TASMANIA

TASMANIAN INDUSTRIAL COMMISSION

CITATION: Cassidy v ALA Investment Advisors Pty Ltd [2024] TASIC 9

PARTIES: Philippa Cassidy (applicant)

ALA Investment Advisors Pty Ltd (respondent)

SUBJECT: *Industrial Relations Act 1984*, s 29(1) application for hearing of an industrial dispute

FILE NO: T15097 of 2023

DATE REASONS ISSUED: 27 May 2024

HEARING DATE: 21 March 2024 (Det. Conference)

COMMISSIONER: Deputy President Ellis

CATCHWORDS: Industrial dispute – dispute relating to long service leave – “pressing necessity” not found – application dismissed.

REPRESENTATION:

Applicant in person

Respondent: N Foss, F Wulandari

PHILIPPA CASSIDY v ALA INVESTMENT ADVISORS PTY LTD

REASONS FOR DECISION **27 MAY 2024**

[1] On 18 December 2023, Philippa Cassidy made an application for hearing in respect of a dispute relating to her long service leave entitlements.

[2] On 1 December 2023, the applicant terminated her employment with the respondent. The applicant claims that due to the nature of her termination of employment, she is entitled to pro-rata long service leave. The respondent disputes this claim.

[3] The applicant resigned from her employment for the purpose of avoiding a possible termination of employment, allegedly resulting from a current performance management process. Does this reason constitute a “pressing necessity of such a nature as to justify the termination of that employment”?[1]

[4] There is no dispute between the parties as to the continuity of service and the amount of long service leave accrued by applicant in accordance with s 8(2)(b) of the LSL Act. The applicant had been permanently employed by Intas Financial Services, which was acquired by ALA Investment Advisors Pty Ltd (ALA) (the respondent). As a term of the transaction, the respondent accepted the long service leave accrual with Intas from 1 June 2015. The applicant had accrued 8.5 years of long service leave in the course of her employment.

LEGISLATIVE FRAMEWORK

[5] At the outset, it is important to lay out the relevant part of the legislation governing the Applicant’s long service leave. Section 8 of the LSL Act is set out as follows:

> “(2) Subject to subsection (4) , the period of long service leave to which an employee is entitled under this Act is –
>
> …
>
> (b) in the case of an employee to whom this paragraph applies by virtue of subsection (3) who has completed 7 years', but has not completed 10 years', continuous employment with his employer such period of long service leave as bears the same proportion to 8 2/3 weeks as the total period of the employee's continuous employment with his employer bears to 10 years.
>
> (3) Subsection (2) (b) applies to –
>
> (a) an employee who attains the age for retirement;
>
> (b) an employee whose employment is terminated on account of illness of such a nature as to justify the termination of that employment;

[1] *Long Service Leave Act 1976* (Tas) (‘the LSL Act’) s 8(3)(c).

(c) an employee who terminates his employment on account of incapacity or domestic or other pressing necessity of such a nature as to justify the termination of that employment; and

(d) an employee whose employment is terminated by his employer for any reason other than the serious and wilful misconduct of the employee."

[6] For the reasons that follow, this application ought to be dismissed.

The applicant's position

[7] Prior to her cessation of employment, Ms Cassidy was employed for 15 months with ALA as a Senior Adviser and was up to date with her continuing education requirements. She noted the ALA processes, procedures and project management were different from her previous employers, and she did not receive training in the project management software. Additionally, she was required to complete a foundation Statement of Advice for each of her 115 clients.

[8] She alleges the culture changed with the new management to a culture of blame and the support staff became defensive. However, Ms Cassidy's evidence was: [2] "I think my role was supported as a financial advisor."

[9] In August 2023, a performance management process was commenced with nine meetings with the directors of ALA, where it was alleged her performance was short of expectations with a requirement to complete the foundation SOA project by December as a priority. She stated she was very anxious, felt the pressure of the last few months and felt her job was under threat.

[10] At the end of one of the performance meetings in November, she stated Mr Foss offered her to purchase her client base from ALA and she felt it was clear that Mr Foss "did not wish me to continue to be employed at ALA Investment Advisors".[3]

[11] In the final weeks, she was required to attend a meeting with the offer to bring a support person, she requested a postponement for a week as her husband, (her support person) was away. Mr Foss required her to attend the meeting with or without a support person and requested her key. She received a medical certificate from her doctor and on her husband's return, made an appointment with Mr Foss to provide him with her resignation letter.

[12] In her resignation letter, dated 1 December 2023,[4] she stated:

"I hereby resign my position as Senior Financial Adviser, effectively immediately."

[13] She submitted the actions from Mr Foss made it clear that her employment would be terminated at the final scheduled meeting. She stated:

"Should my employment have been terminated it would have been very difficult for me to find another role as a financial adviser, particularly as ALA Investment Advisors

[2] Transcript of Proceedings, Cassidy v Minister administering the State Service Act 2000 (Tasmanian Industrial Commission, T15097 of 2023, Ellis DP, 21 March 2024) 23.
[3] Submission of the Applicant, 8 February 2023.
[4] Exhibit R08.

based their reason to terminate as misconduct and the financial services industry is highly regulated.” [5]

[14] She tendered five client statements supporting her role as their financial adviser.

[15] Applying s 8 of the LSL Act to her circumstances, the applicant contended the following:

a. The parties agree she was continuously employed and this term exceeded 7 years but was not greater that 10 years;
b. an entitlement to pro rata LSL arises in s 8(3) of the LSL Act;
c. she tendered her resignation, her employment was not terminated by the respondent;
d. the nature of her termination of employment may be considered a constructive dismissal by her employer but not for the reasons of serious and wilful misconduct; and
e. in the alternative, there was a “pressing necessity of such a nature as to justify the termination of that employment” as required in s 8(3)(c) of the Act.

[16] In arguing that her resignation was a constructive dismissal, the applicant relied on the UK case *Thomas Cook Group Limited v Air Malta Co Limited* where the test for wilful misconduct was defined by Creswell J as including intention, persistent conduct or reckless carelessness.[6]

[17] The applicant relied on the further guidance in the matter T14424 of 2016, where Commissioner Gay considered the application of s 8 of the LSL Act and found there is a difference between “serious misconduct” and “serious and wilful misconduct”. Both elements are required to be made out.

[18] The applicant submitted her conduct was not intentional, persistent and undertaken with reckless carelessness. She stated the burden of proof to establish wilful misconduct lies with the respondent.

[19] She stated she resigned against her will but there was not serious and wilful misconduct and her employment was not terminated by her employer.

[20] In the alternative, she submitted that she resigned, and her resignation was accepted by her employer. She believes the reason for resignation meets the criteria of “pressing necessity” to justify her termination of employment.

[21] The applicant is a 53-year-old professional with over 28 years of experience as a career Financial Planner and submitted that if her employment had been terminated by the employer, her chance of finding alternative employment “would be almost impossible”.[7] She considered she had no other option but to resign.

[22] Her evidence about her reputational risk was as follows:[8]

“DEPUTY PRESIDENT: So, what would be the difference if you had have stayed and actually through a performance management there may have been – through the

[5] Submission of the Applicant, 8 February 2023.
[6] *Thomas Cook Group Limited v Air Malta Co Limited* [1997] 2 Lloyd’s Rep 39.
[7] Submission of the Applicant, 8 February 2023.
[8] Transcript of Proceedings (n 2) 16-17.

procedural fairness and those appropriate processes, it may have been resulting in termination. What would be the outcome for you if that had have happened?

MS CASSIDY: If I'd been terminated?

DEPUTY PRESIDENT: Yes.

MS CASSIDY: I think it would have been quite difficult to find another job as a financial advisor. Launceston's a very small place.

DEPUTY PRESIDENT: Because of the nature of a small town?

MS CASSIDY: Yes. And I think that there is often an assumption when a person's terminated that they've done something, shall we say, wrong.

DEPUTY PRESIDENT: Right.

MS CASSIDY: Either, you know, fraudulent or, you know, that there's been a major issue with someone if they're terminated."

[23] The applicant's evidence was that if her employment was terminated, it would have significant financial implications of herself and her family. She provided her paysheets in evidence.[9]

[24] Her evidence was that she approached other financial service businesses after she resigned and has commenced with a new employer on 15 January 2024. She stated:[10]

"DEPUTY PRESIDENT: And it appears that you've now got another job?

MS CASSIDY: Yes.

DEPUTY PRESIDENT: So when did you get the –

MS CASSIDY: I started on the 15th of January.

DEPUTY PRESIDENT: 15th of January. And were you making any sort of questions, or were you actually approaching other firms at that stage?

MS CASSIDY: Once I'd resigned, I did.

DEPUTY PRESIDENT: Once you resigned. So that was after the 1st of December.

MS CASSIDY: Yes."

[25] The applicant relied on T7454 of 1998 *Daryl Preston Woolley and Muskett's Timber Sales Pty Ltd,* in which a demotion at work and feeling unwanted resulted in depression and irritableness. In T5390 of 1995 *Andrew Mark Thomas and the Examiner Newspaper Pty Ltd,* it was found that the relocation of his wife for a career advancement resulted in his real and motivating reason to resign to relocate met the required criteria.

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[9] Exhibit A07, A08.
[10] Transcript of Proceedings (n 2) 18.

[26] The applicant submitted there are three essential criteria for pressing circumstances to be found:

a. The reason for resigning was a genuinely held belief, not merely a colourful rationalisation to elicit gain;
b. that the belief was the sole and motivating reason; and
c. a reasonable person would feel compelled to terminate their employment.

[27] The applicant contended the reason for resignation was based on a genuine belief that her employment was no longer tenable. That belief was the sole and motivating reason and any person in that position would feel compelled to end their employment.

[28] Based on her reasons that her employment was about to be terminated through the performance management process which would have been prejudicial to her opportunity of future employment, she resigned her position and contends she is entitled to be paid her pro rata long service leave entitlement of $16,895.40.

The respondent's position

[29] Prior to the applicant's resignation, the respondent contends that a normal performance management process commenced on 29 August 2023 due to the applicant allegedly failing to adopt the processes and meet the obligations outlined in the Transition Plan. The aim was to address the issues of underperformance and identify the areas for performance improvement.

[30] The respondent submitted they provided additional administration support, guidance from internal seniors, training from Fortnum Advice Coaches and Plan Writing Services, as well as extensions to meet timeframes.

[31] The same expectations were set for the rest of the team. After no significant improvements, formal procedures were initiated in October 2023 with a warning letter[11] and a performance improvement plan was issued. She was advised that if there was no significant improvement, further disciplinary action up to and including termination of employment may be taken.

[32] A letter sent to the applicant, dated 29 November 2023,[12] outlined examples of alleged non-compliance with regulatory processes, which referred to significant legal risks to the business. It requested a response in writing or at the meeting scheduled for 4 December 2023.

[33] The applicant made an appointment with Mr Foss, Director ALA Investment Advisors on 1 December and at that meeting, with her husband as support person, resigned her employment. At that meeting, there was no request for any long service leave entitlement and there was no reason provided for her resignation.

[34] It was disputed that there was any targeting, threats or isolation of the applicant and acknowledged that performance management carries a higher degree of stress for an employee, therefore they wanted to address the issues swiftly.

[11] Exhibit R02.
[12] Exhibit A10.

[35] The respondent submitted procedural fairness was offered to the applicant throughout this process. Ms Wulundari, Senior Human Resource Advisor, stated:[13]

> "In regards to the procedures that were followed, as far as the performance improvement plan went, and in our attempts to discuss the arising allegations around serious misconduct, we believe that those procedures were fair and also were in line with standard protocols.
>
> … by offering a support person in meetings, that in itself is standard protocol as well. And in providing the applicant with a letter around what the items were that we wished to discuss, we believed we were doing that to the benefit of the applicant, to ensure that there was transparency."

[36] The respondent submitted the primary reason for her resignation was to avoid assumed and unconfirmed disciplinary action or avoid performance management processes, which do not fall under the bounds of s 8(3)(c) of the Act.

[37] The respondent relied on the findings in T9268 of 2000, *Woodhouse v Mt St Vincent Nursing Home and Therapy Centre inc.* which confirms that the onus is on the applicant to provide details of the nature of the "pressing necessity" at the time of resignation to make a claim for the pro rata leave entitlement. It was found consideration for the claim can only be made against the circumstances which existed at the time of resignation.

[38] The respondent was first made aware of these details through this application on 19 December 2023.

[39] The claim is disputed by the respondent as there was no intention nor any communication that indicated a termination of employment would occur at the meeting 4 December 2023. The letter dated 29 November 2023, outlined matters for discussion. The only mention of a possible outcome of termination was in the initial warning letter of October 2023.

[40] Ms Wulundari provided the following evidence in response to the applicant's allegations of inevitable termination of employment:[14]

> "… We dispute that, and in our response we also stated that we disputed any allegations about threats through the performance improvement plan process at any point during employment."

[41] The respondent claimed that a reasonable person would continue with the proposed meetings and performance management as no threat had been made regarding future employment.

[42] In response to the client testimonials, the respondent states, whilst positive, the testimonials are not relevant to the claim for domestic or pressing necessity.

[43] In conclusion the respondent submitted:[15]

[13] Transcript of Proceedings (n 2) 58.
[14] Ibid 38.
[15] Exhibit R01.

> "We refute the Applicant's claim that the performance management and termination of her employment would impact her ability to be employed in the future. We were informed 2 weeks after her resignation, that the Applicant had been in discussion with another local financial advisory business (her now current employer) seeking a similar role at this business. Thus, the Applicant's employment prospects, earning capacity and personal income has not been impacted by the performance management process we have undertaken and this demonstrates the cessation of her employment was not a necessity to continue her ability to practice as a Financial Adviser."

Consideration

[44] Having regard to s 8 of the LSL Act as a whole, the purpose of the LSL Act must be considered. The purpose is to ensure employees who have completed at least seven years of continuous service[16] are not deprived of a pro rata payment of long service leave, where there are specified circumstances, including: reaching retirement age,[17] termination on account of illness,[18] resignation due to incapacity, domestic or other pressing necessity[19] and termination of employment by the employer, excluding serious and wilful misconduct of the employee.[20]

[45] In this matter, the parties agree the applicant has satisfied the requirement set out in s 8(2)(b) of the LSL Act, having completed at least seven years of continuing employment.

[46] Notwithstanding how stressful the applicant found the performance management process, I do not accept the applicant's submissions that her resignation was of such a nature to be a "constructive dismissal". The applicant was not forced to resign because of the conduct of the employer. That is, because a performance review was being undertaken. The process appears to have been procedurally fair and was implemented to ensure the applicant's compliance with expected standards within a highly regulated environment.

[47] Mr Foss provided evidence, with which was agreed by Ms Cassidy, that additional support was provided to the applicant and the process was undertaken in a timely manner. Therefore, in finding the employer did not terminate the employment through a constructive dismissal, the submissions relating to wilful and serious misconduct are not relevant.

[48] Therefore, the need to demonstrate "pressing necessity" is crucial for the determination of any pro rata entitlement. What is a pressing necessity of such a nature to justify termination? This decision will depend on the individual facts and circumstances of this case.

[49] The Macquarie Dictionary defines "pressing" as "urgent; demanding immediate attention" and "necessity" as something necessary or indispensable; an imperative requirement or need for something; the state or fact of being necessary or inevitable; an unavoidable compulsion to do something.[21]

[50] In s 8(3)(c) of the LSL Act, the nature of the reason giving rise to the application of "pressing necessity" is linked to "justify" the resignation. The Macquarie Dictionary defines "to justify" as "to show a satisfactory reason or excuse for something done".[22]

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[16] *Long Service Leave Act 1976* (Tas) (LSL Act) s 8(2)(b).
[17] Ibid s 8(3)(a).
[18] Ibid s 8(3)(b).
[19] Ibid s 8(3)(c).
[20] Ibid s 8(3)(d).
[21] *Macquarie Dictionary* (3rd ed, 1997) 'pressing' (def 1).
[22] *Macquarie Dictionary,* (online at 27 May 2024) 'justify' (def 5a).

[51] In applying the definition and ordinary meaning of the words "pressing necessity" in context,[23] it is my view that the reason for resignation must be of such an urgent nature that it demands immediate attention as to make it something necessary, imperative or inevitable. Necessity implies the removal of choice to some degree. It is this reason which justifies or provides the reason behind the decision by the employee to terminate their employment.

[52] For the tests that must be applied as to what constitutes 'pressing or other necessity' the Commission has relied on the findings in *Computer Sciences of Australia Pty Ltd v Leslie*,[24] the Full Bench of the Industrial Relations Commission of New South Wales suggested the following questions had to be asked in a case involving 'domestic or pressing necessity':

> (1) Was the reason claimed for termination one which fell within the section?
> (2) Was such reason genuinely held by the worker and not simply colourable or a rationalisation?
> (3) Although the reason claimed may not be the sole ground which actuated the worker in his decision to terminate, was it the real or motivating reason?
> (4) Was the reason such that a reasonable person in the circumstances in which the worker found himself placed might have felt compelled to terminate his employment?'

Was the reason claimed for termination one which fell within the section?

[53] The reason claimed by the applicant was her desire to avoid possible termination by the employer due to alleged poor performance as part of the performance management process.

[54] The respondent was undertaking a performance management process and there is no evidence there was intent by the respondent to bring the employment relationship to an end. After nine meetings, the applicant was provided with a letter, dated 29 November 2023, outlining further alleged performance issues and given a chance to respond in writing or to attend a further meeting with a support person to address those issues. She chose not to address the allegations and instead, resigned her employment.

[55] In my view, she had a choice to continue with the performance management process and respond to the allegations raised in relation to alleged non-compliance with the required standards and regulatory framework.

[56] There is no evidence that she was going to be terminated, rather termination of employment was just one of the advised options at the beginning of the formal disciplinary process in the letter dated 31 October 2023.[25] The applicant provided the following evidence on this matter:

> "DEPUTY PRESIDENT: And we ask the – you can ask the respondent when you're got the chance to ask those questions. So the issue was, at any stage, did Mr Foss or Ms Hartley, or whoever was actually meeting with you, actually say to you that either have to – "We're going to terminate you, or you can resign." Was that ever put to you?

[23] *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 347 ALR 405; 91 ALJR 936.
[24] *Computer Sciences of Australia Pty Ltd v Leslie* [1983] AR (NSW) 828; (1983) 25 AILR 556.
[25] Exhibit R02.

MS CASSIDY: No. Mr Foss did say that the situation was 'untenable', and I would – I would say that is a fairly strong word in – in speaking to someone about their employment prospects.

DEPUTY PRESIDENT: Yes. And that was during the process of performance management?"[26]

[57] Ms Angela Hartley, Partner, ALA Investments, who was present at the meeting on the 27 October 2023 gave the following evidence:[27]

"DEPUTY PRESIDENT: And was there any discussion then around – that termination was inevitable?

MS HARTLEY: I don't think so. I think it was more alluded to.

DEPUTY PRESIDENT: Yep.

MS HARTLEY: It could –

DEPUTY PRESIDENT: It could.

MS HARTLEY: – be inevitable. Ultimately, what we wanted and we said this to her in the meeting is that things to improve, because we didn't want to go down that path."

[58] The offer to purchase her client book was made as an option for her consideration which she did not accept. Ms Cassidy's evidence was:

"MS CASSIDY: When I came into ALA, I had a book of clients.

DEPUTY PRESIDENT: Yes.

MS CASSIDY: Some of whom I've had for 25 years. ALA purchased that book of clients from Will Homan, who was the licensee of Intas Financial Services. Those clients particular to me, which is not obviously the entire book as some were Nick Burke's clients, Mr Foss was suggesting that I purchase them and leave the building.

DEPUTY PRESIDENT: Right.

MS CASSIDY: You know, because basically set up either – either go to another advisory firm or set up on my own.

DEPUTY PRESIDENT: Right.

MS CASSIDY: So it was certainly, I think, indicative that Mr Foss did not have in mind that I was a long term prospect as an employee within ALA."[28]

[59] Her choice was made to avoid possible reputational damage which she alleges may have hindered future employment opportunities in the financial planning profession in Tasmania.

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[26] Transcript of Proceedings (n 2) 20.
[27] Ibid 45.
[28] Ibid 15.

[60] Her submission was: [29] "Such a termination would have been prejudicial to my opportunity of future employment as a financial adviser, which has been my sole occupation for the last 28 years." Her evidence confirmed this reason as:

> "DEPUTY PRESIDENT: So it was really just that you were worried about your reputation?
>
> MS CASSIDY: Yes, yes."[30]

[61] I am not of the view that the resignation was of a pressing necessity, as there was no urgent, immediate need to resign. The performance management process could have been continued. The reasons for "pressing necessity" must be of such an urgent nature that there is no choice but to resign. The applicant made the choice in a considered manner on her terms. Accordingly, I do not find the reason fell within s 8(3)(c) of the Act.

[62] Having found that the applicant did not meet the first criteria and therefore is not eligible for an entitlement to pro rata long service leave, I will provide some commentary about the other elements as they might apply in this matter.

Was such reason genuinely held by the worker and not simply colourable or a rationalisation?

[63] The reason was not declared to the employer at the time of resignation. There was no reason provided. I am satisfied the applicant made a decision to protect her career prospects to resign and leave employment with the respondent, to seek other employment opportunities in Launceston.

[64] Although the applicant submitted she was forced to resign and therefore alleged that it was a constructive dismissal, I do not concur with these submissions as outlined above. I am of the view that despite the applicant genuinely holding the reason for resignation to protect her future prospects of employment, it could be seen as a rationalisation of the resignation.

[65] The applicant contended her employment was no longer tenable as she assumed she would be terminated through the performance management process. There was no evidence that termination of employment was inevitable. She made the choice to resign on her terms. In my view, the resignation was not an urgent necessity and she had time to consider when she resigned. She immediately commenced seeking alternative employment.

Although the reason claimed may not be the sole ground which actuated the worker in her decision to terminate, was it the real or motivating reason?

[66] Her decision to resign has been made clear, she made the decision to resign to avoid the possible termination of her employment, to protect her future employment prospects and she stated her employment was no longer tenable. She has not provided evidence to say why it was no longer tenable, merely she perceived the outcome of the performance management process would be termination of her employment by the employer.

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[29] Exhibit A01.
[30] Transcript of Proceedings 17.

[67] In my view, the sole ground and real reason for her resignation was to avoid the performance management process, the risk of reputational damage and to seek and obtain employment elsewhere. There is no doubt she was keen to change employers as a result of dissatisfaction arising from the performance management process. In my view, this was the motivating factor.

[68] Whether this reason can be classified as a pressing necessity can be distinguished from the cases relied on by the applicant. In T5390 of 1995, *Andrew Mark Thomas and the Examiner Newspaper Pty Ltd* Mr Thomas, the applicant had no option but to resign to relocate to live with his wife in Hobart after a two-year unsuccessful trial of commuting from Launceston to Hobart. The domestic or other pressing necessity was that the individual had no reasonable alternative or no choice but to follow a spouse who has been transferred in employment.

[69] In T7454 of 1998 *Daryl Preston Woolley and Muskett's Timber Sales Pty Ltd,* the applicant resigned due to his wife's medical incapacity as the reason for domestic necessity. Neither of these cases can apply to the current matter.

Was the reason such that a reasonable person in the circumstances in which the worker found herself placed might have felt compelled to terminate his employment?

[70] Despite the anxiety caused by a performance management process, it is my view that a reasonable person may have completed this process by responding to the allegations either in writing or verbally at a meeting with a support person, to enable ongoing employment.

[71] It was the applicant's choice to terminate employment during the process to avoid the process and any possible outcomes. She has decided to pursue other employment opportunities and did not want that prospect tarnished by the finalisation of the performance management process. The immediacy of termination was not a pressing necessity to justify the termination of the employment.

[72] I note there has been no issue with obtaining another position in a financial planning business in Launceston and APRA had audited her case notes and provided approval for the change of employment.

Conclusion

[73] The applicant made a choice to resign to avoid an alleged termination of employment arising from the performance management process. It was asserted this would reduce her chance of future employment in Launceston as a Financial Planner. To reduce potential reputational damage, the applicant chose to resign her employment.

[74] I do not find this reason to meet the criteria as a "pressing necessity" to justify her resignation as required in accordance with s 8(2)(b) of the LSL Act. "Pressing" implies an urgent nature while, "necessity" implies the removal of the choice to some degree; an imperative requirement. The applicant chose to resign for personal reasons.

[75] Accordingly, I dismiss the application.

THE STAMP OF THE TASMANIAN INDUSTRIAL COMMISSION
TASMANIA

Neroli Ellis
Deputy President