

APPEAL TRIBUNAL DECISION

Case number: APL344-19
Applicant: Queensland Building and Construction Commission
Respondent: Casey Buchanan

Before: Senior Member Brown
Date: 18 December 2020
Proceeding type: Tribunal Hearing

IT IS THE FINAL DECISION OF THE APPEAL TRIBUNAL THAT:

In OCR121-17:

1. Order 2 is set aside.

In OCR215-17:

1. Order 1 is set aside;
2. The decision of the Queensland Building and Construction Commission made on 1 September 2017 is confirmed.

Signed



Senior Member Brown
Queensland Civil and Administrative Tribunal

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Queensland Building and Construction Commission v Buchanan* [2020] QCATA

PARTIES: **QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION**
(applicant/appellant)

v

CASEY BUCHANAN
(respondent)

APPLICATION NO/S: APL344-19

ORIGINATING APPLICATION NO/S: OCR121-17; OCR215-17

MATTER TYPE: Appeals

DELIVERED ON: 18 December 2020

HEARING DATE: 21 July 2020

HEARD AT: Brisbane

DECISION OF: Senior Member Brown

ORDERS: **In OCR121-17:**

- 1. Order 2 is set aside.**

In OCR215-17:

- 1. Order 1 is set aside;**
- 2. The decision of the Queensland Building and Construction Commission made on 1 September 2017 is confirmed.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where tribunal considered on review two decisions made by the QBCC – where tribunal set aside the QBCC’s decision to categorise respondent as a permanently excluded individual – where applicant alleges error in failing to apply the amended version of s 56AC of the QBCC Act as it applied at the time of hearing – whether applying the provision as amended would have a retrospective effect – whether provision is procedural and not substantive in effect as to displace the presumption against retrospectivity

Acts Interpretation Act 1954 (Qld), s 20, s 20C
Building Industry Fairness (Security of Payment) Act
 2017 (Qld)
Professional Engineers and Other Legislation
Amendment Act 2014 (Qld)
Queensland Building and Construction Commission Act
 1991 (Qld), s 56AC, s 56AF, s 58, s 59(a)
Queensland Civil and Administrative Tribunal Act 2009
 (Qld), s 17(1), s 20(2), s 24(1), s 24(2), s 142(1), s 146

Buchanan v Queensland Building and Construction
Commission [2019] QCAT 354
D'Arro v Queensland Building and Construction
Commission [2016] QCATA 76
D'Arro v Queensland Building and Construction
Commission [2018] 1 Qd R 204
Ericson v Queensland Building Services Authority [2013]
 QCA 391
Esber v Commonwealth (1992) 174 CLR 430
McNab Constructions Australia Pty Ltd v Queensland
Building Services Authority [2010] QCA 380
Maxwell v Murphy (1957) 96 CLR 261
Ogden Industries Pty Ltd v Lucas (1967) 116 CLR 537
Queensland Building and Construction Commission v
Ezra Constructions Pty Ltd [2019] QCA 304

**APPEARANCES &
 REPRESENTATION:**

Applicant: R De Luchi of counsel instructed by Robinson Locke
 Respondent: No appearance

REASONS FOR DECISION

What is this appeal about?

- [1] Mr Buchanan was an officeholder of two companies, QUBE Projects Pty Limited (QP) and QUBE North Pty Limited (QN). Mr Buchanan ceased to be an office holder of QP on 13 January 2016. Mr Buchanan ceased to be an office holder of QN on 13 December 2016.
- [2] On 3 April 2017 a liquidator was appointed to QN (the first relevant event). On 24 May 2017 a liquidator was appointed to QP (the second relevant event).
- [3] Accordingly, Mr Buchanan:
- (a) ceased to be an office holder of QN approximately 4 months before the first relevant event;
 - (b) ceased to be an office holder of QP approximately 16 months before the second relevant event.

- [4] This appeal is about the time that elapsed between Mr Buchanan ceasing to be an office holder of QP and the happening of the second relevant event and the subsequent effect upon Mr Buchanan's entitlement to hold a builder's licence.
- [5] After the first relevant event, on 16 May 2017, the Queensland Building and Construction Commission gave notice to Mr Buchanan that he was an excluded individual (the first reviewable decision). After the second relevant event, on 1 September 2017, the QBCC gave notice to Mr Buchanan that he was an excluded individual and by reason of his second exclusion, that he was a permanently excluded individual (the second reviewable decision).
- [6] Mr Buchanan commenced separate proceedings in the tribunal seeking review of both of the reviewable decisions.
- [7] On 20 November 2019 the tribunal confirmed the first reviewable decision and set aside the second reviewable decision.¹ The decision of the tribunal had a very important consequence for Mr Buchanan for although he was classified an excluded individual as a result of the first relevant event, he was not classified a permanently excluded individual as a result of the second relevant event. Had the tribunal found that Mr Buchanan was an excluded individual as a result of the second relevant event, Mr Buchanan would have been classified as a permanently excluded individual.
- [8] The QBCC appeals the tribunal's decision.

Appeals – the statutory framework

- [9] The QBCC's grounds of appeal are confined to questions of law. An appeal on a question of law is as of right.² In determining an appeal on a question of law only, the appeal tribunal may confirm or amend the decision; set aside the decision and substitute its own decision; or set aside the decision and remit the matter to the tribunal for reconsideration with or without the hearing of additional evidence.³
- [10] The appeal tribunal should only substitute its own decision if the determination of the question of law resolves the appeal entirely in the appellant's favour.⁴ Otherwise the matter should be remitted for reconsideration.

The *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* – review proceedings

- [11] The tribunal's review jurisdiction is the jurisdiction conferred upon the tribunal by an enabling Act.⁵ In the present case, the enabling Act is the *Queensland Building and Construction Commission Act 1991 (Qld)*. The tribunal must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits.⁶
- [12] In deciding a review of a reviewable proceeding the tribunal may confirm or amend the decision, or set aside the decision and substitute its own decision, or set aside the decision and return the matter to the decision maker for reconsideration.⁷

¹ *Buchanan v Queensland Building and Construction Commission* [2019] QCAT 354.

² *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (QCAT Act), s 142(1).

³ *Ibid*, s 146.

⁴ *Ericson v Queensland Building Services Authority* [2013] QCA 391.

⁵ QCAT Act, s 17(1).

⁶ *Ibid*, s 20(2).

⁷ *Ibid*, s 24(1).

- [13] The decision of the tribunal is taken to be a decision of the decision maker and, subject to any contrary order by the tribunal, has effect from when the reviewable decision takes or took effect.⁸

The Queensland Building and Construction Commission Act 1991 (Qld)

- [14] The QBCC Act includes a statutory regime to prevent certain persons from operating a business in the building industry. The Act provides that individuals and companies may be categorised as ‘excluded’. The Act provides for a person or an individual to be an excluded individual or an excluded company in circumstances where there is a ‘relevant event’. If an individual is excluded twice, the individual is a permanently excluded individual.
- [15] The provisions relating to excluded individuals and excluded companies are found in Part 3A of the Act. Section 56AC sets out the circumstances in which an individual or a company may be classified as an ‘excluded individual’ or an ‘excluded company’.
- [16] If particular stated circumstances⁹ apply to an individual who is a director of, a secretary of, or an influential person in respect of, a construction company placed into liquidation or wound up, s 56AC(4) provides that the person is an ‘excluded individual’ for what is called a ‘relevant company event’.
- [17] Section 56AF sets out the relevant procedures that apply if the Commission considers a person is an ‘excluded individual’. The Commission is required to take specified steps including giving notice to an individual that the Commission considers the person to be an ‘excluded individual’ and, in certain stated circumstances, cancelling the person’s licence.
- [18] The provisions in relation to permanently excluded individuals are found in Part 3B of the Act. Section 58 sets out the meaning of ‘permanently excluded individual’. An individual may be permanently excluded if the individual is twice an excluded individual for a relevant event.¹⁰ The consequences of being a permanently excluded individual are set out in Part 3B, Division 2 and include the Commission being prohibited from granting a licence to a permanently excluded individual.¹¹

The provisions of the QBCC Act relevant to this appeal

- [19] This appeal concerns the tribunal’s decision about the application of s 56AC of the *Queensland Building and Construction Commission Act 1991 (Qld)*. Section 56AC was amended after the second reviewable decision by the *Building Industry Fairness (Security of Payment) Act 2017 (Qld)* (the BIFA amendments). The BIFA amendments came into effect on 10 November 2017, that is, after the second reviewable decision.
- [20] The critical amendment involves s 56AC(2)(c)(ii).
- [21] Section 56AC is set out below as it applied at the time of the reviewable decisions. Those parts of the text *italicised and in bold* represent the subsequent BIFA amendments.

⁸ Ibid, s 24(2).

⁹ QBCC Act, s 56AC(2).

¹⁰ Ibid, s 58(1).

¹¹ Ibid, s 59(a).

56AC Excluded individuals and excluded companies

- (1) This section applies to an individual if—
- (a) the individual takes advantage of the laws of bankruptcy or becomes bankrupt (relevant bankruptcy event); and
 - (b) 3 years have not elapsed since the relevant bankruptcy event happened.
- (2) This section also applies to an individual if—
- (a) a construction company, for the benefit of a creditor—
 - (i) has a provisional liquidator, liquidator, administrator or controller appointed; or
 - (ii) is wound up, or is ordered to be wound up; and
 - (b) 3 years have not elapsed since the event mentioned in paragraph (a)(i) or (ii) (relevant company event) happened; and
 - (c) the individual—
 - (i) was, when the relevant company event happened, a director or secretary of, or an influential person for, the construction company; or
 - (ii) was, within the period of 1 year immediately before the relevant company event happened, a director or secretary of, or an influential person for, the construction company.
 - (ii) was, within the period of 2 years immediately before the relevant company event happened, a director or secretary of, or an influential person for, the construction company.*
- (3) If this section applies to an individual because of subsection (1), the individual is an excluded individual for the relevant bankruptcy event.
- (4) If this section applies to an individual because of subsection (2), the individual is an excluded individual for the relevant company event
- (4) If this section applies to an individual because of subsection (2), the individual is an excluded individual for the relevant company event unless the individual can satisfy the commissioner that at the time the individual ceased to be an influential person, director or secretary for the construction company the company was solvent.*
- (5) An excluded individual for a relevant event does not also become an excluded individual for another relevant event if the commission is satisfied that both events are consequences flowing from what is, in substance, the one set of circumstances.
- (6) A company is an excluded company if an individual who is a director or secretary of, or an influential person for, the construction company is an excluded individual for a relevant event.
- (7) In this section—
- construction company

means a company that directly or indirectly carries out building work or building work services.

(7) In this section—

construction company

(a) means a company that directly or indirectly carries out building work or building work services in this or another State; and

(b) includes a company that, within 2 years immediately before a relevant company event for the company, directly or indirectly carries out building work or building work services in this or another State.

[22] Section 56AF and section 58 of the Act, which were in the same terms at all times, provide:

56AF Procedure if licensee is excluded individual

(1) This section applies if the commission considers that an individual who is a licensee is an excluded individual for a relevant event.

(2) The commission must give the individual a written notice identifying the relevant event and stating the following—

(a) why the commission considers the individual is an excluded individual for the relevant event;

(b) that the individual may make a submission to the commission about the relevant event within the reply period;

(c) the circumstances, stated in subsection (3), in which the commission must cancel the individual’s licence.

(3) The commission must cancel the individual’s licence, by written notice given to the individual, if—

(a) after considering any submission about the notice made by the individual within the reply period, the commission still considers the individual is an excluded individual for a relevant event; or

(b) the individual does not make a submission about the notice within the reply period.

(4) Section 49 does not apply to a cancellation under subsection (3).

(5) In this section— reply period, for a written notice given under subsection (2), means 28 days after the commission gives an individual the written notice.

...

58 Meaning of permanently excluded individual

(1) A permanently excluded individual is an individual—

(a) who has twice been an excluded individual for a relevant event; and

(b) who for each relevant event has been given written notice by the commission stating—

- (i) particulars identifying the relevant event; and
- (ii) why the commission considers the individual is an excluded individual for the relevant event.

(2) Notice under subsection (1)(b)—

(a) must be given while the individual is an excluded individual for the relevant event to which the notice relates; and

(b) if the notice is the second or a subsequent notice the individual has been given about being an excluded individual for a relevant event—

(i) must state the effect of the individual becoming a permanently excluded individual; and

(ii) may be given at any time after an earlier notice was given.

(3) An excluded individual who is a licensee is taken to have been given notice under subsection (1)(b) if—

(a) the individual has been given notice under section 56AF(2); and

(b) for a second or subsequent notice, the notice also includes the information required under subsection (2)(b)(i).

(4) A second or subsequent notice may be given for a relevant event whether the event happened before or after another event for which the commission has already given notice under subsection (1)(b).

(5) However, subsection (1) applies only if an individual became an excluded individual for at least one of the relevant events after the commencement of this section, irrespective of when the circumstances resulting in the relevant event arose.

(6) If a second or subsequent notice does not include the information required under subsection (2)(b)(i) another notice containing the information may be given.

(7) It is declared that in deciding whether 2 relevant events as mentioned in subsection (1) have happened, a relevant event must be counted—

(a) whether the relevant event happened before or after the other relevant event; and

(b) whether or not the notices under subsection (1)(b) for the relevant events were given in the order the relevant events happened; and

(c) regardless of the length of time between the giving of the notices under subsection (1)(b) for the relevant events; and

(d) whether the relevant event happened before or after the commencement of this section, subject to subsection (5).

- [23] In simple terms, the effect of the BIFA amendment to s 56AC(2)(c)(ii) was this: before the amendment, Mr Buchanan was not an excluded individual in respect of the second relevant event and was therefore not classified as a permanently excluded individual; after the amendment Mr Buchanan was an excluded individual in respect of the second relevant event and was therefore classified as a permanently excluded individual.

- [24] In respect of the first relevant event, it is not contentious in this appeal that the learned member correctly found Mr Buchanan was an excluded individual in respect of the first relevant event, that is, the liquidation of QN.
- [25] The issue for determination in this appeal arises in respect of the liquidation of QP, that is, the second relevant event. The timeline of events, by reference to the relevant provisions of the QBCC Act and the BIFA amendments, may be summarised as follows:
- (a) Mr Buchanan ceased being an office holder of QP a little over 1 year and 4 months before the appointment of a liquidator to the company;
 - (b) *Prior* to the BIFA amendments Mr Buchanan had not been an office holder or influential person in respect of QP within 1 year of the liquidation. He was therefore not classified as an excluded individual.
 - (c) *After* the BIFA amendments Mr Buchanan had been an office holder or influential person in respect of QP within 2 years of the liquidation. He was therefore classified as an excluded individual.
- [26] As has been observed, the consequence for Mr Buchanan of being classified as an excluded individual in respect of both the first relevant event and the second relevant event was that he was classified as a permanently excluded individual.

The decision below

- [27] The learned member considered whether the amendment to s 56AC(2)(c)(ii) had a retrospective effect in affecting a right, privilege or liability acquired, accrued or incurred by, or to, Mr Buchanan under the Act prior to the amendment.
- [28] The learned member found that, by application of s 24(2)(b) of the QCAT Act, the tribunal's decision in the review applications would be effective from when the reviewable decision took effect, subject to any contrary order. The learned member found that this provision:
- ... speaks to the conclusion that the law to be applied to the Tribunal's decision is the law that applied as at the date of the original decision.¹²
- [29] The learned member found that applying the law as it was when the tribunal made its decision, rather than the law as it was at the time of the first and second decisions, would result in the tribunal:
- (a) Confirming a decision of the QBCC that was made under the previous law;
 - (b) Based on a new law, not the law applying at the time of the original decision; and
 - (c) Ordering that the decision apply from the date of the original decision (subject to the tribunal making a contrary order).¹³
- [30] The learned member then proceeded to consider the application of the provisions of the *Acts Interpretation Act 1954 (Qld)* and in particular s 20(2) and s 20(3). The learned member found that:

¹² Reasons, [35].

¹³ *Ibid*, [36].

... these provisions convey the intent of the legislature that an amendment of an Act should not permit the imposition of any additional burden upon a person that was not imposed by the earlier Act.¹⁴

- [31] The learned member found support for this interpretation in s 20C of the AI Act. Section 20C(2) provides that if an Act makes an act or omission an offence, the act or omission is only an offence if committed after the Act commences.
- [32] The learned member referred to the difference between amended laws dealing with substance and those dealing with procedure, the former of which can only be prospective and the latter of which may have retrospective effect.¹⁵
- [33] The learned member considered the decision of the Court of Appeal in *D'Arro v Queensland Building and Construction Commission*¹⁶ and stated:

A proper understanding of *D'Arro v Queensland Building and Construction Commission* accords with this interpretation. In that case the issue before the Court concerned whether ss 56AC(3) and (4) of the QBCC Act were being given retrospective operation. The leading judgment was that of Fraser JA, the other judges agreeing. In a key comment His Honour said, '[this] sentence describes the distinction I regard as applicable in this case' when quoting a passage from Windeyer J in *Ogden Industries Pty Ltd v Lucas*:

... I do not think it is the sense in which it is said that an amending Act does not disturb existing liabilities arising out of past transactions. That to my mind describes a liability having become complete by past events rather than a situation in which some future event must occur to make the effect of past events create a completed liability.

In other words, if a liability has matured, an amending Act cannot affect the liability; but if a liability is inchoate, accrued, incomplete or yet to be realised, an amending Act may have an effect upon the later reconsideration of a decision.

It is not a difficult extrapolation to refer not only to liabilities in this context, but to offences, privileges, rights and penalties.¹⁷ (footnotes omitted)

- [34] The learned member then went on to find:

The amendment to the period of liability in s 56AC(2)(c)(ii) from 10 November 2017 is an amendment to a substantive law and should have prospective, not retrospective, operation.¹⁸

- [35] The 'period of liability' referred to by the learned member was the period between the date on which a person ceased being an office holder of, or influential person in respect of, a company and the date of the relevant event ie the company being placed into liquidation.
- [36] The learned member stated:

¹⁴ Ibid, [40].

¹⁵ Reasons, [43].

¹⁶ Ibid, [45]-[47].

¹⁷ Ibid.

¹⁸ Ibid, [44].

Therefore, I conclude that the law that applies in these matters to the period of liability under s 56AC(2)(c)(ii) is that which applied before 10 November 2017, namely, a period of one year.¹⁹

The grounds of appeal

- [37] The QBCC relies upon three grounds of appeal. The first ground of appeal is that the learned member erred in failing to apply the correct version of s 56AC(2)(c)(ii) of the Act. The second and third grounds assert consequential errors by the learned member as a result of the error asserted in the first ground of appeal. The third ground of appeal also asserts error by the learned member in making an order beyond power.
- [38] In respect of the first ground of appeal the QBCC says that the learned member erroneously concluded that applying the amended version of s 56AC would be to give the section retrospective effect. Specifically, the QBCC says that the learned member erred in reasoning:
- (a) The decision of the tribunal would operate from the date of the original decision by the QBCC;
 - (b) A decision confirming the QBCC's decision would effectively be confirming, based on a new law, a decision made under the previous law;
 - (c) The tribunal, in carrying out its task, must have reference to past events;
 - (d) Section 20 and s 20C of the AI Act were supportive of the tribunal's interpretation by conveying the intent of the legislature that an amendment should not permit the imposition of an additional burden that was not imposed by the earlier Act;
 - (e) The relevant liability or 'penalty' had already been imposed by Mr Buchanan's excluded individual classification.

Consideration

- [39] The task before the learned member in conducting the review proceeding was to make the correct and preferable decision, stepping into the shoes of the original decision maker.
- [40] It is trite to observe that difficulties may arise in review proceedings when the statutory provision applicable at the time that the tribunal decides the review proceeding is different to the statutory provision applicable at the time of the decision under review.
- [41] There is a presumption that legislation is not intended to have retrospective effect. In *McNab Constructions Australia Pty Ltd v Queensland Building Services Authority* Chesterman JA stated:²⁰

... the power of an appellate court, or a tribunal, on a rehearing to determine the appeal "by reference to the law as it then exists" is not a power to apply statutes retrospectively unless the terms of the statute require such an application, or the statute is procedural in nature. The presumption against the retrospective application of legislation is not displaced by the circumstance that an appeal by way of rehearing occurs after a change to legislation relevant to the appeal.

¹⁹ Ibid, [49].

²⁰ [2010] QCA 380, [91].

[42] The presumption against retrospectivity may be rebutted by the clear words of the statute. As Chesterman JA referred to in *McNab*, it may also be the case that the subject matter of the statutory provision is procedural as opposed to substantive in effect, in which case there is no presumption against the retrospective effect of the statute.

[43] Whether a provision is substantive or procedural in effect is not always clear. A provision that confers or imposes or otherwise affects rights or liabilities will, however, be substantive in nature.

[44] In *Maxwell v Murphy*,²¹ Dixon CJ stated:

The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.

[45] Addressing the effect of procedural changes, Dixon CJ stated:

But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege, was complete and rested on events or transactions that were otherwise past and closed.²²

[46] Accordingly, if a statutory provision operates to confer or impose or otherwise affect an accrued right or liability defined by past events, it will not be applied because to do so would be to give the provision retrospective effect. Such a provision is substantive in effect. On the other hand, if a right or liability has already accrued, a statutory provision to enforce the right or liability will be procedural in nature.

[47] The circumstances in which a statutory provision may operate to affect an accrued right or liability was considered by the Court of Appeal in *D'Arro v Queensland Building and Construction Commission*.²³

D'Arro v Queensland Building and Construction Commission

[48] In order to understand the decision in *D'Arro* it is necessary to say something about the facts of the case.

[49] Four companies associated with Mr D'Arro were placed into liquidation on 22 May 2009. On 3 July 2009 the QBCC decided that Mr D'Arro was an excluded individual for the liquidator appointments. On 1 July 2010, Mr D'Arro was made bankrupt. The QBCC subsequently decided that Mr D'Arro was an excluded individual for the bankruptcy.

[50] It should be noted here that the applicable statutory regime at the time of the relevant events concerning Mr D'Arro was different to that in the present case. At that time,

²¹ (1957) 96 CLR 261, 267.

²² Ibid.

²³ [2018] 1 Qd R 204.

an excluded individual could apply to the QBCC to be categorised as a 'permitted individual'. Mr D'Arro, as an excluded individual, applied to be categorised as a permitted individual in respect of each of the company liquidations and the bankruptcy. His applications were refused by the QBCC on 2 October 2012. Mr D'Arro applied to the tribunal to review the decisions.

[51] Ultimately, the only decisions the tribunal was required to review were the decision rejecting Mr D'Arro's application to be categorised as a permitted individual in respect of the bankruptcy and the decision to categorise Mr D'Arro as an excluded individual in respect of the first company liquidation.

[52] Between the time of the hearing and the decision being handed down at first instance, the QBCC Act was amended by the *Professional Engineers and Other Legislation Amendment Act 2014 (Qld)* (the PEOLA amendments). The relevant provision of the QBCC Act, s 56AC, provided as follows prior to the PEOLA amendments:

(5) An excluded individual for a relevant bankruptcy event (the first event) does not also become an excluded individual for another relevant bankruptcy event (the other event) if the first event and the other event are both consequences flowing from what is, in substance, the one set of circumstances applying to the individual.

(6) An excluded individual for a relevant company event (the first event) does not also become an excluded individual for another relevant company event (the other event) if the first event and the other event are both consequences flowing from what is, in substance, the one set of circumstances applying to the company.

[53] The PEOLA amendments deleted sub sections (5) and (6) of s 56AC and a new s 56AC(5) was inserted:

(5) An excluded individual for a relevant event does not also become an excluded individual for another relevant event if the commission is satisfied that both events are consequences flowing from what is, in substance, the one set of circumstances.

[54] A 'relevant event' is defined as a relevant bankruptcy event or a relevant company event.

[55] A person who became bankrupt within the preceding 5 years (a 'relevant bankruptcy event') was an excluded individual.²⁴ Similarly, if a person was a director or secretary of, or an influential person in respect of, a company, and the company had (inter alia) a liquidator appointed within the preceding 5 years (a 'relevant company event'), the person was an excluded individual.²⁵ A person who had twice been an excluded individual for a relevant event, was a permanently excluded individual.

[56] The effect of the amendments upon Mr D'Arro were significant and were summarised by the Court of Appeal:

If the amendments were applicable in the Tribunal and if, as the applicant contended, in terms of the new s 56AC(5) the applicant's bankruptcy and the appointment of liquidators to the companies were all consequences flowing from what was, in substance, the one set of circumstances, then s 56AD(8)(a) supplied an additional ground enlivening the power to categorise the applicant

²⁴ QBCC Act, ss 56AC(1), 56AC(3).

²⁵ Ibid, ss 56AC(2), 56AC(4).

as a permitted individual for relevant events. Another possible result of applying the amendments is that, if each relevant event flowed from what was in substance the one set of circumstances, under the amended s 56AC(5) the applicant would be an excluded individual for only one relevant event, the appointment of a liquidator to Innovare; if so, he should not be treated as a permanently excluded individual whether or not he succeeded in his application to be categorised as a permitted individual.²⁶ (footnotes omitted)

[57] At first instance, the tribunal decided that Mr D'Arro was an excluded individual in respect of the company liquidation. The tribunal also decided that Mr D'Arro should not be categorised as a permitted individual. In making the decision, the tribunal relied upon the Act as it applied at the time of the hearing, and not the Act as it applied at the time of the decision.

[58] Mr D'Arro appealed the decision at first instance to the QCAT appeal tribunal. He argued that, among other things, the tribunal should have applied the PEOLA amendments. Had it done so, said Mr D'Arro, it would not have been necessary to determine whether he was a permitted individual because there was only one event for which he was excluded – all events flowing from the one set of circumstances – and the period of exclusion for the first event had expired.

[59] The QCAT appeal tribunal stated:

The PEOLA amendments (if applicable) would benefit Mr D'Arro. This is because if the Tribunal found the appointment of liquidators and the bankruptcy all flow from the 'the one set of circumstances' (under the amended s 56AC(5)) Mr D'Arro can only be deemed an excluded individual for the first relevant event and the period of exclusion (under the QBCC Act) has now expired.

If the QBCC Act (before the PEOLA amendments) is applied there are in effect two relevant events (the liquidation and the bankruptcy) for which Mr D'Arro becomes an excluded individual. If Mr D'Arro is not categorised as a permitted individual, the QBCC's decision that Mr D'Arro is an excluded individual because of the bankruptcy (and the liquidation) has ramifications for Mr D'Arro because under the QBCC Act (before amendment) a person who has 'twice been an excluded individual for a relevant event' is a 'permanently excluded individual'.²⁷

[60] The appeal tribunal decided that to apply the Act as amended would be to give the PEOLA amendments retrospective effect. Central to this determination was the conclusion that a liability had accrued in respect of Mr D'Arro, which liability would be affected if the PEOLA amendments were to be applied. The result, said the appeal tribunal, was that the amendments had no application in the particular circumstances of Mr D'Arro.

[61] The appeal tribunal held:

As found by the Court of Appeal in *McNab's* case, the PEOLA amendments would seem to fall within Dixon CJ's formulation '...applying to facts...that have already occurred in such a way as to...impose or otherwise affect...liabilities'. This is because the events (the liquidation and bankruptcy)

²⁶ *D'Arro v Queensland Building and Construction Commission* [2018] 1 Qd R 204, 211 [18].

²⁷ *D'Arro v Queensland Building and Construction Commission* [2016] QCATA 76, [28]-[29].

have triggered the effect of s 56AC under the QBCC Act (before amendment) and Mr D'Arro is deemed an excluded individual for both relevant events.²⁸

[62] Mr D'Arro appealed to the Court of Appeal.

[63] The Court of Appeal found that on a rehearing de novo the applicable law as it then exists is applied, not the law as it existed at an earlier time.²⁹ The Court considered whether, applying the Act as amended, would result in the PEOLA amendments as applying to facts or events that had already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. Fraser JA with whom the other members of the Court agreed, stated that in order to consider whether the PEOLA amendments would operate retrospectively it was necessary to consider the relevant liability or other consequence of the operation of the Act that would be affected.

[64] The Court of Appeal examined closely the operation of s 56AC(3) and s 56AC(4) of the Act. Neither section was affected by the PEOLA amendments. Fraser JA stated the effect of the various provisions of s 56AC thus:

... ss 56AC(3) and 56AC(4) merely use the expression "excluded individual" as a shorthand description of an individual who, within the preceding five years, took advantage of the bankruptcy laws or became bankrupt in accordance with s 56AC(1) or has the specified relationship with a company to which a liquidator was appointed or was affected by other specified actions in accordance with s 56AC(2).³⁰

[65] The Court did not accept the argument that s 56AC(3) and s 56AC(4) operated upon the date of a relevant event to create a liability or other adverse consequence that would fall within s 20 of the AI Act, finding:

Any relevant liability or thing suffered is instead created by a subsequent cancellation of a licence or refusal of an application for a licence consequent upon a decision by the respondent that an individual is an excluded individual.³¹

[66] The Court observed:

The application of the amendments made by the PEOLA Act would operate retrospectively if they changed the applicant's licence status as it was at a time before that Act was enacted. For example, the PEOLA Act would operate retrospectively if the QBCC Act as amended entitled the applicant or one of his companies to be regarded as having held a licence in a period before the commencement of the amendments even though in that period the respondent had duly refused an application for the licence or duly cancelled the licence under ss 31(1)(e) or 56AE of the QBCC Act or had duly cancelled the licence under s 56AF(3) of the QBCC Act. The respondent did not argue that the PEOLA Act would have any such effect if those amendments were applied by the Tribunal in the review of the relevant decisions. The possible consequences that after the PEOLA Act had commenced any application by the applicant for a licence could not lawfully be refused in reliance upon ss 31(1)(e) or 56AE and the respondent could not lawfully cancel the applicant's licence in reliance upon s 56AF(3) would not attribute a retrospective application to the PEOLA Act;

²⁸ Ibid, [49].

²⁹ *D'Arro v Queensland Building and Construction Commission* [2018] 1 Qd R 204 citing *Esber v Commonwealth* (1992) 174 CLR 430.

³⁰ *D'Arro v Queensland Building and Construction Commission* [2018] 1 Qd R 204, 216 [30].

³¹ Ibid.

although the PEOLA Act would apply with reference to events that had occurred before its enactment, it would not apply “in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events”.³²

[67] The Court stated:

It might be said that the statutory description of the applicant as an excluded individual disadvantaged the applicant in the sense that any licence he held might be cancelled and any application for a licence he might make would be refused, but until such an event occurred the disadvantage should not be regarded as an accrued liability or a completed transaction ...³³

[68] Fraser JA referred to the judgment of Windeyer J in *Ogden Industries Pty Ltd v Lucas*³⁴ and in particular the following passage:

It seems to me that without descending to too much refinement there are at least three main senses in which lawyers speak of a liability or liabilities. The first, a legal obligation or duty: the second the consequence of such a breach of such an obligation or duty: the third a situation in which a duty or obligation can arise as the result of the occurrence of some act or event. It is in the third sense that s 5(1) [of the Workers' Compensation Act 1958 (Vic)] speaks of an employer as liable to pay compensation in accordance with the Act. But I do not think it is the sense in which it is said that an amending Act does not disturb existing liabilities arising out of past transactions. *That to my mind describes a liability having become complete by past events rather than a situation in which some future event must occur to make the effect of past events create a completed liability.* (emphasis added)

[69] Fraser JA considered the last sentence as describing the distinction he considered applicable in Mr D'Arro's case.

[70] The Court concluded that the application of the PEOLA amendments did not attribute a retrospective effect to the Act as amended.

[71] It is appropriate to make two final observations about the decision in *D'Arro* and the operation of s 56AF(3). As has been observed, s 56AF(3) provides that, if the commission considers that an individual who is a licensee is an excluded individual for a relevant event, the commission must (subject to certain stated conditions) cancel the individual's licence.

[72] The QBCC argued that s 56AF(3) operated to oblige the QBCC to cancel Mr D'Arro's licence. At first blush, this provision may appear to operate to crystallise the liability of a licensee through the automatic cancellation of the individual's licence. However Fraser JA observed:

... in the circumstances and subject to the conditions expressed in s 56AF, s 56AF(3) obliges the respondent to cancel any licence held by an individual once the respondent considers that the individual is an excluded individual. Section 56AF(1) makes it clear that any such consequence is not automatically attracted by the operation of ss 56AC(3) or 56AC(4); it may occur only after a decision by the respondent that a licensee is an excluded individual for a relevant event. So much is also consistent with ss 56AH and 61.

³² Ibid.

³³ *D'Arro v Queensland Building and Construction Commission* [2018] 1 Qd R 204, 218 [33].

³⁴ (1967) 116 CLR 537, 584.

...

The circumstance that an evaluative decision that an individual is an excluded individual is required before those sections operate in a way that affects the individual's licence status, together with the possibility that before the individual's licence status is affected the individual may be categorised under subss 56AD(8) and (9) as a permitted individual rather than an excluded individual, make it difficult to accept the respondent's argument that ss 56AC(3) and 56AC(4) themselves operate upon the date of a relevant event to create a liability or other adverse consequence that would fall within s 20 Acts Interpretation Act 1954.³⁵

- [73] As Fraser JA observed, the cancellation of a licence pursuant to s 56AF(3) required, first, that a decision be made that an individual 'is an excluded individual for a relevant event.' Fraser JA stated:

Any relevant liability or thing suffered is instead created by a subsequent cancellation of a licence or refusal of an application for a licence *consequent upon a decision* by the respondent that an individual is an excluded individual.³⁶

- [74] Fraser JA concluded that neither s 56AC(3) nor s 56AC(4) operated to cancel a licence pursuant to s 56AF(3). A decision was first required that an individual was an excluded individual for a relevant event. Because the amended provisions did not operate to effect the cancellation of the licence, the provisions did not operate with retrospective effect.
- [75] Finally, as to whether the effect of a decision by the tribunal might operate to establish that the cancellation by the QBCC of a licence pursuant to s 56AC(3) was ineffective, the Court stated:

The Court was informed that the respondent cancelled a licence under s 56AF(3) when the applicant failed to make an application within a time limited under that subsection. If a Tribunal decision favourable to the applicant took effect from the date when the respondent's reviewable decisions were made it might be contended that the Tribunal decision established that the respondent's cancellation of the licence was ineffective. However the respondent did not rely upon s 24³⁷ in this Court, perhaps because the Tribunal's power to make a "contrary order" under s 24(2) appears to enable it to ensure that the application of amending legislation introduced after a reviewable decision will not give such legislation a retrospective effect which is unwarranted. It is therefore unnecessary to say anything further about the point.

Consideration

- [76] As was observed in *D'Arro*, it is necessary to first identify the relevant liability or other consequence of the operation of the QBCC Act that would be affected by the application of the BIFA amendments. The learned member addressed this issue in the following passage of the reasons:

In the matters before this Tribunal the penalty on Buchanan had been imposed (or would have been but for his actions in forestalling it). That is, he had been declared an excluded individual in the case of QUBE North on 16 May 2017, and in the case of QUBE Projects on 1 September 2017. In the absence of any

³⁵ *D'Arro v Queensland Building and Construction Commission* [2018] 1 Qd R 204, 216 [29].

³⁶ *D'Arro v Queensland Building and Construction Commission* [2018] 1 Qd R 204, 216 [30].

³⁷ Of the QCAT Act.

submissions from him within the allowed 28 days in each case, as it concerned QUBE North he became an excluded individual and, in the matter of QUBE Projects, a permanently excluded individual by the operation of s 56AF and s 58 of the QBCC Act. The penalties to which he was subject had occurred (or would have but for Buchanan's applications) and were not inchoate.³⁸

- [77] In a footnote, the learned member notes that Mr Buchanan did not become a permanently excluded individual for reasons subsequently explained in the decision.
- [78] The learned member referred variously in the reasons to 'penalty' and 'liability'. Regardless of the word used it is readily apparent that the learned member considered that a liability had accrued in respect of Mr Buchanan, that liability being Mr Buchanan having been declared an excluded individual in respect of each of the relevant events.
- [79] As has been observed, where on a rehearing *de novo* the question for decision is whether an applicant should be granted a right, the law as it then exists is applied not the law as it existed at an earlier time. In adopting the formulation in *D'Arro*, the question in the present appeal is whether the BIFA amendments did not form part of that law because the BIFA amendments did not operate retrospectively.
- [80] The learned member stated that if, in making a decision *de novo*, the tribunal confirmed the original decision based upon the law as it presently was, rather than the law as it was at the time of the original decision, the tribunal would be:
- (a) Confirming a decision of the QBCC that was made under the previous law;
 - (b) Based on a new law, not the law applying at the time of the original decision; and
 - (c) Ordering that the decision apply from the date of the original decision (subject to the tribunal making a contrary order).
- [81] The learned member considered there to be a logical problem with this sequence which he summarised thus: 'everything is referable to past events, except the law that is to be applied.'³⁹
- [82] Based upon the analysis earlier in these reasons, the following may be accepted:
- (a) In conducting review proceedings, the role of the tribunal is to conduct a hearing *de novo* and to make the correct and preferable decision. The tribunal is to determine the matter afresh, applying the law as it is at the time of the tribunal's decision. In deciding an application to review a decision the tribunal may, *inter alia*, confirm the original decision. This may require the tribunal to apply a different law to that in force at the time of the original decision however, and subject to the observations that follow, this is one of the requirements of a merits review.
 - (b) In conducting a merits review, the tribunal is not permitted to apply a statute retrospectively unless the terms of the statute require such an application or the statute is procedural in nature. The presumption against the retrospectivity of

³⁸ Reasons, [48].

³⁹ Reasons, [37].

legislation is not displaced by the circumstance that a rehearing occurs after a change to the relevant legislation.⁴⁰

- (c) The application of amending legislation in the determination of an application to review a decision does not, of itself, mean that the legislation is being given retrospective effect. As the Court of Appeal stated in *D'Arro*, legislation will have a retrospective effect if it affects an existing, accrued right or liability.

[83] It is necessary therefore to examine the BIFA amendments in order to determine whether they affected an existing, accrued right or liability. As a starting point, and as was the case in *D'Arro*, s 56AC(3) and s 56AC(4) of the QBCC Act are central to the consideration of the present appeal. It should be noted that both sections are in the same terms as were considered in *D'Arro*.

[84] The learned member found that a 'penalty' had been imposed on the respondent, or would have been but for the commencement of the review proceedings, in the form of his becoming a permanently excluded individual by operation of s 56AF and s 58 of the QBCC Act.

[85] Central to the learned member's determination of the effect of s 56AC is the following passage from the reasons:

There is no decision required by the QBCC about whether or not a person is an excluded individual, a person becomes an excluded individual by operation of the Act. In this case, if Buchanan met the conditions prescribed in s 56AC of the QBCC Act, he became an excluded individual, without more having to occur.⁴¹

[86] Section 56AC(3) and s 56AC(4) use the expression 'excluded individual' to describe an individual who falls within the meaning of s 56AC(1) or s 56AC(2).⁴² An evaluative decision is required by the QBCC that an individual is an excluded individual before the sections operate in a way that an individual's licence status is affected.⁴³ The relevant liability or thing suffered is created by a subsequent cancellation of a licence or refusal of an application for a licence consequent upon a decision by the QBCC that an individual is an excluded individual.⁴⁴

[87] While Mr Buchanan fell within the description of an excluded individual in accordance with the amended s 56AC(2)(c)(ii), neither this section, s 56AC(3) or s 56AC(4) operated to change Mr Buchanan's licence status as it was prior to the BIFA amendments. Contrary to the finding by the learned member, the fact that Mr Buchanan may have been described as an excluded individual for the purposes of s 56AC(2)(c)(ii) was not an accrued liability or a completed transaction as at the date of the decision under review. A further step was required by the QBCC before such a liability accrued, that step being the cancellation of Mr Buchanan's licence or the refusal to grant him a licence consequent upon a determination that he was an excluded individual.

⁴⁰ *McNab Constructions Australia Pty Ltd v Queensland Building Services Authority* [2010] QCA 380 per Chesterman JA.

⁴¹ *Ibid*, [16].

⁴² *D'Arro v Queensland Building and Construction Commission* [2018] 1 Qd R 204, 217.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

- [88] The learned member found that Mr Buchanan was, by operation of s 56AF and s 58 of the QBCC Act, a permanently excluded individual as a result of the second relevant event. Section 56AF operates if a determination is made by the QBCC that an individual who is a licensee is an excluded individual for a relevant event. If, after receiving submissions from the licensee or in the absence of submissions by the licensee, the QBCC still considers the licensee to be an excluded individual, by s 56AF(3) the QBCC must cancel a licensee's licence. However this is not an automatic consequence of the operation of s 56AC(2)(c)(ii), s 56AC(3) or s 56AC(4). By s 56AF(1) the QBCC must first make a *decision* that a licensee is an excluded individual for a relevant event. It is only after such a decision is made that a licensee is subject to an accrued liability.⁴⁵ Section 58 operates only if an individual has twice been determined to be an excluded individual for a relevant event. It follows that nothing in s 58 of the QBCC Act prior to the BIFA amendments created a right privilege or liability.
- [89] In relation to the learned member's finding that an offence or penalty had been imposed upon Mr Buchanan, it is apparent from a consideration of s 56AF and s 58 that neither section creates an offence or imposes a penalty based upon a licensee's classification as an excluded individual.
- [90] Accordingly, the learned member erred in concluding that s 56AF and s 58 operated in the circumstances to create a liability or penalty in respect of Mr Buchanan prior to the BIFA amendments.
- [91] The learned member, relying upon *D'Arro* and the consideration by Fraser JA of the decision in *Ogden Industries Pty Ltd v Lucas*, found that the AI Act operated to support the conclusion that a penalty had been imposed upon Mr Buchanan by the reviewable decisions and that to apply the BIFA amendments would be to give s 56AC(2)(c)(ii) a retrospective effect. In *Ogden* Windeyer J referred to the difference between a liability having become complete by past events as opposed to a situation in which some future event must occur to make the effect of past events create a completed liability. It was this distinction to which Fraser JA referred in *D'Arro* and which he considered as being applicable in the circumstances.
- [92] The error by the learned member was in misconstruing *D'Arro* and concluding that an existing liability had been imposed upon Mr Buchanan. Until such time as a decision had been made regarding Mr Buchanan's licence consequent upon the determination as to whether he was an excluded individual (the future event to which Windeyer J was referring in *Ogden*), Mr Buchanan was not subject to an accrued liability.
- [93] It follows from the foregoing that the learned member erred in concluding that the BIFA amendments, and specifically s 56AC(2)(c)(ii) had retrospective effect.

Conclusion and orders

- [94] The learned member confirmed the first reviewable decision with the result that Mr Buchanan was an excluded individual as a result of the first relevant event. This finding is not appealed.

⁴⁵ See also *Queensland Building and Construction Commission v Ezra Constructions Pty Ltd* [2019] QCA 304.

- [95] The learned member found that for the purposes of s 56AC(5) of the QBCC Act, the appointment of liquidators to each of QUBE North and QUBE Projects were separate events.⁴⁶ This finding is not appealed.
- [96] The learned member found that Mr Buchanan remained a director of QUBE Projects with his consent until 13 January 2016.⁴⁷ The date of the second relevant event, 24 May 2017, is not contentious. The second relevant event occurred within 2 years of Mr Buchanan ceasing to be a director of QUBE Projects.
- [97] There is no dispute about the factual findings by the learned member regarding Mr Buchanan's involvement with QUBE Projects. The error by the learned member was an error of law in failing to apply the correct legislative provisions to the facts before him.
- [98] If the determination of a question of law decides an appeal entirely in favour of the appellant, the appeal tribunal may set aside the decision below and substitute its own decision. The learned member erred in failing to apply the BIFA amendments in respect of the review of the second reviewable decision. Had the learned member applied the BIFA amendments, and s 56AC(2)(c)(ii) specifically, Mr Buchanan was an excluded individual in respect of the second event.
- [99] It follows that, by operation of s 58(1) of the QBCC Act, Mr Buchanan was a permanently excluded individual as a result of his twice being an excluded individual for a relevant event.
- [100] The QBCC has been entirely successful in the appeal on ground one. It is therefore unnecessary to address further appeal ground two.
- [101] Appeal ground three relates to the orders made in OCR121-17. The learned member made two orders. The first order confirmed the first reviewable decision. The second order was in the following terms:
- The Respondent is to set a date which it deems appropriate from which the licences of the Applicant are to be cancelled for the period prescribed by law.
- [102] The QBCC says that the order was beyond power because the determination was not authorised by the QBCC Act or the QCAT Act.
- [103] It is not entirely clear from the reasons why the second order in OCR121-17 was made. In exercising its review jurisdiction in respect of the first reviewable decision, the Tribunal had all of the functions of the decision maker for the reviewable decision and was required to produce the correct and preferable decision following a fresh hearing on the merits. Importantly, the Tribunal could confirm, amend or set aside the first reviewable decision and substitute its own decision, or remit the matter for reconsideration by the original decision maker. The first reviewable decision was a decision made under s 56AF that Mr Buchanan was an excluded individual. The Tribunal had power to confirm the decision that Mr Buchanan was an excluded individual or to set aside the decision on the basis that Mr Buchanan was not an excluded individual. Alternatively the Tribunal could have remitted the matter for reconsideration. There was no need or power to make the second order.⁴⁸ As these

⁴⁶ Reasons [82].

⁴⁷ Reasons [61(c)].

⁴⁸ See for example *RPG v Public Safety Business Agency* [2016] QCAT 331.

reasons make clear, Mr Buchanan's licence status was, and is, a matter for the QBCC to determine based upon Mr Buchanan's status as an excluded individual.

[104] As appeal grounds one and three raise questions of law the appropriate orders are that the appeal is allowed and the decision of the tribunal below is varied as follows:

(a) In OCR121-17:

1. Order 2 is set aside.

(b) In OCR215-17:

1. Order 1 is set aside;

2. The decision of the Queensland Building and Construction Commission made on 1 September 2017 is confirmed.

