RECENT DEVELOPMENTS

Alice Mantel*

Apology to Australia's Indigenous Peoples

On 13 February 2008, the Prime Minister, the Hon Kevin Rudd MP, moved a motion in the House of Representatives apologising to Australia's Indigenous People. The history of this significant event is founded in the tabling of the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, entitled *Bringing Them Home* in Parliament on 26 May 1997. It received widespread publicity at the Australian Reconciliation Convention in Melbourne and led to continuing public and parliamentary debate about the implementation of its recommendations.

A key recommendation in the report was that reparation be made to indigenous people affected by policies of forced removal. That reparation should include an acknowledgement of responsibility and apology from all Australian parliaments and other agencies which implemented policies of forcible removal as well as monetary compensation.

State and Territory parliaments have apologised specifically to those affected by the policies of separation. Under the previous Howard Government the Commonwealth Parliament did not agree to a full apology but expressed 'deep and sincere regret' for unspecified past injustices as part of a Motion of Reconciliation on 26 August 1999.

As one of the first actions of the new Government, the Prime Minister moved to make a full apology. An extract from Mr Rudd's speech follows:

> I move:
>
> That today we honour the Indigenous peoples of this land, the oldest continuing cultures in human history.
>
> We reflect on their past mistreatment.
>
> We reflect in particular on the mistreatment of those who were Stolen Generations—this blemished chapter in our nation's history.
>
> The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future.
>
> We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians.
>
> We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country.
>
> For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry.

* *Editor, AIAL Forum*

> To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry.
>
> And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.
>
> We the Parliament of Australia respectfully request that this apology be received in the spirit in which it is offered as part of the healing of the nation.

Recent reports into the situation of indigenous people:

Report of Inquiry into Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and four related bills concerning the Northern Territory National Emergency (13 August 2007)

The one-day Senate inquiry into the 5 Bills which facilitated the Howard Government's 'emergency' intervention in the Northern Territory, recommended the Bills be passed. The report highlights issues including the alcohol prohibition, compulsory leasing, child welfare, income quarantining, policing and funding elements of the intervention. The Bills displaced the *Racial Discrimination Act 1975* (Cwth) and gave enormous control over NT Aboriginal communities to the Commonwealth without consultation with an elected Aboriginal consultative body.
http://www.aph.gov.au/senate/Committee/legcon_ctte/nt_emergency/report/index.htm

Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (June 2007)

This 350 page report into child assault and abuse made 97 recommendations, covering areas such as government services and intergovernmental cooperation, community governance, relations with police, education, alcohol, family support services and suggests appointing a Commissioner for Children and Young People.
http://www.nt.gov.au/dcm/inquirysaac/pdf/bipacsa_final_report.pdf

Bringing them Home: A Report on the Economic and Social Characteristics of those Impacted on by Past Policies of Forcible Removal of Children (June 2006)

This baseline report by the Ministerial Council of Aboriginal and Torres Strait Islander Affairs (MCATSIA) compares the different economic and social situations of Indigenous people who were forcibly removed from their families to whose who were not removed.
http://www.mcatsia.gov.au/cproot/593/4318/Bringing%20Them%20Home%20Baseline%20Report.pdf

HREOC congratulates Quentin Bryce

The Human Rights and Equal Opportunity Commission (HREOC) congratulated Ms Quentin Bryce AC on her appointment as the next Governor-General of Australia. REOC said Ms Bryce was a visionary and inclusive leader who achieved much by improving equality of Australian women when she was federal Sex Discrimination Commissioner with HREOC from 1988 - 1993. It hailed her appointment as a historic moment in Australia's history and said she will serve as an excellent model for all Australian women and girls.
HREOC MR 14/4/08

Law Council calls to close Guantanamo facility

The Law Council of Australia has joined peak legal bodies from around the world in a letter that calls for the closure of the United States prison facility at Guantanamo Bay.

According to Law Council President, Ross Ray, many detainees were literally children at the time of their arrest, more than five years ago and he said there "is now the very real prospect that, after years in secret detention, up to six detainees will be convicted by the US military, based on evidence obtained using torture, and put to death.
The letter was initiated by the Canadian Bar Association, the Law Society of England and Wales and the Paris Bar and was sent to the President of the United States and the Canadian Prime Minister. The letter has been signed by 34 professional bodies, including the Swedish Bar Association, the Law Society of Ireland, the General Council of the Bar of South Africa and the Australian Bar Association and was published on 27 February 2008.

Review of *Legislative Instruments Act 2003*

Federal Attorney-General Robert McClelland has announced the establishment of a committee to review the *Legislative Instruments Act 2003*, as stipulated by the Act. The *Legislative Instruments Act 2003* established a comprehensive regime for the making, registration, publication, parliamentary scrutiny and sunsetting of Commonwealth legislative instruments.

'The aim of the review is to ensure that the Act is meeting its key objectives, which includes enhancing the accountability of government rule makers,' Mr McClelland said. “We want to make sure that the process of law-making is transparent and that the public has ready access to laws that affect them.”

The review will be undertaken by a committee comprised of:

- Mr Anthony Blunn AO, former Secretary to a number of Australian Government Departments;
- Mr Ian Govey, Deputy Secretary of the Attorney-General's Department; and
- Professor John McMillan, the Commonwealth Ombudsman.

The Committee has released an issues paper and has called for submissions from interested persons and organisations   Information about the review, including the terms of reference, is available from www.ag.gov.au/lia-review.
Media release 25/3/08

NSW Attorney-General asks for unification of discrimination law

NSW Attorney-General John Hatzistergos has asked the Commonwealth to consider the harmonisation of respective anti-discrimination laws.

'I am concerned that NSW residents and businesses have to contend with two layers of regulation when making or responding to a discrimination complaint,' said Mr Hatzistergos. He said complaints were made to different bodies; NSW had a cap on compensation while the Commonwealth's was unlimited, and proceedings were conducted in different jurisdictions with accompanying fee and cost differences.

Mr Hatzistergos said the inconsistencies were confusing and forced people to shop for which jurisdiction offered them the best prospect of success. He said differences also existed in the coverage provided by each system. For example, the Commonwealth did not cover discrimination on the grounds of homosexuality or transgender status, which are unlawful in

NSW. NSW also proscribes vilification on the grounds of race, homosexuality, transgender and HIV/AIDS status. These protections are not available in the Federal jurisdiction, where only racial vilification is prohibited.

Mr Hatzistergos proposed a joint project between the Commonwealth and NSW to harmonise and modernise the operation of discrimination law, which could involve adopting uniform legislation. An alternative or interim solution could be joint administration of both existing systems. The proposal was considered at the meeting of the Standing Committee of Attorney Generals in South Australia in March.

Media release 14/3/08

Haneef Judicial Inquiry announced

Federal Attorney-General, Robert McClelland, has announced that former NSW Supreme Court Judge, the Hon John Clarke QC, will head a judicial inquiry into the case of Dr Mohamed Haneef.

Mr McClelland said the establishment of the Clarke Inquiry is an important step in ensuring public confidence in Australia's counter-terrorism measures, and delivers on the Government's election commitment to establish an independent judicial inquiry into the handling of the Haneef case. The Clarke Inquiry was asked to report by 30 September 2008.

Australian Federal Police (AFP) Commissioner Mick Keelty welcomed the inquiry, stating the AFP would support the process and extend its full cooperation. 'The investigations relating to Dr Haneef and the associated events in the United Kingdom, like all terrorism investigations, are complex and conducted in a fast-paced and dynamic environment,' Commissioner Keelty said.

Media release 13/3/2008

Relationship register celebrates one year anniversary

Victoria's first Relationship Declaration Register set up to allow same-sex and de-facto couples the opportunity to formally register their relationship, today celebrates its first anniversary. To date 88 couples have registered their relationships since the register was launched by the City of Melbourne.

The anniversary comes as the Victorian Parliament's Legislative Council prepares to debate a bill to allow couples to record their relationships with the Registrar of Births, Deaths and Marriage. Deputy Lord Mayor Gary Singer said it was encouraging to see more couples registering their relationships in the City of Melbourne than similar registers in the City of Sydney and Tasmania.

"It's pleasing to see how this initiative has been welcomed by the community. The register is open to all partnerships, but it provides an avenue for same sex couples to publicly declare their love in a way that has not previously been available in Victoria," the Deputy Lord Mayor said.

Of the 88 couples who have registered their relationship in the past year, 37 were male/male couples, 35 were female/female couples and 16 were male/female couples.
Media release 2/4/2008

Recent cases

Attorney-General (Cth) v Alinta Limited [2008] HCA 2 (31 January 2008)

The Takeovers Panel's powers were confirmed in the High Court's decision in *Alinta*. The Full Federal Court, in a majority decision , determined that the Panel, in deciding whether there was a contravention of Chapters 6, 6A, 6B or 6C of the Constitution , was exercising judicial power and therefore the exercise of power and reliance on any contraventions of these provisions was invalid.

The High Court unanimously disagreed with this conclusion and found that the Panel's decision did not amount to an exercise of the judicial power of the Commonwealth. Unlike the majority in the Full Federal Court, the High Court took the view that as the Panel had to take into account public interest and policy in deciding applications and creating new rights and obligations rather than adjudicated on present rights in the law, it was not an exercise of judicial power. Gleeson CJ commented:

> The panel was required to take into account considerations and interests to which the judicial process is ill adapted.

The circumstances leading up to this matter began in 2006, when the West Australian energy company Alinta acquired units in the Australian Pipeline Trust (APT) during the course of its asset merger transaction with AGL. APT successfully challenged the unit acquisition before the Panel, on the basis that it breached the 20 per cent takeover threshold in the Corporations Act. The Panel found that 'unacceptable circumstances' existed and ordered the units to be vested in ASIC and sold.

Alinta then sought judicial review by the Federal Courtof the Panel's decision , claiming that the Panel's power to determine on a breach of the law was invalid under the Constitution, as it involved a body that was not a court exercising federal judicial power. Initially the argument was rejected but, on appeal, the Full Federal Court agreed. The matter then went to the High Court that examined the Panel's operation and found that in light of the structure of its legislation, it performed an administrative function. Several judges also commented on the commercial desirability of the Panel's ongoing role in resolving takeover disputes, even though it would remain subject to judicial review.

***Duncan v Chief Executive Officer, Centrelink** [2008] FCA 56*
Federal Court of Australia Finn J 12/2/2008

Administrative law – *Freedom of Information Act 1982* (Cth) – s 9 requirement to make documents publicly available for inspection and for purchase and to publish a statement specifying those documents – interaction of ss 9(1), 9(2)(a) and 9(2)(b) Administrative law – *Administrative Decisions (Judicial Review) Act 1977* (Cth) – s 13 obligation to give reasons for a decision – meaning of "decision" – requirement of a deliberative process; standing as a "person aggrieved" – necessity of an interest beyond that of an ordinary member of the public

Jabbour v Hicks [2008] FMCA 178
Federal Magistrates Court of Australia, Donald FM, 19/2/2008

Administrative law – *Criminal Code* – application for confirmation of interim control order – preventing terrorist act – training from terrorist organisation – obligations, prohibitions and restrictions – reasonably appropriate and adapted – variation of interim control order – confirmation of interim control order made.

Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources [2008] FCAFC 3

Administrative law – jurisdictional fact – whether finding that proposed action has, will have or is likely to have a significant impact is a condition precedent to Minister's exercise of discretion under s 75(1) of *Environmental Protection and Biodiversity Conservation Act 1990* (Cth).

Administrative law – irrelevant considerations – whether consulting descriptions of ecological communities in privately maintained classification is an irrelevant consideration when construing the term 'listed threatened ecological community'.

Dunstan v von Doussa [2008] FCA 97

Practice and procedure – *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 18 – Attorney-General's right to intervene in proceedings – joinder of Attorney-General as party to proceeding

Procedural fairness at the commencement of an investigation considered

Ryan v ASIC; Re Allstate Explorations NL [2007] 93 ALD 789

The recent decision of Gyles J in *Ryan v ASIC; Re Allstate Explorations NL* provides clarification as to whether procedural fairness needs to be afforded at the commencement of the exercise of a statutory power of an investigatory nature. The applicants sought to have the decision which authorised shareholders as being 'eligible applicants' for the purpose of conducting an examination of the actions of the company administrators set aside pursuant to both s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth) and raised a ground of review, among others, that they should have been afforded procedural fairness by being notified prior to making the decision to authorise. Justice Gyles considered that the 'initiation' of the exercise of a statutory power of an investigatory nature will not normally 'destroy, defeat or prejudice any relevant right or interest' and accordingly would not require notice to be given prior to the exercise of the power. In this case, the exercise of the power to authorise the shareholders as 'eligible applicants' occurred prior to the exercise of the power in relation to the summons of examination and in those circumstances, there was no requirement to give notice.

Crown immunity and commercial contracts

Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited [2007]

Crown immunity in relation to private sector business dealings with governments has undergone a significant change as a result of the High Court's decision in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited* [2007] HCATrans 60 (9 February 2007). Following this decision, Crown immunity will no longer apply to contracts involving Federal, State and Territory governments and commercial corporations.

Before this decision, the generally held view was that anyone contracting with government was immune from the application of the *Trade Practices Act 1974* (TPA). The circumstances in *Baxter* related to five long-term contracts for the supply of sterile fluid products to public hospitals which were awarded to Baxter through public tenders issued by government purchasing authorities of Western Australia, South Australia, New South Wales, Queensland and the ACT. As each purchasing authority was part of the executive arm of each

State/territory government, it was said they did not themselves carry on a business and the TPA did not apply to them.

Baxter tendered to supply the products, on an item by item basis, at particular prices, and also offered to supply the same items for substantially lower prices, on a sole supply basis. If Crown immunity did not apply, the Baxter tender may have amounted to a misuse of its market power because some of the products in the bundled bid were products that only Baxter could supply.

Relying on an earlier High Court case, *Bradken*, Crown immunity was thought to extend to *Baxter* but the High Court declined to apply its earlier decision. The High Court found that *Baxter* was subject to the provisions of the TPA. Potentially ,now the Act will apply to contracts to which the Federal, State and Territory governments are a party and as a consequence of the *Baxter* decision, it is likely the ACCC will be able apply the misuse of market power and tying provisions of the TPA to government tender processes and the sale of government owned assets.

Transfer of FOI requests between agencies

Bienstein v Attorney-General [2007] FCA 1174

The Federal Court considered the obligations that must be fulfilled by an agency before it can validly transfer a request for documents under s 16(1)(b) of the *Freedom of Information Act 1982* (FOI Act).

The applicant made requests for access to certain documents to the Attorney-General and the Minister for Justice and Customs. Both the Attorney-General's office and the Justice Minister's office purported to transfer the respective requests to the Attorney-General's Department pursuant to s 16(1)(b).

Section 16(1)(b) provides that where the subject matter of a requested document is more closely connected with the functions of another agency, the agency to which the request is made may, with the agreement of the other agency, transfer the request to the other agency.

These transfers were held to be invalid by the Federal Court, following an assessment by Gray J that the proper construction of s 16(1)(b) did not provide for the transfer of the whole request but only the specific subject matter of each document answering the description in the request, rather than the subject matter of the request itself.

Administrative announcements

Vic: New Public Transport Ombudsman

Victorian Public Transport Minister, Lynne Kosky, has welcomed lawyer and complaint resolution specialist, Simon Cohen, as the new Public Transport Ombudsman for Victoria - the second Public Transport Ombudsman to be appointed since the office was established in April 2004. Mr Cohen was previously Assistant Ombudsman (Police) with the NSW Ombudsman's Office.

PTOVC media release 22/1/08

Vic: Concerns over Local Council fraud control, developer contributions

A report by Victorian Auditor-General, Des Pearson, titled *Local Government: Results of the 2006-07 audits*, has found that one-third of councils do not have fraud control plans, or

clearly documented fraud management policies and procedures and that there was a lack of staff training in identifying fraud risks.

Shadow Local Government Minister, Ken Smith, pointed to comments by the Auditor-General, which noted that local government was increasingly reliant on developer contributions to maintain their finances. These contributions grew by $176 million or 36% in just one year. He said the report also showed local government raised its rates by 7.8%, far above the rate of inflation.

Media release, 6/2/08

Privacy Commissioner calls for mandatory reporting of major data security breaches

The Privacy Commissioner, Karen Curtis, has reiterated her call for compulsory notification of major data security breaches by Australian organisations in the wake of recent significant data breaches in the United Kingdom.

'While reporting would need to be proportional to the severity of the breach, it would provide organisations with a strong market incentive to adequately secure their databases,' Ms Curtis said. 'It would also give people an opportunity to take any necessary steps to protect their personal information,' she said.

Ms Curtis's Office made a submission to the Australian Law Reform Commission in response to its Discussion Paper 72: *Review of Australian Privacy Law.*

Other recommendations included:

- Maintaining a principles-based and technology neutral approach - to provide flexibility and responsiveness to change.
- Creating codes where specific privacy concerns emerge - to apply in addition to the uniform principles.
- Minimising exemptions from the Privacy Act.
- Health sector - the Privacy Act should "cover the field" for the regulation of private sector health service providers.
- Credit reporting - further independent research on comprehensive (or 'positive') credit reporting is required before it is clear whether its introduction will be beneficial.
- Audits - a qualified audit power would allow the Office to conduct privacy performance assessments of private sector organisations for compliance in certain circumstances.

Media release, 30 /1/08

Pay equity an issue all the way to the top

Sex Discrimination Commissioner, Elizabeth Broderick, said the Equal Opportunity for Women in the Workplace Agency (EOWA) research which shows that even women in top earning positions in the Australian Stock Exchange (ASX) top 200 companies earn much less than their male counterparts is deeply concerning.

Commissioner Broderick said the data revealed in the report titled *'Gender Income Distribution of Top Earners'* makes it clear that 'we have to get serious' about closing the gap between female and male earnings.

According to Commissioner Broderick, there were many reasons for this discrepancy, such as occupational segregation, the impact of family responsibilities, and the pervasive influence of gender stereotypes.

EOWA, Media release, 25/1/08

Greenhouse and Energy Reporting Regulations Policy paper released

The Australian Government has released a Policy Paper outlining its likely approach to the greenhouse and energy reporting regulations to be made under the *National Greenhouse Energy and Reporting Act 2007* (NGER Act).

The paper outlines policy proposals on a number of significant matters that arise under the NGER Act, including:

- definitions of key terms such as '*energy*', *'external auditor'*, *'greenhouse gas'*, *'industry sector'* (for production activities), *'oil or gas extraction activity*';
- the process for nominating the *'responsible entities'* for '*partnerships*' and *'joint ventures'* that are part of a *'corporate group'*;
- boundary issues in relation to '*facilities*';
- tests for what constitutes *'operational control '* over certain types of *'facilities'* such as pipelines, electricity networks, commercial properties, contract mining and various types of transport activities;
- proposed new materiality thresholds for reporting;
- details in relation to reporting procedure, treatment of State and Territory data, record keeping, disclosure obligations, administration; and
- reporting issues surrounding recognition of greenhouse gas removal or reduction projects.

This is an important step towards the implementation of mandatory reporting arrangements under the NGER Act, which, from 1 July 2008, will require companies to report if they trigger certain thresholds. The Act is also the first legislative step in the introduction of an Australian emissions trading scheme, which is scheduled to commence in 2010.