DEVELOPMENTS IN ADMINISTRATIVE LAW[1]

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Government initiatives, inquiries, legislative and parliamentary developments

Passage of ASIO (Terrorism) Bill

After lengthy debate, on 25 June 2003 the Senate passed the Coalition Government's much-amended ASIO (Terrorism) Bill, with the support of the Labor Party over the opposition to the Bill as a whole of the Democrats, the Greens and One Nation. The House of Representatives completed the process on 26 June 2003. Labor indicated that it could support the Bill in its final form, but would seek amendments when it came into government. It was assented to on 22 July 2003.

In the 15 months it took to pass the legislation, the Bill was substantially amended generally by inclusion of greater safeguards for a person subject to a warrant. The Senate was substantially assisted in this process by the reports of several Parliamentary committees and considerable public involvement in debate.

The principal feature of the Act is that it provides for the Director–General of ASIO with the consent of the Attorney–General to seek the issue, by a Judge or a Federal Magistrate acting as an issuing authority, of a warrant for a police officer to take a person into custody for questioning by ASIO, before a judge or retired judge acting as a prescribed authority, where the issuing authority is satisfied 'that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence'. The prescribed authority may order the detention of a person before them for questioning if they are satisfied there are reasonable grounds for believing that otherwise the person may alert someone involved in a terrorism offence, or fail to appear again for questioning, or destroy or tamper with evidence.

The Government had introduced late amendments designed to satisfy the Labor Opposition on a number of unresolved issues including: the minimum age of detainees (raised to 16, with special protections for those between 16 and 18); the maximum period of detention under a single warrant (7 days, though Labor would have preferred 3) and the pattern of questioning (a total of no more than 24 hours in up to 8 hour blocks); and providing for access to a lawyer of a detainee's choosing, subject to exclusion of a particular lawyer where a person may be alerted to the investigation, or there is a danger of destruction or damage to evidence. (There are also limitations on the role of lawyers during questioning.)

The minor parties continued to object, among other things, to provision for the issue of further warrants (dubbed 'serial warrants'), although this can only occur where the Minister is satisfied that it is justified by additional or materially different information from that given earlier.

There is provision in the Act for a person to make complaints, during or after questioning, to the Ombudsman or the Inspector–General of Security and Intelligence, depending on

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whether the complaint relates to the AFP or ASIO. The person detained must be informed at the outset of these rights, and of the right to seek a remedy from a federal court relating to the warrant or the person's treatment under the warrant. The Inspector–General (or a delegate) has a discretion to be present at the questioning or taking into custody of a person, and may express concern about impropriety or illegality which may lead a prescribed authority to defer further questioning or other action.

The amendments made by the ASIO (Terrorism) Act are subject to a sunset clause of three years and review of its operation by the Parliamentary Joint Committee on ASIO, ASIS and DSD. Lawyers for persons questioned in the aftermath of the deportation of M. Willie Brigitte (see next item), and the Australian Council for Civil Liberties, have criticised the weakness in practice of protections for individuals under the regime. The Attorney–General, Mr Ruddock, has confirmed that the provisions of the Act have been used to question, but not to detain, associates in Australia of M. Brigitte, and that further changes to the legislation may be necessary in addition to those discussed in the next item.

On 12 August 2003, Attorney–General Daryl Williams tabled a Protocol to guide the execution of detention and questioning warrants under the new Act, including arrangements for custody and detention, interview duration periods and breaks, and other practical matters.

(***Australian Security Intelligence Organisation Legislation (Terrorism) Act 2003***, No. 77, 2003; ***Senate Hansard***, 17–19, 23 & 25 June 2003; ***House of Representatives Hansard***, 26 June 2003; **Cynthia Banham, 'ASIO laws may be invalid'**, ***Sydney Morning Herald***, 27 June 2003; see also (2003) 38 *AIAL Forum* at 2 and 3 and (2003) 36 *AIAL Forum* at 1; **Freya Petersen, 'Fears ASIO laws a threat to freedoms'**, ***Canberra Times***, 1 December 2003; **Attorney–General's Press Releases**, 10 December 2002 & 12 August 2003)

Further amendments of ASIO's powers in relation to terrorism offences

Following the discovery that a person on a tourist visa, M. Willie Brigitte, was known to the French police as an associate of Al Quaeda, and his subsequent deportation to France, Mr Phillip Ruddock, the new Attorney–General, announced that he would be seeking amendments to the ASIO Act to address practical issues he said had been identified in implementing ASIO's new powers relating to terrorism offences.

The amending legislation was introduced into the Parliament on 27 November and passed by the Senate on 4 December 2003. Its main features include:

- An extension of the maximum questioning time from 24 to 48 hours where an interpreter is used, to allow for additional time taken, but subject to the overall limit of 7 days.

- Introducing new offences to prevent a person subject to a warrant from fleeing the country. These relate to failure to surrender passports, or leaving or attempting to leave the country after being notified of the issue of a warrant.

- Restrictions on anyone disclosing information, while a warrant is in force (up to 28 days), about the issue of the warrant or its content or the questioning or detention of a person under the warrant, or, while the warrant is in force or for 2 years thereafter, about operational information obtained as a result of the issue of the warrant. These restrictions do not prevent the making or investigation of complaints to the Ombudsman or the Inspector–General, or the initiation and conduct of legal proceedings or obtaining legal advice, and do not apply to the extent that they would infringe any constitutional doctrine of implied freedom of political communication.

One commentator, Associate Professor Don Rothwell, expressed the view that the proposed provision for the extension of questioning to 48 hours where an interpreter is used would be a breach of Article 26 of the International Covenant on Civil and Political Rights, which provides that 'all persons are equal before the law' and prohibits discrimination on a number of grounds including language. The Attorney–General replied that his advice is that differential treatment based on objective and reasonable criteria is not discriminatory under Article 26. The Australian Federation of Community Legal Centres criticised the provisions concerning the disclosure of information and extension of questioning time, and called on the Senate to refer the Bill to a Senate Committee for review and public consultation. Media organisations and Liberty Victoria criticised the secrecy provisions.

The Bill passed the Senate on 5 December 2003.

(***ASIO Legislation Amendment Bill 2003***; **Attorney–General's Media Release, 'Government to boost ASIO's counter-terrorism powers'**, 25 November 2003; **Cynthia Banham, 'ASIO grillings will breach civil rights, warns expert'**, ***Sydney Morning Herald***, 27 November 2003; ***Canberra Times***, 5 December 2003)

Legislation proscribing Hamas (military wing) and Lashkar-e-Tayyiba

The Parliament has enacted legislation that adds Lashkar-e-Tayyiba (LeT) and the military wing of Hamas to the present listing of the Hizballah External Security Organisation (see (2003) 38 *AIAL Forum* at 3), as organisations that can, in effect, be listed as terrorist organisations if the Attorney–General is satisfied on reasonable grounds that the organisations are 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act', whether such an act happens or not. Regulations listing the two organisations were made on 9 November 2003 and were immediately effective; they are subject to a sunset clause of 2 years, but may be remade at any time with immediate effect. Listing an organisation as a terrorist organisation brings into play terrorism offences contained in Division 102 of the *Criminal Code Act 1995*.

This kind of legislation, adopted because of Opposition objections to a general power to ban organisations (see the Criminal Code Amendment (Terrorist Organisations) Bill 2003, currently stalled in the Senate), complements the power to make regulations where an organisation has been listed as a terrorist organisation by the United Nations. In addition, a court may find that an organisation is a terrorist organisation as defined in para (a) of the definition in section 102.1 of the Criminal Code

The Attorney–General claimed that LeT had links with Australia (both M. Willie Brigitte and Mr David Hicks have been claimed to be associated with it) and was therefore a threat to Australia and its interests. While there was no linkage of the military wing of Hamas to Australia, the Attorney considered it was prudent to take action. A number of other countries have banned one or both of these organisations. The assets in Australia of Hamas in its entirety, and of LeT, have already been frozen under other legislation by the Minister for Foreign Affairs.

The constitutional issues that may arise in relation to this type of legislation are usefully discussed in the *Bills Digest* on the Hizballah legislation. Issues concerning the retrospective effect of regulations in certain circumstances are dealt with in the *Bills Digest* on the current Bill.

(**Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2002**; ***House of Representatives Hansard***, 5 November 2003; **Parliamentary Library, *Bills Digest No. 60, 2003–04, Criminal Code Amendment (Hamas & Lashkar–e–Tayyiba) Bill 2003***, 8 November 2003, and ***Bills Digest No. 170, 2002–03***, 11 June 2003)

Legislative Instruments Bill passed

A Legislative Instruments Act was first proposed in a 1992 report of the Administrative Review Council. After the failure of three previous Bills in 1994 and 1996, the Parliament has passed the Legislative Instruments Bill 2003 (the Bill) in the last week of the spring sitting.

The Bill is intended to reform procedures for the making, scrutiny and publication of Commonwealth legislative instruments, defined generally as instruments in writing that are of a 'legislative character' (broadly defined in terms of determining or altering the law in a general way, rather than applying it in a particular case) made in exercise of a power delegated by Parliament, with some specified exceptions. The scope of the Bill extends beyond statutory rules such as regulations to an ever-increasing proportion of subordinate legislation in other forms, including a range of instruments of non-self-governing territories, disallowable instruments and proclamations. When combined with the registration provisions discussed below, this will make public access to virtually the whole range of subordinate legislation far easier.

The Bill's central feature is the establishment of a Federal Register of Legislative Instruments managed by the Attorney–General's Department as the means by which all registrable legislative instruments (and explanatory statements) are to be published, and will include compilations of instruments. The Register will be accessible to the public via the Internet, and will be easily searchable.

Existing legislative instruments in force must be registered, within 11 months of commencement for instruments up to 5 years old, and within 35 months for older instruments ('backcapturing'). An instrument made before commencement of the Act that is not registered within the specified period ceases to be enforceable and is taken to have been repealed by the Act except in the case of revenue collection instruments. An instrument made on or after commencement is generally not enforceable unless it is registered.

Legislative instruments that are required to be registered, with a number of specified exceptions, are subject to 'sunsetting' after 10 years, but this may be extended in exceptional circumstances by issue of a certificate by the Attorney–General. Unused and redundant subordinate legislation will thus cease to apply.

In general terms, before an instrument is made, consultation that is appropriate and reasonably practicable must be undertaken, particularly if it has an effect on business or restricts competition. Rule-makers must consider the appropriateness and practicability of consultation, including at least the use of relevant expertise and whether there has been adequate opportunity for comment by those likely to be affected. Examples are given of specific circumstances where consultation would not be appropriate. The absence of consultation does not affect the validity or enforceability of an instrument.

The Bill encourages high drafting standards and is designed to improve the mechanisms for Parliamentary scrutiny and disallowance of most legislative instruments, replacing the current provisions in the *Acts Interpretation Act 1901*. There is to be an independent review of the operation of the Act after 3 years, and a review of the sunsetting provisions after 12 years.

(**Legislative Instruments Bill 2003 and Legislative Instruments (Transitional and Consequential Amendments) Bill 2003**; **ARC Report No. 35, *Rule Making by Commonwealth Agencies***, 1992; ***Bills Digests* Nos 26 and 54, 2003–04** on the two Bills, 9 September and 28 October 2003; **111th Report of the Standing Committee on Regulations and Ordinances**, tabled 26 October 2003)

See further Stephen Argument, 'The Legislative Instrument Bill—Lazarus with a triple by-pass?' 39 *AIAL Forum* 44; Stephen Argument, 'The Legislative Instruments Bill Lives!!' 40 *AIAL Forum* 17.

Review of migration litigation

The Attorney–General, Mr Ruddock, has announced a review of migration litigation with the aim of achieving 'more efficient management of migration cases'. The review is headed by First Parliamentary Counsel, Ms Hilary Penfold QC, and will be assisted by a high level steering committee including a Federal Court judge and a Federal Magistrate, and Deputy Secretaries from the Attorney–General's Department, the Department of Prime Minister and Cabinet, and the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). The review has authority to consult with or invite submissions from relevant bodies or individuals. It is to report by the end of 2003.

In announcing the review, the Attorney referred to the large and rising proportion of all cases before the Federal Court and the Federal Magistrates Court that concerned migration matters (66.5% in 2002–03 in the Federal Court), and to the large number of such cases either withdrawn by applicants before the court reached a decision (more than one–third) or won by the government. Significant aims of the review were to promote 'more efficient management and quicker disposition of migration cases', and to reduce the numbers of 'unmeritorious migration cases while preserving access to justice for cases with merit'.

(**Attorney–General's Media Releases**, 27 October 2003)

Kurdish asylum seekers – regulations excising islands from Migration Zone

On 4 November 2003 an Indonesian fishing boat, the *Minasa Bone*, arrived at Melville Island off the northern coast of the Northern Territory carrying 14 Turkish Kurds. This was only the second boat carrying potential asylum seekers to reach Australia since the post–*Tampa* change in Australia's refugee policies and legislation. The arrival prompted rapid government action. The boat with its crew and passengers was towed back to Indonesian waters by the *HMAS Geelong*, and it has been reported that Indonesia may deport the Kurdish passengers to Turkey. Indonesia is not a signatory to the 1951 Refugees Convention and its 1967 Protocol. On the day of the arrival, regulations were made excising from Australia's Migration Zone a large number of islands in Queensland, Western Australia and the Northern Territory, including Melville Island. There was confusion for some days as to whether the Turkish Kurds had sought asylum, the government at first claiming they did not and then conceding they had done so.

The regulations were subsequently disallowed in the Senate on 24 November 2003 by a combination of the Labor Opposition, the Democrats, the Greens, Australian Progressive Alliance Senator Lees and Independent Senator Harradine. This was the third unsuccessful attempt by the Government to excise such islands (by regulations in June 2002 and by Bill rejected by the Senate for a second time in June 2003), but the regulations were in force on 4 November, apparently preventing the asylum seekers from claiming asylum under Australian law. The regulations while in force had no effect on Australia's protection obligations under international law. The Government stated that its main intention was to 'send a message' to people smugglers that they would not be successful in getting asylum seekers to Australia.

The offices of the UN High Commissioner for Refugees (UNHCR) in Geneva and Canberra have criticised the Australian Government's actions, claiming that 'Australia's actions are at variance with the 1951 UN Refugee Convention and have in effect jeopardised the proper functioning of the international protection system'. The UNHCR was particularly concerned

with the possible return of the asylum seekers to Turkey where their lives could be in danger, which would be a breach of the *non-refoulement* provisions of the Convention.

See also 'The Courts' below at 10 on the decision of the Northern Territory Supreme Court in *Cox v MIMIA*.

(**Migration Amendment Regulations 2003 (No. 8)**, made 4 November and disallowed 24 November 2003; **Australian Parliamentary Library, Research Note No. 22, 2003–4, *Protecting Australia's Borders***, 24 November 2003; **UNHCR Press Release and News Story**, 11 November 2003, available through: http://www.unhcr.ch/cgi-bin/texis/vtx/home)

Discussion paper on resolving deadlocks between the House of Representatives and the Senate

On 9 October the Prime Minister launched a government discussion paper arguing that the double dissolution mechanism in section 57 of the Constitution is an unsatisfactory way to resolve deadlocks between the two Houses of Parliament, and proposing for discussion two models for a process that would supplement rather than replace the section 57 double dissolution process.

The first model 'would allow the Prime Minister to ask the Governor–General to convene a joint sitting of both Houses to consider a bill that has been blocked by the Senate twice during the life of the parliament, with the required three month interval'. The second model (known colloquially as 'the Lavarch model' after the former Labor Attorney–General, Michael Lavarch), would allow the Prime Minister to ask the Governor–General to convene a joint sitting following a general election for the House of Representatives alone, or together with an election for half the Senate, to consider a bill that has been blocked by the Senate twice in the previous Parliament, and is blocked again in the new Parliament. The paper examines some of the advantages and disadvantages of each model.

The Prime Minister has appointed a consultative group to conduct public meetings in capital cities to discuss the matters raised in the paper, the last of which was scheduled for Sydney on 2 December 2003. The group is chaired by the Hon Neil Brown QC, a former minister in the Fraser Government, and includes the Hon Michael Lavarch and Professor Jack Richardson. The final date for submissions was 31 December 2003. Copies of the paper can be obtained from the website: www.pmc.gov.au/docs/constitutionalchange.cfm or by calling (02) 6271 5530.

A recently published book on the Australian Senate by an expert on the American Congress and other legislatures, Dr Stanley Bach, is a useful background to consideration of this issue; an order form is available on the Senate publications website: www.aph.gov.au/Senate/pubs.html . A view opposed to the argument in the discussion paper may be found in the submission to the Consultative Group by the Clerk of the Senate, Mr Harry Evans, accessible from the Senate publications website under the heading 'Procedural papers and seminars'.

(***Resolving Deadlocks: A Discussion Paper on Section 57 of the Australian Constitution***, Commonwealth of Australia, 2003; ***House of Representatives & Senate Hansards***, 8–9 October 2003; **Stanley Bach, *Platypus and Parliament: The Australian Senate in Theory and Practice***, Canberra, October 2003)

Indigenous affairs

A new agency within the Indigenous Affairs portfolio, Aboriginal and Torres Strait Islander Services (ATSIS), commenced its operations in early July. It is designed to 'deliver to indigenous people those programs previously provided by the Aboriginal and Torres Strait Islander Commission (ATSIC)'. The then Indigenous Affairs Minister, Mr Ruddock, said that it would be expected to work closely with the ATSIC Board of Commissioners and the 35 Regional Councils which are to continue to set policies and strategic priorities. The CEO of the new agency is Mr Wayne Gibbons, who also continues to be CEO of ATSIC. (**Attorney–General's Press Releases**, 2 July 2003)

The review of ATSIC commissioned by the previous Minister has produced a final report which, among many other things, makes recommendations for restructuring ATSIC at the national level on the basis of the existing Regional Council structure, and recommends the reunification of ATSIC and ATSIS. (***In the Hands of the Regions: A New ATSIC*, Report of the Review of the Aboriginal and Torres Strait Islander Commission**, November 2003, available on: www.atsicreview.gov.au/; see also Parliamentary Library, ***Research Note***, No. 5, 2003–04, 11 August 2003)

A major report on Aboriginal Reconciliation has been presented by the Senate Legal and Constitutional References Committee. Government members of the Committee presented a dissenting report. (***Reconciliation: Off Track***, Senate Legal and Constitutional References Committee, October 2003)

Administrative Review Council (ARC) – project on automated assistance in administrative decision-making

The ARC has produced an Issues Paper concerning the increasing phenomenon of automated expert systems which are involved in decision-making especially in some high-volume areas. There is a useful lay explanation of what is involved in different kinds of automated systems, and a report on the ARC's stocktake of the incidence in the Commonwealth and some State agencies of the most common form of these systems, rule-base systems. The paper looks at the issues involved in the design and development of such systems, the arguments for and against adopting them and some of the broader problems that may arise from their use, including the possible de-skilling of officers, how to exercise discretions when making decisions in this way, how to ensure accuracy on a continuing basis, auditing requirements and how to ensure independent scrutiny of rule-base systems before and after they come into operation.

The paper examines the application of administrative law standards relevant at each stage of the decision-making and review process, and explores the ways in which rule-base systems can operate to ensure that the administrative law values of lawfulness, fairness, rationality, openness and efficiency can be met when automated systems are employed in decision-making. It asks whether new administrative review processes and new service delivery options may be necessary or become desirable in the light of the development of these systems. The Council lists some optimum features of rule-base systems which it will revise after conducting consultations and receiving submissions, due by 29 August 2003. It is expected that the ARC will finalise its report in the first half of 2004.

(***Automated Assistance in Administrative Decision Making, Issues Paper*, ARC**, 2003)

The courts

All decisions discussed below (except *Cox v MIMIA*) may be accessed on the Australian Legal Information Institute website: http://www.austlii.edu.au

High Court rejects challenge to reasoning process of the Refugee Review Tribunal (RRT)

A High Court decision illustrates the difficulty of obtaining relief through the courts where it is alleged that a tribunal of fact has reached its decision through a flawed process of reasoning. An unsuccessful claimant for protection as a refugee (the applicant) contended that the RRT's reasons for decision in his case had been 'irrational, illogical and not based upon findings or inferences of fact supported by logical grounds'. The reasoning of the RRT objected to was (a) its statement that it gave no weight at all to a witness's testimony claimed to be confirmatory of the applicant's account, because the applicant's claim lacked all credibility, and (b) the way in which it dealt with the evidence of two other witnesses supporting the applicant's claim.

The applicant appealed to the High Court against a refusal of relief by a majority of the Full Federal Court and also brought proceedings for constitutional writs under section 75(v) of the Constitution. Claims of actual or apprehended bias on the part of the RRT were rejected by all judges. By a majority of 4 to 1 (Kirby J dissenting), the court dismissed both the appeal and the application under section 75(v). The majority found no error in the reasoning of the RRT of the kind alleged by the applicant. The RRT had proceeded on the basis that no amount of corroboration could undo the conclusion that the case for refugee status was based on falsehood ('because the well ha[d] been poisoned beyond redemption'). The RRT could therefore not be satisfied as to any corroboration, and did not need to consider it. (Justices McHugh and Gummow, joint judgment; Gleeson CJ's grounds for dismissal were similar.) The joint judgment rejected, in *obiter dicta*, the submission of the Minister that for the purposes of jurisdictional error a distinction should be made between legal and factual errors, although restating that there was no judicial review for error of fact as such.

Justice Kirby would have allowed the appeal, and therefore would have dismissed as unnecessary the application for review under section 75(v).

In his Honour's view the RRT had committed a jurisdictional error within section 476(1)(b) and (c) of the *Migration Act 1958* ((Cth) (the Act) as it stood before September 2001, and the error was not (as the majority of the Full Federal Court had decided) excluded from the court's consideration by section 476(2)(b) of the Act's exclusion of unreasonableness as a ground for review. (See the joint judgment on the possibility of cases of overlap where section 476(2) could deprive an applicant of a ground of review in subsection (1); and see Gleeson CJ.) There were no grounds for the court to exercise restraint in a simple fact-finding decision with effects on the right to life and liberty of a vulnerable individual

(***Re Minister for Immigration and Multicultural and Indigenous Affairs (MIMIA); Ex parte Applicant* S20/2002; *Appellant S106/2002 and MIMIA* [2003] HCA 30**, 17 June 2003)

Decisions on detention

At the time of writing, decisions of the High Court are awaited in several matters involving detention issues, including *B v B*, on appeal from the Full Court of the Family Court relating to detention of children, and *MIMIA v Al Khafaji* and *SHDB v Godwin & ors* which raise the issue of the lawfulness of detention when removal from Australian is sought by an asylum seeker but it is not reasonably practicable to do that in the reasonably foreseeable future. The legal issue in the latter cases is the same as was raised in *MIMIA v Al Masri* (2003) 197 ALR 241 discussed in (2003) 38 *AIAL Forum* at 7–8. The High Court refused the Commonwealth leave to appeal in that matter in the light of the fact that Mr Al Masri had already returned to Gaza and the other cases raised the same issues. Another matter, *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*,

raised the issue whether the conditions of detention in Woomera of asylum seekers who had escaped and been returned exceeded what could reasonably be regarded as necessary for the purposes of the *Migration Act 1958*.

(See ***High Court Transcripts***, 14 August and 12–13 November 2003)

'Refoulement cases' unsuccessful in High Court and Federal Court

The High Court refused on 12 December 2003 to grant special leave to appeal in a case concerning the meaning of section 198(6) of the Migration Act which provides for the compulsory removal in certain circumstances of an unlawful non–citizen 'as soon as it is reasonably practicable'. The appellant's counsel, Julian Burnside QC, had argued that the power to 'remove' was ambiguous and should be read down by reference to Australia's obligations under the Refugee and Torture Conventions not to *refoule* (return) those in danger of persecution or torture. This was seen as the leading case in an attempt to prevent the forced removal from Australia of Iranian asylum seekers whose refugee claims had been unsuccessful. The High Court (Gleeson CJ and Gummow J) said there were insufficient reasons to doubt the correctness of the Full Federal Court's decision to warrant the granting of special leave. (***Applicant M38/2002 v MIMIA***, **High Court Transcripts**, 12 December 2003)

Four days later, a different bench of the Full Federal Court followed that court's earlier decision in *M38*. It held unanimously that in making a determination of 'reasonable practicability' it was not relevant to consider what is likely or even certain to befall the unlawful non-citizen after removal to another country. 'Even if it is virtually certain that he or she will be killed, tortured or persecuted in that country, whether on a Refugees Convention ground or not, that is not a practical consideration going to the ability to remove from Australia. Rather, it is a consideration about a likely course of events following removal from Australia.' The court considered that the power of appeal to the RRT, and the Minister's discretions in sections 48B, 351 and 417 of the Migration Act, were Parliament's mechanisms for guarding against removal in cases of potential death, torture or other persecution, although it said there 'may be room for debate about the adequacy of the provisions'. However, the court did acknowledge that there was an element of 'reasonableness' in the notion of 'practicable' such that, for example, it would be difficult to accept that removal was practicable 'where no country was willing to admit the unlawful non-citizen'. (***NATB v MIMIA*** **[2003] FCAFC 292**, 16 December 2003)

Decisions on wheat exports by growers' company not subject to ADJR Act

A High Court majority decision concerning the role of the successors to the Australian Wheat Board took a narrow view of the application of public law remedies to certain decisions of a private company with a virtual statutory monopoly in the bulk wheat export trade. The company, AWB (International) Limited (AWBI), a wholly owned subsidiary of AWB Limited (AWB) (a wheatgrowers' company with some outside shareholders), is the only person allowed by statute to export wheat without written consent of the Wheat Export Authority (WEA). Section 57 of the *Wheat Marketing Act 1989* (Cth) (section 57) amended in 1999 provides that, before deciding whether to consent to other exports of wheat, WEA must first consult AWBI and gain its the approval. The scheme is broadly described as the 'single desk system of export marketing'.

The appellant company, which had exported wheat on several occasions under the previous scheme, sought consent from WEA on six occasions for export of various grades of durum wheat, but was refused approval by AWBI each time on the basis that approval would jeopardise marketing strategy and adversely impact on growers' returns. In order to make out a case for a breach of section 46 of the *Trade Practices Act 1974* (Cth) (TPA), the

appellant sought to establish that the decisions were invalid under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) and thus not protected by an immunity in section 57. It argued that AWBI had acted according to a rule or policy without regard to the merits of the case.

The High Court dismissed the appeal by a majority of 4 to 1. In dissent, Kirby J (and Gleeson CJ *obiter*) took the view that AWBI's approval decisions were administrative decisions made under an enactment as specified in the ADJR Act. They were fully integrated into the regulatory scheme of section 57, under which AWBI held a veto over the statutory consent of WEA. The only way in which its decisions could have that legal effect was on the basis of clear and unmistakable statutory authority. However, the majority (McHugh, Hayne and Callinan JJ, in a joint judgment), while accepting that there was an 'intersection between the public and the private' in the scheme in section 57, rejected the application of the ADJR Act. AWBI was not exercising a power under section 57 as its power to make the decision in writing 'derived from AWBI's incorporation and the applicable companies legislation'. Moreover, in the view of the joint judgment and Gleeson CJ, no distinction could be made between AWBI's interests and the merits of the case, and AWBI could not be required to take into account public considerations.

In the Chief Justice's view AWBI's policy was not inconsistent with section 57, and no case had been made by the appellant to AWBI to relax its policy on the ground that consent to export would not adversely affect the system of marketing or AWBI or growers. Conversely, Kirby J considered that Parliament had chosen a scheme which made provision for case by case decisions, and adoption of a blanket policy amounted to rewriting the legislation. At least some of the appellant's applications did not appear likely to adversely affect AWB's or AWBI's commercial interests, and should have been genuinely considered: AWBI 'could not shut its ears'.

(***Neat Domestic Trading Pty Limited v AWB Limited*** **[2003] HCA 35**, 19 June 2003)

Kurdish asylum seekers – application for habeas corpus refused by Northern Territory Supreme Court

The Director of the Northern Territory (NT) Legal Aid Service was unable to obtain permission from DIMIA or the Minister's office to gain access to 14 Turkish Kurds who had arrived at Melville Island on 4 November 2003. Her purpose was to provide them with legal assistance if they wished to apply for refugee status. She then applied to the Northern Territory Supreme Court for a writ of habeas corpus relating to those persons. The court refused the application.

The outcome was not affected by the making of regulations excising Melville Island from the Migration Zone (see 5 above), as that matter related only to the question whether the immigrants should have been detained under the *Migration Act 1958*. The court decided there was prima facie evidence of detention, and was not satisfied that the detention was rendered lawful by section 245F(8A) of the Migration Act. Although it had jurisdiction over the defendants, despite the immigrants not being within NT waters, the court denied habeas corpus in accordance with the *Tampa* decision of the Full Federal Court. The court's processes could not be used to obtain entry by immigrants with no right to do so, they would immediately be placed in immigration detention, and the writ was sought not to obtain their release from custody but to obtain instructions concerning applications for visas (*Ruddock v Vardarlis* (2001) 110 FCR 491).

In the course of its reasons the court criticised the behaviour of the government and DIMIA, saying that 'the policy of the government was to operate as clandestinely as possible and to provide no access to the plaintiff or her officers and no information to the plaintiff or to the

public through the media to the extent that this could be avoided'. Even the information provided to the court by a witness from DIMIA was 'quite minimal'.

(***Cox v MIMIA & ors*** **[2003] NTSC 111**, Mildren J, 7 November 2003)

Administrative review and tribunals

Critique of evidentiary processes in RRT proceedings

A Canadian and an Australian academic have published a comparative critique of the operations of the Canadian Immigration and Refugee Review Board (IRB) and the Australian RRT in the context of assessment of claims for refugee recognition by gays and lesbians. In broad terms, the study found that there were major differences in outcomes between the two tribunals in similar cases, and that the evidentiary practices of each differed considerably. The authors' criticisms include such matters as the way the RRT uses 'independent country evidence', the narrow range of such evidence resorted to (not including excellent Canadian IRB material), use of unreliable and vague sources such as DFAT cables, the tendency to use unchanged templates of country information in a large number of reasons for decision, a lack of understanding of the broader cultural context of particular countries, uncritical reliance on sources of limited value for the specific claim, the selective quoting of sources and failure to weigh competing sources of evidence. The authors make a number of practical suggestions that could be achieved administratively in cases of this kind. Many of the criticisms in the study of the RRT's practices are relevant to its work generally.

At the time of writing, the High Court had just handed down its decision upholding appeals by two Bangladeshis who claimed refugee status on the ground of fear of persecution because of their homosexuality. The case will be summarised in the next developments section.

(Catherine Dauvergne (University of British Columbia) and Jenni Millbank (University of Sydney), 'Burdened by Proof: How the Australian Refugee Review Tribunal has Failed Lesbian and Gay Asylum Seekers' (2003) 31 ***Federal Law Review*** at 299–342 (and see (2003) 38 *AIAL Forum* at 6); ***Appellants S395/200 & S396/2002 v MIMIA*** **[2003] HCA 71**, 9 December 2003)

New ARC projects

In addition to its existing projects on judicial review and automated decision-making (for the latter, see 7 above), the ARC has begun several new projects. The first concerns the coercive investigative powers of Commonwealth government agencies, in particular those exercisable without application to the courts, and is intended to determine the need for greater consistency of powers across government. The ARC will also consider accountability mechanisms and protections of individuals.

The second new project concerns the procedural discretions of Commonwealth review tribunals, initially focusing on time limits, standing and stays of decisions, with a view to achieving greater legislative consistency.

The ARC has also resolved to develop a compendium of key principles of administrative law that need to be taken into account in the training of administrative decision makers. In the light of the outcomes of the HIH Royal Commission, it will also undertake a short study of the various legislative mechanisms for reviewing decisions of the Australian Prudential Regulatory Authority.

(***Administrative Review Council: Twenty-seventh Annual Report, 2002–2003***, Commonwealth of Australia, 2003)

Ombudsman

Commonwealth Ombudsman's reports

In the period since the last developments section, the Commonwealth Ombudsman has released the following reports:

- *Own motion investigation into Australian Taxation Office complaint handling* (July 2003)
- *Own motion investigation into complaint handling in the Job Network* (August 2003)
- *Special investigation into the issue of a substitute medical certificate under the Witness Protection Act 1994* (October 2003)

Space does not permit discussion of these reports at this time, but they may be found on the Ombudsman's website: www.comb.gov.au/

Freedom of information, privacy and other information issues

Protection of classified and security sensitive information – ALRC background paper

The Australian Law Reform Commission (ALRC) issued a Background Paper in July 2003 on protecting classified and security sensitive information 'in the course of criminal or other official investigations and court or tribunal proceedings of any kind', as part of its project on a reference from the Attorney–General in April 2003. It sought comments and submissions on the paper by 29 August 2003. The ALRC plans to release a Discussion Paper containing draft proposals in late 2003, and to conduct consultations on it from late 2003 to January 2004. It is required to report to the Attorney–General by 29 February 2004, but the report will not be publicly available until it is tabled in the Parliament.

As directed in the referral, the Background Paper examines the standards contained in the Commonwealth Protective Security Manual and seeks comment on whether they should be made enforceable. It briefly examines the relevance of 'Open Government' legislation and penalties for unauthorised disclosure of official information. The bulk of the paper explores the issues arising in relation to the disclosure or withholding of classified or security sensitive material in civil and criminal court or tribunal proceedings.

A major theme to emerge from the paper is that current mechanisms for regulating the use of security-related information, such as public interest immunity, are blunt instruments that may exclude such information altogether to the disadvantage sometimes of a citizen litigant and sometimes of the government as litigant. The paper contains illuminating discussion of other mechanisms for the consideration by courts and tribunals of security–sensitive information, many of them from overseas practice. Significant questions for consideration arise in relation to various kinds of closed proceedings or the secret giving of evidence. One area where this has raised concern in a number of countries is in immigration hearings (and see next item).

(***Protecting Classified and Security Sensitive Information***, **ALRC, Background Paper 8**, July 2003)

Migration protected information legislation

The Migration Legislation Amendment (Protected Information) Act 2003 was assented to on 15 July 2003. It strengthens the provisions of section 503A protecting information supplied on a confidential basis to a migration officer by a gazetted Australian or foreign law enforcement or intelligence agency where the information is relevant to the exercise of a power relating to the refusal or cancellation of a visa on character grounds (sections 501, 501A, 501B or 501C). The legislation is of particular interest in the light of the ALRC inquiry referred to in the preceding item.

The amendments do four principal things. First, they provide that the Minister cannot be compelled to exercise the Minister's power to declare that protected information may be disclosed to a specified Minister, Commonwealth officer, court or tribunal. In effect, this places the Minister's decisions beyond judicial review (see also (2003) 36 *AIAL Forum* at 2). Second, they extend the description of protected information to include the name of the agency supplying the information and the conditions on which the communication of confidential information occurred, thereby reversing the decision of the Full Federal Court in *NAAO v Department of Immigration and Multicultural Affairs* [2002] FCA 292. Third, they include section 503A in the schedule of secrecy provisions protected by section 38 of the *Freedom of Information Act 1982* (*NAAO* had proceeded on the erroneous basis that section 38 already applied). At the same time they amend the FOI Act in relation to section 503A information to exclude the provisions of section 38(1A), which normally prevent the exemption in section 38 from applying to personal information about the FOI applicant, although other exemptions may apply. This is the only provision of this kind.

Finally, the amendments refine the protection of confidential law enforcement or intelligence information in court proceedings relating to the relevant powers. They enable the Minister to apply for non-disclosure orders by the Federal Court or the Federal Magistrates Court, after consideration of specified criteria. Such orders prevent disclosure of the information to the applicant or legal representative in substantive proceedings, or any other member of the public.

Federal Court finds public service secrecy provision invalid

In a decision with wide-ranging ramifications, Finn J in the Federal Court has held invalid regulation 7(13) of the *Public Service Regulations 1998* (Cth), which prohibits public servants, except in the course of their duties or with the express authority of the agency head, from disclosing 'any information about public business or anything of which the employee has official knowledge'. The regulation breached the constitutional implied freedom of political communication. The decision will be summarised in more detail in the next developments section.

(***Bennett v President, Human Rights and Equal Opportunity Commission* [2003] FCA 1433**, 10 December 2003; ***Canberra Times*, 'Ruling throws secrecy laws into disarray' and 'PS rules on 'secrets' wrong' (editorial)**, 11 December 2003)

Public administration

Reports on role of ministerial advisers and recruitment and training in the APS

The Senate Finance and Public Administration References (FAPA) Committee has reported on its inquiry into ministerial and other advisers which grew out of the concern of the Senate 'children overboard' committee (*Report on a certain maritime incident*, 23 October 2003) that there be mechanisms to make ministerial advisers accountable to Parliament in similar ways to public servants. The majority of the FAPA Committee took the view that advisers could

legally be compelled to appear before Senate Committees, but noted that attempts to enforce that position against government wishes could lead to drawn-out and expensive legal battles. It differentiated between the responsibility of Ministers for the actions of their staff, and the accountability of such staff in the sense of giving an account of their actions in some circumstances.

On that basis, the committee recommended that government should agree to make ministerial staff available to appear before parliamentary committees in circumstances such as where a Minister had not taken responsibility for their actions, or information is received by or communicated from a Minister's office without ministerial involvement, or a government program is administered from a Minister's office. Advisers would not be asked to comment on policy or on policy advice they had given. More information should be made available concerning the employment of all advisers, and there should be greater supervision of record-keeping practices in ministerial offices. The Prime Minister should also be required by legislation to promulgate a code of conduct for ministerial advisers, and ultimately there should be such a code for other advisers. The report recommended the creation of a position of ethics adviser and other measures to make the ministerial advisers code effective. Secretaries of Departments should also have greater security than at present. Government members of the committee rejected the approach of the majority on both advisers and the tenure of Secretaries.

The FAPA Committee has also reported on its 18-month inquiry into recruitment and training in the APS, noting a number of challenging trends in relation to recruitment and retention of staff, and commenting on the fragmenting effects in these areas of devolution of responsibility to agency level. The committee argued that 'the APS Commission must be given a stronger leadership role to counter some of the negative impacts of devolution'. The Commission should annually present a detailed report outlining the progress made by each agency in achieving their recruitment and training objectives. The Committee recommended measures to improve recruitment and retention of young people, graduates and indigenous staff. Finally, it made several criticisms of the lack of evaluation and targeted development of training by agencies, and proposed a major role for the Commission in promoting delivery of centralised training programs in areas such as administrative law, record keeping, financial management and freedom of information.

(***Staff employed under the Members of Parliament (Staff) Act 1984***, **Senate Finance and Public Administration References Committee**, October 2003; ***Recruitment and training in the Australian Public Service***, **Senate Finance and Public Administration References Committee**, September 2003)

Arrangements for purchase of Commonwealth legislation and other material

Following the closure of the Government Bookshop Network on 16 October 2003 (see (2003) 38 *AIAL Forum* at 5), the Attorney–General's Department has made new arrangements for the purchase of publications such as hard copies of legislation, Commonwealth Government Notices Gazettes, marriage stationery and other departmental publications. Commonwealth legislation in printed form will be available in Canberra from CanPrint Information Services (PO Box 7456, Canberra, MC ACT 2610, or over the counter at 16 Nyrang Street, Fyshwick ACT 2609, or for telesales 1300 656 863). They will also be available from Standards Australia offices in State and Territory capital cities (except Darwin), the addresses and phone numbers of which are given in the news release referred to below. Marriage stationery will be available to authorised celebrants through CanPrint Communications telesales (above number).

Electronic copies of Gazettes continue to be available from the Gazettes Online website: www.ag.gov.au/GNGazette.

Electronic copies of Commonwealth legislation continue to be available from the SCALEplus website: http://scaleplus.law.gov.au.

(**Attorney–General's Media Release**, 17 October 2003; see also National Office of the Information Economy's website 'Publications Register' concerning agency publications and their availability: www.publications.gov.au/)

Other developments

Developments concerning Guantanamo Bay detainees

The Australian Government has announced it has negotiated special commitments by the United States Government concerning the conditions to apply to possible trials by a US military commission of Mr David Hicks and Mr Mamdouh Habib, who have been detained at the US Naval Base in Guantanamo Bay for 2 years. It wanted to see trials as soon as possible, and says it has been advised that, under Australian laws in force at the time, neither Mr Hicks nor Mr Habib could be successfully prosecuted in Australia in relation to their alleged activities in Afghanistan or Pakistan. The Attorney–General and the Foreign Minister, in a statement that has been widely criticised, said the Government had been advised that both men had trained with Al Quaeda.

A US military defence counsel has been appointed for Mr Hicks, while at the time of writing his Australian lawyer is to travel to Cuba to discuss with him all issues relating to his trial.

The US Government has agreed not to seek the death penalty in the case of the two Australians, and that if convicted they will be transferred to Australia to serve their sentences. It will allow private conversations between the detainees and their lawyers, and any Australian lawyers retained by them with security clearances may speak to them face-to-face. The accused would not be excluded from evidence in chief, and subject to security arrangements the trials 'will be open, the media will be present, and Australian officials may observe proceedings'. Australian Government officials may also make submissions to any Review Panel reviewing the trial of either man. Mr Hicks, and Mr Habib would be permitted to talk by phone to their families, and two family members could attend their trials. Normal aspects of the procedure of military commissions would apply, such as a presumption of innocence, proof beyond reasonable doubt, the right to silence and the right to military and civilian defence counsel.

At about the same time as that announcement, a Law Lord, Lord Steyn, denounced the imprisonment of some 660 prisoners at Guantanamo Bay as a "monstrous failure of justice', and the military tribunals that will try them as kangaroo courts'. Any trials under this system would be 'a stain on United States justice'. He also criticised British negotiations to obtain a separate agreement so that British prisoners would not receive the death penalty, asking how it could be 'morally defensible to discriminate in this way'. Some US lawyers have queried how the US government could deny other countries the same deal the Australians have obtained. Negotiations about British detainees are still proceeding at the time of writing.

Meanwhile, the US Supreme Court agreed on 10 November to consider the jurisdictional question whether detainees at Guantanamo Bay are entitled to access US civilian courts, but not at this stage the question of the legality of their detention. The US Government has claimed that the status of detainees is an executive branch issue, and that the courts have no jurisdiction as the naval base is not US territory. Mr Hicks and Mr Habib were among 16 foreign nationals who petitioned the court. Previous petitions to federal courts had failed. Lawyers for Mr Hicks and other commentators fear that his trial by a military commission will be over before his rights are tested in the Supreme Court.

(**Joint News Release by the Attorney–General and the Minister for Foreign Affairs**, 25 November 2003; ***Independent***, 26 November 2003; ***New York Times***, 11 November 2003; ***Sydney Morning Herald***, 12 November 2003)

Endnote

1 Coverage of some items has been deferred to the next issue for reasons of space. Note that some of the changes have been made to the main headings used in this section.