RECENT DEVELOPMENTS

Katherine Cook

Amendment to the Commonwealth Privacy Act to further protect de-identified data

On 28 September 2016, the Commonwealth Attorney-General announced that the *Privacy Act 1988* (Cth) will be amended to improve protections of anonymised datasets that are published by the Commonwealth Government.

The publication of major datasets is an important part of 21st century government, providing a great benefit to the community. It enables the government, policymakers, researchers and other interested persons to take full advantage of the opportunities that new technology creates to improve research and policy outcomes.

The ability to deliver better policies and to solve many of the great challenges of our time rests on the effective sharing and analysis of data. For this reason, the Coalition government has promoted the benefits of open government data, in accordance with the Australian Government Public Data Policy Statement, and published anonymised data on <data.gov.au>.

The Minister for Social Services, the Hon Christian Porter MP, recently drew attention to the benefits of research with anonymised data for identifying risks of long-term welfare dependency and to help break the cycle of dependency.

In a unanimous report, the Senate Select Committee on Health drew attention to the opportunities for research and policy design from the government's data holdings and recommended that open access to de-identified datasets should be the default position.

In accepting the benefits of the release of anonymised datasets, the government also recognises that the privacy of citizens is of paramount importance.

It is for that reason that there is a strict and standard government procedure to de-identify all government data that is published. Data that is released is anonymised so that the individuals who are the subject of that data cannot be identified.

However, with advances of technology, methods that were sufficient to de-identify data in the past may become susceptible to re-identification in the future.

The amendment to the Privacy Act will create a new criminal offence of re-identifying de-identified government data. It will also be an offence to counsel, procure, facilitate or encourage anyone to do this, and to publish or communicate any re-identified dataset.

The legislative change, which was introduced in the Spring sittings of Parliament, is to provide that these offences will take effect from 28 September 2016.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Amendment-to-the-Privacy-Act-to-further-protect-de-identified-data.aspx>

Appointment of Australian Information Commissioner and Privacy Commissioner

His Excellency the Governor-General of Australia, General the Hon Sir Peter Cosgrove AK MC (Ret'd), has appointed Mr Timothy Pilgrim PSM as Australian Information Commissioner and reappointed him as Australian Privacy Commissioner.

Mr Pilgrim has served as Australian Privacy Commissioner since July 2010 and has been acting as Australian Information Commissioner since July 2015. Mr Pilgrim's appointments as Acting Information Commissioner and Privacy Commissioner expire on 19 October 2016.

Mr Pilgrim has established a strong reputation in the business community for his considered approach to regulation and understanding of business needs. Mr Pilgrim has worked internationally to help Australia deal with global privacy challenges, particularly through building closer relationships with other privacy regulators.

Prior to his current roles, Mr Pilgrim served as Deputy Privacy Commissioner from 1998 to 2010. He has overseen the implementation of the most significant reforms to Australia's privacy laws since the *Privacy Act 1988* (Cth) was extended to the private sector in 2000.

As Acting Australian Information Commissioner, Mr Pilgrim provided the necessary continuity to allow the Office of the Australian Information Commissioner to build on its significant operational improvements, particularly its streamlined freedom of information functions.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Appointment-of-Australian-Information-Commissioner-and-Privacy-Commissioner.aspx>

Two Bills to bolster the fight against terrorism

On 15 September 2016, the Commonwealth Attorney-General introduced into Parliament two important counterterrorism Bills to ensure our laws are as strong and up-to-date as possible, to enable police and intelligence agencies to fight terrorism and to keep our community safe.

Counter-Terrorism Legislation Amendment Bill (No 1) 2016

Regrettably, children as young as 14 have been involved in terrorism-related activities. This Bill recognises this reality and the need for appropriate safeguards. It modernises the control order regime by:

- reducing the age, from 16 to 14, at which a person of security concern can have a control order placed on them;
- creating new targeted physical search, telecommunications interception and surveillance device regimes to help monitor those subject to control orders; and
- better protecting sensitive information in control order proceedings while ensuring appropriate safeguards, such as providing special advocates when needed.

To address the negative impacts of hate preachers, this Bill criminalises advocating genocide.

The legislation also implements all 21 recommendations of the bipartisan Parliamentary Joint Committee on Intelligence and Security, which reviewed an earlier version of the Bill.

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

Since the national terrorism threat level was raised on 12 September 2014, 48 people have been charged as a result of 19 counterterrorism operations around Australia. A critical part of the federal government's role is managing terrorist offenders serving custodial sentences who continue to pose an unacceptable risk to the community after they are released from prison.

Most states and territories have already enacted post-sentence preventative detention schemes for dealing with high-risk sex or violent offenders, but until now there has been no such scheme for convicted terrorist offenders.

The Bill amends pt 5.3 of the *Criminal Code Act 1995* (Cth) to create a new regime to enable a Supreme Court, upon application by the Attorney-General, to make an order for the ongoing detention of high-risk terrorist offenders who are approaching the end of their custodial sentences and are about to be released into the community.

The court must be satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptably high risk of committing a serious terrorism offence if released.

The Council of Australian Governments agreed in April that the Commonwealth should lead in creating this nationally consistent scheme. The state and territory Attorneys-General agreed in principle to the Commonwealth's draft Bill on 5 August 2016 and continued to work on this important initiative.

The states and territories are the Commonwealth's partners in tackling the threats of terrorism and the Attorney-General thanks them for their cooperation and support.

It is critical that governments work together to implement this scheme as early as possible.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Two-bills-to-bolster-the-fight-against-terrorism.aspx>

Legal advisory service for the Royal Commission into the Protection and Detention of Children in the Northern Territory

On 10 October 2016, the Commonwealth Attorney-General announced a free legal advisory service for people engaging with the Royal Commission into the Protection and Detention of Children in the Northern Territory.

Delivered by the North Australian Aboriginal Justice Agency (NAAJA), the Children in Care and Youth Detention Advice Service will receive $1.1 million from the Australian Government this financial year.

NAAJA is the largest legal provider in the Northern Territory and has a strong track record in providing culturally appropriate services.

This legal advisory service will provide:

- face-to-face and telephone advice for people seeking to engage with the Royal Commission;

- help in accessing legal financial assistance for people appearing as witnesses before the Royal Commission or attending interviews with the Royal Commission;
- referrals to solicitors for people needing ongoing legal representation; and
- community outreach and liaison services, including helping people to understand their legal rights and responsibilities when engaging with the Royal Commission.

The Australian Government is also providing financial assistance for legal representation of people:

- attending interviews with the Royal Commission; and
- appearing as witnesses before the Royal Commission when formal hearings commence later this year.

The Royal Commission was established in July 2016 to enable a swift inquiry into the treatment of children in detention facilities administered by the Government of the Northern Territory.

The funding announced today [that is, on 10 October 2016] is in addition to the $350 million announced in 2015 for Indigenous legal assistance services. The government has also struck a landmark five-year National Partnership Agreement to deliver over $1.3 billion for legal aid commissions and community legal centres.

More information on NAAJA is available at NAAJA website or by calling 08 8982 5110.

More information on legal financial assistance arrangements is available on the Attorney-General's Department website.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FourthQuarter/Legal-advisory-service-for-the-Royal-Commission-into-the-Protection-and-Detention-of-Children-in-the-Northern-Territory.aspx>

Victorian Government appeals Supreme Court decision

The Victorian Government has lodged an appeal against the Supreme Court's decision regarding the Ombudsman's jurisdiction to investigate a referral made by the Legislative Council.

The government is taking this action to protect the architecture of Victoria's integrity regime, particularly regarding the relationship between the Ombudsman and the Houses and committees of the Victorian Parliament.

The government is concerned that the recent Supreme Court decision has significant resource implications for the Ombudsman and will impact on the Ombudsman's ability to conduct investigations into other matters in accordance with the functions spelt out in the *Ombudsman Act 1973* (Vic).

The government is also concerned about the implications of the decision for the question of privilege as between the Houses.

If the decision stands unchallenged, there would appear to be no impediment to one House of the Parliament referring members of the other House to the Ombudsman with regard to any matter whatsoever.

The government is not seeking to obstruct the Ombudsman from commencing an investigation into the reference if and when she determines to do so.

<http://www.premier.vic.gov.au/government-appeals-supreme-court-decision/>

Recent decisions

Apprehended bias and horse racing

Golden v V'landys [2016] NSWCA 300 (4 November 2016)

The applicant, Mr Joseph Golden, was a professional racehorse trainer. The first respondent, Mr Peter V'landys, was the Chief Executive Officer of the second respondent, Racing New South Wales (RNSW).

On 10 May 2011, Mr Golden wrote a letter to RNSW accusing Mr V'landys of being corrupt and incompetent in handling the Commercial Horse Assistance Payment Scheme (CHAPS), which was established to compensate owners and trainers affected by the equine influenza virus.

After receiving Mr Golden's letter, Mr V'landys delegated his authority to the RNSW Licensing Committee to hold a show cause hearing in relation to Mr Golden as to why his trainer's licence should not be suspended. On 16 May 2011, Mr Golden was issued a show cause notice.

On 19 May 2011, Mr Golden wrote two letters to RNSW officials, the first accusing Mr V'landys of corruption and the second accusing two members of the Licensing Committee of corruption.

Between 23 and 25 May 2011, between 8 am and 10 am, Mr Golden stood on the southern end of Grafton Bridge with a placard that read 'RACING NSW CORRUPT CEO, ROBS TAX PAYERS'.

On 23 May 2011, Mr V'landys delegated to the Licensing Committee the authority to amend the show cause notice of 16 May 2011 to 'include any behaviour of Mr Golden between the date of my original delegation and the hearing of that show cause notice and to make a recommendation to me at the conclusion of the hearing'.

On 24 May 2011, Mr Golden was issued with an amended show cause notice, which included the comments in his 19 May letter and his behaviour on Grafton Bridge. Mr Golden was told that the hearing now extended to Mr Golden showing cause why he should not be warned off racecourses within RNSW's control.

On 30 May 2011, Mr Golden stood outside the office of Ms Jannelle Saffin, at that time the federal member for Page, in Grafton and held a placard reading, 'RACING NSW CORRUPT CEO ROBS TAXPAYERS' and 'CHAPS PUBLIC AUDIT REPORTS $200,000,000 MISAPPROPRIATION PUBLIC ENQUIRY NEEDED'.

A show cause hearing was held on 31 May 2011, and on 8 June 2011 Mr V'landys informed Mr Golden that his horse trainer's licence had been suspended for six months (the first decision).

On 8 June 2011, Mr V'landys and RNSW also instructed lawyers to write a letter of demand to Mr Golden concerning alleged defamation conveyed by the placards Mr Golden displayed on the bridge and outside Ms Saffin's office. This letter was sent on 10 June 2011. In that letter, only defamation proceedings on behalf of Mr V'landys (and not RNSW) were contemplated.

On 24 June 2011, a second show cause hearing was held by the Licensing Committee, the subject of which was Mr Golden's conduct in displaying the placards on the bridge and outside Ms Saffin's office. Mr V'landys approved the committee's recommendation that Mr Golden be 'warned off' all racetracks under the control of RNSW indefinitely (the second decision).

Mr Golden sought judicial review of Mr V'landys' decisions on the bases of, among other things, apprehended bias. The primary judge dismissed his challenge, concluding that Mr Golden had not been able to articulate a logical connection between, on the one hand, the circumstances that Mr V'landys had alleged that Mr Golden had defamed him and, on the other, the feared deviation by Mr V'landys from his obligation to decide the case on its merits.

On 7 September 2016, Mr Golden sought leave to appeal the primary judge's decision to the New South Wales Court of Appeal. This was granted. Mr Golden's appeal focused on the second decision to warn him off racecourses indefinitely. Mr Golden contended, among other things, that the primary judge should have found that the decision to warn Mr Golden off was affected by apprehended bias on Mr V'landys' part.

The Court held that the test for a reasonable apprehension of bias requires satisfaction of a double might test: whether a fair-minded observer might reasonably apprehend that a decision-maker might not apply an impartial mind to the question to be decided (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (*Ebner*)). There must also be a logical connection between the first matter and the feared deviation from the course of deciding the case on its merits (*Ebner*).

The Court found that, in this case, the relatively low threshold posed by the test in *Ebner* was satisfied by Mr V'landys exercising a power to decide an appropriate punishment for Mr Golden in circumstances where, at the same time, Mr V'landys was demanding through lawyers that Mr Golden pay him damages and costs for defamation for engaging in the same conduct as was the subject of the decision to warn him off.

Accepting that criticisms of institutions such as RNSW are often directed to the person seen to be leading the institution and that, as a general matter, Mr V'landys would readily be understood as being able to deal with these criticisms, the lawyers' letter to Mr Golden takes on a significance. Despite being, in general, able readily to cope with public criticism of a very emotional kind, Mr V'landys chose to retain private solicitors and threaten Mr Golden with defamation proceedings about the very matter that he was subsequently called upon to judge.

The Court opined that the logical connection test does not require proof of the existence of personal animus. To require such proof would tend to blur the distinction between apprehended bias and actual bias. In this case, the logical connection test was made out when Mr V'landys, through lawyers, personally threatened legal proceedings against Mr Golden, then proceeded to make a decision affecting Mr Golden's rights about that same conduct. As such, Mr V'landys' role in threatening legal proceedings against Mr Golden was 'incompatible' with making the decision to warn off Mr Golden (*Isbester v Knox City Council* (2015) 255 CLR 135).

Is general indifference to agent's fraudulent conduct enough?

Gill v Minister for Immigration and Border Protection [2016] FCAFC 142 (17 October 2016)

In June 2009, the appellant, a citizen of India, entered Australia on a student visa. On 3 May 2011, the appellant's migration agent, on his behalf, made an online application for a Skilled (Provisional) (Class VC) visa (the visa). It was fraudulently stated on the visa application form that the appellant had obtained a skills assessment from Trades Recognition Australia (TRA) and a reference number for that assessment was provided.

On 14 April 2012, the Minister's delegate refused to grant the appellant the visa. The delegate stated that TRA had confirmed that there was no skills assessment with the reference number stated in the visa application form. The appellant's visa application was refused on the basis of the Public Interest Criterion 4020 and the provision of false or misleading information concerning the visa applicants' respective skills.

On 9 May 2012, the appellant sought a review of the delegate's decision in the then Migration Review Tribunal. The Tribunal found that the migration agent had acted fraudulently by including information which was incorrect or misleading in his visa application and which had been fabricated by the migration agent and not the appellant. Before the Tribunal the appellant claimed that he had been the victim of fraudulent conduct by his former migration agent and that the agent had, without his knowledge, provided false information in his visa application, with the consequence that his visa application was invalid.

The appellant then brought judicial review proceedings in the Federal Circuit Court of Australia (the FCCA) in relation to the Tribunal's decisions. A central issue was whether the effect of the alleged agent's fraud meant that the visa application was not a valid visa application. The FCCA dismissed the appellant's application on the basis that relief should be withheld because of the appellant's 'indifference and imputed authority in the agent'.

The appellant then appealed to the Full Federal Court of Australia (the Full Court). The central issue was whether the primary judge erred in concluding that, because of the appellant's 'indifference' to his agent's fraudulent conduct and the 'general authority' he had given to his agent, he had to bear responsibility for that conduct.

The appellant submitted that, although the primary judge found that there was fraud by the agent, he was unable positively to find complicity or collusion by the appellant in that fraud. Therefore, the appellant contended that the primary judge's finding of 'general indifference' was an insufficient basis upon which to visit the agent's fraud on the appellant and that indifference as to honesty or dishonesty was required.

The Minister submitted that the FCCA's findings were open to it and supported its conclusion that the visa application was valid. The Minister emphasised that the FCCA had concerns about the appellant's evidence and credibility, having had the benefit of witnessing the appellant give evidence during cross-examination. Therefore, it was open to the Court to find that the appellant was indifferent to the nature and contents of his visa application and that he had given his agent general authority.

The Full Court (Kenny, Griffiths and Mortimer JJ) held that fraud can arise in a wide range of factual circumstances, such that it is undesirable to prescribe in general terms the scope for judicial review where there is third-party fraud (*SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35). Rather, it is critical to pay close attention to the circumstances in which the issue of fraud arises; and to the terms of any specific legislative provision which may be affected by the fraudulent conduct of a third party such as a migration agent.

The Full Court held that the primary judge erred in failing to address a question which was of central significance in the particular circumstances here — namely, whether the appellant's 'indifference' or imputed general authority to his agent extended to whether or not the agent's conduct in assisting the appellant to make his visa application went so far as to include unlawful or dishonest conduct. In the view of the Full Court, it is one thing to conclude, on the basis of relevant evidence, that a visa applicant, having retained the assistance of a migration agent, gives his or her general authority to that agent to do whatever is lawful and proper to achieve the visa applicant's objective of obtaining a particular visa; it is another to conclude that a visa applicant has placed such matters in the hands of a migration agent and is indifferent to whether the migration agent uses lawful or unlawful means to achieve the visa applicant's objective of obtaining a visa.

The Full Court found that there was no finding by the primary judge that the appellant's 'indifference' as to how his agent carried out his retainer to assist the appellant in obtaining a visa extended so far as to countenance or authorise the agent engaging in fraud or dishonesty.

The primary judge also found that it was not possible for him to make a positive finding that the appellant was complicit or colluded in the agent's fraud. Rather, the primary judge proceeded on the basis that his lesser findings relating to the appellant's 'indifference' and the general authority he gave to his agent meant that the appellant had to bear responsibility for the agent's fraudulent conduct.

In the view of the Full Court, this approach fails to recognise and give effect to the relevant distinction between an indifference as to how the migration agent acting lawfully and properly can achieve a visa applicant's desired outcome; and an indifference as to whether that outcome is achieved by the agent acting unlawfully or dishonestly. This distinction is equally important in the context of considering the legal significance of any general authority given to a migration agent by a visa applicant. In the Full Court's view, the primary judge erred in failing to recognise and give effect to the significance of this distinction and, for these reasons, the appeal should be allowed.

When can an administrative tribunal dispense with a matter without a hearing?

Sasterawan v Roads and Maritime Services [2016] NSWCATAD 142 (18 November 2016)

In May 2015, the respondent, Roads and Maritime Services (RMS), refused Mr Sasterawan a taxi driver authority under the *Passenger Transport Act 1990* (NSW) because he was 'not a person of good repute ... and a fit and proper person to be the driver of a taxi-cab'. That finding was primarily based on Mr Sasterawan's conviction in 2005 for offences under the *Crimes Act 1900* (NSW) for claiming moneys by fraudulently altering Cabcharge dockets (see *Sasterawan v Morris* [2010] NSWCCA 91).

In August 2015, Mr Sasterawan made an application to the New South Wales Civil and Administrative Tribunal (NCAT) for review of the decision made by RMS to refuse to grant him a taxi driver authority (the substantive application).

On 12 May 2016, NCAT appointed Dr Ainsworth to act as guardian ad litem for Mr Sasterawan based on medical evidence provided by Mr Sasterawan under s 45(4)(a) of the *Civil & Administrative Tribunal Act 2013* (NSW) (NCAT Act).

During those proceedings, it transpired that Mr Sasterawan had applied to the Supreme Court of New South Wales for various orders, including that the 2005 conviction be overturned. In light of Mr Sasterawan's application to the Supreme Court, after conferring

with him, the guardian ad litem decided to withdraw the substantive application. Mr Sasterawan opposed this, and on 9 August 2016 NCAT dismissed the application.

Mr Sasterawan then applied for an order under reg 9 of the *Civil and Administrative Tribunal Regulation 2013* (NSW) that a decision made on 9 August 2016 be set aside (the set aside application).

In submissions filed on 4 October 2016, the RMS urged NCAT to exercise its power to dispense with a hearing. The RMS contended, among other things, that the issues raised by the set aside application were neither factually nor legally complex. In addition, the RMS asserted that Mr Sasterawan would not suffer any prejudice if the set aside application was determined without a hearing.

In submissions filed on 26 September, 5 October and 7 October 2016, Mr Sasterawan canvassed many issues but not whether the set aside application should be determined on the papers. His guardian ad litem made no submissions on either issue.

NCAT found that a hearing is generally required for proceedings in NCAT (NCAT Act, s 50). An exception is where NCAT makes an order dispensing with a hearing (NCAT Act, s 50(1)(c)). NCAT may make an order dispensing with a hearing if it is satisfied that the issues for determination can be adequately determined in the absence of the parties by considering any written submissions or any other documents or material provided to NCAT (NCAT Act, s 50(2)). However, NCAT may not make an order dispensing with a hearing unless it has first afforded the parties an opportunity to make submissions about whether the hearing should be dispensed with and has taken any such submissions into account (NCAT Act, s 50(3)).

NCAT held that whether the issues for determination can be adequately determined in the absence of the parties requires consideration of, among other things, the nature and complexity of the issues to be determined and an assessment of the capacity of each party to address those issues in written submissions and material.

In this case, NCAT held that the issue for determination (whether the order sought by Mr Sasterawan to set aside the substantive application can be made) turns on two simple factual matters: whether the parties consented to the setting aside of the 9 August 2016 decision, and whether that decision was made in the absence of Mr Sasterawan. Given the narrow scope and simple nature of the issues to be determined, NCAT concluded that they could adequately be determined in the absence of the parties by considering their written submissions and the material provided. In reaching that view NCAT took into account that the submissions provided by Mr Sasterawan were silent about whether the set aside application should be heard on the papers.

Being satisfied that the issues can be determined adequately in the absence of the parties, NCAT considered whether the power to dispense with a hearing should be exercised.

NCAT found that the history of the proceedings reveals that Mr Sasterawan has a tendency in both oral and written submissions to agitate a great many issues largely irrelevant to the issue at hand. NCAT formed the view it was unlikely Mr Sasterawan would be able or willing to address the narrow issues raised by the set aside application if given the opportunity to make oral submissions. In NCAT's opinion, Mr Sasterawan would not be prejudiced if the set aside application was determined without a hearing. Further, dispensing with a hearing would facilitate the just, quick and cheap resolution of the real issues in dispute.