

CASE NOTE

*Kristy Katavic**

What to do when judicial minds differ: *Legal Practitioner P1 v ACT Civil and Administrative Tribunal*

The case of *Legal Practitioner P1 v ACT Civil and Administrative Tribunal*¹ involved a decision of the ACT Civil and Administrative Tribunal which concerned the proper construction of two provisions in the *Legal Profession Act 2006* (ACT): ss 395 and 424.

Essentially, the Court's task was to look at the substance of the provisions in issue rather than as mere procedure. The issue was whether the requirements for dealing with a late complaint that are set out in s 395(2) of the Act are 'procedural requirements' that the Tribunal may disregard under s 424 of the Act or fundamental requirements that must be met in order for the Tribunal to have jurisdiction to deal with a complaint. The relevant provision is as follows.

the complaint cannot be dealt with (otherwise than to dismiss it or refer it to mediation) if the complaint is made more than 3 years after the conduct is alleged to have happened, unless the relevant council for the person about whom the complaint is made decides that —

- (a) it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay; or
- (b) the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint.

In this instance the Council of the Law Society of the ACT did not address s 395(2). There is no doubt that the circumstances enlivened consideration of s 395(2) and it was incumbent upon the Council to turn its mind to that issue and make a decision.

The Council dismissed the complaint. The complainant appealed to the ACT Civil and Administrative Tribunal seeking review of the Council's dismissal. The failure to address s 395(2) was not raised in those proceedings.

The Tribunal overturned the Council's dismissal and ordered it to commence proceedings. It did so in March 2016. These proceedings were the subject of the Court's decision. As it happens, the Council observed its own failing in relation to s 395 and sought to regularise it using s 424. Section 424 enables the Tribunal to disregard a failure by the Council to observe a procedural requirement in relation to a complaint before the application was made if there is no prejudice to the parties.

The Tribunal dealt with the issue of 'procedural regularisation' by finding that s 395 was a procedural requirement encompassed by s 424. It was satisfied there was no prejudice and made the order that the Council's failure to address s 395 could be disregarded.

The Tribunal followed the decision of Burns J in *Practitioner D3 v ACT Civil and Administrative Tribunal*² (D3). In D3, Burns J decided that s 395(2) was a procedural

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requirement capable of being disregarded under s 424. He did so based on three key reasons:

- (1) the statutory text and context;
- (2) consistency with the legislative history; and
- (3) distinguishing the approach taken by HCA in *John Pfeiffer Pty Ltd v Rogerson*.³

When the matter came before the Chief Justice, the practitioner argued that *D3* was decided wrongly. The practitioner succeeded. The Chief Justice respectfully disagreed entirely with Burns J in *D3*. Her Honour's core finding was that the apparent purpose of s 395 and the expression 'the late complaint *cannot be dealt with*' is to prevent a council from *dealing with* a late complaint by progressing it to an investigation unless it has first decided it is just and fair to deal with the complaint having regard to delay or whether it is in the public interest.

Her Honour considered the purpose of s 395 and likened it to the imposition of a limitation period that may be overcome in certain circumstances. Against that analysis, her Honour considered that the work of s 424 lay in excusing procedural lapses, not acquiring jurisdiction.

Her Honour's view was fortified by aspects of the Explanatory Statement that alluded to what might have been meant by 'procedural requirement'. Section 395 did not feature in that examination. She went on to distinguish the character of decisions made under ss 395 and 424: the former dealing with permission and the latter being concerned with prejudice.

Essentially s 395 was concerned with a deeper kind of consideration requiring some balanced analysis of the position of the parties and the broader public interest.

Her Honour also found that provisions limiting actions should be characterised as imposing a substantive requirement rather than a procedural requirement albeit where they might appear in a particular legal context.

What did the ACT legal profession learn from this? Undoubtedly it is a cautionary tale about the need for decision-makers to ensure that they acquit themselves of all aspects of the decision-making process and pay attention to provisions that may not obviously confer a decision-making power, although it seemed apparent in this case.

Furthermore, there are now two single-judge decisions of the Supreme Court that point in opposite directions in relation to the same provisions. While the exact same issue may not arise in the future, the operation of s 424 may well be the subject of judicial consideration — a matter no doubt ripe for the Court of Appeal.

Endnotes

- 1 2017] ACTSC 173.
- 2 [2016] ACTSC 61
- 3 (2000) 203 CLR 503.