RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Further articles 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. The last issue of the AIAL Forum was devoted to papers from this Conference – the articles by Wheeler and Kinross complete coverage of the Conference.

New privacy protection on the cards

The Australian Government is seeking views on the introduction of mandatory data breach notification laws, which aim to bolster privacy protection for Australians' personal information in digital databases.

Attorney-General Nicola Roxon said that it was timely to hold a public discussion on how legislation might deal with data breaches, such as when private records are obtained by hackers.

‘Australians who transact online rightfully expect their personal information will be protected.

‘More personal information about Australians than ever before is held online, and several high profile data breaches have shown that this information can be susceptible to hackers.

‘The question we are asking is should organisations be required by law to make data breach notifications when they occur?’ Ms Roxon said.

In Australia, organisations are already encouraged to disclose data breaches to the Commonwealth Privacy Commissioner. This discussion paper looks at how legislation might strengthen the protection of personal information, as well as minimise any damage when breaches occur.

Mandatory data breach notification schemes are in place or currently being considered in a number of jurisdictions, including the United States, the European Union, the United Kingdom and Ireland.

The discussion paper released notes these developments in other countries and considers whether a legislative approach is needed in relation to issues such as:

- what constitutes a data breach and what should trigger a notification;
- who should be notified eg the Privacy Commissioner and/or affected consumers; and
- what penalties might be appropriate for failing to notify.

‘As with other public consultation on privacy issues, the Government expects - and welcomes - a wide range of views about whether this legislation is necessary’ Ms Roxon said.

This discussion paper follows new legislation which the Government introduced into the Parliament in May that makes sure Australia's laws keep pace with changing consumer and business practices, particularly in the online environment. The legislation aims to better protect people's personal information, simplify credit reporting arrangements and give new enforcement powers to the Privacy Commissioner.

Further information about the consultation process and a copy of the discussion paper can be accessed on the Attorney-General Department's website at www.ag.gov.au.

http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/17October2012-Newprivacyprotectiononthecards.aspx

Independent Reviewer for adverse security assessments

The Federal Government has announced that it will provide an independent review process for those assessed to be a refugee but not granted a permanent visa as a result of an ASIO adverse security assessment (ASA).

The Government has appointed The Hon Margaret Stone as the inaugural Independent Reviewer. Margaret Stone is a former Judge of the Federal Court. Prior to being appointed to the bench she had a distinguished academic career and was also a partner at Freehill Hollingdale & Page. She is an eminent Australian with experience in legal, immigration and national security matters.

Under the terms of reference released, the Reviewer will examine the materials used by ASIO, will provide a recommendation to the Director-General of Security and will report these findings to the Attorney-General, the Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security.

There will also be a regular 12 month periodic review of adverse security assessments of refugees in immigration detention.

Attorney-General Nicola Roxon said, ‘Refugees in immigration detention who are the subject of an adverse security assessment will have access to this new independent review option.

‘The Government takes both national security and its international obligations to refugees seriously.

‘Independent review will not lower the bar for assessing a refugee’s risk to Australia’s national security, but will provide greater openness and accountability in the security assessment process’.

After the Reviewer completes her work on the initial round of applications, the Government expects the Reviewer to complete each application for review within three months.

Ms Roxon said, ‘ASIO only issues ASAs in a small number of cases. They make up less than one per cent of all irregular maritime arrival visa security assessments undertaken since January 2010.

‘This announcement does not represent the Government’s response to the High Court’s decision in M47 v the Director-General of Security & Others. The Minister for Immigration continues to analyse that case and its implications.

'The Government chose not to announce this review process while the case was before the Court to ensure the review process was consistent with the Court's decision. The Court found in M47 that ASIO's assessment process was procedurally fair. Despite this confirmation from the court, the government believes ASIO and the community will benefit from this new review process adding an additional level of independent scrutiny to ASIO decision making'.

http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/16-October-2012---Independent-Reviewer-for-Adverse-Security-Assessments.aspx

Appointment of Commonwealth Ombudsman

Mr Colin Neave AM has been appointed as the Commonwealth Ombudsman.

In making this announcement the Minister for the Public Service and Integrity Gary Gray said 'Mr Neave had an impeccable record in senior leadership roles in the law, consumer affairs and government administration.

'The Office of Ombudsman is a critical part of our system of government accountability. It plays a key role in ensuring that Australians receive the public service that they deserve.

'His experience in public administration and in complaint resolution means he is well placed to ensure the Office of the Ombudsman is held in the highest regard by the Parliament and the community'.

Mr Neave is currently President of the Administrative Review Council, Vice Chair of the Australian Press Council, Chairperson of the Legal Services Board of Victoria and Chairman of the Commonwealth Consumer Affairs Advisory Council. He was appointed a Member of the Order of Australia in June 2005 for service to public administration and to the banking and finance industry, particularly through dispute resolution.

Previously Mr Neave has served as the Chief Ombudsman of the Financial Ombudsman Service and as the Australian Banking Industry Ombudsman. He has held senior management positions in the public sector of several jurisdictions, including as Deputy Secretary of the Commonwealth Attorney-General's Department, Managing Director of the Legal Aid Commission of NSW, Secretary of the Victorian Attorney-General's Department and Director-General of the South Australian Department of Public and Consumer Affairs.

Mr Neave's appointment is for a period of five years, it commenced on 17 September 2012. It fills a vacancy created by the resignation of the former Commonwealth Ombudsman, Mr Allan Asher.

Mr Gray expressed his thanks to Ms Alison Larkins, Deputy Ombudsman, for her leadership while acting as Commonwealth Ombudsman, and to the staff of the Office of the Commonwealth Ombudsman for the important work they do.

Mr Neave's appointment follows an open merit-based selection process, in accordance with the Guidelines established by the Government in 2008.

http://www.ombudsman.gov.au/media-releases/show/211

Review of information awareness within government released—10 September 2012

Queensland's Office of the Information Commissioner has released the *Results of Desktop Audits 2011–12: Review of Publication Schemes, Disclosure Logs and Information Privacy*

Awareness in Departments, Local Governments, Statutory Authorities and Universities Report.

The report reviews the compliance of over 160 Queensland government agencies with the *Right to Information Act 2009* (Qld) (*RTI Act*) and the *Information Privacy Act 2009* (Qld) from the point-of-view of a community member seeking government held information from agency websites.

It identifies 12 key findings to improve the proactive disclosure of government held information and to better protect individuals' privacy.

Key findings include:

- Agency websites could be better used to promote administrative access to ensure formal applications are made only as a last resort.
- More than 80% of the RTI pages reviewed were easily accessible.
- Significant information could be added to publication scheme classes relating to priorities, decisions, lists and finances.
- 67% of agencies reviewed had a publication scheme and these were generally easy to locate and populated with significant and appropriate content.
- Agencies could better populate disclosure logs with information, as currently many are empty or contain few documents.
- Depending upon the agency and sector, it was rare for more than 50% of material released under the *RTI Act* to be published in disclosure logs.
- Online forms, across all agencies, have a high level of compliance with the *Information Privacy Act 2009* (Qld).

Acting Information Commissioner, Ms Jenny Mead said, 'Although good progress has been made, there is still room for improvement across the public sector.

'The continued improvement of a pro-disclosure approach to government held information can deliver efficiencies and strengthen accountability mechanisms across the public sector'.

http://www.oic.qld.gov.au/information-and-resources/documents/review-information-awareness-within-government-released%E2%80%9410

OAIC annual report confirms increase in FOI and privacy activity

The Office of the Australian Information Commissioner (OAIC) Annual Report 2011–12 shows a steady increase in workload across the OAIC's three functions — freedom of information (FOI), privacy and information policy.

The Australian Information Commissioner, Professor John McMillan said it was a busy but rewarding year.

'2011–12 was the first full year of operation since the OAIC was established on 1 November 2010. This was a year of consolidation, but also a year in which the OAIC dealt with a growing workload and a heightened awareness of information management issues in government, business and the community.

‘The OAIC enquiries line handled 21,317 telephone calls (a 3% increase on the previous year), and 2,822 written FOI and privacy enquiries (a 47% increase). The office received 1,357 privacy complaints, 126 FOI complaints, 456 applications for Information Commissioner review, 2,237 extension of time notifications and requests, and conducted 37 privacy own motion investigations’.

In FOI, the OAIC conducted a review of FOI charges and a survey to assess agency compliance with the publication requirements under the *Freedom of Information Act 1982* (*FOI Act*).

Reflecting on the *FOI Act* reforms that commenced in November 2010, Professor McMillan commented that they were instrumental in strengthening open government. ‘Access to information requests have greater prominence in government. There is a marked increase in FOI requests for policy-related material, more media reporting based on FOI Act disclosures, and greater public awareness of access to information rights’.

Government agencies and ministers covered by the *FOI Act* reported that they received 24,764 FOI requests in 2011–12, an increase of 4.9% on the previous year. The number of FOI requests that agencies had on hand at the end of the year decreased by 14.9%. The reported cost attributable to agency compliance with the *FOI Act* was $41.719 million, an increase of 14.9% on the previous year.

There was also a greater preparedness by applicants to complain about or challenge agency disclosure decisions. ‘The OAIC received 126 FOI complaints during 2011–12, and 456 applications for independent merit review of access denial decisions. A theme that emerges strongly in complaints and reviews is that FOI processing can be improved through improved communication between agencies and FOI applicants: focusing the scope of an FOI request so that it can be processed in a timely manner, and keeping the applicant informed of progress’.

Public concern with privacy protection was reflected in complaints, high level data breaches reported in the media, and own motion investigations by the OAIC.

‘The OAIC dealt with 1,357 privacy complaints, which was an 11% increase on the previous year. Thirty seven investigations were initiated, including some high profile investigations into data breaches occurring in national corporations. The office handled 8,976 privacy-related telephone enquiries, 1,541 written enquiries and 46 data breach notifications. All this points to an increasing level of community awareness and concern about privacy’, Professor McMillan said.

Looking forward, Professor McMillan expected that 2012–13 would be an equally busy year for the OAIC. ‘We expect a continuing increase in privacy and FOI enquiries, complaints and review applications. Reforms to the Privacy Act 1988 are expected to be passed by the Parliament, and an independent review of the FOI Act and the Australian Information Commissioner Act 2010 will commence in November 2012. The OAIC will also conduct an active program to promote proactive information and data publication by government agencies’.

http://www.oaic.gov.au/news/media_releases/media_release_121016_annual_report.html

ARC launches Judicial Review report

On 24 September 2012 the Administrative Review Council President, Colin Neave, launched the Council's 50th Report, *Federal Judicial Review in Australia*, at Parliament House.

‘Judicial review enables a person affected by a government decision to challenge that decision in a court.

‘It is a central feature of Australia's administrative law system, guaranteed by our Constitution.

‘This Report makes recommendations to improve the accessibility and efficiency of Australia's judicial review system.

‘There have been considerable changes to the government landscape since the administrative law package was introduced in the 1970s.

‘In this Report the Council has revisited-and in some cases revised-many of its previous recommendations in relation to judicial review’, Mr Neave said.

This report is the culmination of extensive research and consultation by the Administrative Review Council.

The Council released a consultation paper, *Judicial Review in Australia*, for public comment in April 2011, and received 23 submissions.

The Council also met with representatives from key interest groups, including courts and tribunals, government officers, members of the legal profession, public interest organisations, and experts in the field.

The Report was prepared as part of the Council's statutory responsibility to keep the administrative law system under review.

http://www.arc.ag.gov.au/Mediareleases/Pages/September2012ReleaseofReportNo50FederalJudicialReviewinAustralia.aspx

National Security Migration Regulation ruled invalid

Plaintiff M47-2012 v Director General of Security [2012] HCA 46 (5 October 2012)

The plaintiff, a Sri Lankan national, had been held in immigration detention since arriving on Christmas Island in December 2009. While in detention he applied for a protection visa.

A delegate of the Minister for Immigration found that the plaintiff had a well-founded fear of persecution in Sri Lanka on the basis of his race or political opinion attributed to him as a former member of the Liberation Tigers of Tamil Eelam (LTTE).

However, although the plaintiff was found to be a refugee, he was refused a protection visa on the basis that he did not meet cl.866.225. Specifically the delegate found the plaintiff did not satisfy public interest criterion 4002 (PIC 4002) because he was assessed by ASIO to be a risk to security under the *Australian Security Intelligence Organisation Act 1979* (Cth). That decision was subsequently affirmed by the Refugee Review Tribunal, which is unable to look behind the security assessment. In May 2012, following the Tribunal decision, ASIO issued a further negative assessment (the 2012 assessment). As part of this assessment, ASIO officers interviewed the plaintiff.

The plaintiff commenced proceedings in the original jurisdiction of the High Court challenging the validity of the decision to refuse him a protection visa and his continued detention. The plaintiff argued that ASIO had denied him procedural fairness when making the 2012 assessment; that PIC 4002 was invalid; and that the *Migration Act 1958* (Cth) did not authorise the removal and detention of a person found to be a refugee.

A majority of the Court found that the plaintiff was not denied procedural fairness in connection with the issuing of the security assessment. In the interview that was conducted as part of the 2012 assessment, the plaintiff was legally represented, his attention was directed to ASIO's concerns and he was given ample opportunity to address the issues of concern to ASIO.

However, a majority of the Court held that the Migration Regulations could not validly prescribe PIC 4002 as a condition for the grant of a protection visa because it was inconsistent with the scheme in the *Migration Act* for refusing or cancelling visas on national security grounds in conformity with Articles 32 and 33(2) of the Refugee Convention. French CJ held:

> ..the relationship between PIC 4002 and ss.500-503 [of the Migration Act] spells invalidating inconsistency. That is primarily because the condition sufficient to support the assessment referred to in PIC 4002 subsumes the disentitling national security criteria in Article 32 and 33(2) [of the Refugee Convention]. [PIC 4002] is wider in scope and sets no threshold level of threat necessary to enliven its application. It requires the Minister to act upon an assessment which leaves no scope for the Minister to apply the power conferred by the Act to refuse the grant of a visa relying upon Articles 32 and 33(2). It has the result that the effective decision-making power is shifted to ASIO. Further, and inconsistently with the scheme for merits review provided in s.500, no merits review is available in respect of an adverse security assessment under the ASIO Act 1979. Public interest criterion 4002 therefore negates important elements of the statutory scheme relating to decisions concerning protection visas and the application of criteria derived from Articles 32 and 33(2).

Because PIC 4002 was invalid, a majority of the Court held that the decision to refuse the plaintiff a protection visa had not been made according to law. As a result there had been no valid decision on the plaintiff's application for a protection visa. While that application is still pending, the plaintiff can be lawfully detained as an unlawful non-citizen under the *Migration Act*. Given these conclusions, it was unnecessary for the majority to consider the plaintiff's other arguments about the validity of his detention and proposed removal from Australia.

The *Datafin* principle – part of Australian law?

Mickovski v Financial Ombudsman Services Limited & Anor [2012] VSCA (17 August 2012)

This was an appeal from a judgment in the Common Law Division of the Victorian Supreme Court.

The appellant, Mr Mickovski, sought to challenge a Financial Ombudsman Services (FOS) ruling that it lacked jurisdiction to deal with his complaint against MetLife Insurance Limited (MetLife) in relation to entitlements under a salary continuance policy.

Metlife is a member of FOS. On behalf of its members, FOS conducts a superannuation industry alternative dispute resolution scheme approved by ASIC pursuant to s 912A(1)(g) of the *Corporations Act 2001* (Cth).

FOS's ruling was based on a clause in its then terms of reference, which excluded complaints where the complainant knew or should reasonably have known of all the relevant facts more than six years before notifying FOS of the complaint.

At first instance, the Supreme Court rejected Mr Mickovski's request for judicial review of FOS's decision. In doing so the Court held that the *Datafin* principle, that a private organisation is amenable to judicial review on appropriate grounds if its powers have significant public consequences, applies in Victoria but that FOS's decision did not come within that principle.

On appeal, Mr Mickovski contended, among other things, that the judge erred in holding that the *Datafin* principle was not engaged. To find that the *Datafin* principle was not engaged ignored the practical importance of FOS to consumers, the courts (by relieving the pressures of business) and the insurance industry. FOS's significance was manifest in the requirement in s 912A(1)(g) of the *Corporations Act* that a person holding a financial service licence and who services retail clients must have an external dispute resolution procedure approved by ASIC and only three organisations, including FOS, had been so approved.

The Court held that in the face of increasing privatisation of government functions in Australia, there is a need for the availability of judicial review in relation to a wide range of public and administrative functions. The *Datafin* principle offers a logical, if still to be perfected, approach towards the satisfaction of that requirement. However, the clear implication of the High Court's decision in *Neat Domestic Training Pty Ltd v AWB Ltd* [2003] HCA 35 is that courts should avoid making a decision about *Datafin* unless and until it is necessary to do so.

In this case, the Court did not consider it was necessary to do so. The Court found that taken at its widest, it is doubtful that the *Datafin* principle has any application in relation to contractually based decisions. FOS's power over its members is still, despite the *Corporations Act*, solely derived from contract and it simply cannot be said that it exercises government functions. Even if it could be said that it has now been woven into a governmental system, the source of its power is still contractual, its decisions are of an arbitrative nature in private law and those decisions are not, save very remotely, supported by any public law sanction. Further, the public interest in having a mechanism for private dispute resolution of insurance claims was insufficient to sustain the conclusion that FOS was exercising a public duty or a function involving a public element, in circumstances where FOS's jurisdiction was consensually invoked by the parties to a complaint. In the light of all these factors, FOS is not a body susceptible to judicial review.

Recent FOI decisions

Apache NorthWest Pty Ltd v Department of Mines and Petroleum [2012] WASCA 167 (23 August 2012)

This appeal concerned an application by the second respondent (Lander and Rogers Lawyers), pursuant to the *Freedom of Information Act 1992* (WA) (the *FOI Act*), for access to certain documents held by the first respondent (the Department). The relevant documents had been supplied to the first respondent by the appellant (Apache), the operator of the gas facilities on Varanus Island. The documents related to, among other things, an explosion on Varanus Island, which caused the plant to cease operation for approximately two months.

Under the *FOI Act*, where an application is made for access to documents which contain information of commercial value to a third party (in this case Apache), or where an application is made for access to documents which contain information of commercial value to a third party or concerning the business or commercial affairs of a third party, an agency may not give access to an applicant until it has taken such steps as are reasonably practicable to obtain the views of the third party as to whether the documents contain exempt matter: s 33. If the third party objects to a decision of the agency to give access to a document the third party has a right to an internal review of the decision by another officer of

the agency: s 39 - s 43. If the third party is aggrieved by the decision on the internal review it may seek a review of that decision by the WA Information Commissioner (the Commissioner): s 65. An appeal lies to the Supreme Court on a question of law arising out of the decision of the Commissioner: s 85.

The Department initially refused access but, following an internal review of that decision, found that Lander and Rogers was entitled to access to the documents. Apache then sought a review of that decision by the Commissioner. The Commissioner, with certain limited exceptions, upheld the Department's decision. Apache then appealed against the Commissioner's decision. The primary judge dismissed the appeal and Apache sought review of this decision.

On appeal, Apache contended, among other things, that the primarily judge erred in failing to find: first, that the Commissioner had wrongly concluded that Apache was required to satisfy him on 'the balance of probabilities' that the documents were exempt under the *FOI Act*; and secondly, that the Commissioner had applied the wrong test in respect of each clause, applying a test of 'would' have adverse consequences instead of 'could reasonably be expected to' have adverse consequences.

In considering whether the Commissioner considered the correct test the Court held that the reasoning of the Commissioner on this topic lacked the degree of clarity which would have been desirable. It is evident that the Commissioner was at some pains to reconcile the decision in *Police Force of Western Australia v Winterton* (unreported WASC), where the balance of probabilities had been applied, with the decisions in *Manly v the Minister for Premier and Cabinet* (1995) 14 WAR 550, and *Attorney General's Department v Cockroft* (1986)10 FCR 180, where it had been correctly disavowed.

The Court opined that in attempting to reconcile these decisions the Commissioner was attempting the impossible. However, while the Commissioner sought to reconcile the authorities and engaged in some obscure consideration of how that might be done, in the end he did not 'consider it desirable to attempt to quantify the standard of proof'. The approach he ultimately took was to correctly adopt *Manly* as the applicable test. Therefore, having regard to the context as a whole, the Court was satisfied that the primary judge correctly found that the Commissioner did not apply the balance of probabilities test.

With regard to Appache's contention that the Commissioner had applied the wrong test in respect of each clause, applying a test of 'would' have adverse consequences instead of 'could reasonably be expected to' have adverse consequences, in the Court's view, having regard to the context, the Commissioner did not overlook the correct test.

The Court found that while it would have been preferable for the Commissioner to have stated his conclusion in every instance in terms which expressly referred to the statutory test, even at the expense of some repetition, when the relevant passages were read in context, it cannot reasonably be concluded that the explanation for the Commissioner's omission to do so in the passages relied on by Apache lay in an inexplicable oversight of the test he had elsewhere propounded rather than, as the primary judge found, the application of the correct test expressed in infelicitous language.