RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Appointment of new Commonwealth Sex Discrimination Commissioner

11 February 2016

The Commonwealth Government has announced the appointment of Ms Kate Jenkins as Australia's Sex Discrimination Commissioner for a term of five years.

Ms Jenkins has an outstanding record in advancing gender equality and as a human rights leader more broadly. This has been demonstrated through her current role as Victorian Equal Opportunity and Human Rights Commissioner.

Ms Jenkins has worked closely with a wide range of organisations, including the Victoria Police, to address issues of entrenched discrimination and harassment. Significantly, she established the Victorian Male Champions of Change strategy, building on the national program established by the former Sex Discrimination Commissioner, Elizabeth Broderick. She has also advanced gender equality in all areas of life with a particular focus on diversity in sport, through the Fair Go Sport and Play By the Rule campaigns.

Ms Jenkins is also a former partner at one of the top law firms in the Asia Pacific, Herbert Smith Freehills, where she led an equal opportunity and diversity practice.

The Attorney-General and Minister for Women are deeply impressed by Ms Jenkins' leadership on issues of sex discrimination and sexual harassment and thank her for agreeing to bring her dedication and energy to the national stage.

They look forward to Ms Jenkins' contribution to the work of the Australian Human Rights Commission where she will extend her productive relationships across the Australian Government and the broader Australian community and building on the outstanding work of her predecessor, Ms Elizabeth Broderick AO.

Supporting women to participate in the workforce is an economic and social priority for the Government. Harnessing the power of our most important capital—our human capital—will ensure we secure our economic future.

https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FirstQuarter/11-February-2016-Appointment-of-new-Sex-Discrimination-Commissioner.aspx

Reappointment of the Hon Susan Ryan AO as Commonwealth Disability Discrimination Commissioner

13 November 2015

The Attorney-General has announce that the Government has reappointed the Hon Susan Ryan AO as the Disability Discrimination Commissioner.

Ms Ryan was first appointed as acting Disability Discrimination Commissioner in July 2014, before being confirmed to the role in September 2014. The term of Ms Ryan's reappointment

aligns with the term of her appointment as Age Discrimination Commissioner, which expires on 28 July 2016.

Ms Ryan continues to be a strong advocate for the rights of people with a disability. She is currently leading Willing to Work, the Commission's national inquiry into employment discrimination against older persons and persons with a disability. Consultations are currently being conducted across Australia, which will inform the Commission's recommendations when they report to Government by July 2016.

On behalf of the Government, the Attorney-General congratulates Ms Ryan on her reappointment and thanks her for her services to date.

https://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FourthQuarter/13-November-2015-Reappointment-of-the-Hon-Susan-Ryan-AO-Disability-Discrimination-Commissioner.aspx

Victorian Ombudsman investigates transparency of local government decision making

04 March 2016

The Victorian Ombudsman has commenced an 'own motion' investigation into the transparency of local government decision making, reflecting a pattern of complaints to the Ombudsman on this issue.

The investigation will consider whether councils' decision making is transparent, subject to their obligation to maintain confidentiality and to ensure efficiency in council administration.

The investigation will include:

- closed council meetings and special meetings
- determinations around the handling of confidential matters
- delegations relating to decision making
- the nature and quality of records kept and the public availability of those records.

The *Local Government Act 1989* sets out a framework where councils must be responsible and accountable to the local community in the performance of their functions, the exercise of their powers and use of resources. It requires that councils 'ensure transparency and accountability in council decision making' while section 91 requires councils to make local laws governing the conduct of council meetings and special committees.

The Act is currently under review and the investigation will seek to inform that process.

In her response to the review of the Local Government Act, Ombudsman Deborah Glass noted:

> *Secrecy in government can create conditions in which improper conduct and poor administration can flourish. It also fuels suspicions of wrongdoing and erodes community trust.*
>
> *Members of the public who complain to my office about council decisions occasionally mention the fact that decisions were made 'behind closed doors' or 'in secret' as evidence to support their concerns.*

Local government generates the second highest number of complaints to the Victorian Ombudsman of any portfolio area. In 2014-15 this office dealt with 3410 issues about local government.

All 79 Victorian councils were subject to at least one complaint in 2014-15, however the number varied widely across municipalities.

https://www.ombudsman.vic.gov.au/News/Media-Releases/Media-Alerts/Ombudsman-investigates-transparency-of-local-gover

NSW Privacy Commissioner applauds the findings of the Standing Committee on Law and Justice Inquiry into Serious Invasions of Privacy in NSW

The Privacy and Personal Information Protection Act was written over 17 years ago, well before the invention of Facebook, the iPhone and drone technology. In a world of such rapidly changing technology the privacy protections afforded by the Act, to date, have not kept pace.

The Standing Committee on Law and Justice Inquiry into Serious Invasions of Privacy in NSW, chaired by The Hon Natasha Maclaren-Jones MLC, recommended that NSW introduce a statutory cause of action for serious invasions of privacy. The Committee went further to recommend a significant expansion of the powers of the NSW Privacy Commissioner to address claims of serious invasions of privacy.

The Information and Privacy Commission's Privacy Commissioner, Dr Elizabeth Coombs, has been a staunch supporter of the need to implement a statutory cause of action to address serious invasions of privacy. Dr Coombs' written submission, available on the Parliament of NSW website, supported the recommendations for the development of a statutory cause of action.

Dr Coombs said '*…NSW was the second jurisdiction in the world to introduce laws dealing directly with privacy, so it is appropriate that today NSW again takes a leadership role and hopefully act as the catalyst for other Australian jurisdictions to take similar action*.'

The development of a statutory cause of action, as opposed to reliance on common law remedies, is also supported by leading civil rights, privacy, legal and academic groups across NSW and Australia.

Dr Coombs said: '*This is a win for those people who have had their privacy breached in unimaginable ways and then suffered further indignity in discovering that they had no right to recourse…'*

http://www.ipc.nsw.gov.au/sites/default/files/file_manager/20160303%20MEDIA%20RELEASE%20Serious%20invasions%20of%20privacy.pdf

Appointment of Queensland Privacy Commissioner

Information Commissioner Rachael Rangihaeata is pleased to announce that Mr Phillip Green has been appointed to the role of Queensland Privacy Commissioner by the Governor in Council.

Throughout his career, Mr Green has worked in many different Queensland Government roles and in private practice. Most recently, Mr Green was Executive Director, Small

Business – Department of Tourism, Major Events, Small Business and the Commonwealth Games and held that position from 2008.

Mr Green has a Masters in law, majoring in technology law including privacy, regulation of the Internet and media.

Ms Rangihaeata said, 'Mr Green brings extensive leadership experience and expertise to the role of Privacy Commissioner and will make a valuable contribution to the protection of citizens' privacy rights in Queensland.'

https://www.oic.qld.gov.au/information-for/media/appointment-of-queenslands-privacy-commissioner-11-december-2015

Former NT Chief Justice to inquire into establishment of anti-corruption body

Former Northern Territory Chief Justice of the Supreme Court Brian Martin AO QC has been appointed by the NT Administrator to inquire into and report on the establishment of an independent anti-corruption and integrity body in the Northern Territory.

Acting Chief Minister Willem Westra van Holthe said Mr Martin's appointment followed a motion passed in Parliament that set out the independent process of inquiring into the establishment of a new body.

'Brian Martin has a wealth of legal experience having served as Chief Justice of the Supreme Court of the Northern Territory from 2004 to 2010, as a Judge of the Supreme Court of South Australia between 1999 and 2004 and as Commonwealth Director of Public Prosecutions between 1997 and 1999,' Mr Westra van Holthe said.

'Mr Martin presided over the trial of Bradley Murdoch for the murder of Peter Falconio, as well as the trial of the Snowtown murders in South Australia, and he has extensive experience in criminal matters and anti-corruption proceedings.

'His appointment was recommended by an advisory panel that consisted of the Solicitor-General, the Chief Executive of the Department of Attorney-General and Justice and former Administrator Sally Thomas AC, and has been approved by the Administrator.'

As per the motion passed in Parliament, some of the considerations Mr Martin will take into account include:

- The power to investigate allegations of corruption including against Ministers, Members of the Legislative Assembly and other public officials;
- The power to conduct investigations and inquiries into corrupt activities and system-wide anti-corruption reforms as it sees fit;
- The appropriate trigger for an NT ICAC jurisdiction and the relationship between this body and other Northern Territory bodies such as the Ombudsman;
- Models from any other jurisdictions and indicative costs of establishing various models in the Northern Territory; and
- The use of existing Northern Territory legislation or Northern Territory statutory authorities.

Mr Martin will consult with relevant stakeholders including but not limited to the NT Police, NT Law Society and the Criminal Lawyers Association.

Mr Westra van Holthe said the Government was committed to working in the best interests of the people of the Northern Territory and looked forward to Mr Martin's report.

http://newsroom.nt.gov.au/mediaRelease/17103

Recent Cases

Jurisdictional errors need not be on the part of the decision-maker

Wei v Minister for Immigration and Border Protection [2015] HCA 51 (17 December 2016)

The plaintiff, a citizen of the People's Republic of China, is 22 years old. He first travelled to Australia on a student visa when he was 15 years old. Having completed his secondary schooling in Australia, he went on to enroll in a course of study known as the 'Foundation Program' provided by Macquarie University, a registered provider under the *Education Services for Overseas Students Act* 2000 (Cth) (the ESOS Act). The plaintiff was subsequently granted a Student (Temporary) (Class TU) Higher Education Sector (Subclass 573) visa, a student visa for the purposes of the ESOS Act.

It was a condition of his visa that he be enrolled in a 'registered course' provided by a 'registered provider' under the ESOS Act. Section 19 of the ESOS Act requires registered providers to give information about student visa holders to the Secretary of the Department of Education and Training, including information confirming their enrolment. The information is stored on an electronic database known as 'PRISMS' and can be accessed by officers of the Department of Immigration and Border Protection ('the Department').

Between June 2013 and June 2014, the plaintiff was enrolled in a registered course provided by a registered provider. Unfortunately, confirmation of that enrolment was not recorded in PRISMS. It can be inferred, on the balance of probabilities, that the confirmation of that enrolment was not recorded in PRISMS because Macquarie University failed to perform the obligation imposed on it by s.19 of the *ESOS Act* to upload the relevant information.

On the basis of outdated information in PRISMS, officers of the Department formed the view in early 2014 that the plaintiff was not enrolled in a registered course. After a number of attempts to contact the plaintiff, the officers formally complied with statutory requirements to notify the plaintiff that consideration was being given to cancelling his visa, but the plaintiff did not receive notice of that consideration.

The time for responding to the notification having expired, a delegate of the Minister made a decision on 20 March 2014 to cancel the plaintiff's visa under s.116(1)(b) of the Migration Act for non-compliance with the condition of the visa that he be enrolled in a registered course.

Written notice of the decision, and of the reasons for it, was set out in a letter, which the delegate sent by registered post to the plaintiff on the same day. However, that letter was returned unclaimed.

On 2 October 2014, the plaintiff discovered his visa had been cancelled. The following day, he lodged an application for review of the decision with the then Migration Review Tribunal. The Tribunal decided on 5 December 2014 that it did not have jurisdiction to review the decision, because the application was lodged too late.

The plaintiff filed an application for an order to show cause in the original jurisdiction of the High Court, seeking writs of certiorari and prohibition to quash the decision of the delegate and to prevent the Minister from giving effect to the delegate's decision.

The High Court unanimously held that the delegate's decision to cancel the plaintiff's visa was affected by jurisdictional error. Jurisdictional error, in the sense relevant to the availability of relief under s.75(v) of the Constitution, consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by that Act. There is no reason in principle why jurisdictional error should be confined to error or fault on the part of the decision-maker. The requirement of s.19 of the ESOS Act that a registered provider (in this case Macquarie University) upload onto PRISMS confirmation of enrolment of a person holding a student visa is therefore properly characterised as an imperative duty, in the sense that material non-compliance with the requirement will result in an invalid exercise of the power to cancel a visa conferred by s.116(1)(b) of the Migration Act.

The delegate reached that satisfaction because the delegate found as a fact that the plaintiff was not enrolled in a registered course. The delegate found that fact on the basis of information contained in PRISMS. That finding was wrong because the information contained in PRISMS was wrong. The information contained in PRISMS was wrong because of Macquarie University's failure to perform its imperative statutory duty. The High Court granted the relief sought by the plaintiff.

Incorrect forms and substantial compliance

MZAIC v Minister for Immigration and Border Protection [2016] FCAFC 25 (9 March 2016) (Kenny, Tracey, Buchanan, Robertson and Mortimer JJ)

This appeal was from the judgment and orders of a judge of the Federal Circuit Court of Australia, Judge Hartnett. Her Honour dismissed the application to that court, with costs.

The application to that court was for judicial review of a decision of the then Refugee Review Tribunal that it did not have jurisdiction to review the decision of the delegate of the Minister for Immigration because the application to the Tribunal was not made in accordance with s.412(1)(a) of the *Migration Act 1958* (Cth) (the Migration Act), which requires an application for review to be made in the approved form.

Before the Full Federal Court, the appellant contended that a failure to comply with s.412 did not necessarily lead to the consequence that the Tribunal lacked jurisdiction because the Migration Act does not specify the consequences for non-compliance. In relation to s.25C of the *Acts Interpretation Act 1901* (the AIA), the appellant submitted that the purpose of s.25C is to ameliorate the potentially harsh effects of a failure strictly to comply with the common administrative features of prescribed forms; and when the form submitted by the appellant was compared with the approved from, it was immediately evident that the appellant ‘substantially complied’ with the prescribed form.

The Minister contended, among other things, that s.412 of the Migration Act could not be substantially complied with in circumstances where an applicant used an incorrect form. However, if the Court found it could be; in this case, the appellant did not substantially comply with the requirements of s.412.

The majority of the Full Federal Court (Kenny, Tracey, Robertson and Mortimer JJ)) held that it would be counter to the legislative scheme to hold that the mere use of a superseded form rendered ineffective an application to the Tribunal. The present form is not an application for

a visa, which may well provide precise and detailed information; instead it is an application for review by a Tribunal of an identified decision.

The majority further held that there is no authority for the proposition that to merely use a superseded form prevents there being an analysis of substantial compliance with the current form. It is not the case that no form was used, or a form that appellant was prohibited from using. Moreover, so similar are the two forms that those not versed in the identification system in very small print at the foot of each page would be hard pressed to tell whether or not the form currently approved was being used. The only material difference between the two forms is the new form included provision for the appellant's passport number.

The majority found that there was substantial compliance with an approved form despite the absence of the appellant's passport number. First, the purpose of the form is to indicate that the visa applicant invokes the jurisdiction of the Tribunal and identifies the decision that is being challenged. Secondly, the appellant's application to the Tribunal attached a copy of the notification letter from the Department of Immigration and Border Protection, which contained the appellant's name, date of birth, client ID, application ID and file number. Thirdly, many applicants to the Tribunal would not have passport numbers. Fourthly, the request for a passport number appears to be directed, at best, to the administrative convenience of the Tribunal rather than to whether, as a matter of substance, its jurisdiction has been duly invoked. Fifthly, in context, the request for a passport number provides merely a further or additional means, as a matter of detail, of the purpose stated on the form: ' … to collect information about the person, or persons, applying for review.' It is also significant that, unlike an application for a visa, which occurs at an early stage of the process, an application to the Tribunal of necessity follows a substantial administrative process. If there is a dispute before the Tribunal as to whether the visa applicant truly is a national of a particular country then that is a matter for the review itself rather than the validity of the application. Lastly, assuming the Departmental Secretary fulfils his or her obligation under s.418(3) of the Migration Act, as soon as practicable after being notified of the application to the Tribunal the Secretary will give to the Registrar each other document in the Secretary's possession or control considered by the Secretary to be relevant to the review of the decision; in the present case, this would include the appellant's passport number referred to at item 29 of the appellant's application for a Protection (Class XA) visa. A photocopy of part of that passport was annexed to that application.

The unrepresented applicant and procedural unfairness

SZVCP v Minister for Immigration and Border Protection [2016] FCAFC 24 (9 March 2016) (Kenny, Robertson and Griffith JJ)

This was an application for an extension of time and for leave to appeal from orders of the Federal Circuit Court of Australia made on 15 September 2015.

The applicant is an 'unlawful non-citizen' within s.14 of the *Migration Act 1958* (Cth) (the Migration Act) and is in immigration detention. He was detained at Maribyrnong in Victoria, but had been detained at other immigration centres, including on Christmas Island for about five months.

As at 15 September 2015, the applicant had three substantive applications in the Federal Circuit Court; (1) an application seeking relief arising from the release of his personal information on the Department's website; (2) an application seeking relief from the then Refugee Review Tribunal's decision not to grant him a protection visa; and (3) an application seeking relief from the International Treaties Obligations Assessment (ITOA) concluding he did not engage Australia's non-refoulement obligations. On 15 September 2015, he made an

additional claim for relief in relation to his place of immigration detention: he wished to prevent his return to the Christmas Island Immigration Detention Centre; and for the issue of subpoenas for the production of documents and the attendance of witnesses, who the applicant claimed could provide evidence about the alleged trauma, stress and torture he suffered on Christmas Island.

After a short hearing on 15 September 2015, the primary judge dismissed the applications.

Before dismissing the applications, the primary judge, in response to the application for the issue of subpoenas, informed the applicant that it was inappropriate for the Court to gather evidence. The primary judge also informed the applicant that 'there were matters that are not relevant currently in your application ... because the nature of this Court's jurisdiction is one which it is engaged in determining particular questions which are jurisdictional questions relating to the ITOA and/or the Tribunal decision'. The Court did not in substance address his applications for an interlocutory injunction to prevent his return to Christmas.

Before the Full Federal Court, the applicant sought orders setting aside the primary judge's orders and remitting the matter to the Federal Circuit Court.

The Minister contended that the applicant had not shown that there was any want of procedural fairness. The Minister submitted that the applications in a case were fundamentally defective and properly dismissed and that, in any event, there was no error on the part of the primary judge in refusing to grant the interlocutory injunction.

The Full Court found that there was a clear denial of procedural fairness. The transcript of the hearing makes it clear that the applicant was not given a reasonable opportunity to present submissions in support of any of the dismissed applications. These applications were either not dealt with at all or, in the case of the request for a subpoena, the primary judge acted on the basis of a fundamental misconception that the applicant was asking the Court to gather evidence. The result was that the applicant was deprived of a reasonable opportunity not only to make these applications but also to make his application for injunctive relief.

The Full Court held that the fact that the applicant was unrepresented exacerbates the procedural unfairness that he encountered. Dealing with an unrepresented applicant may require a court to take steps to explain its processes and procedures to the litigant to ensure procedural fairness. This is well-recognised, as *SZRUR v Minister for Immigration and Border Protection* [2013] FCAFC 146, makes clear. However, in the hearing on 15 September 2015, the primary judge made no effort to explain to the unrepresented applicant how he might properly make an application for an injunction under the Federal Circuit Court's rules. Nor did the primary judge explain the other procedures that the applicant might have chosen to utilise.

The Full Court considered that the judge's failure to explain the Court's processes and procedures was unfair to the applicant and involved an unreasonable exercise of power. Had the primary judge taken the time to consider the applications being made by the applicant and to explain the Court's processes and procedures, the outcome might well have been different.

A person aggrieved by a decision under the Judicial Review Act 2000 (Tas)

Tarkine National Coalition Inc v Minister Administering the Mineral Resources Development Act 1995 [2016] TASSC 11 (10 March 2016)

This was an application for an order pursuant to s 35(2) of the *Judicial Review Act* 2000 (Tas) ('JR Act'), requiring the decision-maker to provide a statement of reasons for the decisions to grant two open cut mining leases, to Venture Mining, in an area known as the Tarkine located in the northwest region of Tasmania. Tarkine National Coalition Inc, an incorporated association concerned with the conservation and management of the Tarkine area, requested reasons for those decisions. In each case, the Minister responsible for administering the *Mineral Resources Development Act* 1995 (the MRDA) made the decisions.

The applicant made a number of requests for reasons with respect to the decisions to grant the leases. In refusing to provide reasons for the two decisions, the Minister's stance was the same, asserting that the applicant was not entitled to make a request for reasons because the interests of the applicant were not adversely affected by the decision for the purpose of the JR Act. A letter of 10 February 2015 from the Minister provided: 'the decisions in these matters (to grant the leases under the MDRA) will not produce any relevant physical effect or damage upon the environment in the Tarkine'.

A lease constitutes nothing more than permission to Venture to conduct 'mining operations' on the subject land. The leasee must not conduct any activities which are in breach of the applicable planning scheme, the West Coast Interim Planning Scheme 2013: *Land Use and Planning Appeals Act* 1993 ('LUPA Act'), ss.20(2)(b), 63(2), and, under that Scheme, Venture cannot conduct any mining operations or related activities, such as clearing vegetation, without a permit. Therefore in the Minister's view the legal effect or practical operation of the decision to grant the leases is nil until the West Coast Council exercises its discretion to grant the permit. Therefore the effect of the decision falls short of affecting any interests of the applicant.

In response, before the Court, the applicant contended, among other things, that in light of *Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development* [2014] HCA 50 ('*Argos*'); the Court should not have regard to the broader statutory context in determining whether the applicant is aggrieved. Only the statute, under which the decision was made, in this case the MRDA, is relevant for the purpose of illuminating the nature of the decision and determining the legal and practical effect of the decision. In the alternative, it was contended, that the mining leases allow exploration and preliminary works to be undertaken merely with the approval of the Director of Mines and without any other approval steps or requirement for a permit. These exploration and preliminary works would have an impact on the environment and an adverse impact on the applicant's interests.

Before considering the issue raised by the applicant, the Court considered it is useful to have regard to the meaning of 'decision' under the JR Act. Court opined that generally, a decision needs to be 'final', but is not limited to a final decision disposing of the controversy between the parties. Ordinarily, and subject to the statutory context, 'a conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision' would not amount to a reviewable decision (*Australian Broadcasting Tribunal v Bond* [1990] HCA 33). In this case, the Minister's decision to grant the mining leases qualifies as a decision reviewable under the JR Act. A substantive issue of whether to grant the mining leases was resolved and the decision was, an ultimate, not an intermediate decision as to the granting of leases. The fact that the decision is an intermediate step in the process required before mining operations can commence was irrelevant.

The Court found that whether the order should be made turns on the applicant's entitlement to reasons and whether it is 'adversely affected' by the decisions to grant the mining leases, within the meaning of the JR Act.

The Court opined that 'to draw a conclusion that a person meets the statutory description of 'a person whose interests are adversely affected' by a decision requires: first, identification of a decision of the designated kind; second, examination of the legal or practical operation of that decision; and, third, the making of a judgment that the legal or practical operation of the decision has been to result in an adverse effect on identified interests of the person. The nature of the requisite interests, and the nature and degree of the requisite adverse effect, depend on the statutory context in which the description appears': *Argos*, Gageler J at [76].

In this case, the Court found that there is ample evidence that the applicant qualifies as a person aggrieved. It possesses an interest greater than an ordinary member of the public. Its interest in the Tarkine is long-standing (for over 20 years) and has not been generated by the present proceedings. The applicant's reason for existing is to protect the natural values of the Tarkine. Its objectives include achieving World Heritage status and National Park status for the Tarkine. It has engaged in activities that demonstrate its commitment to conservation and protection of the natural values of the Tarkine. The mining operations will affect its objectives. The operations are large in scale and the environmental footprint of these operations and impact on the natural environment within the lease areas will be substantive. Both mining leases fall within the boundaries of the proposed National Park. Clearly, the decisions authorising mining in the Tarkine adversely affect the applicant's interests. Therefore the applicant is a person aggrieved for the purpose of s.7 of the JR Act.