Civil and Administrative Tribunal
New South Wales

Case Name:	**Houda v Seraphim**
Medium Neutral Citation:	
Hearing Date(s):	12 March 2025
Date of Orders:	30 May 2025
Date of Decision:	30 May 2025
Jurisdiction:	Appeal Panel
Before:	Armstrong J, President A Britton, Deputy President
Decision:	(1) Leave to appeal is refused. (2) These reasons for decision are not to be published, except to the parties, until 5pm on the seventh working day following the day on which these reasons are published to the parties. (3) Order 2 made by the Tribunal on 1 November 2024 in proceedings 2024/00104051 under s 64(1)(c) of the Civil and Administrative Tribunal Act 2013 (NSW) is set aside, from 5pm on the seventh working day following the day on which these reasons for decision are published to the parties. (4) Order 2 made by the Appeal Panel on 18 March 2025 in these appeal proceedings 2024/00444376 under s 64(1) of the Civil and Administrative Tribunal Act 2013 (NSW) is amended such that the reference to “seventh day” now reads “seventh working day”. (5) Ms Seraphim is to file and serve any application for costs on the appeal, together with evidence (if any) and written submissions, within ten (10) working days after publication of these reasons for decision. (6) Mr Houda and Lawyers Corp Pty Ltd are to file and serve evidence (if any) and written submissions in response, within a further ten (10) working days. (7) Ms Seraphim is to file and serve further evidence (if any) and submissions in reply, within a further five (5) working days. (8) The parties are to include in their submissions their views as to whether the issues for determination

	in relation to the making of any order for costs on the appeal can be adequately determined on the basis of the written material lodged with the Tribunal, in the absence of the parties and without a hearing, under s 50 of the Civil and Administrative Tribunal Act 2013 (NSW).
Catchwords:	APPEALS — where party appeals from interlocutory decision of Tribunal relating to non-disclosure, non-publication and exclusion of public from hearing — whether leave should be granted to appeal from interlocutory decision — leave to appeal refused CIVIL PROCEDURE — hearings – exclusion of public — non-disclosure and non-publication — powers of Tribunal under ss 49 and 64 of Civil and Administrative Tribunal Act 2013
Legislation Cited:	Administrative Decisions Tribunal Legislative Amendment Act 2000 (NSW) Anti-Discrimination Act 1977 (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW). Court Suppression and Non-Publication Orders Act 2010 (NSW) South Australian Civil and Administrative Tribunal Act 2013 (SA) Civil and Administrative Tribunal Rules 2014 (NSW), cl 3(1)
Cases Cited:	Adam P Brown Male Fashions Pty Ltd v Phillip Morris Inc (1981) 148 CLR 170; [1981] HCA 39 Bettington v Commissioner of Police [2021] NSWCATAP 110 Champion Homes Pty Ltd v Guirgus [2018] NSWCATAP 54 Collins v Urban [2014] NSWCATAP 17 Commissioner of Australian Federal Police v Zhao (2015) 255 CLR 46; [2015] HCA 5 Commissioner for Fair Trading v PSMG Pty Ltd [2025] NSWCATAP 34 Commissioner of Taxation (Commonwealth) v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55 Council of the New South Wales Bar Association v EFA (2021) 106 NSWLR 383; [2021] NSWCA 339 Corlett v Moubarak (No 2) [2023] NSWCATAP 54 Council for the New South Wales Bar Association v Waterstreet (No 2) [2024] NSWCATOD 51

Dasari v Commissioner of Police, NSW Police Force (No 2) [2024] NSWCATAD 101
Deputy Secretary, Local Government, under delegation from the Secretary, Department of Planning, Housing and Infrastructure v Saravinovski [2024] NSWCATOD 170
DLH v Nationwide News Pty Ltd [2018] NSWCATAD 92
DRJ v Commissioner of Victims Rights [2020] NSWCA 136
Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim (2012) 83 NSWLR 52; [2012] NSWCCA 125
FFO v Cumberland Council [2022] NSWCATAP 164
Forest v Suzanne [2022] NSWCATAP 188
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22
Frost v TAFE NSW (No 2) [2019] NSWCATAD 129
Gallagher v Northern NSW Local Health District [2023] NSWCATAP 245
Hogan v Australian Crime Commission (2010) 240 CLR 651; [2010] HCA 21
Kazas-Rogaris v Council of the Law Society of New South Wales [2024] NSWCATOD 166
Kostov v Ecclesia Housing Limited (No 3) [2018] NSWCATAP 221
Landrey v Nine Network Australia Pty Ltd (2024) 305 FCR 246; [2024] FCAFC 76
Medical Board of Australia v Qazi (No 2) [2024] SACAT 95
Minister for Immigration and Indigenous Affairs v X (2005) 147 FCR 243; [2005] FCAFC 217
Misrachi v Public Guardian [2019] NSWCA 67
Monday (a pseudonym) v R [2022] ACTCA 25
MRWL v Australian Securities and Investment Commission [2022] AATA 3366
Orell v Clas Concrete & Constructions Pty Ltd [2024] NSWCATAP 220
Rinehart v Welker (2011) 93 NSWLR 311; [2011] NSWCA 403
Ritson v Commissioner of Police [2022] NSWCATAP 223
Secretary, Department of Family and Community Services v Smith (2017) 95 NSWLR 597; [2017] NSWCA 206
Shariful v Freitas [2023] NSWCATAP 241
State of New South Wales (Justice Health) and anor v Dezfouli [2008] NSWADTAP 69
Steven Moore (a pseudonym) v The King (2024) 419 ALR 169; [2024] HCA 30
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362; [2017] HCA 34

	XQZT v ASIC [2009] AATA 669
Texts Cited:	Nil
Category:	Procedural rulings
Parties:	Adam Houda (First Appellant) Lawyers Corp Ptd Ltd (Second Appellant) Hana Seraphim (Respondent)
Representation:	Counsel: C Parkin (Appellants) M Lewis SC (Respondent) Solicitors: Murphy's Lawyers Inc (First and Second Appellants) Carroll O'Dea (Respondent)
File Number(s):	2024/00444376
Publication Restriction:	See Orders 2, 3 and 4. By operation of previous orders made by the Appeal Panel (and as amended by Order 4), it is prohibited to publish or broadcast any report of the appeal heard on 12 March 2025, the contents of the Appeal Book, or submissions made on the appeal, except where disclosure is between parties (including legal representatives), or between parties and the Tribunal, until 5pm on the seventh working day following the day on which these reasons for decision are published to the parties.

Decision under appeal

Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Administrative and Equal Opportunity Division
Medium Neutral Citation:	[2024] NSWCATAD 341
Date of Decision:	1 November 2024
Before:	N Hennessy ADCJ, Deputy President K Stubbs, General Member
File Number(s):	2024/00104051

REASONS FOR DECISION

Introduction

1 This is an appeal from a decision of the Administrative and Equal Opportunity Division (AEOD) of the NSW Civil and Administrative Tribunal (NCAT), refusing to make orders under ss 49(2) and 64 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) in AEOD proceedings concerning a complaint brought by Ms Seraphim under the *Anti-Discrimination Act 1977* (NSW) (ADA). In that complaint, Ms Seraphim alleges that she was sexually harassed, and later victimised, by Mr Houda during a placement with the law firm of which he is the principal, Lawyers Corp Pty Ltd.

2 Mr Houda and Lawyers Corp are the appellants in this appeal and the respondents in the AEOD proceedings concerning the ADA complaint. On 8 October 2024, Mr Houda made an interlocutory application asking the Tribunal to make orders limiting the dissemination and publication of a series of WhatsApp messages between Mr Houda and Ms Seraphim (the WhatsApp messages). Mr Houda said that he intended to rely on those messages (included in a bundle of documents comprising 300 pages) as evidence in his defence to the complaint.

3 In the hearing of the application for ss 49(2) and 64 orders (the Confidentiality Application), evidence was led that the case has such notoriety that a pseudonym order would not be effective. The Tribunal accepted this. Mr Houda contended that the WhatsApp messages would be so central to the case that it would not be possible to conduct the hearing in public and therefore an order should be made that the hearing be conducted in private under s 49(2) of the NCAT Act. In addition, Mr Houda urged the Tribunal to make certain non-disclosure and non-publication orders under s 64(1) of the NCAT Act. The Tribunal declined to make those orders.

4 Because this appeal relates to an interlocutory decision, leave to appeal is required to appeal the decision under s 80(2)(a) of the NCAT Act. The Appellants contend that the Tribunal's decision was wrong, that leave to appeal

should be granted under s 80(2) of the NCAT Act, and their appeal should be allowed.

5 The respondent in this appeal, Ms Seraphim, opposes the grant of leave to appeal, contending that the arguments advanced in support of the appeal are fanciful, and that if leave to appeal were to be granted, the appeal should be dismissed. Nationwide News Pty Ltd, appearing with leave, opposes the leave application and the appeal on the same basis as the Respondent. Nationwide News endorsed the submissions made by Ms Seraphim.

NCAT's powers to close a hearing and make non-disclosure and non-publication orders

6 Under s 49(1) of the NCAT Act, the default position is that hearings are open to the public:

> **49 Hearings to be open to public**
>
> (1) A hearing by the Tribunal is to be open to the public unless the Tribunal orders otherwise.

7 Section 49(2) provides that the Tribunal may order that a hearing be held wholly or partly in private:

> (2) The Tribunal may (of its own motion or on the application of a party) order that a hearing be conducted wholly or partly in private if it 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.

8 Section 64 of the NCAT Act gives NCAT power to make certain kinds of non-disclosure and non-publication orders:

> **64 Tribunal may restrict disclosures concerning proceedings**
>
> (1) If 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, it may (of its own motion or on the application of a party) make any one or more of the following orders—
>
> (a) an order prohibiting or restricting the disclosure of the name of any person (whether or not a party to proceedings in the Tribunal or a witness summoned by, or appearing before, the Tribunal),

(b) an order prohibiting or restricting the publication or broadcast of any report of proceedings in the Tribunal,

(c) an order prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal,

(d) an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings 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 proceedings.

9 The objects of the NCAT Act at s 3 include the following:

3 Objects of Act

The objects of this Act are –

…

(f) to ensure that the Tribunal is accountable and has processes that are open and transparent, and

(g) to promote public confidence in tribunal decision-making in the State and in the conduct of tribunal members.

Confidentiality orders sought

10 The Appellants seek the same confidentiality orders on appeal as they sought in the substantive AEOD proceedings (that is, the proceedings on the ADA complaint). In its written reasons published on 1 November 2024 at [9]-[10], the Tribunal described the orders sought as follows:

"(1) An order that the hearing of this complaint be conducted wholly in private pursuant to s 49(2) of the NCAT Act.

(2) An order that the following be prohibited, pursuant to s 64(1)(a), (b) and (c) of the NCAT Act:

(a) the disclosure of the names of all persons who are parties to, witnesses in, or otherwise mentioned in the evidence or submissions in the proceedings;

(b) the publication or broadcast of any report of the proceedings in the Tribunal; and

(c) the publication of evidence given before the Tribunal and matters contained in any documents lodged with the Tribunal or received in evidence by the Tribunal.

11 In the alternative, the Appellants seek:

> "(1) An order that the following be prohibited, pursuant to s 64(1)(a), (b) and (c) of the NCAT Act:
>
> (a) The publication of evidence given before the Tribunal (or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal) concerning:
>
> (i) WhatsApp exchanges between Ms Seraphim and Mr Houda pursuant to s 64(1)(c) of the NCAT Act;
>
> (ii) Certain matters to be identified in private hearing; and
>
> (b) The publication or broadcast of any report of so much of the proceedings in the Tribunal that refer to, or otherwise disclose, the contents of the WhatsApp exchanges or sexual conduct engaged in between Ms Seraphim and Mr Houda pursuant to s 64(1)(b) of the NCAT Act."

The Tribunal's hearing and the decision under appeal

12 On 21 October 2024, the Tribunal heard evidence and submissions in a closed hearing. The Appellants relied upon an affidavit sworn by Mr Houda on 4 October 2024. Mr Houda gave oral evidence and was briefly cross-examined. The Tribunal refused the Confidentiality Application on that day. Written reasons were subsequently provided by the Tribunal on 1 November 2024 (Reasons), which we summarise below. The Tribunal prepared two versions of its reasons for decision, a confidential version provided to the parties and a version with parts redacted prepared for publication on Caselaw. In these reasons for decision, all reference to the Tribunal's reasons are to the former.

13 In the decision under appeal, the Tribunal first considered the relevance of the WhatsApp messages to the ADA complaint. Those messages had been exchanged by Mr Houda and Ms Seraphim between November 2020 and March 2021. The Tribunal stated that many of those messages are directly relevant to issues in dispute in the [ADA] proceedings, and "will feature prominently in the evidence": Reasons at [12].

14 The Tribunal referred to publicity surrounding the proceedings, including information already in the public domain and not subject to confidentiality orders. The Tribunal quoted extracts from an article published on 5 August

2024 in the Daily Telegraph following an interview with Mr Houda. That article contains quotes attributed to Mr Houda, including that Ms Seraphim "was never discriminated against nor was she ever harassed". The Tribunal stated that, in determining whether to make any of the confidentiality orders sought, "we have not taken into account the fact that Mr Houda has spoken to the media about the case and claimed that "objective evidence completely contradicts and is inconsistent with the complaint made"": Reasons at [21]. The Tribunal indicated that Mr Houda had not disclosed the content of the WhatsApp messages (to the media), and that his application to keep that information confidential and have a closed hearing should be considered on its merits.

15 The Tribunal then set out its understanding of relevant legal principles, beginning with a discussion of the principle of open justice and the desirability or otherwise of derogating from that principle. The Tribunal started with the proposition that there is a public interest in open justice, referring to the High Court's description of the rationale for open justice as being "that court proceedings should be subjected to public and professional scrutiny…": *Commissioner of Australian Federal Police v Zhao* (2015) 255 CLR 46; [2015] HCA 5 at [44]. The Tribunal noted that the principle of open justice is reflected in two of the objects of the NCAT Act, namely s 3(f) "to ensure that the Tribunal is accountable and has processes that are open and transparent," and s 3(g) "to promote public confidence in tribunal decision-making in the State and in the conduct of tribunal members": Reasons at [23].

16 The Tribunal observed that open justice typically includes having a hearing that is open to the public, naming the parties and witnesses and allowing publication of what transpires in the proceedings, including the evidence tendered. The Tribunal stated that, unless it makes an order to the contrary, these features apply to hearings of the kind brought by Ms Seraphim under the ADA: Reasons at [24].

17 The Tribunal cited, with approval, the decision of the Appeal Panel of the former NSW Administrative Decisions Tribunal (ADT) in *State of New South Wales (Justice Health) and anor v Dezfouli* [2008] NSWADTAP 69 (*Dezfouli*) in which

the Appeal Panel explained that the equivalent provision to ss 49 and 64 of the NCAT Act must be applied in accordance with consistent standards and values:

> [61]…[It] is unthinkable that the word 'desirable' in section 75(2) should be interpreted without regard to the basic common law precept of open justice. What is desirable under a statutory provision must be determined in accordance with consistent standards and values, not the particular preferences of the court or tribunal applying the provision.

18 The Tribunal recognised that the principle of open justice is given greater prominence in court proceedings, referring to s 6 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) (CSNPOA) which provides that, in deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. An order derogating from this objective may only be made where it is "necessary" to do so on certain public interest grounds or in narrow circumstances to protect private interests: CSNPOA, s 8. In *Reinhart v Welker* (2011) 93 NSWLR 311; [2011] NSWCA 403 at [106], the Court of Appeal characterised "necessary" as a strong word and held that it is insufficient for the court to reach a view that a suppression order should be made because it is merely "convenient, reasonable or sensible" to do so: Reasons at [27].

19 The Tribunal stated that, while the word "desirable" in the NCAT legislation is not as strong as the word "necessary" in the CSNPOA, it means more than merely "convenient, reasonable or sensible": Reasons at [27]. The Tribunal cited *Bettington v Commissioner of Police* [2021] NSWATAP 110 (*Bettington*) at [41] where an Appeal Panel of NCAT warned against substituting the words "special" or "extraordinary" for the natural and ordinary meaning of the word "desirable" in ss 49 and 64 of the NCAT Act: Reasons at [29].

20 Before the Tribunal, Mr Houda submitted that the process of determining an application under the CSNPOA is not dissimilar from that under the NCAT Act, referring to the "calculus of risk" approach preferred by the Court of Appeal when applying s 8(1)(c) of the CSNPOA (see *Council of the New South Wales Bar Association v EFA* (2021) 106 NSWLR 383; [2021] NSWCA 339 (*EFA*) at

[227]-[229]). In that case, the Court of Appeal contrasted two differing approaches to the application of s 8(1)(c). The "probable harm" approach requires proof of the probability of harm in the absence of an order. The other approach, the "calculus of risk" approach, requires a more nuanced consideration, taking into account the nature, imminence and degree of likelihood of harm to occur to the relevant person. In *EFA*, the Court indicated that the factors in favour of making an order need to be balanced against the "important consideration of open justice". In particular the Court identified "the degree to which an order…would encroach upon that principle": *EFA* at [229]; Reasons at [31].

21 Mr Houda submitted that the use of the lower threshold of "desirable" and the width of the potential reasons ("any other reason") in ss 49(2) and s 64(1) of the NCAT Act indicates that the Parliament intended that suppression and non-publication orders be much more readily available to NCAT. The Tribunal stated that, while it agreed with that conclusion, it noted that both NCAT and its predecessors have "consistently attributed considerable importance to the desirability of hearings being open to the public and fully reportable unless good reasons are advanced for restricting public access and or full reporting", citing *Dezfouli* at [61]: Reasons at [31].

22 The Tribunal continued:

> "[32] The strength of the public interest in open justice will vary depending on the kind of proceedings the Tribunal is determining. In our view, it is relatively strong in these kinds of proceedings where the Tribunal is exercising judicial power to resolve a civil dispute between individuals under the *Anti-Discrimination Act*. The fact that the parties are not public figures or that the criminal law is not invoked, does not mean that the principle of open justice should be given less weight.
>
> [33] The matters to be taken into account when deciding whether to close a hearing or make [sic] non-disclosure or non-publication orders were summarised in *State of New South Wales (Justice Health) and anor v Dezfouli* [2008] NSWADTAP 69 at [81]:
>
> > 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.
>
> [34] These matters remain relevant and applicable when interpreting the slightly differently worded provisions in s[s] 49 and 64 of the NCAT provisions. They reflect the standards and values embodied in the NCAT Act."

23 The Tribunal referred to the evidence on which Mr Houda relies in support of the Confidentiality Application, being the WhatsApp messages and a written statement dated 4 October 2024 in which he gave his reasons for requesting a closed hearing, together with non-disclosure and non-publication orders. At [38] of the Reasons, the Tribunal listed those reasons: (1) the messages are of a confidential nature; (2) harm to his daughters and to his relationship with them; (3) harm to his professional reputation and standing; (4) safety concerns.

24 The Tribunal then explained that the question to be determined is whether any of the matters put by Mr Houda, either alone or in combination, make it desirable to make the confidentiality orders he seeks. That involves making factual findings about those matters, applying the "calculus of risk" approach and assessing the degree to which a particular order would encroach upon the principles of open justice as reflected in the NCAT Act for these kinds of proceedings: Reasons at [39].

25 As to the confidentiality of the WhatsApp messages, the Tribunal accepted that when they were sent and received, they were "intended to be confidential communications". Applying the "calculus of risk" approach, the Tribunal stated that "the nature of the text messages is highly confidential". The Tribunal also stated that the context in which those messages were sent and received is relevant. The complaint under the ADA is about sexual harassment and

victimisation in the workplace. When the messages were first sent, Ms Seraphim was about to commence a placement with Mr Houda's legal firm and he was to be her supervisor. The text messages continued for the duration of the time Ms Seraphim worked for Mr Houda: Reasons at [40]-[44].

26 As to harm to his daughters and his relationship with them, Mr Houda led evidence and made submissions about the embarrassment, distress and mental anguish that his daughters would suffer if the WhatsApp messages were publicly disclosed, given their explicit sexual nature. He expressed concern that publication of those messages would place a considerable strain on their relationship with him and may well damage it permanently. The Tribunal was satisfied that Mr Houda's daughters would be embarrassed and distressed by the disclosure of these messages, and that disclosure is also likely to adversely affect Mr Houda's relationship with them: Reasons at [45]-[46].

27 As to harm to professional reputation and income, Mr Houda asserted that the majority of his work is for clients, many within the Arabic community, who are referred to him by others, and that the financial success and reputation of his firm is closely tied to his personal and professional reputation. Mr Houda also said that the sexually explicit content of the messages would not be well received by those who adhere to Islam. The Tribunal found that publication of the messages would have a particularly damaging effect on the number of referrals Mr Houda receives and hence on his income and on that of his employee: Reasons at [47].

28 As to safety concerns, Mr Houda said he held concerns for his personal safety arising from his disclosures made to him about Ms Seraphim contained in some of the WhatsApp messages. The Tribunal was not persuaded that there would be personal safety issues if that evidence were disclosed: Reasons at [48]-[53]. The Appellants do not challenge this aspect of the Tribunal's reasoning.

29 After making findings about the likely harms asserted by Mr Houda, the Tribunal said the three matters to which it gives weight are the confidential nature of the text messages, the likely effects on Mr Houda's daughters and their relationship

with him, and the negative effect on Mr Houda's reputation and income if the WhatsApp messages are disclosed: Reasons at [54].

30 The Tribunal continued:

> "[55] If orders were made in accordance with Mr Houda's option (hearing wholly in private with the various orders made under s 64(1) of the NCAT Act) that would effectively extinguish the principle of open justice as it is articulated in the NCAT Act in relation to these types of proceedings. Even if the alternative orders were made and the hearing was open to the public, the majority of the evidence would not be able to be published. While the principle of open justice would not be extinguished entirely the critical evidence on which many of the Tribunal's findings will be based, would not be open to scrutiny.
>
> [56] The text messages are confidential in nature, but Mr Houda does not point to any consequence to him of disclosing such material. The consequences are confined to the effect on his reputation and income, and the effect on his children and his relationship with them. While significant for these individuals, when balanced against their encroachment on the principle of open justice as articulated in the NCAT Act, these matters are not of sufficient magnitude or seriousness to make it desirable to make any of the orders sought."

Principles as to leave to appeal interlocutory decisions

31 The decision under appeal (to refuse the Confidentiality Application) is an "interlocutory decision": NCAT Act, s 4(1), definition of interlocutory decision paras (b) and (i). Consequently, the Appellants require leave to appeal: NCAT Act, s 80(2)(a).

32 Leave to appeal should only be granted when there are substantial reasons to warrant leave being granted. These reasons include the presence of an error of principle in the decision under appeal, resulting in substantial injustice. For leave to be granted, the decision under appeal must generally be attended with sufficient doubt to warrant its consideration on appeal (see e.g. *Champion Homes Pty Ltd v Guirgus* [2018] NSWCATAP 54 (*Champion Homes*) at [35]; *FFO v Cumberland Council* [2022] NSWCATAP 164 (*FFO*) at [9]; *Bettington at* [22]).

33 As recently noted by an Appeal Panel in *Commissioner for Fair Trading v PSMG Pty Ltd* [2025] NSWCATAP 34, leave to appeal against an interlocutory decision is reserved for cases with special features warranting appellate review

and such appeals are not to be brought as a matter of routine. While it is unnecessary and unwise to lay down rigid and exhaustive criteria, there is a general requirement that there be an error of principle and a risk of substantial injustice if leave was not granted, although these are not necessarily cumulative: [23]-[29].

34 NCAT Appeal Panels have stated, in a number of decisions, that where an application for leave to appeal relates to a question of practice and procedure, the application is to be approached with the restraint applied by an appellate court when reviewing such decisions: see e.g. *Collins v Urban* [2014] NSWCATAP 17 (*Collins*) at [84(3)] citing *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [21]; *Champion Homes* at [35].

35 The principles governing an application for leave to appeal under the NCAT Act are well-established and are repeated in many decisions of the Appeal Panel, often quoting *Collins.* It is only if the decision is affected by sufficient doubt, to warrant its reconsideration on appeal, that leave will be granted. Usually, it is appropriate to grant leave where there is an issue of principle, a question of public importance or an injustice which is reasonably clear, and beyond what is merely arguable: *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597; [2017] NSWCA 206 at [28]. As explained in *Collins* at [84], it is not sufficient merely to show that the Tribunal below was arguably wrong or that there was a bona fide challenge to an issue of fact.

Application for leave and appeal grounds

36 Leave to appeal is sought on the following grounds:

(1) Important issues of principle (or public importance) are raised regarding the proper construction of the powers conferred on NCAT by ss 49(2) and 64 of the NCAT Act, in particular when it is exercising jurisdiction conferred by the ADA.

(2) There is limited guidance from the Appeal Panel, or courts, as to the meaning of the term “desirable” in the context of ss 49 and 64, and the

weight to be given to confidential material in deciding whether to make orders under those provisions. This is a matter which has general application not only for cases arising under the ADA, but in NCAT matters more generally.

(3) The Tribunal's decision involves errors of principle and is attended by sufficient doubt to warrant the grant of leave.

37 The Appellants contend that there is no principled basis for the Appeal Panel to exercise the type of "restraint" that might ordinarily be applied to decisions concerning questions of practice and procedure, given the unchallenged evidence of detriment which will be suffered by the Appellants and third parties if confidentiality orders are not made, and the injustice that would ensue.

38 If leave to appeal is granted, the Appellants foreshadow their intention to rely on the following grounds of appeal:

(1) The Tribunal erred in its approach to assessing whether or not it was "desirable" to hold the hearing in private, or to prohibit the publication of evidence.

(2) The Tribunal failed to give proper regard to the interests of affected third parties in determining whether to hold the hearing in private, or to prevent the publication of evidence.

(3) In the alternative to (1) and (2), the Tribunal erred in the assessment as to whether or not it was "desirable" to prevent the publication of evidence or to hold the hearing in private.

(4) In the alternative to (1) - (3), the Tribunal failed to give adequate reasons or constructively failed to exercise jurisdiction.

39 The Appellants contend that the purported errors made by the Tribunal identified in appeal grounds 1 and 2 above are such that there is sufficient doubt about the correctness of the decision, coupled with the potential for harm to

flow to the Appellants and third parties. The Appellants describe those errors as being "errors of principle".

40 The Respondent (and Nationwide News) oppose leave to appeal being granted for these reasons:

(1) In considering applications for orders under ss 49(2) and 64(1), the principles to be applied, including the notion of open justice, are well settled in NCAT (including at the Appeal Panel level).

(2) There are a substantial number of existing authorities in NCAT (including at the Appeal Panel level) which address the notion of "desirability" in the context of open justice (including ss 49 and 64 of the NCAT Act) such that there are not questions of public importance, administration or policy that need to be clarified in the current appeal.

(3) The Tribunal's decision is not affected by a miscarriage of justice or sufficient doubt to warrant the grant of leave to appeal, and if leave is granted, there are no grounds for a successful appeal.

(4) The Tribunal's decision is a matter involving practice and procedure, and in deciding whether to grant to appeal, the Appeal Panel should exercise the usual "restraint" in such matters.

41 If leave to appeal is granted, the Respondent (and Nationwide News) contend that there would be no substance to the appeal.

42 The parties agree that an appeal under s 80(1) of the NCAT Act is in the nature of a rehearing concerned with identifying error in the decision under appeal, and not a *de novo* hearing. NCAT Appeal Panels have consistently taken the view that, except when a new hearing is conducted under s 80(3), an appeal under s 80(1) involves a rehearing in the sense of conducting a rehearing on the materials before the Tribunal below to determine whether the decision under appeal is the result of some legal, factual or discretionary error and, in

some cases, has power to receive additional evidence*:* see e.g*. Orell v Clas Concrete & Constructions Pty Ltd* [2024] NSWCATAP 220 at [35]. This type of appeal can be contrasted with an appeal against a court suppression or non-publication order under s 14 of the CSNPOA, which is in the nature of a hearing *de novo*: *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52; [2012] NSWCCA 125 at [6].

43 Further, the Appellants say that the Appeal Panel, in determining an appeal by way of rehearing, is entitled to form its own view on whether the statutory test as to "desirability" in ss 49(2) and 64(1) of the NCAT Act is made out with due respect to any advantage the Tribunal may have had at first instance, citing *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [25]; *Landrey v Nine Network Australia Pty Ltd* (2024) 305 FCR 246; [2024] FCAFC 76 at [72]. They say that the question of whether it is "desirable" to make orders under ss 49 or 64 is to be determined on the "correctness" standard, that is, the Appeal Panel should determine for itself the correct outcome, while making due allowance for such "advantages" as may have been enjoyed by the Tribunal at first instance, referring to *Steven Moore (a pseudonym) v The King* (2024) 419 ALR 169; [2024] HCA 30 at [15]; *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21 at [34]; *Rinehart v Welker* (2011) 93 NSWLR 311; [2011] NSWCA 403 at [48].

Should leave to appeal be granted?

44 The issues to be determined in the Appellants' leave application can be summarised as follows.

(1) Whether appellate restraint should be exercised because the Tribunal's decision involves a matter of practice and procedure.

(2) Whether there is sufficient doubt about the correctness of the Tribunal's decision to warrant reconsideration by the Appeal Panel.

(3) Whether the scope or operation of the powers in ss 49 and 64 of the NCAT Act require further appellate guidance as a matter of public importance or principle.

Issue (1): Appellate 'restraint' based on matter being one of practice and procedure

45 The Appellants submit that whilst, on one view, an application for orders under ss 49(2) and 64(1) involves a question of practice and procedure, there is no principled basis for applying the kind of restraint that ordinarily applied in such cases: cf. *Collins* at [84(3)] citing *BHP Billiton Ltd v Dunning* [2012] NSWCA 421 at [21]. This notion derives from the High Court's decision in *Adam P Brown Male Fashions Pty Ltd v Phillip Morris Inc* (1981) 148 CLR 170 at 177; [1981] HCA 39. The Court there recognised that the question of injustice flowing from the order appealed against will generally be a relevant and necessary consideration. In the circumstances of this case, and having regard to the unchallenged evidence of detriment to be suffered by the Appellants and third parties, the Appellants say that injustice is manifest and it would be inappropriate for the Appeal Panel to exercise "restraint" without regard to this.

46 We accept that the Tribunal's decision to refuse to make the confidentiality orders sought is not in the same category as more minor interlocutory matters dealing with practice and procedure. There should nonetheless be substantial reasons to allow appellate review from an interlocutory decision of this nature.

Issue (2): Whether Tribunal's decision attended by sufficient doubt to warrant reconsideration

47 The Appellants seek leave to appeal on the basis that the errors of principle made by the Tribunal, as contended in their appeal grounds 1 or 2, are of sufficient magnitude or importance to justify leave being granted, coupled with the detriment likely to flow to Mr Houda and the affected third parties if the requested confidentiality orders are not made. This ground has been expressed in case law in various ways including that leave should not be granted "unless a substantial injustice would result and the decision is attended with sufficient doubt to warrant it being reconsidered by the [appeal body]":

Champion Homes at [35]. This requires us to consider the merits of the appeal, with reference to appeal grounds 1 and 2.

48 We referred earlier to submissions made by the parties on the standard of appellate review. Those submissions did not address the state of satisfaction the Appeal Panel should reach in considering the merits of the appeal, for the purpose of deciding the leave application. We proceed on the basis that leave should only be granted where the Appellants show a reasonably arguable point in relation to the errors said to have been made by the Tribunal.

Appeal ground 1: Whether Tribunal erred in its approach to assessing "desirability" of making confidentiality orders sought

49 By appeal ground 1, the Appellants contend that the Tribunal erred in its approach to assessing whether or not it was "desirable" to hold the hearing in private, or to prohibit the publication of evidence. The Appellants submit that the Tribunal misconstrued the word "desirable" in ss 49 and 64 of the NCAT Act, overstated the strength of open justice in ADA proceedings, and failed to give sufficient (or any) weight to other relevant factors. In particular, the Appellants contend "the Tribunal's decision miscarried" by reason of any one or more of the following:

(1) the giving of inappropriate weight to the fact that the Tribunal, when hearing a complaint under the ADA, is exercising (non-federal) judicial power;

(2) the failure to give any "real" weight to the (accepted) confidential nature of the WhatsApp messages;

(3) the failure to take into account the importance of respondents to complaints under the ADA "being able to defend themselves without exposing themselves to secondary detriment".

50 We understand the Appellants' submission to be that the sub-grounds listed above at (1) to (3) are different ways in which the Tribunal misapplied the "desirability" test in ss 49 and 64.

Meaning of the word "desirable" in ss 49 and 64 of the NCAT Act

51 The Appellants contend that the Tribunal misconstrued the word "desirable" by failing to give that word its natural and ordinary meaning, which can be understood as "something worth having" (referring to the Cambridge Online Dictionary definition), before having regard to context. They submit that the construction of the powers conferred by ss 49(2) and 64 must begin with the text of those provisions. The purpose of considering context is only to assist in fixing the meaning of the text: *Commissioner of Taxation (Commonwealth) v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39].

52 The Appellants say that the word "desirable" is to be contrasted with the word "necessary" used in the CSNPOA, which is understood to be the touchstone for a derogation to the open justice principle both in that Act and at common law. There is no equivalent to s 6 of the CSNPOA contained in the NCAT Act. Section 6 directs that, in deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

53 The Appellants acknowledge that the NCAT Act contains objects at s 3(f) and (g) (ensuring open and transparent processes and promoting public confidence in tribunal decision-making), and the default position in s 49(1) is that hearings in the Tribunal are open to the public unless the Tribunal orders otherwise. However, they point to the "sharp contrast" between the powers in ss 49(2) and 64, and those under the CSNPOA*: DRJ v The Commissioner of Victims Rights* [2020] NSWCA 136 (*DRJ*) at [23], citing *Misrachi v The Public Guardian* [2019] NSWCA 67 (*Misrachi*) at [13]. They are "significantly different" regimes: *DRJ* at [23].

54 The Appellants accept that embarrassment and reputational damage are generally not sufficient to warrant the exercise of the powers under ss 49 and

64 of the NCAT Act, but may be when combined with other factors (such as the confidentiality of the evidence and the incentive to put on a proper defence).

55 As to the statutory meaning of the expression "desirable", the Respondent refers to the principles relating to statutory construction as restated by the High Court in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 (*SZTAL*) at [14]. There, Kiefel CJ, Nettle and Gordan JJ summarised the Court's task in this regard as follows:

> "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose [citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [69]-[71]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 at [47]]. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense [citing *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2]. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."

56 After referring to the "stated purposes" of the NCAT Act at s 3(f) and (g), the Respondent refers to a number of NCAT decisions where the principles of open justice have been considered and applied. For example, in *Kostov v Ecclesia Housing Limited (No 3)* [2018] NSWCATAP 221, an Appeal Panel stated:

> "[10] In New South Wales there is a system of open justice. From time to time reports of decisions of courts and tribunals reveal circumstances pertaining to parties in proceedings of a personal nature, and some of which deal with a whole range of difficult circumstances. Whilst it is unfortunate that details of this kind are revealed in this way, this is a necessary concomitant of open justice.
>
> [11] There are many cases in this Tribunal where non-publication orders have been made under section 64 of the Act, but they are principally directed to ensuring confidentiality with respect to disciplinary proceedings taken against health practitioners or legal practitioners and concern the names and details of persons who are their patients or clients as well as the families of those patients and clients. It is rare indeed that the name of a practitioner against whom disciplinary proceedings are taken will be suppressed. See for example, *Health Care Complaint Commission v Vo* [2014] NSWCATOD 127…"

57 That analysis was approved by a differently constituted Appeal Panel in *Forest v Suzanne* [2022] NSWCATAP 188 (*Forest v Suzanne*). There, it was also said:

> "[30] In civil proceedings such as those brought by the appellant, the principle of open justice is a centrally important factor. This long standing principle of the common law applies in the Tribunal as it does in courts. In general terms, the principle requires hearings to be conducted in public and information and evidence to be communicated publicly to those present at the hearing. It also requires that nothing be done to discourage fair and accurate reports of proceedings conducted in open hearing, which includes reporting the names of the parties and the evidence given during the proceedings. The open justice principle is reflected in s 49 of the NCAT Act, which, with limited exceptions, requires Tribunal hearings to be conducted in public."

58 The Respondent says that, while it can be accepted that the test of "necessity" in s 8 in the CSNPOA is more onerous than the test of "desirable" in ss 49 and 64 of the NCAT Act, the differences between those two statutory schemes do not provide support for the Appellants' construction of "desirable" (i.e. that a suppression or non-publication order may be granted merely if the Tribunal considers it is "worth having and wanted"). That construction is at odds with the well-settled understanding within the Tribunal of the expression "desirable" where the principles of open justice have been given considerable weight.

59 The Respondent submits that the Appellants have not grappled with authority in the Tribunal and the well-settled principles that are consistently applied. In *Dezfouli*, an ADT Appeal Panel considered the meaning of the phrase "desirable" in the context of the relevant legislation. The principles adopted in *Dezfouli* have been cited with approval in numerous decisions made by NCAT, and its predecessor, the ADT: see e.g. *Deputy Secretary, Local Government, under delegation from the Secretary, Department of Planning, Housing and Infrastructure v Saravinovski* [2024] NSWCATOD 170 at [17], [23]; *Council for the New South Wales Bar Association v Waterstreet (No 2)* [2024] NSWCATOD 51 at [8]; *Kazas-Rogaris v Council of the Law Society of New South Wales* [2024] NSWCATOD 166 at [73]-[80]; *Dasari v Commissioner of Police, NSW Police Force (No 2)* [2024] NSWCATAD 101 at [24]; *DLH v Nationwide News Pty Ltd* [2018] NSWCATAD 92 (*DLH*) at [6]-[11].

60 In our view, the meaning of the expression “desirable” in ss 49(2) and 64(1) is to be understood having regard to the context and purpose of the NCAT Act, including (but not limited to) the stated objects of the Act. We do not accept the Appellants’ submission that the word “desirable” in ss 49(2) and s 64(1) should be understood by reference to a dictionary definition of “something worth having”, with regard only being had to “context” at some later stage of statutory construction. As the High Court said in *SZTAL* (and as the Respondent submits), when ascertaining the meaning of a statutory provision, regard should be had to the context and purpose of the statute when considering the text of a statutory provision, and not at some later stage, and context should be regarded in its widest sense.

61 We turn to consider the three sub-grounds of appeal ground 1.

(1) Inappropriate weight to exercise of judicial power

Submissions

62 The Appellants contend that the Tribunal's decision “miscarried” by reason that it gave inappropriate weight to the fact that the Tribunal, when hearing a complaint under the ADA, exercises judicial (or curial) power (in non-federal matters). At [32] of the Reasons, the Tribunal stated that the strength of public interest in open justice is “relatively strong” in these types of proceedings where the Tribunal is exercising judicial power to resolve a civil dispute between individuals under the ADA.

63 The Appellants acknowledge that there is a presumption of open justice given the objects of the NCAT Act at s 3(f) and (g). In addition, they accepted in the appeal, and in the proceedings below, that whether the Tribunal is exercising judicial power is a relevant consideration in the exercise of the discretion conferred by ss 49 and 64 (Tcpt, 21 October 2024, p. 10(1)). However, they contend that the Tribunal placed too much weight on that consideration and that there was no proper basis for its conclusion that the importance of open justice is “relatively strong” in ADA proceedings.

64 The Appellants submit that the following contextual indicators in the NCAT Act militate against that conclusion: (i) ADA proceedings are subject to the general provisions of the NCAT Act, including s 50 which permits NCAT to determine ADA complaints without a hearing; (ii) the absence of any provision in the NCAT Act which directs the Tribunal to give the principle of open justice different weight in curial and non-curial proceedings; and (iii) the absence of any provision in the NCAT Act which requires the Tribunal to give the principle of open justice significant weight in ADA proceedings because of some special (or public) interest in those types of matters.

65 The Appellants say that if Parliament had intended the Tribunal's powers under ss 49 and 64 to be applied differently in curial and non-curial proceedings, it would have said so. They point to several examples in the NCAT Act where Parliament has taken that approach, for example its decision to subject certain types of proceedings to "bespoke procedures" in relation to costs (e.g. NCAT Act, Sch 3, cl 13).

66 In addition, the Appellants contend that it is significant that, for some areas of the Tribunal's jurisdiction, Parliament made a deliberate decision to modify the principle of open justice, giving as an example, s 65 of the NCAT Act which imposes a self-executing non-publication order over the identities of individuals involved in proceedings in NCAT's Guardianship Division and proceedings involving community welfare.

67 The Appellants say that, after attributing the principle of open justice "substantial weight" on the basis of the nature of the proceedings, being ADA proceedings, the Tribunal simply determined that none of the (largely unchallenged) evidence relied upon by Mr Houda was sufficient to get over the "high bar" it had imposed. They assert that the Tribunal adopted the erroneous approach of effectively giving the open justice principle the same weight required to be given in court proceedings.

68 The Appellants submit that, in the absence of any express provision to regulate the exercise of the powers in ss 49 and 64 in ADA proceedings, there was no

proper justification for the Tribunal to set the bar for a derogation from open justice “at such lofty heights”. Rather, the starting point should have been to recognise that Parliament regards open justice in ADA matters to be an important, but far from paramount, consideration and one where derogation is permitted on far less substantial grounds than are required at common law or under the CSNPOA. It is further submitted that the lower threshold imposed by the NCAT Act is evidence "in and of itself” that Parliament did not intend that open justice be given substantial weight in matters for which jurisdiction is conferred on NCAT.

69 The Respondent rejects the contention that the Tribunal gave “paramount consideration” to the open justice principle. The Appellants’ submission - that the Tribunal’s starting point should have been to recognise that State Parliament did not intend to give open justice “substantial weight” in matters for which jurisdiction is conferred on NCAT - is not supported by authority or extrinsic material. It fails to grapple with the well-established principles applied in numerous NCAT decisions, including that there is a “strong presumption” in favour of open justice in matters proceedings before NCAT, and that the principle ought to be applied coherently: see e.g. *Ritson v Commissioner of Police* [2022] NSWCATAP 223 at [61] applying *Dezfouli* at [81]). See also regarding the presumption of open justice: *Corlett v Moubarak (No 2)* [2023] NSWCATAP 54 (*Corlett*) at [8]-[9]; *FFO* at [46]. The values informing the application of the open justice principle were described in *Dezfouli* as having been consistently attributed with “considerable importance”.

70 The Respondent refers to numerous examples of decisions made by courts and tribunals (including interstate examples) where the emphasis on transparency and accountability informed the approach taken to the making of suppression and non-publication orders. For example, in *Medical Board of Australia v Qazi (No 2)* [2024] SACAT 95 (*Qazi*) (a case involving disciplinary proceedings), the South Australian Civil and Administrative Tribunal stated, in relation to s 60 of the *South Australian Civil and Administrative Tribunal Act 2013* (SA) (an equivalent provision to ss 49 and 64 of the NCAT Act), that nothing detracted

from the need to recognise the fundamental principle of open justice and the aspects of the public interest it seeks to protect. That Tribunal stated relevantly:

> "[33] We do not consider that the legislature, in enacting s 60, intended to generally diminish the importance of the common law principle of open justice or to reduce the weight to be given to it in this Tribunal. The provisions of s 60(1), and the statutory emphasis on transparency and accountability, suggest otherwise. There may perhaps be some jurisdictions of this Tribunal where orders under s 60 are made more readily due to the unique nature of the jurisdiction and all the issues which arise. However, in our view that is not intended to be the case generally. It is not intended that issues of transparency and confidentiality should be generally dealt with in this Tribunal in a way which is out of line with other Australian courts and tribunals.
>
> [34] In summary, the operation of the Tribunal is to be transparent and accountable. There is no general mandate for s 60 orders being made more commonly or more readily. To the contrary, the Tribunal should be vigilant to ensure that the principles of transparency and accountability are not eroded by making orders under s 60 too readily. The breadth of the grounds under s 60(2) increases the range of factors that may be considered but does not weaken the weight that must be accorded to the principle of open justice."

71 The Respondent submits that a substantially similar approach should be taken here, and that the Appellants have not articulated any good reason for taking a contrary approach to the operation of ss 49 and 64 of the NCAT Act.

72 The Respondent further submits that open justice plays an important role with respect to workplace sexual harassment, and there is a strong public interest in ensuring that the allegations made, and the evidence relied on, are not shielded from public scrutiny.

Consideration

73 We do not consider there to be an error of principle in the Tribunal's approach in the prominence it placed on the principles of open justice, nor in taking the view that the strength of the public interest in ADA proceedings is "relatively strong".

74 The contention that the Tribunal attributed "paramount consideration" to the principle of open justice and set the bar for a derogation from that principle at "lofty heights" as contended by the Appellants is not supported by the Reasons. The Tribunal did not use that language in the Reasons.

75 The Tribunal was alive to the difference between the statutory provisions which govern the exercise of the power to make confidentiality orders and to close proceedings, by courts and by NCAT: see e.g. Reasons at [25]-[29]. The Tribunal acknowledged that open justice is given "greater prominence" in courts of NSW where the test is informed by whether a derogation is "necessary". That test was a strong word and warranted exceptional circumstances, whereas the test under the NCAT Act was "not as strong" and did not warrant exceptional circumstances (Reasons at [27]).

76 The Tribunal recognised that Parliament intended for suppression and non-publication orders to be much more readily available to NCAT because of the lower threshold of "desirable" and the width of the potential reasons ("any other reason"). Nevertheless, the Tribunal noted that NCAT and its predecessors had "consistently attributed considerable importance to the desirability of hearings being open to the public and fully reportable unless good reasons are advanced for restricting public access and/or full reporting": Reasons at [31] citing *Dezfouli* at [61].

77 We do not consider that the Tribunal fell into error in its approach as outlined above.

78 The Appellants point to the Court of Appeal's decision in *DRJ,* and the earlier decision of the Court in *Misrachi,* where the significant differences in the statutory schemes relating to suppression and non-publication orders under the CSNPOA and the NCAT Act were highlighted. Both matters concerned Tribunal decisions made in the exercise of NCAT's administrative review jurisdiction. In that respect, in *DRJ*, Leeming JA noted that applications for administrative (or merits) review by NCAT are applications within the executive branch of government (*DRJ* at [21]-[23]). In contrast, here, the Tribunal made its decision in the exercise of (non-federal) judicial power. Notwithstanding this difference, we do not take *DRJ* (or *Misrachi*) to have set out any proposition which runs counter to the approach taken by the Tribunal in this case.

79 Further, we do not agree with the Appellants' submission that, because ADA proceedings are subject to the general provisions of the NCAT Act, that is a statutory indicator that open justice cannot (or should not) be given "substantial weight" in these types of proceedings. If suggested that those provisions indicate that it was Parliament's intention that NCAT take a "one-size-fits all" approach in exercising the powers conferred by ss 49 and 64, we are unable to agree. The types of proceedings decided by NCAT are varied and broad, encompassing civil, administrative, protective and disciplinary jurisdictions. We see nothing in the NCAT Act to suggest that, in the exercise of its multiple jurisdictions, the Tribunal is not entitled to take into account the nature of the jurisdiction being exercised and the subject-matter of the proceedings.

80 The Appellants point to the potential application of s 50 of the NCAT Act to ADA proceedings, noting that there is no relevant limitation on the types of matters in which such an order may be made. Section 50 confers a discretion on the Tribunal to dispense with a hearing where it is satisfied that the issues can be adequately determined in the absence of the parties (s 50(2)), after giving the parties an opportunity to be heard as to the whether that course should be adopted (s 50(3)).

81 In deciding whether to make any order under s 50(2), the Tribunal as constituted would be guided by the objects of the NCAT Act. Consideration would need to be given to the values of transparency and accountability stated at s 3(f) and (g) of the NCAT Act, and the default position that Tribunal hearings are open to the public under s 49(1). Whether final proceedings (or significant interlocutory or ancillary applications) are being determined would also be relevant (as opposed to minor interlocutory or ancillary issues). If suggested that the existence of s 50 in the NCAT Act indicates that Parliament did not intend that open justice be given weight in NCAT proceedings, or that the strength of the public interest in open justice may vary depending on the kind of proceedings before NCAT, we do not agree.

82 Insofar as the Tribunal below had regard to the nature of ADA proceedings as civil disputes which involve the exercise of (non-federal) judicial power, we do

not consider the Tribunal's approach to be erroneous. We reject the Appellants' contention that contextual indicators in the NCAT Act militate against that approach, and that if Parliament had intended the Tribunal's powers under ss 49 and 64 to be applied differently in curial and non-curial proceedings, it would have said so.

83 The approach taken by the Tribunal is not contrary to appellate authority in the courts of NSW, including that of *DRJ* or *Misrachi*. The Tribunal's approach is consistent with appellate authority within NCAT in its recognition that the nature of the Tribunal proceedings, and the type of power that is being exercised, will be a relevant consideration in deciding whether to make ss 49 or 64 orders.

84 Previous NCAT Appeal Panels have recognised that the application of the open justice principle in the Tribunal is complicated by the diverse nature of NCAT's jurisdiction. In that respect, several of those Appeal Panels have referred to Leeming JA's analysis in *DRJ* at [21]-[23]: see e.g. *Gallagher v Northern NSW Local Health District* [2023] NSWCATAP 245 (*Gallagher*) at [66]; *Shariful v Freitas* [2023] NSWCATAP 241 (*Shariful*) at [5]. Previous Appeal Panels have considered the nature of the NCAT proceedings to be relevant when deciding whether to make an order under s 64. That includes whether NCAT is exercising administrative or judicial power, as the latter is generally expected to be open to scrutiny with some exceptions (NCAT Act ss 50, 65): see e.g. *Gallagher* at [66] – [67]; *Forest v Suzanne* at [29]-[30]; *Shariful* at [6].

85 In *Forest v Suzanne*, an Appeal Panel found that, in civil proceedings such as residential tenancy matters brought in NCAT, the principle of open justice is a centrally important factor. The Appeal Panel stated:

> "[29] Proceedings in the Consumer and Commercial Division (and internal appeals from decisions made in such proceedings) are civil proceedings between parties to a dispute, rather than applications for merits review of administrative decisions or other proceedings involving public law. The appellant's proceedings in the Tribunal constituted a claim for compensation for breach of a residential tenancy agreement. This is in effect a claim for damages for breach of contract, albeit in respect of a contract the terms of which are regulated by the [Residential Tenancy] Act. The appellant's proceedings were not administrative review proceedings or proceedings alleging a breach of Information Protection Principles under the Privacy and

> Personal Information Protection Act 1998, in which different considerations and the principle of open justice may apply.
>
> [30] In civil proceedings such as those brought by the appellant, the principle of open justice is a centrally important factor. This long standing principle of the common law applies in the Tribunal as it does in courts…"

86 Similarly, in *Shariful*, the Appeal Panel (differently constituted) found that the type of proceedings, and whether judicial power is being exercised, are relevant to the making of s 64 orders. That Appeal Panel noted (at [6]) that the matter before it (involving a residential tenancy dispute) was one of the large classes of matters involving the exercise of (non-federal) judicial power decided in NCAT (and that NCAT is the sole repository of legislatively conferred jurisdiction in relevant aspects of residential tenancy disputes).

87 With respect to the Appellants' contention that there is nothing in the NCAT Act which requires open justice to be given "significant weight" in ADA proceedings because of some special (or public) interest in those types of matters, the Tribunal said, in the Reasons, that the ADA complaint concerned workplace sexual harassment and victimisation. The Tribunal did not say that the strength it placed on open justice was due to some special feature peculiar to sexual harassment or victimisation complaints under the ADA. Rather the Tribunal indicated its view that the nature of the proceedings (being a civil dispute) involving the exercise of (non-federal) judicial power meant that the strength in the public interest of open justice was relatively strong. As we have said, we do not see error in the Tribunal's approach.

88 In conclusion on this limb of appeal ground 1 (inappropriate weight of exercise of judicial power), we do not consider that the Tribunal's decision demonstrates an error of principle in the way that the Tribunal interpreted and applied the "desirability" test in ss 49(2) and 64, or in approaching its evaluation task by considering the strength of the public interest in open justice as "relatively strong" because ADA matters involve an exercise of (non-federal) adjudicative power to determine civil disputes between individuals.

(2) Importance of confidentiality to Tribunal's determination

Submissions

89 The Appellants contend that, despite acknowledging the confidential nature of the WhatsApp messages, the Tribunal failed to give "due weight" to the public interest in the preservation of confidentiality. They contend that it is significant that both ss 49(2) and 64 identify "the confidential nature of the evidence" as a matter which might render an order "desirable", and this is the only guidance that Parliament has given regarding the considerations that might justify an order. The specific reference to confidentiality is an important textual indicator that Parliament intended NCAT's powers in ss 49(2) and 64 to operate differently (and on a broader basis) to the regime established by the CSNPOA (or the common law) where the confidential nature of evidence simpliciter could never justify an order. The Appellants say that Parliament has determined that the Tribunal ought to be able to derogate from open justice on that basis alone, without regard to other matters.

90 The Respondent submits that, despite the test under ss 49(2) and 64 of the NCAT Act being less onerous (or restrictive) than the CSNPOA (or the common law), there is nevertheless a requirement for derogations from open justice to be applied coherently by courts and tribunals alike. It has therefore been understood (by the Tribunal) that there ought to be some unacceptable consequence to the publication of confidential information to warrant derogation from open justice. The Tribunal below applied the correct legal test and found that, on balance, the harms identified by Mr Houda were not of "sufficient magnitude or seriousness" to make it desirable to make any of the orders sought. That is entirely consistent with authority: see e.g. *Kostov* at [10] - [11]; *DLH* at [10]; *Dezfouli* at [81]. It is also consistent with decisions made in other state Civil and Administrative Tribunals, see e.g. *Qazi* at [27], [33] - [35].

91 The Respondent also submits that that it is important for the public (through the media) to have the opportunity to scrutinise the contents of Mr Houda's communications with Ms Seraphim. That level of scrutiny is particularly important in the context of allegations concerning sexual harassment and to

preserve the integrity of the AEOD proceedings, consistent with the stated objects of the NCAT Act.

Consideration

92 The parties have made submissions, on this appeal, about the relevance of Mr Houda's participation in the Daily Telegraph interview in August 2024 (referred to by the Tribunal in the Reasons at [15]). The Tribunal limited its consideration to whether or not Mr Houda disclosed the messages, accepting that he did not (Reasons at [21]). The Tribunal did not take Mr Houda's participation in that interview and his comments to the media into account in deciding whether to make the confidentiality orders sought. We take the same approach.

93 The Tribunal accepted the Appellants' contention that when the WhatsApp messages were sent and received, they were intended to be confidential communications (Reasons at [40]). The Tribunal declined to make a finding as to whether the messages contain "confidential information" or include "personal confidences", the disclosure of which would give rise to an equitable obligation of confidence (Reasons at [41]).

94 The Tribunal also said that the context in which the messages were sent and received is relevant. Noting that the ADA complaint is about sexual harassment and victimisation in the workplace, the Tribunal observed that when the messages were first sent, Ms Seraphim was about to commence a placement with Mr Houda's legal firm. Mr Houda was to be her supervisor. The messages continued for the duration of the time Ms Seraphim worked for Mr Houda. The Tribunal nonetheless accepted that, for the purpose of applying the "calculus of risk" approach, the nature of the messages was "highly confidential": Reasons at [44].

95 In the determination of the Confidentiality Application, we do not understand the "calculus of risk" approach to require a result which gives primacy to the Appellants' interests in preserving confidentiality of information contained in the WhatsApp messages, over other competing interests.

96 It is self-evident that ss 49 and 64 of the NCAT Act do not mandate the making of confidentiality orders simply because the Tribunal in question makes a finding that certain material is of a "confidential" or "highly confidential" nature. We do not see anything in the Reasons to suggest that the Tribunal failed to give proper (or sufficient) weight to the "confidentiality" of the WhatsApp messages in its assessment of the Confidentiality Application. As is clear from the Reasons, the Tribunal accepted the Appellants' contention that the WhatsApp messages are likely to be centrally relevant to the determination of the ADA complaint. This is not a case where the evidence comprising the WhatsApp messages will be of peripheral or minor importance to the proceedings.

97 At [55] of the Reasons, the Tribunal indicated its concern that the orders sought by Mr Houda "would effectively extinguish" the principle of open justice, and even on the alternative orders sought, the majority of the evidence would not be able to be published. The Tribunal stated: "While the principle of open justice would not be extinguished entirely, the critical evidence on which many of the Tribunal's findings will be based, would not be open to scrutiny": Reasons at [55].

98 We can see no obvious error in the Tribunal's approach. The contention that the Tribunal gave no "real" weight to the "confidentiality" of the WhatsApp messages is rejected. The Tribunal accepted the confidential nature of the messages but did not accept that the consequences (or harms) of disclosure (as put by Mr Houda) were "of sufficient magnitude or seriousness to make it desirable to make any of the orders sought" (at [56]). In substance this ground is a challenge to the merits of the Tribunal's decision.

(3) Disincentive to proper defence

Submissions

99 The Appellants submit that there is a public interest in persons accused of wrongdoing being able to defend themselves by leading exculpatory evidence which may be embarrassing or damaging to them (professionally or personally)

and other family members. The Appellants say that, unless the Tribunal makes orders of the kind sought, they will suffer collateral disadvantage, and this is something which the Tribunal ought to regard as undesirable and make orders accordingly. They submit that the text and context of ss 49(2) and 64 of the NCAT Act (taken together with the fact that Parliament has conferred jurisdiction on NCAT to hear and determine allegations of sexual harassment) permit such derogation from open justice. The Appellants say that, if the Tribunal ultimately finds the Respondent's ADA complaint not to be established, the injustice that would result is particularly manifest.

100 The Respondent characterises the argument put by the Appellants as, in substance, that the Tribunal failed to have sufficient regard to the fact that a party should not have to waive confidentiality (and suffer the consequences of embarrassment and damage to reputation) in defence of serious allegations. It is submitted, firstly, that the Appellants have not been inhibited in their defence. In the AEOD proceedings, the Appellants have filed a defence which put in issue the entirety of the WhatsApp messages. Once the Appellant's defence was filed, it became a public document capable of being accessed by third parties in accordance with Tribunal processes (see Reasons at [19]). Second, the Appellants did not put the argument they now raise clearly before the Tribunal below. Thirdly, there are other considerations outside the interests of the Appellants. There is a public interest in having ADA complaints brought to NCAT publicly interrogated. There is a public interest in current and future clients of the Appellants knowing of allegations against Mr Houda. Suppression of that kind of information has the capacity to diminish public confidence in the administration of justice.

Consideration

101 The Appellants concede that they have not been inhibited in their defence, but say the Tribunal gave no weight to the fact that Mr Houda would suffer harm by having to lead evidence of the WhatsApp messages in his defence and therefore gave no weight to the disincentive to a proper defence.

102 It is not clear that the argument, as it is now articulated by the Appellants, was put to the Tribunal below. As the Respondent correctly points out, the Appellants said very little on this topic before the Tribunal. Mr Houda told the Tribunal that he produced the "entire history" of the WhatsApp messages "only because he considered it necessary to do so for the purposes of defending the claim against me". In his written submissions, it was said in support of it being desirable to suppress the entire matter, that he should be able to defend himself (and Lawyers Corp) without compromising the confidentiality of his communications.

103 Insofar as the Appellants say there is an “acute” risk of the ADA complaint being found to be “wholly without basis”, that submission is unhelpful. The Appellants have not sought summary dismissal of the AEOD proceedings on the basis they are frivolous, vexatious or otherwise lacking in substance (s 55(1)(b), NCAT Act). The Appellants have not sought any adjournment of these internal appeal proceedings to allow time for the Appellants to bring any summary dismissal application in the AEOD proceedings.

104 Insofar as the Appellants say it is significant that previous investigations by NSW Police and the NSW Legal Services Commissioner (respectively) have not resulted in any action being taken against the Appellants, it is not easy to see the relevance of that submission to the issues we have to determine in the leave application. Those persons/bodies are not charged with the statutory responsibility to determine the complaint made by Ms Seraphim under the ADA. They operate in a different statutory (and legal) context.

105 The Appellants also say that, even in courts, where allegations of sexual assault have been found to be made without proper justification, the identity of the (wrongly accused) has been suppressed under the CSNPOA, referring us to a case bearing the citation [2024] NSWDC 41. We note that this decision is restricted on CaseLaw, however a perusal of the published catchwords suggests that the District Court’s decision in question concerns a ruling that the relevant criminal proceedings should not have been brought by the NSW Director of Public Prosecutions because there was no reasonable prospect of

securing a conviction. That type of situation would seem to be very different to the circumstances here.

106 We can see no obvious error in the Tribunal's approach.

Conclusion on appeal ground 1

107 We do not think there is a reasonably arguable case that the Tribunal erred by misapplying the "desirability" test in ss 49 and 64 in any of the ways suggested by the Appellants in their appeal ground 1, sub-grounds (1) to (3). There is no discernible "error of principle" which casts doubt on the correctness of the Tribunal's decision such as to warrant reconsideration by this Appeal Panel. We refuse leave to appeal on this ground.

Appeal ground 2: Whether Tribunal failed to give proper regard to interests of affected third parties

108 By appeal ground 2, the Appellants contend that the Tribunal failed to give proper (or sufficient) regard to the interests of affected third parties in determining whether to make the confidentiality orders sought.

109 In support of the proposition that "the law has always been astute to protect the interests of third parties" with respect to derogations from open justice, the Appellants point to four examples of decisions where confidentiality orders were made which had the effect of protecting family members (or a business) from publicity occasioned by legal proceedings.

110 In *Minister for Immigration and Indigenous Affairs v X* (2005) 147 FCR 243; [2005] FCAFC 217, the Federal Court made a pseudonym order in an immigration case, accepting evidence as to the consequences that might flow to the respondent (and family members) if an order were not made: at [20]. The respondent's identity was suppressed because of his HIV status and the prejudice that he (and family members) might suffer if that fact was publicised through the legal proceedings. The facts of that case are far removed from the present case before the Tribunal, and the very brief comments made by the

Court about affected family members would seem to have little relevance in the present context.

111 The Appellants also refer to *Monday (a pseudonym) v R* [2022] ACTCA 25, which concerned an appeal against the revocation of a suppression order in criminal proceedings about possession of child abuse material. The appellant (the offender) had argued for ongoing suppression of his name to protect the health of a member of his family. There was medical evidence to the effect that publication was life-threatening given that family member's medical condition. The ACT Court of Appeal refused the appeal, which meant that no pseudonym order remained in force. With regard to family members and the effect of publicity, the Court commented at [27] that, while there may be significant and distressing consequences for the lives of family members of offenders that are brought before the courts, this is a consequence of the conduct of the offender and the outcome of the proceedings, not a prejudice affecting the administration of justice. This case would appear to be of no assistance to the Appellants' arguments on this appeal.

112 The Appellants also refer to two decisions of the former Commonwealth Administrative Appeals Tribunal (AAT) (*XQZT v ASIC* [2009] AATA 669; *MRWL v Australian Securities Investment Commission* [2022] AATA 3366) in which the AAT made confidentiality orders, together with grant of stays of banning decisions, for reasons which included the impact of publicity on the interests of third parties. These cases were decided on their own facts, and do not, in our view, provide useful guidance in the present context.

113 We agree with the Respondent's submission that the character of each of the four cases relied upon by the Appellants is different to the one before this Tribunal. In our view, the four cases relied on by the Appellants do not assist in the determination of the leave application.

Interests of Lawyers Corp employee

114 The Appellants submit that the Tribunal, in its dispositive reasoning, fails to grapple with the contention that it was desirable to make the confidentiality

orders sought in order to protect the interests of the employee of Lawyers Corp. This is said to be a relevant (and important) consideration which was disregarded in the final assessment of the Confidentiality Application. The Appellants take issue with the Tribunal's reasoning, at [56], where the Tribunal noted that the consequences of disclosure of the WhatsApp messages are (relevantly) "confined" to the effect on Mr Houda's reputation and income.

115 At [47] of the Reasons, the Tribunal accepted that publication of the messages would have a particularly damaging effect on the number of referrals Mr Houda receives and hence on his income and that of his employee. However, the Appellants say specific submissions were made and developed orally about the impact on Lawyers Corp's employee, and that the implication of Mr Houda's evidence before the Tribunal was that the damage to his reputation would have a flow on effect on the viability or income of that employee.

116 The Respondent says that the contention that the Tribunal failed to have proper regard to the interests of the employee should be rejected. The Tribunal approached this aspect of the Confidentiality Application consistently with how Mr Houda's case was presented to the Tribunal, that is, as part of the adverse consequences to Mr Houda's "reputation and income".

117 The Respondent disputes that specific submissions were made to the Tribunal and developed orally about the Lawyers Corp's employee. The employee was not identified in the supporting application, Mr Houda's written statement, or in submissions made to the Tribunal.

118 In his written statement, under the sub-heading "Harm to my professional reputation and standing", Mr Houda stated (relevantly) that his firm has only one solicitor working for him; the success and reputation of his firm is intimately tied to his personal reputation; and the publication of the messages would damage his professional standing and would have a damaging effect on his (and hence his firm's) ability to generate work and income. No oral evidence was led concerning any "harm" occasioned to the employee.

119 In written submissions, the grounds of the application were stated (relevantly) to be: if the WhatsApp messages were to be made public, harm would be occasioned to Mr Houda's daughters; Mr Houda's relationship with his daughters; and Mr Houda's professional reputation and standing (and, by extension, to his earning capacity and the financial position of Lawyers Corp). Counsel for Mr Houda contended, in oral submissions, there would be "economic consequences" to Lawyers Corp and as a consequence to "[Mr Houda] and employees of that firm" if the material were to be made public" (Tcpt, 21 October 2024, p. 46(14)).

120 The Tribunal considered this aspect of the application under "harm to Mr Houda's professional reputation and income" (Reasons at [47]). The Tribunal found that publication of the messages would have a damaging effect on the number of referrals Mr Houda receives, and hence on his income "and on that of his employee" (at [47]). At [54], the Tribunal explained that it had given weight to "the negative effect on Mr Houda's reputation and income, if the WhatsApp messages are disclosed". It relevantly concluded that the consequences of publication of the WhatsApp messages were confined to the effect on Mr Houda's "reputation and income" (and the effect on his children and his relationship with them). Ultimately, the Tribunal found that, these matters were not of "sufficient magnitude or seriousness to make it desirable to make any of the orders sought", when balanced against their encroachment of the principle of open justice as articulated in the NCAT Act: Reasons at [56].

121 There is no demonstrable error in the way the Tribunal approached this aspect of the Confidentiality Application, and in particular, in failing to refer specifically to the potential impact on the Lawyers Corp employee as one of the consequences to be considered (in [54] to [56] of the Reasons). We agree with the Respondent's submission that the Tribunal approached this aspect of the Confidentiality Application consistently with how it was presented.

Interests of family members

122 The Tribunal was satisfied, on the evidence contained in Mr Houda's written statement, that his daughters would suffer embarrassment, distress and mental anguish if the WhatsApp messages were disclosed. The Tribunal then later said that one of the matters it gave weight is the "likely effects on Mr Houda's daughters and their relationship with him... if the WhatsApp messages are disclosed": Reasons at [54]. Ultimately the Tribunal found, at [56], that whilst those likely effects would be significant for Mr Houda's children, when balanced against the encroachment on the principles of open justice as understood in the NCAT Act, they were not sufficient to make it desirable to make the orders sought.

123 The Appellants submit that the Tribunal failed to give proper (or sufficient) regard to the interests of Mr Houda's daughters. Specifically, it is said that, in circumstances where the likelihood of embarrassment, distress and mental anguish to Mr Houda's daughters was accepted, the Tribunal should have been astute to prevent that outcome. The apparent criticism of the Tribunal is that, in evaluating the likely harm to the daughters, it considered the likely harm subordinate to the interest in open justice.

124 The Respondent submits that the success or failure of an application which seeks to derogate from the principles of open justice on the basis that disclosure or publication has or would cause embarrassment, distress or mental anguish to a family relative is very much dependent on the strength of the evidence. Here, the evidence was brief (several short paragraphs in Mr Houda's written statement) and amounted to no more than his belief. It is well established that this kind of evidence is insufficient to warrant displacement of the presumption of open justice. Despite that, the Respondent says that the Tribunal generously took that evidence at its highest and found that the evidence was not of sufficient magnitude or seriousness.

125 The Respondent says that, here, to the extent that the Appellants criticise the Tribunal for having made an evaluation of the likely harm of the evidence and

considered it insufficient, it is a result of the evidence that was led in support of the Confidentiality Application. Had there been evidence of some more serious harm, such evidence would have been adduced before the Tribunal (noting that Mr Houda is an experienced lawyer). In response on this point, the Appellants say that it is difficult to see what evidence might be led of the likely impact on them of a risk which had not eventuated.

126 We agree with the Respondent's submission on this limb of appeal ground 2. We do not consider that the Tribunal erred in its approach, either by failing to give "proper regard" to the interests of Mr Houda's daughters or by failing to consider the evidence that was before the Tribunal in relation to those family members.

127 It is well established in Tribunal decisions that, while a relevant factor, the prospect of embarrassment and stress affecting a party is generally "an insufficient basis for departing from the general rule that the Tribunal's proceedings should be conducted openly" (*Dezfouli* at [73]). Similar considerations may be said to apply to family members. To the extent that embarrassment or stress may give rise to a demonstrated risk to psychological safety of a party, including the aggravation of a pre-existing mental condition, it may be a consideration that carries considerable weight: see e.g. *Gallagher* at [69]. We accept that, in an appropriate case, that may be in the case in respect of a party's family members. There was no such evidence before the Tribunal in relation to Mr Houda's daughters.

Conclusion on appeal ground 2

128 In summary on appeal ground 2, there is no demonstrable error on the part of the Tribunal. We do not think there is a reasonably arguable case that the Tribunal erred on failing to give sufficient regard to the interests of affected third parties.

Remaining appeal grounds

129 The Appellants do not rely on appeal grounds 3 or 4 in relation to their application for leave. We need consider these appeal grounds only if we decide to grant leave to appeal.

Issue (3): Whether further appellate guidance required

130 The Appellants submit that the scope and operation of the powers in ss 49 and 64 of the NCAT Act have not been subject of detailed consideration by the Appeal Panel in the nearly 12 years since the NCAT Act was enacted. They say there is limited appellate guidance on the meaning of the word "desirable" and the weight to be given to confidential material. This is said to raise important issues of principles with general application for all NCAT matters, not only ADA matters, regarding the proper construction of the powers conferred on NCAT by ss 49(2) and 64. In the absence of demonstrable error in the decision under appeal, these contentions do not raise a sufficient basis on which to grant leave to appeal.

131 In deciding whether to make ss 49 or 64 orders, the Tribunal has taken a consistent approach to the principles to be applied. The factors listed in *Dezfouli* at [81] have often been cited (see e.g. *Corlett* at [8]-[9]; *Frost v TAFE NSW (No 2)* [2019] NSWCATAD 129 at [9]-[12]); *DLH* at [6]-[11], to name but a few examples. Those principles include the presumption of open justice, the need for the applicant for a confidentiality order to set out good grounds for the making of the order, and the breadth of the criterion of desirability. It has been said on frequent occasions by differently constituted Tribunals that the prospect of damage to reputation or embarrassment affecting a participant in the proceedings will usually not provide sufficient grounds. Each matter will of course turn on its own facts.

132 It has been expressly acknowledged, in a number of Tribunal decisions, that the test to be applied is not the higher standard of "necessity" as found in ss 6 and 8 of the CSNPOA. The decisions of the Court of Appeal in *Misrachi* and *DRJ* have been regularly cited in Tribunal decisions concerning s 64 orders. In

Misrachi the Court of Appeal explained at [13] that the requirements imposed by s 64(1) of the NCAT Act are less onerous than those imposed by the corresponding provision in the CSNPOA. Similarly in *DRJ*, the Court pointed out that the principles of open justice are more prominent in the consideration by the higher courts of applications under the CSNPOA than they are in the consideration by the Tribunal of applications under s 64 of the NCAT Act.

133 In several decisions, NCAT Appeal Panels have revisited the principles which govern s 64: see e.g. *Corlett*; *Bettington*; *FFO*; *Gallagher*, *Shariful*; *Forest v Suzanne*. If the Appellants' contention is that the numerous Tribunals (including Appeal Panels) have not, in previous matters, given genuine and real consideration to the principles to be applied in deciding whether to make ss 49 or 64 orders, and have simply adopted the reasoning in *Dezfouli* as a matter of comity, that contention is rejected.

134 While the principles of open justice applied in the courts are not determinative when applying ss 49 and 64, the principles of open justice are nonetheless relevant (whether because they are principles encapsulated by the common law, or to the extent those principles require Tribunal processes that are open and transparent by virtue of s 3(f) of the NCAT Act) (see e.g. *FFO* at [48]-[49]; *Corlett* at [11]). Notwithstanding the test in ss 49 and 64 being more flexible and less stringent than the approach which the NSW courts are bound to apply, the view has been consistently taken, in this Tribunal, that there is a presumption in favour of open justice.

135 As noted earlier, differently constituted NCAT Appeal Panels have taken an approach in which the nature of the proceedings is considered in the assessment of the strength of the public interest in open justice (see e.g. *Gallagher* at [66]; *Forest v Suzanne* at [29]-[30]; *Shariful* at [6]). As we have said, we do not consider the Tribunal below took an erroneous approach in considering the type of proceedings and the jurisdiction which is being exercised, including whether the jurisdiction involves the exercise of non-federal judicial (or curial) power in determining a civil dispute between individuals where liability may be found and a range of penalties imposed. The

jurisdiction to determine ADA complaints is conferred solely on NCAT. In an appropriate case, the Tribunal may award damages of up to $100,000.

136 We do not agree with the Appellants' contention that the principles relating to ss 49 and 64 of the NCAT Act need to be reconsidered by this Appeal Panel as a matter of public importance or principle.

Conclusion on leave to appeal

137 For the reasons earlier set out, we have decided to refuse leave to appeal. We do not think that appeal grounds 1 or 2 warrant the Tribunal's decision being reconsidered. In our view, the Tribunal's decision is not attended with sufficient doubt to warrant reconsideration by the Appeal Panel. Nor do we think that there are questions of public importance, principle, administration or public policy, that need to be clarified in this appeal.

Costs

138 The usual costs rule in proceedings such as this is that parties are to pay their own costs unless there are special circumstances justifying an award of costs: NCAT Act, s 60. Ms Seraphim seeks her costs in the appeal. It was agreed at the hearing of the appeal that the issue of costs of the appeal would be addressed separately once the substantive appeal has been determined and that the parties would have an opportunity to be heard on costs at a later stage.

Orders

139 On 1 November 2024 the Tribunal made orders under ss 49(2) and 64(1) of the NCAT Act in order to preserve the confidentiality of information the subject of the Confidentiality Application because Mr Houda and Lawyers Corp foreshadowed that they may seek to appeal Order 3 made by the Tribunal on 1 November 2024 (by which the Tribunal refused the Confidentiality Application). Orders 1 and 2 made on 1 November 2024 were stated to continue in effect pending further order of the Tribunal.

140 There is no need for us to make any further order in relation to Order 1 made on 1 November 2024 (which closed the hearing of the Confidentiality Application).

141 However, in light of our decision to refuse leave to appeal, we will make a further order in respect of Order 2 made on 1 November 2024. That order currently prohibits the publication of any evidence given before the Tribunal or evidentiary material contained in documents before the Tribunal in the Confidentiality Application. We will set aside Order 2 made by the Tribunal, from 5pm on the seventh working day following the day on which these reasons for decision are published to the parties. It is noted that "working day" means a day that is not a Saturday, Sunday or public holiday: Civil and Administrative Tribunal Rules 2014 (NSW), cl 3(1) definition.

142 We make the following orders:

(1) Leave to appeal is refused.

(2) These reasons for decision are not to be published, except to the parties, until 5pm on the seventh working day following the day on which these reasons are published to the parties.

(3) Order 2 made by the Tribunal on 1 November 2024 in proceedings 2024/00104051 under s 64(1)(c) of the Civil and Administrative Tribunal Act 2013 (NSW) is set aside, from 5pm on the seventh working day following the day on which these reasons for decision are published to the parties.

(4) Order 2 made by the Appeal Panel on 18 March 2025 in these appeal proceedings 2024/00444376 under s 64(1) of the Civil and Administrative Tribunal Act 2013 (NSW) is amended such that the reference to "seventh day" now reads "seventh working day".

(5) Ms Seraphim is to file and serve any application for costs on the appeal, together with evidence (if any) and written submissions, within ten (10) working days of publication of these reasons for decision.

(6) Mr Houda and Lawyers Corp Pty Ltd are to file and serve evidence (if any) and written submissions on costs in response, within a further ten (10) working days.

(7) Ms Seraphim is to file and serve further evidence (if any) and submissions on costs in reply, within a further five (5) working days.

(8) The parties are to include in their submissions their views as to whether the issues for determination in relation to the making of any order for costs on the appeal can be adequately determined on the basis of the written material lodged with the Tribunal, in the absence of the parties and without a hearing, under s 50 of the Civil and Administrative Tribunal Act 2013 (NSW).

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

Registrar