RECENT DEVELOPMENTS

Katherine Cook

Appointment of Australian Information Commissioner and Privacy Commissioner

Ms Angelene Falk has been appointed the Australian Information Commissioner and Privacy Commissioner for a three-year term effective from 16 August 2018.

Ms Falk has held senior positions in the Office of the Australian Information Commissioner (OAIC) since 2012. These include Deputy Commissioner since 2016 and Acting Australian Information Commissioner and Privacy Commissioner since March 2018, leading the OAIC in fulfilling the office's functions across privacy, freedom of information and government information management.

Ms Falk has extensive experience delivering the functions of independent regulators and a track record of working across Commonwealth and State agencies, business and the community in law, policy and education.

The Commissioner role is critical to helping ensure the privacy of Australians, particularly in the online environment, and the Attorney-General is confident Ms Falk is the appropriate candidate to meet this challenge.

Ms Falk has been at the forefront of addressing regulatory challenges and potential uses of data in a global environment and also worked to promote public access to information held by government.

Ms Falk played a key role across business, community and government agencies on the implementation of the Notifiable Data Breaches scheme under the *Privacy Act 1988*, which commenced in February 2018.

In 2014 Ms Falk oversaw the OAIC's significant work and stakeholder engagement on the implementation of the reforms to the Privacy Act that commenced that year.

<https://www.attorneygeneral.gov.au/Media/Pages/Appointment-of-australian-information-commissioner-and-privacy-commissioner.aspx>

Appointment of new Victorian Chief Examiner

The Andrews Labor Government has announced the appointment of Sally Winton as an examiner with the Office of the Chief Examiner.

Ms Winton is currently the Public Access Deputy Commissioner in the Office of the Victorian Information Commissioner, where she has worked since September 2017.

She played a key role in the establishment of the Office, working closely with the Information Commissioner and the Privacy and Data Protection Deputy Commissioner.

In her current role, Ms Winton has carried out external reviews of freedom of information decisions and advocacy to promote the objectives of the *Freedom of Information Act 1982*.

Ms Winton was previously with the Office of the Freedom of Information Commissioner, where she initially acted as the Assistant Commissioner from October 2016 and then acted as the Commissioner from June 2017. From 2010 to 2016, Ms Winton held various legal roles at the Australian Criminal Intelligence Commission, rising to the role of National Litigation Manager.

Ms Winton began her career at the Commonwealth Attorney-General's Department in 2006, including as Acting Principal Legal Officer.

She has a Bachelor of Laws and a Bachelor of Arts from the University of Queensland and a Graduate Diploma of Legal Practice from the Australian National University.

The Office of the Chief Examiner was established in 2005 to help combat organised crime by obtaining evidence through the use of coercive powers.

<https://www.premier.vic.gov.au/new-appointment-to-office-of-chief-examiner/>

New Race Discrimination Commissioner

Australia's new Race Discrimination Commissioner will take up the position on Monday, 8 October 2018.

Mr Chin-Leong Tan has been appointed to the position for a term of five years.

Mr Tan is a well-known and recognised leader in the multicultural community, and I congratulate him on this significant appointment. Mr Tan's story is like that of so many Australians who were born overseas and chose to make a new life in Australia.

Because of the opportunities presented by and available in Australia, Mr Tan pursued his tertiary education in Australia and made Australia his home. After completing degrees in Arts and Law, Mr Tan practised as a lawyer for over 20 years in Australia.

Since 2015, Mr Tan has been the Director of Multicultural Engagement at Swinburne University of Technology in Melbourne and led the development of a Charter of Cultural Diversity, resulting in the university being awarded at the 2017 Victorian Multicultural Excellence Awards.

Between 2011 and 2015, Mr Tan served as the Chairperson and Commissioner of the Victorian Multicultural Commission. At the 2017 Victorian Multicultural Excellence Awards ceremony he was honoured with an Acknowledgement of Service in recognition of his dedicated service to the Victorian Multicultural Commission.

He has also been a member of the Victorian Police Commissioner's Human Rights Strategic Advisory Group, a member of the Victorian Department of Premier and Cabinet's Multicultural Services Delivery Inter-Departmental Group and a member of the Victorian Government Ministerial Council for a Multilingual and Multicultural Victoria.

Mr Tan also has extensive experience within the legal profession, having served on various local council bodies and associations, providing him with great experience in a range of community engagement activities, including with Australia's multicultural communities.

Mr Tan has served as a member of the Australian Football League's Multicultural Focus Group and is a well-respected community leader on a range of community and public affairs issues.

<https://www.attorneygeneral.gov.au/Media/Pages/new-race-discrimination-commissioner-5-october-2018.aspx>

Trust, transparency and right to information: accountability in an age of democratic disquiet

A culture of secrecy and a desire for non-disclosure are still commonplace across many areas of politics and the bureaucracy, according to Professor Ken Smith, Dean and Chief Executive of the Australian and New Zealand School of Government.

Professor Smith made this claim during his delivery of this year's Right to Information (RTI) Day Solomon Lecture, titled 'Trust, Transparency and Right to Information: Accountability in an Age of Democratic Disquiet'.

'Work that makes government more transparent or improves integrity must be seen as essential for rebuilding the trust that makes it possible for governments to operate effectively and work for the public good.'

In the lecture, Professor Smith also advocated for the need to return to the basics of our fundamental purpose of ensuring public trust and the need always to operate in the public interest rather than serve narrower sectional interests.

Professor Smith said, 'We need to understand our relative position as public officers within the community as elites and ensure that government is not perceived as being of the elites, by the elites, and for the elites'.

'The Right to Information reforms and their implementation are so important to reversing the massive declines in trust. We must do our utmost to ensure engaged, participatory and deliberative democracy.'

'Focusing on transparency in the way we go about our business and continuing to open up government, and of course access to the information which supports our evidentiary basis for decision-making — will bring huge benefits to the community and importantly build rather than continue to erode trust in our democratic institutions', Professor Smith said.

Queensland's Information Commissioner, Ms Rachael Rangihaeata, said, 'RTI Day celebrations and the Solomon Lecture are a timely reminder that building community trust through more open, transparent and accountable government requires strong leadership and continual work by all levels of the public service'.

'We must be proactive and vigilant in ensuring a right to access government-held information, and Queensland government agencies have a responsibility to release information unless it is contrary to the public interest to do so', Ms Rangihaeata said.

A copy of Professor Smith's speech and recording of the 2018 Solomon Lecture are available at <www.oic.qld.gov.au/rtiday2018>.

The Solomon Lecture was hosted by the Office of the Information Commissioner in partnership with the Queensland Public Service Commission.

<https://www.oic.qld.gov.au/information-for/media/trust,-transparency-and-right-to-information-accountability-in-an-age-of-democratic-disquiet>

OIC joins the NT Ombudsman's Office

The Northern Territory Ombudsman, Mr Peter Shoyer, has welcomed the staff of the Office of the Information Commissioner to his team.

Following the recommendations in the Martin report (which led to the establishment of the Independent Commissioner Against Corruption), the freedom of information and privacy functions of the Office of the Information Commissioner have been transferred to the Ombudsman.

As part of the arrangement, Mr Shoyer has taken over as Information Commissioner from Ms Brenda Monaghan. Ms Monaghan has been appointed Deputy Ombudsman and will continue to deal with freedom of information and privacy matters as Deputy Commissioner. Mr Shoyer was the inaugural Information Commissioner for the Northern Territory from 2003 to 2007.

'We are all very positive about the new arrangement', Mr Shoyer said. 'It will allow a larger team to respond to any concerns regarding FOI, privacy and administration in public bodies.'

<https://www.ombudsman.nt.gov.au/news/oic-joins-ombudsmans-office>

Recent decisions

Can a last-minute change in judicial proceedings result in a denial of procedural fairness?

Nobarani v Mariconte [2018] HCA 36 (15 August 2018)

The appellant claimed an interest in challenging a handwritten will made in 2013 by the late Ms Iris McLaren (the 2013 Will). The 2013 Will left the whole of Ms McLaren's estate to the respondent. In August 2004, Ms McLaren had made a will in which she made bequests to the Animal Welfare League of money and land and bequeathed to the appellant shares of her jewellery and personal possessions (the 2004 Will).

The appellant filed a caveat against a grant of probate without notice to him. The Animal Welfare League also filed a caveat. The respondent later reached compromise with the Animal Welfare League, and this claim was dismissed.

The respondent brought proceedings for orders that the caveats cease to be in force (the caveat motion). The respondent also filed a summons for probate of the 2013 Will and a statement of claim. As part of the caveat motion, the respondent filed an affidavit sworn by Ms McLaren's solicitor, who prepared the 2013 Will. The solicitor said he knew Ms McLaren well by the time of her death. When he attended her for the signing of the 2013 Will, she was alert and interested and said the respondent was the only person who cared about her. He said she understood that she had left everything to the respondent, and the 2013 Will was signed by Ms McLaren in the presence of two witnesses.

In the caveat motion, the appellant was not named as a defendant and, although he was served with the statement of claim and filed an appearance, he was not directed by the

Court to take any steps in those proceedings. The appellant was unrepresented. At a directions hearing on 23 April 2015, it was explained to the appellant that the trial would be limited to determination of his caveat motion.

However, on 14 May 2015, three business days before the trial, at the first directions hearing held by the trial judge, that judge told the appellant that the trial would be of the claim for probate and directed that the appellant be joined as a defendant. Senior counsel for the respondent did not mention that the appellant had only filed evidence in opposition to the caveat motion.

On 20 May 2015, the trial commenced. The appellant's conduct at the trial was not orderly and his defence was hastily prepared and almost incomprehensible. The substantially abbreviated timetable to trial had consequential effects, including that the appellant was unable to call the key witnesses to the 2013 Will. The appellant made a number of applications for adjournments. These were refused by the trial judge, who stated that the appellant had had sufficient time to prepare because the matter had been set down for a trial for some time. The trial judge delivered judgement orally, granting probate of the 2013 Will in solemn form. The appellant was ordered to pay costs.

The appellant then appealed to the NSW Court of Appeal. A majority of the Court of Appeal (Ward JA and Emmett AJA) dismissed the appellant's appeal. Ward JA concluded that, although the appellant had been denied procedural fairness, that denial did not deprive him of the possibility of a successful outcome. Emmett AJA concluded that the appellant did not have an interest in the validity of the 2013 Will. In dissent, Simpson JA would have allowed the appeal, concluding that the appellant has been denied procedural fairness and that the denial was a substantial miscarriage of justice.

By grant of special leave, the appellant appealed to the High Court. Before the High Court, the appellant contended that the Court of Appeal erred in not ordering a retrial. The respondent contended, among other things, that there was no denial of procedural fairness and, if there was, there was no substantial miscarriage of justice by reason of any such denial. The High Court found that the trial judge did not appreciate, and was not informed, that the dates that had been set down were only to be used for the hearing of the caveat motion and that no directions had been made for taking any steps for a trial of the claim for probate.

The High Court unanimously held that the appellant was denied procedural fairness. The High Court found that the denial of procedural fairness arose from the consequences, and effect on the appellant, of altering the hearing, at short notice, from a hearing of the caveat motion to a trial of the claim for probate.

While the case presented by the respondent, with the evidence of Ms McLaren's solicitor at its heart, was strong, the grant of probate in solemn form was not inevitable. The denial of procedural fairness amounted to a 'substantial wrong or miscarriage' in the sense that the appellant was denied the possibility of a successful outcome.

The correct test for determining on appeal whether an administrative decision is legally unreasonable

Minister for Immigration and Border Protection v SZVFW [2018] HCA 30 (8 August 2018)

On 3 December 2013, SZVFW and his wife applied for protection visas. The application included a postal and residential address in Roselands, New South Wales. On 3 March 2014, the Department of Immigration and Border Protection invited SZVFW to an interview

via a letter sent to the Roselands address. On 25 and 26 March 2014, a Mandarin-speaking departmental officer contacted SZVFW to reschedule his interview. Neither SZVFW nor his wife attended the scheduled interview or provided any further supporting documents. Their applications were refused by a delegate of the then Minister for Immigration and Border Protection.

After the applications were refused, the respondents sought review by the Tribunal of a decision of a delegate of the appellant (the Minister) to refuse their application for protection visas. Both applicants included the Roselands address and SZVFW's mobile number and email address.

In May 2014, the Tribunal wrote to the respondents at their Roselands address, via ordinary post, inviting them to provide material or written arguments on the review. On 15 August 2014, using the same method, the Tribunal invited the respondents to appear before it at a hearing. The respondents did not contact the Tribunal or attend the hearing.

The Tribunal, relying on s 426A(1) of the *Migration Act 1958* (Cth), proceeded to determine the review application, affirming the delegate's decision to refuse the protection visas. Section 426A(1) relevantly provided that, if an applicant for review was invited to appear before the Tribunal and fails to appear, the Tribunal may proceed to make a decision on the review without taking further action to allow or enable the applicant to appear before it.

On 15 September 2014, SZVFW and his wife were informed of the Tribunal's decision. The letter was addressed to the Roselands address.

The respondents sought judicial review in the Federal Circuit Court of the Tribunal's decision to proceed to make a decision in their absence. The primary judge held that the Tribunal's decision to proceed without taking further action to allow or enable the respondents to appear before it was legally unreasonable. Her Honour considered that the Tribunal could have easily identified another avenue for communicating with SZVFW and his wife because they had provided SZVFW's mobile number and email address to the Tribunal. The primary judge also noted that the matter had been before the Tribunal for a relatively short period of time and SZVFW, and his wife, were not represented by a migration agent.

The Minister appealed to the Full Court of the Federal Court. The Minister challenged the primary judge's conclusion of unreasonableness. The Full Court upheld the primary judge's decision, holding that the Minister was required to demonstrate that the primary judge's evaluation of the legal unreasonableness ground involved appealable error of fact or law akin to that required in appeals from discretionary judgements (which are subject to the principles explained in *House v The King* (1936) 55 CLR 499). The Full Court found such an error had not been demonstrated and dismissed the appeal.

By grant of special leave, the Minister appealed to the High Court. The Court unanimously allowed the appeal.

The High Court held that principles stated in *House v The King* had no application to an appeal by way of rehearing from a judicial review of an administrative decision on the ground that the decision was legally unreasonable. Rather, the Full Court of the Federal Court was required to examine for itself the administrative decision of the Tribunal to determine whether the primary judge was correct to conclude that the decision was unreasonable.

In this case, the High Court unanimously held that, contrary to the conclusion reached by the primary judge, the administrative decision of the Tribunal was not legally unreasonable. In the Court's view, given the respondents' failure to respond to the Tribunal's invitations, and having regard to s 426A(1), the Tribunal's decision to proceed in the absence of the respondents was not unreasonable. Section 426A(1) enabled the Tribunal to make a decision without taking any further action to allow an applicant to appear before it. Moreover, the primary judge paid no regard to the lack of interaction between SZVFM and the Department, when they did not attend to be interviewed, in circumstances where could be no suggestion that they had not received a written invitation to attend that interview. As such, there was no suggestion that the failure of SZVFW and his wife to attend the Tribunal hearing was unremarkable.

Whether an error of law in relation to one criterion is a jurisdictional error where another criterion was not met

Hossain v Minister for Immigration and Border Protection [2018] HCA 34 (15 August 2018)

Mr Sorwar Hossain is a citizen of Bangladesh. He first came to Australia in 2003 on a student visa. When this expired he unsuccessfully applied for two protection visas and acquired a debt to the Commonwealth as a result of these applications. Between 2008 and 2013 he was an unlawful non-citizen. In 2010, Mr Hossain met a woman who became his de facto partner in 2013. In May 2015, he applied for a partner visa. A delegate of the then Minister for Immigration and Border Protection refused to grant this visa.

Mr Hossain then applied to the Administrative Appeals Tribunal (the Tribunal) for review of the delegate's decision. As part of its review of the delegate's decision, the Tribunal had to decide whether it was satisfied that Mr Hossain met two criteria prescribed by the *Migration Regulations 1994* (Cth). The first criterion was that the application for the visa be made within 28 days of the applicant ceasing to hold a previous visa 'unless the Minister is satisfied that there are compelling reasons for not applying' that criterion. The second criterion was that the visa applicant 'does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment'. Section 65 of the *Migration Act 1958* (Cth) provided that, 'if satisfied' that all the criteria prescribed for the visa had been met, the Minister (or on review the Tribunal) was to grant the visa; and that, 'if not so satisfied', the Minister (or on review the Tribunal) was to refuse to grant the visa.

The Tribunal was not satisfied that the first criterion had been met because Mr Hossain had not applied for the partner visa within 28 days of ceasing to hold a previous visa and the Tribunal was satisfied that there were no compelling reasons, as at the time at which Mr Hossain had applied for the partner visa, for not applying that criterion. The Tribunal also was not satisfied that the second criterion had been met because Mr Hossain had a debt to the Commonwealth, which he had made no arrangements to repay. Although Mr Hossain told the Tribunal that he intended to repay the debt, he had provided no evidence that he had taken any steps to repay the debt.

The Tribunal accordingly affirmed the delegate's decision not to grant the partner visa.

Mr Hossain applied to the Federal Circuit Court of Australia for judicial review of the Tribunal's decision. By the time the application came to be heard, Mr Hossain had fully repaid his debt to the Commonwealth.

The Minister conceded, before the Federal Circuit Court, that the Tribunal had made an error of law by deciding that there were no compelling reasons for not applying the first

criterion as at the time of the visa application. Instead, the Tribunal should have decided whether such reasons existed as at the time of the Tribunal's decision. The Minister further argued that the conceded error was not a jurisdictional error because the Tribunal's failure to be satisfied that the second criterion (the debt to the Commonwealth) was met provided an independent basis on which the Tribunal was bound to affirm the delegate's decision.

The Federal Circuit Court held that the Tribunal's error in relation to the first criterion was jurisdictional in nature and meant that the Tribunal's decision was invalid, notwithstanding that the Tribunal also had not been satisfied that the second criterion had been met.

The Minister then appealed this decision to the Full Court of the Federal Court. On appeal, a majority of the Full Court held that the Tribunal's error was jurisdictional in nature. However, that error had not stripped the Tribunal of authority to affirm the delegate's decision, because it had to be satisfied that a separate criterion (the debt to the Commonwealth) had not been met. In dissent, Mortimer J thought the correct approach was to accept that the error was jurisdictional and then to ask whether there is utility in the grant of relief to an applicant because of the second basis for the decision on review. In her view, approaching the matter as one of discretion, the orders made by the Federal Circuit Court were not futile because Mr Hossain had repaid his debt to the Commonwealth and therefore meeting the second criterion would no longer be an issue. Further, if the Tribunal had not made an error in relation to the first criterion, properly instructed it might have been persuaded to delay making its decision until such time as Mr Hossain was able to pay his debt to the Commonwealth.

By grant of special leave, Mr Hossain appealed to the High Court. The High Court opined that to describe a decision as 'involving jurisdictional error' is to describe that decision as having being made outside of jurisdiction. A decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it is purported to be made as 'no decision at all'. To that extent the decision is 'invalid' or 'void'.

The High Court held that a decision-maker is required to proceed on a correct understanding of the applicable law but that an error of law will not be jurisdictional in nature if the error does not materially affect the decision. The Tribunal's findings with respect to the second criterion provided an independent basis on which the Tribunal was bound to affirm the delegate's decision. Therefore, the Tribunal's incorrect decision on the first criterion was immaterial to determining whether a jurisdictional error had occurred.

The suggestion that the Tribunal might have allowed Mr Hossain more time to arrange to repay his debt if the Tribunal had not made the error in relation to the first criterion was insufficient to demonstrate that the Tribunal's decision might have been different had it not made the error in relation to the first criterion. The High Court dismissed the appeal.