Civil and Administrative Tribunal

New South Wales

Case Name:	Tukel v Commissioner of Police, NSW Police Force
Medium Neutral Citation:	[2021] NSWCATAD 60
Hearing Date(s):	9 February 2021; (Final submissions received 22 February 2021)
Date of Orders:	12 March 2021
Decision Date:	12 March 2021
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	S Frost, Senior Member
Decision:	(1) Pursuant to s 49 of the Civil and Administrative Tribunal Act 2013 (NSW) (NCAT Act), the hearing of this application, as well as the hearing of the application in the substantive proceedings, be conducted in the absence of the Applicant, the legal representatives of the Applicant, and the public, insofar as it relates to the Confidential Documents specified in the Confidential Affidavit. (2) Pursuant to s 59 of the Administrative Decisions Review Act 1997 (NSW), the Respondent not be required to lodge copies of the Confidential Documents specified in the Confidential Affidavit in support of the application and provided to the Tribunal in accordance with the orders of the Tribunal. (3) Pursuant to s 64(1)(c) of the NCAT Act, the publication of the Confidential Documents and the Confidential Affidavit, or matters contained in the Confidential Documents and the Confidential Affidavit, is prohibited. (4) Pursuant to s 64(1)(d) of the NCAT Act, the disclosure of the Confidential Documents and the Confidential Affidavit, or matters contained in the Confidential Documents and the Confidential Affidavit,

	to the Applicant and his legal representatives is prohibited. (5) Pursuant to ss 64(1)(b), 64(1)(c) and 64(1)(d) of the NCAT Act, the transcript and recording of the confidential hearing in this preliminary proceeding are not to be published or released to the Applicant, the legal representatives of the Applicant, or the public.
Catchwords:	ADMINISTRATIVE REVIEW – Firearms – Firearms prohibition order – Where applicant found to be not fit, in the public interest, to have possession of a firearm – Non-disclosure orders – Where non-disclosure orders made which prohibited disclosure of some evidence to applicant
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Firearms Act 1996 (NSW) Administrative Decisions Review Act 1997 (NSW) Administrative Appeals Tribunal Act 1975 (Cth)
Cases Cited:	News Corporation Ltd v National Companies and Securities Commission [1984] FCA 400; 5 FCR 88 Fitzgibbon v Turnbull [2017] FCA 968; 162 ALD 87 Grant v Commissioner of Police [2020] NSWCATAD 158 CYL v YZA [2017] NSWCATAP 105 State of New South Wales (Justice Health) v Dezfouli [2008] NSWADTAP 69 Bellamy v Bellamy [2018] NSWSC 534
Texts Cited:	None cited
Category:	Procedural rulings
Parties:	Fidel Tukel (Applicant) Commissioner of Police, NSW Police Force (Respondent)
Representation:	Counsel: P Tierney (Applicant) C Mantziaris (Respondent) Solicitors: Cunningham Solicitors (Applicant) Crown Solicitor’s Office (Respondent)

File Number(s):	2019/00289323
Publication Restriction:	In accordance with Order (5) above, pursuant to ss 64(1)(b), 64(1)(c) and 64(1)(d) of the Civil and Administrative Tribunal Act 2013 (NSW), the transcript and recording of the confidential hearing in these preliminary proceedings are not to be published or released to the Applicant, the legal representatives of the Applicant, or the public.

REASONS FOR DECISION

Background

1 On 14 November 2018 the respondent Commissioner made a firearms prohibition order (FPO) against Mr Tukel, under s 73(1) of the *Firearms Act 1996* (NSW). In brief terms, the FPO was made because of Mr Tukel's antecedents and his association with an Outlaw Motorcycle Gang (OMCG), which led the Commissioner to form the opinion that Mr Tukel 'is not fit, in the public interest, to have possession of a firearm'.

2 Mr Tukel asked for an internal review of the Commissioner's decision but the decision was affirmed. Mr Tukel then applied to the Tribunal for an administrative review of the Commissioner's decision.

3 The administrative review by the Tribunal is to be conducted under the *Administrative Decisions Review Act 1997* (NSW) (ADR Act): *Firearms Act*, s 75(1).

4 In accordance with standard practice, the Tribunal made orders for the Commissioner to lodge material in the substantive matter pursuant to s 58 of the ADR Act, and the Commissioner filed and served a bundle of documents on 8 November 2019.

5 The Commissioner also foreshadowed that he would seek an order under s 59 of the ADR Act releasing him from the obligation to lodge a number of additional documents under s 58. Such an order, in combination with others sought by the Commissioner, would allow the Commissioner to use the additional documents in the review proceeding but to keep them confidential from Mr Tukel and his legal representatives.

6 The Commissioner describes the package of orders that he seeks as 'standard confidentiality orders'. As originally drafted, the Commissioner sought the following orders:

(1) Pursuant to s 49 of the *Civil and Administrative Tribunal Act 2013* (NCAT Act), the hearing of this application be conducted in the absence of the Applicant in the substantive proceedings, the legal representative for the Applicant in the substantive proceedings, and the public.

(2) Pursuant to s 59 of the ADR Act, the Commissioner not be required to lodge copies of the documents (Confidential Documents) specified in the confidential affidavit in support of the Application and provided to the Tribunal in accordance with the orders of the Tribunal (Confidential Affidavit).

(3) Pursuant to NCAT Act s 64(1)(c), the publication of the Confidential Documents and the Confidential Affidavit, or matters contained in the Confidential Documents and the Confidential Affidavit, is prohibited.

(4) Pursuant to NCAT Act s 64(1)(d), the disclosure of the Confidential Documents and the Confidential Affidavit, or matters contained in the Confidential Documents and the Confidential Affidavit, is restricted to the Commissioner, the legal representatives for the Commissioner and the Tribunal.

(5) Pursuant to ss 64(1)(b) and 64(1)(c) of the NCAT Act, the publication and reporting of the hearing of this application, including any evidence given during the hearing, is prohibited.

7 For reasons which will become apparent later (see [33] below), the Commissioner's proposed Order (4) has since been amended so as to read as follows:

(1) Pursuant to NCAT Act s 64(1)(d), the disclosure of the Confidential Documents and the Confidential Affidavit, or matters contained in the Confidential Documents and the Confidential Affidavit, to the Applicant and his legal representatives be prohibited.

Why does the Commissioner seek the orders?

8 In support of the application for the confidentiality orders the Commissioner relies on the affidavit of Detective Sergeant Bruce Groenewegen, sworn on 18 December 2020. DS Groenewegen has been a police officer for 31 years and is currently attached to the Criminal Groups Squad, State Crime Command.

9 DS Groenewegen has specialised knowledge of OMCGs, particularly in relation to the nature and identifying characteristic of OMCGs through identifiers, including their culture and background, norms of conduct, and their

activities, both criminal and legitimate. He has led teams investigating numerous complex criminal offences committed by OMCG members. Those investigations have not only been concerned with the collection of evidence, but also the review and analysis of intelligence information relating to OMCG activity and culture which impacts directly on the strategies involved in the collection of evidence.

10 In his affidavit DS Groenewegen provides an explanation of the Computerised Operations Policing System (COPS), an electronic database adopted by the NSW Police Force (NSWPF) in 1994 as a record-keeping system to capture, record and store operational information and intelligence on an organisation-wide basis. COPS provides a means by which NSWPF officers record and enquire on the details of persons, organisations, locations, objects, property and vehicles that are of interest to police. When an officer enters information into COPS relating to an event, person, property, vehicle, object or organisation, the COPS system allocates a COPS event number to that entry.

11 COPS is made up of a number of sub-databases, including the Intelligence sub-database, which is used to create, update and enquire on all information that is specifically linked to an Information Report. The creation of an Information Report is the other avenue by which information is entered into COPS. An Information Report is the method by which information that is or could be of interest to police is recorded. This information can be derived from one or a number of different types of sources. It could be based on something that was observed or that was reported by a member of the public. When an officer enters information into COPS, the system allocates a unique number to that Information Report.

12 Once on the COPS database, the information on COPS is used to identify, assess and evaluate the law enforcement environment.

13 DS Groenewegen explains that law enforcement agencies such as the NSWPF rely heavily on assistance from persons who provide confidential sources of information, including ‘human sources’ and ‘informants’. Those expressions refer to individuals who agree (either formally or informally) to provide information covertly to law enforcement to assist in the investigation,

apprehension or prosecution of suspected offenders. DS Groenewegen says that if the identity of any individuals providing confidential assistance to law enforcement agencies is disclosed, or if those individuals were suspected by criminals of being confidential sources of any of the information in the material the subject of the application for confidentiality orders (which he identifies by the label 'Confidential Material'), they may be subjected to acts of retribution.

14 The procurement of information from human sources is of such great import that the protection of the identities of human sources and the origin of information is paramount. If NSWPF is unable to guarantee the security of the identity of human sources or the origins of information, there is a very real risk that persons formerly prepared to give information may be deterred from doing so.

15 In his affidavit DS Groenewegen explains that the Confidential Material is only accessible by law enforcement personnel with clearance to access the material. The information in the Confidential Material has been collated and maintained by the NSWPF and other law enforcement agencies to assist in the monitoring and investigation of criminal activity and those persons who participate in unlawful conduct. It is necessary that such intelligence holdings remain confidential and not known to those who are subject to such intelligence holdings.

16 Disclosure of the Confidential Material, according to DS Groenewegen, would allow a picture to emerge showing what matters are known to the NSWPF about the activities of Mr Tukel and others, from which inferences could be drawn as to what matters are therefore not known by the NSWPF. While it is possible that Mr Tukel may suspect or know some of the information held by the NSWPF, disclosure of the Confidential Material has the potential to confirm any such suspicions.

17 DS Groenewegen has reviewed the Confidential Material and, based on his experience and his knowledge of Mr Tukel's history and association, he states that disclosure of any of the Confidential Material would or could:

- prejudice current and future investigations into criminal activity;
- identify confidential sources of information to law enforcement;

- place identified persons at risk of harm; or
- pose a risk to public safety through further acts of violence.

18 The Commissioner's case in support of the various confidentiality orders can be simply put:

- DS Groenewegen's evidence is sufficient to satisfy the Tribunal that the circumstances here are 'special', justifying the making of the orders;
- there is a public interest in protecting police investigative techniques;
- disclosure of what is known by Police inevitably leads to the disclosure of what is not known, with the consequence that those engaged in criminal activities (or their associates) might adjust their behaviour to avoid Police detection;
- there is a public interest in protecting the confidentiality of Police sources and not disclosing information concerning informants; and
- NCAT s 64(1) implicitly permits the denial of procedural fairness that would result from the making of orders under that provision.

19 The Commissioner also refers to s 75(5) of the *Firearms Act*, which provides that in specified circumstances, the Tribunal 'is to receive evidence and hear argument in the absence of the public, the applicant for the administrative review and the applicant's representative'. This provision, it is contended, either:

- provides 'a powerful independent reason for the exercise of the discretionary powers conferred by NCAT ss 49 and 64 and ADR Act s 59'; or
- mandates the making of orders under those provisions 'to the extent that such orders are necessary for upholding the requirements of s 75(5)'.

20 In conclusion, the Commissioner submits:

> The review of firearms prohibition orders (made under section 73) is clearly conferred under section 75(1)(f) of the *Firearms Act* alongside a number of identified decisions. There is no justification for a construction of *Firearms Act* s 75(5) that ties it exclusively to the range of decisions identified in subsection 75(4). The words 'administrative review of any such decision' refer back to section 75(1) and the range of reviewable decisions identified there.

Why does Mr Tukel oppose the making of the orders sought?

21 Mr Tukel affirmed an affidavit on 8 February 2021 in which he notes his belief that 'it is unfair to me that untested and unverified material could be submitted to the Tribunal without even the most minimal oversight as to their reliability, accuracy and completeness'. He cites a number of cases of allegedly

inaccurate COPS entries relating to him, and provides alternative versions of recorded interactions with the Police.

22 He is clearly concerned that he will be kept in the dark about the case presented against him by the Commissioner.

23 Mr Tukel's counsel has made extensive submissions to the effect that the orders sought should not, and in some cases cannot, be made.

24 It is submitted that the proposed orders, if made, would result in the inability of Mr Tukel 'to properly and meaningfully advance his case for review'. The submissions continue:

> The concern held by the applicant with that proposition is in regards to both the degradation of the legal quality of the proceedings and the prejudice which is caused to his ability to properly advance his case. The irony which arises is, of course, that these proceedings are brought by the applicant who complains of a decision which involved a denial of procedural fairness and who now faces the perpetuation of that treatment in the very review which he brings to the Tribunal.

25 Specifically in relation to proposed order (1), it is submitted that it is not at all apparent that NCAT Act s 49 is capable of being used for the purpose of excluding *the applicant himself* from a hearing. The heading to the section ('Hearings to be open to public') suggests that it deals with an exception to the open justice principle in relation to *the public*. It strains the construction of 'private' in s 49(2) to suggest that it can include 'private to one party only'.

26 It is submitted that there is a fundamental 'right' in favour of the applicant (and no less the respondent) to a proceeding that is conducted in accordance with basic tenets of fairness and justice: NCAT Act, s 3(e). Approaching the construction of the NCAT Act in a harmonious way means the objectives in s 3 of the Act inform the manner of exercise of discretions that exist in the Act: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 335 at [70].. Those objectives form part of the 'context' that should be taken into account when construing those discretions: *Lee v New South Wales Crime Commission* [2013] HCA 39 per Hayne J at [92]-[93].

27 As for the Commissioner's reliance on s 75(5) of the *Firearms Act* to support the making of the confidentiality orders sought, Mr Tukel's submission is that the words 'any such decision' in s 75(5) refer only to a decision of the kind

referred to in s 75(4) – namely, ‘a decision referred to in subsection (1)(a) or (c) that was made on the grounds referred to in section 11(5A) or 29(3A)’. This construction is supported, it is claimed, by the common reference in each of ss 75(4) and (5) to those precise subsections – 11(5A) and 29(3A) – and which are only applicable to decisions in relation to firearms licences or firearms permits.

28 The submissions note that the substantive decision under review in this proceeding is a decision that imposed an FPO on Mr Tukel, a decision taken ‘in secret, without according the applicant even the most basic requirements of procedural fairness’. Unlike decisions relating to firearms licences and permits (where a citizen initiates the process by seeking the grant of a specific ‘right’ to do something), decisions relating to FPOs are initiated by the Commissioner, unknown to the person affected. The making of an FPO creates ‘rights’ in favour of the NSW Police Force, including open rights of search and entry. Whatever justification there may be for ‘standard confidentiality orders’ in the case of licences and permits is not relevant to the case of FPOs.

29 During the interlocutory hearing Mr Tukel’s counsel raised for the first time an argument that an order under NCAT Act s 64(1)(d) can go no further than to prohibit or restrict the disclosure of material to *some or all of the parties* – but not to their legal representatives. I allowed time for the parties to make supplementary written submissions on that question.

30 The submission on behalf of Mr Tukel is that, as a matter of construction, s 64(1)(d) does not authorise the making of an order in the terms originally sought by the Commissioner. A legal representative of a party is not a ‘party’. Paragraph 64(1)(d) operates to qualify the principle of open justice required by s 3(f) of the NCAT Act. It can neither be construed as a facilitative power nor to support a ‘broad spectrum exclusionary regime’, such as the Commissioner seeks.

31 It is submitted that, if the Tribunal is minded to make orders excluding the applicant, then a more appropriate regime would be to:

(a) grant access to any confidential evidence (should it be proposed to be tendered in the substantive proceedings) to the applicant's lawyers; and

(b) take that evidence in the substantive hearing in the absence of the applicant (but not his lawyers); and

(c) make an order that neither any confidential evidence nor the details of any confidential hearing be disclosed by the applicant's lawyers to the applicant or any other person without further leave of the Tribunal.

32 Such a scheme, it is submitted, would do 'less violence to the rights of the applicant to procedural fairness than that proposed by the respondent'. It would enable Mr Tukel's lawyers to have some input at a confidential hearing.

33 In reply, the Commissioner sought a reformulation of proposed order (4), as already indicated earlier in these reasons (see [7] above), to counter what according to Mr Tukel's submissions rendered the order 'problematic' in that it sought to authorise disclosure to persons who had already had access to the material.

34 More substantively, the Commissioner submitted there is strong and persuasive authority indicating that the word 'parties' in s 64(1)(d) can include a party's legal representative. In that regard, the Commissioner referred to *News Corporation Ltd v National Companies and Securities Commission* [1984] FCA 400; 5 FCR 88 (*News Corp*), and *Fitzgibbon v Turnbull* [2017] FCA 968; 162 ALD 87.

The principles involved

35 Sections 49, 59 and 64 of the NCAT Act contain exceptions to the general rules under which hearings are generally held in public, documents before the Tribunal are available to all parties, and reasons for decision are published without restriction.

36 As the Tribunal said in *Grant v Commissioner of Police* [2020] NSWCATAD 158, at [18]-[20]:

> [18] Subsections 49(2) of the NCAT Act, which authorises the holding of private hearings, and s 64(1) of the NCAT Act are to be applied bearing in mind the principle of open justice and the rules of procedural fairness. The general rule is that "[a] hearing by the Tribunal is to be open to the public unless the Tribunal orders otherwise" (NCAT Act, s 49(1)). This provision reflects the principle of open justice (*CYL v YZA* [2017] NSWCATAP 105 at

[96]). As the Appeal Panel has commented, "the ordinary and orthodox rule in the Tribunal is that it sits in the open, the proceedings are public, and its reasons for decision are given publicly, sometimes orally, more commonly in writing" (*CYL v YZA* [2017] NSWCATAP 105 at [94]).

> [19] The Tribunal is ordinarily bound by the principles of procedural fairness or natural justice. It "may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice" (NCAT Act, s 38(2)). Section 64(1)(d) provides an express exception to this, permitting the Tribunal to make an order that evidence be withheld from a party if the Tribunal considers this to be "desirable." The word "desirable" should be interpreted with regard to the basic common law precept of open justice (*State of New South Wales (Justice Health) v Dezfouli* [2008] NSWADTAP 69 at [61], with reference to the predecessor to s 64(1) of the NCAT Act, being s 75(2) of the *Administrative Decisions Tribunal Act 1997* (as it was then known)).
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> [20] In *Bellamy v Bellamy* [2018] NSWSC 534 at [30], Parker J said, with respect to s 64(1)(d):
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> > "Section 64(1)(d) is a provision which applies generally to proceedings in the Tribunal. Most proceedings in the Tribunal are ordinary adversarial proceedings and in those proceedings the rules of natural justice generally apply so as to require the Tribunal to afford various procedural safeguards to the parties. One elementary safeguard is that, except in extraordinary circumstances, the rules of natural justice prevent a party from being deprived of an opportunity to make full submissions on the issues to be decided by not being provided with all of the evidence which is before the Tribunal."

37 In *State of New South Wales (Justice Health) v Dezfouli* [2008] NSWADTAP 69 (referred to in *Grant*, above, at [19]), the Appeal Panel also said at [81]-[82]:

> [81] It is difficult if not impossible to set out in short form all the matters that, according to the case law just discussed, should be taken into account in deciding whether an order should be made under section 75(2). It must suffice here simply to draw attention to the following points of relevance to our decision in this case: (a) the presumption in favour of open justice; (b) the need for an applicant for a suppression order to establish good grounds for making the order; (c) the comparative breadth of the criterion of 'desirability'; (d) the important differences between the types of suppression order that may be made – between (for instance) an order (as in this case) prohibiting disclosure of the identity of a participant and an order that a hearing occur in closed session, without notice to a party; (e) the undoubted breadth of the range of purposes that may be served ('any other reason'); (f) the possibility that the purposes to be served may be a mixture of private and public interests; and (g) the possibility that, although generally speaking the prospect of damage to reputation or 'embarrassment' affecting a participant in the proceedings will not provide sufficient grounds for a suppression order, there may be unusual circumstances where this is the principal consideration underlying an order.
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> [82] … In the light of our examination of the authorities, we would not dispute that, for an order to be made, the circumstances should be 'special' or 'out of the ordinary' (though a requirement that they be 'exceptional' may involve setting the bar too high). But it is important to recognise that this is at most a necessary, not a sufficient, condition.

Consideration

38 In this case I was satisfied, on the basis of the material in DS Groenewegen's affidavit, that I should conduct part of the interlocutory proceeding in private, and in the absence of Mr Tukel and his legal representatives. In my view, and despite the submissions to the contrary made on Mr Tukel's behalf, that course is authorised by NCAT s 49. If, in the alternative, that part of the proceeding had been conducted simply *in the absence of members of the public* – so as to exclude everyone other than the parties and their representatives – and it had emerged that some of the material may properly be the subject of an order under s 64(1)(d), the utility of such an order would necessarily have been undermined.

39 On similar reasoning it seems appropriate to expand the order under NCAT s 49 to cover the substantive hearing as well. In that way the Tribunal, as constituted to hear the substantive application, can conduct part of the hearing in private. Of course, it remains open to the Tribunal as so constituted to revoke the order to that extent should it be considered inappropriate or no longer necessary.

40 During the confidential hearing I examined the Confidential Material and had regard to DS Groenewegen's Confidential Affidavit. I have weighed up the factors identified in *Dezfouli*, giving significant weight to the presumption in favour of open justice, the denial of procedural fairness that necessarily accompanies the orders sought, particularly those based on s 64 of the NCAT Act, and the need for the Commissioner to establish good grounds for the making of the orders. I became satisfied that the disclosure to Mr Tukel of the Confidential Material has the potential, as stated by DS Groenewegen, to:

- prejudice current and future investigations into criminal activity;
- identify confidential sources of information to law enforcement;
- place identified persons at risk of harm; or
- pose a risk to public safety through further acts of violence.

41 Mindful that the making of orders under s 64(1)(d) should be confined to the 'extraordinary' (*Bellamy v Bellamy*), or 'special' or 'out of the ordinary' case (*Dezfouli*), I am satisfied that it is desirable, by reason of the potential for the

disclosure to Mr Tukel of the Confidential Material to cause any one or more of the outcomes identified by DS Groenewegen, to make an order prohibiting the disclosure of the Confidential Material to Mr Tukel. Those potential outcomes distinguish this case from the typical administrative review case that is brought to the Tribunal, and they are the factors that move this case into the 'extraordinary' or 'special' or 'out of the ordinary' category.

42 I should add here, in answer to Mr Tukel's submission on this topic, that the specific nature of the power in NCAT Act s 64 must take precedence, in an appropriate case, over the general provisions in s 3 of the Act.

43 On the question as to whether the prohibition I have ordered in relation to disclosure of the Confidential Material to Mr Tukel himself should extend to Mr Tukel's legal representatives, I accept the Commissioner's submission that the Tribunal has the power to prohibit disclosure to a party's legal representative.

44 I base that conclusion on what the Full Federal Court said in *News Corp*, referred to in [34] above, a case considering the scope of a statutory provision, s 35(2)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), that is cast in almost identical terms to NCAT s 64(1)(d). The relevant provision of the AAT Act was as follows:

> Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may, by order -
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> …
>
> (c) give directions prohibiting or restricting the disclosure to some or all of the parties to a proceeding of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceeding.

45 Fox J said at 96:

> A course often followed in litigation is for access to be granted to counsel, on the footing that he, or he and his solicitor, are the only persons to see a document. It is a convenient but dangerous practice, as it involves the withholding from a client by his legal representative of information relevant to the litigation. The acceptance of such a course would not, I imagine, be within the ordinary retainer of counsel, and would as a rule need specific instructions. Counsel relied upon the practice, as part of his argument, and submitted that the Tribunal had erred in not following it. An application to the effect mentioned had been made to the Tribunal, but was rejected by it. In the light of the statutory provisions, I doubt whether the Tribunal had power to act in any such way, but it would in any event be a matter for its discretion, and its failure to

> exercise the discretion in favour of the applicant is not a matter which would by itself involve an appealable error of law. I should add in this regard that the submission of the applicants depended at several points in drawing a distinction between "party" and the legal representative of a party, when considering the statutory language, but in my opinion the distinction is not sustainable.

46 Woodward J agreed, at 103:

> I think the reference to 'parties' in s 35(2)(c) must be taken to include any persons representing those parties pursuant to s 32 of the Act, which is not confined to lawyers. It would be ridiculous if the Tribunal had power in a proper case to deny access to a company or organization but not to the officer who happened to be representing it. And in my view even lawyers retained for a particular case should not be put in the invidious position of having to conceal important information from their clients, unless the proper trial of an action admits of no reasonable alternative. However, the reference to "restricting the disclosure" indicates that (among other possible conditions) disclosure may, in a proper case, be confined to certain named persons connected with a party.

47 In *Fitzgibbon v Turnbull* [2017] FCA 968; 162 ALD 87, Robertson J followed *News Corp*, stating at [61]:

> In my opinion the legal representatives of a party are in no different position to a party: see *News Corporation Limited* at 96 (per Fox J) and 103 (per Woodward J).

48 Having concluded that the Tribunal has the *power* to prohibit disclosure to a party's legal representatives, I now have to consider whether the power should be exercised as a matter of discretion.

49 I think it should. The alternative course suggested in the submissions of Mr Tukel's counsel is in my view unsatisfactory and, for the reasons articulated in *News Corp*, both 'dangerous' (Fox J) and tending to place the representatives in an 'invidious' position in relation to their client (Woodward J). The confidential nature of the material can only properly be protected if the order under NCAT s 64(1)(d) also prohibits disclosure to Mr Tukel's legal representatives.

50 I turn now to the question of an order under s 59 of the ADR Act.

51 Under s 59(2)(b) the Tribunal may make an order that a copy of a document not be lodged with the Tribunal if it considers that it would be appropriate to make an order under s 64 of the NCAT Act prohibiting or restricting the publication or disclosure of evidence of the document.

52 I have already indicated that I consider it appropriate – indeed, desirable – to make such an order under s 64. Now, it does not automatically follow that an order under ADR Act s 59 must be made – the language of s 59 is 'the Tribunal *may* make an order' (my emphasis) – but it would be a curious outcome if (as here) the Tribunal actually made an order (not just 'consider[ed] that it would be appropriate') under s 64 but did not also order that the documents need not be lodged under s 58.

53 I order under ADR s 59 that the Commissioner not be required to lodge copies of the documents specified in the Confidential Affidavit of DS Groenewegen.

54 I make the remaining orders sought by the Commissioner (albeit slightly amended) to support and supplement the utility of the orders already made.

Firearms Act, s 75(5)

55 While not strictly necessary for the determination of this interlocutory application, I note my preference for Mr Tukel's construction of s 75(5) over that of the Commissioner as quoted in [20] above.

56 The reference in s 75(5) to 'any such decision' must, in my view, be a reference only to those decisions specified in s 75(4). Subsection (5) follows on from subsection (4) and it is natural, in light of the language common to both provisions, that the later one refers to the earlier.

57 The Commissioner's alternative construction – that 'any such decision' can refer to any of the kinds of decisions specified in subsection (1) – does not sit well with the fact that the words in subsection (5) have no relevance at all to a decision of the kind specified in paragraph (d) or (e) of subsection (1), and probably not to one in paragraph (b) either.

Orders

(1) Pursuant to s 49 of the *Civil and Administrative Tribunal Act 2013* (NCAT Act), the hearing of this application, as well as the hearing of the application in the substantive proceedings, be conducted in the absence of the Applicant, the legal representatives of the Applicant, and the public, insofar as it relates to the Confidential Documents specified in the Confidential Affidavit.

(2) Pursuant to s 59 of the ADR Act, the Respondent not be required to lodge copies of the Confidential Documents specified in the Confidential

Affidavit in support of the application and provided to the Tribunal in accordance with the orders of the Tribunal.

(3) Pursuant to s 64(1)(c) of the NCAT Act, the publication of the Confidential Documents and the Confidential Affidavit, or matters contained in the Confidential Documents and the Confidential Affidavit, is prohibited.

(4) Pursuant to s 64(1)(d) of the NCAT Act, the disclosure of the Confidential Documents and the Confidential Affidavit, or matters contained in the Confidential Documents and the Confidential Affidavit, to the Applicant and his legal representatives is prohibited.

(5) Pursuant to ss 64(1)(b), 64(1)(c) and 64(1)(d) of the NCAT Act, the transcript and recording of the confidential hearing in this preliminary proceeding are not to be published or released to the Applicant, the legal representatives of the Applicant, or the public.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar