extent the adjudicator had functions under part 2 and part 3, division 3 of the HRA, and the member ought to have found that the adjudicator was obliged to apply that right in acting and making the decision and interpreting all statutory provisions, including s 94(2) of the BCCM Act.

- [36] The respondent filed a notice contending that the appeal tribunal decision should be affirmed on either of two alternative grounds that:
- (a) The adjudicator was a “tribunal” within the meaning of s 9(4)(b) acting in a non-administrative capacity (exercising judicial power) such that the adjudicator was not a “public entity” subject to the obligations under s 58 of the HRA; or
 - (b) The appeal tribunal’s decision to dismiss the appeal should be affirmed because remittal to the adjudicator would not lead to a different decision, as the adjudicator’s decision was substantively compatible with the right to property in s 24(2), regardless of non-compliance with s 58 of the HR Act.
- [37] Each ground raised a question of law. The grounds of appeal overlap amongst themselves and with the issues raised in the notice of contention. It is convenient to consider them in a different order.

Was the adjudicator a public entity?

- [38] A public entity is broadly defined in the HRA to encompass a range of entities and individuals. The adjudicator was a public service employee appointed under the *Public Sector Act 2022* (Qld). As such, the adjudicator was within s 9(1)(b) of the definition of public entity in the HRA.
- [39] However, the adjudicator would *not* have been a public entity, for the purposes of the HRA, when deciding Mr Huang’s application if, in doing so, the adjudicator was a “court or tribunal” and was not “acting in an administrative capacity” within the meaning of s 9(4)(b) of the HRA.

Was the adjudicator a tribunal exercising judicial power?

- [40] Although “court” is defined in the HRA, “tribunal” is not. In the context in which s 9(4)(b) appears in the HRA, it is clear that a tribunal is a body or person able to exercise judicial power, as well as act in an administrative capacity.
- [41] Parliament refers to “court or tribunal” immediately after the other excluded entity,¹⁸ being the Legislative Assembly and persons performing functions in connection with its proceedings.¹⁹
- [42] Counsel for the Attorney identified the description by Bell J in *Re Kracke v Mental Health Review Board* of the meaning of “tribunal” in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), as helpful:

“a tribunal is a person or body who, under a statute, operates independently of government and possesses a limited and specified jurisdiction or authority to make particular decisions of a judicial or administrative character applying general principles of law or policy.

¹⁸ HRA, s 9(4)(b).

¹⁹ HRA, s 9(4)(a).

Although such a tribunal can operate flexibly and informally, it would normally conduct a proceeding according to practices and procedures, either specified under the statute or within the authority and control of the tribunal, appropriate and adapted to the nature of its jurisdiction. A tribunal will not be directable by government with respect to the determination of particular cases.”²⁰

- [43] This is consistent with the view of Anderson J in *Re Monger; ex parte WMC Resources Ltd* that “tribunal” in its ordinary meaning signifies something more than an official performing an “essentially administrative task”, in that case: “examining doctors’ reports for compliance” with statutory medical evidence requirements and “deciding whether they do or do not comply.”²¹ His Honour says:

“The dictionaries tell us that, in its primary sense, ‘tribunal’ means a place or seat of judgment (Shorter Oxford Dictionary), a body appointed to adjudicate disputes (Butterworths Australian Legal Dictionary) and (according to the Dictionary of English Law) a person or body exercising judicial or quasi-judicial functions outside the regular judicial system...”²²

- [44] The expression “court or tribunal” is used in s 31 of the HRA, which provides for a right to a fair hearing in a court or tribunal.

- [45] The statutory expression in the HRA derives more immediately from the right to equality before “courts and tribunals” in article 14 of the *International Covenant on Civil and Political Rights*. In that instrument, a court or tribunal is referred to as “a competent, independent and impartial tribunal established by law”. The United Nations Human Rights Committee has explained the expression:

“The notion of a ‘tribunal’ in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.”²³

- [46] Parliament adopted a similar description of “a competent, independent and impartial court or tribunal”.²⁴ Such a body has lawful authority to decide matters (“competent”), is separate from the executive and legislative branches of government (“independent”), and is unconnected to the parties and disinterested in the outcome (“impartial”).

- [47] An adjudicator is tasked with resolving disputes, including disputes like that brought by Mr Huang.²⁵ An adjudicator must act independently, and cannot be directed about the manner of resolution or the substance of a dispute.²⁶ These have been called “hallmarks” and “pivotal features” of the judicial process.²⁷ An adjudicator must

²⁰ (2009) 29 VAR 1 (*Re Kracke*), 72 [305]. This view was not disturbed by subsequent considerations in *R v Momcilovic* (2010) 25 VR 436 and *Momcilovic v The Queen* (2011) 245 CLR 1.

²¹ [2002] WASCA 129, [76] (*Re Monger*).

²² *Re Monger*, [76] (Murray J agreeing at [25]; Scott J agreeing at [91]).

²³ *General Comment No 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*, 90th session, UN Doc CCPR/C/GC/32 (23 August 2007) at [18].

²⁴ HRA, s 31(1).

²⁵ BCCM Act, ss 227(1)(b), 276(1)(a) and (b).

²⁶ BCCM Act, 232(5), 267(2).

²⁷ *Owen v Menzies* [2013] 2 Qd R 327 (*Owen v Menzies*), 334 [14], 338 [19] (de Jersey CJ); (Muir JA agreeing at 357 [101]).

observe natural justice, act fairly, and properly consider an application.²⁸ An adjudicator may make an order that is just and equitable in the circumstances to resolve the dispute.²⁹

- [48] While judicial power cannot be exhaustively defined, certain features of a body's functions have been observed as salient. In *New South Wales v Wojciechowska*, the High Court summarised:

“A judicial decision: is a ‘binding and authoritative decision of controversies between subjects or between subjects and the Crown made by a tribunal which is called upon to take action’; ‘determines existing rights and duties and does so according to law’, that is, ‘by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion’; and is an ‘authoritative determination by means of the judicial method, that is, an enforceable decision reached by applying the relevant principles of law to the facts as found.’”³⁰

- [49] In determining whether the respondent breached the BCCM Act, the adjudicator was not substituted in the position of the respondent, the original decision maker. The adjudicator was not conducting a merits review.³¹ He was not exercising a broad evaluative power.³² Nor was the adjudicator required to give effect to any relevant government policy or act on considerations of general policy, convenience, or expediency.³³ He was not creating new rights or liabilities for the parties.³⁴ Rather, the adjudicator was determining the existing rights and liabilities of the respondent and Mr Huang in accordance with a concrete norm of reasonableness and a concrete concept of the obligation to act reasonably.³⁵
- [50] The adjudicator was bound to decide the dispute. He could not choose to take no action.³⁶ The adjudicator had power to make orders about the existing rights and liabilities of the parties, including the declaration Mr Huang sought. He could restrain unlawful conduct and order reimbursement.³⁷ The adjudicator instead dismissed Mr Huang's application. The dismissal decision was not an order that either party could register as an order of the Magistrates Court.³⁸ Nor could a party have registered a declaration, had the adjudicator acceded to the relief Mr Huang sought in his application.
- [51] It was common ground that the adjudicator's decision was binding on the parties. Subject to an order of the appeal tribunal or this Court, an adjudicator's decision is the only remedy for a dispute of the kind raised by Mr Huang.³⁹

²⁸ BCCM Act, s 269(3)(a) and (b).

²⁹ BCCM Act, s 276(1).

³⁰ (2025) 283 CLR 148 (*Wojciechowska*), 159 [16] (footnotes omitted).

³¹ *Wojciechowska*, 164-165 [24]-[25].

³² *Wojciechowska*, 166-167 [31].

³³ *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 550-551 [4] (Gleeson CJ), citing *R v Spicer; ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277, 305 (Kitto J).

³⁴ *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188-191.

³⁵ See *Wojciechowska*, 165-166 [28].

³⁶ See *Wojciechowska*, 166 [29].

³⁷ BCCM Act, s 276(2), s 276(3) and Schedule 5, items 8 and 24.

³⁸ BCCM Act, s 286, s 287(2).

³⁹ BCCM Act, s 229.

- [52] In short, the adjudicator's role was to quell the controversy between the parties by ascertaining the facts, applying the law to them, exercising any discretion, and making a binding decision. Ordinarily, this would be characterised as the exercise of judicial power.⁴⁰
- [53] The appointment of the adjudicator for "a fixed term, or for a specific adjudicative task," was "secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner".⁴¹ So, the nature of his appointment did not prevent the adjudicator from being a tribunal. The adjudicator's investigative powers did not alter the nature of the adjudicator's role in dealing with Mr Huang's application.⁴² Nor did the absence of rules of evidence.⁴³
- [54] The adjudicator had no power or mechanism under the BCCM Act to enforce his decision. This is "a strong factor weighing against the characterisation of its powers as judicial",⁴⁴ but is not essential to the characterisation of its conduct as an exercise of judicial power.⁴⁵ If the other relevant features had indicated that the adjudicator's powers were administrative, rather than judicial, that inability would assume more importance.
- [55] Although not a judicial officer, the adjudicator was exercising a judicial function in finding and declaring the existing rights of the parties about the subject matter of their dispute. In deciding Mr Huang's application, the adjudicator was a tribunal, within the meaning in the HRA, and was not acting in an administrative capacity. The member erred in concluding otherwise.

Was the adjudicator's decision one of a private nature?

- [56] The "private" nature of the dispute between the parties before the adjudicator did not determine the nature of the adjudicator's conduct or the decision about that dispute. In considering and deciding Mr Huang's application, the adjudicator was exercising a statutory function, which was judicial in nature, and binding on the parties. It follows that the adjudicator was not acting in a private capacity and the decision was not an act or decision of a private nature, within the meaning of s 58(4) of the HRA.⁴⁶ The member erred in concluding otherwise.⁴⁷

Did s 5(2)(a) of the HRA require the adjudicator to directly apply the right not to be arbitrarily deprived of one's property?

- [57] The Commission, as an intervener, supported Mr Huang's appeal. Mr Huang adopted the Commission's submissions about the proper interpretation of s 5(2)(a) of the HRA.
- [58] By s 5, Parliament provided:

⁴⁰ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

⁴¹ *Valente v The Queen* [1985] 2 SCR 673, 698 (Le Dain J), cited with approval by Gleeson CJ in *Forge v ASIC* (2006) 228 CLR 45, 59 [13].

⁴² BCCM Act, s 269, s 271.

⁴³ BCCM Act, s 269(3)(c).

⁴⁴ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 (**Brandy**), 257 (Mason CJ, Brennan and Toohey JJ).

⁴⁵ *Brandy*, 269 (Deane, Dawson, Gaudron and McHugh JJ); *Attorney-General (Cth) v Alinta* (2008) 233 CLR 542, 599 [175] (Crennan and Kiefel JJ).

⁴⁶ cf *Innes v Electoral Commissioner of Queensland (No 2)* (2020) 5 QR 623 (**Innes**), 684 [303] (Ryan J).

⁴⁷ The outcome of the appeal does not turn on whether the adjudicator was acting in a private capacity.

“5 Act binds all persons

- (1) This Act binds all persons, including the State and, to the extent the legislative power of the Parliament permits, the Commonwealth and the other States.
- (2) This Act applies to—
 - (a) a court or tribunal, to the extent the court or tribunal has functions under part 2 and part 3, division 3; and
 - (b) the Parliament, to the extent the Parliament has functions under part 3, divisions 1, 2 and 3; and
 - (c) a public entity, to the extent the public entity has functions under part 3, division 4.
- (3) Subsection (2) does not limit or otherwise affect—
 - (a) another function conferred by this Act on an entity mentioned in the subsection; or
 - (b) a function conferred by this Act on any other entity.
- (4) Nothing in this Act makes the State liable to be prosecuted for an offence.”

[59] Part 2 of the HRA sets out the human rights of all individuals in Queensland. These are separated into “Civil and political rights” in part 2, division 2, and “Economic, social and cultural rights” in part 2, division 3.

[60] The Commission contended that s 5(2)(a) of the HRA requires courts and tribunals “to directly apply certain human rights” that relate to their functions when acting judicially. The Commission submitted that this interpretation of s 5(2)(a) should be accepted for three reasons:

- (a) *First*, the right to a fair trial and the right to equality before the law “would be rendered nugatory” if s 5(2)(a) did not require courts and tribunals to apply them;
- (b) *Second*, it was “doubtful” that Parliament intended “to ensure the common law was not altered” by the HRA, because the explanatory notes to the Bill noted the effect on courts was “through the interpretation of laws and adjudicating rights”; and
- (c) *Third*, this Court should not depart from the analysis of the Victorian Court of Appeal in *De Simone v Bevnol Constructions & Developments Pty Ltd (De Simone)*.⁴⁸

[61] In response to the Commissioner’s submissions, the Attorney contended that s 5 “signposts” the functions in part 3, division 3, which “pick up” the rights contained in part 2, divisions 2 and 3, and that s 5(2)(a) does not impose any direct obligation on a court or tribunal to observe the rights set out in part 2, divisions 2 and 3. This construction was said to be favoured by the following five considerations.

⁴⁸ (2009) 25 VR 237 (*De Simone*), 247 [52] (Neave JA and Williams AJA).

- [62] *First*, in limiting the application of the HRA to the functions particular to each organ of government,⁴⁹ for each of which provisions create specific obligations particular to the organ, Parliament did not intend s 5(2) to create freestanding obligations, but rather to refer to the specific obligations contained elsewhere in the HRA.
- [63] *Second*, part 2 provides a list of the human rights that are to be promoted and protected. This is consistent with s 4(a), which states that the main objects of the HRA are to be achieved, in part, by “stating the human rights Parliament specifically seeks to protect and promote”.⁵⁰ It does not identify any functions that a court or tribunal is to exercise.
- [64] *Third*, the HRA does not provide that courts and tribunals are to consider human rights when making any judicial decision. It is silent about whether courts and tribunals are to act compatibly with human rights generally, save when acting administratively. In contrast, the HRA contains express provisions about when obligations are imposed, for instance in s 38 (for the Legislature), s 48 (for courts or tribunals construing statutory provisions), s 53 (for the Supreme Court), and s 58 (for public entities).
- [65] *Fourth*, if s 5(2)(a) created freestanding obligations for courts and tribunals to consider human rights in all matters when acting judicially, then the obligations of courts and tribunals under the HRA would be more expansive than those of public entities, which are limited only “to the extent the public entity has functions under part 3, division 4”, and further limited by exceptions in s 58 (2), (3) and (4).
- [66] *Fifth*, if s 5(2)(a) were to be construed as imposing freestanding obligations on courts and tribunals to directly apply human rights, then it would create a right to appeal from any judicial decision on the basis of an error of law in failing to consider a particular human right. This would be inconsistent with the intention to not create standalone remedies for contraventions of the HRA, expressed in the Explanatory Notes.⁵¹
- [67] The Attorney’s leading counsel observed that the Commission’s submission “treats the objects in s 3 as objects to be pursued at all costs, irrespective of the mechanisms chosen by Parliament to give effect to them.”

Consideration of the intervenors’ contentions

- [68] It is convenient to explain why the Attorney’s construction of s 5(2)(a) is to be preferred and then deal with each of the Commissioner’s contentions.

The objects of the HRA and how they are to be achieved

- [69] The HRA has three main objects:⁵²
- (a) To protect and promote human rights;
 - (b) To help build a culture in the Queensland Public Sector that respects and promotes human rights; and

⁴⁹ These are set out in part 2 and part 3, division 3 (for courts and tribunals), part 3, divisions 1, 2, and 3 (for Parliament), and part 3, division 4 (for public entities).

⁵⁰ *Innes*, 197; *Wood v The King* (2022) 303 A Crim R 466, 480 [70], 482 [76], 483 [81]-[82], 484 [90], 485 [93] (Davis J).

⁵¹ Pages 7 and 8.

⁵² HRA, s 3.

- (c) To help promote a dialogue about the nature, meaning and scope of human rights.
- [70] Amongst the ways these main objects “are to be achieved primarily”, the following are relevant:
- Requiring public entities to act and make decisions in a way compatible with human rights;⁵³
 - Requiring courts and tribunals to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights;⁵⁴ and
 - Conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted in a way compatible with human rights.⁵⁵
- [71] The other primary means of achieving the main objects concern the operation of Parliament and its committees;⁵⁶ a process for the resolution of human rights complaints;⁵⁷ and the functions of the Commission.⁵⁸
- [72] The main objects, including protecting and promoting human rights, are not to be achieved *primarily* by courts and tribunals directly applying human rights in the manner advanced by the Commissioner.
- [73] The HRA expressly identifies the effect of its provisions on the role of courts and tribunals, acting judicially. Such bodies are to interpret statutory provisions, to the extent possible consistent with their purpose, in a way compatible with the human rights identified in part 2 of the HRA.⁵⁹ The Supreme Court has a separate specific role under s 53 to declare that a statutory provision cannot be interpreted in a way compatible with human rights. By enacting the human rights in part 2, divisions 2 and 3 of the HRA, Parliament required courts and tribunals to consider those rights when relevant to performing those functions.
- [74] By s 31(2), Parliament gives a court or tribunal power to exclude persons from hearings “in the public interest or the interests of justice”. This is plainly intended to apply directly to courts and tribunals. The same is the case with s 31(3), which requires judgments and decisions of courts and tribunals to be published. The same might also be said of s 34, dealing with double jeopardy, and s 35, dealing with retrospective criminal laws. Some other civil and political human rights have an obvious application to the functions of courts and tribunals.⁶⁰
- [75] The right to have a criminal charge or a civil proceeding decided by a competent, independent and impartial court or tribunal after a fair hearing conducted in public,⁶¹ the rights of accused persons in criminal proceedings,⁶² the rights of children in the criminal process,⁶³ the right not to be tried or punished more than once for an

⁵³ HRA, s 4(b).

⁵⁴ HRA, s 4(f).

⁵⁵ HRA, s 4(g).

⁵⁶ HRA, s 4(a), (c), (d), (e) and (h).

⁵⁷ HRA, s 4(i).

⁵⁸ HRA, s 4(j).

⁵⁹ HRA, s 48.

⁶⁰ HRA, s 15, s 29(5) and s (7).

⁶¹ HRA, s 31(1), subject to the exclusion of other persons in the public interest or the interests of justice under s 31(2).

⁶² HRA, s 32(1), (2) and (4).

⁶³ HRA, s 32(3) and s 33.

offence,⁶⁴ and the presumption against the retrospective operation of criminal laws,⁶⁵ are common law principles and presumptions developed by the courts. Courts and tribunals apply these rights, under the supervision or review of superior courts. The other “minimum guarantees” in s 32(2) are specific measures developed by the common law and statute⁶⁶ to give effect to these common law rights.

- [76] Many of these human rights apply when a court or tribunal is exercising criminal jurisdiction. Some of these human rights may apply when a particular issue arises in other types of proceeding.⁶⁷ In civil proceedings, the parties frame the issues that the court or tribunal is to decide. The issues may include the interpretation of a statute or whether a decision-maker has acted in a way inconsistent with one or more human right. In this sense, a human right might be said to apply “directly” to courts and tribunals when performing functions to which the human right is directed.
- [77] In each case, it will always be necessary to examine whether the court or tribunal is performing a function to which a human right applies – e.g. a criminal proceeding or the interpretation of a statute. This interpretation is similar to that referred to as the “intermediate interpretation”.⁶⁸
- [78] It would be inconsistent with the other provisions of the HRA, and the scheme they put into effect, to construe s 5(2)(a) as requiring a court or tribunal to “directly apply” each human right when acting judicially in deciding each dispute. By the HRA, Parliament not only identified the human rights, but also provided how they were to be applied by each organ of government.
- [79] There would be no utility in requiring the court or tribunal to consider every human right when some, many or all are not relevant to the judicial function the court or tribunal is performing.
- [80] The role of the court or tribunal in civil matters is to decide the dispute the parties bring before it, based on the evidence they adduce and the submissions they make. Nothing in the HRA or any of the extrinsic material placed before this Court shows any legislative intention to alter the adversarial nature of the judicial process by requiring a court or tribunal, acting judicially, to investigate whether the dispute before it engaged any or all of the human rights in part 2, divisions 2 and 3.
- [81] The “direct application” of any of the human rights in part 2, divisions 2 and 3 to a court or tribunal is to be determined by reference to the function the particular court or tribunal is performing. This will differ according to the issues before the forum and the terms of the relevant human right, because these will frame the relationship of the human right to the function the court or tribunal is performing. In a civil proceeding, if a particular human right is not in issue between the parties, and no statute is to be interpreted, then the human right will not apply directly to the function the court or tribunal is performing.
- [82] These interpretation issues are explored below in dealing with the Commissioner’s three contentions.

⁶⁴ HRA, s 34.

⁶⁵ HRA, s 35.

⁶⁶ HRA, s 32(2)(f), (i) and (j).

⁶⁷ The primary decision of the tribunal in *De Simone*, considered below, was such a proceeding.

⁶⁸ *Re Kracke*, 63 [250] (Bell J).

Rendering established rights nugatory

- [83] The Commissioner's *first* contention should be rejected. Nothing in the HRA indicates an intention to render pre-existing common law rights "nugatory" if the HRA does not require courts and tribunals to apply them "directly".⁶⁹
- [84] Some of these human rights are "deeply rooted"⁷⁰ in the common law.⁷¹ For example, an accused person's privilege against self-incrimination has been understood as a human right⁷² and applied by courts and tribunals long before the HRA was enacted.⁷³ It is a substantive right,⁷⁴ which has been described variously as "a cardinal principle of our system of justice",⁷⁵ a "fundamental bulwark of liberty"⁷⁶ and "fundamental to a civilised legal system".⁷⁷
- [85] It cannot be doubted that Parliament intended courts and tribunals to continue to apply these common law rights after the HRA commenced. Parliament made clear that these, and other rights or freedoms arising or recognised under the common law, are not abrogated or limited by being omitted or only partly included in the HRA.⁷⁸
- [86] Parliament did not "create" these common law rights by enacting them, amongst other civil and political rights, in part 2, division 2 of the HRA. The Commissioner's contention that these rights would be lost, absent an interpretation of the HRA that required courts and tribunals to "directly apply" them as human rights, must be rejected.
- [87] The human right that Mr Huang would put in issue is that a "person must not be arbitrarily deprived of the person's property."⁷⁹ It has been a common law right at least since the *Magna Carta* (1215), cl 52. The common law has been said to be "built upon a respect for private property rights".⁸⁰ In the absence of "clear language" the common law has led courts to resist interpreting statutes "so as to infringe upon fundamental common law principles, rights and freedoms."⁸¹

Modification of the common law by the HRA

- [88] The *second* contention should also be rejected.
- [89] Courts and tribunals can act in accordance with the specific provisions of the HRA as they apply to their functions without altering the nature of their roles as judicial decision makers, as they have evolved under the common law.

⁶⁹ HRA, s 12.

⁷⁰ Zuckerman, A, *Zuckerman on Australian Civil Procedure* (2023, 2nd ed, LexisNexis), 18.1.

⁷¹ *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 (**McFadden**), 420-421 (Kirby P); *McMahon v Gould* (1982) 7 ACLR 202 (**McMahon**), 205 (Wooten J).

⁷² *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (**EPA v Caltex**), 508 (Mason CJ and Toohey J).

⁷³ *McFadden*; *McMahon*.

⁷⁴ *EPA v Caltex*, 508 (Mason CJ and Toohey J).

⁷⁵ *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ).

⁷⁶ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 340 (Mason ACJ, Wilson and Dawson JJ).

⁷⁷ *McFadden*, 420 (Kirby P).

⁷⁸ HRA, s 12.

⁷⁹ HRA, s 24(2).

⁸⁰ *Vanmild Pty Ltd v Fairfield City Council* (1992) 75 LGRA 374, 376 (Kirby P).

⁸¹ *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 582 [17] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

- [90] In *Beale v Chief Health Officer*,⁸² the Court dealt with a different question: whether the HRA gave rise to an independent obligation on the court to grant relief in respect of disclosure. In rejecting that contention, the Court observed that, as relief was not sought under s 53, which conferred a specific function on the Court, “there is no function the court performs under Part 2 and Part 3 Division 3 of the Act.”⁸³
- [91] The construction advanced by the Commissioner, and adopted by Mr Huang, would require a court or tribunal to undertake its own enquiries to identify any human right that could be affected by a decision it was to make. Such an investigative role might be appropriate for courts in civilian legal systems or tribunals with inquisitorial powers. It is inapt for courts and tribunals acting judicially within the common law tradition, which decide disputes brought to them by the parties based on evidence adduced and submissions made by the parties. Nothing in the HRA indicates an intention to alter the adversarial nature of the judicial system in Queensland and give it the inquisitorial nature of civilian courts.
- [92] Nothing in the HRA, or in any of the extrinsic materials to which the Court was taken, identifies a denial or infringement of human rights by courts or tribunals as a mischief to be remedied by the HRA.

The decision in De Simone

- [93] The Commissioner’s *third* contention was that to the extent an interpretation of s 5(2)(a) might depart from the analysis of an equivalent provision by the Victorian Court of Appeal in *De Simone*, this Court should resile from that interpretation for that reason.
- [94] The decision in *De Simone* concerned whether three human rights in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**) “applied directly” to the Victorian Civil and Administrative Tribunal (VCAT) in deciding an application for a partial stay of a civil proceeding against a party the subject of a police investigation arising out of the same facts as alleged in the civil proceeding.⁸⁴ These were the right to a fair hearing before a competent, independent and impartial court or tribunal,⁸⁵ the right to be presumed innocent until proved guilty according to law,⁸⁶ and the right not to be compelled to testify against oneself or to confess guilt.⁸⁷
- [95] In *De Simone*, the Court acknowledged the difficulties in reconciling the equivalent provision to s 9(4)(b) of the HRA – which excludes a court or tribunal from the meaning of public entity, except when acting in an administrative capacity – with the equivalent provision to s 5(2)(a) of the HRA – which applies the *Charter* to courts and tribunals to the extent they have functions under the equivalent of HRA part 2 and part 3, division 3. The Court concluded that the reference to the functions of courts and tribunals under both the equivalent of part 2 and part 3 of division 3 made it appear that the equivalent of s 5(2)(a) “implicitly reads down” the exclusion in the equivalent of s 9(4)(b), so that part 2 “applies directly to courts and tribunals” and the *Charter* human rights about a fair hearing, the presumption of innocence, and the

⁸² [2022] QCA 188.

⁸³ *Beale v Chief Health Officer* [2022] QCA 188, [49] (Morrison JA; Bond JA and Flanagan J agreeing).

⁸⁴ (2009) 25 VR 237, 238-239 [4], 247 [52] (Neave JA and Williams AJA).

⁸⁵ The equivalent to HRA, s 31(1).

⁸⁶ The equivalent to HRA, s 32(1).

⁸⁷ The equivalent to HRA, s 32(2)(k).

privilege against self-incrimination “apply directly to courts and tribunals, when they exercise their functions”, including when acting judicially. It followed that those human rights applied directly to the VCAT when determining the stay application.

- [96] Without diminishing the respect that ought to be accorded to the opinion expressed in *De Simone*, it is relevant to note that the Court refused the applicant leave to appeal, including on the proposed ground that would have raised this issue for determination.⁸⁸ The Court’s opinion on this point was not necessary for the decision.
- [97] It is also relevant to note that the matter before the Court in *De Simone* concerned only three specific human rights of a person charged with a criminal offence.
- [98] The right to a fair trial according to law is “a fundamental element of our criminal justice system.”⁸⁹ In *Dietrich v The Queen*, Deane J quoted with approval the following description by Isaacs J of “the elementary right of every accused person to a fair and impartial trial”:

“That such a right exists as a personal right seems to me so deeply rooted in our system of law and so elementary as to need no authority to support it. It is a right which inheres in every system of law that makes any pretension to civilization. It is only a variant of the maxim that every man is entitled to his personal liberty except so far as that is abridged by a due administration of the law. Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle. And if the right be admitted, it would be an empty thing, unless the law adequately protected it.”⁹⁰

- [99] The right “not to be compelled to testify against themselves or to confess guilt”, restates the common law “companion rule” sometimes called the “right to silence”.⁹¹ It is the “companion” to the presumption of innocence. The presumption of innocence is “fundamental” as “an aspect of the accusatorial nature of a criminal trial in our system of criminal justice”.⁹²
- [100] Courts and tribunals applied these rights, and superior courts enforced them, before the HRA or the *Charter* was enacted. It was not in doubt that Victorian courts and tribunals were obliged to continue to apply those rights after the enactment of the *Charter*.⁹³
- [101] Other aspects of the *De Simone* decision aid in understanding the preceding observations. The Court doubted that the right to a fair hearing in the *Charter* required any modification of the common law principles,⁹⁴ and determined that, even if VCAT was in error in so finding, leaving that arguable “error” uncorrected would not cause substantial injustice to the applicant on the facts of the case.⁹⁵

⁸⁸ *De Simone*, 248 [57].

⁸⁹ *Dietrich v The Queen* (1992) 177 CLR 292 (*Dietrich v The Queen*), 299 (Mason CJ and McHugh J).

⁹⁰ *Dietrich v The Queen*, 326-327; *R v Macfarlane; Ex parte O’Flanagan and O’Kelly* (1923) 32 CLR 518, 541-542. As noted above, other “minimum guarantees” in s 32(2) are also common law rules, presumptions or rights, some forming parts of the common law right to a fair trial.

⁹¹ *Lee v The Queen* (2014) 253 CLR 455 (*Lee v The Queen*), 467 [33] (French CJ, Crennan, Kiefel, Bell and Keane JJ).

⁹² *Lee v The Queen*, 466-467 [32], citing *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481-482 and *X7 v Australian Crime Commission* (2013) 248 CLR 92, 119-120 [46].

⁹³ *Charter*, s 5.

⁹⁴ *De Simone*, 247 [53].

⁹⁵ *De Simone*, 247 [54].

- [102] With respect, the present appeal provided a more fulsome opportunity to consider the “difficulties” identified in *De Simone* than what was afforded by the circumstances, the limited scope of argument advanced by the self-represented applicant, and the particular human rights under consideration in that case.
- [103] The conclusions in [73] to [81] above, about the proper interpretation of s 5(2)(a) of the HRA in its application to a court or tribunal acting judicially, are to be preferred, notwithstanding that they may depart to some extent from the broadly expressed view of the Court in *De Simone*.

Conclusion on the direct application of the right to property to the adjudicator’s decision when acting judicially

- [104] For the above reasons, and because neither party put Mr Huang’s human right in issue and no question of statutory interpretation arose, the adjudicator was not required to directly apply the right to property in s 24 of the HRA when determining the dispute between Mr Huang and the respondent.

Was the rescission resolution compatible with the right to property?

- [105] Counsel for the Attorney submitted that whatever the nature of Mr Huang’s property, one could not characterise the rescission resolution as *arbitrarily* depriving him of it.
- [106] The respondent’s rescission resolution was passed at the annual general meeting after circulation of information that was found not to be misleading or unclear in context. Mr Huang was given an opportunity to obtain his own expert reports on the annexe prior to the meeting. There was no reasonable, less intrusive proposal that would allow the respondent to retain access to the utility infrastructure beneath the annexe after the repairs were completed. The rescission resolution was reasonable in circumstances.
- [107] These findings of the adjudicator were not disturbed by the appeal tribunal. Mr Huang no longer disputes them.
- [108] Mr Huang’s case in the adjudication did not include a contention that the respondent had arbitrarily deprived him of his property. It is possible that, had he advanced that contention, Mr Huang might have led other evidence or made other submissions in the adjudication. He would bear the onus of proving that the rescission resolution arbitrarily deprived him of his property. In this Court, Mr Huang did not seek to articulate the case he might advance, if the appeal were to be allowed, the appeal tribunal decision set aside, and the dispute remitted to the adjudicator for determination.
- [109] Given the conclusions reached above, it is not necessary to decide whether the attorney’s submission should be accepted as another basis on which Mr Huang’s appeal should be dismissed.
- [110] In the circumstances, the Court should not decide whether the rescission resolution was compatible with the right to property in s 24 of the HRA.

Outcome on the appeal and notice of contention

- [111] Mr Huang has persuaded the Court that the decision of the appeal tribunal was affected by an error identified in his notice of appeal. The respondent has succeeded

on its notice of contention. It follows that leave to appeal should be granted, but the appeal should be dismissed.

Costs

- [112] Mr Huang and the respondent agreed that the question of any costs order that might be made binding on each of them would be better determined after the substantive relief was decided.
- [113] The Court should direct those parties to file any written submissions on a costs order within 14 days of the publication of these reasons. Those submissions should not exceed five pages.
- [114] Neither intervenor sought any order for costs.

Final disposition

- [115] The Court should order:
1. Leave to appeal granted.
 2. Appeal dismissed.
 3. The applicant and the respondent are to file any written submissions on costs, not to exceed five pages, within 14 days.