JFT v Alcohol Mandatory Treatment Tribunal of the Northern Territory
[2015] NTSC 72

PARTIES:	JFT v ALCOHOL MANDATORY TREATMENT TRIBUNAL OF THE NORTHERN TERRITORY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LA 4 of 2015
DELIVERED:	26 October 2015
HEARING DATES:	17 and 22 April 2015
JUDGMENT OF:	BARR J

CATCHWORDS:

APPEALS – Appeal from Local Court – original appeal to Local Court against decision of the Alcohol Mandatory Treatment Tribunal – appeal on a question of law only – error of law must be sufficient to vitiate the decision – Tribunal made no vitiating errors of law which Local Court failed to correct – Local Court otherwise made no vitiating errors of law – appeal dismissed.

STATUTORY INTERPRETATION – Appeal "in relation to a question of law only" – appellant contends that words "in relation to" evidence legislative intention to allow appellant to raise issues of fact, or mixed fact and law – held, appeal limited to questions of law.

EVIDENCE – Appeal from Local Court – original appeal to Local Court against decision of the Alcohol Mandatory Treatment Tribunal Mandatory residential treatment order – appellant contends no evidence to satisfy criteria contained in s 10 *Alcohol Mandatory Treatment Act* – s 10(c), 'capacity' not 'cognitive impairment' as defined in the *Mental Health and Related Services Act*, but rather ability to make appropriate decisions about alcohol use or personal welfare – s 10(e), Tribunal entitled to consider overall effect of the residential treatment order, including enforced abstinence, and not only the treatment program – sufficient evidence before the respondent to satisfy the criteria contained in s 10(c), (e) and (f) of the Act.

EVIDENCE – Pursuant to s 49(2)(b) *Alcohol Mandatory Treatment Act*, three month statutory maximum operative period for mandatory residential treatment orders – appellant contends order for maximum period not supported by evidence – period of the order discretionary, in line with objects and principles of the Act – no error of law.

STATUTORY INTERPRETATION – Appeal from Local Court – original appeal to Local Court against decision of the Alcohol Mandatory Treatment Tribunal – pursuant to s 33 of the Act, the Tribunal 'may' order mandatory treatment – Tribunal need not expressly refer to the existence of a discretion as to whether to order a mandatory treatment order – Tribunal remarks evidence consideration of the option of releasing the appellant – no error of law.

APPEALS – Appeal from Local Court – original appeal to Local Court against decision of the Alcohol Mandatory Treatment Tribunal – senior assessment clinician's assessment report failed to comply with criteria as set out in s 22(3)(c) of the Act – magistrate fell into error – deficient compliance with s 22(3)(c) cannot be made good by the senior treatment clinician's treatment plan pursuant to s 56(2) – non-compliance resulted in evidentiary deficiency which could be made good by evidence and submissions at the hearing – no resulting denial of natural justice or procedural fairness before the Tribunal.

Alcohol Mandatory Treatment Act s 8(1)(a), s 9(1), s 10, s 12, s 14, s 17, s 19(2), s 20(b), s 22, s 33(a), s 49(2)(b), s 51(1)(2) and s 56(2).
Local Court Act s 19.
Mental Health and Related Services Act s 6A.
Police Administration Act s 128(1).

Debates, 12th Assembly, 1st Session, 27 June 2013, at 54/84.
Pearce and Geddes *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th Ed, 2014).

Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and Ors (1997) 115 NTR 25; *Ashley v Millar* [2015] NTSC 63; *Prior v Mole* [2015] NTSC 65; *Collector of Customs v Pozzolanic* (1993) 43 FCR 280; *Craig v South Australia* (1994-1995) 184 CLR 163; *Development Consent Authority v Phelps* (2010) 27 NTLR 174, [2010] NTCA 3; *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353; *Wilson v Lowery* (1993) 4 NTLR 79, referred to.

Krew v Commissioner of Taxation for the Commonwealth 71 ATC 4213; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* (1988) 82 ALR 175; *Ruhamah Property Co Ltd v Federal Commissioner of Taxation* (1928) 41 CLR 148; *XCO Pty Ltd v Federal Commissioner of Taxation* (1971) 124 CLR 343, followed.

Colby Corporation Pty Ltd v Federal Commissioner of Taxation (2008) 165 FCR 133, not followed.

REPRESENTATION:

Counsel:

Appellant:	N Aughterson
Respondent:	T Moses

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	Bar1515
Number of pages:	44

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

JFT v Alcohol Mandatory Treatment Tribunal of the Northern Territory
[2015] NTSC 72
No. LA 4 of 2015

BETWEEN:

JFT
Appellant

AND:

ALCOHOL MANDATORY TREATMENT TRIBUNAL OF THE NORTHERN TERRITORY
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 26 October 2015)

[1] This is an appeal from the Local Court exercising appellate jurisdiction pursuant to s 51(2) *Alcohol Mandatory Treatment Act* in an appeal from the Alcohol Mandatory Treatment Tribunal. The appeal from the Local Court to this Court is pursuant to s 19 *Local Court Act*.

[2] On 20 January 2015 the respondent tribunal ("the Tribunal") made a mandatory residential treatment order in relation to the appellant for the statutory maximum period of three months.[1] The Tribunal also made a

[1] *Alcohol Mandatory Treatment Act* s 33(a) and s 49(2)(b).

12 month income management order.[2] The orders were made after a hearing under Pt 6 of the Act.

[3] An appeal to the Local Court was heard on 23 March 2015 and an order dismissing the appeal was made on 24 March 2015. The critical question before this Court, in considering an appeal from a decision of the Local Court, is whether the Local Court erred in law. It is not whether the Tribunal erred in law.[3] However, if the Tribunal made an error of law which vitiated the decision appealed from and which was not corrected on appeal to the Local Court, when it should have been, that would amount to an error of law by the Local Court. The grounds of appeal, set out in [4] below, generally assert error on the part of the Local Court in failing to find error on the part of the Tribunal. For that reason, it will be necessary to examine the proceedings before the Tribunal: the evidence, submissions, orders made, and the reasons for those orders, to determine whether the Tribunal erred.

[4] The grounds of appeal to the Supreme Court are as follows:

> 1. The learned Magistrate erred in failing to find that there was no evidence or no sufficient evidence before the Respondent to satisfy the criteria contained in s 10(c), (e) and (f) of the *Alcohol Mandatory Treatment Act* (the Act).
>
> 2. The learned Magistrate erred in failing to find that there was no evidence or no sufficient evidence to enable the Respondent to be satisfied that an order for the maximum period of 3 months or for any specified period was warranted.

[2] *Alcohol Mandatory Treatment Act* s 50(1) & (2).
[3] See, for example, *Development Consent Authority v Phelps* (2010) 27 NTLR 174; [2010] NTCA 3 at [10].

3. The learned Magistrate erred in finding the Respondent had considered whether it had a discretion, or had in fact exercised its discretion, under s 33 of the Act.

4. The learned Magistrate erred in failing to find that the Respondent took into account irrelevant considerations in relation to the criteria in s 10 of the Act.

5. The learned Magistrate erred in finding that there had been compliance with s 22(3)(c) of the Act.

Preliminary issue

[5] An appeal from the Local Court to the Supreme Court is permitted only "on a question of law".[4] An appeal from the Tribunal to the Local Court "may be made in relation to a question of law only".[5]

[6] In relation to the appeal from the Tribunal to the Local Court, Counsel for the appellant argues that where the appeal 'relates to' or 'involves' a question of law, the question of law is merely a qualifying condition to ground the appeal. Subject to the qualifying condition being satisfied, the appellant may raise issues of fact, or mixed fact and law, as grounds of appeal.

[7] The appellant's argument relies on *Colby Corporation Pty Ltd v Federal Commissioner of Taxation*,[6] in which Branson and Stone JJ observed as follows, in relation to an appeal to the Federal Court from the Administrative Appeals Tribunal:

[4] *Local Court Act* s 19(1).
[5] *Alcohol Mandatory Treatment Act* s 51(2).
[6] *Colby Corporation Pty Ltd v Federal Commissioner of Taxation* (2008) 165 FCR 133 at [13].

> The right to appeal from a decision of the Tribunal ["on a question of law"] is to be distinguished from a right to appeal "in relation to" a question of law or where the appeal "involves" a question of law. As Gummow J remarked in *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation*,[7] "The existence of a question of law is ... not merely a qualifying condition to ground the appeal, but also the subject matter of the appeal itself".

[8] The learned Judges were emphasising that appeals to the Federal Court from the Administrative Appeals Tribunal are confined to issues of law, because of the use of the limiting words in s 44 of the legislation, "on a question of law". However, with respect, I do not understand the distinction drawn by their Honours between an appeal "on a question of law" and an appeal "in relation to" a question of law. Moreover, I consider that the reference to "where the appeal 'involves' a question of law" requires some clarification.

[9] The extracted comments of Gummow J in *TNT Skypak* were made in the course of an explanation by his Honour of the difference between an appeal under the former s 196 *Income Tax Assessment Act* (Cth) to a Board of Review and an appeal to the Federal Court on a question of law under s 44 *Administrative Appeals Tribunal Act* (Cth).

[10] For a proper understanding of what is meant by references in more recent judgments to an appeal which "involves" a question of law, the starting point is the 1922 amendment to the *Income Tax Assessment Act* (Cth) by the insertion of a subsection enabling the Commissioner or taxpayer to appeal to the High Court from any decision of the administrative Board of Review

[7] (1988) 82 ALR 175 at 178.

which, in the opinion of the High Court, involved a question of law.[8] The relevant criterion was that the decision appealed from had to involve a question of law, not that the ground of appeal involved a question of law. Referring to the amended legislation in *Ruhamah Property Co Ltd v Federal Commissioner of Taxation*,[9] the High Court made the following observation:

> An appeal has now been brought to this Court under s 51(6) of the Act, which provides that a taxpayer may appeal to the High Court from any decision of the Board which in the opinion of the High Court involves a question of law. If some question of law be involved in the decision of the Board we apprehend that the whole decision of the Board, and not merely the question of law, is then open to review. …

[11] In *Krew v Commissioner of Taxation for the Commonwealth*,[10] a case heard by the High Court in its original jurisdiction, Walsh J considered whether or not he could entertain an appeal pursuant to s 196 (2) of the *Income Tax Assessment Act 1936* (Cth), a provision in very similar terms to s 51(6) discussed in the previous paragraph. His Honour said:

> … I have accepted as correct the view that the jurisdiction of this Court under s 196 does not depend upon a decision by it that the board of review has made an error of law which has affected its decision. This is a point on which judicial opinion has not been unanimous, but I think that the view which I should accept is that this Court may, and should, hear an appeal if it is satisfied that a question of law arose for decision by the board and that it does not matter for this purpose whether or not this Court holds that the decision of the board on that question was right or wrong … .[11] As I have reached the conclusion that the appeal is properly before me the

[8] The relevant history of statutory amendment is set out in *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353 at 373.
[9] *Ruhamah Property Company Limited v The Federal Commissioner of Taxation* (1928) 41 CLR 148 at 151.
[10] *Krew v Commissioner of Taxation for the Commonwealth* 71 ATC 4213 at 4215.
[11] Citations omitted: *Federal Commissioner of Taxation v Sagar* (1946) 71 CLR 421 at 423; *Federal Commissioner of Taxation v Shaw* (1950) 80 CLR 1 at 6 - 8; *Fisher v Deputy Commissioner of Taxation* (Cth) (1966) 40 ALJR 328.

> consequence is that the whole decision of the board, and not merely the question of law, is open to review: *Ruhamah Property Co Ltd v Federal Commissioner of Taxation*.[12]

[12] In *XCO Pty Ltd v Federal Commissioner of Taxation*,[13] another case heard by the High Court in its original jurisdiction, Gibbs J observed:

> ... if some question of law be involved, the whole decision of the Board, and not merely the question of law, is open to review ... Moreover it is immaterial for the purposes of jurisdiction whether or not the question of law involved was erroneously decided by the Board ... ; if this were not so the Court might have to determine the substantial issue involved in an appeal from the Board before it could decide whether an appeal lay.

[13] It can be seen from these authorities that the reference by Gummow J in *TNT Skypak*[14] to the old s 196 of the Tax Act providing for appeals from the Board of Review which "involved" a question of law was actually shorthand for appeals from decisions of the Board of Review *which decisions* involved a question of law (not *which appeals* involved a question of law). His Honour made that very clear by his next sentence which read, "The result was that if some question of law was involved, the whole of the decision of the Board was open to review, not merely the question of law."

[14] In my opinion, the jurisprudence in relation to a now-repealed provision, which permitted an appeal from a decision which involved a question of law, is not relevant to and should not be applied in the present case to legislation

[12] (1928) 41 CLR 148 at 151.
[13] (1971) 124 CLR 343 at 348.
[14] (1988) 82 ALR 175 at 178.

which provides that an appeal may be made "in relation to a question of law only".

[15] Counsel for the appellant contends that the legislature could have simply adopted the well-known restrictive condition for an appeal, namely "on a question of law", if that were intended. Counsel contends that the chosen condition, "in relation to a question of law only", indicates a legislative intention to be somewhat more generous in relation to the right of appeal from orders of a Tribunal which may impose significant restrictions on personal liberty, including mandatory residential treatment for a period of up to three months.

[16] I disagree. In my opinion, there is no material difference between the appeal provision in the *Alcohol Mandatory Treatment Act*, and the appeal provisions under the *Local Court Act* (or, for that matter, the *Return to Work Act*[15]) which limit appeals to errors of law, by the use of the words "on a question of law". It is unclear whether the reference by Branson and Stone JJ in *Colby Corporation*, to a right of appeal "in relation to" a question of law, was based on a court's interpretation of a particular statutory appeal provision containing that phrase.[16] However, to the extent that the preface "in relation to" in s 51(2) *Alcohol Mandatory Treatment Act* might suggest that a somewhat loose connection between a ground of appeal

[15] Formerly the *Workers Rehabilitation and Compensation Act.*
[16] Counsel have been unable to refer me to any statutory appeal provisions in those terms.

and a question of law is permissible, the word "only" (at the end of the phrase "may be made in relation to a question of law only") nullifies that.

[17] I therefore conclude that the appeal from the Alcohol Mandatory Treatment Tribunal to the Local Court was limited to questions of law. In this respect, I agree with the conclusion of the learned magistrate in the Local Court.[17] The practical significance of this conclusion is that appeal grounds 1 and 2 can still be argued, to the extent that they assert there was no evidence to support the impugned finding, but not on the basis that there was 'no sufficient evidence'. If there was some evidence to support the finding, there was no error of law.[18]

The legislative scheme

[18] Before considering the grounds of appeal, I will set out and summarise those provisions of the *Alcohol Mandatory Treatment Act* ("the Act") which are relevant to this appeal. This is not intended to be an exhaustive summary of the Act.

[19] A mandatory treatment order may be made in relation to a person if the person meets all the criteria for a mandatory treatment order.[19] The criteria for a mandatory treatment order are set out in s 10 of the Act, which I reproduce below:

> 10 Criteria for a mandatory treatment order

[17] Transcript 24/03/2015 p 56.
[18] *Wilson v Lowery* (1993) 4 NTLR 79 at 84 par (2), par (3) and par (4).
[19] *Alcohol Mandatory Treatment Act* s 9(1).

The following are the criteria for a mandatory treatment order in relation to a person:

(a) the person is an adult;

(b) the person is misusing alcohol;

(c) as a result of the person's alcohol misuse, the person has lost the capacity to make appropriate decisions about his or her alcohol use or personal welfare;

(d) the person's alcohol misuse is a risk to the health, safety or welfare of the person or others (including children and other dependants);

(e) the person would benefit from a mandatory treatment order;

(f) there are no less restrictive interventions reasonably available for dealing with the risk mentioned in paragraph (d).

[20] A mandatory treatment order means either a mandatory residential treatment order or a mandatory community treatment order. This appeal concerns a mandatory residential treatment order. The nature of such an order is described in s 12 of the Act which is reproduced below:

12 Mandatory residential treatment order

A mandatory residential treatment order is an order in relation to a person that:

(a) authorises the admission of the person to, and the detention of the person at, a specified treatment centre; and

(b) requires the person to participate in treatment at the treatment centre; and

(c) bans the person from possessing, consuming or purchasing alcohol.

[21] Under s 128(1) *Police Administration Act*, a person may be taken into protective custody if the person is intoxicated and, inter alia, (1) is unable to adequately care for himself or herself and it is not practicable at that time for the person to be cared for by someone else; or (2) may cause harm to himself or herself or to somebody else.[20] In certain circumstances, a person who is in protective custody must be taken to an assessment facility for an assessment in accordance with the *Alcohol Mandatory Treatment Act*. Such a person is then an "assessable person" for the purposes of the Act.[21] After an assessable person is taken to an assessment facility, a senior assessment clinician must admit the person to the facility and detain the person for the purpose of an assessment.[22] That assessment must be conducted as soon as practicable after the assessable person is able to be properly assessed. Further, it must be conducted not later than 96 hours after the assessable person is admitted to the assessment facility.[23] In carrying out the assessment, the senior assessment clinician must form an opinion as to whether the assessable person is likely to fulfil the criteria for involuntary admission or involuntary treatment or care in the community under the

[20] For a recent discussion of s 128 *Police Administration Act*, see *Ashley v Millar* [2015] NTSC 63 at [5] - [6]; *Prior v Mole* [2015] NTSC 65 at [9] - [13].
[21] *Alcohol Mandatory Treatment Act* s 8(1)(a).
[22] *Alcohol Mandatory Treatment Act* s 14.
[23] *Alcohol Mandatory Treatment Act* s 17(1), s 17(2).

Mental Health Act,[24] or whether the assessable person is likely to meet the criteria specified in s 10 of the Act for a mandatory treatment order.[25]

[22] If the senior assessment clinician is of the opinion that the assessable person is not likely to fulfil the *Mental Health Act* criteria, the clinician must make an application to the Alcohol Mandatory Treatment Tribunal in relation to the assessable person.[26]

[23] The application to the Tribunal must be accompanied by an assessment report.[27] The assessment report must be in the form approved by the CEO and must include the following:[28]

> (a) a statement as to whether, in the senior assessment clinician's opinion, the assessable person meets all the criteria for a mandatory treatment order, and the basis for that opinion;
>
> (b) demographic information about the assessable person, including:
>
> (i) whether he or she is an adult; and
>
> (ii) whether he or she is a member of a particular cultural group; and
>
> (iii) all other information that, in the clinician's opinion, would be relevant to the Tribunal in deciding what order (if any) to make in relation to the person;
>
> (c) if, in the clinician's opinion, the assessable person meets all the criteria for a mandatory treatment order – details of the

[24] *Alcohol Mandatory Treatment Act* s 19(2)(a).
[25] *Alcohol Mandatory Treatment Act* s 19(2)(b).
[26] *Alcohol Mandatory Treatment Act* s 20(b) and s 22(1).
[27] *Alcohol Mandatory Treatment Act* s 22(2).
[28] *Alcohol Mandatory Treatment Act* s 22(3).

> treatment in which, in the clinician's opinion, it would be appropriate and practicable for the assessable person to participate.

[24] The requirement, that the assessment report include an opinion on the part of the senior assessment clinician in relation to the matters referred to in paragraphs (a), (b)(iii) and (c), indicates the legislative intent that the Tribunal should take the opinion on those matters into account as evidence in deciding what order (if any) to make in relation to an assessable person. In the absence of other evidence, the Tribunal would normally be expected to attach considerable weight to: (1) the senior assessment clinician's opinion as to whether the assessable person meets all the criteria for a mandatory treatment order, and the clinician's explanation of the basis for that opinion; and, if all criteria are met, (2) the senior assessment clinician's statement of the details of the treatment in which, in the clinician's opinion, it would be appropriate and practicable for the assessable person to participate.[29]

[25] On my interpretation of s 22(3)(c) of the Act, the senior assessment clinician must specify the details of the treatment proposed for the assessable person and express an opinion that the treatment, as detailed, would be appropriate and practicable for the participation of the assessable person. The sufficiency of the senior assessment clinician's compliance with this requirement is the subject of grounds of appeal 1, 2 and 5, and is discussed below at [36] - [38].

[26] The Tribunal must hear and decide an application made under s 22 of the Act as soon as practicable but not later than 96 hours after receiving the application.[30] Meanwhile, a senior assessment clinician at the facility where the assessable person is detained must ensure that the person continues to be detained following assessment until the person is required to be released from the assessment facility or transferred to a treatment centre in accordance with the Act.[31] In practice, the assessable person would be detained (at least) until the hearing before the Tribunal. Following the hearing, the Tribunal may make a mandatory treatment order if the s 10 criteria for a mandatory treatment order (and another negative condition precedent, not here relevant) are satisfied. Otherwise, the Tribunal must make an order for the person to be released.[32]

Background to the appellant's mandatory treatment order

[27] At the time the appellant was assessed in respect of the s 10 criteria for a mandatory treatment order,[33] he was a 37 year old man, originally from Wadeye, but resident of Darwin for some 15 years. He was living in the long grass, as he had for many years. He did not want to return to his home community because of violence there. He had children in Wadeye, but had not seen them for many years. His first language was Murrinh-Patha, but he

---

[29] *Alcohol Mandatory Treatment Act* s 22(3)(a) and (c).
[30] *Alcohol Mandatory Treatment Act* s 31(1).
[31] *Alcohol Mandatory Treatment Act* s 24.
[32] *Alcohol Mandatory Treatment Act* s 33(a) & (b).
[33] See Assessment Report for Alcohol Mandatory Treatment Tribunal, dated 18 January 2015, part of exhibit "JC-1" to the affidavit of Jared Clow affirmed 16 March 2015. Some parts of the Assessment Report are incorrectly dated '18/01/2014'.

could speak and understand English quite well. He had a long history of alcohol misuse, from the age of 15. At the time he was assessed, he was drinking at least two litres of wine each day (19.5 standard drinks). He would often wake up with his hands and body shaking. He would then consume a morning drink to alleviate those symptoms. He had a history of seizures when withdrawing from alcohol. He was spending his whole day purchasing alcohol, consuming alcohol and recovering from the effects of alcohol intoxication. He had had 39 protective custody apprehensions in the previous 12 months, 20 of those within the previous six months, with high breath alcohol readings. He had previously been subject to a mandatory residential treatment order for three months, from 7 April 2014. However, he had continued to drink heavily after his release.

[28] Not surprisingly, the appellant was assessed to be a person who was misusing alcohol.[34] He therefore satisfied the criteria in s 10(a), being an adult, and s 10(b), misusing alcohol. He also satisfied one of the criteria in s 10(d) of the Act: his alcohol misuse was assessed to constitute a risk to his health, safety and welfare. Reference was made to the risk of harm from falling; alcohol-related seizures; altered conscious state, and the appellant's vulnerability to being assaulted or suffering head trauma at the hands of others. The appellant also had a history of aggression to police when intoxicated. There is no issue on this appeal in relation to the basis for assessment of the criteria in s 10(a), s 10(b) and s 10(d) of the Act.

[34] *Alcohol Mandatory Treatment Act* s 10(b).

However, ground 1 (restricted as explained in [17]) asserts that there was no evidence to satisfy the criteria in s 10(c), s 10(e), and s 10(f) of the Act. In written submissions, counsel for the appellant refers in particular to s 10(e) and s 10(f) and contends that there was no evidence in relation to relevant matters or in relation to the appropriate duration of the order.[35]

Ground 1 – the s 10 criteria

[29] With respect to s 10(c) of the Act, the appellant was assessed as having lost the capacity to make appropriate decisions about his alcohol use and personal welfare, due to his alcohol misuse. Reference was made to the 39 episodes of protective custody in the previous 12 months, due to intoxication, and the fact that the appellant continued to drink in spite of the health and legal implications. Reference was also made to periods of imprisonment for alcohol-related offending. The appellant was said to be "in a harmful cycle of daily excess alcohol consumption". In her assessment of the appellant for alcohol misuse, the senior assessment clinician had written that the appellant "drinks a lot more than he intends". This piece of evidence was available to the Tribunal also in relation to the appellant's capacity to make appropriate decisions about his alcohol use.

[30] Counsel for the appellant contends that the matters referred to did not establish *loss of capacity* on the part of the appellant "to make appropriate decisions about his alcohol use or personal welfare". Counsel contends that,

[35] Appellant's Outline of Submissions par 4.

for s 10(c) to be satisfied, something additional to the criteria in s 10(b) and s 10(d) must exist; in effect, that there would need to be impairment of mental function or mental capacity. Counsel refers to the definition of 'cognitive impairment' in s 6A *Mental Health and Related Services Act*, reproduced below,[36] which includes an intellectual impairment resulting in a substantially reduced capacity in decision-making. Counsel relies on the Explanatory Statement to the Bill for the *Alcohol Mandatory Treatment Act*, and submits that s 10(c) requires an appraisal of whether the appellant's decision-making capacity about his welfare or alcohol use is sufficiently impaired due to his alcohol misuse.[37]

[31] I consider that the loss of capacity in the context "the person has lost the capacity to make appropriate decisions …" does not necessarily mean that the person has impaired mental function or impaired mental capacity in the sense of a 'cognitive impairment' within the meaning of the *Mental Health and Related Services Act*. The "capacity" referred to in s 10(c) *Alcohol Mandatory Treatment Act* is the ability or capability to make appropriate

---

[36] **6A Complex cognitive impairment and related terms**

(1) [*Not relevant*]

(2) A person has a ***cognitive impairment*** if the person has an intellectual impairment, neurological impairment or acquired brain injury (or any combination of these) that:

(a) is, or is likely to be, permanent; and

(b) results in substantially reduced capacity in at least one of the following:

(i) self-care or management;

(ii) decision making or problem solving;

(iii) communication or social functioning.

[37] Appellant's Outline of Submissions par 29.

decisions about alcohol use or personal welfare. For a person to satisfy the s 10(c) criterion, the relevant loss of capacity could be evidenced by dependence on alcohol involving an overwhelming urge to obtain and consume alcohol, or the lack of will power to resist the urge to obtain and consume alcohol. The loss of capacity contemplated by s 10(c) *Alcohol Mandatory Treatment Act* could be as a result of a 'cognitive impairment' as defined in the *Mental Health and Related Services Act* (if such impairment were the result of alcohol misuse), but the loss of capacity need not result from intellectual impairment, neurological impairment or acquired brain injury, and need not be permanent.

[32] My conclusion in the previous paragraph is consistent with the objects of the Act, in particular the object stated in s 3(c) of restoring the capacity of misusers of alcohol to make decisions about their alcohol use and personal welfare by providing for their mandatory assessment, treatment and management. Another relevant object is stated in s 3(b): to improve the social functioning of misusers of alcohol through appropriate therapeutic and other life and work skills interventions.

[33] The evidence before the Tribunal in relation to s 10(c) of the Act is set out in [29] above. The senior assessment clinician also 'spoke to' her written assessment at the Tribunal hearing. In my judgment, there was evidence capable of satisfying the Tribunal that, as a result of his alcohol misuse, the appellant had lost the capacity to make appropriate decisions about his alcohol use or personal welfare. The evidence included statements of fact,

from which inferences could be drawn,[38] and statements of opinion. In relation to inferences, I accept the respondent's submission that evidence that a person is repeatedly not making appropriate decisions is capable of supporting an inference that such a person has lost the capacity to make appropriate decisions.[39] The Appellant has not established that there was no evidence on which the Tribunal could have been satisfied as to the relevant loss of capacity referred to in s 10(c) of the Act.

[34] With respect to s 10(e) of the Act, the requirement that the person would benefit from a mandatory treatment order, the senior assessment clinician responded 'yes' to the relevant question, affirming that the appellant would benefit, and explained the basis for her opinion as follows:

> Mr T would benefit from a period of abstinence from alcohol and the opportunity to participate in a structured rehabilitation program. He would be able to learn to identify his triggers to drink at high levels and ways to effectively deal with these and how to recognise high risk situations and strategies to manage them. A MRTO would provide Mr T with an opportunity to reduce the harm from alcohol, engage with cultural activities and learn new life and coping skills. A MRTO may assist in reconnecting with family and country. Further benefits include improved health and social and emotional well-being. Mr T has completed rehabilitation at DAATS[40] in April 2014 but he relapsed as he returned to the same environment. Relapse is a recognised part of the cycle of change. Further rehabilitation would allow Mr T to build on previous knowledge gained at DAATS. Mr T has stated he would like to stay at DAATS and receive treatment for his alcohol dependence. He has two relatives currently in treatment at DAATS. In the past Mr T participated well in the programs and enjoyed the activities including music. He enjoys playing the guitar

[38] *Wilson v Lowery* (1993) 4 NTLR 79 at 85 refers to primary facts and 'secondary facts', being facts inferred from primary facts.
[39] Respondent's Outline of Submissions par 33.
[40] 'DAATS' is the Darwin Alcohol Assessment and Treatment Service, one of 16 declared treatment providers in the Northern Territory.

and in the past formed a music group with his co-peers during his stay in treatment at DAATS.

[35] It appears that, between the date of assessment on 18 January 2015 and the date of the Tribunal hearing on 20 January 2015, the appellant may have changed his mind about wanting to participate in another mandatory residential treatment program. The appellant's counsel informed the Tribunal, "He's told me that he doesn't want to be here, he doesn't want to participate in treatment … . He was consistent in his instructions that he wouldn't participate".

[36] In purported compliance with s 22(3)(c) of the Act, discussed in [24] - [25] above, the senior assessment clinician proposed a treatment plan for the appellant. Under the side heading "Appropriate treatment for client", she wrote "Mandatory Residential Treatment Order". Under the further heading "Declared treatment providers with available capacity to offer appropriate treatment", she crossed a box to indicate Darwin Alcohol Assessment and Treatment Service, one of 16 possible providers. The senior assessment clinician did not specify the details of the actual treatment proposed for the appellant (the relevant assessable person), and did not express an opinion that the treatment, as detailed, would be appropriate and practicable for the participation of the appellant. The 'Treatment Plan' was deficient in those significant respects. The senior assessment clinician did not comply with s 22(3)(c) of the Act.

[37] Counsel for the respondent argues that there was, in the assessment report, sufficient information to comply with s 22(3)(c) of the Act. Counsel relied on references in the assessment report to "mandatory residential treatment" and the clinician's assessment as to outcomes (for example, bringing about the appellant's abstinence from alcohol) as details of treatment. I reject the submission in that, although there may be reference to a structured rehabilitation treatment program, there were no details given of the actual treatment, as distinct from the anticipated outcome.

[38] Counsel for the respondent also argued that s 68 *Interpretation Act* would overcome the difficulty identified by the appellant. I reject that submission, because the problem identified by the appellant was the content of the report and the failure of the report writer to include matters which were required to be included, not the form itself. In fact, had the form been properly completed, there could have been some relevant content inserted to cure the deficiency identified. I reject that submission.

[39] The appellant submits that the use of the word "would" in s 10(e), and not "could", as part of the stated requirement that "the person would benefit from a mandatory treatment order", indicates probability rather than mere possibility.[41] I agree. Counsel for the appellant contends that the treatment program intended for the appellant was not produced to the Tribunal, so that it would have been impossible for the Tribunal to independently assess its

[41] The Bill as originally drafted used the word "could", but was amended after the consultation process. See Debates, 12th Assembly, 1st Session, 27 June 2013, at 54/84.

benefit.[42] At one stage of the proceedings before the Tribunal, the senior assessment clinician said:

> The people are saying that there isn't a program, but there actually – I've got – the program timetable is actually up here on the wall. We've got two new managers here, so I mean we do have a program, that's why this – you know, it's rehabilitation, so.[43]

[40] The senior assessment clinician, when asked if the appellant would be able to participate in the program at DAATS, claimed that he had done very well in the past, referring to his earlier period of involuntary treatment.[44] However, when it was pointed out to her that the aftercare plan for the previous admission said that the appellant had refused to attend therapeutic groups, except music groups, the clinician qualified her earlier answer, and said, "Participated well in music then". She explained that when she had previously looked after the appellant, he was in the music group, and that she had presumed, wrongly, that he was participating equally well in the other therapeutic groups.[45] My reading of the transcript suggests that the clinician's evidence before the Tribunal was superficially reassuring but lacking in substance. The senior assessment clinician made a number of statements about the program in which it was proposed the appellant would participate, including the following:

> Well there's a program up here actually … I know there's going to be amendments, they're amending the program as well, but I know there

[42] Appellant's Outline of Submissions par 17.
[43] Transcript of proceedings, 20 January 2015 p 5.4.
[44] Transcript of proceedings, 20 January 2015 p 5.1.
[45] Transcript of proceedings 20 January 2015 p 6.5.

> is music actually integrated into the program and it's on Thursday afternoon.[46]
>
> … I mean this is the program that's here, … it's been tweaked as well, there's other things that are going to be added in. So – I mean the program is running … there has been a lot of staff changes and – and that kind of thing, but people come and go here all the time, it's pretty transient anyhow, you know, but there is a full team, like there's two treatment managers, there's new case managers they've started as well, and I can send you a copy of the program if you want.[47]

[41] The senior assessment clinician gave evidence by video link to the Tribunal, situated at Casuarina, from the Berrimah premises of the Darwin Alcohol Assessment and Treatment Service (DAATS). The appellant and his counsel were both at the premises of DAATS.

[42] Although there had been earlier reference in the Tribunal hearing to "two senior treatment clinicians" (who I assume were the same persons as the "two treatment managers" referred to in the above extract), the senior assessment clinician told the Tribunal that neither of the two senior treatment clinicians would be available to attend to talk about details of the actual treatment proposed for the appellant. They were said to be too busy with the "full packed" program in which they were engaged. The Tribunal did not respond to the clinician's offer to forward a copy of the program which, it would appear, was on display at the DAATS premises.[48]

---

[46] Transcript of proceedings 20 January 2015 p 6.7.
[47] Transcript of proceedings 20 January 2015 p 8.5.
[48] I refer to the clinician's statement at T 5.4, "… the program timetable is actually up here on the wall"; and, at T 6.7, "Well there's a program *up here* actually…". These suggest that there was a document on display, setting out details of the program and/or a timetable for the program.

[43] The definition of "treatment" contained in s 5 of the Act is "therapeutic, health, diversionary, educational or other intervention or treatment aimed at remedying or reducing a person's misuse of alcohol". I infer that, based on its specialist experience,[49] the Tribunal had an understanding as to the general structure and content of the program run by the Darwin Alcohol Assessment and Treatment Service. Questions asked and comments made by the Chairman, Medical Member and Community Member of the Tribunal support this inference. I note also that counsel for the appellant declined the opportunity to see the program (such as it was), and told the Tribunal that he had seen the program before.[50]

[44] Counsel for the appellant in this Court contends that, because of the deficiencies identified by me in [36] above, the Tribunal was unable to make an independent assessment as to whether an order, in the nature of a treatment order, would benefit the appellant. Counsel for the appellant before the Tribunal made a number of submissions to the effect that there was no evidence about the specific components of the program applicable to the appellant's specific circumstances. The appellant contends that the Tribunal wrongly rejected the argument that lack of knowledge of the program on the part of the Tribunal called into question the benefit of the program for the appellant.

[49] The Chairman noted at transcript p 12.8 that the Tribunal had been operating for some 18 months and had taken account of health issues he described as "quite horrendous for indigenous people".
[50] Transcript of proceedings 20 January 2015 p 7.4.

[45] Under the statutory scheme established by the Act, the Tribunal was required to decide the application before the preparation of an individualised treatment plan by the senior treatment clinician pursuant to s 56(2) of the Act. Such a treatment plan is not prepared until after a person is admitted to a treatment centre.

[46] In considering the appellant's argument, it is important to clarify that the requirement of s 10(e) is that the person would benefit from a mandatory residential treatment *order*. The Tribunal had to consider the overall effect of the order, and not only the proposed treatment. A most significant aspect of the mandatory residential treatment order was that the appellant would be provided with proper accommodation, given regular meals, and would not be permitted alcohol. He would have assigned to him a case manager (for individual case management sessions) and a treatment clinician. He would have access to a music program (with instruments provided) and counselling. A period of abstinence, even if enforced or involuntary, with regular nutrition, would give the appellant a significant health benefit if only because his body would have a period of time to recover from the debilitating effects of alcohol misuse. In this context, the Chairman of the Tribunal made it clear that he was interested in stabilising and improving the appellant's health.[51] That is entirely consistent with the inclusion of "health … intervention or treatment aimed at remedying or reducing a

[51] Transcript of proceedings 20 January 2015 p 12.7.

person's misuse of alcohol" within the definition of "treatment" in s 5 of the Act.

[47] The Tribunal's decision acknowledged that there was some uncertainty about the content of the proposed treatment program,[52] and that the appellant may well not have been motivated to participate in any such treatment program.[53] Notwithstanding the appellant's ambivalence or contrariness, the Tribunal's decision in relation to s 10(e) of the Act was as follows:

> As I said during the discussions, we have those two competing issues and it could be that J could change his mind once again once he gets into the program. But in our view, … given that the program is up and running and does provide counselling for alcohol addiction, and also will address his other medical issues and give him counselling on the effect [which] alcohol has on those medical issues, the Tribunal states that J would benefit from a mandatory treatment order.

[48] The Tribunal's decision might have been more fully explained, but that is not the point. It was not for the Local Court to over-zealously scrutinize the Tribunal's reasons in an attempt to discern some inadequacy in the way the reasons were expressed.[54] The Local Court was not considering the merits. There was evidence clearly capable of satisfying the Tribunal that the appellant would benefit from a mandatory treatment order, specifically a mandatory residential treatment order. The appellant has thus failed to establish the absence of evidence on which the Tribunal could have been so satisfied.

---

[52] Transcript of proceedings 20 January 2015 p 13.3.
[53] Transcript of proceedings 20 January 2015 p 18.9.

[49] In relation to s 10(f) of the Act, the requirement that there are no less restrictive interventions reasonably available, the senior assessment clinician wrote as follows:

> Mr T's current living situation is not conducive to other forms of treatment (i.e. day programs, counselling sessions) due to a chaotic and unstable lifestyle. Therefore, no current less restrictive rehabilitation is available, other than mandatory residential treatment. Mr T would like to receive treatment at the DAATS facility.

[50] The reference to "chaotic and unstable lifestyle" reflects the matters summarized in [27] - [29] above.

[51] Counsel for the appellant refers to the Explanatory Statement to the Bill for the *Alcohol Mandatory Treatment Act* where it was noted that the s 10(f) criterion is intended to capture a situation where the person might be satisfactorily treated and managed in the community without the need for a mandatory treatment order.[55] Counsel submits that the Tribunal too readily accepted the senior assessment clinician's statement that the appellant had no fixed place of abode, in circumstances where the appellant's counsel informed the Tribunal that the appellant "stays with his aunt at Knuckey Lagoon … for the most part".[56]

[52] The argument advanced on behalf of the appellant on appeal to this Court was directed at the unreliability of the senior assessment clinician's

---

[54] *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271 - 2.
[55] Appellant's Outline of Submissions par 31.

statement as to the appellant's place of abode, and the weight to be given to the statement. These are not questions of law.

[53] Moreover, there was no attempt by the appellant to demonstrate that the suggested accommodation with his aunt at Knuckey Lagoon was stable and otherwise appropriate. Indeed, counsel for the appellant before the Tribunal acknowledged that the accommodation was not such as to have enabled the appellant to avoid the 39 protective custody apprehensions in the previous 12 months, referred to in [27] above. Through his counsel, the appellant expressed his unwillingness to participate in residential treatment, and did not suggest as an alternative that he would comply with a mandatory community treatment order. Such a treatment order requires a person to participate in treatment from a specified community treatment provider and also bans the person from possessing consuming or purchasing alcohol. The matters summarised in [27] - [29] are a clear indication of how difficult it would be for the appellant to comply with the requirements of a mandatory community treatment order. Counsel for the appellant before the Tribunal acknowledged the nature of that difficulty in the following statement, which was part of his submission opposing the making of a mandatory residential treatment order:

> … for rehabilitation to be effective the person needs to want to be rehabilitated. The second thing, which is supported by J's history, he's been here once previously, his home is in Darwin; his home is in an environment where alcohol is available, where he is not willing to

[56] Appellant's Outline of Submissions par 32; Transcript of proceedings 20 January 2015 p 7.8; see also the Tribunal's consideration p 21.4.

participate in programs of follow-up, in courses or counselling on release.[57]

[54] An important principle set out in s 6(a) of the Act is that involuntary detention and involuntary treatment of a person are to be used only as a last resort when less restrictive interventions are not likely to be effective or sufficient to remediate the risks presented by the person. In my judgment, the Tribunal had more than enough evidence to be satisfied that any intervention less restrictive than involuntary detention and treatment would not be effective or sufficient in the case of the appellant. Therefore, the 'no evidence' ground in relation to s 10(f) of the Act has not been made out. There is no error of law.

[55] For reasons explained to this point, I reject appeal ground 1.

Ground 2 - no evidence to warrant an order for the maximum period

[56] Ground 2 can still be argued to the extent that it asserts that there was no evidence to support the three-month period of operation which the Tribunal ordered for the mandatory residential treatment order, but not on the basis that there was no sufficient evidence.[58]

[57] Counsel for the appellant contends that there was no mention made by the senior assessment clinician in her assessment report and, before the Tribunal, no evidence or submission by the senior assessment clinician in relation to the appropriate period of operation of the order. The three-month

[57] Transcript of proceedings 20 January 2015 p 12.2.

order imposed by the Tribunal was therefore without any evidentiary basis, in circumstances where there was no treatment plan before the Tribunal to enable an independent assessment as to the appropriate duration of any order.

[58] It is correct that there was no specific evidence or submission from the senior assessment clinician that a three-month order was the most appropriate in the appellant's case, rather than an order for a period of one month, two months, or some other period less than three months. However, the understanding of the Tribunal and of counsel for the appellant before the Tribunal was that the DAATS program was a 12-week program.[59] Ms King, the Community Member of the Tribunal, even explored with the appellant's counsel whether the appellant would benefit from a three-month sobriety order outside of the residential program.[60]

[59] In my opinion, once the Tribunal had determined that it was appropriate to make a mandatory residential treatment order, the period of operation of the order was discretionary. The discretion had to be exercised in a manner which was consistent with the objects of the Act, set out in s 3 of the Act, and in accordance with the principles to be applied under s 6 of the Act. The Tribunal was entitled to look at all the evidence and to draw inferences from the evidence. The appellant had previously undergone treatment under a

[58] See [17] above, and the cases referred to.
[59] Transcript of proceedings 20 January 2015 p 9.
[60] Transcript of proceedings 20 January 2015 p 11.3.

mandatory residential treatment order, but had relapsed upon discharge from the program. Based on the assessment of the senior assessment clinician, the appellant was very seriously misusing alcohol, and had lost the capacity to make appropriate decisions about his alcohol use and personal welfare. The Tribunal was entitled to impose an order for the maximum period of time in order to give the appellant the best possible opportunity of recovering his health, improving his social functioning and restoring his capacity to make decisions about his alcohol use and personal welfare. No error has been identified in the exercise by the Tribunal of its discretion, and hence no error on the part of the magistrate in the Local Court.

[60] Counsel for the appellant contends that a mandatory residential treatment order would not have been effective in the case of the appellant, who had no motivation and was thus an unwilling participant in any alcohol rehabilitation program. Whatever the factual merits of that contention may be, it does not raise a question of law.

[61] Counsel for the appellant also contends that a lesser period of mandatory residential treatment might well be have been appropriate in order to achieve the desired outcome. Reference was made to the New Zealand Law Commission report on “Compulsory Treatment for Substance Dependence”, which suggested a maximum period of 28 days as appropriate. Reference was also made to the recommendation by the New Zealand National Committee for Addiction Treatment of six weeks as the initial maximum period of detention. However, there was no statutory or other legal

obligation for the Tribunal to consider those research or policy documents. The fact that significant research in our trans-Tasman neighbour led to recommendations of one month or six weeks as the maximum appropriate period of mandatory residential treatment does not mean that the Tribunal's discretion miscarried, or that the Tribunal erred in law in imposing a three-month mandatory residential treatment order under Northern Territory law which allows for a three-month order.

[62] I reject appeal ground 2.

Ground 3 – error in failing to identify discretion

[63] The appellant contends that the Tribunal fell into error in failing to consider whether it had a discretion under s 33 of the Act before ordering mandatory residential treatment, and that the magistrate in the Local Court then erred in finding, by implication, that the respondent had considered whether it had a discretion before exercising such discretion. The appellant argues that, because the Tribunal made no reference to the existence of a discretion, it should be therefore inferred that the Tribunal failed to consider whether it had such a discretion.

[64] Section 33 of the Act reads as follows:

> Orders that can be made by a Tribunal
>
> Following the hearing of the application, the Tribunal may:

(a) make a mandatory treatment order in relation to the affected person if the Tribunal is satisfied that the affected person:

(i) meets the criteria for a mandatory treatment order; and

(ii) is not, under section 9(2), a person in relation to whom a mandatory treatment order must not be made; or

(b) otherwise, make an order for the affected person to be released.

[65] Both parties to the appeal contend that the words "the Tribunal may", in the first part of s 33, mean that the Tribunal is vested with a discretion which would logically extend to making no order at all on the hearing of an application. I doubt that that is correct. The point was not fully argued on appeal, probably because no issue was taken on the hearing of the appeal in the Local Court. My preliminary view is that the words "the Tribunal may" mean "the Tribunal must", in the sense that it must make an order under either par (a) or par (b) of s 33. The words appear to invest the Tribunal with a discretion, but the power is actually coupled with a duty.[61] A more intricate interpretation issue is whether, if the criteria in both sub-pars (i) and (ii) of par (a) of s 33 are satisfied, the Tribunal must make a mandatory treatment order pursuant to par (a), or whether it could still make an order under par (b). In this context, the meaning and function of the word "otherwise" in s 33(b) is significant. I take it to mean "if the Tribunal is not satisfied under s 33(a)". However, it could also mean "if the Tribunal does not make a mandatory treatment order under s 33(a)". For the purposes of

deciding this appeal, I will proceed on the basis that the Tribunal had a discretion to order the release of the appellant, even if the Tribunal were satisfied that the s 10 criteria were satisfied.[62]

[66] Counsel for the appellant before the Tribunal argued, in effect, that a mandatory treatment order would be futile, and that there was nothing to suggest that the appellant would not simply return to his normal lifestyle after completing his three-month program, as he had done previously. Although counsel did not refer to s 33 of the Act, the implication of submission was that the Tribunal should simply release the appellant.[63] The Tribunal rejected that submission, but not for the reason that it did not have a discretion. Rather, the Chairman referred to the risks to the appellant's health (referring to liver damage and alcoholic dementia) and to the object of stabilising and improving health, referred to in s 3(a) of the Act.[64] The Chairman then said:

> To release somebody who has got chronic issues back into the same environment without any support systems to me is just not – it's something that we are very, very reluctant to do as far as that's concerned.

[67] Although the Tribunal ultimately determined that the appellant's circumstances called for the most significant intervention available, the Chairman's remarks evidence consideration of the option of releasing the

---

[61] See the discussion in Pearce and Geddes *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th Ed, 2014), par 11.6 – par 11.7.
[62] And, not relevant in this case, the negative condition precedent under s 33(a)(ii), that the appellant was not, under s 9(2), a person against whom an order could not be made.
[63] Transcript of proceedings 20 January 2015 p 12.3.

appellant. Ms King, as mentioned in [58], had earlier raised the possibility of a community treatment order.[65] The Tribunal plainly recognized that it had a discretion as to whether to intervene, and as to what orders it might make. The magistrate found that there was no need for the Tribunal to have expressly used words such as, "We now proceed to consider whether or not to exercise our discretion under s 33 of the Act".[66] I agree with his Honour.

[68] I reject appeal ground 3.

Ground 4 – irrelevant considerations

[69] The appellant contends that the Tribunal took into account irrelevant considerations in arriving at its decision. The only relevant considerations are the criteria set out in s 10 of the Act. That the inquiry is confined in this way is reinforced by the objects set out in s 3 of the Act.

[70] The appellant refers to a number of observations said to have been made by the Chairman of the Tribunal, as follows:

- That the matter is of concern to the general society and indigenous society and that there would be reluctance to release "somebody who has got chronic issues back into the same environment".[67]

- The "cost to the community" is an issue that the Tribunal has to take into account.[68]

---

[64] Transcript of proceedings 20 January 2015 p 12.7.
[65] Transcript of proceedings 20 January 2015 p 11.3.
[66] Transcript of proceedings 24 March 2015 p 60.3.
[67] Transcript of proceedings 20 January 2015 p 12 – p 13.
[68] Transcript of proceedings 20 January 2015 p 13.

- The onus that the person not be caught up in alcohol abuse that leads to problems as far as their health and "their community" is concerned.[69]

- There are cultural issues that the appellant should be attending to and "no-one wants to see you being drunk in the streets … it's not good for you, good for your culture".[70]

[71] Counsel for the appellant contends that the observations were "more than mere gratuitous comments", and that they suggest that the Tribunal misconceived its role and saw itself as having a wider brief to protect the community, beyond the protection envisaged by s 10(d) of the Act. The comments are said to reflect an attitude which enabled the Tribunal to take a particular view in relation to the requirement of benefit under s 10(e) of the Act and to automatically issue an order of three months' duration.

[72] I reject the submission. In my view, the content of the dot-point paragraphs incompletely states or misinterprets the Chairman's observations. I set out below the context in which the quoted words in each of the above dot-point paragraphs were actually said:

- … where a person is in great need of medical intervention or some other counselling, we must take that into account when we are reaching a decision as to whether we impose an order. Yes, there is a restriction on liberty and, as other people have said, "It's a gaol". I have said basically, "Well, it's not a jail". It is trying to deal with an issue that is of concern not only to the general society, but also to the indigenous society, and [that] there are too many young indigenous people that are going into real harm because nothing has been there to help them to try and address their issues. And I have said it before… that doing nothing is not an option in a lot of cases.

[69] Transcript of proceedings 20 January 2015 p 19.
[70] Transcript of proceedings 20 January 2015 p 21.

To release somebody who has got chronic issues back into the same environment without any support systems to me is just not – it's something that we are very reluctant to do as far as that's concerned.

- Now in relation to JFT … he's had the 39 PCs in the last 12 months. The damage to himself, the cost to the community are issues that we must take into account and we must also look at what – if J continues to drink in that same fashion the risk to him is going to be something that we – it's just not acceptable.

- … What we are looking at as far as people that come before the tribunal is, 'Do they meet the criteria of the Act ?'. And we have to also take into account their health issues and what would be of benefit for them. … In some ways, yes, it is a restriction on their liberty, but to equate it to a gaol I will not countenance that as far as he is concerned. The aim is to get a person to be able to cope with their lifestyle, even though it is a rough lifestyle, but not to be caught up in the alcohol abuse that leads to great problems as far as their health and their community is concerned and that's our concern as well. So that's where we come from as far as this. Yes, it might be a restriction, but it gives the medical profession an opportunity to try and address the issues that if not addressed will cause a client to die in a – much quicker than it otherwise would be.

- [*After providing reasons for decision and making final orders, the Chairman continued as follows …*] J, it is up to you now to address those issues. 39 times coming to the attention of police because of alcohol with high readings, that's not good, and you have got cultural issues you should be attending to and no one wants to see you being drunk on the streets or anything of that nature. It's not good for you, good for your culture, and you have obviously got a talent for music then that's something that you should continue and ask the people at the treatment centre to help you find avenues that you can work towards using music once you get out, and also finding yourself a permanent address [other] than the long grass. Okay.[71]

[73] It can be seen from a reading of the more complete context in [72],

compared with the observations attributed to the Chairman in the appellant's

written submissions, that the first dot-point extract demonstrates a focus on the appellant's health and the need for medical intervention. There was no indication of some "wider brief" to protect the community; rather there was an expression of concern on behalf of the community for persons like the appellant who were "in great need of medical intervention and some other counselling". On the same comparison, the second dot-point extract shows predominantly a concern for the appellant: the impugned words "the cost to the community" are preceded by the words "the damage to himself", and are followed by the words "the risk to him", both references to the appellant. The Chairman's observations were made in response to submissions by the appellant's counsel, part way through the hearing. While they may have reflected the Chairman's thinking at that point, they did not form part of the Tribunal's ex tempore decision. In my view, it would be unfair to criticise the Tribunal for having misconceived its function or having taken into account irrelevant considerations, based on the one possibly irrelevant reference. The Tribunal's statements should not be "construed minutely and finely with an eye keenly attuned to the perception of error".[72] On the same comparison, the third dot-point extract also shows predominantly a concern for the appellant's health. The reference to "their community" should appropriately be seen to reflect a consideration of the criterion in s 10(d) of the Act, namely that "the person's alcohol misuse is a risk to the health, safety or welfare of the person or others (including children and other

[71] Transcript of proceedings 20 January 2015 p 21.9.
[72] *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287.

dependants)". This permits consideration of the risk to the safety or welfare of members of the community in which the assessable person resides. On the same comparison, the fourth dot-point extract was part of a statement made to the appellant by the Chairman after he had announced the Tribunal's decision and given reasons in the presence of the appellant and his counsel. It was no more than a brief speech of encouragement by the Chairman, possibly misconceived in the case of the appellant, but again not evidence that the Tribunal went beyond its statutory function or took into account irrelevant considerations.

[74] If, contrary to my conclusions in [73], the content of any of the dot-point extracts, in particular the second dot-point extract, reveals an error of law on the part of the Tribunal, the error was not one on which the Tribunal's decision depended and was therefore not such as to vitiate the Tribunal's decision.[73] The test is whether "there was a real possibility (not a mere or slight possibility) that the error of law could (but not necessarily would) have affected the Tribunal's decision".[74] In my opinion, there was no possibility at all that the contended error of law could have affected the Tribunal's decision.

[75] An alternative test in relation to an administrative tribunal, such as the Tribunal at first instance, was stated in *Craig v South Australia*:[75]

[73] *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and ors* (1997) 115 NTR 25 at 35.15; *Development Consent Authority v Phelps* (2010) 27 NTLR 174; [2010] NTCA 3 at [11].
[74] *Development Consent Authority v Phelps* (2010) 27 NTLR 174; [2010] NTCA 3 at [23].
[75] *Craig v South Australia* (1994-1995) 184 CLR 163 at 179.7, per the Court.

> If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the Tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it. [underline emphasis added]

[76] *Craig* emphasizes the need for the identified error of law to be such as to have an effect on a tribunal's exercise of power. In the present case, the appellant has not demonstrated that the Tribunal placed any weight on the matters said to constitute errors of law, or that the contended errors of law had any effect on the Tribunal's decision.

[77] The reasoning of the Local Court was somewhat different to my reasoning; however, the result is the same. The appellant has not established that that the Local Court's ultimate finding on this ground was wrong in law. I therefore reject appeal ground 4.

Ground 5 – non-compliance with s 22(3)(c) of the Act

[78] I referred in [36] to the failure of the senior assessment clinician to comply with s 22(3)(c) of the Act.

[79] Counsel for the appellant complains that the Local Court erred in law in finding that s 22(3)(c) had been complied with. Counsel contends that the relevant part of the assessment report did no more than identify that the application was for a mandatory residential treatment order and state the name of the treatment provider. The specific error on the part of the learned

magistrate was in finding that the inadequate treatment plan was sufficient to satisfy the requirements of s 22(3)(c) of the Act, "at least in part because of the separate requirements of s 56(2) of the Act".[76]

[80] The decision of the learned magistrate read, relevantly, as follows:

> The submission was that the assessment report contained no details as required in s 22(3)(c) and this was a fatal flaw … that the report therefore did not meet the needs of the section … and that was fatal in some way.
>
> Mr Moses in response pointed to the fact that a detailed treatment plan under s 56(2) of the Act is intended to come into existence only after the person is first taken into treatment. It says specifically: "As soon as practicable after the person is admitted to the treatment centre the senior treatment clinician must prepare a treatment plan for the person". "As soon as practicable" is the test … .
>
> Mr Moses submitted that identification in the assessment report of a proposed treatment centre, as was the case here, is sufficient to satisfy s 22(3)(c).
>
> I had some difficulty with that submission initially. But for the provisions of s 56(2), that difficulty might have continued. But s 56(2) must be read together with s 22(3)(c), such that I am satisfied that it is not envisaged by s 22(3)(c) or the scheme of the Act as a whole that a detailed treatment plan form part of the assessment report and form part of what was before the Tribunal when it makes its decision. In this case the [report] identified the treatment centre where it recommended the appellant be taken into (inaudible) detention, mandatory treatment. And I am satisfied that that satisfies the requirement in the circumstances of this case.

[81] In my opinion, the learned magistrate fell into error. The deficiencies in the assessment report, arising from the senior assessment clinician's failure to comply with s 22(3)(c), cannot be made good, after the person is admitted to

[76] Appellant's Outline of Submissions par 49.

the treatment centre as a result of a mandatory residential treatment order, by the preparation of a treatment plan by the senior treatment clinician pursuant to s 56(2). The requirements of s 22(3)(c) are clear. Nonetheless, I need to consider the effect of the senior assessment clinician's non-compliance. I bear in mind that I determined in [46] - [48] above that her non-compliance did not have the effect that the Tribunal could not be satisfied under s 10(e), because: (1) the criterion in that paragraph is satisfied if the person would benefit from a mandatory treatment *order*, and from everything which such an order entails, as distinct from the actual treatment itself, and (2) there was evidence capable of satisfying the Tribunal that the appellant would benefit from a mandatory residential treatment order notwithstanding some uncertainty about the content of the proposed treatment program.

[82] Counsel for the appellant contends that the requirement in s 22(3)(c) serves at least two purposes. The first purpose is to assist the Tribunal to determine whether the treatment plan is appropriate to the needs of the person so as to benefit the person, as required by s 10(e) of the Act. In principle, I agree. As explained in [24] above, the Tribunal would normally attach considerable weight to the senior assessment clinician's statement of the details of the treatment in which, in the clinician's opinion, it would be appropriate and practicable for the assessable person to participate. I repeat, however, that the criterion in s 10(e) of the Act is that the person would benefit from a

mandatory treatment *order*. The submissions of counsel for the appellant do not properly take account of the inclusion of the word "order" in s 10(e).

[83] The second purpose of s 22(3)(c) contended for by counsel for the appellant is to inform the assessable person of the treatment proposed, to enable the person to make submissions as to whether that treatment is appropriate and practicable for the assessable person's participation, and as to the potential benefit of such treatment. The non-compliance therefore raises the issue of natural justice or procedural fairness. Such non-compliance, even on the appellant's case, would not deprive the Tribunal of jurisdiction, because that would mean that no hearing could lawfully take place, and that the Tribunal would not have jurisdiction to make any orders, even an order for a person's release pursuant to s 33(b) of the Act. It cannot have been the purpose of the legislation that the Tribunal should be deprived of jurisdiction because of non-compliance by the senior assessment clinician with s 33(2)(c) of the Act.[77]

[84] In my opinion, the non-compliance resulted in a deficiency in the evidence. The Tribunal and the appellant were not given the degree of assistance which the legislature intended they should have had. However, the deficiency could be made good by evidence and submissions at the hearing. The senior assessment clinician gave evidence, and counsel for the appellant was able to cross-examine her. Counsel for the appellant was able to draw to

the attention of the Tribunal the lack of detail in the treatment proposed for the appellant, and to make submissions to the effect that a mandatory residential treatment order should not be made. He did just that. He succeeded to the extent that the Tribunal appeared to accept that evidence of detail was lacking.[78] Nonetheless, there was evidence of a formal program proposed for the appellant's participation, a program which was being run by DAATS at the time. The program was on display at the premises of DAATS. As found by me in [43] above, the Tribunal had an understanding of the general structure and content of the program, if not the precise details. I refer also to [46] above. The appellant's counsel had seen the program. The situation was not one, for example, where the Tribunal had access to the program, and the appellant and his counsel did not. In this case, the appellant and his counsel, and the Tribunal members, were all similarly informed.

[85] In my opinion, the non-compliance did not mean that the appellant was denied natural justice or procedural fairness in the proceedings before the Tribunal.

[86] It follows that the error of law on the part of the learned magistrate, found by me at [81], did not result in his Honour erroneously dismissing the appeal to the Local Court. I therefore reject appeal ground 5.

---

[77] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93] is relevant, by analogy. It is not directly relevant, because the non-compliance in the present case was not an omission on the part of the Tribunal itself, but rather a non-compliance by a third party with a statutory obligation imposed on that third-party.
[78] See [47] above.

Conclusion

[87] The appellant has not established any of the grounds of appeal. The Tribunal did not make any vitiating errors of law which the Local Court failed to correct on appeal, nor did the Local Court make any other vitiating errors of law.

[88] The appeal should be dismissed.
