REMOVAL FROM OFFICE AND SECTION 33 OF THE *ACTS INTERPRETATION ACT 1901*

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The recent decision of the Federal Court in *Nicholson-Brown v Jennings*[1] was concerned with the suspension and subsequent removal from office of persons who held statutory appointments under a Commonwealth Act. The dismissal of a challenge to this action pointed to the significance of s 33 of the *Acts Interpretation Act 1901* (Cth) (AIA) to decisions relating to holders of public offices.

Acts Interpretation Act s 33

The relevant provisions of s 33 read:

> (1) Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.
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> …
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> (3) Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.
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> …
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> (4) Where an Act confers upon any person or authority a power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including a power to appoint a person to act in the office or place until:
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> (a) a person is appointed to the office or place; or
> (b) the expiration of 12 months after the office or place was created or became vacant, as the case requires:
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> whichever first happens, and as also including a power to remove or suspend any person appointed, and to appoint another person temporarily in the place of any person so suspended or in place of any sick or absent holder of such office or place:
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> Provided that where the power of such person or authority to make any such appointment is only exercisable upon the recommendation or subject to the approval or consent of some other person or authority, such power to make an appointment to act in an office or place or such power of removal shall, unless the contrary intention appears, only be exercisable upon the recommendation or subject to the approval or consent of such other person or authority.
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> (4A) In any Act, ***appoint*** includes re-appoint[2].

The effect of this section was crucial to the outcome of the decision in *Nicholson-Brown v Jennings* but it is also of general importance when considering whether action can be taken to suspend or remove a person from any office to which they have been appointed under a statutory power.

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Section 33(1)

Section 33(1) is of general significance to public service decision-makers as it negates the proposition that a power, once exercised, cannot be invoked again. The section indicates that a decision may be revisited unless there is a contrary intention evidenced by the legislation under which the decision has been made. This issue will have to be resolved by having regard to the nature of the decision and the legislation under which it is made. This whole issue including the scope of ss 33(1) and (3) was comprehensively examined by Robert Orr and Robyn Briese in 'Don't think twice? Can administrative decision makers change their mind?'[3] It is not proposed to revisit this general discussion.

In the present context, it is worth noting that Gray J at first instance in *Clark v Vanstone*[4] held that s 33(1) permitted a second suspension to be imposed on Mr Clark under an express power to suspend a Commissioner from office provided by s 40 of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). This ruling was not challenged on the subsequent appeal[5]. The express power to suspend in s 40 meant that it was not necessary to invoke the general power in s 33(4). However, the ruling indicates that it would seem to be possible to exercise that general power more than once if the circumstances required.

Section 33(3)

Section 33(3) relates to the making, etc, of an 'instrument'. For a period after the decision of the Federal Court in *Australian Capital Equity v Beale*[6] the operation of the section was confined to instruments that were 'legislative' in character. This was a significant limitation on the value of the section for public officials who had been accustomed to rely upon it to justify the revisiting of a wider range of decisions than those classifiable as 'legislative'.

The view taken in the *Australian Capital Equity* case was re-examined in detail and rejected by Emmett J of the Federal Court in *Heslehurst v New Zealand*[7] and by the Victorian Court of Appeal in *R v Ng*[8]. The view that now holds sway is that any instrument made under an Act may be revoked, amended or varied, regardless of its subject matter[9]. Accordingly, if an appointment were effected by means of an instrument, it would be possible to revoke that appointment pursuant to the power in s 33(3): provided, of course, that the legislation permitting the appointment by instrument did not evidence a contrary intention.

However, it is not usual for a public appointment to be made by an instrument. Some high level offices will be. However, appointments to most public offices, while made in writing, will not be done by way of a formal instrument.

Wilcox J in *Laurence v Chief of Navy*[10] made the important point that just because an appointment is made in writing it does not mean that it has been made by an 'instrument'. He said:

> I see a conceptual distinction between a power to issue an instrument, which itself has an operative legal effect, and a power to make a statutory decision which is immediately operative, but in the interests of good administration, is thereafter recorded in writing….It may be assumed that almost every exercise of statutory power to make a decision will be recorded in writing. Accordingly on [counsel's] argument, s 33(3) would apply to almost every statutory decision. It seems unlikely that parliament would have intended, in an indirect way, to make almost every statutory discretion subject to the possibility of revocation or amendment at any time.

In that case, Wilcox J held that the respondent could not revoke an approval that had been given for the applicant to resign from the Defence Force. The approval was in writing, but it was not an instrument and s 33(3) did not apply in relation to it.

From this it can be said that, except in those cases where the governing legislation requires an appointment to be made by an instrument, s 33(3) will not allow an appointment to be revisited. If this is to occur, it will have to be in reliance upon s 33(4).

It is against this background that *Nicholson-Brown v Jennings* may usefully be considered.

Nicholson-Brown v Jennings

The case involved an application to review decisions to suspend and then dismiss the two applicants from their positions as inspectors under s 21R of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the Commonwealth Act). The decisions had been made by the respondent, the Victorian Minister for Aboriginal Affairs, acting as a delegate of the Commonwealth Minister.

The Commonwealth Act required consultation with the relevant aboriginal community before an appointment as inspector was made. This consultation had occurred prior to the appointment of the applicants. The position of inspector was not remunerated. An inspector could make an 'emergency declaration' which had certain consequences under the Act.

It was decided that the management of aboriginal heritage sites should in future be dealt with under Victorian legislation and Bills were introduced into the Commonwealth and Victorian Parliaments to give effect to this decision. The qualifications for appointment as an inspector were significantly different in the proposed Victorian legislation than that which had existed under the Commonwealth Act at the time of the appointment of the applicants.

The respondent Minister wrote to all inspectors appointed under the Commonwealth Act who would not be qualified for appointment under the proposed Victorian legislation indicating that he was considering removing them from office 'in order to smooth the transition to the new arrangements'. The letter invited the inspectors to indicate why they should not be removed from office. It also indicated that, pending a final decision on the issue of dismissal, the appointments of the inspectors were suspended.

The applicants' solicitors responded to the respondent's letter and opposed their suspension and provided arguments why they should not be dismissed. The respondent said that he took their representations into account but proceeded to dismiss them.

The authority for the respondent's action was said to lie in the provisions of s 33(4) of the AIA. The applicants claimed that the requirements of s 21R of the Commonwealth Act and of s 33(4) had not been satisfied as the respondent had not consulted with the aboriginal community before making his decision. It was also claimed that s 33(3) of the AIA limited the operation of s 33(4).

Middleton J dismissed the applications. He said that the power of the respondent to appoint an inspector under s 21R of the Act was not contingent upon the recommendation, or subject to the approval or consent, of a local Aboriginal community, as referred to in the proviso to s 33(4). The concept of consultation was not the same as acting upon a recommendation, approval or consent and therefore the proviso in s 33(4) was not activated. Section 33(4) did no more than expand the power to appoint to include the power to remove (or suspend) an inspector. The proviso to s 33(4) was not applicable to the exercise of the power in the section in circumstances where there was no statutory obligation to act upon a recommendation, etc, before making an appointment.

Middleton J also rejected an argument put by the applicants that s 33(4) could be invoked either to suspend or remove an appointee, but not both. The section could be called in aid of each action and could be used sequentially in relation to the one appointment.

His Honour went on to observe that the power to make an appointment under s 21R did not require the making of an instrument, even though the appointment had to be 'in writing', and s 33(3) accordingly had no application. The observations of Wilcox J in *Laurence's* case above were cited. However, even if this conclusion was not correct, Middleton J said that s 33(3) did not impose a constraint on the exercise of the power under s 33(4) additional to that contained in the proviso to that section.

It should be noted that s 33(4) is not limited to written appointments. Exceptional though it will be, the section is capable of application to an oral appointment.

Contrary intention

Like all provisions of the AIA, s 33(4) applies 'unless the contrary intention appears'. The nature of the activity may be such that it is apparent that a decision cannot be undone: *Laurence's* case, above; *Minister for Immigration and Multicultural Affairs v Watson*[11]. The legislation under which the appointment was made or complementary legislation relating, for example, to public service conditions of employment, may create a contrary intention: see *Director-General of Education v Suttling*[12] . However, compare *Geddes v McGrath*[13] and *Thomson v Minister for Education*[14] in both of which cases the view was taken that the legislation under which the appointments were made did not intend to limit the power to remove the appointee from office.

(The decision in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[15] raises an interesting point in a different context. There Gaudron J said that the fact that the Minister could invoke s 33(4) of the AIA to dismiss an appointee to a public office meant that a judge could not be appointed to the position, it being incompatible for the holder of a judicial office to hold a position at the discretion of the Executive.)

Procedure for dismissal from office

Section 33(4) of the AIA does not affect any legislative or common law requirements relating to the manner in which a person's appointment may be determined. So procedural fairness requirements must be met[16] and the decision must be reached without breach of administrative law grounds of review[17]. If a procedure is set out in legislation that must be complied with before a person is removed from office, the section does not limit that requirement.

Summary of s 33(4)

The following propositions relating to the operation of s 33(4) may be garnered from this discussion:

- The section operates independently from ss 33(1) and (3).
- It applies to all statutory appointments, whether made by instrument or otherwise and whether in writing or not.
- It applies to suspension and removal from office and can be invoked in relation to the one employment.
- The power under the section may be exercised more than once in relation to the one appointment.
- The proviso to the operation of the section is applicable only to the matters to which it refers, namely appointments made on the recommendation, or requiring the approval or consent, of another person or authority.

- The operation of the section may be displaced by evidence of a 'contrary intention'.
- The section does not affect any requirements imposed by statute or the common law relating to the way in which a removal from office must occur.

Endnotes

1 [2007] FCA 634.
2 The equivalent provisions in State and Territory Interpretation Acts are: ACT: s 208; NSW: s 47; NT: 44; Qld: s 25; SA: s 36; Tas: s 21; Vic: s 41; WA: s 52. All these sections, except those of NSW, Qld and SA, have a provision equivalent to the proviso to s 33(4) of the Commonwealth Act.
3 (2002) 35 *AIAL Forum* 11.
4 (2004) 211 ALR 412.
5 (2005) 224 ALR 666.
6 (1993) 114 ALR 50.
7 (2002) 189 ALR 99.
8 (2002) 5 VR 257.
9 See, for example, *Glaxosmithkline Australia Pty Ltd v Anderson* (2003) 130 FCR 222; *X v Australian Crime Commission* (2004) 139 FCR 413; *Nicholson-Brown v Jennings*, above, n 1. Much reliance was placed in these cases and in those referred to in the text to observations of Brennan J when President of the Administrative Appeals Tribunal in *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs* (1978) 1 ALD 167 at 171-2.
10 (2004) 139 FCR 555 at 558.
11 (2005) 88 ALD 115.
12 (1987) 162 CLR 427.
13 (1933) 50 CLR 520.
14 (1993) 29 ALD 525.
15 (1996) 138 ALR 220 at 232.
16 *Barratt v Howard* (2000) 170 ALR 529.
17 *Nicholson-Brown v Jennings*, above n 1.