CITATION:	*Hunter v Nursing and Midwifery Board of Australia* [2017] NTSC 64
PARTIES:	HUNTER, Keith Bunda v NURSING AND MIDWIFERY BOARD OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM NORTHERN TERRITORY CIVIL AND ADMINISTRATIVE TRIBUNAL EXERCISING TERRITORY JURISDICTION
FILE NO:	21711110
DELIVERED ON:	17 August 2017
DELIVERED AT:	DARWIN
HEARING DATES:	16 May 2017
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

COSTS – Indemnity costs – Principles regarding award of indemnity costs – Little prospect of successfully defending one ground of appeal – Delay by respondent in making an offer to settle – Respondent to pay indemnity costs from 10 May 2017 – Respondent to pay earlier costs on the standard basis.

PRACTICE AND PROCEDURE – appeal from decision of NTCAT – circumstances in which consent orders may be made – appeal allowed by consent.

PRACTICE AND PROCEDURE – leave to appeal – time for filing application – application to dispense with compliance – order made.

Health Practitioner Regulation National Law (NT) ss 171, 172, 173, 174, 175, 176, 178
Northern Territory Civil and Administrative Tribunal Act (NT) ss 45, 46, 141
Supreme Court Act (NT) s 20
Supreme Court Rules (NT) r 83.22

BAE Systems Australia Ltd v Rothwell [2013] NTCA 3; *Bernadt v Medical Board of Australia* [2013] WASCA 259; *Citigroup Pty Ltd v Mason* (2008) 171 FCR 96; *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 36 FCR 225; *Coppa v Medical Board of Australia* (2014) 34 NTLR 74; *George v Rockett* (1990) 170 CLR 104; *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; *Kapser v Psychology Board of Australia [No 2]* [2015] NTCAT 179; *Keith Bunda Hunter v Nursing and Midwifery Board of Australia* [2017] NTCAT 109; *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337; *Politis v Trewin* (2011) 30 NTLR 1; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Telstra Corporation Ltd v Minister for Broadband, Communications and the Digital Economy* (2008) 166 FCR 64; referred to.

REPRESENTATION:

Counsel:

Appellant:	A. Moses SC; D. Mahendra
Respondent:	I. Freckelton QC; G. McMaster

Solicitors:

Appellant:	MSP Legal
Respondent:	Australian Health Practitioner Regulation Agency

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Hunter v Nursing and Midwifery Board of Australia
[2017] NTSC 64
No. 21711110

BETWEEN:

KEITH BUNDA HUNTER
Appellant

AND:

NURSING AND MIDWIFERY BOARD OF AUSTRALIA
Respondent

CORAM: BLOKLAND J

REASONS FOR ALLOWING CONSENT ORDERS ON APPEAL AND DECISION ON COSTS

(Delivered 17 August 2017)

Background

[1] On 16 May 2017 the applicant/appellant (the appellant) was granted leave to appeal a decision of the Northern Territory Civil and Administrative Appeal Tribunal (NTCAT) delivered on 16 February 2017. The appeal was allowed and the NTCAT decision was set aside. Further, the Court declared the relevant antecedent decision of the respondent Nursing and Midwifery Board of Australia (the Board) to impose conditions on the appellant's registration

to practise as a nurse was invalid and ordered the decision be set aside. The question of costs was reserved.

[2] The brief procedural history is that in July 2016, after a performance assessment, the Board imposed conditions on the appellant's registration to practise as a nurse. He appealed the Board's decision to NTCAT. NTCAT upheld the decision of the Board. On appeal to this Court, the parties sought to have the appeal allowed by consent. Given the argument on costs, some consideration of the questions raised in the appeal is required.

The questions of law raised

[3] Prior to the appeal being settled, it was anticipated the principal questions of law to be considered were whether NTCAT erred as a matter of law by failing to take into account a relevant consideration, namely the illegality or invalidity of the performance assessment, by determining that illegality or invalidity was of no or limited relevance in the exercise of its functions. Further, whether NTCAT erred as a matter of law by taking into account an irrelevant consideration by relying on the performance assessment report when making its decision, in circumstances where the performance assessment report was invalid or contrary to law. More generally, whether the NTCAT decision was legally unreasonable because it relied on a performance assessment report that was invalid or contrary to law. Finally, whether NTCAT erred by finding as a matter of jurisdictional fact the Board had a "reasonable belief" in the terms required by s 178 of the *Health*

Practitioner Regulation National Law (NT) (the National Law) that the way the appellant practised the health profession is or may be unsatisfactory, given the asserted invalidity of the performance report said to support the finding of the jurisdictional fact.

[4] In the alternative, the appellant anticipated arguing jurisdictional error on the proposed ground that the respondent Board's decision was made without jurisdiction due to its failure to comply with the National Law. Accordingly, it was to be argued the Board's decision was made without lawful jurisdiction.

[5] The more particular arguments to be put by the appellant were a suggested failure by the Board to satisfy the requirements of s 171 of the National Law that provides for an assessor to be appointed by the National Agency and chosen by the Board to carry out the assessment. The appointed assessor must be a registered health practitioner and the National Law allows the registered health practitioner to obtain assistance from another health practitioner when conducting assessments. In this instance, the appellant raised the issue that two assessors carried out the assessment and a total of four assessors were ultimately engaged with the assessment. One was not a registered health practitioner. Further, it was to be argued that the Board did not satisfy s 172 of the National Law as it failed to identify two assessors it had purported to appoint to carry out the assessment and had failed to provide the applicant with written notice in accordance with s 173 of the National Law. Finally, as mentioned, it was to be argued that the Board fell

into jurisdictional error as the Board did not possess the requisite "reasonable belief" under s 178(1)(a)(i) of the National Law that the appellant's practice is or may be unsatisfactory in the circumstances.

[6] Before the consent resolution of the appeal, it was anticipated the Board would argue, *inter alia*, NTCAT was correct to apply *Kapser v Psychology Board of Australia [No 2]*[1] to conclude that in the context of a merits review, the issue is the factors that constitute the "the correct or preferable decision" as set out in s 46(1) of the *Northern Territory Civil and Administrative Tribunal Act* (NT). Section 46(1) was described as the objective of the review jurisdiction. It was to be contended NTCAT had taken the correct approach by not embarking upon an analysis of the circumstances that lay behind being seized of the review.

[7] Further, the Board would argue that NTCAT was correct to find the role of the additional persons who conducted the assessment "would not be likely, and did not, affect the outcome of the performance assessment";[2] that the finding was reasonably open as a finding of fact; and that it was reasonable and open to the assessor to draw upon the assistance of others for the conduct of the assessment. The Board was to argue the requirements of s 176 of the National Law were satisfied and that NTCAT was correct to find this was so.

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1 [2015] NTCAT 179 at [16].
2 *Keith Bunda Hunter v Nursing and Midwifery Board of Australia* [2017] NTCAT 109 at [42].

[8] As indicated, on the morning of the hearing, senior counsel for both parties advised the Court that the matter had resolved in a particular way and the Court was asked to make consent orders allowing the appeal.

Application of principles on consent orders allowing appeals

[9] The Court's jurisdiction to conduct an appeal from NTCAT is governed by s 141 of the *Northern Territory Civil and Administrative Tribunal Act*. Appeals from NTCAT are confined to questions of law and a party may only appeal with the leave of the Court. In terms of the application for judicial review to determine the question of jurisdictional error, the Court has power to make orders "in such terms as it thinks fit and to issue, or direct the issue of, writs in such terms as it thinks fit".[3]

[10] If satisfied that jurisdiction is properly enlivened and that an error of the type contended is arguable, the relevant authorities confirm consent orders may be made. The principle of judicial restraint with respect to settlement by parties to litigation underpins the approach to be taken. I was referred to relevant Federal Court authorities. There is no reason or distinguishing feature that would suggest those principles should not apply in this instance. In *Telstra Corporation Ltd v Minister for Broadband, Communications and the Digital Economy* it was said:[4]

> The above observations do not mean that the Court is relieved of the obligation to ensure that a proposed consent order is both within

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3 *Supreme Court Act (NT)* s 20.

4 [2008] FCAFC 7; 166 FCR 64 at [47], per French, Weinberg and Greenwood JJ.

> power and appropriate. There is long established authority that the Court cannot be given power, by consent of the parties, to make an order that it would not have the power to make without their consent: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163. That limitation and the requirement that the order be 'appropriate' do not mandate close scrutiny of the merits of the proposed order by the Court. There is a principle of judicial restraint in the scrutiny of settlements between legally represented parties of full capacity which applies to consent orders: *Australian Competition and Consumer Commission v Real Estate Institute (WA) Inc* (1999) 161 ALR 79.

[11] In relation to the character of the power conferred by s 24 of the *Federal Court of Australia Act* 1976 (Cth) in *Citigroup Pty Ltd v Mason*[5] the Full Federal Court stated:

> The appellate jurisdiction of the Federal Court is conferred by s 24 of the *Federal Court of Australia Act 1976* (Cth). Subsection (1) confers jurisdiction to "hear and determine" a range of appeals. We have little doubt that the observations in the joint judgment in *Allesch v Maunz* 203 CLR 172 quoted earlier were directed, and only directed, to the exercise of adjudicative powers in an appellate jurisdiction. That is, they were directed to the powers of a Full Court when hearing and determining a contested appeal, which might involve the reception of further evidence, leading to the exercise of the powers to vary or revoke orders made by the primary judge.
>
> We also have little doubt that those observations were not directed to a power to make a consent order, namely a power of the type exercisable under s 25(2B)(b) by a single judge or a Full Court. Such a consent order is, in the words of the Act, made to dispose of an appeal. It does not involve, other than in the loosest sense, a determination of the appeal and certainly does not involve the determination of the appeal after a contested hearing. The fact that a consent order can be made by a single judge militates, in our opinion, against the conclusion that, as a matter of construction, the power to make the order can only be exercised if the Court, in exercising appellate jurisdiction, is satisfied there is error on the part of the judge whose judgment is the subject of appeal (often, in practice, a single judge of the Federal Court).

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5 [2008] FCAFC 151; 171 FCR 96 at [10] and [11].

[12] I was satisfied jurisdiction was properly enlivened with respect to ordering the appeal be allowed in these circumstances and to grant declatory relief. In my view, the parties identified arguable appellable errors, however, the NTCAT decision was set aside by consent.

Arguable errors identified by the parties

[13] Arguable errors of the character sufficient to allow the appeal by consent include the failure of NTCAT to take into account the illegality or invalidity of the performance assessment or determining it was of limited relevance to the exercise of its functions; alternatively its reliance on an irrelevant consideration, being an invalid or unlawful performance assessment report.

[14] The character of reviews and the function of NTCAT are set out in s 45 and s 46(1) of the *Northern Territory Civil and Administrative Tribunal Act*:

> **45 Rehearing**
>
> The Tribunal must review a reviewable decision by way of rehearing.
>
> **46 Proceeding for review of reviewable decision**
>
> (1) The objective of the Tribunal exercising its review jurisdiction is to produce the correct or preferable decision.

[15] NTCAT dealt with the question of invalidity or unlawfulness of the performance assessment as follows (citations removed):[6]

Assessment Report's "Validity"

[36] The second criticism was that the performance assessment was conducted in a way which breached of the National Law, making the Respondent's decision, being based on the assessment, invalid.

[37] The Applicant's criticisms of the performance assessment were the following:

a) 4 people conducted the performance assessment where section 171 provides for only one assessor to be appointed;

b) The assessment was held a day earlier than the date notified under section 173; and

c) The Board failed to discuss the report, and failed to see if the Applicant would alter his practices, pursuant to section 176.

[38] The Applicant submitted that the effect of the above "rendered the Board's decisions ... invalid" but the *validity* or *legality* of the Respondent's decision is not the issue for the Tribunal. As stated in the introduction, this Tribunal is bound by *NTCAT Act* where section 46 requires us to consider the evidence and produce "the correct and preferable decision".

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6 *Hunter v Nursing and Midwifery Board of Australia* [2017] NTCAT 109 [36]-[41].

[39] The Applicant cited extensive extracts of *Project Blue Sky v ABA* but this law relates to declaratory relief and the lawfulness of actions. *Project Blue Sky* has no bearing on what is the correct and preferable decision, and only limited relevance to the issue of the evidentiary weight to be given to the performance assessment findings.

[40] A similar comment was made by Bruxner SM *in Kapser v Psychology Board of Australia [No. 2]* [2015] NTCAT 179 at [16]:

> "The types of errors identified may well have been relevant in the context of an application to a Court for judicial review of the Board's decision, but they are of no direct significance upon a merits review by NTCAT, where the question is what is the 'correct or preferable' decision".

[41] It is therefore not necessary to consider submissions about the *legality* or *validity* of the conduct of the performance assessment. However, that is not to say this is an entirely irrelevant issue. If the performance assessment was conducted unfairly the outcome of the assessment may be unreliable and perhaps given less weight. This was not the submission of the Applicant, possibly because s 53 of the *NTCAT Act* provides that the Tribunal is not bound by the rules of evidence. Nevertheless, the reliability of the report findings is relevant and the complaints as to the performance assessment are addressed next.

[16] In respect of the question of the legality or validity of the performance assessment, as has been noted above, the Board had previously submitted NTCAT were correct to conclude that a merits review required consideration only of what constituted the correct or preferable decision rather than embarking upon an analysis of the antecedent circumstances resulting in NTCAT being seized of the matter.

[17] To similar effect the Board previously maintained:

> "[t]he jurisdictional fact submissions of the Applicant wrongly contend that the issue of the Board's beliefs is in the province of review by NTCAT".

[18] NTCAT had similarly concluded: "It is therefore not necessary to consider submissions about the *legality* or *validity* of the performance assessment".[7]

[19] This passage, and the submissions in support of it, appear to suggest that when reviewing a decision, NTCAT reviews only the merits of the decision, but not jurisdictional questions such as whether the original decision maker had the power to make the decision. Section 46(1) requires the Tribunal to produce "the correct" decision. Consequently, if the decision reviewed by NTCAT was a decision the original decision-maker had no power to make, the only "correct" decision is to set aside the original decision made without power. This analysis, as pointed out on behalf of the appellant finds support in the observations of Rares J when his Honour was commenting on the

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7 *Hunter v Nursing and Midwifery Board of Australia* [2017] NTCAT 109 at [41].

similarly constituted Administrative Appeals Tribunal in *Martinez v Minister for Immigration and Citizenship*:[8]

> "The only correct and preferable decision which the tribunal could have made at the time it acted was to set aside the decision under review, because there was no power to make it in the first place".

[20] If there was no power for a performance assessment to be conducted by four individuals, it must be seriously arguable that it was necessary for NTCAT to consider the jurisdictional question raised by the appellant in order to reach the "correct" decision. A number of issues were raised as to whether there had been compliance with the National Law. In effect, there is a real question about whether the extra purported assessors were assisting the assessor lawfully under the National Law, or whether they operated as assessors without authority under the National Law. The Court was told the assessment report was signed off by the appointed assessor but stated: "It is the agreed opinion of the four assessors". The powers conferred by ss 171-176 of the National Law are subject to prescribed conditions. Section 171 of the National Law did not authorise an assessment by four persons. As was said in *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal*:[9]

> "Where Parliament has created a body constituted in a particular way, that body can only function in that way".

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8 [2009] FCA 528; 177 FCR 337 at [4] and [23].
9 (1986) 7 NSWLR 503 at 513, per Kirby P and Hope JA.

[21] A similar situation arose in *Politis v Trewin*[10] concerning the constitution of a Promotions Appeal Board under the *Public Sector Employment and Management Act* (NT) requiring an objective assessment to determine whether a person present who was not a member of the Promotions Appeal Board was engaged in an unauthorised collective decision. The proceedings and decision of the Promotions Appeal Board were declared invalid.

[22] There may have been some confusion at an earlier time as to the role played by particular persons in the professional assessment. Previously, the Board's arguments rested on the observation by NTCAT that under s 171 of the National Law, provision is made for an assessor (who is a registered practitioner) to conduct a performance assessment and that the assessor can "ask another health practitioner to assist" the assessor in carrying out the assessment.[11] NTCAT found that the role of two of the additional persons, one whom was not a registered practitioner, to facilitate video recording and for cross-cultural or security reasons, "would not be likely, and did not, affect the outcome of the performance assessment".[12] It was to be argued this did not constitute any form of legal error and arose as a result of the overall assessment of the conduct of the performance assessment. However, the validity of the assessment process is genuinely called into question given the involvement of the additional persons in its conduct.

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10 [2011] NTSC 78; 30 NTLR 1.
11 *Hunter v Nursing and Midwifery Board of Australia* [2017] NTCAT 109 at [42].
12 Ibid.

[23] The Board previously argued there had been "substantial compliance" with s 171(3) of the National Law, however as pointed out on behalf of the appellant in these proceedings, the doctrine of "substantial compliance" was specifically rejected in *Project Blue Sky Inc v Australian Broadcasting Authority*.[13]

[24] In any event, on behalf of the Board, consent was indicated to allowing the appeal. So far as can be ascertained on the materials available, it was strongly arguable the assessment process was invalid and that NTCAT fell into error by not examining the same.

[25] A further point that arguably had the capacity to be resolved in favour of the appellant is the question of the existence of a "reasonable belief" as a jurisdictional fact that must exist in order to enliven the power in s 170 of the National Law to require a practitioner to participate in a performance assessment. The Board must be satisfied of certain matters before requiring a practitioner to participate in a performance assessment. That satisfaction is a condition precedent to requiring the performance assessment and is a jurisdictional fact or a necessary criterion upon which the exercise of the power rests.[14]

[26] Given the potentially adverse consequences to a health practitioner, it is unsurprising the legislation requires the Board to possess the required

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13 [1998] HCA 28; 194 CLR 355 at 388-390 per McHugh, Gummow, Kirby and Hayne JJ.

14 See *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 at [183] per Gummow and Hayne JJ.

"reasonable belief" before the practitioner is required to participate in a performance assessment.

[27] NTCAT relied on the reasoning of Barr J in *Coppa v Medical Board of Australia*[15] to reject the contention that the jurisdictional fact had not been met. In *Coppa*, his Honour rejected an argument that the Medical Board "should have conducted 'some level of fact finding in order to determine whether or not the allegations had at least some substance', before requiring the plaintiff to undergo a health assessment".[16] The appellant here contended NTCAT misapplied Barr J in *Coppa*, as it failed to have regard to the evaluative process of the evidence that was undertaken by his Honour. It was not suggested the Board was required to go through a fact finding process, but rather it was required to evaluate the entirety of the material before commencing the process.

[28] On behalf of the Board there was to be argument that it would have been inappropriate for NTCAT to review the beliefs of the Board, in the absence of any indication that the Board did other than consider bona fide the information that was before it. The Board contended NTCAT's reasoning was consistent with Barr J in *Coppa v Medical Board of Australia*.[17]

[29] In my view there is some force in both submissions on the *Coppa* point. Clearly NTCAT were not required to enter into a fact finding process about

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15 [2014] NTSC 48; 34 NTLR 74.
16 Ibid at [58].
17 Ibid at [52]-[58].

the Board's belief, but the Board was required to make an evaluation of the material it had in its possession. NTCAT were required to consider the evaluation, but not enter into fact finding. Significantly, at the conclusion of a discussion of "reasonable grounds" in *George v Rockett*[18] the High Court said:

> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given or more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to summarise or conjecture.

[30] Any evaluation of material towards the establishment of reasonable grounds must be based on objective circumstances. In *Bernadt v The Medical Board of Australia*[19] it was said:

> That being so, the fact or facts directly in issue concerning a practitioner's conduct, performance or health do not have to be proven on the balance of probabilities: *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104. However, there must be proven objective circumstances sufficient to justify the belief.

[31] The evaluation process is to be tempered by the context that it is merely part of an investigative process, not in itself leading to a substantive adverse finding that would attract the rules of natural justice.[20] In any event it is not suggested the rules of natural justice apply. An evaluation of the available

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18 [1990] HCA 26; 170 CLR 104 at 116.
19 [2013] WASCA 259 at [66].
20 *Coppa v Medical Board of Australia* (2014) 34 NTLR 74 at [59] per Barr J.

material is entirely appropriate on review. The order allowing the appeal is, however, made by consent. This too was an arguable point, although not of the same strength as the question raised by the engagement of four assessors.

Dispensing with the time in which to file the application for leave

[32] As leave to appeal is required pursuant to s 141(2) of the *Northern Territory Civil and Administrative Tribunal Act*, an order was sought to dispense with compliance with the seven day period stipulated in *Supreme Court Rules* (NT) r83.23(2). In my view there was understandable confusion in relation to the time period within which to file the application. The delay was not at all significant. These circumstances were well explained by the appellant's solicitor in her affidavit of 20 May 2017 and were not attributable to the conduct of the appellant. The appeal had merit and it would have been unjust not to dispense with compliance. The relevant order was made dispensing with compliance.

Costs

[33] The appellant seeks indemnity costs for the following reasons:

(i) The appellant had indicated on 26 May 2016 that he was willing to be reassessed.

(ii) The appellant contended the Board did not have jurisdiction to require him to undertake an assessment by more than one assessor; that this should not have been opposed as it is contrary to the plain reading of s 171(3) of the National Health Law.

(iii) The respondent for the first time put forward a without prejudice offer at 4:40pm on Friday 12 May 2017 and the matter was only the subject of agreement on the morning of the hearing, 16 May 2017. The appellant points out this has led to substantial costs being incurred which could have been avoided. No explanation has been provided for the late concession being made by the Board.

[34] Senior counsel for the Board agreed costs should be ordered but on the usual basis; that this was not an appropriate case for an order of indemnity costs. It was argued the position of the number of assessors and their status was not straight forward. There was arguably room to consider that their presence was in the nature of facilitating security, dealing with cultural issues, communication and logistics; and that with respect to two of the persons appointed, one was a principal assessor and one was a secondary assessor. In short, it was submitted the position was not always clear cut given the possibility to obtain assistance and to assist with other matters including communication.

[35] Ultimately the Court was told that the Board made a pragmatic decision to settle the appeal.

[36] Reference was made to the costs aspects of *BAE Systems Australia Ltd v Rothwell,*[21] a Work Health case subject to the *Work Health Act* that has specific cost and efficiency incentives within the Act to encourage early resolution of worker's claims.

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21 [2013] NTCA 3.

[37] In *BAE Systems Australia Ltd v Rothwell*, Riley CJ confirmed that for costs to be taxed on an indemnity basis there must be some special or unusual feature in the case. His Honour reviewed the authorities relevant to the exercise of the discretion including Sheppard J in *Colgate-Palmolive Company v Cussons Pty Ltd*[22] where it was confirmed that the awarding of costs is in the discretion of the Court, but the discretion must be exercised judicially. Indemnity costs may be awarded in a variety of circumstances. The categories in which such orders may be made are not closed or rigid. Riley CJ highlighted examples of circumstances where costs may be ordered on an indemnity basis.[23] Those examples included where a party has pursued a matter which, on proper consideration, should have been seen to be a hopeless case.[24] A further example mentioned was where there was undue prolongation of the case by groundless contentions.[25]

[38] Mildren J in *BAE Systems Australia Ltd v Rothwell*[26] emphasised the discretionary nature of the decision whether or not to order taxation on the basis of indemnity costs. His Honour said "the exercise of the discretion to order costs over and above the ordinary is exceptional, usually reserved for cases where the losing party has been engaged in unmeritorious, or deliberate or high-handed or other improper conduct, such as to warrant the

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22 [1993] FCA 801; 46 FCR 225 at 231-4.
23 *BAE Systems Australia Ltd v Rothwell* [2013] NTCA 3 at [26].
24 *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 at 231, quoting French J in *J-Corp Pty Ltd v The Australian Builders Labourers Federation Union of Workers [No. 2]* (1993) 46 IR 301, 303.
25 *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 at 231-2, quoting Davies J in *Ragata Development Pty Ltd v Westpac Banking Corporation* (Unreported, Federal Court of Australia, 5 March 1993)
26 [2013] NTCA 3 at [85].

Court showing its disapproval and, at the same time, preventing the successful party being left out of pocket".

[39] In *Colgate-Palmolive Company v Cussons Pty Ltd*[27] Shepherd J gave the following examples that may warrant the exercise of the discretion:

> "Notwithstanding the fact that that is so, it is useful to note some of the circumstances which have been thought to warrant the exercise of the discretion. I instance the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud (both referred to by Woodward J in *Fountain* and also by Gummow J in *Thors v Weekes* (1989) 92 ALR 131 at 152; evidence of particular misconduct that causes loss of time to the Court and to other parties (French J in *Tetijo*); the fact that the proceedings were commenced or continued for some ulterior motive (Davies J in *Ragata*) or in wilful disregard of known facts or clearly established law (Woodward J in *Fountain* and French J in *J-Corp* (supra)); the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions (Davies J in *Ragata*); an imprudent refusal of an offer to compromise (eg *Messiter v Hutchinson* (1987) 10 NSWLR 525; *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 at 724 (Court of Appeal); *Crisp v Keng* (unreported, Court of Appeal, NSW, Kirby P, Priestley JA, Cripps JA, No 40744/1992, 27 September 1993) and an award of costs on an indemnity basis against a contemnor (eg Megarry V-C in *EMI Records* (supra)). Other categories of cases are to be found in the reports. Yet others to arise in the future will have different features about them which may justify an order for costs on the indemnity basis. The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party and party basis.

[40] The Board's conduct at the actual hearing of this matter was laudable. In circumstances that involved the appellant's reputation, professional standing and employment it was commendable on the part of the Board to take a pragmatic decision and consent to the appeal being allowed. However, the

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[27] (1993) 46 FCR 225 at 233-234.

compromise came very late in all of the circumstances. It was not disputed that the appellant had agreed to be reassessed as early as May 2016. That factor and the belated decision to consent to the appeal does require consideration of the discretion to order indemnity costs.

[41] While it is to be expected that the Board would support NTCAT's decision that was favourable to it, it is difficult to see how that position was justified after receiving and having time to properly consider the appellant's submissions on appeal. The submissions regarding the validity of the assessment, given the number of purported assessors and the authorities relevant to the issue of the meaning of a "correct decision" must have been compelling. It is appreciated that there may have been a "grey area" around the role undertaken by each of the "assessors", however once faced with the relevant authorities, it is difficult to understand why an offer to settle the matter was not made earlier. Notwithstanding the hearing of the appeal was significantly abbreviated due to the Board's consent, a substantial amount of costs could have been avoided, if after a reasonable time to reflect on the appellant's submissions, the Board had advised the appellant of its pragmatic view at an earlier time.

[42] On the material available to me in this matter which has not involved a full determination of the merits, I have come to the conclusion that at least one of the initial grounds had little or no prospect of being successfully defended. That is, the invalid assessment process by virtue of the number of "assessors" and the failure to regard that matter as relevant to the question

of the correct decision. Other grounds may not be as clear. In those circumstances, and given the Board's view disclosed to the appellant very close to the date of the hearing, there is no real explanation as to why relevant concessions were not made at the time the Board filed its submissions. The Board's submissions were filed on 10 May 2017. By that time, the Board was in the position to have considered the compelling submissions made on behalf of the appellant. Although I do not agree with the appellant that indemnity costs should be awarded over the life of the litigation, given the Board should have become cognizant of its lack of prospects of success after considering the appellant's submissions on appeal, in the exercise of the discretion I will depart from the usual position and award costs on an indemnity basis from 10 May 2017. The Board must have realised its poor prospects but continued to defend the matter. All other costs will be on the ordinary basis.

Costs Orders

[43] The Board is to pay the appellant's costs of the proceedings below in the NTCAT on the standard basis.

[44] The Board is to pay the appellant's costs of the appeal on the standard basis up to 10 May 2017 and on an indemnity basis thereafter.

[45] The matter is certified fit for two counsel, one being senior counsel.

[46] In default of agreement, costs are to be taxed.