

## RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

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### **Landmark FOI case**

The High Court's decision in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 (6 September 2006)<sup>1</sup> highlighted the role of 'conclusive certificates' in protecting internal government documents from release to the public. Treasurer Peter Costello issued a certificate in 2003 blocking disclosure of documents about the first home buyer's scheme and income tax 'bracket creep'. The Treasurer claimed that release of provisional deliberations on these matters would mislead the public and inhibit discussion by officials on controversial issues.

The High Court considered the process that the Administrative Appeals Tribunal should follow under s 58(5) of the *Freedom of Information Act 1982* in reviewing the use of a 'conclusive certificate'. In a 3:2 decision, the Court held that the Tribunal could not substitute its own opinion about whether disclosure would be contrary to the public interest – it could not 'undertake a full merits review', balancing the various factors for and against disclosure. The majority appeared to differ, however, on the appropriate approach. Justices Callinan and Heydon said that a certificate will be beyond review if only one reasonable ground exists for the public interest claim. This attracted much critical commentary.<sup>2</sup> Justice Hayne, on the other hand, said the Tribunal should consider whether the public interest claim is 'supported by logical arguments which, *taken together*, are reasonably open to be adopted', noting that the Tribunal must decide whether the public interest grounds as a whole are reasonable.

### **Scope of judicial review report**

On 19 May 2006 Chief Justice Murray Gleeson and Attorney-General Philip Ruddock launched a report by the Administrative Review Council entitled *The Scope of Judicial Review*.<sup>3</sup> The report analyses the desirable scope of judicial review and the circumstances in which limitations might be justified. It considers the constitutional framework for judicial review, when legislative amendment to its scope might be appropriate, and how this could best be achieved. It concludes with some broad principles about the circumstances in which restrictions on judicial review can be justified, intended to assist drafters of new legislation.<sup>4</sup>

The report is intended to complement the Council's 1999 publication, *What Decisions are Subject to Merits Review?*<sup>5</sup>

### **AWB inquiry**

(For further background see AIAL Forum No. 48.)

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At the time of writing, the Cole Royal Commission (*Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme*) was due to deliver its final report on 24 November 2006. The Royal Commission held extensive hearings between December 2005 and September 2006 into potential breaches of the UN sanctions regime for Iraq by Australian companies, including AWB Limited, BHP Billiton, Melbourne engineering firm Rhine Ruhr and Queensland pharmaceuticals company, Alkaloids of Australia. The role of government departments - especially the Department of Foreign Affairs and Trade (DFAT) - in overseeing Australian wheat exports to Iraq was also a key issue. Prime Minister John Howard, Minister for Foreign Affairs Alexander Downer and Minister for Trade Mark Vaile were asked to submit statements to the inquiry, with Mr Downer and Mr Vaile giving evidence in person.

Professor Stephen Bartos of the National Institute for Governance said that the source of the AWB oil-for-food scandal lay in governance: 'corporate governance arrangements within AWB, national regulatory arrangements for the oversight of AWB and, underlying both of these, national governance standards that apply to agricultural politics'. Professor Bartos said the terms of reference for the Royal Commission were restrictive and did not allow investigation of AWB's culture 'which is at the heart of why the alleged kickbacks occurred'. He also criticised DFAT's cable system, noting that evidence provided to the inquiry by Ministers showed that it 'is no longer working to ensure the flow of information – in fact it impedes information'.<sup>6</sup>

Attempts by AWB Limited to prevent the release of additional documents to the Royal Commission led to important Federal Court judgments on the scope of legal professional privilege as well as prompting changes to the *Royal Commissions Act 1902*.<sup>7</sup>

### ***Citizenship testing discussion paper***

In September 2006, the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, Andrew Robb, released a discussion paper entitled *Australian Citizenship: Much more than a ceremony. Consideration of the merits of introducing a formal citizenship test*.<sup>8</sup>

The paper suggests that a formal citizenship test could help people fully participate in the Australian community because 'it would provide a real incentive to learn English and to understand the Australian way of life.' To pass the test applicants would need 'a level of English which allows them to participate through education and employment.' They would also have to understand 'common Australian values' such as respect for the freedom and dignity of the individual, support for democracy, commitment to the rule of law, the equality of men and women, the spirit of a fair go, and mutual respect and compassion for those in need.

Prominent Government backbencher Petro Georgiou criticised the paper, saying he could find 'no detailed, robust analysis of a problem and no evidence of how the new measures would resolve a problem that has not been demonstrated'. He noted that applicants already face a citizenship 'test' during a compulsory interview, and asked why Australia should copy countries which already have formal tests such as the US, the UK, Canada and the Netherlands, which have 'a less distinguished record' than our own in multicultural harmony and integration.<sup>9</sup>

### ***Failure of Migration Bill***

On 14 August 2006 the Federal Government withdrew the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 from the Senate when it became clear that reservations about the Bill on the part of Government senators meant it would not be passed.<sup>10</sup> The Bill proposed to amend the *Migration Act 1958* by expanding the offshore processing regime - currently applying to 'offshore entry persons' and 'transitory persons' - to cover all people arriving on mainland Australia unlawfully by sea (including those airlifted to Australia at the end of a sea journey). According to the Minister for Immigration, Senator Vanstone, this would have eliminated the distinction 'between unauthorised boat arrivals at an excised offshore place and those who reach the mainland'.<sup>11</sup>

The Bill was introduced following a protest by Indonesia about the granting of temporary protection visas in March 2006 to 42 asylum seekers from its province of Irian Jaya (West Papua). The group landed on Cape York, avoiding the offshore islands 'excised' from Australia's migration zone under the Migration Act.<sup>12</sup>

Key concerns with the Bill, including on the part of some government members, were:

- All asylum seekers arriving by sea on the Australian mainland would have their claims processed on Nauru. Families with children would not live in the community but would be confined in a detention centre on the island.
- Asylum seekers on Nauru would not have access to legal protections available in Australia, especially the right of appeal to the Refugee Review Tribunal
- People with valid asylum claims could remain on Nauru indefinitely if other countries did not take the refugees Australia refused to accept.<sup>13</sup>

### ***Health and services access card***

On 26 April 2006 Prime Minister Howard announced that the 'Australian Government has decided to proceed in principle with a new access card for health and welfare services'.<sup>14</sup> According to the Government, the access card will use smart card technology to improve the access to and delivery of health and social services benefits. It will replace 17 health and social services cards, including the Medicare card, health care cards and veteran cards. The access card will be phased in over a two year registration period beginning in 2008. From early 2010, people will only be able to obtain government health and social services benefits if they have an access card.<sup>15</sup>

In May 2006 the Minister for Human Services Joe Hockey announced the formation of an Access Card Consumer and Privacy Taskforce headed by Professor Allan Fels.<sup>16</sup> The Taskforce released its first discussion paper on the access card on 15 June 2006.<sup>17</sup> In November 2006, Mr Hockey announced plans for legislation to prevent the smartcard being used as an identity card. The proposed laws would stop businesses such as hotels and banks, as well as State Governments, being able to demand the card to check a person's identity. In addition, individual holders would be given ownership of the card, in contrast to other cards such as driver's licences and credit cards which remain the property of the issuer.<sup>18</sup>

Electronic Frontiers Australia has established a website on the Access Card.<sup>19</sup>

### ***Whistleblower report***

On 2 November 2006, the Commonwealth Ombudsman, Queensland Ombudsman and New South Wales Ombudsman jointly released a paper calling for a coherent, national approach to the revision of whistleblower legislation. Prepared by Dr A J Brown of Griffith University, the paper highlights the inconsistencies between the nine Commonwealth, State and Territory Acts covering whistleblowing in Australia. It says that none of the whistleblower laws in Australia adequately provide the three elements needed to facilitate public interest disclosures, namely:

- Protecting whistleblowers
- Ensuring disclosures are properly dealt with, and
- Assisting the making of disclosures.<sup>20</sup>

### **RECENT CASES**

#### ***Absorbed person visa no protection against removal***

*(See background in AIAL Forum No. 48.)*

*Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (High Court, 8 November 2006).<sup>21</sup> The High Court held that a failure by the Minister for Immigration to consider the fact that Mr Nystrom was deemed to hold an 'absorbed person visa' under the *Migration Act 1958* did not amount to jurisdictional error. Mr Nystrom held a transitional (permanent) visa which was cancelled by the Minister on character grounds under s 501 of the Act because of his criminal record. Under s 501F, cancellation of a visa under s 501 is taken to be a decision to cancel any other visa, including an 'absorbed person visa'. The High Court said that there was 'no room for discretion in the matter' – the Minister was not required to consider the possible effect of s 501F on Mr Nystrom.

Media reports indicated that the High Court's ruling affected a number of other people whose visas had been cancelled on character grounds following criminal convictions, but whose removal from Australia had been delayed pending the decision.<sup>22</sup>

The High Court's decision in *Nystrom* allows the practise to continue of removing people who have not formally become citizens of Australia but who have been here since they were small children and know no other country. This has previously led to controversy where convicted criminals have been deported - after completing their sentences - to countries where they have few contacts and do not know the language. As noted in *AIAL Forum No. 48*, while the Full Federal Court was divided on the legalities of the *Nystrom* matter, it was unanimous in expressing strong concern about this practice.

*Can 'self-employed' people be 'unemployed' under the Social Security Act 1991?*

*Secretary, Department of Employment and Workplace Relations v Joss* (Federal Court, 10 July 2006).<sup>23</sup> Mr Joss helped select and prepare a boat for survey work. It was unclear

whether he was formally employed in this task. He applied for Newstart Allowance claiming that he was 'unemployed' within the meaning of s 593(1) of the *Social Security Act 1991* (Cth). The Social Security Appeals Tribunal was satisfied that he was 'unemployed'. The Administrative Appeals Tribunal (AAT) affirmed the decision. It said that possibly Mr Joss was 'self-employed' given his expectation of future partnership in the boat, but this 'would not prevent him ... from being regarded as unemployed'.

In the Federal Court Justice Graham held that the AAT had erred in law by stating that a 'self-employed' person could be 'unemployed'. A person will be 'unemployed' if they are without work or employment and that situation is both temporary and involuntary. However, even if Mr Joss was not an 'employee', he was carrying on business or engaging in work with a view to profit. He could not be considered 'unemployed' for the purpose of s 593(1) of the *Social Security Act*.<sup>24</sup>

### *The AAT and litigation privilege*

*Ingot Capital Investments Pty Limited v Macquarie Equity Capital Markets Limited* (NSW Supreme Court, 6 June 2006)<sup>25</sup>. This case considered whether the *Evidence Act 1995* applies to proceedings in the Administrative Appeals Tribunal. The issue was whether AAT hearings could be either 'proceedings' as that term is used in s 119 of the Act (litigation privilege) or 'legal proceedings' for the purpose of common law legal professional privilege. Justice Bergin noted that s 4 of the Act states that it applies to 'all proceedings in a federal court'. A 'federal court' in turn includes any person or body 'required to apply the laws of evidence'. The AAT is not 'required' to apply the laws of evidence and is therefore not a 'court'. So the Evidence Act does not apply to the AAT. Justice Bergin also said that the AAT stands outside the 'adversarial system of justice'. Therefore there was no proper basis upon which the common law litigation privilege should be extended to them.

### **Privacy issues**

#### *Privacy Legislation Amendment Act 2006*

This Act was assented to on 14 September 2006. It amends *Privacy Act 1988* and the *National Health Act 1953* to:

- ensure medical practitioners can access health information through the Prescription Shopping Information Service without breaching the National Privacy Principles;
- ensure genetic information is covered by the National Privacy Principles about health and sensitive information;
- enable health care professionals to disclose genetic information to genetic relatives if there is a serious health risk to a genetic relative.<sup>26</sup>

#### *Medicare and PBS Privacy Guidelines*

On 1 August 2006, the Privacy Commissioner released a Review of the Privacy Guidelines for the Handling of Medicare and Pharmaceutical Benefits Scheme (PBS) claims information. The Privacy Commissioner announced that under new guidelines:

- individuals will be able to have their Medicare and PBS claims information linked by Medicare Australia in a single report;
- Medicare Australia will be able retain claims information indefinitely, rather than deleting it after 5 years as currently required, subject to a range of privacy protections;
- other Australian Government agencies will be prevented from storing Medicare and PBS claims information on the same database in. Currently, such restrictions only apply to Medicare Australia and the Department of Health and Ageing.<sup>27</sup>

*Privacy Legislation Amendment (Emergencies and Disasters) Bill 2006*

This Bill inserts a new Part VIA in the *Privacy Act 1988* to enhance information exchange between Australian Government agencies, State and Territory authorities, private sector organisations, non-government organisations and others, in an emergency or disaster situation. It is aimed at the practical issues highlighted during events such as the Asian tsunami in December 2004. Current exemptions concerning use and disclosure of personal information have proven difficult to apply in situations involving mass casualties and missing persons.<sup>28</sup>

The Bill was passed by the Senate on 17 October and at the time of writing was before the House of Representatives.

**Endnotes**

- 1 [http://www.austlii.edu.au/au/cases/cth/high\\_ct/2006/45.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2006/45.html)
- 2 See eg, Denis O'Brien, 'Reform needed to protect FOI', *The Canberra Times*, 7/9/06, p. 15.
- 3 [http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media\\_Releases\\_2006\\_Second\\_Quarter\\_19\\_May\\_2006\\_-\\_New\\_Report\\_on\\_the\\_Scope\\_of\\_Judicial\\_Review\\_-\\_0922006](http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_19_May_2006_-_New_Report_on_the_Scope_of_Judicial_Review_-_0922006).
- 4 [http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications\\_Reports\\_Report\\_Files\\_Report\\_No\\_47](http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Report_Files_Report_No_47).
- 5 [http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications\\_Reports\\_Downloads\\_What\\_decisions\\_should\\_be\\_subject\\_to\\_merit\\_review](http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review).
- 6 Andrew Fraser 'System-wide rottenness drove AWB: academic', *The Canberra Times*, 10/11/06, p. 2.
- 7 See in particular *AWB Limited v Honourable Terence Rhoderic Hudson Cole* (No 5) [2006] FCA 1234 (18 September 2006) which held that communication between a client and a lawyer which facilitates a crime is not protected. Also *AWB Limited v Honourable Terence Rhoderic Hudson Cole* [2006] FCA 571 (17 May 2006) which held that a draft Statement of Contrition was not protected by litigation privilege because it was produced for use in an inquiry. This decision prompted the Government to introduce the *Royal Commissions Amendment Act 2006* (assented 14 June 2006), which clarified the power of a Royal Commissioner to demand documents subject to legal professional privilege. Under the new provisions, a decision by the Commissioner about privilege is reviewable by the Federal Court. See official Royal Commission website at <http://www.ag.gov.au/agd/www/UNOilForFoodInquiry.nsf>.
- 8 [http://www.citizenship.gov.au/news/DIMA\\_Citizenship\\_Discussion\\_Paper.pdf](http://www.citizenship.gov.au/news/DIMA_Citizenship_Discussion_Paper.pdf).
- 9 <http://theaustralian.news.com.au/story/0,20876,20523992-17281,00.html>.
- 10 Phillip Coorey, 'PM dumps new asylum law', *Sydney Morning Herald* online edition at smh.com.au, viewed 14/8/06.
- 11 Senator Amanda Vanstone, media release 11 May 2006, 'Minister seeks to strengthen border measures'; see also Sue Harris-Rimmer, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, Parliamentary Library Bills Digest No 138 2005-06.
- 12 See Harris-Rimmer, op.cit., pp 3-5.

- 13 Petro Georgiou MP, Second reading speech, Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, House of Representatives 9 August 2006, House Hansard, p. 40. Mr Georgiou described the Bill as 'the most profoundly disturbing piece of legislation I have encountered since becoming a Member of Parliament'. See also Senate Legal and Constitutional Affairs Committee report 13 June 2006 at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/migration\\_unauthorised\\_arrivals/report/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/migration_unauthorised_arrivals/report/index.htm)  
[http://www.pm.gov.au/news/media\\_releases/media\\_Release1905.html](http://www.pm.gov.au/news/media_releases/media_Release1905.html).
- 15 See Office of Access Card home page at [http://www.humanservices.gov.au/modules/resources/access\\_card/060615\\_taskforce\\_discussion\\_paper.pdf](http://www.humanservices.gov.au/modules/resources/access_card/060615_taskforce_discussion_paper.pdf).  
<http://www.humanservices.gov.au/media/releases/060524.htm>  
[http://www.humanservices.gov.au/modules/resources/access\\_card/060615\\_taskforce\\_discussion\\_paper.pdf](http://www.humanservices.gov.au/modules/resources/access_card/060615_taskforce_discussion_paper.pdf).
- 18 Annabel Stafford, 'Smartcard laws to act on privacy', *The Age*, 8/11/06, p.7. See Minister Hockey's speech to National Press Club at <http://www.joehockey.com/mediahub/speechDetail.aspx?prID=192>.
- 19 <http://www.efa.org.au/Issues/Privacy/accesscard.html#pmmr>.
- 20 Commonwealth Ombudsman, Queensland Ombudsman, New South Wales Ombudsman, 'Whistleblower protection laws need national revision: new issues paper', media release, 2 November 2006.
- 21 [2006] HCA 50.
- 22 Andra Jackson and Jewel Topsfield, 'Detainees await impact of visa ruling', *The Age* online edition, [theage.com.au](http://theage.com.au), viewed 10/11/06.
- 23 [2006] FCA 884.
- 24 [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2006/884.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/884.html).
- 25 [2006] NSWSC 530.
- 26 <http://www.aph.gov.au/library/pubs/bd/2006-07/07bd009.htm>.
- 27 [http://www.privacy.gov.au/news/06\\_13.html](http://www.privacy.gov.au/news/06_13.html).
- 28 [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2402&TABLE=EMS](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2402&TABLE=EMS).