RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Make a date for the AIAL National Administrative Law Conference

The 2012 National Administrative Law Conference 'Integrity in Administrative Decision Making' will be held at the National Wine Centre, Adelaide on Thursday 19 and Friday 20 July 2012.

In 2004 Chief Justice Spigelman delivered the AIAL National Lecture Series about the fourth branch of government, the integrity branch. This Conference will provide an opportunity to consider the concept of the integrity branch, the institutions that constitute it and its health in 2012. In addition to addressing these and related topics the Conference will also review the state of administrative law in the Commonwealth, States and Territories.

New Tax File Number Guidelines

On 12 December 2011, the Office of the Australian Information Commissioner (AIC) issued new *Tax File Number Guidelines 2011* (TFN Guidelines).

The TFN Guidelines are issued under the *Privacy Act 1988* (Privacy Act). The TFN Guidelines replace the previous Tax File Number Guidelines 1992. The TFN Guidelines, which are legally binding, regulate the collection, storage, use, disclosure, security and disposal of individuals' tax file number (TFN) information. The TFN Guidelines only apply to the TFN information of individuals and do not apply to TFN information about other legal persons including corporations, partnerships, superannuation funds and trusts.

A breach of the TFN Guidelines is an interference with privacy under the *Privacy Act*. Individuals who consider that their TFN information has been mishandled may make a complaint to the AIC.

www.oaic.gov.au/law/tax-file-numbers.html

A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy

The Commonwealth Government released an issues paper, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, on 23 September 2011, to inform its response to the ALRC's recommendations to introduce a statutory cause of action for serious invasions of privacy. The NSW Law Reform Commission[1] and Victoria Law Reform Commission[2] have also recommended similar causes of actions be adopted.

This paper considered whether Australia should introduce a statutory cause of action for privacy and, if so, what elements a statutory cause of action might include. The paper considered the analysis of the Australian, Victorian and New South Wales Law Reform Commissions, and the policy context and current legal positions in Australia and comparable jurisdictions.

The deadline for comments was 18 November 2011. The Government is currently considering the more than 70 submissions received. For more information, visit www.ag.gov.au/Consultationsreformsandreviews/Pages/ACommonwealthStatutoryCauseofActionforSeriousInvasionofPrivacy.aspx.

DIAC to rethink detainee transfer processes

A Commonwealth Ombudsman investigation into the transfer of 22 detainees to the Metropolitan Remand and Reception Centre at Silverwater during the April 2011 riots at Villawood Immigration Detention Centre has prompted the Department of Immigration and Citizenship (DIAC) to review its processes.

Acting Deputy Ombudsman George Masri said the investigation had found deficiencies in the way in which detainees were notified about their transfer to Silverwater, the records kept by DIAC and the follow up with detainees after their transfer.

'DIAC did not follow its own procedures in relation to the transfers either during or after the incidents at Villawood on 20 and 21 April last year,' Mr Masri said.

'Notwithstanding the operational demands at the time, once the physical threat to staff and detainees had passed, DIAC had an obligation to ensure that all procedural and administrative requirements were met. This did not happen.'

Mr Masri said that DIAC had not appropriately informed the detainees about why they had been transferred to Silverwater and had delayed notifying the detainees' migration agents. There were also considerable gaps in DIAC's records regarding these transfers.

'DIAC's own procedures require it to keep comprehensive records about the welfare of a person in immigration detention who has been transferred to a correctional facility but, when asked, the department was not able to produce any relevant records,' he said.

'Nor did DIAC fully comply with its mandated requirement to visit a detainee in a correctional institution within 24 hours of arrival at the institution and to contact them weekly thereafter, either in person or by telephone. The first visit did not take place until six days after the detainees were transferred and only one or two more visits in person occurred 11 or 12 days later. There is no evidence of weekly contact being made during the period the detainees were held at Silverwater.'

DIAC has agreed to the Ombudsman's recommendations for improving its processes and has instigated a review of transfer arrangements between immigration and correctional detention, as well as within the wider immigration detention network. DIAC expects to update relevant policy and procedures for implementation later this year.

The Ombudsman investigated the transfer of the detainees from Villawood to Silverwater following a complaint by the detainees' legal representative, a member of the NSW Council for Civil Liberties.

The report, Department of Immigration and Citizenship: Detention arrangements – The transfer of 22 detainees from Villawood Immigration Detention Centre to the Metropolitan Remand and Reception Centre Silverwater, is available from www.ombudsman.gov.au.

www.ombudsman.gov.au/media-releases/show/204 - 23 April 2012

Overhaul of the Commonwealth Acts Interpretation Act 1901

On 15 June 2011, Federal Parliament passed the Acts Interpretation Amendment Bill 2011, enacting a number of significant changes to the *Acts Interpretation Act 1901* (the Act).

> It is hoped that these amendments, which came into force on 27 December 2011, will result in significant improvements to the Act as well as improving the clarity of Commonwealth legislation more generally.

The amendments assist the implementation of the clearer laws elements of the Government's *Strategic Framework for Access to Justice in the Federal Civil Justice System*. While the Act has been subject to numerous amendments since 1901, this is the first time the Act has been comprehensively amended to address concerns regarding its structure, application to modern technology and language.

The amendments seek to improve the structure of the Act by co-locating the definitions which are currently scattered throughout the Act, and co-locating other provisions that are currently not in a logical order.

There are also a number of substantive amendments. For example:

- ensuring that powers in relation to instruments apply to all types of instruments;
- allowing section 19B and 19BA Orders to apply retrospectively (these Orders update references in legislation to a particular Minister, Department or Secretary of a Department so that they can be read consistently with responsibilities as allocated under the Administrative Arrangements Order);
- providing that an action by a Minister other than the Minister who is authorised to perform that action is not invalid merely on that basis;
- providing that anything done by or in relation to a person purporting to act under an appointment (including an acting appointment) is not invalid merely because the occasion for the appointment had not arisen, there was a defect or irregularity in connection with the appointment, the appointment had ceased to have effect or, in the case of acting appointments, the occasion to act had not arisen or had ceased; and
- specifying that everything in an Act as enacted by the Parliament should be considered part of an Act.

A number of concepts have also been modernised. For example:

- allowing meeting participants to be in different locations and to participate using technology such as video-conferencing; and
- adjusting the definition of 'document' to include things like maps, plans, drawings and photographs.

The first audit of a Commonwealth partner under the Auditor-General's new powers

Following a request from the Joint Committee of Public Accounts and Audit (JCPAA) the Auditor-General has decided to undertake a performance audit, under section 18B of the *Auditor-General Act 1997* (the Act), of the administration of:

- the 2011 Heads of Agreement for the Continued Management, Operation and Funding of the Mersey Community Hospital as represented by the Commonwealth Department of Health and Ageing (DoHA) and the Tasmanian Department of Health and Human Services (DHHS); and

- the earlier 2008 Heads of Agreement for the management, operation and funding of the Mersey Community Hospital as represented by DoHA and DHHS.

This will be the first performance audit of a Commonwealth partner pursuant to section 18B of the Act. Section 18B and a number of other changes were introduced into the Parliament as a private member's Bill. The Act implemented the majority of recommendations made by the JCPAA in its report 419, *Inquiry into the Auditor-General Act 1997*. The Amendments commenced on 8 December 2011.

Under section 18B of the Act, a performance audit may be conducted to assess the operations of a Commonwealth partner where the Commonwealth has provided money for a Commonwealth purpose. Where a Commonwealth partner is, is part of, or is controlled by the government of a state or territory, a performance audit may only be conducted at the request of the responsible minister or the JCPAA. The JCPAA's decision follows a request from the Auditor-General prompted by representations received from a member of the Federal Parliament.

Public consultation for national security legislation reform

The Commonwealth Government has announced new plans to review national security legislation to ensure Australia's national security capability can evolve to meet emerging threats, while also delivering the right checks and balances for a civil society.

Attorney-General Nicola Roxon has asked the Parliamentary Joint Committee on Intelligence and Security to consider potential reforms through public hearings. The Attorney emphasised that this is the beginning of the process and the Government was seeking diverse views before determining which legislative reforms it would pursue.

The Government is proposing reforms to the *Telecommunications (Interception and Access) Act 1979*, the *Telecommunications Act 1997*, the *Australian Security Intelligence Organisation Act 1979* and the *Intelligence Services Act 2001*.

Lawful access to telecommunications will be reviewed to ensure that vital investigative tools are not lost as telecommunications providers change their business practices and begin to delete data more regularly.

Strengthening safeguards and privacy protections within national security legislation will also be considered, including clarifying the roles of the Commonwealth and state ombudsmen in overseeing telecommunications interception by law enforcement agencies.

Changes that will be examined by the Committee include an authorised intelligence operations scheme for ASIO officers. Such a scheme would see ASIO officers afforded the same protection from criminal and civil liability for authorised operations that Australian Federal Police currently receive.

The Committee will also consult on measures to address security risks posed to the telecommunications sector, and whether the Government needs to institute obligations on the Australian telecommunications industry to protect their networks from unauthorised interference.

If the request is agreed to, the Government would ask the Committee to report back by 31 July 2012. The Government will then consider the report before developing draft legislation for consultation.

www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/4-May-2012---Public-consultation-for-national-security-legislation-reform.aspx

4 May 2012

National Children's Commissioner to be established

The Federal Government has announced the creation of a National Children's Commissioner within the Australian Human Rights Commission.

Attorney-General Nicola Roxon said that the new Commissioner will focus on promoting the rights, wellbeing and development of children and young people in Australia. 'For the first time, Australia will have a dedicated advocate focussed on the human rights of children and young people at the national level,' Ms Roxon said.

The Minister for Families, Community Services and Indigenous Affairs Jenny Macklin said establishing a Federal Children's Commissioner was a key action under the Government's *National Framework for Protecting Australia's Children 2009-2020*.

'We want every child to grow up safe, happy and well. The new Commissioner will represent the views of children and young people, particularly those most vulnerable, at the national level,' Ms Macklin said.

Minister for Community Services Julie Collins said children and young people need a national advocate to ensure their rights are reflected in national policies and programs. 'The national Commissioner will not duplicate but complement the work of states and territories, particularly the work of other commissioners and guardians.'

The Children's Commissioner will take a broad advocacy role to promote public awareness of issues affecting children, conduct research and education programs, consult directly with children and representative organisations; it will also monitor Commonwealth legislation, policies and programs that relate to children's rights, wellbeing and development.

The Government has called for expressions of interest for the position.

www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/29-April-2012---Gillard-Government-to-establish-National-childrens-commissioner.aspx

29 April 2012

Victorian Independent Broad-based Anti-corruption Commission legislation too narrow and flawed, LIV says

Legislation creating the Independent Broad-based Anti-corruption Commission (IBAC) is flawed, too narrow and should be reconsidered, according to the Law Institute of Victoria (LIV).

LIV President Michael Holcroft said recently that the limited mandate of IBAC will make it inefficient and will undermine public confidence in the handling of corrupt public officials.

'We support a robust anti-corruption body able to investigate all corruption in the public sector. Despite having introduced five separate pieces of legislation, we don't think the Government has achieved this goal,' Mr Holcroft said.

'The legislation is flawed – it is difficult to read and will be difficult to use,' Mr Holcroft said.

Mr Holcroft said the proposed IBAC was not much more than the Office of Police Integrity (OPI) by another name. IBAC subsumes the OPI jurisdiction and widens it to include unsworn officers with a narrow mandate relating to 'serious' corrupt officials.

In a submission to the Government, the LIV said that the definition of corrupt conduct was limited to only some indictable offences. The offences of misconduct in public office or conspiracy are not included. Serious corrupt conduct is not defined, and is left to be determined by the IBAC Commissioner with no guidance to help the Commissioner, other integrity bodies or the public understand what 'serious' corrupt conduct is.

Mr Holcroft said the LIV was also concerned that the new IBAC is underfunded. Past OPI expenditure suggests that at least $100 million would be needed over four years to administer OPI functions, leaving only $70 million over four years to cover the establishment costs of IBAC and the costs of investigating serious corruption.

'We believe that the starting point for IBAC – its mandate to investigate corruption – should be broad. We need a better definition of 'serious corrupt conduct' so that it is clear what IBAC will investigate and what it will refer to other integrity bodies including the Ombudsman,' he said.

The relationship between the IBAC Act and the Victorian Whistleblower Protection Act is also unclear. Mr Holcroft said the LIV was also concerned that IBAC could question people without telling the witness the nature of the allegations. The capacity of the overseeing Victorian Inspectorate to fix any wrongs in IBAC investigations as they occur also requires greater clarity.

The LIV also says IBAC should have broader flexibility to hold public hearings, by removing the need for 'exceptional circumstances'.

The LIV's submission can be found on the Institute's website at: http://www.liv.asn.au/PDF/About/Media/120509_LIV_IBAC-Submission.aspx.

www.liv.asn.au/About-LIV/Media-Centre/Media-Releases/IBAC-legislation-too-narrow-and-flawed,-LIV-says.aspx?rep=1&glist=0&sdiag=0

10 May 2012

Recent decisions

Exactly when is a decision-maker functus?

SZQOY v Minister for Immigration [2012] FMCA 289 (19 April 2013)

The applicant, a national of Nepal, sought judicial review of a Refugee Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate not to grant her a Protection Visa. The applicant claimed among other things that she had a well founded fear of persecution on the basis of an interfaith relationship.

The Tribunal member completed his decision on 2:32pm on 27 July 2011 and at 2:34pm used the electronic Tribunal case management system to inform the Tribunal's registry that the decision was ready to be published to the applicant and the Minister. At 4:57pm on the same day, the applicant's adviser faxed a submission containing additional potentially relevant evidence to the Tribunal. The Tribunal member after being presented with the submission asked that the material be forwarded to the Registry Manager for response as he had decided that there was no jurisdictional error and the case could not be reopened. At 6:34pm the applicant's advisor was notified of the Tribunal decision by fax.

The Minister contended that the point at which the Tribunal became *functus officio* was to be determined by reference to s 430(2) of the Migration Act 1958. Section 430(2) relevantly provides that a decision of the Tribunal (other than an oral decision) is taken to have been made on the date of the written statement.

The Minister referred a recent decision of Smith FM in *SZQCN v MIAC* [2011] FMCA 606 (23 September 2011), which held, pursuant to s 430(2), that the Tribunal decision is deemed to take effect upon the first moment in time on the date appearing on the written statement of reasons for the decision, regardless of the actual time when the decision was finalised in the mind of the Tribunal member, or when the statement of reasons was completed within the Tribunal, or published to the applicant. The Minster submitted that this construction ascribed to the Parliament the unlikely intention of deeming a decision-maker to be *functus* even before his or her statement of reason had been published. Instead, the Minister submitted that the better construction was that a Tribunal decision is final at the point when the presiding member has conveyed it to the Tribunal registry for publication.

The Court found that s 430(2) is concerned with when the limitation period for judicial review of the Tribunal's decision starts to run and not with when the Tribunal has completed its task. The Court found that in the absence of any specific provision governing the time when the Tribunal became *functus*, no decision was beyond recall prior to the publication of the decision. In this case, there was no direct evidence that the presiding member could not have recalled the decision at any point prior to its dispatch and the despatch was not an automated and irreversible process but effected through the actions of a Tribunal officer. Therefore given this final step was not taken until after the applicant's adviser had sent the further submissions, the Tribunal was not *functus* at the time the submissions were received.

Consequently the Court found that the Tribunal member erred when he concluded that the matter was finalised when he saw the additional submissions. The Court held that the information in the submission was not so insignificant that the failure to take it into account could not have materially affected the decision. Consequently the Tribunal should have considered it and its failure to do so was a jurisdictional error.

The consequences of a failure to properly appoint statutory officers

Kutlu v Director of Professional Services Review [2011] FCAFC 94 (28 July 2011) (*Kultu*)

This decision concerned whether a failure to follow a legislated consultation step prior to making a statutory appointment invalidated the appointment and the decisions of the purported appointee.

The *Health Insurance Act 1973* (HI Act) requires the Minister for Health and Ageing to consult with the Australian Medical Association (AMA) before appointing a medical practitioner to be a member of the PSR panel (s 84(3)) or a Deputy Director (s 85(3)).

In 2005 and 2009, without first consulting the AMA, the then Ministers appointed a number of medical practitioners as Deputy Directors and/or Panel members of the PSR panel. Each of the appointees was a member and/or Deputy Director of a PSR Committee (the Committee) that made adverse findings against five medical practitioners in conducting reviews of those practitioners' rendering of professional services for which the Commonwealth paid Medicare benefits. In late 2010, the Commonwealth made public the information that the Ministers had not complied with the statutory requirement of prior consultation before making, among others, those appointments.

The five applicant medical practitioners contended that the Minister's failure to follow the HI Act meant that the Committees were not validly constituted and the findings by those Committees against them had no effect.

The Commonwealth contended, among other things, that it could not have been the intention of the Parliament that such a failure, first, rendered the appointments invalid, and, second, caused the constitution and all the processes of Committees of which such appointees were members to be invalid. The Commonwealth also argued that, even if the appointment of a Panel member or Deputy Director itself were invalid, this did not deprive the Committee, on which that appointee acted, of validity. It argued in the alternative that the common law principle of preserving the validity of what had been done by de facto officers ought to be applied to preserve what such Committees had done.

The Court held that the requirement in the HI Act to consult the AMA is mandatory:

> ... the requirements of ss 84(3) and 85(3) are essential preliminaries to the Minister's exercise of the power of appointment. They have a rule-like quality that is easily identified and applied. The sections do not direct the Minister to carry out his or her powers of appointment in accordance with matters of policy. Instead, they confer a discretion to appoint after the preconditions of consultation with, and advice by, the AMA have been fulfilled and the Minister has had regard to that advice. ...

It followed that all the impugned appointments were invalid and as such the adverse findings and the final reports of the PSR Committees constituted by one or more of the appointees was invalid.

While the Court found that the public inconvenience resulting from a finding of invalidity of the various impugned appointments is likely to be significant:

> ....the scale of both Ministers' failures to obey simple legislative commands to consult the AMA before making the appointments is not likely to have been a matter that the Parliament anticipated. If the appointments were treated as valid, the unlawfulness of the Ministers' conduct in making them would attract no remedy. And, if that were so, the appointees would hold the offices to which the Minister had unlawfully appointed them and they could not be prevented by injunction or other orders of a court from exercising the powers of those offices.

The Court also rejected the Commonwealth's argument that the de facto officers doctrine applied. The Court held that the de facto officers doctrine is a principle of common law that can be overridden by statute (*R v Janceski* [2005] NSWCCA 281). In this case, the Parliament did not authorise persons to exercise those offices unless they had been appointed in accordance with s 84(3) and s 85(3) of the Act.

On 10 February 2012, the High Court granted special leave to appeal to the Commonwealth. However on 18 May 2012, the Commonwealth filed a Notice of Discontinuance. This followed the introduction of the Health Insurance Amendment (Professional Services Review) Bill 2012 in the Commonwealth Parliament on 9 May 2012. The Bill addresses issues raised by Kutlu by ensuring that actions taken under Part VAA, VB or VII of the HI Act and any flow on acts that have been brought into question as a result of the Kutlu decision,

are treated as valid and effective and are to be taken always to have been valid and effective.

Dob-in letters and illogicality and irrationality

SZOOR v Minister for Immigration and Citizenship [2012] FCAFC 58 (27 April 2012)

This was an appeal from a judgment of the Federal Magistrates Court that upheld a decision of the Refugee Review Tribunal (the Tribunal) affirming a decision not to grant the appellant a protection visa.

The appellant was a Pakistan citizenship, he claimed, among other things, that he had a well founded fear of persecution on the grounds of imputed political opinion. The appellant claimed that in July 2005 while working as a cameraman for GEO TV in Pakistan, he was involved with the filing of a news report about a Jamia Manzoor-ul-Islamia (JMI) madrassa. The appellant alleged that as a result of his involvement with the news report he was attacked by JMI and threats were made against his life. He provided corroborative documentary material to the Tribunal to support his claims, including, among other things, a letter purportedly from the Punjab Union of Journalists (PUJ), a medical report and a news report.

During its consideration of the matter, the Tribunal received an anonymous 'dob-in-letter'. The letter alleged, among other things, that the appellant's claims were fabricated. The Tribunal put the substance of the letter to the appellant. In its reasons the Tribunal found that although the allegation was made by a person who wished the appellant ill, the fact that the person making the allegation was able to detail the nature of the fabrication, which was supported by an analysis of the evidence provided by appellant, pointed to it being true.

The issue in the appeal was whether the Tribunal, by making a finding against the appellant, in part by relying on the letter, committed a jurisdictional error. The appellant contended that there was no probative evidence to support the allegations in the letter and, therefore, the Tribunal's reasoning was illogical and its findings as a whole vitiated (*MIAC v SZMDS* [2010] HCA 16 (26 May 2010)) (*SZMDS*).

Relying primarily on the High Court's reasoning in *SZMDS*, the Court (Rares, McKerracher and Reeves JJ) unanimously dismissed the appeal.

Justice Rares stated that the approach to irrationality or illogicality dictated by the authorities in the High Court appear to be that even if the decision-maker's articulation of how and why he or she went from the facts to the decision is not rational or logical, if someone else could have done so on the evidence, the decision is not one that will be set aside. It is only if no decision-maker could have followed that path, and despite the reasons given by the actual decision-maker, that the decision will be found to have been made by reason of a jurisdictional error.

While Rares J agreed that the appeal should be dismissed; he stated that, unfettered by High Court authorities, he would have concluded that the fact that an anonymous letter writer may have access to certain information that is accurate does not logically, rationally or reasonably allow the inference to be drawn that the other assertions made by the mysterious source are true:

> It is difficult to see how it is in the public interest that unknown persons who give no basis for their being in a position to make prejudicial assertions about another person are entitled to any credence in decision-making under the Act: cf *VEAL* 225 CLR at 98-99 [24]-[25]. Unconstrained by authority, I

> would have found that to do so is as irrational, illogical and unreasonable as having regard to a person saying that the red headed applicant for a visa should have his claim rejected because he has red hair and is a liar. However, the law appears to be otherwise.

Justice McKerracher, with whom Reeves J agreed, held that the appellant's argument paid insufficient regard to the other strong conclusions already reached by the Tribunal in relation to the appellant's conduct and his credibility before it considered the letter and, therefore, the substance of the letter was not integral to the subsequent reasoning of the Tribunal. Justice McKerracher found that the Tribunal, independent of the letter, had already concluded that the corroborative documentary material was obliviously and deliberately fabricated.

However, McKerracher J noted that, if the letter was the only material before the decision-maker in a hypothetical case, or reliance was placed on that document in order to lead to other conclusions or judicial facts, doing so would involve a process which might well be tainted with illogical or irrational reasoning. Had the letter been the only evidence relied upon, the appeal might have been disposed of quite differently.

FOI: legal professional privilege and the parliamentary privilege

British American Tobacco Australia Ltd v Secretary, Department of Health and Ageing [2011] FCAFC 107 (23 August 2011)

This case concerned a request by British American Tobacco (the appellant) to the Secretary of the Department of Health and Ageing (the respondent) under s 15 of the *Freedom of Information Act 1982* (FOI Act) for access to a copy of a memorandum of advice provided by the Attorney-General's Department (AGD) to the Tobacco Policy Section of the then Department of Health Services and Health (DHSH). The advice concerned legal and constitutional issues relating to the generic packaging of cigarettes.

The respondent refused the request on the basis that the documents were exempt from production under s 42 of the FOI Act because they were subject to legal professional privilege. The respondent's decision was affirmed by the Administrative Appeals Tribunal. The appellant appealed the Tribunal's decision to the Full Federal Court.

The appellant contended before the Full Federal Court that the legal professional privilege in the AGD legal advice was waived by the respondent. The appellant relied upon five acts of disclosure which, either alone or cumulatively, were said to have resulted in a waiver of privilege.

These acts were:

- a reference to aspects of the AGD legal advice in a Government Response paper which was tabled in the Senate;
- subsequent publication of the Government Response paper on a government website;
- a provision of a summary of the AGD legal advice to the Tobacco Working Group (TWG), (an advisory group to government) and the Ministerial Tobacco Advisory Group (MTAG), an advisory group which replaced the TWG; and
- the provision of a summary of the AGD legal advice prepared for the TWG to the appellant in the course of the proceedings before the Tribunal.

The respondent submitted that both the tabling of the Government Response paper and subsequent publication were "proceedings in parliament" pursuant to s 16(2) of the *Parliamentary Privileges Act 1987* (the *PP Act*) and therefore could not be considered by a Tribunal or Court for the purpose of determining whether legal privilege in the AGD legal advice had been waived (s 16(3) of the *PP Act*). Section 16(3) restricts the uses which may be made of evidence of federal parliamentary proceedings in litigation and proceedings before Courts and Tribunals. It provides:

> In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of—
>
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
>
> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

Additionally, the respondent contended that none of the acts of disclosure relied upon by the appellant were inconsistent with the respondent continuing to insist upon the privilege.

The Full Court (Keane CJ, Downes and Besanko JJ) held that legal professional privilege in the AGD legal advice had not been waived.

The Court accepted the respondent's argument that the tabling of the Government Response in the Senate was protected by parliamentary privilege under s 16(3) of the PP Act and this prevented the Tribunal and the Court from having regard to this when determining whether privilege was waived.

The Court did not accept the respondent's contention that s 16(3) extended to the publication of the Government response on a departmental website. Rather the Court affirmed the test for implied waiver stated in *Mann v Carnell* [1999] HCA 66 and affirmed in *Osland v Secretary, Department of Justice* [2008] HCA 37 that waiver of legal professional privilege will occur if the conduct of the person seeking to rely upon the privilege is inconsistent with the maintenance of the privilege. The disclosure of the gist of a privileged communication does not necessarily result in a waiver of the privilege. The Court held that in this case, the respondent was not seeking to deploy a partial disclosure of the AGD legal advice on its website for any forensic or other advantage.

In relation to the provision of summaries to the TWG and the MTAG, the Court held that the disclosures were not inconsistent with the maintenance of the privilege and, additionally, that the TWG and the MTAG were not 'outsiders' in relation to the government. Therefore, providing the advice to these bodies was not inconsistent with the maintenance of privilege.

With regard to the disclosure of the summary to the appellant during the Tribunal proceedings, the Court agreed with the Tribunal in finding that this disclosure was consistent with the claim of privilege. This circumscribed version of the AGD legal advice was disclosed as a document relevant to the Tribunal proceedings.

FOI: documents held by the Official Secretary to the Governor-General

Kline and Official Secretary to the Governor-General [2012] AATA 247 (30 April 2012) (Deputy President Hack SC)

Ms Kline nominated a person for appointment to the Order of Australia in 2007 and 2009. On both occasions her nominees were not appointed.

On 26 January 2011, Ms Kline applied under the *Freedom of Information Act 1982* (Cth) (*FOI Act*) for access to a number of documents held by the Official Secretary to the Governor-General (the respondent). The documents related to, among other things, Ms Kline's nominations to the Order and all correspondence held by the Official Secretary in relation to this nomination.

The Official Secretary decided, and the Information Commissioner on review agreed, that the Act does not apply to those documents by reason of s 6A of the Act. Section 6A provides that the *FOI Act* does not operate with respect to documents held by the Official Secretary unless they relate to 'matters of an administrative nature'.

The Tribunal held that none of the documents or categories of documents in dispute relate to matters of an administrative nature. The Tribunal found that documents generated in connection with the conferral of the Order honours do not ordinarily relate to matters of 'an administrative nature'. They relate to substantive functions of the Governor-General. While it is possible to conceive of exceptions to this general proposition (for example, correspondence with the supplier of medals and insignia, or with a caterer providing refreshments at the awards ceremony), the documents in question do not relate to this type of matter. If the *FOI Act* was intended to apply to documents generated in connection with a wider view of the Governor-General's functions, it would have done so using clear words.

The Tribunal also drew an analogy with the decision of Gray J in *Bienstien v Family Court of Australia* [2008] FCA 1138. In *Bienstien* the Federal Court relied on the limitation in s 5 of the *FOI Act* which provides, like s 6A, that the *FOI Act* does not operate with respect of documents held by a court unless they relate to 'matters of administrative nature'. While in this case the independence of the judiciary was not at stake, the Tribunal considered whether the documents in question related to matters that are concerned with the exercise of the Governor-General's function in circumstances where the proper exercise of that function would be compromised by disclosure. The Tribunal found that making choices about who would receive an honour is akin to a judicial function that involves a delicate judgment and frank advice from the Council of the Order is essential to the process. This being so, there are good reasons why this process should occur behind closed doors.

Endnotes

1 See NSWLRC Report at 8-10. See further NSWLRC Report at 7-22 and VLRC Report at 145-146.
2 See VLRC Report at 147.