White Folder

FILED

- 5 AUG 2025

SUPREME COURT OF NEW SOUTH WALES

APPELLANT'S SUBMISSIONS IN REPLY TL

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2025/250144

TITLE OF PROCEEDINGS	
Appellant	**DARACON ENGINEERING PTY LTD (ACN 002 640 262)**
First Respondent	**DAVID JAMES KELSALL**
Number of Respondents	**Five**

1. These submissions are made in reply to the submissions filed by the First Respondent (Mr Kelsall) on 29 July 2025 (**RS**). The abbreviations are those adopted in the Appellant's (Daracon's) summary of argument dated 10 July 2025 (**SA**) (White Folder (**WF**) 516).

Leave to appeal

2. Pursuant to s 32(1) of the *Dust Diseases Tribunal Act 1989* (NSW) an appeal to this Court may be made by a person "dissatisfied in point of law or on a question as to the admission or rejection of evidence" in a decision.[1] Plainly matters of practice and procedure are not excluded (cf RS[2]), a fortiori where they involve a point of law.[2] An appeal may be brought based on an alleged failure by the primary judge to accord procedural fairness.[3]

---

[1] A "decision" is a judgment, order or ruling": DDT ct s s 3.
[2] See generally, *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 at [149]-[150]; *Attorney-General (NSW) v X* (2000) 49 NSWLR 653 at [124]; *Goodwin v Commissioner of Police* [2010] NSWCA 239 at [10]; *Workers Compensation (Dust Diseases Board) v Smith* [2010] NSWCA 19 at [14]; *CGU Insurance Ltd v AAI Ltd* [2016] NSWCA 335 at [27]-[31]; .
[3] *Escobar v Spindaleri* (1986) 7 NSWLR 51 at 53, 57, 60; *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 at [159]; *Amaca Pty Ltd v Doughan* [2011] NSWCA 169 at [33]; *Fisher v Nonconformist Pty Ltd* [2024] NSWCA 32 at [37]-[45].

I David Andersen solicitor for the Appellant Certify this document is suitable for publication.

3. Section 32(4)(a) of the DDT Act provides that an appeal from an interlocutory decision may be made only by leave of the Supreme Court. The Tribunal's decision was a ruling that was determinative of Daracon's legal rights, and in such cases "a Court of Appeal submits itself to self-imposed restraints, but restraints which though strict, are somewhat less stringent than those adopted in matters of practice or procedure".[4] Leave will be granted if there is "a question of principle or of general public importance", or "a case of an injustice which is reasonably clear, in the sense of going beyond what is merely arguable".[5]

4. Contrary to Mr Kelsall's submissions (RS[13]-[21]), the decision involved a clear injustice to Daracon. The decision had immediate and direct consequences regarding the rights and procedures of Daracon and Mr Kelsall in the proceedings.[6]

5. The course of proceedings demonstrates that the decision caused an injustice to Daracon. Mr Kelsall commenced the proceedings in the Tribunal on 13 December 2023, and amended the statement of claim on 19 December 2024 (ASOC). The primary judge gave a direction on 14 April 2025 for amendment of the ASOC in certain respects which did not involve adding a new claim against any respondent. The FSASOC filed on 24 April 2025 introduced an entirely new claim against Daracon (**OL Claim**). On 5 May 2025 Daracon by motion pursuant to s 63 of the CPA Act sought to set aside the clauses in the FSASOC raising the OL Claim, with supporting evidence that it had inadequate notice or time to prepare its defence and evidence, and written submissions relying on the CP Act ss 56-60, 63. Mr Kelsall had provided no explanation for the delay, or the failure to disclose the intention to exceed the bounds of the direction.

6. On 3 June 2025 the Tribunal made it plain that the hearing would be fixed for a date prior to September 2025.[7] In the decision given on 3 June 2025, the primary judge accepted that no leave had been given to add the OL Claim, and that this was an "irregularity" within s 63(1), but gave Mr Kelsall leave *nunc pro tunc* under s 63(3)(b) and 64 to amend to include the OL Claim in the FSASOC.

---

[4] *In re the Will of FB Gilbert (dec)* (1946) 46 SR (NSW) 318, 323; *Choy v Tiaro Coal Ltd (in liq)* [2018] NSWCA 205; (2018) 98 NSWLR 493 ('*Choy*'), 496 [8].
[5] *Choy* 511 [81] per Leeming JA (Gleeson and Payne JJA agreeing).
[6] *Choy* 502 [37].
[7] Transcript of Tribunal proceedings, 3 June 2025 (WF 482).

7. Contrary to the submission that this is a "fear of ... future injustice" (RS[18]), the Tribunal's orders compel Daracon to defend the OL Claim, in circumstances where Daracon's unchallenged evidence was that it could not adequately prepare to defend itself in order for the hearing to take place during Mr Kelsall's anticipated lifetime (SA[16]-[20]). The Tribunal's reference at J29 to a possible "indulgence" being afforded to Daracon must be understood in that context. As a practical matter, it is Mr Kelsall's state of health which will dictate when the hearing is conducted, limiting severely any "indulgence" that might be capable of being granted to Daracon (see WF 460.48-50).

8. The proper preparation of a defence and evidence requires Daracon to, inter alia, review and investigate the 13,602 pages of material delivered by Mr Kelsall to Daracon the day after the Tribunal's decision was handed down. Any "indulgence" cannot ameliorate the fundamental unfairness and prejudice that the Tribunal's decision has caused Daracon. The injustice is a present injustice, not a future one.

9. It is not to the point that, had the Tribunal allowed Daracon's motion, Mr Kelsall could have commenced the OL Claim in separate proceedings against Daracon. Even if that occurred, Mr Kelsall would have needed to apply to the Tribunal for an order that the two proceedings be heard concurrently or consolidated. Mr Kelsall could not have any reasonable expectation that such an order would be made. It would raise exactly the same procedural fairness considerations that Daracon raised before the Tribunal and raises in this appeal.

10. Daracon submits that applying the test of reasonably clear injustice, leave to appeal should be granted.

Ground 1: Failure to consider CPA Act s 58

11. In the appeal, what must be shown is error in the exercise of discretion under s 63(3), in the *House v R*[8] sense. The Grounds of Appeal establish that the primary judge made an error of legal principle, failed to take into account, or give sufficient weight to, relevant

[8] (1936) 55 CLR 499 at 505. See *Young v Hones (No 2)* [2014] NSWCA 338 at [15]; *Choy v Tiaro Coal Ltd (in liq)* [2018] NSWCA 205; (2018) 98 NSWLR 493, 496 [8].

matters and arrived at a result so unreasonable and unjust as to suggest that one of these errors occurred.

12. The basis on which the Tribunal granted leave to amend was, pursuant to s 63(3)(b), in exercise of the Tribunal's "power to allow amendments". The power under s 64 of the CP Act to allow an amendment is governed by s 58 of the CPA Act, which requires the Tribunal to act in accordance with "the dictates of justice".

13. Section 58(2)(a) of the CP Act provides that the Tribunal "must have regard to the provisions of sections 56 and 57" of the CP Act. Mr Kelsall's submissions concerning proposed Ground 1 of the appeal do not grapple with the fact that there is simply no reference in the Tribunal's judgment to the factors in ss 56 and 57 of the CP Act, which pursuant to s 58(2)(a) of the CPA were mandatory considerations for the Tribunal in deciding whether to grant Mr Kelsall leave to amend his claim to add the occupier's liability claim.

14. Contrary to the assertion (RS [28]) that "the whole of the primary judge's reasons" were directed to the factors in ss 56 and 57 of the CP Act, not one paragraph of the judgment identifies or considers the matters in those sections, expressly or implicitly. Contrary to RS [31], the Tribunal has a duty to consider the factors in ss 56 and 57 of the CP Act. That duty is imposed by the mandatory language of s 58(2)(a).[9] All factors in those sections are self-evidently important.[10]

15. The reference in RS[31] to the decision in *Choy v Tiaro Coal Ltd (in liq)*[11] is inapt. First, the Court of Appeal in *Choy*[12] found that the primary judge had expressly referred to the factors in s 56 of the CP Act. That is not the case for the decision presently under appeal. Second, the Court of Appeal in *Choy*[13] found that the entirety of the primary judge's reasoning implicitly reflected the "overriding purpose in the rules and the particular instantiations of that purpose in these rules". Again, the same could not be said about the

---

[9] *Hans Pet Constructions Pty Ltd v Cassar* [2009] NSWCA 230 [38].
[10] *Bellingen Shire Council v Colavon Pty Limited* [2012] NSWCA 34 [31].
[11] *Choy* 507-508 [64].
[12] *Choy* 507 [62].
[13] *Choy* 507-508 [64].

Tribunal's reasons. The Tribunal simply does not refer to the mandatory considerations in ss 56 and 57 of the CP Act, whether explicitly or otherwise.

16. The Tribunal failed to have regard to injustice to Daracon, being a factor in s 58(2)(b(vi)); the failure of Mr Kelsall to make use of earlier opportunities to seek leave to amend to add the OL Claim, being a factor in s 58(2)(b)(v); the failure of Mr Kelsall to be timely in interlocutory activities, a factor in s 58(2)(b)(ii), and the degree of difficulty and complexity involved in responding to the OL Claim, a factor in s 58(2)(i). It can be inferred from the silence in the judgment as to these factors that the primary judge did not consider them to be relevant. This constitutes error of failing to take into account a relevant matter, for the purposes of *House v R.*

Ground 2: Failure to consider substantial argument seriously advanced by appellant

17. Daracon accepts that in order to succeed on this ground of appeal, the *Dranichnikov* error,[14] it must demonstrate that it made a case or submissions which the primary judge in substance failed to address in determining its claim. Daracon's submissions on the factors in ss 58, 56 and 57 were central to the case it advanced in its motion and were substantial and clearly articulated arguments, seriously advanced. The factors were clearly relevant to the exercise of the Tribunal's discretion under s 63(3). The Tribunal did not indicate that the submission raised matters that were irrelevant to its exercise of discretion (SA[34]). The judgment failed to address the submission at all.

18. The vice in the Tribunal's decision is not (as RS [39] seems to suggest) that the Tribunal failed expressly to refer to permissible but not mandatory considerations. The vice is that the Tribunal failed to consider at all Daracon's case and extensive submissions on why the factors in s 58(2) and 56 and 57 of the CPA were relevant, and why considering those factors would lead the Tribunal to conclude that Mr Kelsall should not be permitted to bring the OL Claim against Daracon (SA[35]-[36]). It is incorrect (RS[41]) to confuse the *Dranichnikov* error with a complaint about failure to refer to each item of evidence.

[14] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at [24]-[25]; *Day v SAS Trustee Corporation* [2021] NSWCA 71 [37].

The result of the failure described in *Dranichnikov* is a denial of procedural fairness or jurisdictional error. This is an error in the *House v R* sense.

Ground 3: Failure to give adequate reasons

19. Daracon accepts, as set out at RS [49], that the duty to give reasons does not apply to every interlocutory decision, however minor. However, this was not a minor interlocutory decision (SA[40]). If the Tribunal refused leave to Mr Kelsall, then Daracon would not be required to defend itself against the OL Claim. It is far more consequential than the example in RS [32].

20. The significance of this decision for the parties meant that the Tribunal was required to provide the parties with adequate reasons. If the Tribunal was minded to exercise its discretion in Mr Kelsall's favour, then at the very least its reasons for decision had to address Daracon's submissions on ss 56-58 of the CP Act and give reasons why it did not accept those submissions. The reasons should also have addressed Mr Andersen's evidence that Daracon could not properly defend itself in relation to the OL Claim in these expedited proceedings. The Tribunal's reasons did not address any of these matters (WF 387-390).

21. At RS [51]-[52], Mr Kelsall seeks to justify the paucity of reasons on the basis that the gist of the Tribunal's decision was to leave questions of Daracon's inability to properly defend itself in these proceedings to subsequent case management, and therefore it was not necessary for the Tribunal to engage in detail with Daracon's evidence and submissions on this issue.

22. However, the entire basis for Daracon opposing leave being granted to Mr Kelsall to amend at the heel of the hunt to introduce an entirely new claim against Daracon was Daracon's inability to properly defend itself against the OL Claim in the expedited hearing, irrespective of the case management steps that followed. The idea that Daracon's concerns could be addressed by the Tribunal in subsequent case management decisions is illusory and avoids the issue of injustice and denial of procedural fairness that the Tribunal failed to grapple with (WF 460.48-50).

The Court should re-exercise the discretion and refuse Mr Kelsall leave to amend

23. Notwithstanding the submissions at RS [55]-[66], if the Court were to re-exercise the discretion, it should not grant leave to amend to Mr Kelsall.

24. First, even if Mr Kelsall did decide to commence fresh proceedings against Daracon on the basis of occupier's liability, it does not follow that Mr Kelsall would have the right for those proceedings to be heard concurrently with his existing claim.

25. Second, it is incorrect to suggest (RS[58]-[61]) that there is no evidentiary basis for the conclusion that if leave is granted to Mr Kelsall, then Daracon will be forced to defend itself in the proceedings without sufficient time to be able to do so. The evidence of Mr Andersen, which was not challenged below, provides that evidentiary basis. He set out in his affidavit of 1 May 2025 that Daracon could not, even with his assistance, investigate and prepare for the hearing in less than six months. As is clear from the Tribunal's directions (WF 482), it requires that the matter be heard before September 2025. That is much less than the six months that Mr Andersen stated would be required.

26. Third, Daracon's inability to prepare in time was compounded by Mr Kelsall's conduct of his case, including declining to provide the litigation file relating to the OL Claim to Daracon's solicitors when requested in May 2025 (WF 227 and WF 310).

27. Fourth, although Mr Kelsall's counsel stated from the bar table why there had been such an inordinate delay in making the amendments in the F2ASOC, there is no evidence to make good that submission. Submissions from the bar table unsupported by evidence cannot discharge the obligation on Mr Kelsall to "bring the circumstances giving rise to the amendment to the court's attention, so that they may be weighed against the effects of any delay and the objectives of the rules".[15] Moreover, Mr Kelsall's submission did not address the question of why counsel had not been engaged at a much earlier stage to conference Mr Kelsall, for example, in March 2024 when Mr Kelsall's cancer was found to have metastasised from his lungs to his liver.

[15] *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175, 215 [103].