RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

A special issue on integrity in administrative decision making

In 2004 Chief Justice Spigelman delivered the AIAL National Lecture Series on the fourth branch of government, the integrity branch. The 2012 National Administrative Law Conference, held in July, revisited this subject. This issue of the AIAL Forum is devoted to papers from this Conference – more will be published in the next issue.

Telstra breaches Privacy Act

The Australian Privacy Commissioner, Timothy Pilgrim, has found Telstra in breach of the Privacy Act after the details of 734,000 Telstra customers were made available online in December 2011.

The investigation's findings were released on the same day that the Australian Communications and Media Authority also found that Telstra had breached the Telecommunications Consumer Protections Code (TCP Code) (see below).

A database containing the details of customers who had a range of Telstra services was made accessible via a link on the internet. The database contained information such as customer names, phone numbers, order numbers and, in a very limited number of cases, dates of birth, drivers licence numbers and credit card numbers.

The Commissioner's report found that a number of internal errors occurred in the lead up to the incident in December 2011.

'I found the privacy breach occurred because of a series of errors revealing significant weaknesses in Telstra's reporting, monitoring and accountability systems', Mr Pilgrim said.

'Of particular concern is that a number of Telstra staff knew about the security issues with the database but did not raise them with management. This incident could have been easily avoided if appropriate planning was undertaken.

'The failure by Telstra to correctly categorise the database project in its design phase as one involving customer data meant that the database did not receive the appropriate level of protection from the very beginning'.

The Commissioner found Telstra to be in breach of two National Privacy Principles under the *Privacy Act 1988* (Cth):

- National Privacy Principle 2.1 (Use and disclosure)
- National Privacy Principle 4.1 (Data security)

Mr Pilgrim warned businesses of the importance of conducting a Privacy Impact Assessment (PIA) when commencing new projects.

'Build your privacy in at the beginning, don't bolt it on as an afterthought. All businesses should conduct a PIA to make sure that potential privacy risks are considered at the start of any project and that risk mitigation strategies are put in place'.

Telstra has committed to a remediation project to introduce significant measures to protect the security of the personal information it holds and prevent unauthorised access and disclosure in the future. The Commissioner closed the investigation after reviewing the remediation plans Telstra has in place.

In ceasing his investigation into the matter, the Commissioner asked Telstra to provide him with a report on the progress of the remediation project by October 2012. He also asked Telstra to provide to him with a report on the completion of the remediation project by April 2013.

'The Privacy Act does not give me the power to impose any penalties or seek enforceable undertakings from organisations I have investigated on my own initiative. However, the privacy law reforms that are currently before Parliament will provide me with additional powers and remedies when conducting such investigations.'

The full investigation report can be accessed at:
http://www.oaic.gov.au/publications/reports.html#omi_reports
http://www.oaic.gov.au/news/media_releases/media_release_120629_telstra_breaches_privacy_act.html

ACMA finds Telstra in breach of TCP Code

Telstra breached its customer privacy obligations when personal information about 734,000 of its customers was made accessible online during 2011.

On 9 December 2011, Telstra advised the Australian Communications and Media Authority (ACMA) that the names and, in some cases, addresses of up to 734,000 Telstra customers had been accessible via a link available on the internet. Usernames and passwords of up to 41,000 of these Telstra customers had also been accessible.

'Under clause 6.8.1 of the Telecommunications Consumer Protections Code (TCP Code) a Carriage Service Provider must protect the privacy of each customer's billing and related personal information,' said Acting ACMA Chairman, Richard Bean. Mr Bean added that:

'We are most concerned about the length of time–more than eight months–during which a significant number of Telstra customers' personal information was publicly available and accessible.'

'Clearly there were gaps in Telstra's processes to identify and act on the matter prior to media reports of the disclosure.'

Telstra has taken steps to remedy its processes and the ACMA is considering those steps and its formal enforcement response.

Where the ACMA finds a TCP Code breach, it can issue the service provider involved with a direction to comply with the code or it can issue a formal warning. However, it cannot fine or otherwise penalise the provider.

http://www.acma.gov.au/WEB/STANDARD/233693/pc=PC_410412

Privacy protections now in place for the new eHealth system

Laws establishing the new eHealth system include a new role for the Office of the Australian Information Commissioner (OAIC) as the system's independent privacy regulator.

The Australian Privacy Commissioner, Timothy Pilgrim, welcomed the extension of his role to cover the new eHealth system and reminded Australians to make informed decisions about their privacy.

'The eHealth system is an important initiative aimed at improving the delivery of health services in Australia. I encourage individuals to read the terms and conditions of the system carefully.'

'You are in control, so make sure you understand how your personal and health information will be collected, used and disclosed. You can decide which healthcare providers can see your record and what information they can access. Have a conversation with your healthcare provider about what will be uploaded and accessed from your eHealth record,' Mr Pilgrim said.

The Privacy Commissioner also reminded Healthcare providers participating in the eHealth record system that they need to take steps to understand their obligations under the eHealth laws. These laws impose new obligations in addition to the existing obligations under the Commonwealth *Privacy Act 1988*.

'Healthcare providers' obligations include not collecting more information from a patient's eHealth record than is necessary, and making sure their staff are trained in how to handle eHealth records correctly,' Mr Pilgrim warned.

The Commissioner also encouraged people to exercise their privacy rights.

'If you think that information in your eHealth record has been mishandled you can make a complaint. I now have the power to seek civil penalties and accept enforceable undertakings from health providers who don't protect this information,' Mr Pilgrim said.

http://www.oaic.gov.au/news/media_releases/media_release_120701_ehealth_records_launch.html

Government fails on children's rights

Australia's treatment of suspected people smugglers, who said that they were children, has breached international human rights law and raised serious questions about the resilience of our criminal justice system, according to Australian Human Rights Commission President Catherine Branson QC.

Ms Branson has released '*An age of uncertainty',* the report of her inquiry into the treatment of suspected Indonesian people smugglers, who said that they were children. In releasing the report, Ms Branson said that between late 2008 and late 2011, Australian authorities apparently gave little weight to the rights of these young Indonesians.

'The events outlined in this report reveal that, between 2008 and 2011, each of the Australian Federal Police, the Office of the Commonwealth Director of Public Prosecutions and the Attorney-General's Department engaged in acts and practices that led to contraventions of fundamental rights, not just rights recognised under international human rights law but in some cases rights also recognised at common law, such as the right to a fair trial,' Ms Branson said.

'It seems likely that some of those acts and practices are best understood in the context of heavy workloads, difficulties of investigation and limited resources.

'Others, however, seem best explained by insufficient resilience in the face of political and public pressure to "take people smuggling seriously"; a pressure which seems to have contributed to a high level of scepticism about statements made by young crew on the boats carrying asylum seekers to Australia that they were under the age of 18 years.'

Ms Branson said the authorities involved failed to question practices and procedures that led to young Indonesians, who are now known to have been children or to have been highly likely to have been children, being held in detention in Australia for long periods of time, in many cases in adult correctional facilities.

She said the Australian Federal Police and the Commonwealth Director of Public Prosecutions (CDPP) continued to rely on wrist x-ray analysis as evidence of age despite increasing evidence indicating that the process was uninformative as to whether a young person was over the age of 18 years. Wrist x-ray analysis continued to be used for age assessment purposes despite the fact that the Royal Australian and New Zealand College of Radiologists, the Australian and New Zealand Society for Paediatric Radiology, the Australasian Paediatric Endocrine Group, and the Division of Paediatrics, Royal Australasian College of Physicians advised that the technique was unreliable and untrustworthy.

'The Office of the CDPP also failed to identify that it was under a duty to examine whether it could continue to maintain confidence in the integrity of the evidence being given by the radiologist most commonly engaged by the Commonwealth as an expert witness, and under an obligation to disclose to the defence the material in its possession that tended to undermine his evidence,' Ms Branson said.

She said the federal Attorney-General's Department failed to review the contemporary literature which critically examined the technique, failed to seek independent expert advice and failed to provide informed and frank policy advice to the Attorney General–including advice concerning the risk that reliance on the technique had led and would continue to lead to children wrongly being identified as adults.

'The dogged reliance on wrist x-ray analysis, together with inadequate reliance on other age assessment processes, resulted in the prolonged detention, sometimes in adult correctional facilities, of young Indonesians who it is now accepted were, or were likely to have been, children at the time of their apprehension.'

Ms Branson said she hoped that her Inquiry would also lead to 'mature' reflection on the strengths and weaknesses of the criminal justice system more generally.

'The Inquiry has revealed that this system may be insufficiently robust to ensure that the human rights of everyone suspected of a criminal offence are respected and protected,' she said.

'To this end, I urge all of the agencies involved to give consideration to how the human rights of this cohort of young Indonesians came to be breached in the ways outlined in this report.'

The report makes a number of recommendations to assist in creating a lasting environment in which the rights of young Indonesians suspected of people smuggling are respected and protected in every interaction they have with Australian authorities. Key among these is the recommendation that the *Crimes Act* be amended so that wrist x-ray analysis can no longer be used as evidence that a person is over the age of 18 years.

'Careful consideration should also be given to the steps that need to be taken to ensure that in the future Australia does respect the human rights of all who comes into contact with our system of criminal justice,' Ms Branson said.

The report is available online at http://www.humanrights.gov.au/ageassessment/report/ http://www.humanrights.gov.au/about/media/media_releases/2012/57_12.html

President reports on *Cherkupalli v Commonwealth of Australia*

President of the Australian Human Rights Commission, Catherine Branson QC, has found that the Commonwealth arbitrarily deprived Mr Prashant Cherkupalli of his liberty for 509 days from 26 November 2004 to 19 April 2006.

Ms Branson found that in so doing the Commonwealth had breached Mr Cherkupalli's human right not to be subject to arbitrary detention in article 9(1) of the International Covenant on Civil and Political Rights (ICCPR).

Mr Cherkupalli is an Indian national who came to Australia in July 2003 to undertake a Master of Computer Studies degree. At this time, successful completion of this course of study would have qualified him for a permanent Australian visa.

His initial student visa gave him a limited right to work but, after this expired on 13 August 2004, and pending the processing of his application for a further student visa, he was granted a bridging visa which precluded him from working.

On 26 November 2004, Mr Cherkupalli was found working at Michel's Patisserie in Chester Hill in breach of the no work condition of his bridging visa. He was detained and taken to Villawood Immigration Detention Centre (VIDC) where his bridging visa was cancelled.

He was detained in the VIDC for 17 months before being granted another bridging visa on 19 April 2006 and ultimately a further student visa.

Mr Cherkupalli's application for a further student visa was pending when he was detained.

On 22 December 2004 this application was refused because of his failure to comply with the 'no work' condition on his bridging visa. Mr Cherkupalli challenged this decision in the Federal Magistrates Court and, on 18 November 2005, that Court made a consent order remitting the decision to the Department of Immigration and Citizenship for reconsideration.

That reconsideration ultimately resulted in Mr Cherkupalli being granted a further student visa but that visa was not granted for nearly two years.

In the meantime, Mr Cherkupalli made at least ten applications for a bridging visa, three of which were refused and in respect of seven of which the Department sought surety in the amounts of either $10,000 or $8,000. As Mr Cherkupalli could not raise these amounts he withdrew the applications.

As a result, Mr Cherkupalli remained in detention at VIDC until April 2006 when, following community representations to the Minister, he made a further application for a bridging visa which was granted the same day.

He was granted a further student visa on 29 October 2007 and completed a Master of Engineering Studies in April 2009.

By this time, however, successful completion of his studies no longer qualified him for a permanent Australian visa.

President Branson found that the Commonwealth's actions in deciding to detain and, thereafter detaining, Mr Cherkupalli in an immigration detention centre, were inconsistent with article 9(1) of the ICCPR. A summary of President Branson's findings can be found in Part 2 of the Report.

The President recommended that the Commonwealth pay $697,000 in financial compensation to Mr Cherkupalli.

Ms Branson made a number of other recommendations including the following: that the Department ensure its staff receive training in the importance of protecting the right to liberty; that regular reviews of detention of non-citizens include consideration of whether the non-citizen is in the least restrictive form of detention; and that the Commonwealth provide a formal written apology to Mr Cherkupalli.

The Commonwealth has noted the President's recommendations but has not agreed at this stage to pay Mr Cherkupalli compensation, as he has a separate ongoing compensation claim in the Supreme Court of New South Wales concerning the substance of the complaint. The President's recommendation will be considered in light of that litigation.

The Commonwealth has agreed to some of the recommendations pertaining to training and operational issues within the Department. Details of the Commonwealth's response can be found in part 15 of the Report.

The full report can be found at
http://www.humanrights.gov.au/legal/humanrightsreports/AusHRC49.html
http://www.humanrights.gov.au/about/media/media_releases/2012/38_12.html

Next President of the Australian Human Rights Commission

Attorney-General Nicola Roxon has announced the appointment of Professor Gillian Triggs as the new President of the Australian Human Rights Commission.

'Professor Triggs is a distinguished and extensively published international lawyer with a strong foundation in human rights law,' Ms Roxon said.

'It is with great pleasure that I announce the appointment of Professor Gillian Triggs as the next President of the Australian Human Rights Commission.

'It is evident that Professor Triggs' experience in human rights law and her abilities as a senior administrator equip her with the skills necessary to fulfil this important role.

'The Australian Government looks forward to working with Professor Triggs on the protection and promotion of human rights in Australia.'

On 10 February 2012, the President of the Commission, Catherine Branson QC, announced her intention to leave the position in July 2012.

'The Government thanks President Branson for her dedication and hard work in leading the Commission and her passionate advocacy for the rights of all Australians, particularly those most vulnerable in our society,' Ms Roxon said.

Professor Triggs has been appointed as President for a period of five years commencing on the 30 July 2012.

Professor Triggs is currently Dean of the Faculty of Law at the University of Sydney. She has previously worked as the Director of the British Institute of International and Comparative Law in London and has been Chair and Member of several federal government advisory bodies.

http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/29-June-2012---Gillian-Triggs---Next-President-of-the-Australian-Human-Rights-Commission.aspx

Ombudsman review leads to an overhaul of income management decision making

The Department of Human Services (DHS) income management decision making has undergone significant revision and improvement in response to concerns identified during an Ombudsman review.

On 7 June 2012, Acting Ombudsman Alison Larkins released her office's investigation report into two aspects of the DHS income management decision making. The investigation examined decisions not to exempt a person from income management because that person was financially vulnerable and decisions about applying income management to a person because they were considered vulnerable. The reviewed decisions had all been made between August 2010 and March 2011.

The report highlights that the initial decision-making tools and guidelines used by decision makers did not adequately assist them to meet legislative requirements. The Ombudsman's review also identified problems with the use of interpreters, record keeping, training and dealing with review and exemption requests.

Ms Larkins said that she was concerned that some decisions reviewed by her office showed that legislative criteria had not been met and many lacked a sound evidence base. Letters designed to explain decisions were inadequate and unclear and did not inform customers of their review rights.

'DHS decisions need to comply with the legal requirements, accord with policy instructions and meet the income management program objectives,' Ms Larkins said.

'And it is only fair and reasonable that letters should explain decisions, do so in clear language that is free from jargon or terms not widely known, and provide information about how to ask for a decision to be reviewed.'

Ms Larkins said that because of the seriousness of the issues found during her investigation, she took the unusual step of writing to DHS and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) part way through the investigation to raise her concerns. DHS immediately commenced its own internal review. Ms Larkins commended both agencies on their actions and their commitment to fix the problems identified. She said that since she first raised her concerns, the DHS and FaHCSIA have taken substantial action, which includes:

- establishing a taskforce to review decisions, training, decision-making tools and templates, policy and guidelines and to develop a quality framework for income management decisions;

- amending decision-making tools and processes to ensure decision makers properly address the legislative criteria;

- revising its training packages and delivering training to 300 staff;

- updating policy, reference material and guidelines to better reflect the intent of the legislation;

- improving procedures relating to the use of interpreters and establishing a working group to advise on the appropriate use of interpreters in line with best practice; and

- updating and improving templates for letters advising of decisions.

'DHS and FaHCSIA have accepted all of my recommendations. I commend their commitment to improving administration of the income management program and look forward to reviewing their progress in three months,' Ms Larkins said.

The Ombudsman's report, Review of Centrelink* Income Management Decisions in the Northern Territory: Financial Vulnerability Exemption and Vulnerable Welfare Payment Recipient Decisions, is available at www.ombudsman.gov.au.

*When the Ombudsman commenced the investigation, the responsible agency was Centrelink. Subsequently, Centrelink was incorporated into the DHS.

http://www.ombudsman.gov.au/media-releases/show/206

Appointment of new chairperson and members to Victorian Law Reform Commission welcomed by legal profession

The Law Institute of Victoria (LIV) has welcomed the appointment of a new Chairperson and members to the Victorian Law Reform Commission (VLRC).

Attorney-General Robert Clark announced the appointment of former Supreme Court judge Philip Cummins QC as the new Chairperson of the VLRC.

Mr Cummins will be joined by former Supreme Court judge Frank Vincent QC and Dr Ian Hardingham QC on the VLRC.

'The LIV congratulates Mr Cummins on his appointment as Chairperson of the VLRC. He is a leader in the legal profession and brings a wealth of experience to the position,' said LIV President Michael Holcroft.

'The LIV also congratulates Mr Vincent and Dr Hardingham on their appointments. Experienced and highly regarded, they are welcome additions to the VLRC and their contribution will be invaluable on matters of law reform.

'These are important positions in the justice system and the LIV thanks Mr Cummins, Mr Vincent and Dr Hardingham for accepting them.'

Dr Hardingham will undertake the review of Victoria's succession laws announced earlier this year. The review will consider legal issues relating to wills, estate administration and inheritance.

Mr Cummins will join the VLRC on July 17 and assume the role of Chairperson on September 1 after a handover period with the current acting Chairperson, David Jones.

The LIV recognizes the excellent contribution made by Mr Jones in the role of acting Chairperson since March 1, 2012.

The LIV hopes the Victorian Government acts on recommendations made by the VLRC in relation to guardianship and the sex offenders register, which were handed down during Mr Jones' stewardship.

http://www.liv.asn.au/About-LIV/Media-Centre/Media-Releases/Appointment-Of-New-Chairperson-And-Members-To-Vict.aspx?rep=1&glist=0&sdiag=0

Camera Surveillance and Privacy Report

Queensland's Office of the Information Commissioner report, *Camera Surveillance and Privacy: Review of camera surveillance use by Queensland government agencies and compliance with the privacy principles in the Information Privacy Act 2009* (Qld) was tabled in the Queensland Parliament on 31 July 2012.

The *Camera Surveillance* review examined the practice of camera surveillance in Queensland government agencies and the extent to which camera surveillance systems were designed and operated with privacy considerations in mind.

The *Camera Surveillance* review involved an audit of camera surveillance usage by Queensland public sector agencies, including local government and public authorities, to examine the extent to which the increasing volume of surveillance footage is gathered and used in accordance with legislative requirements designed to protect Queenslanders' privacy.

Acting Privacy Commissioner, Lemm Ex, said, 'By and large, the 20,000 or more cameras being operated by Queensland government agencies are being operated with attention to privacy issues. This has largely been due to the efforts of the operational staff, who have applied common sense to the development and operation of the systems.'

'The ambiguity surrounding management responsibilities of camera surveillance systems represents a risk which, if left unmanaged, could result in a significant privacy breach' Mr Ex said. 'Agencies' privacy vulnerabilities would be greatly reduced if corporate attention was given to the operation of the camera surveillance systems with privacy considerations in mind.'

'This report recommends that all Queensland government agencies review their camera surveillance systems, and the policies and procedures regarding their governance to improve compliance with the privacy principles under the *Information Privacy Act 2009* (Qld)', Mr Ex said.

The report makes 15 recommendations, one of which is that all Queensland government agencies that operate camera surveillance systems should:

- ensure data security practices to protect camera surveillance footage against loss, unauthorised access, disclosure, modification or any other misuse, and that these practices are described in documented policies and procedures; and

- actively inform the community of the presence of camera surveillance systems, the rationale for their deployment, the privacy safeguards for the system and the mechanism by which members of the community can apply for access to the surveillance footage.

http://www.oic.qld.gov.au/information-and-resources/documents/camera-surveillance-and-privacy-report%E2%80%9431-july-2012

NSW Privacy Commissioner Report into RailCorp sale of unclaimed USB data keys released

On 13 June 2012, the Office of the NSW Privacy Commissioner released a report about its own motion investigation of the RailCorp sale of unclaimed USB Data keys under the *Privacy and Personal Information Protection Act 1998* (NSW) (the *PPIP Act*).

USB devices can contain data that includes personal and health information. NSW privacy law requires that public sector agencies, such as RailCorp, ensure that they do not disclose personal information without the consent of the person concerned. In the case of lost property this consent is difficult to obtain.

The investigation led by Deputy Privacy Commissioner, John McAteer, commenced following reports alleging that third party personal information was accessible by persons who had purchased USB keys through public auctions held by RailCorp in 2011.

RailCorp responded 'constructively and quickly once contacted by this office' said Deputy Commissioner McAteer. Of its own accord RailCorp ceased selling unclaimed USB keys and commenced a review of its approach to the auctioning of devices that may contain data capable of identifying individuals. 'RailCorp is consulting the Office of the NSW Privacy Commissioner on this review' said Mr McAteer.

This investigation found that while RailCorp undertook a data cleansing process of USB keys prior to auction, this process did not prevent the recovery of cleansed data using off the shelf, inexpensive software and that the obligations under section 12 (c) of the *PPIP Act* were not met.

The NSW Privacy Commissioner Dr Elizabeth Coombs commended both RailCorp's proactive approach and the investigation undertaken by the Deputy Commissioner. 'Technology advances have meant that there are now many mobile devices that store data concerning individuals. We will continue to assist RailCorp in the development of its policy towards the auction or appropriate disposal of such devices,' Dr Coombs said.

The report can be accessed on the Office of the Privacy Commissioner website at www.privacy.nsw.gov.au.

http://www.privacy.nsw.gov.au/Lawlink/privacynsw/ll_pnsw.nsf/vwFiles/Railcorp_mediarelease_final.pdf/$file/Railcorp_mediarelease_final.pdf

Legislation to establish Military Court of Australia

Legislation to establish the new Military Court of Australia was introduced into the Federal Parliament on 21 June 2012.

The Military Court of Australia Bill 2012 will establish the Military Court of Australia under Chapter III of the Constitution to provide a permanent and constitutionally sound system of military justice for Australia's defence forces.

The new Court will provide a modern system dedicated to trying serious service offences and will ensure independent and transparent military justice for service personnel on a long-term basis. It will play an important role in holding Australian Defence personnel accountable.

The Court's establishment follows a series of Senate Committee reports over a number of years recommending extensive changes to the system of military justice.

In 2005, the Senate Foreign Affairs, Defence and Trade References Committee report, *The Effectiveness of Australia's Military Justice System*, recommended that the Australian Defence Force abolish the court martial system and introduce a system of trials of serious service offences by a permanent military court, established under Chapter III of the Constitution.

The new Military Court of Australia will replace the interim system of military justice that has operated since 2009.

The interim system was put in place following the High Court's decision in *Lane v Morrison*, which found the Australian Military Court established by the previous Government to be unconstitutional.

'The Military Court of Australia will be a separate court with the same independence and constitutional protections as other Federal courts,' Attorney-General Nicola Roxon said.

'The Government has worked closely with the defence and legal communities to ensure that the Military Court of Australia will provide fair and effective justice for Australia's service personnel.'

Minister for Defence Stephen Smith said the reforms to Australia's military justice system would strengthen operational effectiveness and discipline in the Australian Defence Force (ADF).

'Military Court Judges will be able to sit overseas and on military bases, so the Court will be flexible enough to meet the needs of the ADF,' Mr Smith said.

The Court has been designed so it has a proper appreciation of the nature of service offences and the impact that they can have on maintaining service discipline.

Uniformed legal officers will continue to prosecute and to defend Australian Defence Force personnel charged with a service offence.

Judicial officers of the Military Court must, by virtue of their training or experience, understand the nature of service in the ADF but cannot be serving ADF members or reservists, due to the need for judges to be independent of the chain of command.

Existing judges of the Federal Court of Australia and Federal Magistrates of the Federal Magistrates Court may be appointed to the Military Court and so hold dual commissions. Certain administrative functions will be performed using existing Federal Court systems and resources.

Mr Smith said the bulk of disciplinary and less serious charges will continue to be dealt with and reviewed by commanders at the summary level unless the serviceman or woman elects trial by the Court.

The Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 will provide arrangements for transition to the new Military Court and includes additional enhancements to the Australian Defence Force military discipline system, not directly associated with the establishment of the Military Court.

On 29 June 2012 the Senate jointly referred the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 and the Military Court of Australia Bill 2012 for inquiry and report. The reporting date is 9 October 2012**.**

http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/21-June-2012---Legislation-to-establish-Military-Court-of-Australia.aspx

Commonwealth legislation enacted in response to High Court's decision in *Williams v Commonwealth*

On 27 June 2012, the *Financial Framework Legislation Amendment Act (No. 3) 2012* (FFLA Act) was enacted in response to the High Court's decision in *Williams v Commonwealth* [2012] HCA 23 (*Williams*).

The High Court in *Williams* overturned the understanding on which the Commonwealth had acted since Federation, that the Commonwealth could develop and administer spending programs without the need for legislative authority for those programs. In *Williams* a majority of the High Court held that legislative authority is necessary for certain spending.

Williams involved a challenge to the constitutional basis for the Commonwealth's activities and expenditure in relation to the National School Chaplaincy Program. This was an administrative program for the funding of chaplaincy services in schools, administered most recently by the Department of Education, Employment and Workplace Relations pursuant to administrative guidelines. In 2012, the Program was expanded and renamed the National School Chaplaincy and Student Welfare Program.

In *Williams*, the High Court invalidated an agreement made by the Commonwealth under the National School Chaplaincy Program by a 6:1 majority. The majority also invalidated the making of payments by the Commonwealth under that agreement, on the ground that they were not supported by the executive power of the Commonwealth. In particular, four of the justices did so on the basis that the Commonwealth executive government could not enter into agreements and make payments under the Program without legislative authority. Appropriation legislation was not sufficient nor was subsection 44(1) of the *Financial Management and Accountability Act 1997* (the *FMA Act*).

Williams also has significant implications for the validity of Commonwealth spending programs that are not supported by legislation other than an appropriation Act, where there may be a constitutional need for legislative support to be provided.

Many Commonwealth spending programs and agreements are already authorised by legislation. The *Williams* decision has no implications for such programs and agreements. The decision also has no implications for Commonwealth agreements with and grants to the States (including grants in relation to health, education, transport, roads and the environment), nor does the decision have any implications for agreements and payments for the ordinary services of the government.

However, there remain a significant number of other spending programs and arrangements that are not supported by legislation other than an appropriation Act. The *FFLA Act* amends the *FMA Act* to ensure that the requisite legislative authority can be provided in such cases.

Specifically, the *FFLA Act*:

- amends the *FMA Act* to empower the Commonwealth, where authority does not otherwise exist, to make, vary or administer arrangements under which public money is or may become payable, or to make grants of financial assistance,

including payments or grants for the purposes of particular programs, where those arrangements or grants, or a class including those arrangements or grants, or relevant programs, are specified in regulations. The proposed amendments would also apply in relation to arrangements etc that were in force immediately before those amendments came into operation;

- clarifies that decisions under the proposed amendments are not decisions to which the *Administrative Decisions (Judicial Review) Act 1977* applies; and

- amends the *Financial Management and Accountability Regulations 1997* to specify arrangements or grants, or classes of arrangements or grants, or programs, in accordance with the proposed amendments to the *FMA Act*.

Recent decisions

***LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90 (22 June 2012)**

This was an appeal from a Federal Court decision dismissing an application for review of a decision of the Administrative Appeals Tribunal. The Tribunal had dismissed the application for non-compliance with a Tribunal order in relation to the application under s 42A(5) of the *Administrative Appeals Tribunal Act 1975* (the *AAT Act*).

The appellant companies contended that the primary judge erred in finding that the Tribunal did not improperly exercise its power conferred by s 42A(5) of the AAT Act by reasons of failing to take into account a relevant consideration, namely an affidavit of HB Schokker (the Schokker affidavit) that was provided before the Tribunal's dismissal hearing. At that dismissal hearing counsel for the Taxation Commissioner made extensive oral submissions about the substance of the Schokker affidavit.

Although the appeal raised a short and orthodox question, the circumstances in which that question arose were, in the Court's experience, unique. Approximately 95% of the paragraphs of the Tribunal's reasons were taken from the Commissioner's written submissions and a further three or four paragraphs of the Tribunal's reasons were taken from the Commissioner's written reply to the appellants' written submissions.

The issue of the Tribunal's extensive copying of the respondent's submissions was not drawn to the attention of the primary judge.

In the Court's opinion, the Tribunal did not conduct an evaluation of the material in the Schokker affidavit, either by reference to Commissioner's written or oral submissions. Importantly, nowhere in the decision did the Tribunal refer to the detailed analysis of the Schokker affidavit by counsel for the Commissioner in oral submissions.

The Court held that the Tribunal did not have regard to the material in the Schokker affidavit and thus failed to have regard to the appellant's explanation relevant to both the question of breach of the Tribunal's directions and to the exercise of the Tribunal's discretion conferred by s 42A(5) of the AAT Act. For these reasons the Court set aside the Tribunal's decision and the matter was referred back to the Tribunal for further consideration.

***Khondoker v MIAC* [2012] FCA 654 (22 June 2012)**

This was an application for an extension of time to appeal from a judgment of the Federal Magistrates Court dismissing an application for an order setting aside orders made by the Federal Magistrates Court.

The applicant applied for the visa on 30 June 2008. On his visa application form he indicated that he was applying for a Skilled - Independent (subclass 885) visa. On 3 December 2008, the applicant emailed the Department stating that he had made a major mistake and he had actually intended to apply for a Skilled - Regional Sponsored (subclass 487) visa. The applicant sought to amend his visa application; however, the Department informed him that if he wanted to apply for a subclass 487 visa, he would have to lodge a new application.

The applicant did not lodge an application for a subclass 487 visa and, on 19 February 2009, the Minister's delegate refused to grant him a subclass 885 visa. On 11 March 2011, the applicant applied to the Migration Review Tribunal (the MRT) for a review of the delegate's decision. The MRT affirmed the delegate's decision but this decision was, by the consent, quashed by the Federal Magistrate and remitted to the MRT. On 21 October 2011, the MRT again affirmed the decision of the delegate not to grant the applicant a subclass 885 visa. In doing so the MRT rejected the applicant's contention that it was open to him to alter his application so as render it an application for a subclass 487 visa.

Before the Federal Magistrates Court and the Federal Court, the applicant contended that, among other things, he had made a mistake when he placed a cross in the box indicating that he was applying for a subclass 885 visa and had at all times intended to apply for a subclass 487 visa. The applicant asserted that s 25C of the *Acts Interpretation Act 1901* (Cth) (the *Acts Interpretation Act*) (which relevantly provides that, where an Act prescribes a form, strict compliance with the form is not required and substantial compliance is sufficient) permitted him to convert his visa application into an application for a subclass 487 visa.

In dismissing the application for an extension, the Court considered, among other things that s 25C of the *Acts Interpretation Act* did not permit the applicant to convert his visa application into an application for a subclass 487 visa. Section 25C is not directed to a circumstance where a person incorrectly completes a form which actually or substantially complies with the prescribed form, even if the error on the part of the person completing the form was inadvertent. Rather it is directed to ameliorating the consequences of a person failing to comply with the prescribed form in circumstances where that person substantially complies with the requirements of that form.

The Court also stated that s 45 of the *Migration Act 1958* imposes an obligation upon the visa applicant to make clear to the Department precisely which visa he or she is applying for. The Act does not permit a visa applicant to amend his or her application by fundamentally altering the subject matter of the application by changing the class of visa applied for.

In the Court's view, the visa application which the applicant submitted conveyed only one meaning - it was not susceptible to multiple interpretations. When the applicant placed a cross in the box for a subclass 885 visa, he plainly and unequivocally indicated that he wanted this type of visa. The delegate assessed and determined the applicant's visa application on that basis. The Tribunal reviewed the delegate's decision on the same basis. It had no jurisdiction to do otherwise (s 338 and s 348 of the Act).

***The Herald and Weekly Times Pty Ltd v The Office of the Premier (General)* [2012] VCAT 967**

On 15 November 2011, the Herald and Weekly Times Pty Ltd sought access under s 17 of the *Freedom of Information Act 1982* (Vic) (*FOI Act*) to a copy of Mr Michael Kapel's diary. Mr Kapel was the former Chief of Staff to the Premier from December 2010 to January 2012.

The Office of the Premier (OTP) refused the request on the basis that the diary of the Premier's Chief of Staff did not fall within the meaning of 'an Official document of a Minister' as defined in section 5 of the *FOI Act*. Section 5(1) of the *FOI Act* provides:

> ***Official document of a Minister*** **or** ***Official document of the Minister*** means a document in the possession of a Minister, or in the possession of the Minister concerned, as the case requires, that relates to the affairs of an agency, and, for the purposes of this interpretation, a Minister shall be deemed to be in possession of a document that has passed from his possession if he is entitled to access the document and the document is not a document of an agency ...

On 7 February 2012, the applicant sought review of the respondent's decision. The applicant contended that the document was 'an official document of the Minister'. The respondent contended that the document was not an official document of the Minister, as it was not in the possession of a Minister and did not relate to the affairs of an agency.

Mr Kapel left Australia in early May 2012 to take up the position as Victoria's Commissioner in the Americas and did not appear before the Tribunal. Instead, Mr Nutt, the Premier's current Chief of Staff, gave evidence.

On the basis of discussions between Mr Nutt and Ms Carney, the former personal assistant to Mr Kapel, Mr Nutt, among other things, informed the Tribunal that: Mr Kapel's diary related to appointments made in Mr Kapel's role as Chief of Staff to the Premier; and the only persons who had control over and access to the diary were Mr Kapel and Ms Carney. However, Mr Nutt also agreed under cross-examination that the Premier was entitled to access his diary and he assumed that the same situation would have existed between the Premier and Mr Kapel's diary. On this basis, the Tribunal found that the Premier was entitled to access the document, regardless of who created the document and therefore was deemed to be in possession of the diary.

The Tribunal held also that it was likely that some entries in the diary related to the affairs of an agency. The Tribunal found that the OTP supports and serves the Premier in his ministerial role as head of the government and the Minister for the Arts, and the Chief of Staff only acts on the instructions of the Premier. Therefore Mr Kapel's diary included entries directly related to his and the OTP's support of and service to the Premier in the Premier's ministerial capacity.

Following the earlier decision of *Davis v Office of Premier (General)* [2011] VCAT 1629, the Tribunal held that whenever a document contains a matter that relates to a Minister's exercise of ministerial functions, the document will also relate to the affairs of an agency. The fact that the document may also be of a party political nature does not preclude that matter from also relating to the affairs of an agency.

The Tribunal held that while there is no question that a ministerial advisor performs a separate and distinct function to that of a public servant, there can be overlap in the performance of their respective functions. Ultimately the question of whether a document relates to the affairs of an agency is a question of fact that requires an analysis of the document's actual contents.

Accordingly, the Tribunal found that the range of entries which qualify for release could include:

- attendances involving a range of stakeholders, both with and without the Premier and with and without public servants;
- interaction with public servants, both with and without the Premier;
- attendances involving Parliamentary colleagues, the media, unions, and community, business and ethnic parties and organisations;

- attendances involving foreign dignitaries, including politicians and diplomats;
- other entries which may record events, whether or not attended by the Chief of Staff; and

- entries in the nature of descriptions, observations or outcomes.

***Sunol v Collier* [2012] NSWCA 14 (20 February 2012)**

This was an interim judgment in a proceeding in the NSW Court of Appeal. The proceeding involved four questions of law referred to the Court of Appeal by the Appeal Panel of the Administrative Decisions Tribunal (ADT), pursuant to s 118 of the *Administrative Decisions Tribunal Act 1997* (NSW) (the *Tribunal Act*).

The proceedings concerned an appeal against a decision of the ADT to register a conciliation agreement between Mr Collier and Mr Sunol, that Mr Sunol would not post on any website material referring to homosexual people or homosexuality in a manner which breached the *Anti-Discrimination Act 1977* (NSW). The conciliation agreement was executed by the parties after Mr Collier previously made a complaint about a number of statements published by Mr Sunol on the internet, which, according to Mr Collier, vilified homosexual people in contravention of s 49ZT of the Act.

During the Appeal Panel proceedings it became apparent that Mr Sunol sought to raise questions about the constitutional validity of s 49ZT of that Act, namely whether it infringes the constitutional implication of freedom of political communication. The Appeal Panel accepted that it had no jurisdiction to determine constitutional questions and referred the issue to the Court of Appeal for determination under s 118 of the Tribunal Act.

The Court found that the ADT is not a court for the purposes of s 77(iii) of the *Australian Constitution*, and therefore is not the recipient of powers conferred by Commonwealth statutes affecting an investiture in accordance with that provision (*Trust Company of Australia Ltd v Skiwing Pty Ltd* [2006] NSWCA 185). However, it does not follow that the powers and authority conferred on the ADT by State law evaporate immediately when an issue is raised in a case about the constitutional validity of a provision of the State law under which a claim has been made.

The Court held that if the Appeal Panel is persuaded that the State law is invalid because it is unconstitutional, it may decline to grant relief. Alternatively, it may grant relief, in which case the unsuccessful party may disregard the order, or more prudently take steps to have the order set aside.

The Court held that this approach is not consistent with the Court's earlier approach in *Attorney General v 2UE Sydney Pty Ltd & Ors* [2006] NSWCA 349 (*Radio 2UE*). *Radio 2UE* involved a similar issue to that which arose in these proceedings, namely whether s 49ZT of the Anti-Discrimination Act contravened the implied constitution protection for freedom of communication.

In *Radio 2UE,* Spigelman CJ at [90] said:

> there are of course a number of ways in which the issue sought to be agitated before the Appeal Panel can be resolved. Given the stage which the present proceedings have reached a reference of a question of law to the Supreme Court pursuant to s118 of the [Tribunal] Act would appear to be the most efficacious.

In this case the Court held that there is a fundamental difficulty with the procedure proposed by Spigelman CJ. The jurisdiction conferred on the ADT by the Tribunal Act does not permit

it to determine constitutional questions because: the operation of the Commonwealth Constitution involves an exercise of federal judicial power and the State cannot confer such power on its own courts or tribunals; and the Commonwealth, which has power to invest the court of a State with federal jurisdiction, has not done so in respect of the ADT because it is not a State court.

The Court held that, properly understood, s 118(1) empowers the ADT to refer questions of State law arising in the appeal. It cannot refer questions that involve the exercise of Federal jurisdiction. It followed that the referral of questions that involved an exercise of Federal jurisdiction to the Supreme Court were inappropriate and each question should be answered 'inappropriate to answer'.

***Kable v State of NSW* [2012] NSWCA 243 (8 August 2012)**

From February to August 1995 the appellant was held in a New South Wales prison in accordance with an order made by a Supreme Court judge, on an application by the Director of Public Prosecutions, purportedly under the *Community Protection Act 1994* (NSW). That Act permitted a detention order to be made in respect of the appellant (and no one else) if a judge was satisfied that he was likely to commit a serious act of violence and it was appropriate to hold him in custody.

The appellant successfully challenged the constitutional validity of the Act in the High Court (*Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24). The High Court held that the Act was inimical to the exercise of judicial power. It was wholly invalid, as were all the steps taken under it.

In 1996 the appellant commenced proceedings seeking damages arising from the conduct of the State and its officers for detaining him for six months on the basis of the detention order made under the invalid Act.

The claim involved three causes of action: (i) abuse of process; (ii) malicious prosecution; and (iii) the tort of trespass to the person in the form of unlawful imprisonment. At first instance the NSW Supreme Court held that there was no case to go to a jury in respect of any of the three causes of action and dismissed the action.

On 1 November 2010 Mr Kable appealed this decision to NSW Court of Appeal.

In relation to (i) and (ii) the Court of Appeal held that there was no basis for finding that the Director of Public Prosecutions commenced the proceedings for any purpose other than that revealed by the legislation and that, applying the standards contained in the Act, there were not reasonable grounds for seeking the order provided by that Act. The possibility that the Act exceeded the constitutional powers of the legislature could not of itself turn otherwise legitimate proceedings into a malicious prosecution (*A v State of New South Wales* [2007] HCA 10).

Malice on the part of the Parliament could not be established. It is not open to a litigant to impugn the motives of the Parliament. To provide compensation for those who suffer from a purported but unconstitutional, legislative act is to confer a right to compensation based on unconstitutionality, in the absence of any common law tort.

In relation to (iii) the respondent tried to avoid this conclusion by relying, among other things, on the principle that an order of a superior court has effect until set aside, sufficient to provide lawful justification for a deprivation of liberty.

The respondent referred to numerous authorities for the proposition that an order of a superior court made in excess of jurisdiction is merely voidable not void and therefore has effect until set aside (see *Cameron v Cole* [1944] HCA 5; *DMW v CGW* [1982] HCA 73; *Ousley v The Queen* [1997] HCA 49; *Re Wakim; Ex parte McNally* [1999] HCA 27; *Re Macks* and *Matthews v Australian Securities and Investments Commission* [2000] FCA 288). However, as Hayne J stated in *MIMA v Bhardwaj* [2002] HCA 11 summarising the effect of those authorities at [151]:

> In general, *judicial orders* of superior courts of record are valid until they are set aside on appeal, even if they are made in excess of jurisdiction. [Emphasis added.]

As such the principle depends on the order being made in the exercise of judicial power by a superior court.

While there was no doubt that the Supreme Court was a superior court; this did not mean that all exercises of statutory power by its judges constituted judicial orders. Accordingly, the central issue was whether the order that held Mr Kable in detention was an order made in the exercise of judicial power.

The Court held that the High Court had decided this issue when it ruled that the order that held Mr Kable in detention was an invalid non-judicial order. In doing so it held that an order made under the Act was not a judicial act and was void from the beginning. Therefore this basis for protection of the respondent against Mr Kable's claim for false imprisonment failed.