RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook*

New South Australian tribunal to streamline justice

On 24 July 2013 legislation to establish a South Australian Civil and Administrative Tribunal (SACAT) was introduced into the South Australian Parliament ahead of consultation during the winter break.

Attorney-General John Rau said the SACAT is an important step towards access to efficient and fair justice and will take pressure off the court system.

'The SACAT will provide a 'one stop shop' for the community on a broad range of civil and administrative matters. This is a significant leap forward for South Australia'.

'The Tribunal will simplify access to justice for South Australians by providing one body for making and reviewing a range of administrative decisions which are currently performed by a wide array of decision making bodies such as ministers, commissioners, specialist boards and tribunals.

'It will also assist in relieving some of the backlog and delays experienced by our court system and provide the courts with more capacity to deal with other matters more quickly.'

The 2013-14 State Budget included $6.4 million over four years to establish the SACAT.

The South Australian Civil and Administrative Tribunal Bill 2013 outlines provisions to establish the Tribunal. The Bill will be followed by further legislation, once consultation has been completed, to make necessary amendments to existing statutes to confer jurisdiction on the Tribunal.

The Tribunal will:

- act with as little formality and legal technicality as possible;
- ensure efficient and cost effective processes for all parties involved;
- allow for streamlining of registry and administrative functions through a single organisation; and
- facilitate access to its services throughout the State by use of technology.

'The Tribunal will have the power to obtain evidence, manage parties, make appropriate determinations and control its processes to suit the matter it is considering,' Mr Rau said.

'It will also focus on alternative dispute resolution and assist parties reach agreement in their own way.'

'The SACAT is just one element of a package of reforms by the State Government to improve court efficiency and access to justice.'

The SACAT will be headed by a President, who will hold concurrent office as a Judge of the Supreme or District Court. The Tribunal will consist of members with a broad range of expertise and qualifications.

http://agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/2013-MR-sacat.pdf

President appointed for NSW super tribunal

The NSW Attorney-General Greg Smith SC has announced the appointment of Mr Robertson Wright SC as a Supreme Court judge and as the inaugural President of the NSW Civil and Administrative Tribunal (NCAT).

'NCAT will become the gateway for almost all tribunal services in NSW when it begins operating in January and I am pleased to announce that its first president has extensive experience not only in the law, but in tribunal operations and dispute resolution,' Mr Smith said.

Mr Wright has been practising as a barrister for 30 years and has been a Judicial Member of the Administrative Decisions Tribunal (ADT) since 2007.

'On the ADT, Mr Wright has presided over a range of matters including disciplinary hearings for legal practitioners and cases involving breaches of discrimination law,' Mr Smith said.

'As a barrister, Mr Wright has appeared in a large number of cases relating to competition and consumer protection.'

'He has also been involved in numerous mediations, assisting parties to resolve disputes and avoid expensive court proceedings.'

Mr Wright obtained a Bachelor of Laws and Arts at the University of Sydney, receiving first class honours for both degrees. He began practising law in 1980, was admitted to the bar in 1983 and has been a Senior Counsel since 2001.

Outside the law, Mr Wright served for 15 years in the Army Reserve, attaining the rank of major.

Mr Wright will be sworn in as a Supreme Court judge on 25 October 2013. On the same date, he will begin a five-year term as NCAT President.

'As President of NCAT, my focus will be on ensuring that tribunal processes are simple and efficient and that just outcomes are delivered quickly, cost effectively and transparently,' Mr Wright said.

NCAT will integrate 23 of the State's tribunals and bodies. Harnessing the expertise of the State's existing tribunals, NCAT will operate four specialist divisions:

- Consumer and Commercial;
- Guardianship;
- Administrative and Equal Opportunity; and
- Occupational and Regulatory.

NCAT will also have an internal appeals panel to enable accessible and timely reviews of most tribunal decisions.

'The creation of a tribunal network will build a collegiate atmosphere among division members, which will help to improve the quality and consistency of services,' Mr Smith said.

http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_news2013#16102013

Retired Judge to review the South Australian State Records Act

The South Australian State Government has initiated an independent review of the *State Records Act 1997* (SA) so that it remains relevant to current practices and technologies across Government.

Attorney-General John Rau said he believes the Act as it presently stands is not achieving practical results. 'Official government records are an important resource for the community for understanding the history of decisions made across Government,' Mr Rau said.

'It has become increasingly apparent to me that the State Records Act, which was written in the late 1990s, is losing its relevance in the digital information age.

'The Government's requirement for agencies to share more information to improve services and provide more information to the public also supports the need for a review'.

'The vast majority of government business is now conducted online.

'Government needs legislation that supports practical and sustainable management of these official records, while at the same time ensuring records of long-term value to the community are preserved'.

'Whilst retaining information remains critical; what is kept, how this is done, when this is done and why this is done are all questions that must be addressed'.

'Today I am announcing that Retired District Court Judge Alan Moss will be conducting a thorough review of the Act to address these questions and others relevant to the keeping of State records'.

Mr Rau says he expects the review will require a great deal of work in order to understand the full nature and extent of the issues involved.

'I do not intend to impose an arbitrary or unrealistic timeline on Mr Moss as we are after a good outcome for the community, not a superficial quick fix,' Mr Rau said.

'The review may recommend that more education is required, it may make suggestions for amendments to the Act, or it may even call for a new Act altogether.

'What is important is that the Act becomes relevant to current and foreseeable means of communication and that any ambiguities about how the Act is understood and implemented across Government are cleared up.'

http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/2013%20-%20MR%20state%20records.pdf

ALRC seeks input into Serious Invasion of Privacy law reform

The Australian Law Reform Commission (ALRC) has released the Issues Paper, *Serious Invasions of Privacy in the Digital Era* (ALRC Issues Paper 43, 2013), to begin the consultation process for its Inquiry.

The Terms of Reference for this Inquiry ask the ALRC to consider the detailed legal design of a statutory cause of action, and in addition, other innovative ways the law might prevent or redress serious invasions of privacy.

ALRC Commissioner for the Inquiry, Professor Barbara McDonald, said 'Although there has been significant privacy reform in recent years, there are still gaps in the legal protection of privacy. The digital era has created further challenges for the law, as, every day, we learn about new technologies for the tracking or surveillance of others and about new ways in which organisations and individuals may use and communicate all sorts of private information online. The task of designing a civil action to allow people to sue for serious invasion of privacy requires a careful balancing of legitimate interests in privacy with other matters of public interest including freedom of speech and expression, media freedom to inform and investigate, the effective delivery of services including healthcare, and the promotion of a vibrant and prosperous national economy.'

Key considerations for the ALRC include ensuring that any new protection would be compatible with existing privacy laws and regulation and that any proposed legislation is adaptable to future technological changes, but not so vague as to cause uncertainty.

The Issues Paper builds on work previously undertaken by the ALRC in 2008 and the Department of Prime Minister and Cabinet in 2011, and the recent work of both the NSW and Victorian Law Reform Commissions. It asks for submissions not just on issues relating to a stand-alone cause of action but also about alternative ways that existing laws could be supplemented or amended to provide more and appropriate protection for privacy in the digital era.

Privacy law affects not just government, big business and the media. It affects a range of occupations and activities in all kinds of social contexts. It has the potential to affect everyone. The ALRC invites individuals and organisations to make submissions in response to the questions contained in the Issues Paper, or to any of the background material and analysis provided. This community input will help inform the development of draft recommendations for reform to be released in a Discussion Paper due at the end of February 2014.

The Issues Paper is available free of charge from the ALRC website, www.alrc.gov.au, and is also available as an ebook.

For more information about the ALRC enquiry go to www.alrc.gov.au/inquiries/invasions-privacy. To keep up to date with the Inquiry, subscribe to the Inquiry e-news or follow #PrivRev or @AusLawReform on Twitter.

The Final Report is due to be delivered to the Attorney-General by 30 June 2014.

http://www.alrc.gov.au/news-media/media-release/alrc-seeks-input-serious-invasion-privacy-law-reform

Freedoms and Rights concerns in QLD bikie laws

The Commonwealth Human Rights Commission has significant concerns about the effects of the three Bills passed by Queensland parliament this week to curtail criminal activity among bikie gangs throughout the state. – The Vicious Lawless Association Disestablishment Bill, The Tattoo Parlours Bill and The Criminal Law (Criminal Laws Disruption) Amendment Bill.

'We have concerns that the internationally agreed freedoms and rights of specific groups of people in Queensland may be breached by the effect of these laws,' said Commission President, Professor Gillian Triggs. 'Indeed, we have concerns that the very manner in which the Bills were passed - rushed through without any form of public consultation – carries with it serious human rights ramifications, as does the fact that they target people on the basis of who they associate with, rather than for something they have done.'

Article 25 of the International Covenant on Civil and Political Rights, to which Australia is a signatory, states that 'Every citizen shall have the right and the opportunity … to take part in the conduct of public affairs, directly or through freely chosen representatives … to have access, on general terms of equality, to public service in his country.'

'The fact that the laws were rushed through without being subjected to the parliamentary committee process, without affording public consultation or scrutiny, would very likely not satisfy the requirements of the International Covenant on Civil and Political Rights,' Professor Triggs said.

Additionally, the Commission is concerned that people deemed by the legislation to be 'vicious lawless associates' will now be automatically subject to mandatory extra punishment above what would apply for the declared offence, including an additional 15 to 25 years imprisonment, and be subject to the potential waiving of bail and parole and a reversal of the onus of proof.

'The provision which we think raises the greatest concern from a human rights point of view is that each person is entitled to be treated equally with others before a court of law' said Professor Triggs. 'Here we have an attempt to specifically identify a class of person - members of a criminal motorcycle gang - and to require that there be mandatory sentences in relation to them.'

'As a democratic and fair society, freedom of association, freedom of expression and our right to be treated equally before the law in accordance with the International Covenant of Civil and Political Rights should be fundamentals under which we operate.'

Professor Triggs said that the passing of any laws, especially those creating wide reaching or sweeping powers, should be accompanied by a statement of Human Rights compatibility, as they are at the federal level, and also allow for their debate and scrutiny beforehand.

http://www.humanrights.gov.au/news/stories/freedoms-and-rights-concerns-qld-bikie-laws

Recent Decisions

Kingborough Council v Resource Management and Planning Appeal Tribunal [2013] TASSC 60 (16 October 2013)

Mr Kalis (the respondent) applied to the Kingborough Council (the Council) for a permit to develop a shopping centre at Margate. The Council refused the application. The respondent appealed to the Tasmanian Resource Management and Planning Appeal Tribunal (the Tribunal) and was successful. The Tribunal made two decisions. First, it directed the Council to issue a permit. Negotiations then followed as to the appropriate conditions to be attached to the permit. The Tribunal subsequently directed the Council to issue a permit subject specified conditions.

The respondent then applied to the Tribunal for an order for the Council to pay its costs. As part of that application the respondent applied for, and was issued, a summons, under the *Resource Management and Planning Appeal Tribunal Act 1993* (Tas), requiring the Council to produce to the Tribunal the minutes of a closed meeting which considered the respondent's earlier offer to resolve the appeal without proceeding to a hearing. The respondent argued that those minutes were relevant to his application for costs.

The Council applied under s 17 of the *Judicial Review Act 2001* (the Act) to the Tasmanian Supreme Court for a review of the Tribunal's decision to issue the summons. That section provides that a person aggrieved by a decision to which the Act applies may seek an order of review relating to the 'decision'. A 'decision' to which the Act applies is 'a decision of an administrative character made under an enactment'. A person aggrieved by a decision is a person whose interests are adversely affected by the decision.

Before considering the substantive issue, the Court considered two preliminary matters.

First, the respondent contended that the application was misconceived, in that the Tribunal's decision 'was conduct' for the purposes of making a decision (s 18), rather than a 'decision' (s 17).

The Court held that although the dispute about the permit had been determined, and the issue of the summons was a step along the way in the argument about costs, the issuance of the summons raised a discrete issue. Both the presiding member and the parties obviously considered it a matter of importance, given the extent of the submissions and the fact they resulted in a written decision by the Tribunal. If the summons was left unchallenged the ability of the Council to protect the minutes of the closed meeting from scrutiny would also potentially be lost. As such the Court found that the actions of the presiding member amounted to a decision and that this preliminary argument must fail.

Second, the respondent contended that the Council was not a person aggrieved because no adverse consequences flowed to the Council as a consequence of the issue of the summons. Instead, all that the summons required was that the relevant minutes be produced to the Tribunal. Without more, that would not result in the respondent or anyone else being able to view the minutes. In effect there was no loss of confidentiality, and therefore no adverse consequences. The Council contended that it was a person aggrieved because the summons affected its legal rights. It was being compelled to do something it would otherwise not be required to do and it could be punished if it failed to comply.

The Court held that the purpose of the summons is to obtain material which may have an impact on a decision of the Tribunal as to costs. The documents sought to be produced were from a closed Council meeting. Under the *Local Government (Meeting Procedures)*

Regulations 2005 (Tas), such material is required to be kept confidential unless the Council authorises its release. By issuing the summons, the Tribunal was overriding this and forcing the Council to produce material it would otherwise have no legal obligation to produce. In addition, there was a potential penalty if the Council did not comply. As such the Court was satisfied that the Council's interests had been adversely affected by the Tribunal's decision and therefore it was a person aggrieved.

SZQBN v Minister for Immigration and Citizenship [2013] FCAFC 94 (Jacobson, Edmonds and Logan JJ)

On 27 January 2011, a delegate purporting to act under s 116(1)(g) of the *Migration Act 1958* (the Act) made a decision to cancel the appellant's tourist visa, on the basis that she was satisfied that the appellant had ceased to be a genuine visitor. The delegate cancelled the visa following a lengthy interview at Sydney airport. The delegate's reasons included a statement that while the appellant claimed he had an incentive to return to China when he was interviewed, he then refuted that claim by stating that he did not want to return to China because he believed he may be treated unjustly. After being notified of the decision, the appellant applied for a protection visa.

The appellant sought judicial review of the decision in the then Federal Magistrates Court. He sought final relief, including a writ of certiorari quashing the decision and a writ of prohibition prohibiting the Minister from giving effect to the delegate's decision.

At the hearing, the Minister conceded jurisdictional error in the delegate's decision on the basis that she had denied the appellant procedural fairness by failing to give him particulars of an allegation that he intended to apply for a protection visa using false documents (s 120 of the Act). However, the Minister argued that the Court should exercise its discretion to refuse relief on the basis that the appellant had acted in bad faith and come to the Court with 'unclean hands' because he had misled the delegate during the interview by claiming that he was a genuine visitor to Australia. The appellant's protection visa application gave rise to an inference that the appellant's answers during the interview were untruthful and were designed to perpetrate a fraud on the delegate.

The Federal Magistrate refused to grant relief to the applicant on the basis of the appellant's bad faith and dismissed the application. The appellant then appealed to the Full Federal Court. The essential issue in the appeal was whether there was a sufficient connection between the bad faith found by the Federal Magistrate and the relief sought by the appellant to withhold the grant of an order in the nature of certiorari or prohibition.

In the Full Federal Court's view, notwithstanding the different nature of prohibition, and the different test for standing in comparison to mandamus, it must be accepted that in appropriate circumstances, bad faith by an applicant may be a discretionary bar to relief.

After considering the authorities the Full Federal Court held that the exercise of discretion to refuse relief for jurisdictional error due to bad faith or unclean hands is the exception, not the rule (*MZYSU v Minister for Immigration and Citizenship* [2012] FCA 1073). Bad faith which justifies the exercise of the discretion is characteristically constituted by significant dishonesty on which an applicant relies to subvert the proper processes of, and secure an advantageous outcome in, the relevant transaction or court proceedings (*R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389).

The Full Federal Court found that the decision at first instance suffered from a failure on his Honour's part to identify, and with precision, the finding of bad faith and its connection with

the relief that was sought: see *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35. In the Full Federal Court's view there was no immediate or necessary connection between the untruths the delegate found, about the appellant's intention not to return to China, and the delegate's failure to give the appellant particulars of the adverse information as required by s 120 of the Act.

In the Full Federal Court's opinion it would have been open to the Minister to contend that the delegate's failure to comply with s 120 of the Act would have made no difference as the appellant's visa would have been cancelled anyway: see *Stead v State Government Insurance Commission* [1986] HCA 54. However, the Minister did not do so either at first instance or on appeal.

Wingfoot Australia Partners Pty Ltd v Eyup Kocak [2013] HCA 43 (30 October 2013)

On 16 October 1996, the respondent worker suffered a neck injury at work. In 2009 the worker commenced two proceedings in the Victorian County Court relating to that injury: one seeking leave to bring proceedings for common law damages ('the serious injury application'); and the other seeking a declaration of entitlement to medical or like expenses under the *Accident Compensation Act 1985* (Vic) (the Act) ('the statutory compensation application').

The statutory compensation application was transferred to the Victorian Magistrates' Court, which at the employer's request, referred three medical questions to a Medical Panel for determination under s 45(1)(b) of the Act. Upon receiving the Medical Panel's opinion and written statement of reasons, the Magistrates' Court made consent orders to adopt and apply the opinion, and dismissed the statutory compensation application.

The serious injury application subsequently came before the Victorian County Court. The employer foreshadowed a contention that the County Court was bound by the Medical Panel's opinion either by virtue of s 68(4) of the Act (which provides that the Panel's opinion must accepted as final and conclusive by a court); or on the basis that the orders made by consent in the Magistrates' Court gave rise to an issue estoppel that precluded the worker from arguing that his injury was related to the injury he suffered on 16 October 1996.

The employer's foreshadowed contentions provoked the worker to apply to the Victorian Supreme Court for an order in the nature of certiorari to quash the Medical Panel's opinion. The grounds included that the Medical Panel failed to give adequate reasons for its opinion, thereby failing to meet the standard required by the *Administrative Law Act 1978* (Vic) (the *Administrative Law Act*). The application was dismissed but the worker successfully appealed to the Court of Appeal, which found that the reasons given by the Medical Panel were inadequate. By special leave to appeal, the appellant appealed to the High Court.

The High Court unanimously held that inadequacy of reasons is an error of law on the face of the record of an opinion of a Medical Panel for which certiorari will ordinarily be available. The High Court found that a Medical Panel is a 'tribunal' and its opinion on a medical question referred to it is a 'decision' within the meaning of the *Administrative Law Act*. Therefore an error of law manifest on the face of the Medical Panel's opinion is an error of law on the face of the record, and certiorari will be available to remove the legal consequences of an opinion for which non-compliant reasons have been given.

However in this case, an order in the nature of certiorari was not available, as the opinion of the Medical Panel had no continuing legal consequences. The function of an order in the nature of certiorari is to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power. An order in the nature of certiorari is not

available in respect of an exercise or purported exercise of power, the legal effect or purported legal effect of which is moot or spent. The operation of s 68(4) of the Act in the present case required the opinion given by the Medical Panel on the medical questions referred to it in the statutory compensation application to be adopted and applied by all courts and persons in the determination of the question or matter the subject of the statutory compensation application. Therefore the Medical Panel's opinion was spent when the Magistrates' Court dismissed the statutory compensation claim and had no bearing on serious injury application.
The Court also held that s 68(4) cannot create an estoppel giving a greater measure of finality to a medical opinion than that provided by s 68(4) itself. As the Medical Panel's opinion was spent when the Magistrates' Court dismissed the statutory compensation application there was no issue estoppel binding the parties in the conduct of the serious injury application.

Further, the High Court held that, in any event, the Medical Panel's reasons explained the actual process of reasoning by which it formed its opinion in sufficient detail to enable a court to see whether the opinion involved any error of law, and therefore met the standard required by the *Administrative Law Act*.

The High Court held that the Court of Appeal erred when it considered a higher standard was required. Unlike a judge deciding the same medical questions, a Medical Panel when explaining its reasons is under no obligation to explain why it did not reach a different opinion, even if that different opinion is shown by material before it to have been formed by someone else.

When considering the issue of the adequacy of the Medical Panel's reasons, the High Court also confirmed that in Australia there is no freestanding common law duty to give reasons for making a statutory decision.

Jamal v Director of Public Prosecutions [2013] NSWCA 355 (25 October 2013) (Meagher JA, Gleeson JA, and Latham J)

On 10 November 2011, Mr Jamal was found guilty in the NSW Local Court of assault and sentenced to a conditional good behaviour bond for 12 months. The Local Court also made a final apprehended violence order (the AVO) against Mr Jamal. Mr Jamal appealed to the NSW District Court.

The appeal was heard on 23 March and 1 June 2012. At the first hearing the possibility for an adjournment to obtain legal representation was raised with Mr Jamal by the Crown. However, he did not seek an adjournment until very late in the second hearing after Nicholson DCJ informed Mr Jamal that he was ready to give his decision. The adjournment was refused and Nicholson DCJ confirmed the conviction and the sentence imposed by the Magistrate, but amended the terms of the AVO.

On 29 June 2012, Mr Jamal sought review of the District Court's decision in the Court of Appeal. Mr Jamal's Counsel contended that he had been denied procedural fairness on the basis that he had not been given a reasonable opportunity to present his case because, among other things: (1) he was not afforded the opportunity to be legally represented; (2) his application for an adjournment (on 1 June 2012) was refused; and (3) he did not have the assistance of an interpreter (on 1 June 2012). While Mr Jamal's Counsel acknowledged that Mr Jamal had a day-to-day command of the English language and had been a lawyer in Egypt, Mr Jamal was out of his depth before an appeal court.

The Court of Appeal held that the obligation of procedural fairness is concerned with providing a person whose rights are potentially affected in a matter with the opportunity to deal with relevant issues. However, a party's failure to make proper use of that opportunity cannot be used to support a claim of procedural unfairness.

The Court of Appeal held there had been no denial of procedural fairness on the basis that the adjournment had not been granted. It was clear from the transcript, that in rejecting that application, Nicholson DCJ attached primary significance to the significantly late timing and content of the application, the utility of the adjournment to enable Mr Jamal to find legal representation (given he had been unable to find legal representation after the 23 March hearing), and the likelihood that a legal representative could not meaningfully assist Mr Jamal based on his assessment of the transcript of the Local Court hearing.

The Court of Appeal also found there was no denial of procedural fairness on the basis that Mr Jamal did not have the assistance of an interpreter for the entire hearing. After examining the District Court transcript, the Court of Appeal found (1) that when the interpreter was present he was used infrequently; (2) the application for an adjournment was made on the basis that Mr Jamal wished to seek legal representation, not that he required an interpreter, and (3) on those occasions when the Nicholson DCJ had trouble understanding Mr Jamal, he gave Mr Jamal further time for explanation and clarification.