COMMERCIAL TRIBUNAL
CONSOLIDATED INDEX

SECOND HAND MOTOR VEHICLES ACT 1971 (SA)

Commissioner for Consumer Affairs v Turner

26 February 1991
07/90/02
Judge Noblet, Ms Clothier, Mr Markin

Jurisdiction: Second Hand Motor Vehicles Act 1971 (SA)
Legislation considered: Second Hand Motor Vehicles Act 1971 (SA) s14
Keywords: Disciplinary enquiry; permanent disqualification

Facts:
The Tribunal conducted an enquiry pursuant to section 14 of the Act in relation to the respondent to enquire whether there was proper cause for disciplinary action to be taken as a result of allegations made in a complaint lodged by the Acting Commissioner for Consumer Affairs. The counts related to transactions entered into by businesses with which the respondent was associated. These counts recited certain facts which established that the respondent acted either negligently or unfairly. One of the counts alleged that the respondent carried on business without being licensed. Other counts alleged that he entered into an agreement or arrangement with intent to defeat, evade or prevent the operation of the Act.

Determination:
1. The Tribunal found that the respondent had acted both negligently and unfairly. Both were grounds for disciplinary action under section 14 of the Act. The respondent had further attempted to evade the operation of the Act by including artificial prices on contracts in an attempt to exclude the duty to repair. It will be common practice in the future for dealers who are caught engaging in this practice to lose their licence.

2. As far as the allegation that the respondent had carried on business without a licence was concerned, the Tribunal was satisfied that an arrangement was entered into by the respondent that he would pay a weekly fee to someone else for the use of that other person's licence.

3. There was no doubt that there was proper cause for disciplinary action against the respondent. He had shown himself to be a person who had few, if any, scruples when dealing in second hand motor vehicles. He had shown himself to be a person who was prepared to deliberately flout the Act by falsifying contract documents and by carrying on business without a licence.

4. The Act is designed to curb unscruplous and unfair practices and to eliminate from the trade some of the undesirables that used to infest it. The respondent is the very sort of person against whom the legislation is aimed.

5. After having regard to the range of penalties set out in the Act, the Tribunal ordered that the respondent be disqualified permanently from holding a licence under the Act, that the respondent be fined the sum of $2,500 and that he be ordered to make a contribution towards the costs of the complainant in the sum of $1,000 plus witness fees.

Commissioner for Consumer Affairs v Cox Automobile Sales Pty Ltd

16 April 1991
300/90/02 & 301/90/02
Judge Noblet, Ms Clothier, Mr Potter

Jurisdiction: Second Hand Motor Vehicles Act 1971 (SA)
Keywords: Disciplinary enquiry

Facts:
The complaint in relation to the company referred to three transactions in respect of which orders made by the Commercial Tribunal for payment of money had not been complied with. Orders were subsequently made for payment out of the Compensation Fund of the amounts which the company had been ordered to pay. The complaint went on to allege that the company acted negligently and unfairly in relation to each of these three transactions, in addition to failing to comply with an order of the Tribunal.

Determination:
On the basis of the findings made, the Tribunal was obliged to impose disciplinary action. After having regard to the range of penalties, the Tribunal ordered that the company's licence be cancelled and the company be disqualified from holding or obtaining a licence for a period of five years. In the case of Mr Cox, his failure to ensure that the company complied with the orders of the Tribunal was quite inexcusable and must be regarded as an extremely serious breach of his obligations as the manager of a licensed company. The manner in which he treated three of his customers was not

only negligent, it was most unfair. As such the Tribunal order that he be disqualified from holding or obtaining a licence for a period of five years, that he be fined the sum of $1,000 and that he pay the costs of the complainant fixed at $200.

Commissioner for Consumer Affairs v Gordon

23 April 1991
01/91/02
Judge Noblet, Ms Clothier, Mr Markin

Jurisdiction: Second Hand Motor Vehicles Act 1971 (SA)
Legislation considered: Second Hand Motor Vehicles Act 1971 (SA) ss14, 15
Keywords: Disciplinary enquiry; disqualification

Facts:
The complaint alleged that on 27 July 1989 the respondent was the subject of an order made by the Commercial Tribunal in previous discplinary proceedings as a result of which his licence was cancelled and he was disqualified from holding a licence for a period of four years and was ordered to pay $400 costs to the complainant. The complaint went on to allege that between March 1990 and December 1990 the respondent was employed or otherwise engaged in the business of a licensed second hand motor vehicle dealer which is an offence under section 15 of the Act and as such disciplinary action was in order.

Determination
The evidence established that the respondent had been employed or otherwise engaged in the business of a licensed second hand motor vehicle dealer during the period of his disqualification. Accordingly there was proper cause for discplinary action pursuant to section 14 of the Act. Having regard to the fact that the respondent had ignored the order of disqualification, and given that he had wrought enormous havoc on customers in South Australia, the Tribunal ordered that the respondent be permanently disqualified from holding a licence under the Act and that he be fined the sum of $4,000 plus $500 costs.

Commissioner for Consumer Affairs v Mondial Motors Pty Ltd

7 May 1991
01/91/02
Judge Noblet, Ms Clothier, Mr Crawford

Jurisdiction: Second Hand Motor Vehicles Act 1971 (SA)
Legislation considered: Second Hand Motor Vehicles Act 1971 (SA) s15
Cases referred to: Benninga (Mitcham) Limited v Bijstra [1946] KB 58; *Buntine v Hume* [1943] VLR 123
Keywords: Disciplinary enquiry; "otherwise engaged"

Facts:
The complaint alleged that the respondent had been guilty of an offence pursuant to section 15 of the Act in that it employed or otherwise engaged a person in the business who at the time was disqualified from holding a licence under the Act.

Determination:
The meaning of the word "engaged" depends on the context in which it is used. In the context of section 15 a person who carries out any work whatsoever, for however short a period, in the business of a dealer is engaged in that business for the purpose of the section. A person who performs duties of any kind associated with the business of a car dealer is engaged in the business for the purposes of the section. In determining whether a fine is appropriate it is necessary to consider whether the company has been convicted of the offence relied on for the purpose of the disciplinary proceedings. In determining the appropriate penalty for a company it is necessary to take into account the fact that the company is a separate legal entity from those who are owning and managing it at a particular time and that that situation may change. The appropriate form of disciplinary action was to cancel the company's licence. The company should be disqualified until further order from holding a licence under the Act, and a fine imposed on it of $2,000. The company was further ordered to pay the complainant's costs of $250.

Briscoe v Ridgway

30 May 1991
34/91/02
Judge Noblet, Mr McFarlane, Mr Wilson

Jurisdiction: Second Hand Motor Vehicles Act 1971 (SA)

Facts:
The applicants purchased a Valiant motor vehicle from the respondent. On 31 May 1989 the applicant obtained a report from the RAA indicating fourteen defects which the RAA considered to be covered by the warranty. Subsequent reports indicated that a number of items remained outstanding despite the fact the dealer had been given, in the intervening period, an opportunity to carry out repairs.

Determination:
On the facts of the case the Tribunal ordered that the respondents pay the applicant the reasonable cost of repairs being $73 and costs of $140.

Watts v Turner

2 July 1991
38/91/02
Judge Noblet, Ms Clothier, Mr Potter

Jurisdiction: Second Hand Motor Vehicles Act 1971 (SA)
Keywords: Compensation

Facts:
The applicant purchase a Mazda van from the respondent which was financed by way of loan and supported by a guarantee. An arrangement was made for the applicant's Toyota Corolla to be traded in and for the dealer to pay out the finance on the trade-in leaving the applicant with no further liability in relation to the Corolla. This did not occur and the applicant remained liable on the credit contract on the Corolla and the guarantor remained liable in respect of the loan for the purchase of the Mazda. The applicant retrieved the Corolla from the dealer's yard. The applicant sought an order that the respondent take back the Mazda and pay out the finance owing on it so that the applicant retained the Corolla, and so that each party was returned to its original position.

Determination:
No such order could be made under the Act. However, the applicant was both the purchaser of a vehicle from a dealer and the vendor of a vehicle to a dealer and was entitled to claim from the dealer any loss that has been

suffered as a result of the dealer not carrying out the obligations imposed on him under those transactions. The applicant was entitled to claim the loss that they had suffered so as to put them back in the same position as if the contract for the purchase of the Mazda had been properly carried through. The amount of the deficiency on the sale of Toyota less the amount owing on the loan would be payable by the dealer to the applicant. The Tribunal ordered payment out of the Compensation Fund of $1,468.30, being the instalments that the applicant had continued to make in respect of the Corolla. The Tribunal further ordered payment out of the Compensation Fund of an amount of $1,034.60, being an amount ordered by the Tribunal that the respondent pay to the applicant under a previous application for repairs which had not been complied with.

Vale v Tricon Pty Ltd

29 August 1991
86/91/02
Judge Noblet, Mr Markin, Ms Clothier

Jurisdiction: Second Hand Motor Vehicle Act 1971 (SA)
Legislation considered: Second Hand Motor Vehicles Act 1971 (SA) s25, 26
Keywords: Duty to repair; rules of evidence; burden of proof

Facts:
An application was made under section 26 of the Act in relation to the alleged failure of a dealer to carry out their duty to repair a vehicle purchased from it by the applicant.

Determination:

1. The Tribunal is not bound by the rules of evidence and is required to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms. Nevertheless the rules of evidence are applied except where that would produce some injustice or undue delay or prejudice to either party.

2. The burden of proof in an application such as this lies upon the applicant to establish on the balance of probabilities that they are entitled to an order against the respondent and the facts necessary to form a proper basis for that order being made.

3. It is not the duty of the purchaser under section 25 to continue to return a vehicle to a dealer time and time again. The duty is satisfied, and the purchaser is entitled to apply for an order under section 26, when the vehicle is delivered once to the dealer and the

dealer has been given a reasonable opportunity to repair the defect and the dealer fails to repair the defect.

4. Section 25 requires a dealer, in carrying out repairs pursuant to the duty to repair, to discharge that duty by carrying out the repairs in a manner which conforms to accepted trade standards.

5. The Chairman indicated his intention to recommend to the Government that the Act be amended to place a statutory obligation on a dealer to advise a purchaser of a vehicle of what repairs have been carried out and what repairs that were requested have not been carried out after a vehicle is brought in for repairs under the dealer's duty to repair.

6. On the balance of probabilities the dealer had failed to carry out repairs and the applicant was entitled to claim from the dealer the reasonable cost of carrying out those repairs. The Tribunal ordered that the dealer pay to the respondent a total of $1,465.71.

Commissioner for Consumer Affairs v Gordon

9 September 1991
94/91/02
Judge Noblet, Ms Clothier, Mr McFarlane

Jurisdiction: Second Hand Motor Vehicle Act 1971 (SA)
Legislation considered: Second Hand Motor Vehicles Act 1971 (SA) ss14, 15
Keywords: Disciplinary enquiry; employment of disqualified person

Facts:
The Tribunal conducted an enquiry pursuant to section 14 of the Act to determine whether proper cause existed for disciplinary action against the respondent in relation to allegations made in a complaint lodged by the Commissioner for Consumer Affairs. The complaint alleged, inter alia, that the respondent employed or otherwise engaged her husband in her business in breach of section 15 of the Act.

Determination:
1. The respondent admitted all the allegations and the Tribunal made a formal finding that proper cause existed for disciplinary action pursuant to section 14(10)(a)(i) of the Act.

2. It was necessary to impose a penalty which would serve not only to indicate the seriousness of the type of conduct the respondent had

been involved in but which would serve as a deterrent to others who may be minded to engage in such conduct.

3. It was clear that the respondent was a willing participant in a scheme which was clearly designed to find a way around the disqualification order previously made against her husband by the Tribunal.

4. The Tribunal ordered that the respondent be fined $2,000, that her licence be cancelled, that she be disqualified permanently from holding a licence under the Act, and that she pay the respondent's costs.

Zarko v Carnaby Motors Pty Ltd

9 September 1991
40/91/02
Judge Noblet, Ms Clothier, Mr McFarlane

Jurisdiction: Second Hand Motor Vehicles Act 1971 (SA)
Legislation considered: Second Hand Motor Vehicles Act 1971 (SA) s26(5)
Keywords: Repair of defects; offer of settlement; Court of Conscience

Facts:
An application was made under section 26 of the Act in relation to the costs of repairs to a vehicle purchased by the applicant from the respondent being repairs which the purchaser claimed should have been carried out by the respondent dealer. The applicant alleged that the dealer authorised repairs to be carried out by another person. The application was therefore made under section 26(5) of the Act.

Determination:
1. Where an offer is made to pay an amount in full settlement of a claim, it is highly desirable to document that offer in writing and any acceptance of it so that no subsequent problems can arise. It is certainly the case if an offer is made on that basis and accepted on that basis then the claim may be regarded as having been compromised and no further claim may be made.

2. The Tribunal is, in its dispute resolution jurisdiction, a Court of Conscience and is not required to determine applications according to the strict application of the law but rather according to what is fair. That is not to say that the Tribunal can disregard legislation which determines the rights and duties of parties. However, where there is a conflict on the evidence, the Tribunal is able to resolve that

conflict by coming to a decision it thinks is fair in all the circumstances even though it may involve some degree of compromise as far as both parties are concerned.

3. The Tribunal was satisfied pursuant to section 26(5) of the Act that the respondent authorised the repairs and that the applicant had paid for them and was entitled to be reimbursed. The respondent was ordered to pay the applicant the sum of $870.

Commissioner for Consumer Affairs v Turner

24 September 1991
110/91/02
Judge Noblet, Ms Clothier, Mr Markin

Jurisdiction: Second Hand Motor Vehicles Act 1971 (SA)
Keywords: Disciplinary enquiry; disqualification; cancellation of licence

Facts:
A complaint lodged by the Commissioner against the applicant alleged that there were grounds for disciplinary action against the respondent for failing to comply with orders of the Commercial Tribunal, failing to fulfil with proper expedition their obligations to purchasers of second hand vehicles, failing to maintain sufficient financial resources to properly carry on business as a dealer, and on the ground that they had ceased to be a fit and proper person to hold a licence.

Determination:
The Tribunal was satisfied that the respondent had failed to comply with orders of the Tribunal and that in a number of cases they had failed to fulfil with proper expedition all their obligations to repair vehicles pursuant to the duty to repair imposed by the Act. The Tribunal was also satisfied that the respondent had insufficient financial resources to properly carry on business as a dealer. In consequence of those findings the respondent had ceased to be a fit and proper person to hold a licence under the Act. The Tribunal concluded that the respondent's licence must be cancelled. The Tribunal further ordered that the respondent be disqualified from holding a licence under the Act for a period of ten years and thereafter until further order.

BUILDERS LICENSING ACT 1967 (SA)

Commissioner for Consumer Affairs v Reid

6 March 1991
12/90/07
Judge Noblet, Ms Clothier, Mr Thomas

Jurisdiction: Builders Licensing Act 1967 (SA)
Legislation considered: Builders Licensing Act 1967 (SA) ss19, 20
Keywords: Disciplinary enquiry; insolvency; disqualification

Facts:
The Tribunal conducted an enquiry for the purpose of determining whether proper cause existed for disciplinary action against the respondent in relation to matters alleged in a complaint lodged by the Commissioner for Consumer Affairs.

Determination:

1. It was not seriously disputed by the respondent that there was proper cause for disciplinary action against them pursuant to the Act. Accordingly, a formal finding was made because the respondent was a director of a body corporate that was insolvent.

2. The purpose of a disqualification order under section 19 of the Act is not so much for the purpose of punishing the respondent as to ensure that the public is properly protected from repetition of the conduct which originally gave rise to the disqualification order being made. Because of the requirements of section 10(9) of the Act it would be extremely difficult for the respondent to obtain a licence within the next 10 years. It would be difficult for him to establish that there were "special reasons" why a licence should be granted to him. However, this would not prevent the respondent from being engaged in the business of a builder as a financial consultant or in some other way. Nor would it prevent him from forming a company and having the company employ him as a registered building work supervisor.

3. Having regard to the management deficiencies of the respondent's company and the criticisms of the liquidator, it was inappropriate for the respondent to be involved in the building industry in any way while those difficulties remained. An appropriate period for disqualification was five years. The Tribunal approved the employment of the respondent by a licensed builder subject to conditions.

Commissioner for Consumer Affairs v Kirkwood

8 April 1991
07/90/07
Judge Noblet, Mr Wilson, Mr Robinson

Jurisdiction: Building Licensing Act 1986 (SA)
Legislation considered: Building Licensing Act 1986 (SA) ss10(9), 20
Cases referred to: Sobey v Commercial and Private Agents Board (1979) 22 SASR 70
Keywords: Disciplinary enquiry; insolvency

Facts:
The company, Kirkwood Pty Ltd, controlled by the respondent, was placed in liquidation on 24 July 1990. There was evidence that the total deficiency in relation to the liquidation would exceed five million dollars. There was further evidence that the respondent deliberately defrauded creditors by stealing money which belonged to them to prop up other businesses. On 20 August 1990, the respondent, through another company, Kirkwood Builders Pty Ltd, lodged an application for another builders licence. Objections were lodged and the application was subsequently withdrawn.

Determination:
The respondent's conduct had been absolutely appalling and they should not be involved in any capacity whatsoever in the building industry in the foreseeable future. The licence that the respondent held and their registration as a building work supervisor must be cancelled. The circumstances of insolvency were such that the respondent was not a fit and proper person to hold registration as a building work supervisor or a licence as a builder. The respondent may not safely be accredited to the public as a person in whom the public could have any confidence whatsoever. There should be an absolute disqualification for ten years and thereafter there should be a further disqualification until further order.

Applebee v Lanzilli Constructions Pty Ltd

13 June 1991
49/89/07

Jurisdiction: Builders Licensing Act 1967 (SA)
Keywords: Remedial work; compensation

Facts:
The building work in question was originally carried out for the previous owners of the applicant's home in 1985. The home was purchased in 1987 and the applicants succeeded to the rights of the previous owner as far as

statutory warranties were concerned, having purchased the house within five years of its completion. An order was made with consent of the parties in December 1989 for the performance of certain remedial work to the bathroom of the house. Some work was carried out in response to that order but the work was never completed satisfactorily. The applicants lodged a second application for an order for the payment of compensation for failure to carry out remedial work in accordance with the order.

Determination:
The reasonable amount of compensation to which the applicants were entitled as a result of the builder's failure to perform the remedial work in accordance with the previous order of the Tribunal was $2,472 and the respondent was ordered to pay that amount to the applicants together with $23 costs.

Czupak v Alan Hickinbotham Pty Ltd

14 June 1991
21/90/07
Judge Noblet, Mr Robinson, Mr Wilson

Jurisdiction: Builders Licensing Act 1967 (SA)
Legislation considered: Builders Licensing Act 1967 (SA) s32; *Commercial Tribunal Act* 1982 (SA) s13
Caes referred to: Bellgrove v Eldridge (1954) 90 CLR 613; *D Galambos & Sons Pty Ltd v McIntyre* (1974) 5 ACTR 10; *Jarvis v Swan Tours Limited* [1973] 1 All ER 71; *Jackson v Horizon Holidays Limited* [1975] 3 All ER 92; *Heywood v Wellers* [1976] 1 All ER 300; *Hutchinson v Harris* (1978) 10 Build LR 19; *Athens-Macdonald Travel Service Pty Ltd v Kazis* [1970] SASR 264; *Pearson v Hirschausen* (1988) 138 LSJS 227; *Campbelltown City Council v Mackay* (1988) 15 NSWLR 501; *Perry v Sidney Phillips & Son* [1982] 3 All ER 795; *Westsub Discounts Pty Ltd v Idaps Australia Limited (No 2)* (1990) 94 ALR 310; *Birmingham & District Land Company Limited v The London and North-western Railway Company* (1881) 57 LT 185; *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870; *The "Salaverry"* [1968] 1 Lloyd's LR 53
Keywords: Defective building work; compensation; costs

Facts:
The applicants entered into a building contract with the respondent for the construction of a house. It was an express term of the contract that the builder "shall erect and build the said works in a workmanlike manner upon the said land in accordance with the plans and specifications". The application alleged that certain work was performed other than in accordance with the plans and that other work was not performed in a

workmanlike manner. The applicants sought an order for rectification or alternatively the cost of repair, compensation and damages.

Determination:

1. The respondent was liable to repair the cracks in the ceiling.

2. The measure of damages for faulty building work is usually the cost of performing remedial work. However, if the remedial work is not feasible or justifiable having regard to the nature of the work and the seriousness of the defects, then compensation should be calculated on the basis of the difference between the value of the work as carried out and the value that the work would have had if it had been carried out in accordance with the contract and the statutory warranties.

3. The applicants had not established any entitlement to compensation in relation to cracking of the concrete slab on the floor, the separation of the kitchen island bench from the wall, the separation of the kitchen cupboards from the wall or the movement of the footpath.

4. The defects in the roof were caused by defective construction.

5. The distortion of the walls was minor and no remedial work would be feasible or justifiable to remedy the problem. As such it was a matter the Tribunal would take into account in awarding some general damages to the applicants.

6. Compensation in the amount of $300 was allowed for the damage to the footpath.

7. A small allowance for cracking of the bathroom wall tiles was made in the overall award of compensation.

8. An order for remedial work and an allowance in the overall award of compensation was made for the inconvenience suffered by the applicants due to the inability of the laundry door to fully open.

9. Compensation of $400 was awarded in relation to the builder's failure to comply with the specification in respect of insulation.

10. An order for remedial work was made in relation to the construction of the roof.

11. The applicants spent considerable amounts on engaging consultants in an attempt to identify the causes of the problems with their home.

The Tribunal considered whether it was reasonable for the applicants to incur these amounts for these reports. It allowed the sum of $4,000 as the reasonable cost of consulting fees and reports.

12. The applicants claimed that the value of their house had been severely diminished by the lack of reinforcing in the concrete slab. The Tribunal was not satisfied that the builder failed to place reinforcement in the concrete slab and thus the cost of the valuation report was not allowed as part of the applicant's claim.

13. The applicants claimed compensation for vexation, distress, worry and inconvenience. The combined effect of section 32 of the *Builders Licensing Act* 1967 (SA) and section 13 of the *Commercial Tribunal Act* 1982 (SA) and the fact that the Tribunal was dealing with a statutory remedy rather than applying common law principles, meant that the Tribunal was not obliged to assess damages or compensation in the same manner as a court acting according to law. However, in practical terms, there is very little difference as it is now well established that courts may award damages for foreseeable vexation, distress, worry and inconvenience. It is no longer necessary for any such damages to be related to "nervous shock" or some other medical condition. The important factor is that the vexation, distress, worry and inconvenience in respect of which the damages are awarded must have been a forseeable consequence of the actions of the person against whom the order is made. It must have been regarded as forseeable that if the respondent failed to construct the house in accordance with the contract and the plans and specifications, and defects appeared in the house as a result, the applicants would suffer a great deal of distress and inconvenience. The Tribunal allowed the sum of $1,000 as general compensation.

14. The applicants claimed that the respondent pay the whole of their costs. The respondent submitted that the applicants should not be entitled to an order for costs because they had been awarded little more than they would have received if they had accepted the offer which was made shortly before trial and repeated during the trial. For practical purposes there is little difference between payment of an amount into court and making an offer before trial. Although costs follow the event in most circumstances, it is also relevant to determine whether the offer was made at a reasonable time in all the circumstances, giving the applicants time to consider it properly and decide whether or not to accept it. Having regard to the circumstances of the case it was fair to award costs to the applicants, but on a scale slightly less than that which would have been used if they were to recover their full costs. The Tribunal

ordered that the respondent pay the costs of the applicant in the proceedings on the Local Court scale applicable to a judgment for $10,000.

Commissioner for Consumer Affairs v Britton

15 July 1991
15/91/07
Judge Noblet, Mr Fiora, Mr Minuzzo

Jurisdiction: Builders Licensing Act 1967 (SA)
Legislation considered: Builders Licensing Act 1967 (SA) s40
Cases referred to: DeFreitas v Commercial Tribunal (1989) LSJS 494; *Australian Mutual Provident Society v Allan* (1978) 52 ALJR 407; *Stevens v Brodribb Saw Milling Co Pty Ltd; Gray v Brodribb Saw Milling Co Pty Ltd* (1986) 63 ALR 513; *Swayne v Palm* [1970] SASR 158.
Keywords: Employee; sub-contractor

Facts:
The complaint alleged that the respondent carried out building work without being the holder of an appropriate licence and thereby committed an offence under section 9(1) of the Act, which is a ground for disciplinary action pursuant to section 19(11)(a) of the Act.

Determination:
The respondent had performed building work for fee or reward. The onus was on the respondent to prove, on the balance of probabilities, that he was not carrying on business as a builder. The respondent had not discharged this onus and was therefore guilty of conduct that constituted a breach of section 9 of the Act and there was proper cause for disciplinary action. The respondent was to be disqualified from holding a licence or registration under the Act for a period of six months and was to pay the complainant's costs of $250.

Hoskins and Psarros v Mantel Homes Pty Ltd

3 October 1991
14/91/07
Mr Canny, Ms Clothier, Mr Robinson

Jurisdiction: Builders Licensing Act 1967 (SA)
Keywords: Breach of building contract and statutory warranties; costs

Facts:
The applicants claimed damages for breach of a building contract and breach of statutory warranties contained in the Act by the respondent. The

claim for damages totalled $71,716 as well as an unspecified claim for stress and loss of amenities. The respondent claimed that the applicants had failed to pay the respondent a progress payment in respect of brickwork.

Determination:
The Tribunal considered the applicant's claim and all the evidence and awarded an amount of $21,025 in damages. The Tribunal found that the applicants did not prove their claim in respect of emotional stress or for loss of anticipated profits from deer farming activities. The Tribunal could not allow the applicants' claim for legal advice but gave consideration to the claim in exercising its discretion on the question of legal costs. The Tribunal allowed the respondent's counter claim at $42,389.64, being the contract amount less the amount paid by the applicants. The Tribunal ordered that the applicant pay the respondent's legal costs based on the Local Court scale of a claim for $10,000.

Commissioner for Consumer Affairs v Cesaro

5 November 1991
37/91/07
Judge Noblet, Mr Fiora, Mr James

Jurisdiction: Builders Licensing Act 1967 (SA)
Legislation considered: Builders Licensing Act 1967 (SA) ss9, 19, 20, 25, 49
Keywords: Disciplinary Inquiry; insolvency; disqualification

Facts:
The Tribunal conducted an enquiry pursuant to section 19 of the Act to determine whether there was proper cause for disciplinary action. The two companies of which the respondent was a director did not hold a licence under the Act and had become insolvent. The respondent himself had been declared bankrupt. The allegations related to the failure to hold a licence and the insolvency of the companies and the respondent.

Determination:
There was proper cause for disciplinary action to be taken against the respondent pursuant to section 19(11) of the Act. In the circumstances, given the large loss suffered by people who dealt with the respondent, very severe disciplinary action was necessary. The appropriate order was disqualification and cancellation of licence and registration.

Symes v Bokay

19 November 1991
54/91/07
Judge Noblet, Ms Clothier, Mr Thomas

Jurisdiction: Builders Licensing Act 1967 (SA)
Legislation considered: Builders Licensing Act 1967 (SA) s32
Keywords: Rectification, compensation

Facts:
An application was made under section 32 of the Act seeking orders against the respondent in relation to building work carried out by him. The respondent did not hold a licence under the Act and had tried to disguise the nature of the arrangement with the applicant.

Determination:

1. Under section 32 of the Act, if the Tribunal is satisfied that there has been a breach of the contract or of the statutory warranty implied by the Act, it may order the performance of remedial work or order payment of an amount due under the contract or by way of compensation for the breach.

2. On the evidence, the Tribunal was satisfied that the work carried out by the respondent was absolutely appalling. The work fell well short of the requirement under the Act that all domestic building work be carried out in a workmanlike manner and in accordance with the plans and specifications agreed to between the parties.

3. A great deal of rectification work would be necessary in order to put the work into a reasonable condition, having regard to the warranties implied by the Act. The Tribunal would not even contemplate ordering the respondent to go back and do the work. The Tribunal made an order by way of compensation for the cost of rectification, materials, stress, inconvenience and the costs of the application amounting to $4,707.50.

Unley Property Developments Pty Ltd v Corradini

10 December 1991
29/90/07
Mr Canny, Mr Robinson, Ms Clothier

Jurisdiction: Builders Licensing Act 1967 (SA)

Facts:
The applicant and the respondents entered into a building contract for a two storey house on 8 September 1988. After completion of the house a dispute arose between the parties and each lodged claims with the Tribunal.

Determination:
After taking all matters into consideration the Tribunal concluded that the respondents were to pay the builder the sum of $31,881. No order was made as to costs.

COMMERCIAL AND PRIVATE AGENTS ACT 1972 (SA)

Tremelling

18 March 1991
CCA 62976-5
Judge Noblet, Mr Bunny, Mr Whiley

Jurisdiction: Commercial and Private Agents Act 1972 (SA)
Cases referred to: Sobey v Commercial and Private Agents Board (1979) 22 SASR 70; *ex parte Meagher* (1919) 19 SR (NSW) 433
Keywords: Crowd controller; fit and proper person; previous convictions

Facts:
An application was made under the Act for a licence with an endorsement authorising the performance of the functions of a crowd controller. The applicant sought to have the licence made subject to the condition in section 11(1)(a) of the Act which would permit him to perform the functions permitted by the endorsement only while employed by another person. Objections to the grant of the licence were lodged by the Commissioner of Police and the Commissioner for Consumer Affairs based on the applicant's previous convictions.

Determination:
1. The only question which arose at the hearing of the application was whether the applicant was a fit and proper person to be granted a licence with the endorsements sought. The Tribunal enquired into

the circumstances of the applicant's previous convictions. The applicant was required to establish that he was possessed of sufficient moral integrity and rectitude of character so as to permit him to be safely accredited to the public, without further enquiry, as a person to be entrusted with the sort of work which the licence entailed. The burden of proof lay with the applicant to establish to the satisfaction of the Tribunal that he is a fit and proper person to hold the licence sought.

2. The applicant had been working as a crowd controller for three years at a suburban hotel. A reference indicated that he conducted his duties well and that he was trusted and respected. However, given the fact the applicant had a recent conviction, the Tribunal was of the opinion that the applicant had failed to show that he was a fit and proper person to hold a licence. The application was therefore refused. The Tribunal granted leave to appeal pursuant to section 20(2) of the *Commercial Tribunal Act* 1982 (SA).

Walker

30 April 1991
61803-8
Judge Noblet, Mr Whiley, Mr Fiora

Jurisdiction: Commercial and Private Agents Act 1992(SA)
Legislation considered: Commercial and Private Agents Act 1972 (SA) s12(9)(a)
Cases referred to: Walker v Hayes, (Unreported, No 2699 31 January 1991); *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70; *Pav v Commercial & Private Agents Board* (1988) 143 LSJS 1; *Walker v Hayes* (1986) 44 SASR 250.
Keywords: Application for licence; security officer; representative of Aboriginal community

Facts:
An application was made under the Act for a licence with endorsements authorising the performance of the functions of a security agent, security guard, security officer and crowd controller. Objections were lodged by the Commissioner for Consumer Affairs and the Commissioner for Police, alleging that the applicant was not a fit and proper person to hold a licence by reason of his criminal convictions.

Determination:
In view of the excellent references and character evidence the Tribunal may have been prepared to grant the application, notwithstanding the record of previous offences. However, a recent conviction made it difficult to

achieve the state of satisfaction which section 12(9)(a) of the Act requires in relation to the applicant's fitness and propriety. The Tribunal was concerned that the applicant may find that his perceived duty as a representative of the Aboriginal community brought him into conflict with his duty as a licensee to cooperate with the police. The applicant had failed to satisfy the Tribunal on the balance of probabilities that he met the criteria set out in the Act for the granting of a licence. The application must therefore be refused on the ground that the applicant had failed to satisfy the Tribunal that he was a fit and proper person to hold a licence under the Act.

Covino

14 May 1991
62712-9
Judge Noblet, Mr Germaine, Mr Fiora

Jurisdiction: Commercial and Private Agents Act 1972 (SA)
Cases referred to: Sobey v Commercial and Private Agents Board (1979) 22 SASR 70
Keywords: Fit and proper person

Facts:
The applicant applied for a licence under the Act with an endorsement authorising him to perform the functions of a crowd controller. An objection was lodged by the Commissioner for Consumer Affairs on the ground that the applicant was not a fit and proper person to hold a licence because of convictions recorded against him.

Determination:
After having seen the remarks made by the Judge of the Supreme Court when sentencing the applicant for false imprisonment and larceny offences, it was the view of the Tribunal that the applicant was not a fit and proper person to hold a licence under the Act. Accordingly, the licence application was refused.

Powell

4 July 1991
63234-*
Judge Noblet, Mr Wakelam, Mr Moorehouse

Jurisdiction: Commercial and Private Agents Act 1972 (SA)
Legislation considered: Commercial and Private Agents Act 1972 (SA) s14(1); *Acts Interpretation Act* 1915 (SA) s22
Phrases considered: "the same endorsement"

Keywords: Security alarm agent

Facts:
An application was made under the Act for a licence with an endorsement authorising the performance of the functions of a security alarm agent. The application raised a question of law which was to be determined by the Chairman of the Tribunal. The question was whether the expression in section 14 of the Act, "the same endorsement", could be satisfied by the holding of an endorsement which was conditional, when the other endorsement, with which it must be "the same", was unconditional.

Determination:

1. It was possible to construe the expression "the same endorsement" in two ways. One was that the description related only to the functions authorised by the endorsement; the other was that such description related to both those functions and the question of whether the endorsement is conditional or unconditional. It was necessary, in accordance with section 22 of the *Acts Interpretation Act* 1915 (SA), to look at the purposes or objects of the Act to see which interpretation would promote those purposes and objects. The purpose and object of the Act is best served by interpreting section 14 in such a manner that the expression "the same endorsement" relates only to the functions covered by the endorsement, not to the question of whether the endorsement is conditional or unconditional. If that is not, in fact, the effect that Parliament intended the section to have, the Parliament can remedy the matter by an appropriate amendment.

2. In order to determine the application, section 14 could be ignored, because it is of no concern to the Tribunal whether some provision of the Act may be breached in future. The licence was granted to the applicant with an endorsement authorising him to perform the functions of a security alarm agent, the licence to be subject to the condition set out in section 11(1)(a) of the Act.

Commissioner for Consumer Affairs v Smith

23 September 1991
03/91/10A
Judge Noblet, Mrs Edwards, Mr Fiora

Jurisdiction: Commercial and Private Agents Act 1972 (SA)
Keywords: Disciplinary enquiry; suspension of licence

Facts:
The Commissioner for Consumer Affairs lodged a complaint against the respondent alleging that the respondent held a licence which was subject to the condition set out in section 11(1)(a) of the Act, and he carried out work for another licensee in circumstances in which he was not an employee and thereby acted in breach of that condition of the licence.

Determination:
The respondent must have known that his conduct was in breach of the Act, because he had previously applied for his endorsements to be made unconditional and his application had been refused because the Tribunal was not satisfied that he had sufficient financial resources for an unconditional licence. The appropriate form of disciplinary action was a fine and a suspension of his licence for three months.

LANDLORD AND TENANT ACT 1936 (SA)

Gillespie & Eady v Sweet

22 March 1991
168/90/03
Judge Noblet

Jurisdiction: Landlord and Tenant Act 1936 (SA)
Legislation considered: Landlord and Tenant Act 1936 (SA) s56; *Acts Interpretation Act* 1915 (SA) ss15(1)(c), 15(1)(e), 16(2)
Keywords: Jurisdiction

Facts:
An application was made under the Act by a landlord seeking an order against a former tenant for payment of amounts totalling $30,373.65. No defence was filed, however the tenants intended to make a counter claim against the landlord, and the landlord would then join a third party in relation to the matters raised in the counter claim. The applicant conceded that the Tribunal had no jurisdiction to determine a dispute between a party to a commercial tenancy and a third party, and therefore applied to have the application removed to the District Court.

Determination:
1. The question was whether the removal order should be made under section 56 of the Act as it stood before the recent amendment or under section 56 as it now stands. Section 56 was repealed by section 5 of the *Landlord and Tenant Act Amendment Act* 1990 (No 2) (SA) and a new section substituted as from 11 March 1991.

2. The approach taken by the old section and the new section is quite different. Old section 56 was based on the concept of the Tribunal having "exclusive jurisdiction to *hear and determine* any claim ...", whereas new section 56 deals with the forum in which an action should be *commenced.* The position in relation to actions commenced in the Tribunal before 11 March 1991 was therefore unclear.

3. The effect of sections 15(1)(c) and 15(1)(e) of the *Acts Interpretation Act* 1915 (SA) is that where an Act is amended, the amendment does not affect any power exercisable prior to the amendment, or affect any legal proceeding in respect of any such power. The effect of section 16(2) is that any such legal proceedings may be continued as if the amendment had not been effected. The question which arose therefore was whether old section 56 of the Act continued in force for the purpose of continuing and completing proceedings which were before the Tribunal as at 11 March 1991. The question was whether section 56 constituted a substituted enactment adapted to the continuance and completion of the proceedings.

4. In the view of the Tribunal, the new section 56 is not adapted to the continuance and completion of proceedings commenced before 11 March 1991. It is directed at the forum in which proceedings should be commenced, and there is nothing in the section to indicate that it is intended to operate retrospectively in relation to proceedings already commenced. The new section 56(3) applies (inter alia) to an action that has been commenced before the Tribunal but should have been commenced before a Court. This could not apply to an action commenced before the Tribunal before the 11 March 1991. No such action "should have been commenced before a Court" because the Tribunal had exclusive jurisdiction when the proceedings were commenced. The Tribunal was not obliged to remove to the appropriate court (pursuant to section 56(3)) an action commenced before 11 March 1991 which, had it been commenced after that date, should have been commenced in a court.

5. A further question may arise in the future if proceedings which should have been transferred under new section 56(3) or (4) are not transferred. If a Court or the Tribunal completes such proceedings and makes a decision on them, and the Court or Tribunal and the parties all overlook the fact that the proceedings should have been commenced elsewhere or transferred, the decision of the Court or Tribunal would stand.

McDonald v Prestige Plaza Pty Ltd

9 April 1991
16/89/03
Ms K McEvoy, Mr Proeve, Mr Macdonald

Jurisdiction: Landlord and Tenant Act 1936 (SA)
Legislation considered: Landlord and Tenant Act 1936 (SA) ss10, 11, 12, 54
Cases referred to: Rosa Investments Pty Ltd v Spencer Shier Pty Ltd [1965] VR 97; *Pryce v Neimann* (1948) SASR 241; *Finney Isles & Co Ltd v Estate Cecil Herbert Pelling* (1950) St R Qd 128; *Junghenn v Wood* (1958) SR (NSW) 327; *Perpetual Trustee Co Ltd v Pacific Coal Co Pty Ltd* (1953) 55 SR (NSW) 459; *Langmore v Vines* [1917] VLR 595; *Montague v Browning* [1954] 1 WLR 1039; *Weston v Ray* [1946] VLR 373; *Aarons v Lewis* (1877) 3 VLR (E) 234; *Hughes v Waite* [1957] 1 All ER 603; *Francis Longmore & Co Ltd v Stedman* [1948] VLR 322; *Bagust v Rose* (1963) 80 WN (NSW) 604; *Westinghouse Electric Australasia Ltd v Barina Properties Pty Ltd* [1975] 2 NSWLR 652; *Woods & Co Ltd v City and West End Properties Ltd* (1921) 23 TLR 98; *Rush v Matthews* [1926] 1 KB 492; *Westminster (Duke) Store Properties Ltd* [1944] 1 All ER 118; *Regor Estate Ltd v Wright* [1951] 1 All ER 219; *Loder v Tokoly* (1952) 69 WN (NSW) 254
Keywords: "rent"; "operating expenses"

Facts:
A commercial tenancy agreement was entered into in respect of the premises on 1 April 1981 for a period of ten years. On 17 July 1987 an assignment of the tenancy to the appellants was registered. On 31 January 1989 the appellant received a Notice of Intent to Retake Possession on the basis of arrears of rent and other charges. The appellants sought orders granting an injunction against the respondent restraining it from taking possession of premises known as shop 3A "Toms's Supermarket", Pelican Plaza Shopping Centre Ridgehaven, and from interfering with the tenants' equipment and the premises. The respondent brought a further action seeking an order that the tenants give possession of the premises in favour of the landlord.

Determination:
The tenants argued that sections 10 and 11 of the Act had not been complied with in relation to the notice. The Tribunal found that the notice had a clear meaning and that the intention of the notice, to terminate the tenancy for arrears of rent, but to allow the tenants to remain in the premises at will, was quite clear. The tenants further argued that the monies outstanding did not fall within the definition of "rent" in section 12 of the Act. The Tribunal found that "rent" can include "operating

expenses" including government charges. For the purposes of commercial tenancies governed by other than Part IV of the Act, "rent" can include whatever the parties agree. As such, the landlord was exercising its power of re-entry for non payment of rent and did not have to provide the tenant with a notice which complied with section 10 of the Act. Section 68 of the Act limits the scope of the remedies which the Tribunal can order. The landlord had exercised its power of re-entry onto the premises and had allowed the tenants to remain there as tenants at will, and the lease had been determined according to its terms, and the landlord could take possession whenever it wished.

Jurdi v RB Scarce Nominees Pty Ltd

8 May 1991
127/90/03
Mr Canny, Mr Symons, Mr Whittenbury

Jurisdiction: Landlord and Tenant Act 1936 (SA)
Keywords: Commercial tenancy

Facts:
The landlord and the tenant entered into a written lease agreement which was subsequently amended to provide that the landlord would accept one half rent for the first six months of the lease. The applicant claimed damages for the landlord's failure to carry out repairs to the premises and for breach of the statutory warranty in section 66 of the Act. The respondent claimed that the applicant failed to make rental payments required by the lease, and that it had not carried out its agreement to repair and paint as required by the lease.

Determination:
The applicant had not proved his claim and as such it was ordered that the applicant pay the respondent all monies due to the respondent and the respondent's legal costs which were to be determined by the Tribunal.

Pishas & Sons Pty Ltd v Aronis Nominees Pty Ltd

2 May 1991
141/90/03
Mr Canny, Mr Macdonald, Mr Symons

Jurisdiction: Landlord and Tenant Act 1936 (SA)
Keywords: Jurisdiction

Facts:
The applicant and the respondent entered a lease agreement dated 20 January 1991. The applicant listed ten grounds in an application for an order of the Tribunal which included inter alia that the applicant be compensated for losses incurred, repair of premises, and option to occupy the whole of the property. The respondent sought arrears of rent, possession of the premises, damages and costs.

Determination:
That the applicant pay to the respondent the sum of $1,500 rental, and costs. Most of the claims of the applicant were beyond the jurisdiction of the Tribunal, however, the Tribunal did order that the respondent give the applicant access to the toilets, electrical switchboard and compressor, and a list of qualified tradespersons who could be contacted in an emergency.

Davidson v Sando Pty Ltd

25 June 1991
71/91/03
Mr Canny, Mr Symons, Mr Macdonald

Jurisdiction: Landlord and Tenant Act 1936 (SA)
Cases referred to: Commonwealth v Verwayen (1990) 95 ALR 321; *Waltons Stores v Maher* (1988) 62 ALJR 110.
Keywords: Renewal of lease; waiver of conditions; duty between landlord and tenant

Facts:
The premises comprised shop 2 of the Brighton Shopping Centre, and at all material times were used to carry on the applicant's dry cleaning business. The premises were first leased to the applicant in 1971 and the lease was subsequently renewed, until in 1989 a three year lease was entered into to expire on 30 April 1991. The respondent informed the applicant in March of 1991 that because they had not notified the respondent of their intention to renew the lease within the prescribed time they were required to vacate the premises by 30 April 1991. The applicant alleged that by the conduct

of the landlord since 1971 the conditions for the renewal of the lease had been waived.

Determination:
The respondent did not owe any duty to the applicant to continue the leasing arrangements between them and consequently could not be said to be in breach of any duty. The tenant had the onus of establishing, on the balance of probabilities, the facts necessary to support their case. The Tribunal or a Court cannot make a new lease between the parties. It is up to the parties themselves to make such a lease and this they had failed to do. Judgment was entered for the respondent.

Dix v Tenshek

12 August 1991
110/91/03
Judge Noblet, Mr Symons, Mr Macdonald

Jurisdiction: Landlord and Tenant Act 1936 (SA)
Legislation considered: Landlord and Tenant Act 1936 (SA) s68
Keywords: Quiet enjoyment; right of renewal

Facts:
An application was made by the tenants of premises for relief under section 68 of the Act to resolve a dispute between the landlord and the tenants. The premises comprised a shop and a connected dwelling divided into two parts, one of which was occupied by the landlord and the other part was occupied by the tenants. The applicants' claim related to four different issues. First, a claim about a dispute regarding the installation of coloured lights on the verandah of the premises; secondly, a dispute about excess water charges payable by the tenant; thirdly, an allegation that the landlord was interfering with the quiet enjoyment of the premises by the tenants; fourthly, a dispute about who should pay for the painting of the lounge and hallway in the residence occupied by the tenants.

Determination:
1. The landlord's refusal to allow coloured lights to be installed, subject to the restrictions which the tenants are prepared to accept, was unwarranted, was an unreasonable refusal, and constituted a breach of the lease. It was perfectly reasonable for the tenants to install the lights.

2. The tenants were liable to pay 75% of excess water charges levied in respect of the premises as a whole as provided for in the lease. However, the tenants were obliged to pay for those water charges

only during their period of occupation. One quarter of the total amount was to be refunded to the tenants by the landlord.

3. Derogatory remarks do not, of themselves, amount to interference with the quiet enjoyment of the premises. However, unnecessary contact between the parties should be avoided wherever possible. It was also permissible to have an advisor present during the annual inspection by the landlord of the premises.

4. The landlord had made a verbal promise, before the lease was signed, to paint the living room and hallway of the residence. The landlord had not complied with their promise which was not a term of the lease. A fair resolution of the dispute would be for the tenants to pay the cost of the preparation of the walls for painting and for the landlord to pay the cost of labour and materials for the painting.

5. The tenants had an interest in the premises and were entitled to remain there until the expiration of the term. Furthermore, the tenants had a right of renewal for a further three years and the landlord could not unilaterally take that right away from them, provided they complied with the lease and with the conditions for the exercise of that right.

Barjo Investments Pty Ltd v Karavas

28 August 1991
95/90/03
Judge Nobelt, Mr Haigh, Mr Foreman

Jurisdiction: Landlord and Tenant Act 1936 (SA)
Keywords: Commercial tenancy dispute

Facts:
The parties were unable to reach agreement as to the consequences of findings made by the Tribunal on 13 August 1990. The landlord purported to permit the tenant to re-enter the premises. The tenant argued that this permission was conditional upon payment of outstanding rent. Immediately after purporting to allow the tenant to re-enter, the landlord served on the tenant a notice to quit the premises by 3 October 1990. The application was heard on 12 September 1990. At the hearing the landlord undertook to allow the tenant to re-enter the premises to remove their goods if no agreement could be reached as to the purchase price for the sale of those goods by the tenant to the landlord. The tenant was unlawfully denied access to the premises for a period 71 days. Vacant possession was given to the landlord on 4 October 1990, although agreement as to the purchase

price was not reached until 13 October 1990. The tenant claimed damages and the landlord counter claimed.

Determination:
The tenant had a valid claim against the landlord totalling $3,956.11 for loss of stock, legal costs, rental payments on cash register, hire purchase interest, locksmith fee and general damages for inconvenience. The landlord had established a claim totalling $3,690.16 for decomissioning of refridgeration units, replacement of locks, painting, rent and outgoings.

Gillespie & Eady v Yeubrey

18 September 1991
166/90/03
McCanny, Mr Symons, Mr Macdonald

Jurisdiction: Landlord and Tenant Act 1936 (SA)
Keywords: Unexecuted lease

Facts:
An application was made by the applicants for payment for the respondent of rent, outgoings and rates. The claim was made under a letter the applicants sent to the respondent. The letter contemplated that a formal lease document would be prepared by the applicant's solicitors. This was done but the lease was never executed.

Determination:
The Tribunal was satisfied that there was a valid commercial lease between the parties and the applicants had therefore proved their claim and were entitled to recover the monies sought from the respondent.

LAND AGENTS BROKERS AND VALUERS ACT 1973 (SA)

Craik v Agents Indemnity Fund

28 May 1991
13/90/05
Judge Noblet, Mr Moorehouse, Mr Alexander

Jurisdiction: Land Agents Brokers and Valuers Act 1973 (SA)
Legislation considered: Land Agents Brokers and Valuers Act 1973 (SA) s62(1), 72b ; *Land Agents Brokers and Valuers Act (Amendment Act)* 1988 (SA); *Acts Interpretation Act* 1915 (SA) s22(1)
Cases referred to: Maxwell v Murphy 1956 (SA) 96 CLR 261; *Dixie v Royal Columbian Hospital* (1941) 2 DLR 138; *In re a Solicitor's Clerk*

[1957] 1 WLR 1219; *Robertson v City of Nunawading* [1973] VR 819; *Geschke v Del-Monte Home Furnishers Pty Ltd* [1981] VR 856; *R v Vine* (1875) LR 10 QB 195; *Customs and Excise Commissioners v Thorn Electrical Industries Limited* [1975] 1 All ER 439; *La Macchia v Ministry for Primary Industry* (1986) 23 ALR 23; *Coleman v Shell Company of Australia Limited* (1943) 45 SR (NSW) 27; *Grey v Pearson* (1857) 10 ER 1216; *Magor & St Mellons Rural District Council v New Port Corporation* [1952] AC 189; *Cooper Brookes (Woollongong) Pty Ltd v FCT* (1981) 35 ALR 151; *DR Fraser & Co v Minister of National Revenue* [1949] AC 24; *Daly v Sydney Stock Exchange Limited* (1986) 60 ALJR 371; *Gladstone CC v Local Government Superannuation Board* [1980] Qd R 48; *Hayward v Road Knight* [1927] VLR 512; *Schofield v Consolidated Interest Fund* (1988) 49 SASR 546.
Phrases considered: "trust money", "fiduciary default"; breach of trust
Keywords: Retrospectivity; misapplication of money; breach of trust; fiduciary default; compensation

Facts:
An application was made under the Act for compensation to be paid out of the Agents Indemnity Fund in relation to a pecuniary loss suffered as a result of an alleged fiduciary default by a former licensed landbroker. The application was dealt with under section 76b of the Act and an investigation was carried out by the Commissioner for Consumer Affairs in order to assess the amount of compensation to which the applicants were entitled. The Commissioner subsequently served a notice on the claimants pursuant to section 76b(2) of the Act informing them that their claim had been rejected. The applicant rejected the Commisioner's assessment and the Commissioner referred the application to the Tribunal.

Determination:
1. There are four significant times in the chain of events in a typical claim for compensation. The first is the entrusting of monies to an agent or broker; the second is a fiduciary default by the agent or broker; the third is a loss suffered by reason of the fiduciary default; and the fourth is the making of a claim for compensation as a result of that loss. The relevant provisions of the Act have been amended several times over the last few years and it would not be difficult to envisage circumstances under which the provisions of the Act were different at each of the four times referred to above.

2. The money paid to the broker was in two separate amounts in March 1985. After considering the legislative history of the Act the Tribunal came to the conclusion that a claim made for compensation from the Agents Indemnity Fund after 2 November 1988 must be dealt with under both the procedures and substantive law as amended at that date.

3. In case the Tribunal was wrong in its conclusion as to the intention of Parliament, it also considered the common law on retrospective operation of statutes. There is, at common law, a presumption against retrospectivity which can only be rebutted by a contrary intention. It seemed that paragraph 14 of the Schedule to the Act, inserted by the *Land Agents Brokers and Valuers Act Amendment Act* 1988 (SA) with effect from 1988 "manifests ... by clear implication a contrary intention" and therefore was intended to have a retrospective operation.

4. The provisions enabling compensation to be paid out of the Agents Indemnity Fund are designed to provide persons who suffer a loss with an avenue of redress that they would otherwise not have. They are not concerned with punishment of the person who caused the loss to be suffered and they do not divest the person who caused the loss to be suffered of any accrued rights. Therefore to apply both the substantive and the procedural law as it existed at the time the applications were made, did not involve giving retrospective effect to the present provisions of the Act.

5. If, by reason of amendments to the law, the claimants had a claim under the law as amended, then they were entitled to pursue that claim even if it was based on past events. The Tribunal therefore proceeded to deal with the claim under the law as it stood at the time the claims were made, that is, the Act as amended by amendments up to and including the *Land Agents Brokers and Valuers Act Amendment Act* 1988 (SA).

6. The Tribunal considered the definition of "trust money" and concluded that the wide-sweeping changes introduced by the 1988 Amending Act were intended to discard the necessity for the applicant to prove that the money entrusted to the broker was entrusted to him in their capacity as an agent.

7. The words "defalcation", "misappropriation" and "misapplication" were considered by the Tribunal and in summary the Tribunal concluded that in order to establish a fiduciary default, the applicants were required to prove that a monetary deficiency occurred through a breach of trust on the part of the agent, or that the agent stole the money entrusted to them, or that the agent applied the money for a purpose different from that for which it was entrusted to them.

8. On the facts, there was no evidence that the broker stole the applicant's money so as to amount to a misappropriation. Nor could it be said that there was a misapplication of the money. The

applicants had not therefore established a fiduciary default on the part of the broker and the first part of their claim failed.

9. However in relation to the second part of their claim the applicants had proved that the broker acted quite improperly and in breach of trust and therefore the applicant's loss was as a result of a fiduciary default and they were accordingly entitled to compensation in the amount of $31,000 plus interest.

Hewitt, Hollow and Australian Property Group

14 August 1991
RLA 44825-1; RM 44826-*; RMA 44827-8
Judge Noblet, Mr Bruce, Ms Clothier

Jurisdiction: Land Agents Brokers and Valuers Act 1973 (SA)
Legislation considered: Land Agents Brokers and Valuers Act 1973 (SA) ss15, 16, 32 ; *Land Acquisition Act* 1955 (Cth) s61; *Acts Interpretation Act* 1915 (SA) s22a
Cases referred to: Gun v Commercial Tribunal (1988) 142 LSJS 137; *Commonwealth of Australia v Rhind* (1966-67) 40 ALJR 407; *D'Emden v Pedder* (1904) 1 CLR 91; *Essendon Corporation v Criterion Theatres Limited* (1947) 74 CLR 1; *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 59 ALJR 265.
Phrases considered: "other adequate practical experience"; "body corporate"
Keywords: "corporation"; Commonwealth of Australia

Facts:
An application was made by two natural persons for registration as managers pursuant to the provisions of the *Land Agents Brokers and Valuers Act* 1973 (SA). The Australian Property Group applied for a licence under the Act. The question arose as to whether the two individuals were qualified to be registered as a manager in accordance with section 32(2) of the Act. Neither applicant had previously been licensed as an agent or as a land broker. The question was whether the applicants had had "other adequate practical experience". The question further arose as to whether the Australian Property Group, which was part of the Commonwealth Department of Administrative Services, was a "corporation" within the meaning of the Act.

Determination:
1. The Tribunal approached this question by asking whether the practical experience which the applicants had had, combined with their educational qualifications, had provided them with as good a grounding in real estate as they would have had if they had been

employed as a registered sales representative for a continuous period of two years within the last five years. The Tribunal was satisfied that both the applicants had had "other adequate practical experience".

2. There was no basis for recognising that the Australian Property Group had a separate personality or legal entity. It was not a corporation at common law or by custom, nor was it incorporated under legislation. It was not even mentioned in the *Lands Acquisition Act* 1955 (SA). Registration of a business name does not confer corporate status on those carrying on business under that name. The definition of "corporation" in the Act was otiose. It was probably inserted to make it absolutely clear that a corporation includes any incorporated body which may not, in ordinary parlance, be regarded as a corporation. The context of the Act required that the word "corporation" be read down so as to refer only to a corporation aggregate, not a corporation sole.

3. It was submitted that the Commonwealth of Australia is a body corporate and that a licence should be granted to the Commonwealth of Australia trading as the Australian Property Group. It was clear that the Act did not bind the Crown in the right of the Commonwealth. The Crown was not mentioned expressly in the Act, nor could any necessary implication be gleaned from the words of the Act, or from the subject matter covered by it, that the Crown should be bound. Even if the Act bound the Crown in right of the State of South Australia, it would not bind the Crown in the right of the Commonwealth. The law relating to the acquisition and disposal of land is the subject of Commonwealth legislation (*Land Acquisition Act* 1955 (Cth)) and any State law inconsistent with that law is, to the extent of the inconsistency, invalid pursuant to section 109 of the Commonwealth Constitution.

4. The Australian Property Group was prepared voluntarily to submit itself to all the requirements of the Act. The Tribunal expressed grave doubts as to whether the Commonwealth may voluntarily submit itself to control by State law, except by way of Commonwealth legislation.

5. The Group was not a person for the purposes of the Act and therefore could only be granted a licence if it was a corporation. The applicant relied upon section 61 of the *Lands Acquisition Act* 1955 (Cth). Having considered the relevant case law on the interpretation of section 61, the Tribunal concluded that it was not satisfied that it made the Commonwealth of Australia a corporation for the purposes of the Act. The Act, when viewed as a whole, did

not contemplate the granting of a licence to a body politic, whether or not it was also a body corporate.

6. The granting of a licence to the Commonwealth of Australia would be an exercise in utter futility. The Commonwealth could not be prosecuted for any offence committed under the Act, and the Tribunal could not exercise against the Commonwealth any of the disciplinary powers conferred by section 85 of the Act. There would be no enforceable sanction if the Commonwealth chose not to comply with any provision of the Act with which other licensed agents are required to comply.

7. As it would clearly exceed the legislative power of South Australia to bind the Commonwealth of Australia, section 22a(1) of the *Acts Interpretation Act* 1915 (SA) required that the words "corporation" and "body corporate" in the Act be construed so as not to include the Commonwealth of Australia. If the Commonwealth were to legislate to incorporate the Australian Property Group and to require by legislation that it comply with all State laws relating to the acquisition and disposal of land as an agent of the Commonwealth, the position may be different. The Tribunal was not satisfied that the Commonwealth was entitled to be licensed under the Act and the application was refused.

Zollo v Agents Indemnity Fund

24 September 1991
122/88/05, 123/88/05 & 124/88/05
Judge Noblet, Ms Clother, Mr Hawkins

Jurisdiction: Land Agents Brokers and Valuers Act 1973 (SA)
Legislation considered: Land Agents Brokers and Valuers Act 1973 (SA) s76b; *Commercial Tribunal Act* 1982 (SA) s20
Cases referred to: Craik v Agents Indemnity Fund (28 May 1991); *Daly v Sydney Stock Exchange Limited* (1986) 60 ALJR 371; *Schofield v Consolidated Interest Fund* (1988) 49 SASR 546; *Dobcol Pty Ltd v Law Institute of Victoria* [1979] VR 393; *John Fairfax & Sons Pty Ltd v EC DeWitt & Co (Australia) Pty Ltd* [1958] 1 QB 323; *Aiden Shipping Co Ltd v Interbulk Limited* [1986] 2 All ER 409; *Walkley v Dairy Vale Co-operative Limited* (1972) 39 SAIR 327
Keywords: Indemnity Fund; compensation; costs; fiduciary relationship; misapplication of money

Facts:
Applications were made under the Act for compensation to be paid out of the Agents Indemnity Fund in relation to a pecuniary loss suffered as a result of an alleged fiduciary default by a former licensed landbroker.

Determination:

1. It was clear that the terms under which the money was entrusted to the landbroker were that the money would at all times be either in the landbroker's account or in an investment in the name of the claimants. When the business collapsed the money was not in a trust account nor was it invested. There was a misapplication of the money deposited by the claimants.

2. The substantive law to be applied was the law as amended by the 1988 amendment to the Act. The money entrusted to the land broker was money in their possession or control in their capacity as a landbroker who was an "agent" as defined.

3. The claimants' actual pecuniary loss did not include loss of interest on the amounts deposited with the landbroker.

4. Pursuant to section 76(b)(6) of the Act the claimants were entitled to compensation in the amount of $10,850.

5. It was entirely consistent with conscience and common sense that the Commissioner pay the costs of the claimants. There was nothing in the legislation to suggest that a claimant should not be entitled to an order for costs against the Commissioner when the Tribunal allows a claim which the Commissioner has previously rejected.

6. Questions of appeal from a determination of the Tribunal under section 76b of the Act limit the rights of appeal conferred by section 20 of the *Commonwealth Tribunal Act* 1982 (SA).

AF Real Estate Pty Ltd

17 October 1991
LA 1277-3
Judge Noblet, Mr Black, Ms Clothier

Jurisdiction: Land Agents Brokers and Valuers Act 1973 (SA)
Legislation considered: Land Agents Brokers and Valuers Act 1973 (SA) s22, 30
Keywords: Part time employment; income

Facts:
An application was made for the consent of the Tribunal to employ a sales representative on a part time basis pursuant to section 22 of the Act and a registration manager on a part time basis pursuant to section 30 of the Act.

Determination:
The receipt of income from a share farming venture does not involve "employment" for the purpose of the relevant sections of the Act. The sections were addressed to employment and not the receipt of income. There were special circumstances which justified consent to be granted to the sales representative being employed on a part time basis due to the fact that it was difficult to justify full time employment in real estate businesses insome relatively small country towns. The disability of one of the directors also contributed to the special circumstances. Consent was given pursuant to section 22(2) of the Act to employ the sales representative on a part time basis.

Commissioner for Consumer Affairs v Holder

18 November 1991
01/91/05
Judge Noblet, Mr Wilson, Mr Alexander

Jurisdiction: Land Agents Brokers and Valuers Act 1973 (SA)
Cases referred to: Beames (15 February 1990)
Keywords: Disciplinary action; mortgage broking; fine

Facts:
The Tribunal conducted an enquiry pursuant to section 84 of the Act in relation to matters alleged in a complaint lodged by the Commissioner for Consumer Affairs. Most of the allegations related to deficiencies in the record keeping systems of the respondent and related to his mortgage broking activities.

Determination:
There was proper cause for disciplinary action to be taken against the respondent. The Tribunal took into account the undertaking given by the respondent that he had ceased conducting mortgage broking activities and would not conduct such activities in the future. A penalty was to be imposed in this matter to indicate to landbrokers in general that failure to comply with all legal requirements in relation to trust accounts and mortgage broking activities will not be tolerated and will result in a penalty being imposed if the matter comes before the Tribunal. The amount of the fine to be ordered was $750. As there was no suggestion of incompetence there was no necessity to take action in relation to the respondent's licence.

JE White Pty Ltd

19 December 1991
01/59/91
Judge Noblet, Ms Clothier, Mr Hawkins

Jurisdiction: Land Agents Brokers and Valuers Act (1973 (SA)
Legislation considered: Land Agents Brokers and Valuers Act 1973 (SA) ss7(2), 63
Cases referred to: Stephenson Nominees Pty Ltd v The Official Receiver on Behalf of the Official Trustee in Bankruptcy (1987) 74 ALR 67; (1987) 76 ALR 485; *Zollo v Agents Indemnity Fund* (24 September 1991); *Craik v Agents Indemnity Fund* (28 May 1991)
Keywords: Trust monies; exemption

Facts:
The Minister for Consumer Affairs referred an application for an exemption pursuant to section 7(2) of the Act. The application sought exemption from the provisions of section 63 of the Act which deal with trust monies. In 1985 various trust accounts of the broking and agent limbs of the business were consolidated after a meeting with the then Land and Business Agents Board.

Determination:
1. It is completely wrong in principle for a land agent and a land broker to operate their trust accounts as a single bank account on which withdrawals can be made by either of them. An unscupulous landbroker or agent could easily milk the trust account of funds held on behalf of the clients of the other person. The problems in ascertaining whether the clients would have a claim against the Agent Indemnity Fund would be almost insurmountable.

2. Had it not been for the meeting with the Land and Business Agents Board the Tribunal would have had no hesitation in recommending against the approval sought. However the Tribunal was not satisfied that the information from the Board constituted sufficient reason to grant the application. In all the circumstances the Tribunal was not satisfied that a proper case had been established for the exemptions applied for. However the applicants would have until 31 December 1992 to make the changes and an exemption would be granted until then subject to conditions.

COMMERCIAL TRIBUNAL ACT 1982 (SA)

Cox v Commisioner for Consumer Affairs

20 June 1991
300/90/02
Judge Noblet

Jurisdiction: Commercial Tribunal Act 1982 (SA)
Legislation considered: Commercial Tribunal Act 1982 (SA) s18(1)
Keywords: Suspension of order

Facts:
An application was made under section 18 of the Act to suspend the operation of an order of the Tribunal until the determination of an appeal against that order. The order was for the disqualification of the applicant's licence for five years and a fine of $1,000.

Determination:
There is a discretion as to whether or not the operation of a previous order should be suspended; suspension does not follow automatically when an appeal is instituted. Some grounds must be shown as to why the discretion should be exercised in favour of the party making the application. However, no grounds were put to the Tribunal as to why it should make the suspension order, and in these circumstances the Tribunal was not prepared to make the order and the application was therefore refused.

CONSUMER CREDIT ACT 1972 (SA)

Club Resorts Finance Pty Ltd

24 July 1991
62338-*
Judge Noblet, Mr Milne, Mr Krumins

Jurisdiction: Consumer Credit Act 1972 (SA)
Legislation considered: Section 29 *Consumer Credit Act* 1972 (SA)
Cases referred to: Sobey v Commercial & Private Agents Board (1979) 22 SASR 70; *ex parte Meagher* (1919) 19 SR (NSW) 433
Keywords: Application for credit provider's licence; fit and proper person

Facts:
An application was made under section 29 of the Act for a licence as a credit provider to be granted to the company. An objection to the grant of a licence was lodged by the Legal Services Commission of South Australia

on a number of grounds including, that the persons in control of the company were not fit and proper persons to hold a licence and that the applicant had insufficient financial resources to carry on business in a proper manner under the licence.

Determination:

1. The onus was on the applicant to establish the matters set out in section 29 of the Act. There is no onus of proof on the objector. Nor is the objector bound by particulars of the objection in the same way as a party is bound by pleadings. That is not to say however that the applicant is not entitled to advance notice of the case it has to answer as far as the objection is concerned.

2. The Tribunal was left with the overall impression that the whole emphasis of the sales presentation of the company was on high pressure and sophisticated sales techniques with very little attention given to the credit aspects of the transaction except by way of assuring each customer that they could afford to borrow the money. The company engaged in misleading and otherwise undesirable trading practices.

3. It is incumbent on those responsible for the management of a licensed credit provider to ensure, as far as possible, that staff employed by the company do not engage in misleading or unfair practices and that staff, in their dealings with consumers, have proper regard for the requirements of the law, with particular reference to the *Consumer Credit Act* 1972 (SA).

4. The Tribunal was unable to be satisfied that two of the persons in control or influence of the company were fit and proper persons and thus the application for a licence was refused.

AGC (Industrial) Limited v Ball

3 October 1991
02/91/01
Judge Noblet, Ms Clothier, Mr Queale

Jurisdiction: Consumer Credit Act 1972 (SA)
Legislation considered: Consumer Credit Act 1972 (SA) s60a
Cases referred to: York Credit Pty Ltd (1981) ASC 55-108; *Barclays Australia (Finance) Limited* (1981) ASC 55-124; *Joytone Pty Ltd* (unreported); *Victorian Producers Cooperative Company Limited* (unreported); *Australian Guarantee Corporation Limited v Stander & Or* (1987) ASC 55-546; *Australian Guarantee Corporation v Leed & Ors* (1987) ASC 55-593; *Encyclopedia Britannica (Australia) Inc v The*

Director of Consumer Affairs & Ors (1988) ASC 55-636; *Australian Guarantee Corporation Limited v Roberts & Ors* (1989) ASC 55-950; *Australian Guarantee Corporation Limited v Ogilvy & Or* (1990) ASC 55-968; *Mercantile Credits Limited v Barber & Ors* (1990) ASC 55-988; *AGC v Hawkins* (1991) ASC 56-041; *Re CBFC* (1991) ASC 56-063; *AGC v Chivell & Ors* (1991) ASC 56-071; *Re AGC* (1991) ASC 56-078
Keywords: Non-compliance with legislation; credit charges; prejudice to consumers; relief

Facts:
An application was made under section 60a of the Act seeking orders for relief against the consequences of contraventions or non-compliance with certain provisions of the Act. The application acknowledged that the company stood to make a loss by reason of a failure to comply with all the requirements of section 40 of the Act, particularly the requirement that a credit contract to which the section applies must contain information as to the rate at which the credit charge accrues. The original application sought relief in relation to 79 bills of sale involving a large number of consumers. The company, AMEV Finance Limited, was acquired by Australian Guarantee Corporation Limited. Of the 79 bills, 63 were entered into before the takeover date and 16 after that date.

Determination:
1. The fact that none of the 65 respondents to the application attended the hearing or took part in the proceedings tended to suggest that none of them considered that they would suffer any prejudice as a result of an order made by the Tribunal. The Tribunal also took into account, on the question of possible prejudice, the fact that most of the grantors of the bills of sale were people who were conducting some type of business and could be assumed to have had a relatively higher degree of sophistication in relation to credit contracts than some other non-business consumers who borrow money from finance companies.

2. The Tribunal was impressed by the steps taken by AGC to ensure that the requirements of the relevant legislation were complied with. The company had devoted a great deal of attention to staff training and compliance checking. AMEV did not have such a system in place.

3. The applicant was prepared to undertake not to take any future enforcement action in respect of the contracts that were still current without informing the Tribunal or the Commissioner for Consumer Affairs, and to undertake that any enforcement action would be in accordance with the requirements of the *Consumer Transactions Act* 1972 (SA).

4. It was desirable that the Tribunal's approach to this matter was consistent with the approach it had previously adopted and, subject to differences in the relevant legislation, consistent with the approach taken by equivalent interstate authorities on similar matters.

5. The Tribunal had regard to the matters mentioned in section 60a(4), however, they were not the only matters which had to be taken into account. The Tribunal has a discretionary power to grant relief "to such extent as may be just".

6. The breaches which occurred before the takeover were less deserving of relief than those which occurred after. Accordingly, the Tribunal granted relief to a different extent depending on the date of the transaction. In respect of those transactions entered into before the takeover, the applicant was entitled to recover or retain credit charges as if the nominal annual percentage rate under each transaction was 75% of the rate which should have been disclosed; with respect to the transactions after the takeover the applicant could recover or retain 90% of the rate which should have been disclosed.

Household Financial Services Limited

29 October 1991
01/91/01
Judge Noblet, Ms Clothier, Mr Queale

Jurisdiction: Consumer Credit Act 1972 (SA)
Legislation considered: Consumer Credit Act 1972 (SA) s60a, 40
Cases referred to: AGC v Ball & Or (3 October 1991)
Keywords: Non-compliance with Act; prejudice to consumers; disclosure of rate; relief

Facts:
Two applications were made under section 60a of the Act which provides a mechanism for a person obtaining relief against the consequences of contravention of, or non-compliance with, a provision of the Act where the person stands to make a loss in consequence of that contravention or non-compliance. The contraventions revealed by the audit of the company's contracts were relatively minor and did not involve any substantial prejudice to the persons concerned.