RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Parliament passes the Tribunals Amalgamation Bill

On 14 May 2015 the Commonwealth Parliament passed the Tribunals Amalgamation Bill, a significant reform, which will merge the key Commonwealth merits review tribunals into one body.

From 1 July 2015, the Social Security Appeals Tribunal (SSAT) and the Migration Review Tribunal–Refugee Review Tribunal (MRT–RRT) will join the Administrative Appeals Tribunal (AAT).

This is the biggest reform to the Australian administrative law system since the AAT was established in 1975 as a generalist merits review tribunal with broad jurisdiction.

Bringing the tribunals together will enhance access to justice through the provision of a single, simple point of contact for users of the tribunal. It will adjudicate over 40,000 applications every year, providing fair, just, economical, informal and quick reviews of administrative decisions.

Expertise that is essential to managing matters in specialist jurisdictions will be maintained, while procedures will be harmonised and simplified wherever possible.

The merger will achieve savings of $7.2 million over four years through shared back office functions and property holdings.

Applicants will come to the merged tribunal to challenge Government decisions in areas such as: tax matters; visa applications; social security benefits; workers compensation; disability support; freedom of information requests and veterans' entitlements.

The new AAT will commence under the leadership of Justice Duncan Kerr *Chev LH* as President.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/SecondQuarter/14-May-2015-Parliament-passes-the-Tribunals-Amalgamation-Bill.aspx

Tax complaints to move from Commonwealth Ombudsman

The way in which people complain about the Australian Taxation Office and Tax Practitioners Board will change from 1 May 2015.

Legislation transferring the tax complaints role from the Commonwealth (Taxation) Ombudsman to the Inspector-General of Taxation (IGT) will come into effect on that date and from then most tax complaints will need to be directed to the IGT.

The Ombudsman will continue to receive complaints concerning Public Interest Disclosures or Freedom of Information issues about the ATO or Tax Practitioners Board.

Commonwealth Ombudsman Colin Neave said he would work with the IGT to minimise confusion or inconvenience to taxpayers, and that arrangements for the transfer of the function were in place.

http://www.ombudsman.gov.au/media-releases/show/243

Office of the Australian Information Commissioner cooperates with international counterparts to finalise Adobe investigation

The Australian Privacy Commissioner, Timothy Pilgrim, has found that Adobe Systems Software Ireland Pty Ltd (Adobe) breached the *Privacy Act 1988*, following a cyber-attack that affected at least 38 million Adobe customers globally, including over 1.7 million Australians.

Recognising the global nature of this incident, the Commissioner's investigation was conducted in cooperation with the Data Protection Commissioner of Ireland and the Office of the Privacy Commissioner of Canada.

The Commissioner's investigation found that Adobe failed to take reasonable steps to protect all of the personal information it held. 'The Privacy Act does not require an organisation to design impenetrable systems, however, this case demonstrates the importance of organisations applying sufficiently robust security measures consistently across systems,' Mr Pilgrim said.

The personal information compromised in the attack was held on a backup system that was designated to be decommissioned. The information included email addresses, encrypted passwords, plain text password hints and encrypted payment card numbers and payment card expiration dates.

'Adobe generally takes a sophisticated and layered approach to information security and the protection of its IT systems,' Mr Pilgrim acknowledged. 'However I was particularly concerned about the way in which Adobe protected its customers' email addresses and associated passwords in the compromised system.'

The type of encryption that Adobe used for the customer passwords stored in its backup system, together with password hints stored in plain text, allowed security experts to identify the most common passwords and the customer accounts associated with those passwords.

'I am satisfied that the measures that Adobe took in response to the data breach will assist it to significantly strengthen its privacy framework and meet its obligations under the Privacy Act. I have asked Adobe to engage an independent auditor to certify that it has implemented the planned remediation, and to provide me with a copy of the certification and auditor report by 30 June 2015', Mr Pilgrim said.

As this breach occurred prior to 12 March 2014, Adobe was subject to the National Privacy Principles (NPP). The Commissioner's investigation focused on NPP 2 (use and disclosure) and NPP 4 (data security):

- NPP 2 stated that an organisation must not use or disclose personal information about an individual for a purpose other than the primary purpose of collection, unless a listed exception applies.
- NPP 4.1 provided that an organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure.

NPP 2 was replaced on 12 March 2014 by Australian Privacy Principle (APP) 6, and NPP 4 was replaced by APP 11. The requirements of these APPs are substantially similar to the two NPPs.

Further, as the breach occurred before 12 March 2014, the Privacy Commissioner's powers, under the *Privacy Act 1988,* to resolve the investigation were limited to making recommendations.

The OAIC and Data Protection Commissioner of Ireland exchanged information about the data breach in accordance with the Memorandum of Understanding on Mutual Assistance in the Enforcement of Laws Protecting Personal Information in the Private Sector, which they entered into on 25 April 2014. See OAIC website: www.oaic.gov.au/about-us/corporate-information/memorandums-of-understanding/mou-oaic-dpci.

The OAIC and Office of the Privacy Commissioner of Canada exchanged information under the APEC Cross-Border Privacy Enforcement Arrangement: APEC Cross-Border Privacy Enforcement Arrangement (PDF).

The full report can be accessed on the OAIC website: www.oaic.gov.au/privacy/applying-privacy-law/commissioner-initiated-investigation-reports/adobe-omi

http://www.oaic.gov.au/news-and-events/media-releases/privacy-media-releases/office-of-the-australian-information-commissioner-cooperates-with-international-counterparts-to-finalise-adobe-investigation

Oversight of the *Public Interest Disclosures Act 1994* (NSW) Annual Report 2013-2014

On 7 May 2015, the NSW Ombudsman tabled his office's third annual report under the *Public Interest Disclosures Act 1994* (NSW) (*PID*). The report provides a snapshot of the disclosures made and handled by public authorities that year. It also outlines the work of the office in monitoring the way in which public interest disclosures are dealt with through interactions with public authorities, the complaints handled and the audits conducted.

The report discusses the growing awareness of the *PID* and the protections it affords for reporters. Despite this, there are challenges and barriers which impede effective internal reporting, such as the management of people involved in the process, and their workplaces; the intention is to minimise the disruption and conflict that can result from reporting.

https://www.ombo.nsw.gov.au/news-and-publications/news/oversight-of-the-public-interest-disclosures-act-1994-annual-report-2013-2014

Southern Phone Company's silent number privacy breaches

The Australian Communications and Media Authority (ACMA) has found that Southern Phone Company Limited (SPC), by inadvertently removing the silent number classification from its customer records when uploading customer data to the Integrated Public Number Database (IPND), contravened:

- clause 4.6.3 of the Telecommunications Consumer Protections Code (the TCP Code);
- clause 5.12 of the IPND Industry Code; and
- subsection 101(1) of the Telecommunications Act 1997.

The ACMA has now directed SPC to comply with the privacy clauses of the TCP Code and accepted an enforceable undertaking offered by SPC.

The ACMA investigation found that SPC failed to protect the privacy of 3,854 silent line customers resulting in their telephone numbers and associated name and address details being published in three Australia-wide online public number directories between 18 March 2014 and 24 July 2014. In addition, some of the affected customers also had their service details published in various regional hard copy directories. SPC notified all affected customers of the incident and offered customers the option of a new telephone number free of charge.

'Failure by a telco provider to honour a customer's request for a silent number is an issue that the ACMA takes very seriously, particularly given that such requests often arise from concerns over personal safety,' said ACMA Chairman, Chris Chapman.

The Enforceable Undertaking (EU) commits SPC to upgrade its data collection, engage an independent auditor to review its processes, instigate a comprehensive education and training program, and comprehensively report to the ACMA. Failure to meet the EU exposes SPC to Federal Court action.

SPC has fully cooperated with the ACMA during the investigation and acknowledged that the ACMA had reasonable grounds to make its findings.

The ACMA consulted with the Office of the Australian Information Commissioner during the investigation.

The ACMA will closely monitor SPC's compliance with the EU and direction.

http://www.acma.gov.au/Industry/Telco/Carriers-and-service-providers/Obligations/southern-phone-companys-silent-number-privacy-breaches

Appointment of NSW Ombudsman

On 9 June 2015, NSW Premier Mike Baird announced the appointment of Professor John McMillan AO as NSW Ombudsman, succeeding Bruce Barbour, whose term concluded on 30 June.

At his own request, and because he is aged 65, Professor McMillan has been appointed in an acting capacity for a two-year term.

Professor McMillan is the inaugural Australian Information Commissioner and was Commonwealth Ombudsman between 2003 and 2010. He is an Emeritus Professor of the Australian National University.

'I welcome the appointment of Professor McMillan, whose skills and experience put him in an ideal position to help ensure our public agencies maintain a world's-best level of performance,' Mr Baird said.

'Professor McMillan will take over responsibility for Operation Prospect, which Mr Barbour has progressed to its concluding stages, and I look forward to a comprehensive report as soon as possible.

'Finally, I would like to commend Mr Barbour for his service to NSW,' Mr Baird said.

https://www.nsw.gov.au/media-releases-premier/appointment-nsw-ombudsman

The Australian Human Rights Commission welcomes progress on constitutional recognition

Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda has welcomed the release of a Joint Parliamentary report on constitutional recognition of Aboriginal and Torres Strait Islander peoples.

The Final Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was tabled in Federal Parliament on 25 June 2015.

'The options set out in this report will help guide our discussions at the upcoming bipartisan summit on constitutional recognition,' Commissioner Gooda said.

'We need urgent bipartisan agreement on the path forward and a consensus on the question to be put to the Australian public in a referendum.

'I hope that an agreement on the way forward is reached quickly, and with the involvement of Aboriginal and Torres Strait Islander peoples.

'As I have said before, we cannot afford to let constitutional recognition of Aboriginal and Torres Strait Islander peoples fall from public consciousness.'

The report also recommended the insertion of the United Nations Declaration on the Rights of Indigenous Peoples in the Human Rights Act.

'Together with constitutional recognition, the Declaration is a blueprint for realising the rights of Aboriginal and Torres Strait Islander peoples,' Commissioner Gooda said.

https://www.humanrights.gov.au/news/media-releases/commission-welcomes-progress-constitutional-recognition

Annual report on the operation of the Charter released

After eight years of operation, Victoria's Charter of Human Rights and Responsibilities has moved beyond simple compliance with the law to proactively shaping and improving public sector decision-making.

The annual Charter report, tabled in the Victorian Parliament on 25 June 2015, provides further evidence that since its inception in 2006, the Charter has become a catalyst for change that has promoted and strengthened a culture of human rights across Victoria.

Victorian Equal Opportunity and Human Rights Commissioner Kate Jenkins says, 'This year's report gives a clear picture of how far the Charter has come.

'In many ways, it is now part of everyday business for public authorities to consider human rights when they make decisions that affect people, but is also more than just ticking a box. The critical shift has been towards addressing systemic issues in human rights as the Charter is used in more sophisticated ways when authorities are developing and reviewing policies.

This means the Charter is working as intended, however, some of the disturbing issues raised in this year's report show that there are still a number of areas where human rights practices can be improved.'

In addition to the usual consultations with state government departments, statutory agencies, local councils and community organisations, the Commission this year invited more than 50 community organisations to complete a human rights survey. Government departments and agencies were also given the opportunity to provide comments on specific human rights issues.

The key issues raised this year include the impact on Victoria's tough on crime reforms as well as the experience of children and young people in the criminal justice system. Concerns over increased rates of incarceration of Aboriginal women were also highlighted, in addition to the rights of LGBTI people and the barriers faced by Victorians with disabilities when reporting crimes.

A number of high profile family violence related deaths in Victoria in the first half of 2014 also raised the issue of human rights obligations for Government.

'We need to keep building on the progress we've made to ensure that the Charter continues to be a key driver in organisational behaviour through to law reform efforts aimed at protecting and promoting human rights for all Victorians,' Ms Jenkins said.

This year also sees the Eight Year Review of the Charter. The Commission has made a submission, incorporating 27 recommendations to further strengthen the Charter and to enhance the development of a human rights culture in Victoria.

As a new and developing law, the Charter required a review after four years of operation and again after eight years. The reviews provide an important opportunity to strengthen and build understanding on the role the Charter can play to improve human rights outcomes for all Victorians. The eight year review of the Charter is being conducted by independent reviewer Michael Brett Young. He is due to report to the Attorney General on his review by 1 September 2015.

http://www.humanrightscommission.vic.gov.au/index.php/news-and-events/media-releases/item/1261-annual-report-on-the-operation-of-the-charter-released

Recent Cases in Administrative Law

The fair-minded observer and the Staffordshire terrier

Isbester v Knox City Council [2015] HCA 20 (10 June 2015)

Following a hearing before the Knox Domestic Animals Act Committee of the Knox City Council (the panel), a delegate of the respondent who was the Chairperson of the panel made a decision under s 84P(e) of the *Domestic Animals Act* 1994 (Vic) (the *Act*) to destroy the appellant's Staffordshire terrier (Izzy). Section 84P(e) of the *Act* provides the Council with the power to destroy a dog where its owner has been found guilty of an offence under s 29 of the *Act*. The appellant had been convicted in the Ringwood Magistrates' Court of an offence under s 29(4) of the *Act*, on a charge that her dog had attacked a person and 'caused serious injury'.

Another member of the panel (Ms Hughes), who had participated fully in the panel's decision-making process and drafted the reasons for the decision, was an employee of the respondent whose duties included the regulation of domestic animals under the *Act*. Ms Hughes had also been substantially involved in the prosecution of the appellant in the Magistrates' Court and the investigation that resulted in those proceedings. Prior to the hearing the appellant was informed that 'the officer involved in the investigation may be present but they will not be involved in the decision-making'.

The appellant unsuccessfully sought judicial review of the respondent's decision in the Victorian Supreme Court. The appellant then appealed to the Court of Appeal of the Victorian Supreme Court, which dismissed the appeal. By grant of special leave, the appellant appealed to the High Court.

The issue before the High Court was whether the decision to destroy the dog should be quashed because of the substantial involvement of Ms Hughes both in the prosecution of the charges concerning the dog and in the panel's decision to destroy the dog.

The High Court unanimously allowed the appeal. The High Court found that a fair-minded observer might reasonably apprehend that the respondent's employee (Ms Hughes) might not have brought an impartial mind to the decision to destroy the appellant's dog, because her role in the Magistrates' Court proceedings gave her an interest that was incompatible with her involvement in the decision making process of the panel.

The High Court held that, although another member of the panel was responsible for making the decision to order the destruction of the dog, there was still an apprehension that the involvement of the respondent's employee in the Magistrates' Court prosecution might affect not only her own decision-making, but also that of the other members of the panel. The High Court found that natural justice required that she not participate in making the decision, and that the decision of the respondent's delegate must therefore be quashed.

Procedural fairness and flexibility in Tribunal hearings

Uelese v Minister for Immigration and Border Protection & Anor [2015] HCA 15 (6 May 2015)

The appellant is a Samoan born New Zealand citizen who moved to Australia in 1998. When he arrived in Australia he was granted a Class TY Subclass 444 Special Category (Temporary) visa, which allows him to remain in Australia indefinitely, while he is a New Zealand citizen. The appellant has a 'substantial criminal record' for the purposes of s 501(7)(c) of the *Migration Act 1958* (Cth) (the Act). In 2012, on the basis of that criminal record, a delegate of the Minister for Immigration made a decision under s 501(2) of the *Act* to cancel the appellant's visa.

The appellant applied to the Administrative Appeals Tribunal (the Tribunal) for review of the delegate's decision. Under a ministerial direction made pursuant to s 499 of the *Act*, the Tribunal was required to consider the best interests of any minor children in Australia affected by the cancellation of the appellant's visa. The appellant made submissions about the best interests of three of his children. However, during cross examination of his partner, in the Tribunal hearing, it also emerged that the appellant has two other younger children from a different relationship. It was unclear as to why the appellant did not acknowledge these children.

Section 500(6H) of the *Act* provides that the Tribunal must not have regard to any information presented orally in support of a person's case unless it has been provided in a written statement to the Minister at least two days before the Tribunal holds a hearing. The Tribunal held that s 500(6H) prevented it from considering the position of the appellant's two

youngest children from a different relationship and affirmed the delegate's decision to cancel the appellant's visa.

The appellant applied to the Federal Court for judicial review of the Tribunal's decision. That application was dismissed. The appellant then appealed to the Full Court of the Federal Court. That appeal was also dismissed. By special leave, the appellant appealed to the High Court.

The High Court unanimously allowed the appeal. The High Court held that s 500(6H) does not preclude the Tribunal from considering information, which is not presented by or on behalf of an applicant for review as part of his or her case. The Tribunal, acting upon its erroneous understanding of the effect of s 500(6H) of the *Act*, truncated the review which it was required to undertake.

The High Court held that s 500(6H) should not be construed to restrict the flexibility of the Tribunal to ensure procedural fairness to the parties to a review beyond what is required by its terms (see s 33(1) of the *Administrative Appeals Act 1975*). In particular the Tribunal failed to have regard to whether the interests of the appellant's two youngest children would be best served by cancelling his visa. As a result, the Tribunal did not conduct the review required by the *Act*, and consequently acted beyond its jurisdiction (see *Minister for Immigration and Citizenship v Li* [2013] HCA 18).

Valid applications and incorrectly completed forms

Hassan v Minister for Immigration [2015] FCCA 894 (27 January 2015)

The applicants sought judicial review of a decision of the Migration Review Tribunal (the Tribunal) that an application lodged was not a valid application for review. Under s 347 of the *Migration Act 1958* (Cth) an application for review had to be made in the approved form, by the person who was the subject of the decision, in this case, the visa applicant, not the sponsor.

The applicant's solicitor lodged the approved application form; however, Questions 3 and 5 of the form, which required the name and contact details of the person applying for review, were incorrectly filled out with the sponsor's details, rather than the primary visa applicants' details. Nevertheless, the completed form correctly contained full details of the decision sought to be reviewed, and all the visa applicants' details, and the declaration to be signed by each person applying for review was signed by the visa applicant and his wife.

The Tribunal focused on Question 3 of the form, which incorrectly set out the sponsor's name and took the view that the person applying for review was not the visa applicant and therefore there was no valid application.

The applicants then sought judicial review of this decision by the Federal Circuit Court of Australia.

The issue before the Court was whether the visa applicant was the person who made the application for review and, if so, whether the information on the face of the form fulfilled the purpose of the form and substantially complied with it (s 25C of the *Acts Interpretation Act 1901* (Cth)).

The Court held that the applicants, despite providing the incorrect details in Question 3, had made a valid application. The completed form was in substantial compliance with the relevant legislative requirement. The form itself as it had been completed contains all of the details necessary to determine whether it is a valid application. It contains full details of the

decision that is sought to be reviewed. It contains all the visa applicants' details, as would be required whether described as the visa applicant or the review applicant. It also describes all of the other visa applicants, which form part of the one family. Significantly, at the end of the form, the formal declaration section clearly identifies that the person that is seeking this review and lodging the form is the visa applicant himself.