RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

National inquiry report released

On 2 May 2016, the Australian Human Rights Commission and the Attorney-General, Senator the Hon George Brandis QC, launched a report on employment discrimination against older Australians and Australians with disability: *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability*.

'This Inquiry report is an historic first in terms of the scope and range of issues addressed. We have never had such a clear or detailed national picture of what happens to older workers and those with disability in the labour market', said the Hon Susan Ryan AO, Age and Disability Discrimination Commissioner.

'The exclusion of capable and skilled older people and people with disability from the workplace results in a massive waste of human capital and productivity. It drives increases in public expenditure that in the long term are not sustainable', she said.

The inquiry heard of the distress, poor health and poverty experienced by individuals unfairly excluded from paid work. It held 120 consultations with more than 1100 people between July 2015 and February 2016.

Key recommendations include:

- establishing a Minister for Longevity;
- developing national action plans to address employment discrimination and lift the labour force participation of older people and people with disability;
- expanding the role of the Workplace Gender Equality Agency to become the Workplace Gender Equality and Diversity Agency;
- introducing national education campaigns to dispel myths and stereotypes about older people and people with disability;
- adopting targets for employment and retention of older people and people with disability in the public service.

The report also recommends improvements to existing laws and policies and presents a suite of strategies for businesses and employers to improve employment of people with disability and older people.

The Australian Human Rights Commission hopes to see a speedy adoption and implementation of these recommendations so that all Australians who are willing and able to work can do so.

https://www.humanrights.gov.au/news/media-releases/national-inquiry-report-released-today

Appointments to the Australian Human Rights Commission

On 5 May 2015, the Commonwealth Attorney-General, the Hon Senator George Brandis, announced the appointment of the Hon Dr Kay Patterson as Age Discrimination

Commissioner, Mr Alastair McEwin as Disability Discrimination Commissioner and Mr Edward Santow as Human Rights Commissioner. These appointments will be for five years and ensure that the Australian Human Rights Commission has its full complement of commissioners.

Dr Patterson is a psychologist with expertise in gerontology and has had extensive experience advocating for older Australians. She is a current Commissioner of the National Mental Health Commission. Dr Patterson has had a long and distinguished career as a parliamentarian and an academic. She served as a senator for Victoria for 21 years and has held a number of ministerial positions, including as a cabinet minister, the Minister for Health and Ageing, the Minister for Family and Community Services and the Minister Assisting the Prime Minister for Women's Issues. Dr Patterson is extremely well placed to advocate for the transformation of community attitudes towards older Australians and continue our national conversation on the rights of older persons and their contributions to all aspects of our society.

Mr McEwin has been a longstanding advocate for the rights of people with disability and has represented the interests of people with disability at all levels. He is a former chief executive officer of People with Disability Australia and a former manager of the Australian Centre for Disability Law. In addition to his extensive qualifications and experience, Mr McEwin brings to the role lived experience of the issues confronting people with disability. The Attorney-General believes he will be a fantastic leader and role model for the sector.

Mr Santow is the Chief Executive Officer of the Public Interest Advocacy Centre. He is a Senior Visiting Fellow at the University of New South Wales and a former senior lecturer. Mr Santow is currently a Director of the Australian Pro Bono Centre and the University of Sydney Law School Foundation. He has very strong academic and practical knowledge of human rights. The Attorney-General said he is confident that Mr Santow will successfully prosecute the case for our fundamental political freedoms in Australia.

The commissioners were selected following a comprehensive merit selection process that complied with the APSC Merit and Transparency Guidelines. The selection panel included the Secretary of the Attorney-General's Department, the President of the Human Rights Commission, the President of the Australian Law Reform Commission, a representative of the Australian Public Service Commissioner and a former Director-General of the Queensland Department of Justice and the Attorney-General.

The Attorney-General said the success of the Australian Human Rights Commission should be measured by outcomes, not by rhetoric. The Attorney-General is confident that these new commissioners will be strong advocates for their sectors by adopting a pragmatic and courageous approach to promoting human rights, enabling the Australian Human Rights Commission to become a strong voice for all Australians, not just a select minority.

https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/SecondQuarter/5-May-2016-Appointments-to-the-Australian-Human-Rights-Commission.aspx

Improving transparency for Victorians

The Andrews Labor government will merge the Victorian Office of the Freedom of Information (FOI) Commissioner and Commissioner for Privacy and Data Protection into a single office, streamlining Victoria's information and data oversight bodies.

A newly created Office of the Victorian Information Commissioner (OVIC) will look after freedom of information, privacy and data protection issues, matching similar New South Wales, Queensland and Commonwealth bodies.

This ensures the Victorian community has a single regulator to oversee Victoria's FOI, public sector privacy and data protection laws and provide independent advice to government across those closely related fields. The new body will also help to improve the way government manages information.

It will be led by an Information Commissioner and will be supported by a Public Access Deputy Commissioner, who will improve FOI decision-making, and a Privacy and Data Protection Deputy Commissioner.

Legislation to establish the Office of the Information Commissioner will be introduced into Parliament shortly, delivering on the Labor government's election commitment to overhaul freedom of information, including:

- the ability to review ministerial and departmental decisions, including under cabinet exemptions;
- reducing the time to respond to an FOI request from 45 days to 30 days;
- reducing the time that agencies have to seek the Victorian Civil and Administrative Tribunal's review from 60 days to 14 days.

These reforms are only the first stage in improving transparency and access to information for Victorians. The Labor government will shortly announce details of a comprehensive review of Victoria's FOI legislation.

The Labor Government's action on transparency contrasts with the former Liberal government, which refused to release ambulance and CFA response data. The Labor government immediately moved to release this information and is legislating to stop future governments from hiding it from the community.

Under existing structures, the FOI Commissioner handles complaints about government decisions and monitors legislative compliance. The Commissioner for Privacy and Data Protection provides guidance to the public sector in dealing with personal information and provides a recourse for complaints from the community.

The current Commissioner for Privacy and Data Protection, Mr David Watts, and the current Acting Freedom of Information Commissioner, Mr Michael Ison, will both continue in their roles until OVIC is established.

http://www.premier.vic.gov.au/improving-transparency-for-victorians/

Appointment of a new South Australian Equal Opportunity Commissioner

The South Australian Government has announced the appointment of Dr Niki Vincent as the new Equal Opportunity Commissioner. Dr Vincent has been appointed as Commissioner for a five-year term commencing on 26 May 2016. Ms Anne Burgess will cease her role as the Acting Commissioner on 27 May 2016.

Dr Vincent has been the Chief Executive Officer of the Leaders Institute of South Australia since 2004. She has held, and currently holds, a variety of community and board positions, including with:

- the Committee for Economic Development Australia (advisory board member);
- the South Australian Institute for Educational Leadership (advisory board member);
- Time for Kids (board member);
- Community Leadership Australia (board member).

Dr Vincent has also authored 16 publications in peer-reviewed academic journals and 14 presented and published conference papers.

http://www.agd.sa.gov.au/appointment-equal-opportunity-commissioner

OAIC establishes national privacy consumer forum

The Office of the Australian Information Commissioner (OAIC) has announced the establishment of a Consumer Privacy Network and is calling for organisations that represent consumer interests to join.

The Consumer Privacy Network will assist OAIC to understand further and respond to current privacy issues affecting consumers. The group will meet twice a year for in-person forums in addition to providing advice to OAIC throughout the year on key areas of work.

'Privacy continues to be an issue of growing concern for the community, particularly with the rapid increase in the range of technology and consumer goods that access and rely upon personal information. When consumers understand their rights, they can make informed choices about how their personal information is handled', says Mr Timothy Pilgrim, Acting Australian Information Commissioner.

'In the past year, the OAIC has made a significant difference to consumers' privacy with the launch of numerous education materials and the finalisation of over 1900 privacy complaints in 2014–15, as well as through its ongoing work with private sector organisations and Australian Government Agencies to help improve their privacy practices', Mr Pilgrim added.

'We want to work closely with consumer protection and advocacy groups that are at the frontline of consumer concerns. The establishment of the Consumer Privacy Network reinforces our commitment to engaging and consulting with consumer communities to best inform our program of work.'

'I encourage all interested parties to express their interest in joining the Consumer Privacy Network', said Mr Pilgrim.

Expressions of interest are open until 4 April 2016. For further information and to submit an application please visit www.oaic.gov.au.

https://www.oaic.gov.au/media-and-speeches/media-releases/oaic-establishes-national-privacy-consumer-forum

Recent cases

Procedural fairness and the Ombudsman

University of South Australia v Miller [2016] SADC 54 (3 June 2016) (Slattery J)

Dr Miller is a former employee of the University of South Australia (the University). On 13 January 2014, the University received a *Freedom of Information Act 1991* (SA) (FOI Act)

application from Dr Miller seeking access to a copy of a confidential email between Dr PH and Ms KW about an investigation of alleged misconduct of Professor Ha. Dr Miller made these allegations. The University denied Dr Miller access to the email, finding the release of the document would be contrary to the public interest to ensure efficient and effective conduct of University functions and to protect the personal information of an individual.

On 8 March 2014, Dr Miller asked the University to undertake an internal review of its decision. On 24 March 2014, the University informed Dr Miller that, upon undertaking its review, it determined to refuse access to the document. In doing so, the internal reviewer broadened the basis of refusal to cll 9 and 13 (documents containing confidential material) and 16 (documents concerning operations of agencies) of sch 1 of the FOI Act.

Dr Miller sought external review by the Acting Ombudsman (the Ombudsman). On 27 August 2014, the University received the provisional determination and reasons of the Ombudsman and a request for further submissions before making her final determination. The Ombudsman also received further submissions from Dr Miller, but the University did not see these and the Ombudsman did not give the University an opportunity to respond to them. The submissions provided further information about Dr Miller's complaint against Professor Ha, including an allegation that staff members could have been exposed to genetically modified human pathogens.

On 7 October 2014, the Ombudsman made a final determination ordering production of the email on the basis that it was not an exempt document. The Ombudsman's decision, among other things, summarised Dr Miller's further submissions. It also found that the contents of the email were well known within the University's School of Pharmacy and Medical Sciences and the industry.

The University sought permission from the District Court to appeal against the decision made by the Ombudsman that the email was not an exempt document under the FOI Act. Under s 42E of the *District Court Act 1991* (SA), the District Court may give permission only where the appeal is on a point of law and where there are cogent reasons to depart from the determination of the Ombudsman.

The University contended, among other things, that it had been denied procedural fairness because it had not seen and had not been invited to respond to the further submissions made by Dr Miller.

The Ombudsman contended that Dr Miller's submissions did not prompt the Ombudsman to change her determination. Therefore, as the outcomes of the provisional and final determination were the same, it did not consider it necessary to seek further submissions from the University in response to the submissions made by Dr Miller about the provisional determination.

The Court found that the Ombudsman had taken into account Dr Miller's further submissions, including incorrectly accepting that Professor Ha was an employee and that the email was publicly available and notorious within the relevant schools. The Court found that each of these matters raised by Dr Miller is both intuitively and intrinsically important because of its potentially damaging effect. While it is not the role of the Ombudsman to descend into the arena of the complaint made by Dr Miller, the opportunity to respond must be given to the University and those involved, particularly given the serious nature of some of the assertions, like the exposure of staff members to genetically modified pathogens.

The Court found that the actions of the Ombudsman in receiving the further material, considering it, acting upon it and failing to give the University any opportunity to address it before making the decision were an error, which vitiates the decision of the Ombudsman.

The Court then considered whether that error was sufficient to justify a grant of leave. The appropriate question to address is whether the Ombudsman's conclusion falls outside the range of conclusions that were reasonably open to her: that is a question of law (*Department of Premier and Cabinet v Colin Thomas* [2014] SADC 56, [11]).

The University contended that the Ombudsman's conclusion in relation to the question of public interest fell outside the range of conclusions that was reasonably open to her. First, the disclosure of the email would fail to protect the integrity of the University's internal investigation process and, second, there was no countervailing public interest in disclosing the email. The University should be able to investigate complaints sufficiently and effectively and that process would be compromised if the supply of information to the University investigators were somehow prejudiced.

However, while the Court agreed that the University's internal inquiry into Dr Miller's complaint was a private matter, and the Court found it difficult to conceive how the disclosure of documents received in the course of such an inquiry can be anything other than contrary to the public interest, this was not a matter that the Court needed to decide in this case.

Instead, the Court was satisfied that the Ombudsman's failure to afford the University procedural fairness had deprived the University of the possibility of a successful outcome, and the Court was not satisfied that a properly conducted consideration of the relevant matters could not have produced a different result. In the Court's opinion the University must succeed on that ground alone.

Is a friendship or an association enough to preclude judicial impartiality?

Waterhouse v Independent Commission Against Corruption (No 2) [2016] NSWCA 133 (Basten JA, Ward JA, Gleeson JA)

For more than two decades, Mr Waterhouse has claimed that he and his mother were unsuccessful in equity proceedings before Kearney J because other members of his family used their relationship with the former Premier, the late Neville Wran QC, to have the matter heard by Kearney J, who was allegedly appointed to ensure that the applicant was unsuccessful. In 1999, 2000 and 2012 Mr Waterhouse requested that the Independent Commission Against Corruption (ICAC) investigate allegations of corruption involving the Labor government and judiciary.

After conducting a preliminary investigation in 2000, ICAC declined to investigate further, similarly declining to investigate his subsequent requests. In 2014 Mr Waterhouse sought judicial review of ICAC's 2012 decision in the Supreme Court. Justice Garling found that ICAC had a statutory discretion to decline to investigate, which it had validly exercised in this case. Mr Waterhouse also sought to set aside an earlier leave application judgment of the Court (*Waterhouse v Independent Commission Against Corruption* [2015] NSWCA 300 (Basten JA, Emmett JA and Sackville AJA)) on the ground that the judges involved had conducted themselves in a manner giving rise to a reasonable apprehension of bias.

To support his contentions of bias, Mr Waterhouse made several assertions. First, he claimed that all of the judges of the Supreme Court of New South Wales were tainted by actual or apprehended bias and would be unable properly to hear his cases free from prejudgment. This was, he contended, by reason of association with colleagues, Adams and

Allsop JJ, who had acted as opposing counsel in the equity proceedings in which he had been unsuccessful, leading to the possibility that a fair-minded observer might think that such an association might preclude judicial impartiality.

Second, Mr Waterhouse specifically alleged that the trial judge, Garling J, did not disclose the fact that he was appointed by the Labor government to the Bench and was also the recipient of substantial and very lucrative Labor government briefs and commissions before his judicial appointment. The affidavit also asserted that Garling J had 'concealed' his 'close friendship with' Allsop and Adams JJ.

Third, in seeking to have the earlier leave application judgment of the Court, Mr Waterhouse suggested, among other things, that specific words spoken by the judges had been removed from the sound recording and consequently did not appear in the transcript of the hearing, giving rise to a reasonable apprehension of bias.

Fourth, with regard to Sackville AJA, Mr Waterhouse alleged that he pointed his finger at Mr Waterhouse during the proceedings and said 'You are warned'. However, Mr Waterhouse did not provide evidence concerning the context surrounding this statement.

The Court dismissed Mr Waterhouse's applications. In doing so, it rejected all allegations of bias.

The Court held that Mr Waterhouse had misconceived the relevance of the associations relied upon. The Court held that there are many institutional litigants who have numerous cases in the Supreme Court. It is common for individual judges to have acted for such litigants while at the Bar. They may or may not recuse themselves in relation to litigation involving former clients, depending upon the nature of their relationship and other relevant factors. The suggestion that colleagues who have not acted for such litigants are disqualified because of their friendship or association with those who have so acted has never been raised. The Court found that it might confidently be stated that there is no possibility that a fair-minded observer might think that such an association might lead a judge to fail to deal impartially with litigation involving that party.

Mr Waterhouse also failed to satisfy the Court of the truth of his allegations concerning tampering with the court's audio recording in the earlier leave application. The Court held that no judge would have had any reason to seek to have material deleted and the suggestion that that occurred is entirely fanciful. This conclusion was also consistent with the evidence of Ms Walsham (Reporting Services Branch) that no request to delete anything from the transcript was made and that, had it been made, she would have been advised of it.

The Court further held that, assuming that the words 'You are warned' had been spoken, it did not indicate an apprehension of bias on the part of the judges hearing his case.

When is it unreasonable not to endeavour to contact an applicant who fails to attend a hearing?

WZAVH v Minister for Immigration [2016] FCCA 1020 (6 May 2016) (Lecev J)

The applicant (a Pakistani citizen) applied for a protection visa with the assistance of Case for Refugees (Case). When the visa was refused, the applicant applied to the then Refugee Review Tribunal for a review of that decision. He thought Case was acting for him, but he failed formally to appoint Case as his representative. He also failed to update his address with the Tribunal when he moved. However, the Tribunal had his correct mobile phone number and email address.

Pursuant to ss 425 and 425A of the *Migration Act 1958* (Cth), the applicant was invited to a Tribunal hearing on 8 October 2014. This invitation was sent to a previous address and he did not receive it. When the applicant failed to appear, the Tribunal checked for any communication but no messages had been received. Although the Tribunal Hearing Record included the applicant's mobile phone number, the Tribunal made no attempt to contact the applicant and, pursuant to s 426A(1A) of the Act, refused the applicant a protection visa without taking any further steps to allow the applicant to appear.

When the applicant learned a decision had been made, he sought judicial review of the Tribunal's decision in the Federal Circuit Court.

The applicant contended, among other things, that the Tribunal acted unreasonably in exercising its discretion under s 426A(1A) to proceed without taking further steps to allow the applicant to appear. The applicant argued that the inclusion of his mobile phone number on the Tribunal Hearing Record, when the Tribunal had previously corresponded with him by post, supported his contention that it is general practice for the Tribunal to contact applicants by phone to confirm their hearing date and related matters.

The Minister contended that, in considering the exercise of the discretion under s 426A(2) of the Act to reschedule a hearing, the Tribunal is not required, where there is compliance with ss 425 and 425A of the Act, to make further enquiries if the applicant fails to attend the review hearing (*Minister for Immigration and Multicultural and Indigenous Affairs v SZFHC* [2006] FCAFC 73, [38]–[39] (Spender, French and Cowdroy JJ); compare *Kaur v Minister for Immigration and Border Protection* [2014] FCA 915 (*Kaur*) (Mortimer J)).

The Court held that, while the Tribunal is not under an obligation to afford 'every opportunity' to an applicant for review to present their case and it is open to a Tribunal to determine that 'enough is enough' (*Minister for Immigration and Citizenship v Li* [2013] HCA 18, [82] (Hayne, Kiefel and Bell JJ)), in this case, the Tribunal did nothing to afford the applicant a meaningful opportunity to present his case, save for sending him the invitation to the Tribunal hearing. While that action complied with the requirements of s 426A of the Act, the exercise of the discretion to proceed to make a decision without taking any further action to allow or enable the applicant to appear before it was, in the Court's view, in all the circumstances, unreasonable (*Kaur*).

The Court held that it is entirely reasonable (and common sense, as was pointed out in *AZAFB v Minister for Immigration and Border Protection* [2015] FCA 1383) for the Tribunal to endeavour to contact an applicant who has provided the relevant contact details, including a telephone number, especially where that telephone number appears on the Tribunal's Hearing Record. Dependent upon the circumstances, it may be reasonable for the Tribunal, having endeavoured to contact an applicant, to proceed under s 426A(1A) of the Act, but it is not reasonable to proceed without making that endeavour when an obvious means of contact is available.

The Court found that the fact that the Tribunal would endeavour to use the contact details provided (including a telephone number) before making a decision on the review under s 426A(1A) of the Act is implicit in the terms of the declaration signed by an applicant, which provides that if he or she changes their contact details and does not inform the Tribunal of the new address the Tribunal may proceed to make a decision about their case 'even if it cannot contact me'. It must be inferred from the terms of the declaration that the Tribunal will make endeavours to contact an applicant by means of the contact details provided and will not simply proceed to make a decision without endeavouring to contact the applicant, as occurred here. If the Tribunal had used the applicant's mobile number in an attempt to contact him and had failed, or had contacted him and he had elected not to proceed, it would

have been reasonable for the Tribunal to proceed in the manner that it did. However, in this case there was no such attempt by the Tribunal.

For these reasons, the Court considered that the Tribunal committed a jurisdictional error by acting unreasonably in exercising its discretion to proceed to make a decision without taking further steps that might have allowed the applicant to appear before it.