RECENT DEVELOPMENTS

Katherine Cook

Appointments to the Commonwealth Administrative Appeals Tribunal

On 28 June 2017, the Commonwealth Attorney-General announced the appointment of the Hon Justice David Thomas as President of the Administrative Appeals Tribunal (AAT). Justice Thomas has also been appointed as a judge of the Federal Court. His appointment is for seven years.

Justice Thomas has been a member of the Supreme Court of Queensland and President of the Queensland Civil and Administrative Tribunal (QCAT) since 2013.

Justice Thomas is President of the Royal National Agricultural and Industrial Association of Queensland and Deputy Chair of the Queensland Ballet.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/SecondQuarter/Appointments-to-the-Administrative-Appeals-Tribunal.aspx>

Royal Commission into the Protection and Detention of Children in the Northern Territory: Reporting date extended

On 30 August 2017 the Commonwealth Attorney-General announced that the Commonwealth will recommend to his Excellency the Governor-General that the reporting date for the Royal Commission into the Protection and Detention of Children in the Northern Territory be extended until 17 November 2017.

The extension was at the request of the Royal Commission to ensure parties to the Royal Commission have sufficient time to respond to notices of adverse material.

The extension will be accommodated within the Royal Commission's existing budget. There will not be any additional hearings during this period.

<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/ThirdQuarter/Royal-Commission-into-the-protection-and-detention-of-children-in-the-Northern-Territory-reporting-date-extended.aspx>

NSW Ombudsman report: Review of police use of the Terrorism (Police Powers) Act 2002

The NSW Ombudsman's office has completed its fourth review of the operation of the preventative detention and covert search warrant powers in pt 2A and pt 3 of the *Terrorism (Police Powers) Act 2002*.

The review period was 1 January 2014 to 31 December 2016. The Attorney-General tabled the Ombudsman's report on Tuesday 13 June 2017. This is the Ombudsman's last review of the operation of this Act. The Ombudsman's oversight functions in relation to police are being transferred to the newly-established Law Enforcement Conduct Commission. This includes the review functions under this Act.

During the review period, the pt 3 covert search warrant powers were not used.

In September 2014, the pt 2A preventative detention powers were used for the first and only time since the powers were introduced in 2005. The Ombudsman monitored their use and had discussion with police at that time about some practical implementation issues. However, this report does not make any formal recommendations because of amendments made to the Act in 2016 that inserted pt 2AA (Investigative detention powers). Previous Ombudsman reports have documented strong concerns of police that the preventative detention powers under pt 2A were operationally ineffective. Those concerns were addressed with the introduction of pt 2AA, effectively making the preventative detention powers redundant.

'Since 2016 police have had new investigative detention powers under Part 2AA of the Terrorism (Police Powers) Act. These new expanded powers make the preventative detention powers in Part 2A redundant. Those preventative detention powers should therefore be allowed to expire in December 2018 in accordance with their sunset clause', said the Acting Ombudsman, Professor John McMillan.

The Acting Ombudsman has also reported his concerns about the lack of oversight of the new pre-investigation detention powers.

'In 2005, Parliament required the Ombudsman to scrutinise the use of the preventative detention and covert search warrant powers and report back every 3 years. This recognised the need for a robust system of independent oversight of the extraordinary powers that these are', said the Acting Ombudsman.

'Police now have the power to detain a person as young as 14 years old for up to 4 days without a warrant, and question them. It is surprising there was no provision for independent civilian oversight of a power of this nature. I recommend that the Minister consider giving the Law Enforcement Conduct Commission oversight over use of the investigative detention powers under Part 2AA. This will continue the proud tradition embedded in Ombudsman practice of ensuring public confidence in police is maintained by making sure police are acting in a fair and reasonable manner', said the Acting Ombudsman.

<https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0007/45457/Media-release-Terrorism-Police-Powers-4th-report-tabled-13-June-2017.PDF>

Full-time SACAT President appointed

Crown Solicitor Ms Judy Hughes has been appointed as the new President of the South Australian Civil and Administrative Tribunal (SACAT) and as a Supreme Court judge.

Ms Hughes replaces former SACAT President, Justice Parker, who has made a significant contribution to SACAT's establishment and initial three years of operation and who will continue as a full-time Supreme Court judge.

Background

As Crown Solicitor, Ms Hughes has led an office of more than 280 employees delivering legal services to the state government. She has served in senior roles within the Crown Solicitor's Office for over a decade, including as head of the Public Law Section, and was previously Deputy Commissioner of the Office of Consumer and Business Affairs.

Ms Hughes sits on the Board of Examiners for legal practitioners and has served on a number of government steering committees.

The role of president was established as a part-time position; however, a full-time president is now required to oversee the continued expansion of SACAT.

The extension of the position to full-time was funded within the 2017–18 state budget.

<https://www.agd.sa.gov.au/newsroom/full-time-sacat-president-appointed>

New guide paves way for better data privacy management

The Office of the Australian Information Commissioner (OAIC) and CSIRO's Data61 have released a guide to assist organisations to de-identify their data effectively. The practical and accessible guide is for Australian organisations that handle personal information and are considering sharing or releasing it to meet their ethical responsibilities and legal obligations, such as those under the *Privacy Act 1988.*

'The interpretation and application of data has the potential to positively transform our lives and bring about great social and economic benefits. However, we need to remember that many of these data sets are made up of individuals' personal information. So when we think about releasing it we need to anticipate the risks to ensure we are protecting the rights of individuals', said Mr Timothy Pilgrim, Australian Information and Privacy Commissioner.

'Deciding whether data should be released or shared — and, if so, in what form — requires careful consideration. A range of factors needs to be considered, from ethical and legal obligations to technical data questions. Integrating the different perspectives on the topic of de-identification into a single, comprehensible framework is what this guide is all about.'

Dr Christine O'Keefe, the lead author of the guide and Research Scientist at Data61, explained: 'at CSIRO's Data61 we are a trusted advisor to government and industry organisations and we help them access the power of their data by applying deep science, engineering and design to derive insights from it and make it accessible to others without compromising privacy.

'At present, there is no publicly available, comprehensive risk management guide in Australia to assist organisations with de-identification. That's why we have set out to create this standalone guide as an adaptation of the existing UK version, *the Anonymisation Decision-Making Framework* — and make it freely available.

'The community is increasingly conscious of how their data is being used, as well as the risk of data breaches, which underlines how important it is to ensure that de-identification is carried out well', said Dr O'Keefe. The De-identification Decision-Making Framework focuses on assessing and managing re-identification risks within the context of the data release or share. It encourages organisations to think more broadly and consider the data release environment as well as the techniques and controls applied to the data.

Commissioner Pilgrim added, 'de-identification is one solution for sharing and releasing data while meeting legislative demands and community expectations. It is an exercise in risk management, rather than an exact science, and it's important that we strike the right balance between maintaining useful data and making sure it's safe'.

'The OAIC looks forward to engaging further with organisations and technical experts on de-identification', said Commissioner Pilgrim.

<https://www.oaic.gov.au/media-and-speeches/media-releases/new-guide-paves-way-for-better-data-privacy-management>

Recent cases

A privative clause by another name?

Graham v Minister for Immigration and Border Protection [2017] HCA 33 (6 September 2017) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)

Mr Graham (the plaintiff) and Mr Te Puia (the applicant), both citizens of New Zealand, had their subclass 444 visas cancelled by the Minister for Immigration and Border Protection (the Minister) on character grounds pursuant to s 501(3) of the *Migration Act 1958* (the Migration Act).

In making each decision, the Minister considered information purportedly protected from disclosure by s 503A of the Migration Act. Section 503A(2)(c) prevents the Minister from being required to divulge or communicate information from a gazetted agency to a court or a tribunal (among other bodies) when reviewing a purported exercise of power by the Minister under s 501, s 501A, s 501B or s 501C of the Migration Act, to which the information is relevant. A gazetted agency encompasses 'anybody, agency or organisation responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud, or security intelligence in, or in a part of Australia' (Migration Act, s 503A(9)).

Mr Graham brought proceedings in the High Court's original jurisdiction seeking writs of prohibition to prevent the Minister from acting on his decision to cancel his visa; and a writ of certiorari quashing the decision. Mr Te Puia sought that the Minister's decision be set aside.

Mr Graham contended, among other things, that s 503A(2) of the Migration Act was invalid because it required a federal court to exercise judicial power in a manner inconsistent with the essential character of judicial power. Further, he contended that s 503A(2) limited the right or ability of affected persons to seek relief under s 75(v) of the *Constitution* as to be inconsistent with the place of that provision in the constitutional structure.

The Minister contended, among other things, that, as a matter of policy, it may be accepted that admissible evidence should be withheld only if and to the extent that public interest requires it but that there is no constitutional principle which requires the courts to be the arbiter of that question.

The majority (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) held that inclusion of s 75(v) of the *Constitution* means that it is impossible for the Parliament to deprive the High Court (or another court exercising jurisdiction under s 77(i) or (iii) by reference to s 75(v)) of the ability to enforce the legislated limits of an officer's power.

The majority held that the question of whether a law transgresses that constitutional limitation is one of substance and degree; and to answer it requires an examination not only of the legal operation of the law but also of practical impact of the court's ability to exercise its jurisdiction.

The majority found that s 503A(2)(a) of the Migration Act imposes a blanket and inflexible limit on obtaining and receiving evidence relevant to the curial discernment of whether legislatively imposed conditions and constraints on the lawful exercise of powers conferred by that Act on the Minister. The practical effect is that it prevents the High Court (and the Federal Court) from obtaining information which, is relevant to the purported exercise of the Minister's power. As such, s 503A(2)(c) is invalid to the extent that it prevents the Minister from being required to communicate relevant information to the High Court when it is exercising its jurisdiction under s 75(v) of the *Constitution* to review the Minister's purported exercise under s 501, s 501A, s 501B or s 501C of the Migration Act.

The majority opined that the Minister's attempt to analogise the operation of s 503A(2) to the operation of the common law principle of public interest immunity was misplaced. Even outside of the context of judicial review of executive action, a court always had in reserve the power to enquire into the nature of the document for which protection was sought (*Robinson v State of South Australia* [No 2] [1931] AC 704 at 716).

The majority also held that the decisions of the Minister to cancel Mr Graham's and Mr Te Paui's visas were invalid. The Minister acted on a wrong construction of s 503A(2) and wrongly understood s 503A(2) to prevent him from being required to communicate certain information to a court engaged in judicial review of the impugned decisions.

Finely balanced — procedural fairness and national security

El Ossman v Minister for Immigration and Border Protection [2017] FCA 636 (6 June 2017) (Wigney J)

In July 2014 the applicant, a Lebanese citizen, applied for a combined Partner (Temp) (Class UK) and Partner (Residence) (Class BS) visa.

On 22 October 2014 the applicant attended the offices of the Department of Immigration and Border Protection (DIBP). There he was interviewed by officers from the Australian Security Intelligence Organisation (ASIO).

At no point during the three-hour interview did the ASIO officers specifically put to the applicant three issues: first, he used another name and a person using that name had been involved in politically motivated violence; second, there was information that the applicant had a close association with the late leader of Jund al-Sham; and, third, there was information that the applicant shared a close personal association with a former bodyguard for Australian Lebanese terrorist Haussam El Sabbagh ('three issues').

In August 2015, following that interview, ASIO furnished DIBP with an adverse security assessment in respect of the applicant. The assessment was that the applicant directly or indirectly posed a risk to security. ASIO assessed, among other things, that Mr El Ossman had been involved in politically motivated violence, maintained associations with numerous terrorist and extremist individuals and harboured an extremist ideology. ASIO recommended that the applicant's visa application be refused and that his bridging visa be cancelled. DIBP cancelled his visa and he was taken into immigration detention. The applicant's application for a substantive visa was also refused.

The applicant then challenged the adverse security assessment in the Federal Court. His primary contention was that the adverse security assessment was 'made in excess of jurisdiction'; specifically, that ASIO failed to afford him procedural fairness by failing to put the three issues to him.

The Court found that the issue that lies at the heart of this matter highlights the potential tension between the interests of national security and the requirements of procedural fairness in the context of making security assessments under the *Australian Security Intelligence Organisation Act 1979* (Cth).

The Court found that, in this case, there was no question that ASIO was required to afford the applicant procedural fairness: it was required to adopt a procedure that was reasonable in the circumstances to give the applicant, as a person whose interests were likely to be affected by ASIO's exercise of power, an opportunity to be heard.

In this case, the Court held that the critical question is whether the procedure adopted by ASIO was sufficient to ensure that the decision to make the adverse security assessment was made fairly, having regard to the legal framework within which the decision was made and the particular facts and circumstances of the case. The Court held that in this case the situation was finely balanced.

The Court found that the applicant was given no opportunity to respond to or make submissions concerning the three issues. The Court found that nothing was said to the applicant during the interview to indicate that ASIO possessed any information that might cause it to doubt any of his answers to the questions that were put to him. Also, nothing was said to the applicant to suggest that the interviewers had any doubts or concerns about the reliability or truthfulness of any of his answers or any reason for doubting his responses.

While the Court accepted that some of the information about the three issues was immune from disclosure because disclosure would have been prejudicial to national security, parts of the specific information were not immune because versions of the intelligence report and a statement of grounds, which included general information concerning each of the three issues, were produced to the applicant for the purposes of these proceedings.

The applicant was also given no further opportunity, by way or further interview or otherwise, to address the three issues. He was not contacted by ASIO during the period between the interview and the cancellation of his visa almost a year later.

The Court issued a writ of certiorari setting aside the adverse security assessment.

Is a failure to notify litigants of changes in court fees a breach of procedural fairness?

DC v Secretary, Department of Family and Community Services & Ors [2017] NSWCA 225 (8 September 2017) (Beazley P, White JA and Sackville AJA)

On 5 July 2013, by order of the Children's Court, DC's (the applicant's) nine-year-old son, C, was placed into the care of the Minister for Family and Community Services until he reaches 18 years of age. A care plan was also registered under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the Care Act), which provided that the applicant should have supervised contact with C for two hours two times per year according to C's wishes.

On 24 July 2013, the applicant filed an appeal against the Children's Court's orders in the District Court of New South Wales. C's mother also lodged a concurrent appeal.

On 1 August 2015, sch 1 of the *Civil Procedure Regulation 2012* (NSW), which prescribes the court fees, was amended. One of the consequences of the amendment was that daily hearing fees became payable in District Court proceedings that extended beyond the first day. The applicant was not advised of the changes.

The applicant later became aware of his liability to pay daily hearing fees, and he applied to the primary judge to waive the fees. The primary judge informed the applicant that only a Registrar of the District Court had the power to determine an application for waiver of fees. The applicant indicated he wished to withdraw from the hearing. He was advised by the primary judge that, if he did so, C's care plan would remain the same. The applicant subsequently withdrew from the proceedings and his appeal was dismissed.

After the hearing of the mother's concurrent appeal, the primary judge dismissed her appeal; set aside the orders of 5 July 2013; and made fresh care orders under the Care Act. The primary judge also approved an addendum to C's care plan, which provided that 'there be contact between C and his father for two hours two times per year during school holidays subject to C's wishes and supervised by Community Services or an authorised person'. The effect of the addendum was that the applicant was no longer able to visit C on his birthday.

Eleven months after the primary judge's decision, the applicant filed a summons for judicial review of the orders of the primary judge in the New South Wales Court of Appeal.

The applicant contended that, among other things, he was denied procedural fairness by not having been advised earlier that daily hearing fees were payable.

Justice White opined that the obligation to provide procedural fairness is an obligation of the court and not only the judge hearing a proceeding. The core obligations of procedural fairness are that the proceeding be heard by an impartial judge and that the parties be given a fair opportunity to be heard. The extent to which a self-represented litigant must be advised of the practice and procedure of the court for the purpose of ensuring a fair trial will depend upon the circumstance of the case (*Hamod v New South Wales* [2011] NSWCA 375 at [313] per Beazley JA).

Justice White found that there was a fine distinction between a self-represented litigant's right to be informed of matters of practice and procedure such as are necessary for him to be able to conduct a fair trial and his right to be informed of matters relevant to a decision as to whether to persist with an appeal or to take steps outside the hearing of the appeal to seek relief from the financial burden of hearing fees. This is a real distinction in deciding whether the District Court committed jurisdictional error by not affording the applicant procedural fairness.

President Beazley and Sackville AJA held that, while it is desirable for parties to be informed of the processes involved in the litigation, there was no obligation on the Court, including the registry, to advise affected litigants that daily hearing fees had been introduced. Further, this failure did not mean that the applicant was denied information necessary for him to be able to conduct a fair trial.