RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

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New Australian law reform inquiry to focus on freedoms

The Attorney-General, Senator the Hon George Brandis QC, has asked the Australian Law Reform Commission (ALRC) to review Commonwealth legislation to identify provisions that unreasonably encroach upon traditional rights, freedoms and privileges.

Senator Brandis said that the review will be one of the most comprehensive and important ever undertaken by the ALRC.

'This is a major instalment towards the commitment I made to restore the balance around the issue of human rights in Australia,' said Senator Brandis.

'I have asked the Commission to identify where traditional rights, freedoms and privileges are unnecessarily compromised within the legal structure of the Commonwealth. Where encroachments exist, the Commission will determine whether they are justified.

'For too long we have seen freedoms of the individual diminish and become devalued. The Coalition Government will strive to protect and restore them.'

'Freedoms are some of the most fundamental of all human rights. They underpin the principles of democracy and we cannot take them for granted.

'The Commission will focus in particular upon commercial and corporate regulation; environmental regulation; and workplace relations.'

The Attorney-General has asked the Commission to provide its report by 1 December 2014.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/11December2013-NewAustralianLawReformInquiryToFocusOnFreedoms.aspx

Super Tribunal to start on 1 January 2014

Acting NSW Minister for Justice Michael Gallacher announced that the NSW Civil and Administrative Tribunal (NCAT) will start on 1 January 2014.

'The NCAT is a one-stop shop for almost all state tribunals making it easier for people in NSW to access the services they need,' Mr Gallacher said.

'NCAT enables these services to exist as a network, rather than in isolation, which will improve their quality, consistency and transparency. People will also have access to an internal appeals panel, which will provide quick and accessible reviews of most tribunal decisions.'

The government has integrated 22 of the State's tribunals and bodies into a new overarching tribunal that will provide a simple, quick and effective process for resolving disputes, supervising occupations and reviewing executive action.

Harnessing the expertise of the State's existing tribunals, NCAT operates four specialist divisions:

Consumer and Commercial
Guardianship
Administrative and Equal Opportunity and
Occupational

Across all types of matters, NCAT is committed to: timely, fair, high-quality decision-making; maintaining current levels of service including retaining specialist expertise and services; and continuous improvement in service delivery.

In October last year the government announced the appointment of the Hon Justice Robertson Wright as a Supreme Court judge and as the inaugural President of NCAT. Justice Wright was sworn in as a Supreme Court judge on 25 October 2013. On the same date, he began a five-year term as NCAT President.

'If you have lodged an application with an existing tribunal before 1 January 2014 and it has not yet been heard, the application does not have to be re-lodged at NCAT,' Mr Gallacher said.

'If you are making an application after 1 January 2014 you will be making an application to NCAT.

'Tribunal services will continue to be delivered in multiple locations with registries located across metropolitan and regional NSW,' Mr Gallacher said.

Further information can be found at: http://www.ncat.nsw.gov.au.

http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_news2013#ncat

New Information Commissioner for NSW

NSW Attorney-General Greg Smith SC today announced the appointment of Elizabeth Tydd as the NSW Information Commissioner.

'Ms Tydd will be an independent advocate for transparency and accountability within the state's government agencies, universities and local councils,' Mr Smith said.

'She is well qualified for the role, having worked at a senior executive level in government agencies and independent authorities and been involved in developing transparent policies, resolving disputes and making decisions that upheld the rights of the community.'

The Information Commissioner champions the community's right to information under the *Government Information (Public Access) Act 2009* (NSW). This includes advising agencies about the proactive release of government information, monitoring their compliance and investigating complaints.

'Community members whose applications for information are refused by government agencies, councils or universities can contact the Information Commissioner and seek a review of the decision,' Mr Smith said.

Prior to her appointment as Information Commissioner, Ms Tydd was Executive Director of the NSW Office of Liquor, Gaming and Racing.

In a career spanning more than two decades, Ms Tydd has served as Assistant Commissioner (Compliance and Legal Group), Office of Fair Trading and as Deputy Chairperson of the Consumer Trader & Tenancy Tribunal - the largest tribunal in NSW.

She has also performed the role of Deputy President and Arbitrator at the Workers Compensation Commission.

Ms Tydd is an accredited mediator; she holds a Bachelor of Laws and a Master of Laws from the University of Technology, Sydney and is currently undertaking a Certificate in Governance at the Governance Institute of Australia.

Ms Tydd will begin her five-year appointment as Information Commissioner on 23 December 2013.

For more information about the role of the Information Commissioner and the Office of the Information and Privacy Commission, visit www.ipc.nsw.gov.au.

http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_news2013#new_ic

Inquiry into Children in Immigration Detention announced

The President of the Australian Human Rights Commission, Professor Gillian Triggs, has announced that she will lead an inquiry into the mandatory and closed immigration detention of children seeking asylum in Australia.

'This inquiry will investigate the impact of immigration detention on the health, well-being and development of these children,' said Professor Triggs. 'These are children that, among other things, have been denied freedom of movement, many of whom are spending important developmental years of their lives living behind wire in highly stressful environments.'

In 2004, the Commission's landmark report, 'A Last Resort? National Inquiry into Children in Immigration Detention', found that the mandatory immigration detention of children was fundamentally inconsistent with Australia's international human rights obligations and that detention for long periods created a high risk of serious mental harm.

'It has been ten years since the 'A Last Resort?' report and, when that inquiry was announced, there were over 700 children in immigration detention,' said Professor Triggs. 'Today the numbers are far higher than at any time during the first national inquiry, with over 1000 children currently in immigration detention facilities in Australia and over 100 children detained in the regional processing centre of Nauru.'

Professor Triggs said the new inquiry will also measure progress in the ten years since the last investigation, and find out whether Australia is meeting its obligations as a party to the United Nations Convention on the Rights of the Child 1989.

'It will be vital that we receive submissions from as many people as possible who currently have or previously have had contact with children who are or were asylum seekers and their families, including detainees themselves,' Professor Triggs said. 'The benefit of a national inquiry is that, through public hearings and submissions, it gives a voice to children and families who are directly affected by detention – as well as to people who have had direct experience with them in any number of community capacities, including professionals, experts, friends and others.'

Professor Triggs said she expected that the Commission will complete the inquiry before the end of the year.

For more information about the inquiry, as well as submission forms, go to www.humanrights.gov.au/national-inquiry-children-immigration-detention-2014

https://www.humanrights.gov.au/news/media-releases/inquiry-children-immigration-detention-announced

Immigration detainees with adverse security assessments v Commonwealth of Australia (Department of Immigration & Citizenship)

Eight adults with adverse security assessments from ASIO were arbitrarily detained in closed immigration detention facilities, the President of the Australian Human Rights Commission, Professor Gillian Triggs, has found in a report tabled in Parliament.

The conduct also affected a young boy who was granted a protection visa and was residing in immigration detention with his mother who had an adverse security assessment.

After the former Minister for Immigration and Citizenship provided his response to this report on 26 April 2013, ASIO issued a fresh, non-prejudicial security assessment in relation to the boy's mother. This superseded her previous adverse security assessment and she was released from immigration detention with her son.

Seven of the adult complainants in this report had been found to be refugees. The other adult was assessed as engaging Australia's complementary protection obligations, meaning that he risked significant harm if he was returned to his country of origin. All of the adult complainants had received an adverse security assessment from ASIO recommending that a protection visa not be granted. ASIO was not asked for advice about whether the complainants could be placed in a less restrictive form of detention.

'I recommend that a comprehensive and individualised assessment be undertaken for each complainant to assess whether they pose a risk to the Australian community and whether any such risk could be addressed (for example by imposing conditions) without their being required to remain in an immigration detention facility' Professor Triggs said.

The kinds of conditions that could be imposed include a requirement to live at a specified place, curfews, travel restrictions, regular reporting and possibly even electronic monitoring.

Professor Triggs did not express any view as to what the outcome of an assessment in each particular case would be.

Professor Triggs found that the Department of Immigration and Citizenship failed to ask ASIO to assess whether six of the complainants were suitable for community based detention while they were waiting for their security clearance. Information provided by ASIO suggested that community detention assessments could be conducted within 24 hours. Instead, these six people were held in closed detention for between 15 and 19 months while a security assessment in relation to the grant of a visa was carried out.

Professor Triggs also found that, as a result of Government policy, people who were refused a visa on advice from ASIO were automatically not considered for community detention. However, this was a policy decision and not because of advice from ASIO that community detention was not appropriate.

The detention of the complainants in these circumstances was arbitrary and in breach of article 9(1) of the International Covenant on Civil and Political Rights.

In the case of Ms EG and her son Master EH, Professor Triggs found that the failure to consider fully alternatives to closed detention amounted to a breach of articles 3 and 37(b) of the Convention on the Rights of the Child.

Professor Triggs recommended that the Minister tell his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention merely because the department has received advice from ASIO that the person not be granted a visa on security grounds.

Professor Triggs also made a series of recommendations to the department. First, that the department refer each of the complainants to ASIO for advice about whether less restrictive detention could be imposed, if necessary subject to special conditions to ameliorate any identified risk to security.

Secondly, that similar advice be sought in relation to other people in immigration detention with adverse security assessments.

Thirdly, that the department refer cases back to the Minister for consideration of alternatives such as community detention, with details of how any potential risk identified by ASIO could be mitigated.

Fourthly, that Australia continue actively to pursue alternatives to detention, as well as the prospect of third country resettlement, for all people in immigration detention who are facing the prospect of indefinite detention.

The last recommendation was noted by the department. The other recommendations were not accepted by the Minister or the department.

The Commission made similar recommendations in a report tabled in Parliament on 26 November 2012 in relation to 10 adult Sri Lankan refugees with adverse security assessments from ASIO and three children (report [2012] AusHRC 56).

Although the department has not accepted the Commission's recommendations for referral of any of these cases to ASIO, fresh security assessments have been conducted by ASIO in a number of cases, either of its own motion or following a recommendation from the Hon Margaret Stone. This has resulted in non-prejudicial assessments being made for a family of two parents and three children and another single man (all part of the Commission's report tabled last November) and also in relation to Ms EG and her son Master EH (part of the current report).

As this decision can be reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), this is the only statement the Commission will be making on this matter.

A copy of this report: Immigration detainees with adverse security assessments v Commonwealth of Australia (Department of Immigration & Citizenship) is online at www.humanrights.gov.au/publications/immigration-detainees-adverse-securi...

The previous report: Sri Lankan refugees v Commonwealth of Australia (Department of Immigration & Citizenship) is online at www.humanrights.gov.au/legal/humanrightsreports/AusHRC56.html.

https://www.humanrights.gov.au/news/media-releases/immigration-detainees-adverse-security-assessments-v-commonwealth-australia

South Australian Law Society welcomes privacy paper

The Law Society of South Australia has welcomed the South Australian Law Reform Institute's (SALRI) invasion of privacy paper.

'It's the right time for an examination of privacy laws in SA,' Law Society President Morry Bailes said.

'SA is one of only two states in Australia to not have express legislative right to privacy.'

'With technology advancing at a rapid rate and surveillance techniques getting ever more sophisticated, we need a conversation about whether we have a legitimate right to privacy.'

'How important is the right to privacy? If we have nothing to hide, do we need to be concerned about privacy protection? It depends on how you feel about an individual or Group covertly monitoring your personal activities or collecting personal information about you.' The SALRI paper asks whether the law sufficiently protects personal privacy, and how we may be able to reconcile the right to privacy with the right to free expression.
SALRI is inviting submissions on the paper.

'The Law Society will certainly make a submission on this paper, and I encourage other community members who are interested in the protection of privacy to do so as well,' Mr Bailes said.

The Law Society commends SALRI for its insightful paper and the Attorney-General for re-establishing the law reform institute.

The SALRI was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the University of Adelaide.

http://www.lawsocietysa.asn.au/pdf/media_centre_releases/131219_Law_Society_welcomes_privacy_paper.pdf

Recent Decisions

The Official Secretary to the Governor-General and the FOI Act

Kline v Official Secretary to the Governor-General [2013] HCA 52 (6 December 2013)

On 26 January 2011, Ms Kline (the appellant) applied under the *Freedom of Information Act 1982* (Cth) (*FOI Act*) for access to a number of documents held by the Official Secretary to the Governor-General (the Official Secretary). The documents related to the Australian system of honours, the Order of Australia, which is managed by the Official Secretary. The appellant had nominated a person for appointment to the Order of Australia in 2007 and

2009. On both occasions the nominations were unsuccessful and her nominees were not appointed to the Order.

The Official Secretary decided, and the Information Commissioner on review agreed, that the *FOI Act* does not apply to the requested documents by reason of s 6A(1) of the *FOI Act*. Section 6A(1) provides that the *FOI Act* does not operate with respect to documents held by the Official Secretary unless they 'relate to matters of an administrative nature'. The appellant then sought review by the Administrative Appeals Tribunal, which affirmed the Official Secretary's decision. The Full Federal Court upheld the Tribunal's decision.

By special leave, the appellant appealed to the High Court. The appellant contended, among other things, that the exemption in s 6A(1) should be construed widely, such that the only documents of the Official Secretary excluded from the operation of the *FOI Act* are documents which disclose any aspect of the decision-making process in respect of a particular nomination for the Order.

The Official Secretary contended that exception in s 6A(1) should be construed narrowly and operates to oblige it to only give access to documents under the *FOI Act* which involve the management or administration of the office.

The High Court held that the task of construing s 6A(1) of the *FOI Act* is governed by what the Court has recently said about the importance of the text of a statute, the meaning and effect of which are not to be displaced by statements in secondary material (*Saeed v Minister for Immigration and Citizenship* [2010] HCA 23).

The High Court found that the exception of a class of documents which related to 'matters of an administrative nature' referred to documents concerning the office 'apparatus' which supported the exercise of the Governor-General's substantive powers and functions. Accordingly only documents, which relate to the management and administration of the Official Secretary, such as the office's resources, could be sought under FOI.

As the appellant's FOI request related to the substantive powers or functions of the Official Secretary's office, they did not fall within the exception in s 6(1A) of the *FOI Act.*

Is the failure to follow a process an error of law?

Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship [2013] HCA 53 (12 December 2013)

The plaintiff, a Sri Lankan national of Tamil ethnic origin and former member of the Liberation Tigers of Tamil Eelam, arrived at Christmas Island by boat in 2010. Because she had arrived at Christmas Island without a visa, she was an 'offshore entry person' and the *Migration Act 1958* (Cth) prevented her from making a visa application unless the Minister exercised his power under s 46A of the Act to allow her to do so.

In order to consider whether to exercise that power, the Minister created the Refugee Status Assessment process (RSA). Under this process the Department of Immigration and Citizenship (the Department) assessed whether the plaintiff was a person in respect of whom Australia owed protection obligations under the Refugees Convention. Under the RSA if a person was found to be a person to whom Australia owed protection obligations, that person was referred to the Minister for consideration under s 46A (*Plaintiff M61/2010E v The Commonwealth* [2010] HCA 41). The plaintiff was assessed to be such a person.

However, the plaintiff was also the subject of an adverse security assessment by the Australian Security Intelligence Organisation. The Department, acting on ministerial guidelines, took that adverse security assessment to mean that the plaintiff could not satisfy a criterion for the grant of a visa (public interest criterion (PIC) 4002), and therefore it did not refer the plaintiff's case to the Minister for his consideration. Subsequently, in *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46, the High Court held that PIC 4002 was invalid.

In the original jurisdiction of the High Court, the plaintiff argued that the Department's failure to refer her case to the Minister was an error of law because the Minister had not followed the RSA process. The plaintiff sought habeas corpus and declaratory relief, claiming on both statutory and constitutional grounds that her detention was unauthorised. She also asked High Court to re-open and overrule its decision in *Al-Kateb v Godwin* [2004] HCA 37 (*Al-Kateb*).

The High Court unanimously held that the exercise of the Minister's power was affected by an error of law. The High Court found that despite the broad provisions of s 46A, which required the Minister to make a determination to allow an offshore entry person to apply for a visa if the Minister thinks it is in the public interest, the Minister had committed himself to the RSA process. Given PIC 4002 was invalid; an adverse security assessment was no longer a barrier to satisfying the criterion for a grant of a protection visa, and therefore following the RSA process, the plaintiff's case should have been referred to the Minister. As such, the Minister's failure to follow the RSA process constituted an error of law.

The Court held that, because the Minister, as a result of the error of law, had yet to complete his consideration of whether to permit the plaintiff to make a valid application for a visa, the plaintiff's continued detention, being for the purpose of allowing that consideration to be completed according to law, is authorised by the Act.

The Court declined to reopen its decision in *Al-Kateb.*

Can the offer of a further opportunity to be heard remedy a breach of procedural fairness?

X v University of Western Sydney [2014] NSWSC 82 (17 February 2014)

The plaintiff was a first year medical student at the University of Western Sydney (the defendant). On 29 August 2013, he was suspended after a female student (the complainant) complained about his conduct following a social event as a residential college and a 'Facebook' exchange the next day. The plaintiff subsequently challenged his suspension in the NSW Supreme Court and, on 11 September 2013, Beech-Jones J held that the University failed to afford procedural fairness to the plaintiff before he was suspended, and made a declaration that the suspension decision was not validly made and had no effect.

On 1 October 2013, the delegate (Dr Rowland) determined the plaintiff should again be suspended. On 30 September 2013, before making this decision, Dr Rowland interviewed the complainant for the first time. At that interview the complainant spoke of, among other things, her anxiety about running into the plaintiff at University and how this was affecting her study. Dr Rowland did not inform the plaintiff or his lawyers that he had decided to meet with the complainant before making his decision. Nor did he provide any information to the plaintiff on the health and safety matters that complaint had raised, or provide him with an opportunity to respond.

On 18 October 2013, in response to a letter from the plaintiff's lawyers asserting that he had been denied procedural fairness, Dr Rowland provided the plaintiff with his notes from the meeting with the complainant and notified the plaintiff that he was prepared to give him the opportunity to make further written submissions. No further submissions were provided.

On 4 November 2013, the plaintiff challenged the validity of Dr Rowland's decision in the NSW Supreme Court. The plaintiff contended, among other things, he had not been afforded procedural fairness because Dr Rowland had failed to disclose to him matters conveyed by the complainant at the interview on 30 September 2013.

The defendant contended that the plaintiff was afforded numerous and comprehensive opportunities to be heard before Dr Rowland made his decision on 1 October 2013 (including at meetings on 13 September and 19 September 2013 with the plaintiff and his lawyers); and that the issues critical to the suspension decision were apparent to the plaintiff.

The defendant alternatively submitted that even if the plaintiff was entitled, as a matter of procedural fairness, to be notified of what was said to Dr Rowland by the complainant, or of his proposed reasoning, it did not follow that the failure to do so before the making of the decision vitiated it. The defendant contended that any denial of procedural fairness had been remedied by the provision of those reasons and all relevant records to the plaintiff (including Dr Rowland's notes from his meeting with the complainant), and Dr Rowland's continued preparedness to revisit his decision if further material was presented (*Aye v Minister for Immigration and Citizenship* [2010] FCAFC 69).

The Court held that it was clear from Dr Rowland's 'Reasons for Decision' that the complainant's information (which may have been adverse to the plaintiff) was central to his decision to suspend the plaintiff. The matters conveyed by the complainant were relevant and significant to the suspension decision under the University's Misconduct policy, which required a decision-maker to consider the interests of both parties. As such the plaintiff was denied procedural fairness before he was suspended.

The Court also did not consider that the decision in *Aye* was applicable to decisions made under the University's Misconduct Policy. The Court held that no principle was cited to support the proposition that an affected person who has been denied procedural fairness is required to engage in a further inquiry by the same decision-maker.

Delegations and authorisations and rental rebate fraud

New South Wales Land and Housing Corporation v Navazi [2013] NSWCA 431(12 December 2013)

For some years Mr Ali Navazi (the respondent) was a tenant of the Land and Housing Corporation (the Corporation) and in receipt of a rental rebate. In March 2010, following a tip off, and subsequent investigations, an officer in the Department of Housing, determined that the respondent's rental rebate should be cancelled, retrospectively from June 2003. The respondent challenged the validity of that decision in the Common Law Division of the NSW Supreme Court.

The primary judge (Rothman J) held that the decision should be quashed, primarily on the ground that the Corporation had no power to cancel the rental rebate without conducting an investigation under s 58 of the *Housing Act 2001* (NSW) (the Act) for the purpose of determining the weekly income of the respondent; a task which he held had not been undertaken: *Navazi v New South Wales Land & Housing Corporation* [2013] NSWSC 138. The primary judge referred to, but did not need to decide, two questions relating to

delegation. Mr Navazi had submitted that there was no valid delegation of authority upon the officers of the Corporation, including Ms Morgan who purported to undertake the s 58 investigation, or upon Ms Roil who purported to cancel Mr Navazi's rental rebate pursuant to s 57(1). Mr Navazi also submitted that the *Carltona* principle, which recognises that Government officials or bodies can have agents within their agencies who are authorised to perform certain tasks without formal delegation, did not operate.

The Corporation appealed that decision. By notice of contention Mr Navazi sought to uphold the primary judge's decision on the two questions relating to delegation.

The NSW Court of Appeal disagreed with primary judge's decision to invalidate the decision to cancel Mr Navazi's rental subsidy. The Court then considered the two delegation questions.

The Court found that s 6 and 15 of the Act maintain the distinction between delegation and agency. Section 6(3) of the Act expressly invokes agency:

> Any act, matter or thing done in the name of, or on behalf of, the Corporation by the Director-General, or with the authority of the Director-General, is taken to have been done by the Corporation.

In contrast, s 15 confers a power of delegation upon the Corporation and Director-General.

The Court held that the presence of those separate provisions within the Act confirms that there can be no implication in the legislative regime from the existence of a power to delegate that the *Carltona* principle has been displaced. A power to delegate does not necessarily exclude the existence of an implied power to act through the agency of others: *Re Patterson; Ex parte Taylor* [2001] HCA 51, although it is a factor which makes the operation of the *Carltona* principle less likely: *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2009] NSWCA 352. However in this case s 6(3) of the Act removes the need to consider whether agency has been impliedly displaced.

The Court found that in April 2008, the Director-General approved the appointment of Ms Morgan to a temporary position as 'Project Director' to get 'the new fraud policies and procedures implemented'. As such, there can be no doubt that Ms Morgan's investigation pursuant to s 58 was expressly authorised by the Director-General.

The Court further opined that even in the absence of this authorisation, given the nature and scale of the issue (in March 2007 over 150 active tenant fraud investigations were underway), a court would readily find, aided if necessary by the presumption of regularity, that Ms Morgan was authorised to undertake investigations. Accordingly, Ms Morgan's investigation and report about Mr Navazi answers the description of something done on behalf of the Corporation with the authority of the Director-General.

With regard to Ms Roil's decision, the Court held that taking Mr Navazi's argument at its highest; the absence of an express delegation says nothing as to whether Ms Roil was acting on behalf of the Corporation with the authority of the Director-General, which is sufficient to engage s 6(3). There is no sound reason to find that the Act required all cancellation decisions, of which there would most likely be many, involving a backdating for a period in excess of six months to be undertaken by the Director-General.