

DEVELOPMENTS IN ADMINISTRATIVE LAW

*Peter Prince**

Government initiatives, inquiries, legislative and parliamentary developments

Key developments

New Ministry

On 24 January 2006 Prime Minister Howard announced changes to his Ministry and the Administrative Arrangements Order. The changes included two promotions into Cabinet, four new appointments to the outer Ministry and four new parliamentary secretary appointments¹.

AWB inquiry

By Letters Patent dated 10 November 2005, the Hon Terence Cole was appointed Commissioner to investigate whether Australian companies including AWB Limited (the former Australian Wheat Board) mentioned in the Final Report of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme (the Volcker Report) breached any Federal, State or Territory law. The Inquiry has the powers conferred by the *Royal Commissions Act 1902*. In light of evidence which emerged during the Inquiry, Commonwealth Attorney-General Philip Ruddock announced on 7 February 2006 that he had agreed to expand its terms of reference to cover BHP Billiton Limited, Tigris Petroleum Corporation Pty Ltd and related companies and persons².

Privacy review

The Attorney-General announced on 31 January 2006 that the Australian Law Reform Commission (ALRC) will review the *Privacy Act 1988*. Recent reports by the Privacy Commissioner and the Senate Legal and Constitutional Committee both recommended that a comprehensive review of the Privacy Act be undertaken. The review will examine to the extent to which the Privacy Act and related laws continue to provide an effective framework for the protection of privacy in Australia. The review is to be completed by 31 March 2006³.

ID cards

In a series of interviews in January and February 2006 the Attorney-General indicated that an inquiry into the costs and benefits of a National Identity Card would be held in the near future⁴.

Victoria: Human Rights Charter

The Attorney-General of Victoria, Rob Hulls, announced on 20 December 2005 that Victorians would get their own charter of human rights and responsibilities in 2007. Mr Hulls said Victoria would not be embracing a US style bill of rights. The Charter would be

* BA (Hons) M.Phil (USyd) M.Leg Studs, LLB(Hons) (ANU), Canberra-based government lawyer.

enshrined in legislation to commence on 1 January 2007, with a review likely after four years. As with the ACT Human Rights Act, courts would be able to make declarations that legislation was incompatible with the state's defined rights and freedoms. The declarations would be non-binding but the Attorney-General would be required to inform Parliament of them⁵.

Parliamentary Developments

Key legislation

Key legislation dealt with by the Commonwealth Parliament in the Spring 2005 and Autumn 2006 sittings included:

Anti-terrorism legislation, including:

- ***Anti-Terrorism Act 2005***. Assented: 3/11/05; Act No. 127, 2005. Amended the *Criminal Code Act 1995* to clarify that it is not necessary to identify a particular terrorist act to prove an offence. Also provides for a review by the Council of Australian Governments (COAG) of the operation of the legislation after 5 years.
- ***Anti-Terrorism Act (No. 2) 2005***. Assented: 14/12/05; Act No. 144, 2005. Amended several Acts to implement COAG agreed legislation (see *AIAL Forum* No 47). Provides for control orders over terrorist suspects for up to 12 months, allows suspects to be held in preventative detention for up to 14 days, bans organisations which incite terrorism, creates offences for urging hostility towards various groups and updates sedition offences.

Both Acts were the subject of considerable debate both in Parliament and the Australian community generally⁶.

New legislation

Key legislation listed for introduction and/or debate in the Autumn session 2006 (February-March 2006, 4 sitting weeks) is shown below. Commentary is largely taken from http://www.pmc.gov.au/parliamentary/docs/proposed_legislation.doc. Items marked with an asterisk are intended for passage during these sittings.

- **Australian Citizenship Bill 2005**

Restructures the 1948 Act and introduces a framework for the collection, use and storage of personal identifiers to increase the government's ability to accurately identify people seeking to become citizens; prohibits the Minister approving applications from those assessed to be direct or indirect risks to Australia's security

- **Law Enforcement Reform Bill**

Provides for the establishment, functions and powers of an Australian Commission for Law Enforcement Integrity, headed by a statutory Integrity Commissioner, as an independent body with special investigative powers to look into possible corruption in Australian Government law enforcement agencies and to recommend remedial measures, including prosecution, to the relevant authorities. Implement the government's response to the Fisher Review of Professional Standards in the Australian Federal Police.

- **Australian Human Rights Commission Legislation Bill**

Restructures and renames the Human Rights and Equal Opportunity Commission

- **Privacy Amendment Bill**

Ensures that, in the event of an emergency or a disaster, Australian Government agencies can exchange personal information with each other, private sector organisations, non-government organisations and the states and territories. Implements review recommendations

- **Telecommunications (Interception) Amendment Bill 2006**

See below under FOI, privacy and other information issues

- **Migration Amendment (Migration Zone) Bill**

Amends the *Migration Act 1958* to provide greater certainty in the definition of 'migration zone'; clarifies powers in relation to the detention of persons on board vessels; expands the definition of 'excised offshore place' to include certain islands and territories in Northern Australia; and specifies an 'excision time' for the places that are added to the definition of 'excised offshore place'.

- **Migration Amendment (Visa Integrity) Bill**

Amends the *Migration Act 1958* to strengthen provisions in relation to the integrity of the visa program and strengthen the provisions relating to the flow of information between the department and its clients

- **Migration Legislation Amendment (Border Integrity) Bill**

Amends the *Migration Act 1958* to strengthen provisions in relation to border integrity; and amends the *Customs Act 1901* to ensure that the same reporting obligations exist under both migration and customs legislation

- **Airspace Bill**

Creates a head of power for an Airspace Authority to take over the airspace management function currently performed by Airservices Australia and amends the *Air Services Act 1995* and the *Civil Aviation Act 1988*.

- **Therapeutic Goods Amendment (Repeal of Ministerial responsibility for approval of RU486) Bill 2005**

Amended the *Therapeutic Goods Act 1989* to make it possible to evaluate, register, list or import abortifacients (medicines intended to induce an abortion) such as RU486 (mifepristone) for use in Australia without the approval of the Minister for Health and Ageing. The Commonwealth Therapeutic Goods Administration will determine whether such drugs can be prescribed. The Bill was sponsored by Senators Judith Troeth (Liberal), Fiona Nash (National), Lyn Allison (Democrat) and Claire Moore (ALP). All parties allowed a 'conscience vote' on this issue in the Federal parliament. The Bill passed the Senate on 9 February 2006 and the House of Representatives on 16 February 2006⁷.

An amendment proposed by Andrew Laming (Liberal Qld) to allow the TGA to prescribe RU486 subject to disallowance by Parliament was defeated. A further amendment proposed by Jackie Kelly (Liberal NSW) retaining ministerial approval but giving Parliament the right to disallow a decision was also defeated.

Key Parliamentary Committee reports

Key Parliamentary reports tabled during the Spring 2005 and Autumn 2006 sessions included:

- **Joint Standing Committee on Migration:** *Review of Audit Report No. 1 2005-2006: Management of Detention Centre Contracts - Part B*
- **Senate Legal and Constitutional Affairs Committee:** *Inquiry into the administration and operation of the Migration Act 1958*. Interim report tabled 21 December 2005; final report due 27 February 2006.
- **Senate Foreign Affairs, Defence and Trade Committee:** *The removal, search for and discovery of Ms Vivian Solon*. Final Report tabled 8 December 2005⁸.

Ombudsman

Inquiry into deportation on character grounds

The Commonwealth Ombudsman has released a report into Administration of s 501 of the *Migration Act 1958* as it applies to long-term residents. The report highlights many deficiencies in the content and application of policies and procedures for cancelling the visas of long-term residents under s. 501 of the Migration Act (failure to pass character test). The report recommends that the Department of Immigration:

- review all cases where the visa of a long-term Australian resident has been cancelled under s. 501 and he or she is still in immigration detention or awaiting removal from Australia
- in the case of any person who may have held an 'absorbed person visa' (see discussion of Nystrom below), advise the Ombudsman whether the person was accorded procedural fairness and what action the Department intends to take
- develop a code of procedural fairness to guide the administration of s. 501
- review the application of s. 501 and other relevant provisions of the Migration Act and advise whether s. 501 should be applied to long-term permanent residents⁹.

Telecommunications Industry Ombudsman

The Australian Communications and Media Authority is investigating more than a dozen voice over internet protocol (VoIP) providers who have yet to register for mandatory Telecommunications Industry Ombudsman Scheme¹⁰.

The Courts

Minister's failure to consider whether deportee had 'absorbed person visa'

*Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs*¹¹: Born in Sweden in 1973 while his parents were on holiday from Australia, Mr Nystrom arrived in this country when he was 27 days old. He has never left Australia. He also did not formally become an Australian citizen. After a number of criminal convictions, in 2004 the Minister purported to cancel a transitional (permanent) visa held by Mr Nystrom before deporting him.

In a 2:1 decision in the Full Federal Court, Moore and Gyles JJ said this was 'yet another disturbing application' of s. 501 of the Migration Act, suggesting that 'administration of this aspect of the Act may have lost its way.' The majority held it was jurisdictional error for the Minister not to consider the fact that the appellant was within the category of those deemed under the Migration Act to hold an 'absorbed person visa'.

While Emmett J disagreed and noted that 'the material before the Court indicates that the appellant is a thoroughly unpleasant man having been convicted of serious and odious crimes', he shared 'the disquiet expressed by their Honours concerning the circumstances in which a man who has spent all of his life in Australia and who has no knowledge of the Swedish language will be removed to Sweden and banished from Australia because of what must be characterised as an accident of history and an oversight on the part of his parents'.

On 16 December 2005, the High Court granted special leave for the Minister to appeal (see *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (M95/2005)).

Lack of procedural fairness where RRT did not inform appellant of adverse letter

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs.¹² VEAL and his wife, an Eritrean couple, were refused protection visas in 2001. They sought review by the Refugee Review Tribunal. The Department then received a letter which included the sender's name and address and which said that VEAL had admitted being accused of killing a prominent political figure in Eritrea and that VEAL supported and worked for the Eritrean government.

The Department forwarded the letter to the RRT, which upheld the refusal to grant VEAL a protection visa, without informing him of the existence or contents of the letter. The High Court held unanimously held that procedural fairness required the RRT to inform VEAL of the existence of the letter and the substance (although not the detail) of its contents before affirming the refusal to grant a visa.

The High Court held that the application of principles of procedural fairness depends on the particular circumstances of each case, so there are no absolute rules about disclosure of information from an informer or disclosure of the informer's identity to an interested person such as VEAL. In this case, procedural fairness at least required that VEAL know the substance of what was said about him in the letter.

Lack of procedural fairness where prolonged delay in determining visa application

*Nais, Nait and Naiu v Minister for Immigration and Multicultural and Indigenous Affairs and Refugee Review Tribunal*¹³. A husband, wife and daughter from Bangladesh were refused protection visas in May 1997. They applied to the RRT for review and after giving oral evidence at a hearing in May 1998, they did not hear from the RRT for three and a half years. In December 2001 they attended another hearing and in January 2003 the RRT

refused their application, noted that the husband made admissions that certain claims made by him and his wife were fabricated suggesting this indicated collusion.

By a 4:2 majority the High Court held that the RRT's decision, which centred on the credibility of the asylum seekers, was not made fairly. The procedure was flawed in a manner likely to affect the RRT's capacity to make a proper assessment of the family's sincerity and reliability. When the RRT, without explanation, draws out its procedures to such an extent that its capacity to discharge its statutory obligations is likely to be materially diminished, then a case of procedural unfairness arises.

Reasons for rejecting challenge to Work Choices advertising campaign

On 21 October 2005 the High Court published its reasons for rejecting a challenge to Government advertising promoting proposed changes to industrial relations laws. In *Combet and anor v Commonwealth of Australia*¹⁴ Mr Combet, secretary of the ACTU, and Nicola Roxon, the shadow Attorney-General, contended that expenditure of public money on the advertisements was unlawful. Section 83 of the Constitution provides that no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law. Schedule 1 of the *Appropriation Act (No 1) 2005-2006* (Cth) relating to the Department of Employment and Workplace Relations (DEWR) portfolio refers to the outcome of *Higher productivity, higher pay workplaces*. Combet and Roxon argued that the Parliament had not, by this item in the Appropriation Act, appropriated money for the advertising campaign.

The Court, by a 5-2 majority, held that it had not been shown that the drawings were not covered by the Appropriation Act. Section 7(2) of the Appropriation Act restricts the application of DEWR funding: it may only be applied 'for the departmental expenditure' of the Department. But the Act imposes no narrower restriction on the scope of the expenditure. Therefore it does not matter whether any part of the DEWR funding is spent otherwise than on activities leading to higher productivity or higher pay workplaces (or activities forming part of either of the other two outcomes), so long as it is 'departmental expenditure'. The plaintiffs did not contend that expenditure on advertising the reform package was not 'departmental expenditure'.

Administrative Review and Tribunals

Refusal to waive processing fee in FOI matter

*Re Australian Privacy Foundation and Attorney General's Department*¹⁵. The Australian Privacy Foundation (APF) sought a waiver of the processing fee for a request to the Attorney-General's Department under the *Freedom of Information Act 1982* for documents relating to the Anti-Money Laundering Reform process being undertaken by the Department.

Section 29(5) of the FOI Act states that in considering whether to reduce or not impose a charge for a request for information, the agency or Minister must consider whether the charge would cause financial hardship to the applicant and whether access to the documents in question is in the general public interest or the interest of a substantial section of the public.

The Administrative Appeals Tribunal noted that while its income was modest, the Australian Privacy Foundation had assets of more than \$7,000. So a processing charge of \$160 would not cause it financial hardship.

On the public interest issue, the Department argued that compared to s 36 of the FOI Act, there was a higher 'bar' under s 29(5) because this relates to the discretion to waive a charge, and Government policy has always been that such charges should be imposed

wherever possible. Release of the documents not only had to be in the interests of 'a significant number of people, a large class of persons', but the Tribunal had to be satisfied that the documents could and would be brought to the notice of public. In contrast, the APF argued that refusal to waive a fee for a not for profit organisation whose objects were consistent with the implied constitutional freedom of communication on matters of government and politics is 'both a burden and neither reasonable nor appropriate in the circumstances'. Given its finding on financial hardship, the Tribunal held that it did not need to decide this question.

Freedom of Information, privacy and other information issues

Landmark freedom of information case

*McKinnon v Secretary Department of the Treasury*¹⁶. On 3 February 2006 the High Court granted leave to appeal in a landmark FOI case that will test the ability of government ministers to issue 'conclusive certificates' preventing the release of official documents on public interest grounds. The challenge has been brought by *The Australian's* freedom of information editor Michael McKinnon after the Treasurer Peter Costello issued such a certificate in 2003 to block release of documents on income tax and the first home buyers scheme.

Justice Kirby observed that 'they do not leap out as ...very secret sort of documents', noting that 'what is legally significant is whether the correct test has been applied' under s 58(5) of the FOI Act by the Administrative Appeals Tribunal. In this matter the AAT agreed that there were reasonable grounds for the claim that the disclosure of the documents would be contrary to the public interest. Justice Kirby stated that there is 'a delicate balance that Parliament has created in the Act which is protective of that small zone to which the Act will not penetrate, but that small zone, in an accountable democracy, is an important matter to define correctly. That is why it does seem to be a matter which this Court should examine.'¹⁷

New telecommunications interception regime

On 16 February 2006 the Attorney-General Philip Ruddock what he described as 'the most comprehensive amendments to the *Telecommunications (Interception) Act 1979* since its inception. The amendments implement recommendations from the *Report of the Review of the Regulation of Access to Communications* by Anthony Blunn AO. According to Mr Ruddock, the Bill represents 'a fundamental shift in the interception regime to extend privacy safeguards to all stages of electronic communications ...They also assist our law enforcement and security agencies to keep pace with increasingly sophisticated methods of avoiding detection'. The official media release stated that the amendments will¹⁸:

- introduce a new stored communications regime which prohibits access to stored communications held by a telecommunications carrier unless a warrant is issued
- implement the Blunn recommendation that law enforcement agencies be able to intercept the communications of a person who will communicate with a suspect in limited and controlled circumstances, and
- permit a warrant to be sought allowing the interception of a particular telecommunications device (rather than service).

Privacy Commissioner revokes General Insurance Information Privacy Code

Commonwealth Privacy Commissioner Karen Curtis has signed an instrument which will revoke the General Insurance Information Privacy Code from 30 April 2006. Under the Privacy Act organisations can develop their own privacy codes, which when approved, replace compliance with the National Privacy Principles (NPPs). The General Insurance Information Privacy Code was approved on 17 April 2002. However a 2005 review concluded that given the cost, the low number of privacy complaints, and the degree of industry take-up of the Code, it could not be said that there was value in the continued operation of the Code. Organisations that had adopted the Insurance Industry Privacy Code will now need to comply with the NPPs¹⁹.

Public administration

Shergold sets standard for Ministers resignation

The Secretary of the Department of Prime Minister and Cabinet, Dr Peter Shergold, laid down guidelines for resignation of government ministers in an address to the National Press Club on 15 February 2006.

Dr Shergold said that 'if the failure is a failure of ministerial direction ... or if a minister had their attention drawn to matters and then took no action, then it seems to me that a minister would be clearly responsible for the failures within their department'.

Dr Shergold promised that as with the Palmer report into the Department of Immigration, 'if something comes out of the Cole Commission which suggests that there are failures within the Public Service, then you can have my absolute commitment that we will move to address them with the same vigour'²⁰.

Other developments

New Human Rights Commissioner

On 15 December 2005 the Attorney-General Phillip Ruddock announced the appointment of Mr Graeme Inness as the new Human Rights Commissioner and Acting Disability Discrimination Commissioner. The appointment of Mr Inness for a five year period follows the expiry of Mr Sev Ozdowski's term as Human Rights Commissioner on 7 December 2005. Mr Inness was previously Deputy Disability Discrimination Commissioner²¹.

Blair gets ID card proposal through House of Commons

The UK Government has introduced revised legislation for an ID card scheme that would store biometric information such as fingerprint, iris and face recognition data. The proposal was first approved by the House of Commons in October 2005, but rejected by the House of Lords in January 2006. The Government argues that ID cards will help combat identity theft, abuse of state benefits, illegal immigration, organised crime and terrorism. Subsequently, on 13 February 2006, the House of Commons passed a compromise scheme, under which the cards will not be compulsory for everyone. However from 2008 anyone applying for or renewing a passport will have to pay for an identity card as well. An amendment requiring the scheme to be entirely voluntary was rejected. The legislation will now be returned to the House of Lords²².

Review by the UK Law Commission on the desirability of post-legislative scrutiny

The UK Law Commission has stated that ‘As the body charged with keeping all the law under review we are concerned both at the volume of legislation that is passed by Parliament and whether it accurately gives effect to the underlying policy aims.’ It noted that ‘there is no systematic practice of reviewing laws after they have been brought into force to ensure they are working as intended’²³. The consultation paper examines the potential for developing a more formal system of reviewing laws (post-legislative scrutiny) and encouraging better regulation.

Endnotes

- 1 See media release at http://www.pm.gov.au/news/media_releases/media_Release1752.html. See full ministerial list at http://www.dpmc.gov.au/parliamentary/ministry_list.cfm.
 - 2 See official website with full terms of reference, transcripts, submissions and other material at <http://www.ag.gov.au/agd/www/UNoilforfoodinquiry.nsf>.
 - 3 See media release including terms of reference at <http://www.law.gov.au/ag>.
 - 4 See transcripts at http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview_Transcripts. See parliamentary library e-brief at <http://www.aph.gov.au/library/INTGUIDE/LAW/IdentityCards.htm>.
 - 5 See media release at http://www.dpc.vic.gov.au/domino/Web_Notes/newmedia.nsf/0/a4ec80ecaab0073eca2570dd007e7448?OpenDocument
 - 6 The Commonwealth Parliamentary Library maintains a comprehensive guide to developments on terrorism law in Australia. See the parliamentary library's terrorism law website at <http://www.aph.gov.au/library/intguide/law/terrorism.htm>. This site includes links to the Prime Minister's announcement about a specific terrorist threat requiring the urgent passing of the *Anti-Terrorism Act 2005*, early drafts of the No. 2 Act made public by the ACT Chief Minister and Boe Lawyers, e-briefs and bills digests prepared by the library analysing both Acts, as well as Parliamentary Committee reports and key articles.
 - 7 See report tabled on 8 February 2006 by Senate Standing Committee on Community Affairs at http://www.aph.gov.au/senate/committee/clac_ctte/ru486/report/report.pdf.
- See bills digest at <http://www.aph.gov.au/library/pubs/bd/2005-06/06bd096.pdf> and parliamentary library research note at <http://www.aph.gov.au/library/pubs/rn/2005-06/06rn19.htm>.
- 8 For terms of reference, reports and links to submissions, see http://www.aph.gov.au/committee/inquiries_comm.htm.
 - 9 See report at www.comb.au
 - 10 See Dorothy Kennedy, "Regulator reviews status of VoIP providers", *Australian Financial Review*, 3.1.06, p. 12.
 - 11 [2005] FCAFC 121 (21 July 2005)
 - 12 [2005] HCA 72, 6 December 2005
 - 13 [2005] HCA 77, 14 December 2005
 - 14 [2005] HCA 61
 - 15 [2005] AATA 1204, 6 December 2005
 - 16 [2006] HCATrans 13
 - 17 see Elizabeth Colman, "High Court to hear test case on FOI", *Weekend Australian* 4.2.06, p. 2.
 - 18 See media release at http://www.ag.gov.au/agd/WWW/agdhome.nsf/Page/Latest_News
See Brendan Nicholson, "Proposal to tap innocent people unwarranted", *The Age*, 16.2.06 at <http://www.theage.com.au/news/national/>
 - 19 See media release at http://www.privacy.gov.au/news/media/06_02.html
 - 20 See Andrew Fraser, "Shergold sets out guidelines on ministerial responsibility", *Canberra Times*, 16.02.06, p. 2.
 - 21 See media release at http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases2005
 - 22 Source: Andrew Gray, "Blair wins crucial ID card vote", *The Age*, 15 February 2006, p. 16. For further information, see links to UK material in parliamentary library e-brief at <http://www.aph.gov.au/library/INTGUIDE/LAW/IdentityCards.htm>
 - 23 See consultation paper and press release at http://www.lawcom.gov.uk/post_leg_scrutiny.htm