RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Streamlined arrangements for external merits review

On 13 May 2014, the Abbott Government announced its intention to streamline and simplify Australia's external merits review system. The reforms will remove unnecessary layers of bureaucracy and deliver an improved and simplified merits review system for all Australians. This is in line with the Coalition's commitment to streamline government and reduce duplication to deliver efficient, effective government. The measure is expected to save $20.2 million over four years.

From 1 July 2015, key Commonwealth external merits review agencies will be amalgamated—namely, the Administrative Appeals Tribunal (AAT), Migration Review Tribunal and Refugee Review Tribunal, Social Security Appeals Tribunal and the Classification Review Board. Merits review of Freedom of Information (FOI) matters, currently undertaken by the Office of the Australian Information Commission (OAIC), will also be transferred to the AAT from 1 January 2015.

The merger of merits review agencies will provide an accessible 'one stop shop' for external merits review and will ensure that end-users have a review option that is fair, less confusing, just, economical, informal and quick.

Most states and territories have now established a similar 'super tribunal' for merits review, with considerable success.

The complex and multilevel merits review system for FOI matters has contributed to significant processing delays. Simplifying and streamlining FOI review processes by transferring these functions from the OAIC to the AAT will improve administrative efficiencies and reduce the burden on FOI applicants. The AAT will receive a funding boost to assist with the backlog and to better meet acceptable timeframes

Under the new arrangements, the Office of the Privacy Commissioner will be established as a separate statutory office and will continue to be responsible for the exercise of statutory functions under the *Privacy Act 1988* and related legislation.

The Government acknowledges the valuable contribution of Professor John McMillan AO as the Australian Information Commissioner and Dr James Popple as the Freedom of Information Commissioner and the staff of the OAIC.

The Government is committed to an external merits review system that is more efficient, less complicated and more effective.

The Budget is part of the Government's Economic Action Strategy to build a strong, prosperous economy and a safe, secure Australia.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/SecondQuarter/13May2014-Streamlinedarrangementsforexternalmeritsreview.aspx

Law Council of Australia concerned by removal of IAAAS Funding

The Law Council of Australia regrets the Australian Government's decision to cease funding the Immigration Application Advice and Assistance Scheme (IAAAS).

Law Council of Australia President, Mr Michael Colbran QC, said the IAAAS funds professional migration advice and application assistance to eligible immigration clients, including people seeking protection in Australia.

The existing IAAAS model provides modest funding to Australian lawyers and migration agents to provide limited assistance to asylum seekers so they can properly prepare their claims for refugee status or other forms of protection.

'The Law Council considers that the provision of advice and assistance by registered legal practitioners and migration agents is critical to an effective and efficient system of processing protection claims.

'The IAAAS assistance helps ensure that asylum seekers understand the relevant legal process that applies to their claim and ensures that people are able to present these claims in the appropriate form.

'The IAAAS does not extend to providing legal advice about challenging negative decisions in the courts but is important in enabling protection claims to be considered by qualified persons with the result that unsubstantiated protection claims are abandoned at an early stage and unsuccessful applicants are returned swiftly,' Mr Colbran said.

'Without this funding assistance, many vulnerable people will be left to navigate a legally complex system on their own,' Mr Colbran said.

The Law Council is also concerned that the Government's decision to cease funding to the IAAAS will place an unreasonable and unjustified burden on the Australian legal profession to provide pro bono assistance for the tens of thousands of asylum seekers who will otherwise be without help to make one of the most significant legal applications in their lives.

'While the legal profession has always demonstrated great generosity in providing advice to those most in need on a pro bono basis, it cannot be expected to underwrite the threatened failure of the Australian Government to meet this most basic need for assistance.

'While removing legal assistance from this group of clients may at first sound like a cost saving measure, the reality is that without legal assistance, the burden on the community will be increased in many ways, people's claims will be unfairly rejected and their cases could end up in the courts at significantly greater cost in the long run. 'The consequences for further delays in processing claims are obvious – as is the increased social and economic cost of further prolonged detention.

'The Law Council calls upon the Australian Government to reconsider its position and maintain IAAAS funding,' Mr Colbran concluded.

http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409_--Law_Council_concerned_by_removal_of_IAAAS_Funding.pdf

Guidelines urge privacy awareness when publishing personal information

The Queensland Office of Information Commissioner has released a new guideline entitled 'Self-publishing and the privacy principles' to assist people in becoming aware of the privacy implications of publishing their own personal information by explaining how their privacy rights can be affected when they publish or give their personal information for the purposes of publication.

The guidelines are being published during Privacy Awareness Week 2014, a community awareness campaign which encourages individuals to take an active and informed approach to protecting their personal information and raises awareness among public sector staff of their obligations under the *Information Privacy Act 2009* (Qld).

http://www.oic.qld.gov.au/about/news/guidelines-urge-privacy-awareness-when-publishing-personal-information

Australian Human Rights Commission to continue representing people with disability

The Australian Human Rights Commission is pleased that it continues to have the support of the Federal Government.

The President of the Australian Human Rights Commission, Professor Gillian Triggs, has, however, expressed her disappointment that the Commission's budget has been reduced by $1.65 million over the next four years and the reduction of special-purpose Commissioners from the current seven to six.

Professor Triggs notes that the statutory appointment of the current Disability Discrimination Commissioner, Graeme Innes, ends in July 2014. During his term, Commissioner Innes has made an outstanding contribution to the rights of people with disability and the development of the National Disability Insurance Scheme.

Pending a future appointment to be made by the Attorney-General, Professor Triggs will assume responsibility for continuing to meet the statutory obligations required under the Disability Discrimination Act.

The Commission has also decided to convene a national disability rights forum in early 2015, to bring the sector together to identify the key human rights issues being faced by people with a disability.

'It is vital that the human rights of Australians with disability, including older Australians, continue to be heard, especially when they are among the most vulnerable in our community. As President, I will see to it that we ensure people with disabilities have a voice,' said Professor Triggs.

https://www.humanrights.gov.au/news/media-releases/commission-continue-representing-people-disability

Northern Territory Civil and Administrative Appeals Tribunal to reduce red tape

The Northern Territory Country Liberals Government continues to cut red tape with the introduction of the Northern Territory Civil and Administrative Tribunal (NTCAT), a one-stop-shop for civil and administrative appeals.

NTCAT will create a user-friendly appeals process and replace the majority of the 35 commissioners, tribunals, committees and boards, which currently exist.

Attorney-General John Elferink said this is about creating efficiencies for Territorians by providing a single, central, easy to use system.

'The Tribunal will hear and determine a broad range of administrative matters and operate independently of Government,' Mr Elferink said.

'NTCAT will have the ability to make decisions based on information before them, as well as information which has come to light since the original decision.

'The Tribunal will remove unnecessary duplication and inefficiencies, a similar move which has already been adopted in all states across the country, except Tasmania.

'Careful consideration will be given as to whether individual bodies should remain or be abolished and their jurisdiction transferred to the Tribunal.

'The administrative law reforms will require amendments to an estimated 117 acts, a process to be completed carefully and gradually.

'Additionally, the 54 acts which include an appeals mechanism through the Supreme Court and Local Court will be assessed to identify its suitability for the NTCAT.

'The NTCAT also contains the membership structure of the Tribunal, stating that the president must be a magistrate or eligible for appointment as a magistrate.'

Mr Elferink said a report commissioned by the Northern Territory Government last year confirmed that there is a need for a more centralised appeals process, with greater fairness and flexibility.

'NTCAT is part of the Northern Territory Government's plan to create a strong and more efficient justice system through the Pillars of Justice law reforms,' Mr Elferink said.

'The Giles Government has a plan to deliver a justice system that is accessible and effective for Territorians.'

The NTCAT Bill is expected to be debated in Parliament during the August Sittings.

http://newsroom.nt.gov.au/mediaRelease/9395

IBAC Investigations uncover public sector corruption and police misconduct

The results of key investigations into alleged public sector corruption and police misconduct are detailed in a new report from the Victorian Independent Broad-based Anti-corruption Commission (IBAC), which was tabled in Parliament on 15 April 2014.

Investigations into public sector corruption and police misconduct have examined allegations of fraudulent purchasing in local government, bribery of a public official, and excessive use of force by police during an arrest.

The report outlines IBAC's activities in its first year of being fully operational, including investigations, reviews, and corruption prevention and education work, and IBAC's approach to the new integrity legislation.

In IBAC's first year of full operation, 24 new cases were investigated, 10 of which have been completed. Eleven former Office of Police Integrity (OPI) cases, which were unable to be completed by that agency before it was dismantled, were also completed by IBAC.

IBAC also completed 85 reviews of matters investigated by other entities, such as Victoria Police.

'The Victorian public has a right to expect that the people working for the public sector perform their duties with integrity, fairly and honestly,' IBAC Commissioner Stephen O'Bryan QC said.

'IBAC is committed to exposing, investigating and preventing corruption and police misconduct to ensure that the community can have confidence in our government services and that vital public resources aren't wasted.'

IBAC is working with public sector agencies to build capacity to prevent corruption and misconduct through prevention and education initiatives. In its first year, IBAC held 73 education initiatives across the state, reaching more than 1,600 public sector and police employees.

IBAC has also undertaken research to inform its future activities and where to focus its prevention and education efforts. Research into Victorian public sector employees' perceptions of corruption suggested that many senior Victorian public sector employees would have trouble identifying corruption risks, and would not know where to report corruption.

The special report also explains IBAC's approach to aspects of the legislation, highlights areas that may benefit from amendment, and identifies some aspects of the legislation that restrict the performance of IBAC's investigative functions.

IBAC expects to further engage the Parliament, so that the legislation continues to enable IBAC to fully and effectively perform its functions in exposing and preventing police misconduct and corrupt conduct within the broader Victorian public sector.

http://www.ibac.vic.gov.au/news-events/news/Article/2014/04/15/ibac-investigations-uncover-public-sector-corruption-and-police-misconduct

Recent Cases in Administrative Law

Interpreting and the wrong side of the line

***SZSEI v Minister for Immigration and Border Protection* [2014] FCA 465 (16 May 2014)**

The appellants were Nigerian citizens who had lodged protection visa applications shortly after they arrived in Australia. They claimed to have been threatened by members of a secret society who had killed their twin sons.

The Refugee Review Tribunal (the Tribunal) did not believe the appellants and affirmed the Minister's delegate's decision. The primary reason for this disbelief was inconsistencies in the appellants' evidence.

The appellants sought judicial review of the Tribunal's decision by the Federal Circuit Court, which dismissed their appeal. The appellants then appealed to the Federal Court.

Before the Federal Court, the appellants contended that the hearing conducted by the Tribunal did not comply with s 425 of the *Migration Act 1958* (Cth) (the *Act*); and in particular whether:

(a) the interpreter was permitted to engage in exchanges with the first appellant to the extent that the Tribunal member in effect delegated the function of cond*ucting the hearing to the interpreter other than as authorized by s.428 of the Act*; and

(b) non-translation and mistranslation by the interpreter of the Tribunal member's questions and the appellants' answers were such as to prevent the hearing being a lawful exercise of the Tribunal's function and powers pursuant to s 414 and s 425 of the *Act*.

The Court held that while it was evident that the interpreter exceeded her proper role on various occasions, this did not demonstrate that the Tribunal member unlawfully delegated the conduct of the hearing to her, or that she unlawfully usurped the Tribunal's statutory role.

However, the Court found that the standard of interpretation in this case fell well short of the required standard. It not only involved the interpreter making numerous gratuitous remarks by way of commentary on her part which did not reflect questions asked by the Tribunal, but it also extended to the interpreter making several gratuitous remarks on the credibility of some of the first appellant's answers. Furthermore, it is evident that some of the mistranslations and unprompted interventions were the source of confusion by the first appellant on matters which were of particular significance (including the circumstances of the sons' death) to the ultimate disposition of the review.

The Court held that it is well established that the right created by s 425 of the *Act* imposes an objective requirement for the Tribunal to provide a 'real and meaningful' invitation to give evidence and present arguments relating to the issues arising in relation to the decision under review (see *MIMIA v SCAR* [2003] FCAFC 126). While each case necessarily has to be looked at in the context of its own facts and circumstances, the Court considered that this fell on the wrong side of the line. The Tribunal hearing was not fair and did not meet the requirements of s 425 of the *Act*.

Is a former Tasmanian police officer entitled to merits review?

Gadon v Police Review Board *[2014] TASSC 23 (16 May 2014)*

On 22 May 2013, the Tasmanian Police Commissioner terminated the applicant's appointment as a police officer. On 24 May 2013, the applicant sought a review by the Police Review Board (the Board) of his termination.

On 29 November 2013, after hearing submissions, the Board effectively determined that the nature of the review which it was to carry out was not an unlimited merits review, but a review which required the applicant to demonstrate error on the part of the Commissioner in his determination decision.

The applicant sought judicial review of the Board's determination.

The applicant contended that the *Police Service Act 2003* (TAS) requires the Board to carry out a full merits review. While the Commissioner contended that the review is an appeal by way of rehearing on the material before the decision-maker, with express power to receive additional material, but with error on the part of the Commissioner needing to be shown.

The Court held that the starting point is that the Board is an administrative body whose task is to 'review' administrative decisions, determinations or recommendations made by the Commissioner. The Board's power to review is not expressly limited in any way. There is nothing in the text or context of the relevant provisions to compel the implication that the Board is confined to the identification of an error on the part of the Commissioner.

The Court noted the absence of legislative direction that any of the Board members have legal qualifications. While it is possible they might have (and without meaning any criticism of the abilities of the Board members) such a provision might be expected if part of the Board's task was to identify legal errors and to act in accordance with the correct law.

The Court also found it was very significant that the Act provided for the receipt of new material, and the clear mandate that the Board is not restricted to the material before the Commissioner. Such a provision reflects 'de-novo' decision making, where administrative decision-makers are obliged to have regard to the best and most current information available.

The Court also noted that the Board may uphold an application in whole or in part, dismiss it, and make such orders as it considers necessary or desirable for the purpose of giving effect to its decision. With the exception of an express power to remit, these are similar powers afforded to the Commonwealth Administrative Appeals Tribunal, which conducts full merits reviews. Such powers are seen as a convenient and integral part of the merits review process: *Shi v Migration Agents Registration Authority* [2008] HCA 31.

For those reasons, the Court held that a review under the Act is a full merits review of the Commissioner's decision.

Imprecise waste regulations

***Environment Protection Authority v Schon G Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq)* [2014] NSWCA 149 (16 May 2014)**

This appeal was about waste. More precisely, it was about the way in which the 'contribution' payable to the appellant (the EPA) in respect of waste received at a waste facility is to be calculated when no records have been kept.

Section 88 of the *Protection of the Environment Operations Act 1997* (NSW) (the *Act*) requires the occupier of a waste facility to pay to the EPA such contributions as were prescribed by the regulations in respect of all waste received at the facility. Clause 6 of the *Protection of the Environment Operations (Waste) Regulation 2005* applied where there were no or inadequate records, and required the EPA to estimate the tonnes of waste 'at the waste facility'.

The respondent was the liquidator of a company, which had operated a quarry and had also received substantial amounts of waste from off-site. The company had failed kept accurate records of waste received.

The EPA claimed that under cl 6, the respondent was required to pay a contribution of $49,745,055, calculated by estimating the total amount of waste at the site. The EPA contended that cl 6 should be given its ordinary literal meaning. The EPA further argued that where the occupier had chosen not to keep records and had mixed waste received at the site with waste generated on-site, then there was no reason why it should not pay a contribution calculated by reference to an estimation of the total amount of waste at the site.

The respondent contended that the EPA's construction of cl 6 was invalid because (1) it extended beyond the scope of the *Act*, contrary to Shanahan v Scott [HCA] 1957 4; and (2) it was inconsistent with the *Act*, contrary to the regulation-making power in s 323.

The primary judge dismissed the EPA's appeal. The EPA then appealed to the NSW Court of Appeal.

The Court of Appeal held cl 6 was to be construed as a whole and in its context: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28. Clause 6 should be construed so that it is coherent with s 88 of the *Act*, notwithstanding the textual differences between 'at the site' and 'received at the site'. Critical to the context of cl 6 is s 88, which uses the language of waste 'received at' a waste facility. The Court of Appeal also held that as delegated legislation is less carefully drafted and less keenly scrutinised than legislation, the textual difference on which the EPA relied had less weight: *Liversidge v Anderson* [1942] AC 206.

The Court of Appeal found that the EPA's construction would result in delegated legislation that was inconsistent with the *Act*, because it was an estimate of all waste at the site, not just waste received at the site. It would also expand the operation of the *Act*, as the EPA's construction resulted in a penalty for failing to keep accurate records, which was clearly beyond the scope of s 88, which made no reference to 'penalties' only 'estimates'.

Accordingly the Court of Appeal concluded that on its proper construction cl 6 only authorises an estimate of the waste received at a site. Therefore in calculating the appellant's contribution, the EPA did not comply with the *Act* or cl 6.

Procedural fairness and a lack of legal representation

***Doepgen v Mugarinya Community Association Incorporated* [2014] WASCA 67 (28 March 2014)**

The appellant, a prospector who is not of Aboriginal descent, applied to enter the Yandeyarra Reserve, south of Port Hedland, for the purpose of prospecting. The Reserve is Crown land reserved for the use and benefit of Aboriginal inhabitants. It is leased to the respondent, which controls access to the Reserve by way of by-laws made pursuant to the *Aboriginal Communities Act 1979* (WA). The by-laws permit the respondent to impose conditions on access to the Reserve by people who are not of Aboriginal descent

The appellant's application to enter the Reserve was approved by the respondent, subject to the payment of a fee of $25,000 per annum.

The appellant sought a review of the respondent's decision in the WA State Administrative Tribunal (the Tribunal). The appellant alleged that the imposition of the fee constituted unlawful discrimination on the ground of race, contrary to the *Equal Opportunity Act 1984* (WA). Before the Tribunal, the appellant did not have legal representation but was assisted by a friend, Ms Conlan-Nash.

The Tribunal held that the access fee imposed was lawful. The appellant then sought leave to appeal to the WA Court of Appeal. The appellant was required to attend to show cause why the appeal should not be dismissed on the basis that none of the grounds of appeal had any reasonable prospect of success.

The appellant contended that she was denied procedural fairness in that, being aware the appellant could not afford legal representation, the Tribunal should have adjourned the hearing and referred the appellant to the Tribunal's pro bono scheme (of which the appellant was then unaware) to obtain legal representation, such representation being necessary in order for the appellant to have a reasonable opportunity to present her case.

The Court found that this contention was misconceived. The law of procedural fairness is concerned to avoid practical injustice. At its most basic, procedural fairness ensures that parties are given a fair opportunity to have their case heard and that the decision is made by a decision-maker free of bias. The specific content of the requirements of procedural fairness depends upon the particular circumstances of the case: *Re MIMIA; Ex parte Lam* [2003] HCA 6.

There is no principle which required the appellant to have legal representation when appearing before the Tribunal. While a court has jurisdiction to grant an adjournment or order a permanent stay of proceedings until an indigent person charged with a serious criminal offence is provided with appropriate legal representation (*Dietrich v The Queen* [1992] HCA 57), that aside, the rules of procedural fairness do not extend to a requirement that legal representation be available to a party appearing before a court or tribunal: *The State of New South Wales v Canellis* [1994] HCA 51. The appellant was not denied procedural fairness simply because she did not have legal representation.

The Court also found that the appellant was not denied the opportunity to have legal representation. It is evident from the transcript of the hearing that the appellant attended the hearing with the intention that she would argue the matter herself, with the assistance, so far as needed, of Ms Conlan-Nash. It is apparent that the appellant's contention that she should have been referred to the Tribunal's pro bono scheme was an after-thought. And even if she was referred to the pro bono scheme, it was doubtful that she would have been eligible as she was seeking a permit for commercial gain.

In the Court's view, none of the grounds of appeal had any prospect of success. Accordingly, leave to appeal was refused.