RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Counter-Terrorism Legislation Amendment Bill (No. 1)

On 12 December 2014, the Commonwealth Parliament passed the Counter-Terrorism Legislation Amendment Bill (No. 1). The legislation addresses urgent operational needs identified by Australia's intelligence and law enforcement agencies.

The measures in the Bill will assist these agencies to disrupt domestic terrorist threats and support the international coalition to degrade ISIL in the Middle East. They are part of the Government's comprehensive legislative reform agenda to address the threat posed by Australians participating in, and supporting, foreign conflicts or undertaking training with extremist groups.

The Bill will enhance the control order regime in the *Criminal Code Act 1995* (Cth) to allow the Australian Federal Police (AFP) to seek control orders in relation to a broader range of individuals of security concern. This will allow the AFP to take timely action against those suspected of funding, enabling or supporting persons who are suspected of terrorist activity and of fighting with terrorist organisations in foreign conflicts.

The Bill also amends the *Intelligence Services Act 2001* (Cth) and will improve the ability of the Australian Secret Intelligence Service (ASIS) to provide timely support to the Australian Defence Force in military operations.

The Bill incorporates amendments proposed by the bipartisan Parliamentary Joint Committee on Intelligence and Security (PJCIS), which unanimously recommended passage of the Bill. The PJCIS acknowledged that the improvements provided in the Bill were urgently needed to ensure that Australia's intelligence and law enforcement agencies could undertake relevant activities to protect Australian security at home and in support of the Australian Defence Force operations in Iraq against ISIL.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/2December2014-ParliamentPassesCounter-TerrorismLegislation.aspx

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill

On 30 October 2014, the Commonwealth Parliament passed the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill.

This Bill provides measures that will enhance the capability of law enforcement, intelligence and border protection agencies to keep Australians safe.

The conflicts in Syria and Iraq, and the terrorist organisations involved, have changed the threat environment, providing an opportunity for radicalised Australians to travel overseas, become further radicalised and develop the ability to undertake terrorist acts. Returning foreign fighters and supporters of foreign conflicts pose a significant threat to Australia.

This Bill is the second stage in the Government's reform of Australia's national security legislation.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/30October2014-ParliamentPassesForeignFightersBill.aspx

Freedom of Information Amendment (New Arrangements) Bill 2014

The Freedom of Information Amendment (New Arrangements) Bill 2014 proposes changes to an applicant's right to seek review of a freedom of information (FOI) decision. Currently, an FOI applicant can choose to seek review of an information access refusal decision in two ways:

- internal review: an application must be made within 30 days; and
- Information Commissioner review (IC review): an application must be made within 60 days.

Upon commencement of the New Arrangements Bill, the only option for review of an initial access refusal decision will be to make an application for internal review, which must be made within 30 days. When the Bill commences, an applicant seeking review of a decision made between 30 and 60 days beforehand, will lose the right to apply for IC review.

Section 54B gives agencies the discretion to accept an application for internal review even after the 30-day time limit. The Bill will not change that provision. The Office of the Australian Information Commissioner (OAIC) encourages agencies to exercise that discretion and accept applications for internal review from applicants who have been affected in this way: that is, from applicants seeking review outside the 30-day time limit, having lost the right to apply for IC review.

The Bill was proposed to come into effect on 1 January 2015 but was not considered by the Senate before the end of the 2014 sitting period. Accordingly, the OAIC continues to be operational.

http://www.oaic.gov.au/news-and-events/statements/australian-governments-budget-decision-to-disband-oaic/review-rights-and-the-foi-new-arrangements-bill

Department of Immigration and Border Protection unlawfully disclosed personal information of asylum seekers

The Department of Immigration and Border Protection (DIBP) has been found in breach of the *Privacy Act 1988* (Cth), by failing adequately to protect the personal information of approximately 9,250 asylum seekers. They have also been found to have unlawfully disclosed personal information.

The Office of the Australian Information Commissioner (OAIC) was notified by the *Guardian Australia* on 19 February that a 'database' containing the personal information of 'almost 10,000' asylum seekers was available in a report on DIBP's website. DIBP removed the report from its website within an hour of being notified. The report was available on DIBP's website for approximately eight and a half days.

The categories of personal information compromised in the data breach consisted of full names, gender, citizenship, date of birth, period of immigration detention, location, boat arrival details, and the reasons why the individual was deemed to be 'unlawful'.

'This incident was particularly concerning due to the vulnerability of the people involved,' said Australian Privacy Commissioner, Timothy Pilgrim.

The breach occurred when statistical data was mistakenly embedded in a Word document that was published on DIBP's website. The report was accessed a number of times, and was republished by an automated archiving service.

Mr Pilgrim said that OAIC's investigation found that DIBP was aware of the privacy risks of embedding personal information in publications, but that DIBP's systems and processes failed adequately to address those risks. This meant that DIBP staff did not detect the embedded information when the document was created or before it was published.

'This breach may have been avoided if DIBP had implemented processes to de-identify data in situations where the full data set was not needed,' he said.

This data breach also demonstrates the difficulties of effectively containing a breach where information has been published online, and highlights the importance of taking steps to prevent data breaches from occurring, rather than relying on steps to contain them after they have occurred.

'I have made a number of recommendations about how DIBP could improve their processes, including requesting that they engage an independent auditor to certify that they have implemented the planned remediation. I have asked DIBP to provide me with a copy of the certification and the report by 13 February 2015', Mr Pilgrim said.

The OAIC is still receiving privacy complaints from individuals affected by the breach. The OAIC has received over 1,600 privacy complaints to date, and these complaints are on-going.

http://www.oaic.gov.au/news-and-events/media-releases/privacy-media-releases/dibp-unlawfully-disclosed-personal-information-of-asylum-seekers

President reports on KA, KB, KC and KD v Commonwealth (Department of Prime Minister and Cabinet, Department of Social Services, Attorney-General's Department) [2014] AusHRC 80

Four Aboriginal men with intellectual and cognitive disabilities were held for years in a maximum security prison in the Northern Territory despite being found either unfit to stand trial or not guilty by reason of insanity.

If two of these men had been found guilty they would have received a sentence of 12 months. Instead, they were imprisoned for four and a half years and six years respectively.

The Australian Human Rights Commission conducted an inquiry into whether this involved any breach of human rights by Commonwealth.

The Commission found that there was a failure by the Commonwealth to work with the Northern Territory to provide accommodation and other support services, other than accommodation in a maximum security prison, for people with intellectual disabilities who are unfit to plead to criminal charges.

There was an obligation at international law on the Commonwealth to act. This obligation was consistent with domestic obligations undertaken by the Commonwealth in the Northern

Territory. The need for action was well known and had been well known for many years. Specific administrative measures to take this action were provided for by legislation.

The failure to act was inconsistent with or contrary to the complainants' rights under articles 9(1) and 10(1) of the *International Covenant on Civil and Political Rights* and articles 14(1), 19, 25, 26(1) and 28(1) of the *Convention on the Rights of Persons with Disabilities*. In particular, it was contrary to their right not to be arbitrarily detained, and their right as people with disabilities to live in the community with choices equal to others.

In the case of Mr KA and Mr KD, the failure to act was also inconsistent with article 7 of the ICCPR and article 15 of the CRPD which prohibit inhuman or degrading treatment. Mr KA was subject to regular restraint including being strapped to a chair and the use of shackles when outside his cell, seclusion and the use of tranquilizers. Mr KD was subject to regular seclusion and the use of tranquilizers. The prison environment in which they continue to be detained is inappropriate for people with their disabilities.

The Commission made the following recommendations:

1. The Commonwealth provide a copy of the Commission's findings to the Northern Territory and seek assurances from the Northern Territory that it will take immediate steps to identify alternative accommodation arrangements for each of the complainants so that Mr KA and Mr KD are no longer detained in a prison and Mr KB and Mr KC are progressively moved out of held detention. These arrangements should be the least restrictive arrangements appropriate to each individual and should include a plan to progressively move each of them into the community along with necessary support services.
2. The Commonwealth cooperate with the Northern Territory to establish an appropriate range of facilities in the Northern Territory so that people with cognitive impairment who are subject to a custodial supervision order can be accommodated in places other than prisons. This range of facilities should include secure care facilities and supported community supervision. The number of places available in these facilities should be sufficient to cater for the number of people who are anticipated to make use of them.
3. The Commonwealth cooperate with the Northern Territory to ensure that people with cognitive impairment who have not been convicted of an offence are detained as a measure of last resort, for the shortest appropriate period of time, and in the least restrictive appropriate environment.
4. The Commonwealth cooperate with the Northern Territory to ensure that when a person with a cognitive impairment is detained under a custodial supervision order, a plan is put in place to move that person into progressively less restrictive environments and eventually out of detention.
5. The Commonwealth cooperate with the Northern Territory to develop model service system standards for the detention of people with a cognitive impairment.
6. The Commonwealth cooperate with the Northern Territory to ensure that when a person with a cognitive impairment is detained he or she is provided with appropriate advice and support, including the appointment of a guardian or advocate.

The Commonwealth did not directly respond to these recommendations, on the basis that it considered that the Commission did not have jurisdiction to inquire into the complaints.

https://www.humanrights.gov.au/news/media-releases/president-reports-ka-kb-kc-and-kd-v-commonwealth-department-prime-minister-and

NTCAT up and running as president appointed

Richard Bruxner, a local lawyer with more than 35 years' experience in the profession, has been appointed inaugural President of the new Northern Territory Civil and Administrative Tribunal (NTCAT) for 12 months.

A person is eligible to be appointed President of NTCAT if they are a magistrate or eligible for appointment as a magistrate. NTCAT was introduced by the Government this year to cut red tape and create a one-stop-shop for civil and administrative appeals. The Tribunal is intended to create a user-friendly appeals process and replace the majority of the diverse appeals processes sitting with 35 commissioners, tribunals, committees and boards.

NTCAT is designed to produce efficiencies for Territorians by providing a single, central, easy to use system which operates independently of Government. It will base its decisions on 'fairness' rather than strictly legal interpretations and will be less intimidating than the court-based appeals.

The Northern Territory Government has passed legislation in Parliament which will see the appeals processes under several pieces of legislation moved to NTCAT and this will continue over the next 12 months.

NTCAT will operate out of its new headquarters at Casuarina.

http://newsroom.nt.gov.au/mediaRelease/10082

Recent Cases in Administrative Law

A well-founded fear of persecution and the test in S395

Minister for Immigration and Border Protection v SZSCA [2014] HCA 45 (12 November 2014)

The respondent, an Afghan citizen of Hazara ethnicity, arrived in Australia by boat on 21 February 2012. Before coming to Australia, the respondent had lived in Kabul with his family and worked as a self-employed truck driver transporting construction materials between Kabul and Jaghori. Around late January 2011, the respondent was stopped en route to Jaghori by the Taliban, who warned him not to carry construction materials. Thereafter, he took measures to avoid Taliban checkpoints, but continued to carry construction materials. In about November 2011, another truck driver showed the respondent a letter from the Taliban which called on 'local council people to perform their Islamic duty ... to get rid of' the respondent. The respondent left Afghanistan 10 days later.

The respondent's application for a protection visa was refused by a delegate of the Immigration Minister and that decision was affirmed by the Refugee Review Tribunal (the Tribunal). The Tribunal accepted that, if the respondent was again intercepted by the Taliban on the roads on which he usually travelled, he would face a real chance of serious harm and even death for a reason specified in the Refugees Convention. However, The Tribunal found that the risk of persecution would only arise on these roads, which could be avoided by the respondent. It therefore concluded that the respondent did not satisfy the criteria for the grant of a protection visa and affirmed the delegate's decision.

The respondent then sought judicial review of the Tribunal's decision in the Federal Circuit Court.

The Tribunal's decision was quashed by the Federal Circuit Court and an appeal from that Court was dismissed by a majority of Federal Court of Australia.

Both Courts held that the Tribunal had committed the error identified by the High Court in Appellant S395/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71 (S395).

The Minister then appealed by grant of special leave to the High Court.

The High Court unanimously held that the Tribunal did not fall into the error identified in S395. In S395 the Tribunal had accepted that it was not possible for the protection visa applicants to live openly as homosexuals in Bangladesh, but found that they had conducted themselves discreetly and there was no reason to suppose that they would not continue to do so if they returned to that country. A majority of the High Court held that, by reasoning in this way, the Tribunal failed to consider the question it had to decide – whether the applicants had a well-founded fear of persecution. The question for the Tribunal was whether there was a real chance that, upon return to Bangladesh, the applicants would be persecuted for a Convention reason. This was not addressed.

A majority of the High Court held that rather than considering this question the Tribunal had focused on an assumption about how the risk of persecution might be avoided. Gummow and Hayne JJ said that the enquiry was what might happen if the applicants returned, not whether adverse consequences could be avoided. It followed that the issue to which the correct enquiry was directed – whether the fear of persecution was well founded – had not been addressed.

In SZSCA, by contrast, the Tribunal did not fall into that error. Rather, the critical aspect of the reasoning of the Tribunal in this case was its finding that the respondent would not face a real chance of persecution if he remained in Kabul and did not travel on the roads between Kabul and Jaghori. The Tribunal found that he would suffer a real chance of harm for a Convention reason if he carried construction material in another area, but that he was safe in Kabul. Therefore, in contrast to S395, the Tribunal did not divert itself from the question of whether the respondent would face a real chance of persecution if he returned to Afghanistan.

Instead a majority of the High Court found that the Tribunal erred by failing to address whether it would be reasonable to expect the respondent to remain in Kabul and not drive trucks outside it. By failing to do this, the Tribunal was unable to make a final determination as to whether the respondent had a well-founded fear of persecution. As this constituted an error of law, the majority dismissed the appeal.

Judicial discretion and venomous snakes

Hoser v Department of Sustainability and Environment [2014] VCSA 206 (5 September 2014)

The applicant was licensed under the *Wildlife Act 1975* (Vic), which allowed him to earn a living by performing demonstrations with venomous snakes. The applicant was charged with 13 breaches of the conditions of his licence in demonstrations he performed in 2008 and 2009. The charges related to the applicant demonstrating with more than one snake at a time and doing so within three metres of the audience, without adequate barriers or pits. On 16 February 2011, the applicant was found guilty of these charges in the Ringwood Magistrates' Court. He appealed to the County Court but ultimately pleaded guilty due to a lack of funds.

On 7 July 2011, the applicant conducted a demonstration at a shopping centre in which he allowed two snakes to bite his twelve-year-old daughter, for the purpose of demonstrating in his pending County Court appeal that his snakes were safe because he had removed their venom glands.

Following the Country Court proceedings the respondent cancelled the applicant's licence. The applicant sought a review of this decision in the Victorian Civil and Administrative Appeals Tribunal (the Tribunal). The Tribunal affirmed the respondent's decision finding, among other things, that the applicant was 'an unreliable witness who displayed little regard for the truth and his demeanour and evidence, displayed a contempt and reckless disregard for the licence conditions, and he showed no real insight into the nature of his prior offending, in particular by claiming that he pleaded guilty in the County Court because of cost considerations'. The Tribunal also stated that the applicant was unable to substantiate his claimed expertise and did not provide any evidence of his alleged publications. The Victorian Court of Appeal gave the applicant leave to appeal.

Before the Court the applicant contended that the Tribunal erred in its fact finding.

The Court held that an appeal from the Tribunal is limited to questions of law. Therefore the applicant must show errors of law in the exercise of the Tribunal's discretion, by showing there was either no evidence to support the impugned conduct or that finding was not reasonably open. In attacking the exercise of discretion, it was necessary for the applicant to demonstrate error of law in accordance with the well-known principles of *House v the King* [1936] HCA 40:

> If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate Court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonably or plainly unjust, the appellate Court may infer that in some way there has been a failure properly to exercise the discretion, which the law reposes in the Court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

The Court found, among other things, that the Tribunal's credibility findings failed to take into account the relevant expertise of the applicant in determining that his snakes were safe.

The Court found that when the applicant was asked about his publications in cross-examination he offered to provide copies of his publications, which were in his car. The respondent's counsel did not take up the offer but the applicant produced the materials to the Tribunal later that day. That the Tribunal failed to have regard to this evidence may have established that the applicant's expertise and his expert opinion was relevant to whether the public was at risk.

The Court held that the Tribunal's findings that the applicant failed to establish his expertise and that he had reckless disregard could not be sustained. As any expertise the applicant had may have been relevant to the question as to whether, by his conduct, he put the public at risk, the error in the analysis as to that expertise was an error that infected the exercise of discretion. The Tribunal's analysis was not directed at the actual risk posed by the snakes. The Tribunal's discretionary decision to affirm the respondent's suspension and cancellation decision must be set aside.

Procedural fairness and preliminary administrative procedures and particulars

Coppa v Medical Board of Australia [2014] NTSC 48 (17 October 2014)

The plaintiff was a medical practitioner working at a clinic in a remote community in Central Australia. On 30 September and 7 October 2013, the Australian Health Practitioner Regulation Agency (AHPRA) received two notifications about the defendant's alleged impairment due to possible substance abuse.

In response to the first two notifications, the Senior Notifications Officer wrote to the plaintiff by letter dated 18 November 2013 providing him with a copy of the two notifications, and informing him that AHPRA would assess the notification to decide whether or not further action was required, including formal referral to the defendant under the *Health Practitioner Regulation National Law* (NT) (the National Law).

The plaintiff was invited to provide a written response and any other information he might consider relevant.

On 10 December 2013, solicitors acting for the plaintiff replied to AHPRA. The plaintiff's solicitors submitted, among other things, that the allegations were vexatious, did not warrant further investigation and that no further action should be taken.

The defendant did not accept the plaintiff's submission and on 13 January 2014, instead decided to investigate the plaintiff's health, pursuant to s 160(1) of the National Law. The defendant required the plaintiff to undergo a health assessment pursuant to s 169 of the National Law.

On 6 February 2014, AHPRA received a further notification in relation to the plaintiff. This was communicated to the plaintiff.

The plaintiff's solicitors commenced proceedings by originating motion in the Northern Territory Supreme Court, seeking an order restraining the defendant from requiring the plaintiff to undergo a health assessment.

The plaintiff contended, among other things, that the principles of natural justice apply prior to the making of decisions pursuant to s 169 of the National Law. He further contended that the defendant had failed to provide him with procedural fairness by (1) not providing sufficient particulars to enable him to provide a detailed and meaningful response to the allegations, and (2) by requiring him to attend a health assessment based on uncorroborated allegations before giving the plaintiff an opportunity to respond to the further allegations made against him.

The Court rejected the plaintiff's arguments in relation to natural justice and procedural fairness.

The Court found that the rules of natural justice did not apply to the preliminary administrative process that occurred before the respondent reached a 'reasonable belief' necessary to require the plaintiff to undergo a health assessment pursuant to s 169 of the National Law. The defendant's decision to require the plaintiff to undergo a health assessment, did not involve making findings of fact or determining the merits of the notifications. The defendant's decision did not determine any question affecting the plaintiff's rights. The situation was not one where the exercise of the defendant's power had the capacity to interfere with rights, interests or legitimate expectations. There is nothing in the National Law, which expressly or impliedly required the defendant to do more than it did.

In this context, the full process required under Division 9 is a relevant consideration. Importantly, before the defendant could have made any decision under the National Law affecting the plaintiff, it would have had to (1) provide a copy of the report of the health assessor to the plaintiff, (2) nominate a person to discuss the report with the plaintiff, and (3) consider the assessor's report and the discussions held between the plaintiff and the nominated person. Division 9 thus contains its own express procedural fairness requirements.

The Court also rejected the plaintiff's submission that the defendant failed to provide sufficient particulars to enable him to provide a 'detailed and meaningful response' to the notifications. The defendant provided all the information then available to it (except for the identity of the two notifiers), and could not have given any further 'particulars' at that time.

The Court held that the word 'particulars' suggests particulars in civil and criminal litigation, the dual purpose of which is to identify matters in issue, and confine the scope of the evidence relevant to those issues, for the purpose of a hearing or trial. There was no justification for the request for 'particulars' by the plaintiff's solicitors in the preliminary administrative process underway at the time of the request.