

AUSTRALIA / JUDGMENT

Norah v Commissioner for Fair Trading

[2025] NSWCATOD 133**COURT**

Civil and Administrative Tribunal

DECIDED

25 September 2025

BEFORE

L Bryant, Senior Member

CASE / FILE NUMBER

2024/00430085

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Source record

Civil and Administrative Tribunal New South Wales

Medium Neutral Citation: Norah v Commissioner for Fair Trading [2025] NSWCATOD 133**Hearing dates:** 5 May 2025**Date of orders:** 25 September 2025**Decision date:** 25 September 2025**Jurisdiction:** Occupational Division**Before:** L Bryant, Senior Member

Decision: (1) The decision under review is affirmed.
(2) Pursuant to s 64(1)(c) of the Civil and Administrative Tribunal Act, other than to the Tribunal, applicant and respondent, the publication of the contents of all paragraphs in these Reasons marked “[NOT FOR PUBLICATION]” other than the words in those brackets is prohibited.

Catchwords: ADMINISTRATIVE LAW – administrative review – real estate agent – conduct outside the course of carrying on a business as an agent or performing licensed functions – contravention of Rule 1, Schedule 1 of Property and Stock Agents Regulation 2022 under s 37 – where administrator seeks greater penalty than determined in the internal review process – fit and proper person to hold a licence

Legislation Cited: Administrative Decisions Review Act 1997
Civil and Administrative Tribunal Act 2013
Interpretation Act 1987
Property and Stock Agents Act 2002
Property and Stock Agents Regulation 2022

Cases Cited:	Agha v Commissioner for Fair Trading [2024] NSWCATOD 182 Casella v the Registrar of the Real Estate and Business Agents Supervisory Board (2003) 33 SR (WA) 201 Commissioner of Fair Trading v PSMG Pty Ltd [2025] NSWCATAP 34 Commercial Bank of Australia v Amadio (1983) 151 CLR 447 Frugtniet v Australian Securities and Investments Commission [2019] HCA 16; (2019) 266 CLR 250 Maher v Department of Fair Trading [2019] NSWCATOD 21 Marten v Royal College of Veterinary Surgeons' Disciplinary Committee [1966] 1 QB 1 Mavaddat v Real Estate & Business Agents Supervisory Board [2009] WASCA Reyes v Dental Board of South Australia (2002) 83 SASR 551 Shi v Migration Agents Registration Authority [2008] HCA 31; (2008) 235 CLR 286 Sobey v Commercial and Private Agents Board (1979) 22 SASR 70 STAR Training Academy Pty Ltd v Commissioner of Police [2021] NSWCATAP 370 YG and GG v Minister for Community Services [2002] NSWCA 247 Yu v Commissioner for Fair Trading [2022] NSWCATOD 68 Ziems v The Prothonotary of the Supreme Court of NSW (1957) 97 CLR 279
Texts Cited:	None
Category:	Principal judgment
Parties:	Rachelle Carmen Nohra (applicant) Commissioner for Fair Trading (respondent)
Representation:	
Counsel:	P English (applicant) T Bagley (respondent)
Solicitors:	Jemmeson Fisher Legal (applicant) Department of Customer Service (respondent)
File Number(s):	2024/00430085
Publication restriction:	The names of witnesses in the proceedings of the Guardian Division of the Tribunal referred to in these reasons have not been published pursuant to a publication restriction under section 65 of the Civil and Administrative Tribunal Act 2013. The name of a person includes a reference to any information, picture or other material that identifies the person or is likely to lead to the identification of the person.

REASONS FOR DECISION

Introduction

The applicant has applied for review of a decision by the respondent. The decision was made under the Property and Stock Agents Act 2002 (the Act) in relation to the applicant's real estate agent licence. In that decision, the respondent decided to:

reprimand the applicant (s 192(1)(a)).

impose a monetary penalty on the applicant of an amount of 100 penalty units (s 192(1)(d)).

suspend the applicant's licence for a period of 12 months (s 192(1)(f)).

direct the applicant to undertake two training modules (CPPREP5003 - Manage ethical practice in the property industry and CPPREP5001 - Manage compliance with the property industry) before 2 December 2024 (s 192(1)(c)).

The issues

The issues for determination in this review are:

whether disciplinary action should be taken against applicant:

under section 191(a) of the Act, for contravening s 37(2) of the Act by not having the knowledge and understanding of relevant laws, including residential tenancy laws, required by Rule 1, Schedule 1 of the Property Stock and Agents Regulation 2022 (the Regulation) (Ground 1),

under section 191(e) of the Act, for not being a fit and proper person to be involved in the direction, management or conduct of the business of a licensee because of her conduct in relation to her purchase of a property in a personal capacity (Ground 2), and

subject to the outcome of (1)(a) and (1)(b), the proper disciplinary action to be taken against the applicant under s 192 of the Act.

For the reasons that follow, I am satisfied that disciplinary action should be taken against the applicant under s 192 of the Act in relation to Ground 2 and the respondent's decision is affirmed.

Background

The applicant was issued a real estate licence in 2016.

The circumstances giving rise to the disciplinary action relate to the applicant's dealings with Mr A in a personal capacity rather than as an agent.

Mr A is an 82-year-old self-funded retiree who lives alone, is unmarried and has no children. Mr A has a significant cognitive impairment, consistent with Alzheimer's disease.

The applicant met Mr A in 2015 and developed a friendship with him.

On 21 July 2022, Mr A executed an enduring power of attorney and an appointment of enduring guardian, appointing the applicant as his attorney and guardian.

On 28 April 2023 the applicant purchased Mr A's home (the property) from him at significant undervalue.

The sale of Mr A's home did not occur in the course of the applicant's dealings as a real estate agent, and did not involve the use of the power of attorney she had been granted by Mr A.

The Tribunal's Guardianship Division (GD) reviewed Mr A's enduring power of attorney and enduring guardianship appointment in September 2023. This included the applicant giving evidence to the GD as his guardian and attorney.

On 23 September 2023 the GD revoked the appointment of the applicant as Mr A's enduring power of attorney and enduring guardian.

The applicant received a Notice to Show Cause (NTSC) from the respondent on 15 April 2024. The NTSC relied on the following two grounds under the Act:

Section 192(a) of the Act - the applicant may have contravened a provision of this Act or the Regulation.

Section 191(e) of the Act - the applicant may not be a fit and proper person to be involved in the direction, management or conduct of the business of a licensee.

A Delegate of the respondent's Department of Customer Service made a decision in relation to the applicant's real estate licence on 1 October 2024 (Original Decision). The Delegate:

Was satisfied that the applicant engaged in unconscionable conduct in relation to her purchase of the property and failed to address or mitigate the unconscionable conduct.

Found that the applicant failed to demonstrate the required knowledge and understanding of relevant laws and associated regulations and failed to secure Mr A's continuing right to occupy the property.

Was satisfied that the applicant contravened s 37(1) of the Act, and the grounds for taking disciplinary action under s 191(a) of the Act were established.

Was not satisfied that the applicant was not a fit and proper person for the purposes of s 191(e) of the Act.

The applicant sought an internal review.

A Reviewing Officer of the respondent affirmed the Original Decision on 18 November 2024 (Review Decision). In summary the Reviewing Officer:

Considered the applicant's reasons for internal review and specifically that the conduct did not occur during the course carrying on of business or carrying out licensed functions.

Agreed that such conduct could, and in this case did, contravene s 37(2) of the Act which supported the disciplinary action under s 191(a).

Agreed with the Delegate for the Secretary's assessment and findings as to the conduct being deliberate, of major harm, and of major severity.

Agreed that disciplinary action was warranted due to the applicant's lack of accountability and responsibility, which raises concerns about her knowledge and understanding of the laws necessary to lawfully perform the functions of a licence holder and the outcome serves as a warning to other licence holders that disregarding the legislation is unacceptable, and the consequences of doing so are significant.

Did not disturb the finding in the Original Decision that the fit and proper person ground for disciplinary action under s 191(e) of the Act was not made out.

On 19 November 2024 the applicant filed an application for administrative review of the Review Decision.

At an interim hearing on 26 November 2024 an order staying the decision under review was made by the Tribunal.

The respondent provided a List of Additional Issues and Reasons to the applicant dated 20 January 2025 in which it contends the applicant is not a fit and proper person to hold a licence.

Legislation

Section 14 of the Act provides:

14 Eligibility for a licence or certificate of registration

- (1) An individual is eligible to hold a licence only if the Secretary is satisfied that the individual —
- ...
- (b) is a fit and proper person to hold a licence ...

Section 37 of the Act relevantly provides:

37 Rules of conduct for licensee's business

- (1) The regulations may prescribe rules of conduct to be observed in the course of the carrying on of business or the exercise of functions under a licence or certificate of registration.
- (2) A licensee or registered person who without reasonable excuse contravenes a rule of conduct prescribed for the purposes of this section is guilty of an offence.

Maximum penalty—

- (a) for a corporation—1,000 penalty units, or
- (b) otherwise—200 penalty units.

Section 191 of the Act relevantly provides:

191 Grounds for disciplinary action

Disciplinary action under this Part can be taken against a person who is or was the holder of a licence or certificate of registration on any one or more of the following grounds—

- (a) the person has contravened a provision of this Act or any other Act administered by the Minister (including any provision of the Australian Consumer Law (NSW)), or the regulations under any such Act, whether or not the person has been prosecuted or convicted of an offence in respect of the contravention,

...

- (e) the person is not a fit and proper person to be involved in the direction, management or conduct of the business of a licensee,

...

Section 192 of the Act relevantly provides:

192 Disciplinary action

- (1) Each of the following actions is disciplinary action that the Secretary can take against a person under this Act—
 - (a) caution or reprimand the person,
 - (b) give a direction to the person requiring the person to give a specified undertaking to the Secretary as to the manner in which the person will conduct business or exercise functions under a licence or certificate of registration held by the person,
 - (c) give a direction to the person requiring the person to take specified action within a specified time in connection with the conduct of business or the exercise of functions under a licence or certificate of registration,
 - (d) impose a monetary penalty on the person of an amount not exceeding 100 penalty units in the case of an individual or 200 penalty units in the case of a corporation,
 - (e) impose a condition on the person's licence or certificate of registration,
 - (f) suspend the person's licence or certificate of registration for a period that does not exceed the unexpired term of the licence or certificate of registration,
 - (g) cancel the person's licence or certificate of registration,
 - (h) declare the person to be a disqualified person for the purposes of this Act, either permanently or for a specified period,
 - (i) disqualify the person from being involved in the direction, management or conduct of the business of a licensee, either permanently or for a specified period.
- (2) A power conferred by this Act to take disciplinary action against a person is a power to take any one or more of the actions that constitute disciplinary action.

Section 195 of the Act provides:

195 Show cause notice

- (1) The Secretary may serve a show cause notice on a person if the Secretary is of the opinion that there is reasonable cause to believe that there are grounds for taking disciplinary action against the person.
- (2) A show cause notice is a notice requiring a person to show cause why disciplinary action should not be taken against the person under this Act on the grounds specified in the notice.
- (3) A show cause notice is to be in writing and is to specify a period of not less than 14 days after service of the notice as the period that the person to whom the notice is directed has to show cause as required by the notice.
- (4) The person on whom a show cause notice is served may within the period allowed by the notice make oral or written submissions to the Secretary in respect of the matters to which the notice relates. In the case of a corporation, submissions may be made by a director or officer of the corporation.

Section 200 of the Act provides:

200 Administrative review of disciplinary action by NCAT

A person against whom disciplinary action is taken by the Secretary may apply to the Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of the Secretary's decision on the disciplinary action or on a review of the disciplinary action.

Section 8 of the Regulation allows rules of conduct to be prescribed under the Act as follows:

8 Rules of conduct—the Act, s 37

- (1) The rules set out in Schedules 1–4 are prescribed for the Act, section 37 as rules of conduct to be observed in the course of the carrying on of business or the exercise of functions under a licence or certificate of registration.
 - (2) Schedules 1–4 apply as follows—
 - (a) Schedule 1 applies to all agents and assistant agents,
- [...]

Schedule 1 of the Regulation prescribes the general rules of conduct applying to all agents and assistant agents and includes:

1 Knowledge of Act and regulations

An agent must have a knowledge and understanding of the following as necessary to enable the agent to exercise the agent's functions lawfully—

- (a) the Act and the regulations under the Act,

- (b) other laws relevant to the category of licence or certificate of registration held by the agent, including laws relating to the following—
 - (i) residential tenancy,
 - (ii) fair trading,
 - (iii) competition and consumer protection,
 - (iv) anti-discrimination,
 - (v) privacy.

The role of the Tribunal

The Tribunal has jurisdiction to review the decision of an ‘administrator’ (the respondent), if ‘enabling legislation’, (in this case the Act), provides that applications may be made to it for a review of the decision: ss 4(1), 7(1), 8 and 9 of the Administrative Decisions Review Act 1997 (ADR Act). In determining an application for review, the Tribunal is to decide what the correct and preferable decision is having regard to the material before it, including any relevant factual material and any applicable written or unwritten law: s 63 of the ADR Act. For the purpose of reviewing the decision the Tribunal may exercise all functions conferred or imposed by any relevant legislation on the administrator: s 63(2) ADR Act.

Section 200 of the Act allows a person, against whom disciplinary action is taken, to seek administrative review in this Tribunal (*Commissioner of Fair Trading v PSMG Pty Ltd* [2025] NSWCATAP 34 at [42] and [54]).

The time at which the correct and preferable decision is determined is when the Tribunal makes its decision: *YG and GG v Minister for Community Services* [2002] NSWCA 247 at [25].

The applicant’s case

The applicant sought for the decision of the respondent to be set aside because the applicant’s conduct occurred in a personal rather than a professional capacity and she poses no risks to clients in the course of carrying on the business or the exercise of functions under her licence.

In relation to Ground 1, the applicant submitted:

Contrary to the Delegate decision, which was based on s 37(1), the Reviewing Officer determined the internal review on the basis of s 37(2) of the Act. Either this was impermissible, or the applicant was denied procedural fairness in reaching this decision.

The Delegate decision, based on s 37 of the Act, required that the rules of conduct be observed in the course of the carrying on of business or the exercise of functions under a licence. This jurisdictional requirement was absent.

In relation to Ground 2, the applicant submitted:

Ground 2 was found not to be made out in the Original Decision. As this was affirmed by the Review Decision, this is not part of the review and should not be considered by the Tribunal.

She is a fit and proper person within the meaning of s 191(e) of the Act.

The applicant submitted that there are no grounds for disciplinary action arising from her conduct and therefore no action under s 192 should be taken. If the Tribunal considers that action under s 192 is warranted, the only appropriate order is for further training.

The respondent's case

The respondent sought for the Review Decision to be affirmed, subject to the following.

The respondent raised the issue in its List of Additional Issues and Reasons the applicant is not a fit and proper person to hold a license under the Act (s 14(1)(b)), and cited the following paragraphs from the NTSC in support:

46.1. taking advantage of a vulnerable elderly man, Mr A, who was frail, isolated and had impaired cognitive ability;

46.2. purchasing Mr A's home from him at a price that was significantly less than the market value; the Licence Holder was fully cognisant of this undervalue, by her own admission to the GD and because she was a real estate agent in the same neighbourhood;

46.3. failing to act to ensure Mr A's security of tenure when he sold his home to her, and thereby exposing Mr A to the risk of eviction at any time on 90 days' notice;

46.5. giving evidence to the GD which markedly failed to demonstrate the required knowledge and understanding of the relevant laws; and

46.6. contraventions of the Act and Regulation.

The respondent submitted that the Tribunal is able to infer that the applicant's conduct in relation to the transfer of Mr A's home was unconscionable.

The respondent submitted the applicant's absence of moral integrity and failure to acknowledge or take responsibility for the harm caused by her conduct, including seeking to rectify the situation, continues to mean the applicant is not a fit and proper person.

The respondent revised its position and sought a greater penalty than previously issued by the administrator. The respondent seeks for the Tribunal to take the following disciplinary action against the applicant under the Act:

to impose a monetary penalty on the applicant of an amount of 100 penalty units, being \$11,000 (s 192(1)(d));

to cancel the applicant's licence (s 192(g));

to declare the applicant to be a disqualified person for the purposes of this Act, for a period of 3 years (s 192(h)); and

to disqualify the applicant from being involved in the direction, management or conduct of the business of a licensee, for a period of 3 years (s 192(i)).

Material before the Tribunal

The applicant provided the Application for review, a copy of the contract of sale for the property, and written submissions to the respondent and Tribunal dated 3 March 2025, 24 April 2025 and 19 May 2025.

Filed with the applicant's written submissions on 3 March 2025 were:

a sworn witness statement of the applicant dated 28 February 2025 with annexures:

a copy of the Will of the applicant dated 9 June 2023,

a statement of attainment from the Australian College of Professionals dated 19 November 2024 for CPPREP5001 - Manage compliance with the property industry and CPPREP5003 - Manage ethical practice in the property industry and,

screenshot of the phone record showing a phone call between a representative of the NSW Office of the Trustee and Guardian and the applicant regarding Mr A on 28 February 2025.

a statement from Sheneli Meneripitiyage Dona, solicitor from Monardo Legal dated 27 February 2025.

Filed with the applicant's supplementary submissions on 30 June 2025 were:

A title search for the property dated 6 June 2025 showing a caveat on title had been lodged by the applicant on 5 June 2025.

Correspondence between the NSW Office of the Trustee and Guardian and the applicant in early June 2025 in relation to securing Mr A's leasehold interest on the title to the property with various attachments including a draft leasehold agreement for this purpose.

The respondent provided a bundle of material filed pursuant to s 58 of the ADR Act, a List of Additional Issues and Reasons dated 20 January 2025, and written submissions to the applicant and Tribunal dated 28 March 2025 and 14 July 2025.

The s 58 documents relevantly included, summarised by category, documents in relation to:

the NCAT Guardianship Division proceedings (including the reasons for its decision);

the Notice to Show Cause;

the Original Decision;

the Review Decision.

Filed with the respondent's supplementary written submissions on 14 July 2025 was a letter dated 15 May 2025 from the NSW Office of the Trustee and Guardian to the applicant taking issue with the 'improper' transfer of the property to the applicant that is 'liable to be set aside' and seeking for the applicant to propose a resolution as an alternative to litigation.

The hearing

Both parties made oral submissions at the hearing.

The applicant gave oral evidence at the hearing and was cross examined by the respondent.

No other witnesses were required for cross examination.

Evidence for the applicant

Sworn witness statement of the applicant

In summary the applicant says in this statement that:

Mr A was discharged from hospital in August 2023. Since that time the applicant's friendship with and care of Mr A has continued and she arranges and pays for a cleaner and gardener to maintain the property and visits Mr A regularly including having dinner with him once a week.

The applicant has secured Mr A's life estate at the property in her last Will made on 9 June 2023.

At the time the applicant entered into a residential tenancy agreement with Mr A, she did not appreciate the difference between a life estate recorded on the title of the property and a lease. The applicant has undertaken additional training and education through the Australian College of Professionals and now knows the difference between leasehold interests and a life estate.

On 28 February 2025 she spoke to a representative of the NSW Office of the Public Trustee and Guardian who confirmed that following a home visit the NSW Public Trustee and Guardian is happy to keep Mr A living at the property.

Cross examination of the Applicant

The applicant gave evidence as follows under cross examination.

The applicant is a real estate agent of 12 years' experience in residential sales and leasing.

The applicant is director of a company that operates a real estate business in Greystanes NSW with a licensee and team of four office staff.

The applicant makes around 30 sales annually and is responsible for managing approximately 250 residential tenancies each year. The applicant is the principal person for managing the business and the staff depend on her to know residential tenancy law.

The applicant knew Mr B, the solicitor who acted for Mr A in relation to the power of attorney, from a previous dealing where he sent a letter of demand to a client on her behalf. The applicant said that she did not recommend Mr B to Mr A for the power of attorney. This is different to what she told the GD and I will return to this later.

On 21 July 2022 Mr A wanted to appoint her as his power of attorney. The appointment was booked the same day, and the applicant drove Mr A to see Mr B and drove Mr A back home again. The applicant left the room for Mr A to have a private chat with Mr B. It was a short visit for the purposes of signing that document.

On 21 July 2022 the applicant signed Mr A's enduring power of attorney to confirm her appointment. The applicant said that she read the document before signing it to confirm acceptance, including point 6, which stated 'I must always act in the principal's best interests'. It was clear that the applicant did not understand that the enduring power of attorney was effective immediately and she thought that it could only be used when Mr A could no longer look after himself.

The applicant and Mr A spent a lot of time together. In around July 2022, the applicant accepted that Mr A was elderly, not close to family members, did not have many close friends and at that time was dependant on the applicant for parts of his day to day living such as gardening, shopping and if he needed her to help to pay bills such as electricity, rates and utilities. The applicant would drive Mr A places, for example, the post office and take him to the pub to have a drink or food.

Importantly, the applicant gave evidence that from around 21 July 2022 she knew for a fact that Mr A was drinking a lot more alcohol, engaging in heavier drinking and being intoxicated more frequently than before. This affected Mr A's behaviour in various ways:

With his personal care and hygiene: he was not always wearing his false teeth, had lost a lot of weight, soiled his clothes sometimes, and smoked his pipe without a mouthpiece.

With his cognition and mobility: Mr A spoke in a way that was confused and rambling, around once a fortnight when he fell over after drinking the applicant would have to pick him up, he would forget where he put his wallet or where his car was and forget whether he had sold his home.

There was no material change in Mr A's behaviour between July 2022 and the time of the sale of the property in April 2023.

The applicant gave evidence about the sale of Mr A's home, that was consistent with the evidence the applicant gave to the GD. In summary:

Mr A initially offered to gift the applicant his home in late 2022. The applicant declined because he had worked hard for his asset and said that it is only fair for him to spend some of the value of it.

A month before the sale the property next door had sold for \$1.1 million and Mr A's property was of the same or similar value.

Mr A wanted \$500,000 for his home, so long as he was able to remain living there for as long as he wanted.

The applicant declined to purchase the property from Mr A for \$500,000 but proposed \$600,000 as a fair price. The applicant was not able to explain why \$600,000 was fair, other than it was her opinion, and was not based on calculations.

The date of exchange of contracts for the sale was 28 April 2023 and completion occurred in the first week of June 2023.

Different solicitors acted for the applicant and Mr A in relation to the conveyancing transaction.

The residential tenancy agreement entered into between the applicant and Mr A was dated 28 April 2023.

The applicant's conclusion that \$600,000 was fair value for the property was unsupported by her own evidence that the value of the property was about \$1.1 million at the time. The applicant agreed that she was Mr A's power of attorney and enduring guardian at the time of the sale. She knew that Mr A's house was his major asset and represented the vast majority of his wealth. The applicant agreed that Mr A would have obtained more money if the purchase price had been higher, however she has not offered to pay further money to Mr A for the property since the sale.

In the applicant's view Mr A was fully cognisant and knew what he was doing in relation to the sale. According to the applicant, it was in Mr A's financial interests to make the sale at an undervalue, and that they both stood to benefit from it. The applicant said that she still invests and looks after the property for Mr A's benefit and he is content with the current arrangements. The applicant gave evidence that purchasing Mr A's property in the circumstances was and still is the right thing to do.

The applicant said that she asked "the solicitor", presumably Mr B, to make sure Mr A's interest to live at the property is protected for life. The applicant agreed that there is no Deed protecting Mr A's interests and that the residential tenancy agreement was the only agreement made to protect Mr A's interests at the time of the sale. The applicant accepted there has been no consideration paid for the residential tenancy agreement to date and the agreement is ineffectual to secure Mr A's interest to remain living at the property. The applicant conceded at the time the residential tenancy agreement was signed that she did not understand that as a contract, the agreement required consideration to be effective.

The applicant solely attributed Mr A's irrational and erratic behaviour in July 2022 to April 2023 to his drinking. The applicant denied that Mr A was incapable of making the decision to sell the property to her in April 2023, whether through being affected by alcohol or mental incapacity or both. The applicant said that Mr A was not drunk all the time and that she knew his personality when drunk.

Importantly, the applicant conceded under cross examination that:

At the time of the sale she had some responsibility for Mr A's financial affairs and she knew that there were times when he could not make decisions about his financial affairs.

She knew that if Mr A needed money for his medical care or, for example, to pay for a deposit for an aged care facility it would likely come from the proceeds of sale of his home.

She did not check before the sale that the purchase price would cover his future needs.

She did not consult a financial advisor to see whether the proceeds of sale would see him through retirement.

There was a conflict between Mr A's interests and her own interests when the price was negotiated.

Mr A told a solicitor, Ms Dona, that he sold his house in order to have money in the bank and to avoid being poor, which is inconsistent with gifting the house to the applicant.

The residential tenancy agreement does not and could not preserve Mr A's right to continue living at the property – Mr A is still dependant on the applicant for this – and her lack of knowledge in this area had a real consequence for him.

A clause in her Will for Mr A to occupy the property for life does not secure his right to occupation as it would only come into effect upon her death.

Her purchase of the property resulted in her receiving Mr A's most significant asset at significant undervalue.

Mr A was vulnerable to her taking advantage of him at the time of the sale.

The applicant did not easily concede or appear to understand that there was a conflict between her interests and those of Mr A when the price was negotiated, or that he was vulnerable to her taking advantage of him at the time of the sale. Such concerns would be patently obvious to an outside objective observer. The applicant's lack of insight into such basic matters is of serious concern to the Tribunal. To take one example, the applicant denied that there was a risk that she could exploit her power over Mr A by his vulnerability and isolation. In my view this is untenable. The applicant was defensive and appeared to be unaware of or unconcerned about the obvious risks involved in the transaction and whether her conduct was reasonable and appropriate in the circumstances.

Re-examination of the applicant

The applicant gave evidence in re-examination that:

Mr A usually started drinking alcohol at lunch time.

Mr A was sober in the morning and could make good decisions for himself before lunchtime.

Mr A saw the solicitor acting for him on the sale, Mr B, in the morning on the day the contract was signed and there is nothing to suggest Mr A was under the influence of alcohol at that time.

Mr A has never said anything to the applicant to suggest that the terms of the arrangement between them should change.

The applicant is willing to take steps to improve Mr A's security of tenure at the property. The NSW Public Trustee and Guardian, who is responsible for the financial management of Mr A's estate by order of the GD, has prevented this.

In response to a question from the Tribunal about whether she introduced Mr A to Mr B, the solicitor, the applicant confirmed that she did not introduce Mr A to Mr B. The applicant said that Mr A found a brochure or business card for Mr B which led to them being in contact.

The statement from Sheneli Meneripitiyage Dona

Ms Dona, a solicitor with Monardo Legal in Ashfield, visited Mr A at the property for about an hour in the afternoon on 27 February 2025 to provide an independent witness statement for the applicant in these proceedings.

In summary the Ms Dona says in this statement that:

She observed that the property was in a reasonable state of condition and tidiness, Mr A was engaging and comfortable in his interactions with her, he was positively disposed towards the applicant and was mobile around the house and in going on a walk to go grocery shopping, which Mr A said he does regularly of a morning and afternoon.

Ms Dona related the following from her conversation with Mr A:

I later spoke with Mr A about his home and he expressed his love for his home which he purchased around 30 years ago, with words to the effect of "I love this house". He then said "but I sold it to Rachelle". Upon my further enquiry about the sale, he said to me words to the effect of "I bought it off Rachelle and then I sold it to her again. I don 't remember what we were trying to do, nothing illegal. But yeah ". I then said to him words to the effect of "So are you saying that you have known Rachelle for at least 30 years then?". He then replied with words to the effect of "Oh I think I confused myself Maybe I didn't buy the property from Rachelle no. But I sold it to her because I need to have money in the bank now at this age. I don't want to walk outside poor."

Statement of the applicant with character references

Included with the s 58 documents was a statement from the applicant dated 6 September 2023 for the GD proceedings with six character references annexed. [NOT FOR PUBLICATION]

It is clear from the applicant's evidence that Mr A was alone, isolated, extremely vulnerable, dependent upon the applicant in a myriad of ways in his day to day life and trusted the applicant completely to look after his needs, including his financial affairs. The applicant was in a position of trust and confidence in relation to Mr A. Mr A was highly susceptible to being taken advantage of by a person in the applicant's position.

Evidence for the respondent

NCAT Guardianship Division proceedings

[NOT FOR PUBLICATION]

Preliminary matters

The applicant raised several procedural and jurisdictional matters referred to in paragraphs [32(1)], [32(2)] and [33(1)] above which are convenient to deal with prior to the main issues. I have added to this the issue of whether the Tribunal is able to consider whether the applicant's conduct in relation to the purchase of Mr A's home was unconscionable, as contended by the respondent (paragraph [37]).

Ground 1: Is the respondent's administrative decision vitiated by reference to s 37(2) of the Act rather than s 37(1)?

The applicant submitted that the Delegate found the applicant to have contravened s 37(1) of the Act in the Original Decision, however the Reviewing Officer found the Applicant to have contravened s 37(2) of the Act in the Review Decision. According to the applicant, although the Tribunal is required to consider s 37(2) of the Act, as that is what was put to the applicant in the NTSC and was the basis of the determination in the Review Decision, this is not procedurally fair or otherwise permissible.

The respondent's position was that the Tribunal is able to consider s 37(2) of the Act, as included in the NTSC, so long as the question before the Tribunal is the same as was before the internal reviewer under s 63 of the ADR Act.

The NTSC cited s 37(2) of the Act as a basis for disciplinary action against the applicant under Ground 1. The Delegate for the Secretary did not refer to s 37(2) of the Act in the conclusion for the Original Decision and relied upon s 37(1). The reasons for the respondent's decision to take disciplinary action against the applicant in the Review Decision dated 18 November 2024 included express reliance on s 37(2) of the Act.

The question before the decision maker was whether in the exercise of all of the functions conferred or imposed on it by the legislative regime in the Act and Regulation, the disciplinary action should be taken against the applicant. The same question must be answered by the Tribunal. The administrator has a function under the Act to regulate those involved in the property industry including the licensing of real estate agents pursuant to the Act. Section 37(2) of the Act was cited as a basis for disciplinary action against the applicant under Ground 1 in the

NTSC and is clearly relevant to that question.

The Delegate for the Secretary's reliance on s 37(1) rather than s 37(2) of the Act in the Original Decision does not operate to preclude the Tribunal from considering s 37(2) in this administrative review. For the purpose of reviewing a decision, section 63 of the ADR Act sets out the Tribunal's power. The Tribunal may exercise all the powers and discretions that are conferred on the administrator who made the decision. The Tribunal must have regard to the decision of the decision maker as part of the material before the Tribunal. However the Tribunal is not required to make the decision in the terms made by the respondent or in the way contended by the applicant. After considering all the material before it and affording procedural fairness to the parties, the Tribunal must make its own decision.

The applicant has not been denied procedural fairness in relation to the respondent's reliance on s 37(2) of the Act in circumstances when the applicant has been on notice about this aspect of the respondent's decision since she was notified of the Review Decision on 18 November 2024 and had ample opportunity to file evidence and submissions in relation to this issue.

For these reasons I do not agree with the applicant's submissions that it would be impermissible or improper for the Tribunal to rely upon s 37(2) of the Act as a basis for disciplinary action against the applicant under Ground 1, subject to that ground being made out.

Ground 1: Does s 37 of the Act require that the rules of conduct be observed in the course of the carrying on of business or the exercise of functions under a licence?

The applicant submitted the correct interpretation of s 37 of the Act, working together with Rule 1 of Schedule 1 of the Regulation, is that conduct said to breach Rule 1 must occur in (or in connection with) the licence holder's business or functions as a real estate agent. The applicant submitted that no finding made by the Delegate or the Reviewing Officer that the transactions, namely, the sale of Mr A's house to the applicant and the entry into the residential tenancy agreement, occurred while the applicant was acting as a real estate agent. In the applicant's case such a finding is required in order for the contravention of s 37(2) of the Act via Rule 1 to be established.

It is common ground the conduct relied upon by the respondent as the basis for a breach of the Rule 1 did not occur in the course of the applicant's business or functions as a real estate agent.

The respondent submitted that the Reviewing Officer found it was immaterial that the conduct did not occur in the course of the applicant's business activities as an agent or while performing licenced functions. The applicant's breach resulted from her insufficient knowledge and understanding of relevant laws including residential tenancy law. Her lack of knowledge fell short of the competency expected of a person holding a licence, was non-compliant with Rule 1, Schedule 1 of the Regulation and therefore in breach of s 37(2) of the Act. Rule 1 Schedule 1 of the Regulation requires the agent to have knowledge and understanding of the relevant laws without referring to the demonstration of knowledge and understanding within the course of business.

When considering the meaning of a statutory provision it is necessary to consider the provision in the statutory context: *STAR Training Academy Pty Ltd v Commissioner of Police* [2021] NSWCATAP 370 at [54]-[57]. Section 33 of the Interpretation Act 1987 provides that in interpreting the provision of an Act ‘a construction that would promote the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object’. Where the object of the Act is not expressly stated, it must be inferred from the Act as a whole and regard may be had to extrinsic materials in construing a statutory provision: *STAR Training Academy Pty Ltd v Commissioner of Police* [2021] NSWCATAP 370 [56]-[57].

The Act in this case does not have an objects clause. The intention from the Act as a whole is to regulate those involved in property and stock sales and marketing industries by implementing significant consumer protection provisions (*Commissioner of Fair Trading v PSMG Pty Ltd* [2025] NSWCATAP 34 at [109]). On the introduction of the Bill for the Act into the Legislative Assembly on 9 May 2002, Mr Aquilina, the then Minister for Fair Trading stated that the intention of the Act in the second reading speech is “to protect consumers and their investments in their homes.” Where there is ambiguity, the legislation should be interpreted in a way that is consistent with that intention. Mr Aquilina also explained the focus of the Act on the competency of licence holders in the following terms: “By ensuring that those who are granted a licence or certificate of registration demonstrate certain levels of competency, consumers are protected, consumer confidence is boosted, vocational professionalism is increased, and an economically efficient property sector ensues.”

Turning now to the statutory provisions, s 37 of the Act, is headed ‘Rules of conduct for licensee’s business’. Section 37(1) permits the creation of regulations which ‘may prescribe rules of conduct to be observed in the course of the carrying on of business or the exercise of functions under a licence or certificate of registration’. Section 37(2) provides that a licence holder ‘who without reasonable excuse contravenes a rule of conduct prescribed for the purposes of this section is guilty of an offence’. It is clear that sections 37(1) and 37(2) function together. Section 37 permits the creation of rules of conduct to be observed in the course of the carrying on of business or the exercise of functions under a licence or certificate of registration through s 37(1) by use of the word ‘may’. Section 37(2) stipulates that the contravention of rules created under ‘this section’ by a licensee or registrable person, without a reasonable excuse, constitutes an offence.

The location of s 37 within the architecture of the Act, falling within Division 2 of the Act, ‘Business practices and supervision’ and Part 3, ‘General conduct of licensees and registered persons’ adds support to the conclusion that the rules prescribed under s 37 relate to business or licenced functions.

Section 8(1) of the Regulation states ‘The rules set out in Schedules 1–4 are prescribed for the Act, section 37 as rules of conduct to be observed in the course of the carrying on of business or the exercise of functions under a licence or certificate of registration.’

The applicant submitted:

The prescribing of a rule that is beyond a rule of conduct to be observed in the course of the carrying on of business or the exercise of functions under a licence or certificate of registration would be outside of the scope of the empowering provision pursuant to which it was purportedly made. The prescribed rules as contained within schedule 1 of the Regulation have been drafted carefully so as not to not offend against this requirement:

- (a) each rule is drafted so as to relate to an "agent", as opposed to a person;
- (b) there is no rule that seeks to regulate an agent's conduct beyond the scope of the agent's business; and
- (c) relevantly, rule 1 of schedule 1, which contains the knowledge requirement allegedly breached by the Applicant, is prescribed to apply "to enable the agent to exercise the agent's functions lawfully".

The respondent submitted the use of the word 'may' in s 37(1) has the following effect:

It is necessary that statutory interpretation should 'strive to give meaning to every word of [a] provision': *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] (McHugh, Gummow, Kirby, and Hayne JJ). It is also well established that where Parliament uses the word 'may', it intends to 'confer a discretion ... to do or refrain from doing some act': *South Australian Cold Stores Ltd v. Electricity Trust of South Australia* (1965) 115 C.L.R. 247 at 264-265 per Owen J; see also *Interpretation Act 1987 (NSW) s 9(1)*; *Metropolitan Coal Co. of Sydney Ltd v. Australian Coal and Shale Employees' Federation* (1917) 24 C.L.R. 85 at 96-97 per Isaacs and Rich JJ. In the context of the Act, that S 37(1) the choice of the term 'may' reflects how Parliament did not seek to preclude the enactment of rules that should necessarily be observed at all times. This construction is preferable since the Act is concerned with providing confidence to the public 'that agents ... conduct themselves competently, honestly and fairly': *Maher v Department of Fair Trading* [2019] NSWCATOD 21 at [124]. Accordingly, the rules contained in Schedule 1 of the Regulation should not be broadly construed as rules exclusive to conduct in the course of business or in exercising functions under a license, unless the specific rule in question expresses to the contrary.

The respondent submitted that it would be absurd for the respondent authority to be required to wait until an agent demonstrates a lack of knowledge within the course of business, putting consumers at risk, despite it being clear in the agent's conduct outside of business that they do not have the requisite knowledge.

It seems to me that for a breach of rule 37(2) arising from Rule 1, Schedule 1, to be actionable under s 191(a), it would ordinarily need to occur in or in connection with the course of carrying on a business as an agent or performing licensed functions.

A plain reading of Rule 1 of Schedule 1 of the Regulation is that it imposes a knowledge and understanding requirement as distinct from a conduct requirement. This is entirely consistent with the intention of the Act, which is to regulate those involved in property and stock sales and marketing industries, to maintain the competency of licence holders, and to protect consumers.

It is therefore possible for an agent's failure to have a knowledge and understanding of the relevant laws, occurring outside the course of the profession, to contravene Rule 1(b), Schedule 1 of the Regulation and thereby s 37(2) of the Act. However this would be rare because it is subject to the following requirements:

The laws being relevant to the category of licence or certificate of registration held by the agent, as stated in Rule 1(b).

The "knowledge and understanding" being "necessary to enable the agent to exercise the agent's functions lawfully", as stated in Rule 1.

It follows from this conclusion that the Tribunal is able to consider the applicant's lack of knowledge and understanding of the law relating to residential tenancies, that was exposed outside of the course of carrying on a business as an agent or performing licensed functions, to establish a contravention of Rule 1, Schedule 1 of the Regulation under s 37(2) of the Act (Ground 1).

As will be seen below, the Tribunal has not found the requirements referred to above to be made out for Ground 1.

Should Ground 2 should be considered by the Tribunal?

The applicant submitted that Ground 2 (regarding s 191(e) of the Act) was found not to be made out in the Original Decision, and as this was affirmed by the Review Decision, they are not part of the review and should not be considered by the Tribunal.

It is common ground that the Delegate for the Secretary was not satisfied that the applicant was not a fit and proper person for the purposes of s 191(e) of the Act in the Original Decision. This was not specifically addressed by the Reviewing Officer in the Review Decision. Thus the Reviewing Officer did not disturb this aspect of the Original Decision.

The applicant submits the Review Decision made by the Reviewing Officer of the Respondent is the administratively reviewable decision for the purposes of s 63 of the ADR Act, and that decision was limited to the ground which the Secretary was satisfied gave rise to the taking of disciplinary action under the Act (s 198(1)), being s 191(a) of the Act. In the Review Decision, there was no consideration of any facts or law relating to the applicant's fitness and propriety.

The applicant referred the Tribunal to *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 (*Frugtniet v ASIC*) to support her position, and the comments of Kiefel CJ, Keane and Nettle JJ, that included, at [14]-[15]:

It (AAT) is subject to the same general constraints as the original decision-maker and should ordinarily approach its task as though it were performing the relevant function of the original decision-maker in accordance with the law as it applied to the decision-maker at the time of the original decision.

Depending on the nature of the decision the subject of review, the AAT may sometimes take into account evidence that was not before the original decision-maker, including evidence of events subsequent to the original decision. But subject to any clearly expressed contrary statutory indication, the AAT may do so only if and to the extent that the evidence is relevant to the question which the original decision-maker was bound to decide; really, as if the original decision-maker were deciding the matter at the time that it is before the AAT. The AAT cannot take into account matters which were not before the original decision-maker where to do so would change the nature of the decision or, put another way, the question before the original decision-maker..

The respondent submitted that *Frugtniet v ASIC* involved consideration of spent convictions in an administrative decision which is a different context to the present situation. The respondent referred the Tribunal to *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 (Shi), [35]-[38], [96]-[100], [116]-[117], [141]-[142] in relation to the correct approach to be taken to this administrative review.

The Review Decision made by the Reviewing Officer of the respondent is the administratively reviewable decision for the purposes of s 63 of the ADR Act. The applicant submits the effect of s 200 of the Act on an application to the Tribunal for an administrative review “on a review of the disciplinary action” is to constrain the administrative review to be undertaken to the internal review decision, on the terms sought by the applicant.

Section 53(5A) of the ADR Act makes it clear the internal reviewer is able to consider the issues related to s 191(e) included in the NTSC, as is this Tribunal on review under ss 63(1) and 63(2) of the ADR Act. The List of Additional Issues and Reasons provided to the Applicant on 20 January 2025 put the applicant on notice that s 191(e) of the Act would be relied upon by the respondent at the Tribunal hearing.

The question before the Tribunal is not whether the administrator made the correct decision on the material before it. The Tribunal is to determine what the correct or preferable decision is having regard to the material before it, including any relevant factual material and any applicable written or unwritten law: s 63 ADR Act, *Shi* at [140]-[141]. The Tribunal’s review of the administrator’s decision is a review *de novo*. This is often referred to as ‘standing in the shoes of the decision maker’ to consider the matter afresh. It is not an appeal from the decision-maker’s decision.

I do not agree with the applicants' submission that the Tribunal must confine itself to the issues expressly stated in the Review Decision and cannot consider other issues the applicant was clearly on notice of through the NTSC (and additionally from the List of Additional Issues and Reasons filed by the respondent in these proceedings), in coming to its own decision, so long as the Tribunal's decision is within the functions conferred or imposed on the administrator who made the decision: s 63(2) ADR Act.

I am satisfied that the Tribunal is able to consider whether the applicant is a fit and proper person to hold a licence under s 191(e) of the Act.

Is the Tribunal able to consider whether the transfer of Mr A's home to the applicant was an unconscionable dealing?

The respondent made oral submissions at the conclusion of the hearing that, so long as it falls within Ground 1 or Ground 2, an inference is open to the Tribunal that the applicant engaged in unconscionable conduct.

However, in fairness to the applicant, the question must be asked if the requirements of the Act have been complied with and whether the applicant was sufficiently on notice for the Tribunal to entertain this. The Tribunal notes that:

Unconscionable conduct was not expressly referred to in the NTSC, although it was referred to briefly in the GD's reasons for its decision at paragraph [81], which was annexed to the NTSC.

In the Original Decision, the Delegate was satisfied that the applicant engaged in unconscionable conduct in relation to her purchase of the property and failed to address or mitigate the unconscionable conduct. This was considered in the Original Decision in relation to Ground 1 and Ground 2 of the NTSC (at paragraphs [37.9] and [46.1]-[46.2] respectively). The Delegate considered that the ground for taking disciplinary action under s 191(a) of the Act was established but the ground under s 191(e) of the Act was not made out. The Delegate also referred to the applicant having engaged in unconscionable conduct in assessing the severity of the conduct at paragraphs [51.1]-[51.2] of the Original Decision.

The Review Decision referred to the finding of unconscionable conduct in relation to the reasons for the Original Decision concerning Ground 1 under s 191(a), in affirming the decision.

Unconscionable conduct was not referred to in the respondent's List of Additional Issues and Reasons.

Even though unconscionable conduct was not referred to in the NTSC, the Original Decision and the Review Decision gave clear notice to the applicant that this was an issue the administrator had relied upon in taking disciplinary action under Ground 1 under the Act. This is not the case for Ground 2. Ground 2 was not reargued by the respondent until the respondent's List of Additional Issues and Reasons was filed on 20 January 2025 and no reference was made to unconscionable conduct in that document.

In my view the applicant was sufficiently on notice for the Tribunal to consider the issue of unconscionable conduct in relation to the disciplinary ground of s 191(a) of the Act (Ground 1).

However, I am not satisfied that the applicant was sufficiently on notice for the Tribunal to consider unconscionability in relation to s 191(e) of the Act (Ground 2).

As will be seen below, the Tribunal is not satisfied that Ground 1 has been made out. Therefore it is unnecessary to consider the issue of unconscionability further in these reasons.

Ground 1: Contravention of s 37 – s 191(a) of the Act

The applicant's submissions

In summary, the applicant submitted:

The evidence as to the knowledge requirement under s 191(a) of the Act is that the applicant was unaware as to how the residential tenancy agreement entered into with Mr A failed to preserve his right to live at the property for life.

The applicant's failure was inadvertent, cannot be characterised as reckless, and did not consciously disregard any apparent risk to Mr A.

If the Tribunal finds consistently with the above, the Tribunal is unable to find that the applicant acted unconscionably or dishonestly in the transaction with Mr A by consciously taking advantage of his cognitive inabilities.

She poses no risks to clients in the course of carrying on the business or the exercise of functions under her licence.

The only appropriate order for a breach under s 37(2) of the Act in such circumstances is further training.

The respondent's submissions

In summary, the respondent submitted:

the applicant's failure to act to ensure Mr A's right to occupy the property for life would be preserved revealed her lack of knowledge and understanding in her evidence before the GD and the Tribunal.

the applicant's reliance on Mr A's legal practitioner as the reason for not meeting her obligations under s 37 does not alleviate her breach of the provision.

the applicant's position that the disciplinary action is unnecessarily severe signals that her knowledge and understanding of the Regulation is greatly lacking.

Consideration

The operation and requirements of Rule 1, Schedule 1 of the Regulation, and s 37 of the Act were explained earlier in these reasons.

The applicant accepted that it was a condition of the contract of sale for Mr A to continue living at his home following the sale. The applicant gave evidence before the GD that Mr A's right to occupy the property had been secured by a Deed. It was only after the applicant produced and was questioned by the GD about the residential tenancy agreement she entered into with Mr A – not a Deed – that this was shown to be untrue. The respondent submits that the applicant should have known that Mr A's tenancy to remain living at the property following the completion of the sale of the applicant was subject to termination on 90 days' notice. The applicant's lack of knowledge and understanding of this was clearly established in her evidence before the GD.

In her evidence in these proceedings the applicant accepted there has been no consideration paid for the residential tenancy agreement to date and the agreement is ineffectual to secure Mr A's interest to remain living at the property. The applicant conceded at the time the residential tenancy agreement was signed that she did not understand that as a contract, the agreement required consideration to be effective.

According to the respondent, the applicant's insufficient knowledge and understanding consisted of:

being unaware that the residential tenancy agreement did not secure Mr A's lifetime rights;

believing the residential tenancy agreement was a deed;

believing a non-binding promise to never terminate the agreement would be sufficient to secure Mr A's rights;

believing a clause in her Will which ensured Mr A's right to occupy the property would secure his right to occupation, should she become incapable of managing her affairs;

Not understanding the requirements and effect of a deed.

The respondent says that this is evidence of the applicant's lack of knowledge and understanding of relevant laws, including residential tenancy laws, and is sufficient to establish that the applicant has contravened Rule 1(b), Schedule 1 of the Regulation and through this s 37(2) of the Act.

In my view, as previously stated in these reasons, for an agent's failure to have a knowledge and understanding of the relevant laws to contravene Rule 1(b), Schedule 1 of the Regulation and thereby s 37(2) of the Act, the following two requirements must be met:

The laws being relevant to the category of licence or certificate of registration held by the agent (as stated in Rule 1(b)).

The "knowledge and understanding" being "necessary to enable the agent to exercise the agent's functions lawfully" (as stated in Rule 1).

The first requirement, for the laws to be relevant, as stated in Rule 1(b), has been met in relation to the matters referred to at paragraphs [100(1)], [100(2)] and [100(3)] above because they relate to a failure to have knowledge or understanding concerning residential tenancy laws. Residential

tenancy laws are relevant to the class of the applicant's licence as 'Class 1 Agent – Real Estate – Sales or Leasing'. This is because s 8(2) of the Regulation states that Schedule 1 applies to all agents, and Rule 1(b) of Schedule 1 specifies that laws are relevant to the category of licence or certificate of registration held by the agent including laws relating to (i) residential tenancy.

As to the other matters, involving the applicant's Will at [100(4)] and the requirements and effect of a deed at [100(5)], the respondent has not shown how they fall within the meaning of 'relevant laws' in Rule 1(b) of Schedule 1 to the satisfaction of the Tribunal.

Turning now to the second requirement, for the knowledge and understanding referred to in paragraphs [100(1)], [100(2)] and [100(3)] being necessary for the lawful discharge of the agent's functions – this requirement has not been met. This is because the specific knowledge and understanding in relation to the residential tenancy laws that the applicant did not have has not been shown to be necessary to enable the agent to exercise the agent's functions lawfully. Although the applicant's lack of knowledge and understanding may have been completely unsatisfactory for a real estate agent in exercising their functions competently in relation to residential tenancies, it has not been established by the respondent that the knowledge and understanding was necessary to enable the agent to exercise the agent's functions lawfully.

The standard required for a contravention of Rule 1 of Schedule 1 is that the knowledge and understanding lacking is necessary for the lawful carrying out of the agent's functions. The respondent has not met this standard to the satisfaction of the Tribunal.

It follows that the Tribunal is not able to be satisfied that the applicant has contravened Rule 1, Schedule 1 of the Regulation, and thereby s 37(2), as per Ground 1.

Ground 2: Fit and proper person – s 191(e) of the Act

The applicant's submissions

In summary, the applicant submitted:

She is a fit and proper person under s 191(e) of the Act as found in the Original Decision and this was not disturbed by the Review Decision.

The applicant was not aware of Mr A's lack of mental capacity at the time of the sale.

The evidence of Mr A to the GD was that he was supportive of selling the property to the applicant.

Some of the evidence of Mr A's mental capacity may have distorted by alcohol.

The applicant and Mr A each had their own solicitors acting for them in the conveyancing transaction.

She poses no risks to clients in the course of carrying on the business or the exercise of functions under her licence.

There is no grounds for disciplinary action.

The respondent's submissions

In summary, the respondent submitted:

The applicant is not a fit and proper person to hold a licence under the Act (s 14(1)(b)).

A greater penalty than determined by the administrator is warranted because:

The applicant's conduct took advantage of a vulnerable elderly man, who was frail, isolated and had impaired cognitive ability, and demonstrates an absence of moral integrity.

The applicant has not addressed the harm she has caused by continuing to fail to secure Mr A's tenure.

There can be no confidence for the public that the applicant's conduct was a one off: *Maher v Department of Fair Trading* [2019] NSWCATOD 21 at [124].

The applicant's conduct in a personal capacity was sufficiently closely connected to her occupation and manifests the absence of qualities compatible with the occupation: *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279.

That the conduct impacted only one consumer is not determinative of the applicant's fitness and propriety.

The fit and proper person test

The parties referred the Tribunal to *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at [380] per Toohey and Gaudron JJ, with Mason CJ, Brennan and Deane JJ agreeing, to show that that the 'fit and proper' test:

...takes its meaning from its context from the activities in which the person is or will be engaged and the ends served by those activities ... depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.

The Act is concerned with providing confidence to the public 'that agents ... conduct themselves competently, honestly and fairly': *Maher v Department of Fair Trading* [2019] NSWCATOD 21 at [124].

In *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70 ('Sobey'), Walters J stated at [76] that to be a 'fit and proper person':

...the Applicant must show not only that he is possessed of a requisite knowledge of the duties and responsibilities evolving upon him as the holder of a particular licence ... but also that he is possessed of sufficient moral integrity and rectitude of character as to permit him to be safely accredited to the public ... as a person to be entrusted with the sort of work which the licence entails.

Consideration

It follows from the conclusion at paragraph [94] that the Tribunal is unable to consider unconscionable conduct in relation to Ground 2.

Did Mr A have the requisite mental capacity to sell his home to the applicant?

The GD concluded that Mr A did not have the requisite mental capacity on 21 July 2022 to appoint the applicant as his enduring guardian and attorney, and that Mr A was incapable of managing his financial affairs. The sale of Mr A's home occurred some nine months after 21 July 2022. Completion of the sale occurred in the first week of June 2023.

In the respondent's case, Mr A did not have capacity at around the time of the sale to the applicant due to several factors, namely his cognitive impairment, age, frailty, isolation, frequent intoxication and inability to manage his financial affairs. The respondent also points to Mr A's dependency on the applicant, in parts of his daily life socially and practically, and as his enduring power of attorney and guardian. For all these reasons, the respondent maintains that it can be inferred that Mr A's ability to make judgments about his best interests was considerably and adversely affected.

A careful consideration of the medical and lay evidence (summarised at [54(9)] and [54(10)] above) leads to the conclusion that Mr A did not have the requisite capacity when the contract of sale entered was into, on 28 April 2023.

[NOT FOR PUBLICATION]

The Tribunal is satisfied that Mr A did not have the requisite mental capacity to sell his home to the applicant at the time of the sale.

Was the applicant aware or reckless to Mr A being vulnerable and impaired from making informed decisions in relation to the sale of his home?

The applicant submits that she did not know of Mr A's cognitive impairment at the time of the sale and did not become aware of these issues after Mr A's stroke in June 2023. The applicant admitted that she was aware of his increased drinking in July 2022, but that this occurred from lunchtime onwards, and not every day. The applicant's position is that Mr A was sober of a morning and was capable of making good decisions at that time of day, as he did when he signed the contract of sale with Mr B one morning. The applicant denies that she procured the sale of the property to benefit herself. The applicant maintains that Mr A stood to benefit from the transaction and he continues to reside at the property maintenance and rent-free at the applicant's expense.

The respondent submits that it is open to the Tribunal to conclude that the applicant knew or was reckless to the fact that Mr A was vulnerable and impaired from making informed decisions at the relevant time, either through his dementia, and the observable signs of his cognitive decline or through his heavy alcohol use, which may easily have led to him still being intoxicated the following morning.

The applicant objected to the Tribunal considering the issue of recklessness because it had not been raised with the applicant in cross examination.

There is no evidence that the solicitor who acted for Mr A on the sale, Mr B, raised any concerns about Mr A's capacity at the time he signed the contract for sale. However Mr B did not have a long association with Mr A, and there is evidence that Mr A was capable of presenting well to strangers, but when engaging in detail, it became clear he did not have capacity. In this way he may have presented well but was unable to make good decisions.

[NOT FOR PUBLICATION]

[NOT FOR PUBLICATION]

[NOT FOR PUBLICATION]

[NOT FOR PUBLICATION]

The Tribunal is unable to be satisfied on the available evidence that the applicant knew that Mr A was cognitively impaired at the time of the sale. However, as considered below, Mr A's vulnerability and the applicant's position of trust and confidence in his life gave rise to a situation where he was highly susceptible to be taken advantage of in relation to the sale. The Tribunal did not consider it necessary to examine the issue of recklessness in reaching this conclusion below.

Did the applicant take advantage of a vulnerable elderly person for financial benefit?

The applicant did not use the power of attorney to effect the sale of Mr A's property. The applicant was under a misapprehension that the enduring power of attorney could only be used when Mr A could no longer look after himself, and that she did not realise it was in effect before that time. However that does not change the fact that it was in place and increased Mr A's dependency on the applicant.

The evidence of the effects of Mr A's advanced age, isolation, cognitive impairment and physical decline, situational dependency on the applicant, that he had told the applicant that he had appointed her as his enduring power of attorney as he needed someone to assist him with making decisions relating to his finances, and the absence of advice about the likely implications of the sale of his most significant asset on his overall financial position, when considered together, suggest unfairness. Neither the applicant nor Mr A's solicitor, Mr B, took steps to ensure Mr A received professional, independent advice about the likely impact of the sale on his financial position. The applicant was aware that when the sale was negotiated she was his only confidant. Mr A sold his most significant asset for significant undervalue where Mr B did not know about his financial circumstances.

The applicant submits that Mr A knew his own mind and agreed to what he thought was a fair price for the sale. The evidence is that Mr A did not and could not know his own mind and was highly susceptible to the applicant's influence at the time of the sale. Mr A's evidence of how the sale transpired and whether he is content with the arrangements has changed several times and is plainly unreliable (see paragraphs [51(2)], [54(3)], [54(9)(a)] [54(10)(a)], [54(10)(b)]). The applicant's evidence that \$600,000 was a fair and reasonable price for the property when it was worth around \$1.1 million, which was not based on any calculations, and merely the applicant's opinion, is conjecture. In any event, the applicant's financial interest in the transaction means that she has a direct interest and her evidence of what constitutes fair value is of limited weight.

As Mr A's enduring power of attorney, the applicant had undertaken to always act in the best interests of the principal, Mr A, which included avoiding conflicts of interest. A serious conflict between Mr A's interests and the applicant's interests occurred when the price for the purchase of the property was negotiated and following the sale, when the applicant's purchase of Mr A's home resulted in her becoming Mr A's landlord, with the power to remove him from his home on 90 days' notice.

The applicant did not attempt to dissuade Mr A from making the sale and did not explore other options with him as to how he might obtain money if he had wished using the equity in his home. There is no evidence of any attempt made by the applicant to quantify the value of Mr A's life tenancy at the property. No assessment of Mr A's future needs was undertaken. Mr A's position of vulnerability, dependence on the applicant, and mental impairment meant that he was not in a position to determine or look after his own best interests without independent legal and financial advice. From a financial perspective, to enter into the sale in such circumstances was, at best, completely irresponsible, and at worst put Mr A at risk of serious financial detriment.

At the time she purchased Mr A's property, the applicant knew that if Mr A needed money for his medical care or, for example, to pay for a deposit for an aged care facility it would likely come from the proceeds of sale of his home. The appropriateness of the applicant purchasing Mr A's property may have been different if Mr A had obtained advice from an independent financial advisor and a solicitor about his financial position and future care needs to assess whether the sale was in his interests. This is because Mr A's future needs could have been properly assessed, considered and factored into any proposal for sale. In pursuing the sale in the absence of such advice, the applicant failed to recognise that her personal interests seriously conflicted with Mr A's interests. In such circumstances, the applicant offering to purchase the property for \$600,000, when she knew the property was worth around \$1.1 million, was to take advantage of Mr A. Subject to the costs of the sale, the applicant stood to gain a windfall from the sale of around \$500,000, on her own estimates, and upon its completion was enriched to Mr A's detriment.

The Tribunal is satisfied that the applicant proceeding with the sale in such circumstances was taking advantage of a vulnerable elderly person for her own personal financial benefit.

What is the effect of personal misconduct on fitness and propriety?

The Tribunal is satisfied that the following matters have been established on the evidence. These matters were largely admitted by the applicant under cross examination. As will be seen from the Tribunal's conclusions below, this has resulted in her conducting herself in a manner inconsistent with the fitness and propriety required of a licence holder:

Mr A was at all material times a vulnerable elderly man, who was frail, isolated and dependent on the applicant for parts of his day to day living. The applicant was Mr A's enduring power of attorney and guardian. At the time of applicant's purchase of Mr A's home, she had responsibilities for Mr A's financial affairs and she knew that there were times when he could not make decisions about his financial affairs, whether through the effects of excessive alcohol use or more generally.

As Mr A's enduring power of attorney, the applicant had undertaken to always act in the best interests of the principal, Mr A, which included avoiding conflicts of interest. A serious conflict between Mr A's interests and the applicant's interests occurred:

When the price for the purchase of the property was negotiated.

When the applicant's purchase of Mr A's home resulted in her becoming Mr A's landlord, with the power to remove him from his home on 90 days' notice.

The applicant knowingly purchased Mr A's home at significant undervalue, resulting in significant financial loss to Mr A.

The applicant sought and received significant financial benefit from her purchase of Mr A's home.

The applicant failed to act to ensure Mr A's security of tenure when he sold his home to her, thereby exposing Mr A to the risk of eviction at any time on 90 days' notice should anything untoward happen to her.

As a result of these matters the Tribunal finds that the applicant misconducted herself in her personal dealings with Mr A. The Tribunal is satisfied that the applicant misconducted herself by taking advantage of a vulnerable elderly person for her own personal financial benefit.

The respondent made submissions to the effect that the applicant's misconduct may demonstrate qualities incompatible with the fitness and propriety required of a licence holder under the Act, even where the conduct occurred in a personal rather than a professional capacity.

I agree that personal misconduct may be relevant to fitness and propriety if it is sufficiently closely connected to the occupation or it manifests the presence or absence of qualities which are incompatible with, or essential for, the carrying on of the occupation: *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at [290].

The respondent cited *Agha v Commissioner for Fair Trading* [2024] NSWCATOD 182 (at [170]-[172]) which draws a parallel between the function of the fit and proper person test in the Act and protection orders under the Health Practitioner Regulation National Law, both of which seek to protect the public. The respondent cited various cases where personal conduct was considered to be relevant to the person's fitness and propriety to hold a licence for a profession:

A veterinary surgeon found guilty of conduct disgraceful to practicing when he failed to provide adequate care for animals on his personal farm: *Marten v Royal College of Veterinary Surgeons' Disciplinary Committee* [1966] 1 QB 1.

A dentist committed professional misconduct when he indecently assaulted a trainee dental assistant, drove while under the influence, drove while disqualified, assaulted police and resisted police: *Reyes v Dental Board of South Australia* (2002) 83 SASR 551.

A real estate agent engaged in professional misconduct arising from his separate business dealings where he committed dishonest conduct for personal gain that included making false statements to his business associates, a bank, and other businesses and had also given false evidence on oath: *Mavaddat v Real Estate & Business Agents Supervisory Board* [2009] WASCA.

The applicant for a certificate of registration as an assistant real estate agent was found not to have the requisite integrity to hold a certificate of registration due to his willingness to gamble significant sums of money that was not his at the instruction of a potential client: *Yu v Commissioner for Fair Trading* [2022] NSWCATOD 68.

The applicant for a real estate license was not a fit and proper person to be granted a licence because in his previous capacity as a land developer, he committed improper conduct: *Casella v the Registrar of the Real Estate and Business Agents Supervisory Board* (2003) 33 SR (WA) 201. The previous conduct included receiving large sums of money which he was not entitled to and condoning such behaviour in others, and encouraging a finance broker to lend him investor funds which exceeded the value of the property being sold.

The Tribunal has found that the applicant took advantage of a vulnerable elderly person for her own personal financial benefit. The applicant's misconduct in relation to the property transaction with Mr A in a personal capacity is sufficiently closely connected to her profession as a real estate agent. This is because the applicant's licence and authorised functions concern the sales and leasing of property and the Act is concerned with providing confidence to the public 'that agents ... conduct themselves competently, honestly and fairly': *Maher v Department of Fair Trading* [2019] NSWCATOD 21 at [124].

The applicant's belief that purchasing Mr A's property in the circumstances was the right thing to do is of serious concern. The applicant's conduct may put the real estate industry into disrepute and falls short of the community's expectations of a licence holder.

In the result, the applicant's submission that she poses no risks to clients in the course of carrying on the business or the exercise of functions under her licence must be rejected.

Conclusion

I accept that up to the time of the hearing, the applicant showed no real insight into her misconduct in relation to the purchase of Mr A's property. The applicant was unable to recognise that her personal and financial interests conflicted with those of Mr A, an elderly and vulnerable person who, at the time, she had responsibilities to as his enduring power of attorney and guardian. In proceeding with the transaction, the applicant has been enriched to Mr A's detriment. The applicant's belief that purchasing Mr A's property in the circumstances was the right thing to do is greatly concerning. Of equal concern is the applicant's failure to accept responsibility for the issues. She has sought to shift the responsibility for the issues of concern onto the vulnerable person, Mr A, and the solicitor acting for Mr A on the conveyancing transaction, Mr B. She has not sought to pay further money to Mr A to redress the situation and has assumed that allowing him to continue to reside at the property rent and maintenance free is sufficient.

The character references produced by the applicant and included in the s 58 material describing her as having a generous, compassionate and caring nature, and that she is a person of integrity, are inconsistent with the applicant's misconduct. A person with these qualities is unlikely to find themselves in the applicant's situation, and if they did they did, such a person would accept their mistakes, take responsibility for the harm, and take the steps necessary to redress it. The character references could speak only of their personal experiences in dealing with the applicant and in one case her care of Mr A. The character references did not refer to any knowledge or understanding of the issues that have led to the disciplinary action being taken. As a result they are of limited weight.

The actions of the applicant following the hearing to lodge a caveat on title and providing the NSW Public Trustee and Guardian with a draft leasehold agreement that would, if agreed to, and registered on title, more adequately protect Mr A's life estate, are positive signs. These are measures to seek to address Mr A's tenure. However, like the clause in the applicant's Will, they are ineffective to guarantee Mr A's tenure without more.

Thus, the applicant has not addressed the harm she has caused by continuing to fail to secure Mr A's tenure. The situation cannot easily be rectified without the agreement of the NSW Public Trustee and Guardian as the financial manager of Mr A's estate. The applicant seemed to lay blame for the situation with the Public Trustee for withholding its consent. However the Public Trustee has understandably expressed concern to the applicant's legal representative as to the 'improper' transfer of the property to the applicant that is 'liable to be set aside' and sought for the applicant to propose a resolution as an alternative to litigation. The situation the applicant finds herself in here is one of her own making.

The applicant's completion of the two training modules is appropriate and her ongoing care and provision of Mr A in allowing him to remain living at the property is admirable.

As noted in Sobey I must be satisfied that she has sufficient moral integrity and rectitude of character to be safely accredited to the public as a person to be entrusted with the sort of work which the licence entails. In light of all the evidence presented in this matter I am not satisfied that she does.

The respondent submitted the applicant's absence of moral integrity and failure to acknowledge or take responsibility for the harm caused by her conduct, including seeking to rectify the situation, warrants a greater penalty than determined by the internal review process.

I agree with the respondent's assessment of the applicant's misconduct to be deliberate, of major harm, and of major severity.

It follows that the applicant's submission in closing, that the applicant continue under the present supervision of the functions of the licence, would be inappropriate. Nor would it be sufficient disciplinary action for the applicant to simply undertake further training.

Taking into account all of the circumstances, including that the misconduct was in a personal, rather than professional capacity, the Tribunal considers the greater penalty sought by the respondent to be too harsh.

Nevertheless, the Tribunal considers that the discipline imposed by the administrative decision is warranted because of the following factors:

The misconduct involved the applicant's purchase of the home of a vulnerable elderly person:

who was isolated and dependent on the applicant for parts of his day to day living,

that the applicant had responsibilities to in relation to his financial affairs,

that the applicant knew could not make decisions about his financial affairs at times, whether through the effects of excessive alcohol use or more generally.

The misconduct involved the applicant seeking and receiving a significant financial benefit.

The misconduct involved a serious conflict between the vulnerable elderly person's interests and the applicant's interests.

The applicant's misconduct has compromised the vulnerable elderly person's security of tenure.

The applicant has not acknowledged or taken responsibility for her misconduct.

The applicant's misconduct may put the real estate industry into disrepute.

The applicant's misconduct falls short of the community's expectations of a licence holder.

The need to deter the applicant and others in the real estate industry from engaging in such misconduct.

Outcome

The Tribunal is to decide what the correct and preferable decision is having regard to the relevant factual material and applicable law.

I am not satisfied that Ground 1 has been made out, namely that the applicant has contravened s 37(2) of the Act by not having a knowledge and understanding of relevant laws sufficient to enable the agent to exercise the agent's functions lawfully in accordance with Rule 1 of Schedule 1 of the Regulation.

I am satisfied that Ground 2 has been made out that the applicant is not a fit and proper person to be involved in the direction, management or conduct of the business of a licensee because of her misconduct in relation to her purchase of Mr A's property.

It follows that I am satisfied that it is appropriate to take disciplinary action against the applicant under s 192 of the Act.

Orders

The decision under review is affirmed.

Pursuant to s 64(1)(c) of the Civil and Administrative Tribunal Act, other than to the Tribunal, applicant and respondent, the publication of the contents of all paragraphs in these Reasons marked "[NOT FOR PUBLICATION]" other than the words in those brackets is prohibited.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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