RECENT DEVELOPMENTS

Katherine Cook

Appointment of Disability Discrimination Commissioner

Mr Ben Gauntlett has been appointed as Australia's new Disability Discrimination Commissioner at the Australian Human Rights Commission for a five-year term.

Mr Gauntlett has extensive legal experience as a barrister in Victoria and Western Australia and will bring a range of skills and experience to the role, including lived experience with disability.

Prior to his role as a barrister, Mr Gauntlett worked at Freehills for four years in dispute resolution. He was an associate to the Hon Justice Kenneth Hayne AC at the High Court of Australia and also Counsel Assisting the Solicitor-General of the Commonwealth.

This appointment fills the vacancy created by Mr Alastair McEwin's appointment as Commissioner for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

Mr Gauntlett commenced as Disability Discrimination Commissioner on 7 May 2019. In the interim, recognising the importance of this role, President of the commission, Emeritus Professor Rosalind Croucher AM, has been appointed as acting Disability Discrimination Commissioner.

<https://www.attorneygeneral.gov.au/Media/Pages/Appointment-of-Disability-Discrimination-Commissioner-5-april-2019.aspx>

Review of the framework of religious exemptions in anti-discrimination legislation

The Morrison government has commissioned the Australian Law Reform Commission (ALRC) to undertake a comprehensive review of the framework of religious exemptions in anti-discrimination legislation across Australia.

The review is part of the government's response to the Review of Religious Freedom, released in December 2018, conducted by the expert panel led by the Hon Philip Ruddock.

'In announcing the Government's response to the Ruddock Review on 13 December 2018, the Prime Minister and I indicated that we would consult with States and Territories on the terms of a reference to the ALRC on five of the Ruddock Review's recommendations (Recommendations 1 and 5–8) and that consultation has now been concluded', the Attorney-General said.

'It is essential that Australia's laws are nationally consistent and effectively protect the rights and freedoms recognised in international agreements to which Australia is a party. This particularly applies to the right to freedom of religion and the rights of equality and non-discrimination.'

The ALRC review will consider what reforms to Commonwealth, State and Territory law the *Fair Work Act 2009* (Cth) and any other Australian laws should be made in order to:

- limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos; and
- remove any legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), whether such impediments are imposed by a provision analogous to s 18C of the *Racial Discrimination Act 1975* (Cth) or otherwise.

In undertaking this reference, the ALRC will have regard to existing reports and inquiries, including the *Report of the Expert Panel on Religious Freedom* and the ALRC *Report on Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*.

The terms of reference for the review are attached and further information about the review will be available on the ALRC website.

The commission has been asked to report to the government by 10 April 2020.

<https://www.attorneygeneral.gov.au/Media/Pages/Review-into-the-Framework-of-Religious-Exemptions-in-Anti-discrimination-Legislation-10-april-19.aspx>

Expanding the role of the South Australian Civil and Administrative Tribunal

The South Australian Civil and Administrative Tribunal (SACAT) will be given additional responsibilities under new laws proposed by the State government.

Attorney-General, Vickie Chapman MP, said the proposal would see SACAT take over the functions of the South Australian Health Practitioners Tribunal as well as the disciplinary functions of the Architectural Practice Board of South Australia and Veterinary Surgeons Board of South Australia.

A number of matters previously dealt with by the courts will also be transferred to SACAT.

Attorney-General Chapman said the move further supported the government's goal of reducing red tape by centralising administrative review functions.

'Since 2015, SACAT has been the central body of administrative dispute resolution within South Australia and we're working to further consolidate those functions', Ms Chapman said.

'By shifting these separate review and disciplinary functions to SACAT, we're streamlining the sometimes convoluted nature of these processes to the one place and increasing transparency and consistency.'

The move also involves the transfer of equal opportunity complaints and exemption applications from the South Australian Employment Tribunal (SAET) to SACAT.

'While many complaints of discrimination are employment-related, many are not, and involve everything from accommodation and education issues to sale of land', Ms Chapman said.

'The new legislation will transfer equal opportunity jurisdiction to SACAT, which is a more appropriate fit and brings us in line with other States across the country. However, for efficiency and to save double-handling, employment-related complaints can be referred to SAET if they are linked to workers compensation or other proceedings already underway in SAET. This will enable related proceedings to be dealt with at the same time.'

More than 15 other administrative review processes currently dealt with by the courts will also be transferred to SACAT, ultimately reducing the burden on the court system.

'By transferring these administrative reviews, disciplinary and other decision-making functions currently undertaken by the Magistrates Court and District Court to SACAT, we're essentially freeing up the courts to focus on their core judicial work', Ms Chapman said.

This is the fourth of a planned five-stage program to move a number of administrative reviews and disciplinary functions under SACAT.

The first phase in 2015 established SACAT to deal with housing disputes (including residential tenancies), guardianship and administration, consent to medical treatment and advance care directives.

Reviewing administrative decisions across local government, land and housing, taxation and superannuation, environment, energy and resources were then added to SACAT's remit in 2017.

<https://www.agd.sa.gov.au/newsroom/expanding-role-sacat>

Justice Pritchard first woman to be appointed President of the Western Australian State Administrative Tribunal

Attorney General John Quigley has announced the appointment of Supreme Court Justice Janine Pritchard as President of the State Administrative Tribunal (SAT) for a five-year term, beginning on 4 June 2019.

Justice Pritchard is a highly experienced judicial officer who was admitted to practice in Western Australia in December 1993.

In 1991, Justice Pritchard joined the then Crown Solicitor's Office (now the State Solicitor's Office) and worked in that office until her appointment to the bench.

Her primary areas of practice were administrative law, constitutional law, freedom of information and privacy law, industrial law and prosecution of regulatory offences.

Justice Pritchard previously served as Deputy President of the SAT after her appointment to the District Court of Western Australia in June 2009.

She was appointed as a judge of the Supreme Court of Western Australia in June 2010 and as a judge of the Court of Appeal in September 2018.

Justice Pritchard will maintain her commissions as a judge of the Supreme Court and the Court of Appeal.

<https://www.mediastatements.wa.gov.au/Pages/McGowan/2019/04/Justice-Pritchard-first-woman-to-be-appointed-President-of-the-SAT.aspx>

Tasmanian Ombudsman reappointed

The Tasmanian Government has announced that Mr Richard Connock has been reappointed to the position of Ombudsman, ensuring the continuity of the operation of the Office of the Ombudsman and the related roles.

Mr Connock has served in this position, which incorporates the roles of Health Complaints Commissioner, Custodial Inspector, Principal Official Visitor and Co-ordinator of the Official Visitors Scheme, since 2015.

He was Director of the Office of the Ombudsman from 2007 until 2015 and worked as a solicitor and later a barrister between 1982 and 2000.

The appointment is for five years as Ombudsman, Health Complaints Commissioner, Custodial Inspector and Principal Official Visitor, and for three years as Co-ordinator of the Official Visitors Scheme.

It follows the Hodgman Liberal government increasing funding of $245 000 per year for the Office of the Ombudsman in the 2019–20 State Budget to support the Office of the Ombudsman's right to information work.

This funding will enable the recruitment of a new principal officer and new investigation and review officer to increase the capacity of the office in relation to right to information requests.

<http://www.premier.tas.gov.au/releases/ombudsman_re-appointed>

Recent decisions

The scope of merits review by the Administrative Appeals Tribunal

Frugtniet v Australian Securities and Investments Commission [2019] HCA 16 (15 May 2019) (Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon, Edelman JJ)

The appellant has a criminal record. It includes being convicted in the United Kingdom in 1978 of 15 counts of handling stolen goods, forgery and obtaining property by deception and theft (for which he was sentenced to a term of imprisonment and served two years), and by a finding by the Victorian Broadmeadows Magistrates' Court in 1997 that he committed an offence of obtaining property by deception in relation to the issue of airline tickets (for which no conviction was entered but he was fined $1000). At all relevant times these offences constituted spent convictions within the meaning of Pt VIIC of the *Crimes Act 1914* (Cth).

Division 3 of Pt VIIC of the Crimes Act has the relevant effect that:

- a person whose conviction is spent is not required to disclose to any Commonwealth authority the fact that the person was charged with or convicted of the offence; and
- a Commonwealth authority is prohibited from taking account of the fact that the person was charged with or convicted of the offence.

While a Commonwealth authority includes both the Administrative Appeals Tribunal (the Tribunal) and Australian Securities and Investments Commission (ASIC), s 85ZZH(c) of the Crimes Act also provides that Div 3 does not apply in relation to the disclosure of

information to, or the taking into account of information by, a tribunal established under a Commonwealth law.

In 2014, ASIC made a banning order against the appellant under s 80(1) of the *National Consumer Credit Protection Act 2009* (Cth) (the Credit Protection Act) on the basis that ASIC had reason to believe that the appellant was not a fit and proper person to engage in credit activities.

The appellant applied to the Tribunal for a review of ASIC's decision. In affirming ASIC's decision, the Tribunal took into consideration the appellant's spent convictions, which ASIC was expressly prohibited from taking into account under the Crimes Act.

The appellant then appealed to the Federal Court on grounds including that the Tribunal had erred in law in taking the spent convictions into consideration. When he was unsuccessful before the Federal Court, the appellant appealed to the Full Federal Court. Dismissing the appeal, the Full Federal Court held that s 85ZZH(c) of the Crimes Act entitled the Tribunal to take into consideration material which ASIC was prevented from taking into consideration.

By grant of special leave, the appellant appealed to the High Court.

The High Court held that the jurisdiction of the Tribunal on a review of a decision made by ASIC under s 80 of the Credit Protection Act is unaffected by s 85ZZH(c) of the Crimes Act.

The High Court held that the Tribunal was prohibited from taking into consideration a spent conviction. The question for determination by the Tribunal on the review of an administrative decision under s 25 of the *Administrative Appeals Tribunal Act 1975* (Cth) is whether the decision is the correct or preferable decision.

The High Court explained that the Tribunal and the primary decision-maker exist within an administrative continuum. The Tribunal is subject to the same general constraints as the original decision-maker and should ordinarily approach its task as though it were performing the relevant function of the original decision-maker in accordance with the law as it applied to the decision-maker at the time of the original decision.

The High Court held that, depending on the nature of the decision the subject of review, the Tribunal may sometimes take into account evidence that was not before the original decision-maker, including evidence of events subsequent to the original decision. But, subject to any clearly expressed contrary statutory indication, the Tribunal may do so only if and to the extent that the evidence is relevant to the question which the original decision-maker was bound to decide, as if the original decision-maker were deciding the matter at the time that it is before the Tribunal.

Al-Kateb almost revisited

M47/2018 v Minister for Home Affairs [2019] HCA 17 (12 June 2019) (Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon, Edelman JJ)

The plaintiff is an unlawful non-citizen who has been in immigration detention since his arrival in the migration zone in 2010.

When the plaintiff travelled to Australia, he used a Norwegian passport. The plaintiff destroyed the passport and presented himself to Australian immigration officers under a

different name, purporting to be a citizen of Western Sahara. The plaintiff had previously identified himself to Danish authorities as a citizen of Iraq, born in 1990; and to authorities in the Netherlands under a different name as a citizen of Gaza, born on 1 March 1988. In or about 2007, he applied for protection in Iceland under a different name as a citizen of Western Sahara, born in 1991. On 30 December 2009, the plaintiff was intercepted at Singapore airport attempting to travel to New Zealand via Australia on a counterfeit British passport which gave his date of birth as 27 March 1989. On or around 5 January 2010, the plaintiff sought asylum in Germany using the same date of birth.

In Australia, in a number of visa applications between 2010 and 2017, the plaintiff admitted that he had used false names, personal details and passports. In dealings with Australian immigration authorities, the plaintiff gave inconsistent accounts of his personal and family background. The plaintiff also adopted a posture of non-cooperation towards meetings arranged or proposed by those authorities between the plaintiff and the Moroccan and Algerian embassies in Canberra aimed at establishing his identity and nationality.

The plaintiff commenced proceedings in the original jurisdiction of the High Court seeking a declaration that his detention is unlawful because it is not authorised by ss 189 and 196 of the *Migration Act 1958* (Cth). Section 189 of the Migration Act relevantly provides that an officer who knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen must detain the person. Section 196 of the Act requires that an unlawful non-citizen who is detained under s 189 be kept in immigration detention until he or she is removed from Australia under s 198 or s 199, deported under s 200, or granted a visa.

Before the High Court, the plaintiff claimed he is stateless and there is no prospect that he will be removed from Australia to another country. Against that background, he contended that his continued detention is not authorised by ss 189 and 196 for two reasons. First, as a matter of construction, the mandate in ss 189 and 196 to keep an unlawful non-citizen in custodial detention suspends when his or her removal is not practicable at all, or in the reasonably foreseeable future, so that those provisions no longer authorise the plaintiff's detention. Secondly, even if ss 189 and 196 cannot be read as operating in that way, they are invalid in their application to the plaintiff because his continued detention is not sufficiently connected to a constitutionally permissible purpose of administrative detention and so may be imposed only through the exercise of the judicial power of the Commonwealth by the courts designated by Ch III of the *Constitution*.

The defendants submitted that they cannot establish the plaintiff's identity and country of origin because he is not cooperative. Therefore, the defendants contended that the High Court could not infer that the plaintiff is a stateless person or that there is no real likelihood or prospect of removal in the reasonably foreseeable future.

Previously, the High Court in *Al-Kateb v Godwin* (2004) 219 CLR 562 (*Al-Kateb*) found, as a matter of fact in that case, that, although the 'possibility of removal in the future remained', there was 'no real likelihood or prospect of removal of the appellant in the reasonably foreseeable future'. The High Court held, by majority (McHugh, Hayne, Callinan and Heydon JJ), that the authority conferred by ss 189 and 196 of the Act is not limited, either as a matter of the proper construction of those provisions or as a matter of their constitutional validity, to cases where there is a prospect of the detainee being removed to another country within the reasonably foreseeable future.

By contrast, the minority in *Al-Kateb* (Gleeson CJ and Gummow and Kirby JJ) concluded, on the basis of the finding of fact referred to above, that ss 189 and 196, properly construed, did not authorise Mr Al-Kateb's detention. Chief Justice Gleeson did not

consider the constitutional question. Justice Gummow held that the administrative detention of aliens and their segregation thereby from the Australian community for a purpose unconnected with the regulation of their entry, investigation, admission or deportation is not compatible with Ch III of the *Constitution*. His Honour also concluded that the continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government. Justice Kirby agreed that indefinite detention at the will of the executive government, and according to its opinions, actions and judgments, is alien to Australia's constitutional arrangements. In the present case, the plaintiff submitted, among other things, that the minority's view in *Al-Kateb* should now be adopted by the High Court.

The High Court found that the inconsistent statements made by the plaintiff as to his identity and place of origin are not explicable by genuine uncertainty or ignorance, so it cannot be assumed that it is beyond his power to provide further information concerning his identity that may shed positive light on his prospects of removal; neither can it be concluded that the options for his removal within a reasonable time, if his cooperation is forthcoming, have been exhausted.

Accordingly, in this case, the High Court found the inferences contended by the plaintiff were not available and no factual basis for the application of the view of the minority in *Al-Kateb* was established. The result was that no question arose as to the lawfulness of the plaintiff's detention.

'Materiality' is essential to the existence of jurisdictional error

Minister for Immigration and Border Protection v SZMTA; *CQZ15 v Minister for Immigration and Border Protection*; *BEG15 v Minister for Immigration and Border Protection* [2019] HCA 3 (13 February 2019) (Bell, Gageler, Keane, Nettle and Gordon JJ)

These three appeals from judgments of the Federal Court raised issues concerning the effect on a review by the Administrative Appeals Tribunal under Pt 7 of the *Migration Act 1958* (Cth) of a notification to the Tribunal from the Secretary of the Department of Immigration and Border Protection that s 438 of the Act applies in relation to a document or information.

In each of the three appeals, the visa applicant applied to the Tribunal for review of a decision by a delegate of the Minister for Immigration and Border Protection. As required by s 418(3) of the Act, the Secretary gave to the Registrar of the Tribunal documents considered relevant to the review. Subsequently, a delegate of the Secretary or an officer of the department notified the Tribunal that s 438 applied to certain information in the documents. Section 438 applies to a document or information either if the Minister has lawfully certified that disclosure of any matter in the document or of the information would be contrary to the public interest, or if the document, any matter in the document or the information was given to the Minister or the department in confidence. If a Tribunal is notified that s 438 applies to a document or information, the Tribunal may have regard to any matter in the document or to the information and, in certain circumstances, it may disclose to the applicant for review any such matter or the information.

In each appeal, notification was purportedly made under s 438; however, neither the Tribunal nor the Secretary disclosed this fact to the visa applicant.

In all three appeals, the Tribunal affirmed the decisions under review. The visa applicants then sought judicial review of the Tribunal's decisions in the Federal Circuit Court of Australia and Federal Court.

In *CQZ15 v Minister for Immigration and Border Protection* (*CQZ15*), the Federal Circuit Court held that the invalidity of the notification and the non-disclosure of the fact of the notification had resulted in jurisdictional error. The certificate stated that disclosure of specified information contained in specified parts of the departmental file would be contrary to the public interest. The Full Federal Court allowed an appeal by the Minister and remitted the matter for a determination of the materiality of the Tribunal's denial of procedural fairness.

In *BEG15 v Minister for Immigration and Border Protection* (*BEG15*), the Federal Circuit Court held that the information covered by the notification could have made no difference to the outcome of the Tribunal's review. The certificate covered three documents on the departmental file, all of which were in evidence before the Federal Circuit Court in a previous appeal. All three documents related to the disposition of the application for judicial review of the initial decision of the Tribunal. The first document recorded that the consent order had been made after a review by the department of the decision record, confirmed by advice from counsel, revealed 'a probable error of law'. The second document briefly summarised the initial decision of the Tribunal and went on to explain that the Tribunal in the initial decision had 'failed to apply the correct test for complementary protection'. The third document noted that the subject-matter of the review would in consequence be referred to the Tribunal for reconsideration. The Full Federal Court dismissed the appeal.

In *Minister for Immigration and Border Protection v SZMTA* (*SZMTA*), the invalidity of the notification was not raised by the visa applicant until his appeal from the Federal Circuit Court to a single judge of the Federal Court, who held that the Tribunal had made a jurisdictional error and allowed the appeal. The evidence before the Federal Court established that the SZMTA had previously been provided with copies of all of the documents the subject of the notification in response to a request under the *Freedom of Information Act 1982* (Cth).

By special leave, CQZ15 and BEG15 and the Minister in SZMTA appealed to the High Court.

The High Court unanimously held that the fact of a notification to the Tribunal that s 438 applies to a document or information will trigger an obligation of procedural fairness on the Tribunal to disclose the fact of the notification to the applicant for review.

The majority (Bell, Gageler and Keane JJ) explained that procedural fairness ordinarily requires that an applicant be apprised of an event which results in an alteration to the procedural context in which an opportunity to present evidence and make submissions is routinely afforded. A s 438 notification alters the procedural context within which the Tribunal's duty of review is to be conducted. For example, if valid, the notification erects a procedural impediment to the otherwise unfettered ability of the Tribunal to take into account the document or information if the Tribunal considers it to be relevant to an issue to be determined in the review. It also truncates the specific obligations of the Tribunal under ss 424AA and 424A — to give clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review.

However, the majority of the High Court further held that a breach by the Tribunal of that obligation will result in jurisdictional error if, and only if, the breach is material, in the sense that the breach deprives the applicant of the possibility of a successful outcome (*Hossain v Minister for Immigration and Border Protection* [2018] HCA 34). By majority, the High Court also held that an invalid notification will result in jurisdictional error if, and only if, the notification is material.

The majority explained that 'materiality' is essential to the existence of jurisdictional error. A breach is material to a decision only if compliance could realistically have resulted in a different decision. Where materiality is in issue in an application for judicial review, and except in a case where the decision made was the only decision legally available to be made, the question of the materiality of the breach is an ordinary question of fact in respect of which the applicant bears the onus of proof. Like any ordinary question of fact, it is to be determined by inferences drawn from evidence adduced on the application.

The High Court found that, in *CQZ15*, the Federal Court was correct to remit the matter to the Federal Circuit Court. In *BEG15*, the Federal Court was correct to find no appealable error in the Federal Circuit Court's decision given the 'immaterial' nature of the documents subject to the certificate. Finally, in *SZMTA*, the Tribunal's denial of procedural fairness was immaterial, because the appellant had been provided with the documents under the Freedom of Information Act, and the Federal Court was wrong to find that the Tribunal had committed a jurisdictional error.