DEVELOPMENTS IN ADMINISTRATIVE LAW

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Withdrawal of access card legislation

(See background in *AIAL (2006) 51 Forum*.)

A strongly critical report in March 2007 by the Senate Finance and Public Administration Committee led to the withdrawal of the Human Services (Enhanced Service Delivery) Bill 2007.[1] The Bill created a legal framework for the Health and Social Services Access Card to replace the Medicare card and other cards and vouchers used to access Australian Government health and social service benefits.[2]

Chaired by Liberal Senator Brett Mason, the Committee said that the Federal Government's decision to hold back for later legislation critical matters such as reviews and appeals, privacy protections and oversight and governance measures meant that it was 'being asked to approve the implementation of the access card on blind faith without full knowledge of the details or implications of the program'. The missing measures were 'essential for providing the checks and balances needed to address serious concerns about the bill'.[3] The Committee noted that two tenders for introduction of the card had already been issued 'creating the impression that passage of this legislation is preordained, rendering Senate oversight superfluous'.[4]

The Committee's central concern was the potential use of the access card as a national identification card. Together with the likelihood that almost every Australian would need the card to use services such as Medicare, the inclusion of a biometric photograph on the face of the card 'virtually guarantees its rapid evolution into a widely accepted national form of identification'.[5] The Committee recommended that the Bill be combined with the second tranche of legislation to allow proper consideration of the access card proposal.

The Federal Government continued to plan on the introduction of the access card in 2008, releasing a further discussion paper by the Consumer and Privacy Taskforce on the registration process for the card.[6]

High Court and control orders

In February 2007 the High Court heard an appeal against the first 'control order' issued under Commonwealth anti-terrorism legislation.[7] The order was issued in August 2006 by the Federal Magistrates Court to Mr Jack Thomas under s 104.4 of the *Criminal Code* (Cth). Earlier that month, the conviction of Mr Thomas on a charge of receiving money from a terrorist organisation had been overturned by the Victorian Court of Appeal.[8] Under the control order, Mr Thomas must remain at his current place of residence between midnight

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and 5 am each day, report to police three times per week, not use any mobile phone unless authorised by the Federal Police and not communicate with members of specified terrorist organisations.

At the heart of the challenge to the control order scheme is the principle that under the doctrine of separation of powers in the Commonwealth Constitution, federal courts can only exercise 'judicial power'. Lawyers for Mr Thomas argued that limiting the freedom of an individual not found guilty of a crime is not an exercise of 'judicial power', so the control order could not be validly issued by the Federal Magistrates Court.[9] In response, the Commonwealth noted that the rigid separation of functions into 'judicial' and 'non-judicial' had been replaced by the 'chameleon' doctrine. There are some powers which are exclusively judicial, such as punishment of criminal guilt, and others concerned purely with policy, which are incapable of being given to courts. But in between there is:

> …the great vast field of endeavour in which the power takes its character from the body to which it is given. It is executive if conferred on an administrative body. It is judicial if conferred on a court.[10]

In this case, the Commonwealth argued, the power to issue control orders was 'not necessarily judicial and not necessarily administrative' but was certainly 'capable of being judicially exercised'.[11]

AWB inquiry

(For further background, see AIAL *(2006) Forum* 48 and 51.)

The Cole Royal Commission (*Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme*) delivered its final report on 24 November 2006.[12] Commissioner Terence Cole found that the conduct of AWB Limited (the former Australian Wheat Board) in paying some $290 million between 1999 and 2003 to a Jordanian trucking company, aware that the money would be passed to the Iraqi regime of Saddam Hussein, was due to a 'failure of corporate culture'. He said that officers of the company were told:

> Pay the money required by Iraq. It will cost AWB nothing because the extra costs will be added into the wheat price and recovered from the UN escrow account. But hide the making of those payments because they are in breach of sanctions.[13]

Commissioner Cole said there was a lack of openness and frankness in AWB's dealings with the Australian Government and the United Nations, noting that 'At no time did AWB tell the Australian Government or the United Nations of its true arrangements with Iraq'.[14] He recommended that proceedings against AWB and its key officers be considered under Commonwealth and State criminal legislation as well as the *Corporations Act 2001*.[15]

Criticism of the Cole Royal Commission focussed on its narrow terms of reference, which required it to look for breaches of the law but did not extend to examining governance and oversight arrangements. As one commentator said:

> The inquiry, to be useful, should have looked at the governance process to see how and why the AWB could get away with rorting the oil-for-food process so easily and quickly without being uncovered by checks and balances in the Department of Foreign Affairs and Trade, the responsible minister's office and cabinet.[16]

Such critics suggested that the failure of federal bureaucrats to properly investigate the activities of AWB, despite warnings as early as 2000 and 2001, indicated deeper problems with the system of accountable governance in Australia.[17] As an article in *The Age* said:

> To avoid more and more administrative scandals and cover-ups, Australia needs more open government and genuine accountability of executive government to the Parliament through effective FOI legislation, reintroduction of program budgeting and detailed appropriations and cash accounting.[18]

New Citizenship Act

On 15 March 2007 the *Australian Citizenship Act 2007* received Royal Assent. The new Act replaces the 1948 statute which created the legal concept of Australian citizenship. The new Act:

- strengthens the residence requirement for citizenship (4 years including at least 12 months as a permanent resident)
- allows authorised persons to request 'personal identifiers' (including iris scans as well as fingerprints and photographs) to confirm the identity of a citizenship applicant, and
- prevents the Minister approving a citizenship application if a person has an adverse ASIO security assessment.

A Commonwealth Parliamentary Library research paper noted that the new Act does not address important nationality issues from recent High Court cases.[19] One issue involves people born overseas who have grown up in Australia, but have not formally become citizens. Legally regarded as 'aliens', they can be deported if, for example, they fail the 'character test' under the Migration Act (for further background, see *AIAL Forum* 48 and 51). Another issue is the constitutional position of dual nationals in Australia. In *Singh*[20] and *Ame's Case*[21] (2005), the High Court defined an 'alien' as a person who owes obligations (allegiance) to 'a sovereign power other than Australia'. As a Parliamentary Library paper stated:

> If this is the extent of the definition, then any dual national in Australia is an 'alien' and can be subject to the full extent of the Commonwealth's power over 'aliens' under the Constitution.[22]

Proposed citizenship test

Despite continued opposition within its own ranks to the idea of a formal citizenship test, the Federal Government maintained its plans to introduce such a test.[23] The Government released a summary of responses to its September 2006 discussion paper on this issue (see 51 *AIAL Forum*).[24] Over 1600 responses were received, with some 60 per cent of respondents supporting a formal test. Over 90 per cent thought that it was important for effective participation as an Australian citizen to have knowledge of Australia and the English language and a demonstrated commitment to the country.[25]

OTHER CASES

Apparent bias and the proper respondent

In *Ho v Professional Services Review Committee* No. 295 [26] (March 2007), the Federal Court questioned whether the Committee was the proper respondent in proceedings challenging its decisions. This case concerned challenges by two doctors – Dr Ho and Dr Do – against findings by separate Review Committees that they had engaged in inappropriate provision of medical services under the *Health Insurance Act 1973 (Cth).*

Justice Rares of the Federal Court held that the Committees had made jurisdictional errors and that their findings should be overturned. However, because each Committee had been an active protagonist in proceedings before the court, there was a possibility of apprehension of bias if the matters were returned to the same committees to be reconsidered:

> …the fact that each committee has defended its own interpretation of the legislation and their dismissal of the doctors' cases would suggest to a fair-minded lay person that they will find it difficult entirely to put out of their mind the approach which the Court in proceedings such as this finds to be erroneous if they were to come to reapply themselves to the task.[27]

Justice Rares said that while each of the Committees was a proper and necessary party to the proceedings, they had chosen an unusual course by contesting the doctors' case with substantive arguments of their own. Instead, he suggested, the active respondent should have been either the Chief Executive Officer of Medicare Australia (who initiated the proceedings by the Committees) or the Minister responsible for the Health Insurance Act, i.e. the Minister for Health.[28] He proposed making orders, therefore, that the two matters be reconsidered, but by new Committees with a different membership to the original review bodies.[29]

The High Court and review of administrative action

In *Bodruddaza v Minister for Immigration and Multicultural Affairs*[30] (April 2007), the High Court in an unanimous decision said that the Federal Government could not impose a time limit on applications for review of migration decisions if this would 'curtail or limit' the applicant's right to seek relief against the Commonwealth enshrined in s 75(v) of the Constitution.[31]

The case is the latest saga in the long history of Federal attempts, under governments of both persuasions, to reduce the use of the Australian court system by people refused the right to stay in this country.[32] Former Labor Immigration Minister Gerry Hand said that throughout his time as Minister he was concerned with the 'amount of public resources consumed in judicial review processes which ultimately did not alter the situation that the person was not entitled to remain in Australia'.[33]

The culmination of Federal efforts to restrict migration appeals was the insertion in 2001 by the Howard Government of a 'privative clause' (s 474) in the *Migration Act 1958* which prohibited review by the courts. In *Plaintiff S157* (2003),[34] the High Court rendered this mechanism largely ineffective. Callinan J also warned that a set time limit for migration appeals would make 'any constitutional right of recourse' under s 75(v) 'virtually illusory' and would be invalid.[35]

In *Bodruddaza* the High Court reiterated that:

> An essential characteristic of the judicature provided for in Ch III [of the Constitution] is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers. Section 75(v) furthers that end by controlling jurisdictional error as asserted in the present application by the plaintiff. In this way, s 75(v) introduced into the Constitution of the Commonwealth an entrenched minimum provision of judicial review.[36]

The *Migration Litigation Reform Act 2005* introduced (in s 486A) a maximum time limit of 84 days from actual notification for lodging an application for review of a migration decision. The Commonwealth argued that analogous to a limitation statute, s 486A regulated the right to institute proceedings and should not be seen as an attempted deprivation of the entrenched jurisdiction of the Court.[37] The High Court rejected this argument, stating:

> To say that because s 486A only denies entitlement to applicants to institute proceedings it therefore cannot trench upon the content of s 75(v) and upon the authority of this Court to determine applications thereunder is to look to form at the expense of substance.[38]

The Court noted that because s 486A limits the right to appeal based on the 'time of the actual notification of the decision in question', it did not allow for 'the range of vitiating circumstances which may affect administrative decision-making'. It made no provision for 'supervening events which…, without any shortcoming on the part of the applicant, lead to a failure to move within the stipulated time limit', noting as an example 'the present case where the plaintiff was one day late, apparently by reason of a failure on the part of his migration adviser'.[39] As the High Court said, imposing a set, non-extendable maximum period for appealing against migration decisions 'subverts the constitutional purpose of the remedy provided by s 75(v)'.[40]

Endnotes

1 Peter Martin, 'Inquiry kills off Access Card law', *The Canberra Times*, 16 March 2007, p.1.
2 http://www.aph.gov.au/parlinfo/billsnet/billslst.pdf.
3 Committee report at http://www.aph.gov.au/senate/committee/fapa_ctte/access_card/report/report.pdf, p.12.
4 Ibid, p.13.
5 Ibid, p.20
6 http://www.accesscard.gov.au/media/taskforce_discussion_paper_on_registration_process_released.htm.
7 See control order at http://www.aph.gov.au/library/intguide/law/terrorism.htm#court
8 ABC 7:30 Report, *Thomas, lawyers set to fight control order*, 29.08.06, www.abc.net.au.
9 ABC Radio National, Perspective, 27 February 2007, interview with Andrew Lynch, Director of the Terrorism and Law Project, Gilbert and Tobin Centre of Public Law, UNSW.
10 See transcript of proceedings 20 February 2007 pp 56-57 at http://www.austlii.edu.au/au/other/HCATrans/2007/76.html.
11 Ibid., p. 59.
12 See Report of the Oil-for-Food Inquiry at http://www.oilforfoodinquiry.gov.au/.
13 Ibid, p. xii.
14 Ibid.
15 Ibid, vol. 4 Findings, pp 109-324.
16 Kenneth Davidson, 'An indictment of politicised bureaucrats', *The Age*, 30 November 2006, p.15.
17 Shaun Carney, 'Politics of preservation', *The Age,* 30 November 2006, p.9.
18 Davidson, op.cit., p. 15.
19 Parliamentary Library, Bills Digest Nos 72-73, 7 December 2005, p.21, at http://www.aph.gov.au/library/pubs/bd/2005-06/06bd072.pdf.
20 *Singh v Commonwealth of Australia* [2004] HCA 43, 9 September 2004
21 *Re Minister for Immigration & Multicultural and Indigenous Affairs; ex p Ame* [2005] HCA 36, 4 August 2005
22 Ibid. See also Peter Prince, 'Mate! Citizens, aliens and 'real Australians'—the High Court and the case of Amos Ame', Research Brief, no. 4, Parliamentary Library, Canberra, 2005–06.
23 See eg Petro Georgiou, 'A needless test for citizenship', *The Canberra Times*, 16 March 2007, p. 13.
24 http://www.minister.immi.gov.au/media/responses/citizenship-test/index.htm.
25 http://www.minister.immi.gov.au/media/responses/citizenship-test/summary_report_citizen_test_paper.pdf
26 [2007] FCA 388
27 Ibid at [112]
28 Ibid at [111].
29 Ibid at [114].
30 [2007] HCA 14.
31 Ibid. at [53]
32 See Peter Prince, *Time limits on migration court appeals*, Research Note No. 58, Parliamentary Library, Canberra, 2003-04.
33 Ibid, p. 1.
34 (2003) 211 CLR 476.
35 Ibid., at 537–8.
36 [2007] HCA 14 at [46].
37 Ibid.at [49].
38 Ibid.at [54].
39 Ibid at [55], [57].
40 Ibid. at [58].