



# CONSUMER, TRADER & TENANCY TRIBUNAL BULLETIN

Issue No: 4 of 2004 (October)

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## CASES

The full text of the judgments are available on the Internet at:  
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### 1. **Lancaster v McMillan & Ors [2004] NSWSC 729**

This was an appeal against an order of the Tribunal for the plaintiff tenant to pay defendant landlords the sum of \$8280.84.

The hearing before the Tribunal took place on 23 September 2003. The plaintiff sought an adjournment of the hearing, citing work commitments. This request was refused at the hearing and the Tribunal made the above order in the absence of the plaintiff.

The plaintiff made an application for re-hearing, which was subsequently refused.

The plaintiff brought an appeal against the decision to refuse the re-hearing application on the grounds of being denied natural justice.

Section 67 of the *Consumer, Trader and Tenancy Tribunal Act 2001* enables an appeal to the Supreme Court where the Tribunal has decided a question with respect to a matter of law. Master Malpass stated:

“The application for re-hearing was brought in respect of what was perceived to be an erroneous rejection of an adjournment application. Neither the Tribunal nor the Chairperson decided a question with respect to a matter of law.”

The plaintiff failed to swear any affidavit deposing the facts to support his summons.

Master Malpass found no error at law, dismissed the summons and addressed the issues of parties seeking an adjournment:

*“Whether or not the first plaintiff was in a situation of difficulty, the material fails to explain why some attendance could not have been made before the Tribunal. Putting that matter aside, the complaint is one of lack of suitable notice. **On any view, the plaintiffs had an opportunity to appear and present their case. They did not take advantage of that opportunity.***

*Whilst a Tribunal can be expected to do what it can to ensure that justice is best served between the parties, it cannot be expected to organise the conduct of its business around the particular work commitments of one litigant.*

*The undesirable practice of seeking an adjournment per medium of facsimile or telephone communication without attendance before the Tribunal has become a vehicle of abuse. If a party chooses to use that vehicle, he or she takes the risk that the Tribunal will reject the application and proceed to a hearing of the proceedings in his or her absence. **The Notice of Conciliation & Hearing makes this quite clear.***

*In dealing with adjournment applications, the Tribunal must consider inter alia the interests of all parties. On the material before the court, I am not satisfied that in refusing the adjournment application, the Tribunal did other than properly exercise its discretionary powers.”*

### 2. **Josevski v Henson [2004] NSWSC 726**

An appeal to the Supreme Court was lodged on 19 November 2003 against a decision of the Tribunal made on 26 August 2002.

The plaintiffs are the owners of a property at Burraneer. They entered into a residential tenancy agreement with the defendants for the occupation

of that property. The defendants abandoned the property during the term of the tenancy.

The plaintiffs brought an application in the Tribunal seeking a monetary order. It set out inter alia a claim for damages. The defendants responded with their own application. It alleged inter alia a failure on the part of the plaintiffs to mitigate their loss.

The claim made by the plaintiff was well in excess of the \$10,000 jurisdiction imposed by the *Residential Tenancies Act 1987*. This jurisdictional issue was raised by the Tribunal at the first of three hearings. At the third hearing of the matter on 26 August 2002, the Tribunal ordered the defendants to pay the plaintiffs the sum of \$7800.00.

The plaintiffs took the view that the sum awarded for damages was manifestly inadequate and their intention to appeal was expressed to the Tribunal. The plaintiffs requested reasons for the decision and these were provided by the Tribunal on 22 October 2003. An appeal was lodged to the Supreme Court on 19 November 2003.

Master Malpass remarked that “The appeal is presently incompetent. It has been brought over a year out of time. ....and that no extension of time had been applied for.”

The Supreme Court has a discretionary power to extend time. It is exercised having regard to the relevant circumstances of the particular case before it and so that justice is best served between the parties. The onus rests with the party seeking the extension of time.

The Master found that the alleged question of jurisdiction was misconceived. The Master took the view that the order was not able to be disturbed by reason of lack of jurisdiction. The plaintiffs persisted with a monetary claim that was in excess of the amount that could be ordered by the Tribunal. In doing so, they had placed themselves in the position where they may have been taken to have elected to waive any excess recoverable in the application.

On the issue of the plaintiff’s mitigating their loss, the Master commented:

*“There was evidence before the Tribunal on the question of mitigation. It suffices to merely mention certain of it. There was evidence that the rental figure under the agreement was too high for the purposes of the period of mitigation. There was evidence of an offer made by the defendants which was not accepted by the plaintiffs. There was evidence of attempts made by both the plaintiffs and the defendants to obtain a tenant. There was evidence of refusal to accept a particular tenant by the plaintiffs because the proposed tenant had a dog.”*

The Master referred to the Tribunal reasons for the decision and was not satisfied that there was any error in respect of the onus of proof. The Master addressed the issue of the quantification of the order and stated:

*“It may well be that the quantum of the order is on the low side. It may well be that criticism can be directed towards the manner in which the evidence was evaluated and how the amount of compensation came to be fixed. Be that as it may, on any view of the ambit of s67, what was done did not involve the deciding of a question with respect to a matter of law.”*

The Master found that there was no denial of natural justice and that the plaintiff’s real complaint is that the order of the Tribunal was “too low”.

The Master refused to grant an extension of time to the plaintiffs and dismissed the summons.

### **3. Oubani v MCI Technologies P/L & Anor [2004] NSWSC 733**

The plaintiff, firstly sought an order pursuant to section 67 of the *Consumer, Trader and Tenancy Act 2001 (the CTTT Act)* that the decision and orders of the Tribunal dated 19 December 2003 be set aside; and secondly, a

declaration that the Tribunal has jurisdiction to hear and determine the plaintiff's application under the *Consumer Claims Act 1998* (the CC Act).

The proceedings before the Tribunal arose from a dispute related to a contract between the plaintiff and the first defendant entered into in December 2001. The first defendant was based in Queensland. The computer software was supplied to the plaintiff at his address in the State of New South Wales.

In February 2003 the plaintiff made his first application to the Tribunal under the CC Act for an order that the purchase price be refunded. The question before the Tribunal was whether it had jurisdiction to hear the application, that is, whether the dispute should be decided within the jurisdiction of New South Wales or Queensland. In April 2003, the plaintiff withdrew his application after the Tribunal indicated it would be inclined to dismiss the application for want of jurisdiction. In September 2003, the plaintiff made a second application to the Tribunal for an order under the CC Act that the first defendant refund his \$5,900.00.

The Tribunal, in dismissing the plaintiff's case, held that there was no jurisdiction to hear the matter as the contract was entered into in Queensland.

Master Harrison examined the provisions of the CC Act.

The Tribunal has and may exercise such functions as are conferred or imposed on it by or under the CC Act (s 5(2) CTTT Act). The Tribunal has jurisdiction to hear and determine any consumer claim brought before it except as otherwise provided by this section (s 7 CC Act). In addition, s 21 of the CTTT Act provides that the Tribunal has such jurisdiction to decide matters, and such powers to make orders and otherwise exercise any function in connection with any such decisions, as is conferred on it by this or any other Act.

The CC Act also contains the presumption that a person who claims to be a consumer is a

consumer unless the contrary is proved. The onus of proving that a person is not a consumer within the meaning of the CC Act is on the party who asserts the other party is not a consumer (s 4).

The plaintiff submitted firstly that the relevant contract was formed in the state of New South Wales and thus being a consumer claim, the Tribunal had jurisdiction; and secondly, that whether the contract was formed in New South Wales or in some other jurisdiction, the clear intent of the CC Act is that any consumer claim as defined by the CC Act can and should appropriately be determined within the NSW jurisdiction. The plaintiff further submitted that a consumer claim depends on the supply of goods or services and that the relevant consideration was whether goods or services were supplied to a consumer in NSW.

It was the Master's view that the relevant consideration is whether goods or services were supplied to a consumer in New South Wales and not where the contract was made. The computer software was supplied to a consumer, the plaintiff, in New South Wales so the Tribunal has jurisdiction to hear this matter.

The Master further agreed with the plaintiff's submission that the *Service and Execution of Process Act 1992 (Cth)* (SEPA) governs the power of the Tribunal to serve its initiating process interstate and that in giving the Tribunals in one State power to serve process on and exercise jurisdiction over residents of another State, the SEPA is concerned with the place of supply rather than the place of contract.

The Master decided that the Tribunal erred at law, upheld the appeal and remitted the matter back to the Tribunal for determination at law.

#### **4. Holden Limited & Heartland Motors Pty Ltd T/as Heartland Holden Parramatta v Andrew Eagleston & Anor [2004] NSWSC 779**

In or about November 2001, the first defendant purchased an "ex-demonstrator" motor vehicle from the second plaintiff for the sum of \$74,000.

The first plaintiff was the manufacturer of that vehicle. The vehicle was plagued with problems. This situation persisted over a couple of years. A number of attempts (at least seven) were made to rectify the problems, without success.

The first defendant brought an application to the Tribunal. He sought an order to be paid the amount of \$65,000.00. The Tribunal made the following order:

The applicant is to return the motor vehicle to the point of purchase, Heartland Holden at 66 Church Street, Parramatta, on or before 19 March 2004, with all repairs to the bodywork completed.

2. The respondents, HEARTLAND MOTORS PTY LTD T/AS HEARTLAND HOLDEN PARRAMATTA & HOLDEN LIMITED, are to pay the applicant, ANDREW JAMES EAGLESTON the sum of \$66,485.00 on or before 26 March 2004.

The plaintiffs filed a summons in the Supreme Court on 29 March 2004 seeking inter alia the setting aside of the orders made by the Tribunal. The proceedings sought relief pursuant to ss65 and 67 of the *Consumer Trader & Tenancy Tribunal Act 2001* (the Act).

The plaintiff's claimed that there was a lack of jurisdiction to entertain the first defendant's claim, lack of power to make the orders that were made, and failure to give natural justice or procedural fairness or error of law (by reason of failure to give adequate reasons).

Master Malpass did not accept the first plaintiff's submission that the first defendant's claim was in fact a claim for rescission of a sale contract ab initio.

The Master stated:

*"The application propounded a claim for a specified sum of money only and the Tribunal had jurisdiction to entertain such a claim. As I understand the ultimate position taken by the plaintiffs, the real thrust of their argument became whether or not the Tribunal had power to make order 1."*

The Master disagreed with the plaintiff's further submissions that the Tribunal had no power to order the first defendant to return the motor vehicle and found that power fell within the parameters of *s.8(2)(c) Consumer Claims Act 1998*.

The Master took the view that the remedies granted by the Tribunal met the merits of the case.

The Master further addressed the plaintiff's submissions on 'inadequate disclosure of reasoning process':

*"In my view, both the language of the section itself as well as other provisions to be found in the Act (including s49) suggest that it does not. This is consistent with a clear legislative intention to limit the avenue of challenge to decisions of the Tribunal."*

The Master was not satisfied that the plaintiffs satisfied the onus of proving their application and dismissed their summons.

## **5. McAuliffe v CTTT & Department of Housing [2004] NSWSC 824**

The plaintiff appealed against a decision of the Tribunal to terminate a residential tenancy pursuant to *s.64 Residential Tenancies Act 1987* (the Act).

The plaintiff sought an order to set aside the order of the Tribunal and a declaration that the plaintiff did not breach section 23 of the Act, in particular, in cultivating a prohibited plant at the premises, did not use the premises for an illegal purpose. The plaintiff further sought a declaration that the breach was not of such seriousness that an order for termination of the tenancy and possession to the second defendant ought to be made

Master Harrison disagreed with the plaintiff's submission that the growing of a prohibited plant did not constitute 'use' of the premises pursuant to section 23 of the Act.

Section 23 of the Act specifically provides:

*“(1) It is a term of every residential tenancy agreement that:*

*(a) the tenant shall not use the residential premises, or cause or permit the premises to be used, for any illegal purpose,*

*(b) the tenant shall not cause or permit a nuisance, and*

*(c) the tenant shall not interfere, or cause or permit any interference, with the reasonable peace, comfort or privacy of any neighbour of the tenant.”*

The plaintiff sought a restricted interpretation of s 23(1)(a) of the Act. The Master stated that the word “use” should be given;

*“...the natural and ordinary meaning of the verb “use” is utilization or employment for or with some aim or purpose – Shorter Oxford English Dictionary. The Macquarie Dictionary definitions of “use” include “to put into service”, to “avail oneself of”, “to exploit to one’s own end” and “to apply to one’s own purposes”.*

The Master decided that the ‘use of the premises’ does not have to involve the ‘use’ of the whole residential premises.

The Tribunal found that plaintiff had breached the terms of section 64 of the Act by cultivating a prohibited plant and possessing a prohibited plant. The plaintiff had previously been charged with possession under the *Drug Misuse and Trafficking Act 1985*.

The Tribunal Member concluded his reasons by stating;

“I find Ms. McAuliffe to have engaged in an activity of a scale and sophistication that amounts to a serious breach of the residential tenancy agreement. The

seriousness of that breach must in all the circumstances, outweigh the consequences of Ms. McAuliffe being uprooted from a community of which she is part.”

The Master disagreed with the Tribunal and found that the cultivating of cannabis in the plaintiff’s premises did not have any adverse effects on neighbouring residents or other persons. The Master, in upholding the summons and setting aside the Tribunal’s decision, found that the judgement of the Tribunal was “*harsh and plainly unjust*” and an error of law was made when the Tribunal terminated the plaintiff’s residential tenancy agreement.

The second Defendant has sought leave to appeal the decision of the Master to the Court of Appeal.

#### **6. Poat v Consumer, Trader and Tenancy Tribunal & Pathfinder Boatland Pty Limited T/as Pathfinder Marine [2004] NSWSC 947**

The plaintiff purchased a boat from the second defendant. The boat proved to be defective in various areas. The plaintiff brought an application in the Motor Vehicle Division of the Consumer Trader & Tenancy Tribunal to recover moneys paid in respect of the boat. The sum claimed was \$383,000. The Tribunal dismissed the application for lack of jurisdiction as the claim exceeded the sum of \$25,000.

The Tribunal has jurisdiction in respect of consumer claims under the *Consumer Claims Act 1998* (The CC Act)(including claims that relate to motor vehicles). The jurisdictional limit in the General Division of the Tribunal is \$25,000. The Motor Vehicles Division has an unlimited jurisdiction with respect to new vehicles used for private purposes.

The Tribunal, after hearing evidence from the parties, and examining various statutory provisions and dictionary meanings, rejected a view presented by the plaintiff that because his consumer claim relating to a boat had been listed in the Motor Vehicles Division the Tribunal, it

therefore had unlimited jurisdiction in respect of it.

Master Malpass explored the legislation that was used to determine the plaintiff's application in the Tribunal. Section 14(3) of the CC Act provides that a party may bring a consumer claim arising from the supply of a new motor vehicle, within the meaning of the *Motor Vehicles Taxation Act 1988* (The MVT Act). The MVT Act provides a definition of a motor vehicle as follows:

*a motor vehicle (other than a light rail vehicle) or trailer within the meaning of the Road Transport (General) Act 1999.*

Section (3)(1) of the Road Transport (General) Act 1999 defines both "vehicle" and "motor vehicle". The former is defined as:

*... a vehicle that is built to be propelled by a motor that forms part of the vehicle.*

A motor vehicle is defined as:

*(a) any description of vehicle on wheels (including a light rail vehicle) but not including any other vehicle used on a railway or tramway, or  
(b) any other vehicle prescribed by the regulations.*

In dismissing the summons, the Master took the view that the Tribunal did not err at law and that a consumer claim relating to a boat cannot be treated as a consumer claim relating to a new motor vehicle and is not properly the subject of an application brought in the Motor Vehicles Division. The Master commented that:

*"In my view, a "new motor vehicle" must not only be built to be propelled by a motor that forms part of the vehicle, but it also must have **wheels**."*

The plaintiff raised an issue both in the Tribunal and in the Supreme Court in relation to the application form for the Motor Vehicles Division. The form states:

*MOTOR VEHICLES DIVISION –*

*Consumer Claims about new and used motor vehicles (including motor boats) and repairs to motor vehicles.*

The Master agreed with the Tribunal Member that the Tribunal cannot confer jurisdiction upon itself. The jurisdiction is conferred by statute.

#### **7. Ideal Waterproofing Pty Ltd v Buildcorp Pty Ltd & Zurich Australian Insurance Ltd & Anor [2004] NSWSC 765**

This was an appeal against the decision of the Tribunal to transfer the proceedings to the District Court of NSW prior to the hearing of a notice of motion filed by the plaintiff.

Both Respondents in the Tribunal had cross-applications against the plaintiff. The Tribunal determined that Buildcorp's cross application was within the \$500,000 jurisdiction of the Home Building Division and that Zurich's cross-application exceeded the jurisdiction. The Tribunal determined that it would be unsatisfactory to have Buildcorp's cross-claim heard in the Tribunal and Zurich's cross-claim heard elsewhere when both claims involved largely the same evidence.

Part 3 of the plaintiff's notice of motion before the Tribunal sought an order that the Tribunal did not have jurisdiction to decide Zurich's cross-application.

In transferring the matter to the District Court, the Tribunal noted a decision of the Member in *Dickinson v D B Mahaffey & Associates Pty Ltd NSW CTTT 123 (31 January 2003)*:

*".....that if the Tribunal proceedings are not transferred to the District Court, there will be a **substantial duplication of proceedings**. This will cause additional cost and inconvenience to the parties and their respective witnesses. It would be more expedient, efficient and effective if the dispute was heard once, by the one Court or Tribunal."*

The plaintiff appealed under s.67 Consumer, Trader and Tenancy Tribunal Act 2001 (CTTT

Act). Section 67 of the Act provides that a party in the proceedings may lodge an appeal to the Supreme Court where the Tribunal decides a question with respect to a matter of law.

Sperling J referred to a decision of Greg James J in *Custom Credit Corporation (in Liq) v Commercial Tribunal of NSW* [1999] NSWSC 1021, in which his Honour discussed the Tribunal deciding a question with respect to a matter of law under s(20)(5) *Commercial Tribunal Act* 1984, which spoke in the same terms as section 67 of the CTTT Act.

His Honour stated at [94];

*"I consider it will at least be necessary for a party to avail itself of the appeal right afforded by s.20(5) to articulate a precise question relating to a matter of law, to show how the decision of it, whether express or implicit, was integral to the conclusion and why that decision was wrong. ...*

Sperling J found that the Tribunal implicitly decided questions of law and did so erroneously.

His Honour found that in taking the Zurich cross-claim into account as a reason for transferring the proceedings, the Tribunal implicitly decided that the cross-claim had at least an arguable basis in law. Otherwise, there was no point in making a transfer order to enable it to be dealt with.

His Honour noted, however, that Zurich's claim had no basis in law.

His Honour accordingly allowed the appeal against the order to transfer the matter to the District Court. His Honour further commented:

*"...the parliament has constituted the Tribunal with limited jurisdiction. From time to time, the Tribunal will have to decide whether it has jurisdiction to hear and determine a matter. That is part of its role. The prospect that the Tribunal may be called upon to fulfil that role in a particular matter is not a good reason for transferring a case to the District Court. It is only where*

*there are bona fide claims genuinely requiring determination and which cannot be decided by the Tribunal that a transfer of proceedings is warranted."*

His Honour declined to grant prerogative relief pursuant to section 65 of the Act as the result under section 67 was more direct.

The following decision was made:

Appeal allowed in part;

(2) Order 1 of the Consumer, Trader and Tenancy Tribunal made on 10 June 2003 set aside;

(3) The application to transfer the proceedings in the Tribunal to the District Court be dismissed;

(4) Each party to bear its own costs of the proceedings in this court.

#### **8. Grygiel v Consumer, Trader and Tenancy Tribunal & Ors [2004] NSWSC 914**

The CTTT granted an adjournment request from the second and third defendants in respect of a directions hearing listed for 17 May 2004. The adjournment application was dealt with on the papers. The plaintiff was not given the opportunity to be heard on the adjournment issue. The plaintiff objected to the adjournment of the directions hearing after being advised in writing.

The Tribunal responded to the plaintiff in a letter dated 26 May 2004. The Tribunal's letter contained the following:

*"There appeared, on the face of it, to be no prejudice flowing to the builder if the adjournment was granted. Furthermore, it seemed good case management not to have a directions hearing of a matter that is under the scrutiny of the Supreme Court."*

The plaintiff commenced the proceedings in the Supreme Court on 11 June 2004 and sought inter alia that:

1. A declaration that the order made in the Consumer, Trader and Tenancy Tribunal (“the Tribunal”) on 14 May 2004 in the matters No. HB 02/48685 and No. HB 02/32025 was made in breach of procedural fairness.
2. A declaration that the order made in the Consumer, Trader and Tenancy Tribunal (“the Tribunal”) on 14 May 2004 in the matters No. HB 02.48685/ and No. HB 02/32025 was ultra vires.
3. A declaration that the order made in the Consumer, Trader and Tenancy Tribunal (“the Tribunal”) on 14 May 2004 in the matters No. HB 02.48685/ and No. HB 02/32025 was ultra vires.

Prior to the hearing of the matter, the Tribunal had held two directions hearings, on 30 June 2004 and 2 September 2004. The Tribunal gave directions to allow the plaintiff to inspect the subject premises and stood the matter over to January 2005.

Master Malpass found that the Tribunal has power to adjourn proceedings pursuant to section 28(5) *Consumer, Trader and Tenancy Tribunal Act 2001* (the Act). The Master further found that the bringing of the appeal was of little consequence to the plaintiff. The Tribunal had already determined the plaintiff’s issues in relation to access to the premises prior to the hearing in the Supreme Court. The Master was not satisfied that the Tribunal had made an error which could invoke an appeal under section 67 of the Act and dismissed the plaintiff’s appeal.

The Master commented that;

*“The Tribunal is obliged to accord procedural fairness to all parties. It should give all parties a reasonable opportunity to be heard on any adjournment application.”*

The Master further found that the intention of the Tribunal in granting the adjournment was well-meaning (to save the parties the time and expense of what was thought to be a pointless attendance before it by reason of the proposed appeal). What it did not do was generate any entitlement to relief in this case.

#### **9. Johnson v Consumer, Trader and Tenancy Tribunal & Anor [2004] NSWSC 974**

This appeal related to whether a decision made by the Tribunal was made in accordance with law. The Tribunal ordered the plaintiff to pay the second defendant the sum of \$10,350.00. The plaintiff appealed the decision of the Tribunal and sought relief under s 65(3) of the CTTT Act and by way of appeal under s 67 of the Act.

The plaintiff submitted that he was denied procedural fairness on 30 January 2003 for the reason that the Tribunal refused him an adjournment and did not afford him procedural fairness.

Master Harrison quoted the Tribunal Member’s reason for decision:

*“The matter was then listed for hearing at the CTTT on 30th January 2003. On that day an explanation was given to both parties of the process, and an opportunity was given to both parties to attempt further conciliation at the venue. Both parties had an opportunity to inspect the other party’s evidence. Once again that process did not resolve or settle the matter.*

*Following that opportunity both parties were asked whether they sought an adjournment to further prepare for the hearing, obtain evidence (expert or otherwise), seek the attendance of any witnesses, or seek any legal advice. Both parties stated they understood all of the issues and were happy for the hearing to proceed and sought the matter be finalised on that day.”*

The Supreme Court discussed denial of natural justice and procedural fairness referring to *Kioa v West* (1985) 159 CLR 550 and *Kearns & Anor v Fair Trading Tribunal of NSW & Anor* [2001] NSWSC 951. Master Harrison stated at 37:

*“Whether there is a denial of procedural fairness depends on the circumstances in each case.”*

The Supreme Court determined that the plaintiff made a conscious decision to have his matter heard on 30 January 2003 and that it open on the evidence for the CTTT to make the finding made. Accordingly, the appeal was dismissed.

#### **10. Sullivan v Hudson & Anor [2004] NSWSC 839**

On 31 May 2004 the Tribunal determined a matter between the plaintiff and the first defendant. The plaintiff sought orders that he did not have to pay the amount of \$800.00, which was an amount outstanding and owed by him to the defendant for mechanical works.

The mechanical works were the supply and installation of a clutch kit to a Subaru motor vehicle owned by the plaintiff. The Tribunal was not satisfied with the evidence given by the plaintiff, in respect of the installation of the new clutch, and made an order that the plaintiff was to pay to the defendant the sum of \$800.00 on or before 18 June 2004.

The Senior Member provided written reasons for his decision and stated:

“I asked the applicant three times to tell me precisely what he said when he arranged with the respondent to have the new clutch installed. At no stage in his verbal evidence he did not say anything about asking that the Subaru brand clutch be installed. He had, however, made the allegation in his letter to Subaru Australia. Having had this discrepancy drawn to his attention, Mr Sullivan then said that he had asked for a Subaru clutch to be installed.

The respondent’s evidence was that he was asked and agreed to remedy a problem in the vehicle. He said that he would take the vehicle away, examine it, and contact the applicant. He did so, and he installed a suitable clutch kit. The respondent was most clear and most emphatic in his evidence that at no stage was he asked to fit a Subaru clutch.”

The plaintiff claimed that the clutch that was installed in his vehicle was only suitable for a Subaru 4WD but his Subaru is a 2WD and the Tribunal Member erred in relation to this issue.

The Master found that the Tribunal made a decision which was open on the facts provided by the parties and could not find any error at law.

The Master further found that there was no error of law when the Tribunal refused to grant the plaintiff a rehearing pursuant to *s.68 Consumer, Trader and Tenancy Tribunal Act 2001*. The Master quoted from the finding of the Deputy Registrar, who on 23 June 2003, decided:

*“The Tribunal’s decision is based on an evaluation of competing evidence that required making findings as to credit. The Presiding Member was best placed to test that evidence. Having made a finding as to credit, the Presiding Member came to a decision that was clearly open to the Tribunal on the evidence. Dissatisfaction otherwise with the Presiding Member’s findings does not amount to substantial injustice. APPLICATION FOR A REHEARING NOT GRANTED.”*

## **ISSUES & GUIDELINES**

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### **Home Building Regulation 2004**

This Regulation commenced on 1 September 2004. This Regulation replaces the *Home Building Regulation 1997* which was repealed on 1 September 2004 by section 10(2) of the *Subordinate Legislation Act 1989*.

Part 2 of the Regulation provides definitions for the purposes of the *Home Building Act* (the Act). Clause 5 of the Regulation provides an extensive list of definitions of “dwelling” as applied in section 3(1) of the Act.

Part 6 of the Regulation provides for the resolution of building disputes and building claims. Clause 78 of the Regulation provides that a warning order is to be placed on Tribunal orders made under Part 3A of the Act. The warning order is to be displayed in the following format:

You must notify the Office of Fair Trading’s Home Building Service in writing when you have complied with this order (for example, when you have done the work or paid the money).

If you do not notify the Home Building Service, your public record will show that you have failed to comply with the order and you may be unable to renew your licence when it expires.

You can be fined up to \$22,000 if you falsely claim you have complied with this order.

The Consumer, Trader and Tenancy Tribunal Bulletin is published by the Consumer, Trader and Tenancy Tribunal of New South Wales. Every effort is made to ensure that information in the Bulletin is accurate. The Consumer, Trader and Tenancy Tribunal Bulletin is intended to inform and it cannot be regarded as a substitute for legal advice. Copies are available on the website at [www.cttt.nsw.gov.au](http://www.cttt.nsw.gov.au) and from the registries of the Consumer, Trader and Tenancy Tribunal.