Recent developments

Katherine Cook

Statutory Review of the Amalgamated AAT tabled

The Commonwealth Government has tabled the Statutory Review of the Amalgamated Administrative Appeals Tribunal.

The review was a statutory requirement under the *Tribunals Amalgamation Act 2015* (Cth) and was conducted by former Justice of the High Court of Australia, the Hon Ian Callinan AC.

The Administrative Appeals Tribunal provides a one-stop shop for the independent review of a wide range of decisions made by the Australian Government.

The Administrative Appeals Tribunal was amalgamated with the former Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Review Tribunal following the commencement of the *Tribunals Amalgamation Act 2015* on 1 July 2015.

This was a significant reform to Australia's administrative law framework, designed to improve efficiency and reduce costs under the previous system, and the Act required a review to commence three years after the commencement of the amalgamated Tribunal.

Mr Callinan was asked to evaluate the amalgamated Tribunal and identify further improvements that could enhance the work of the Tribunal and Commonwealth merits review processes.

Since amalgamation, the Tribunal's workload has increased significantly, particularly in the Migration and Refugee Division. The government is carefully considering the recommendations from Mr Callinan's report and is committed to improving the efficiency of the Tribunal and maintaining the integrity of Australia's migration policy.

The Attorney-General said he looked forward to continuing to work with his colleagues and the Tribunal to ensure the amalgamated Tribunal's success. The government will formally respond to the report in due course.

'I sincerely thank Mr Callinan and his counsel assisting for their dedication and hard work in undertaking this review', the Attorney-General said.

A copy of the report is available on the Attorney-General's Department website.

<https://www.attorneygeneral.gov.au/Media/Pages/statutory-review-of-the-amalgamated-aat-tabled-23-july-2019.aspx>

Respected judge to lead Victorian Law Reform Commission

The Andrews Labor government has announced the appointment of former Justice the Hon Anthony North as the Chairperson of the Victorian Law Reform Commission.

Mr North has had a distinguished career in law that spans more than four decades. He was admitted to practice in 1973 and was appointed Queen's Counsel in 1989. He practised as a barrister at the Victorian Bar until 1995.

In 1995, Mr North was made a judge of the Federal Court of Australia, where he served until his retirement in 2018. He was an additional judge of the Supreme Court of the Australian Capital Territory from 2004 to 2018.

Over his time as a judge, Mr North presided over cases that involved constitutional and commercial law, industrial and employment law, taxation, intellectual property and native title.

Mr North has a strong interest in legal education and has taught, mentored and worked with law students, including holding moot trials at universities.

He holds a Master of Laws from the University of London and a Bachelor of Laws (Honours) and a Bachelor of Arts from the University of Melbourne.

Mr North replaces Bruce Gardner, who was appointed as the Acting Chairperson of the commission in March 2019 following the death of Philip Cummins.

Mr Cummins made a significant contribution to the commission in his time as Chairperson, including in the areas of victims' rights, jury empanelment and medicinal cannabis.

<https://www.premier.vic.gov.au/respected-judge-to-lead-victorian-law-reform-commission/>

South Australia to get new Court of Appeal

The South Australian state government will establish a new dedicated Court of Appeal in South Australia, as a division of the Supreme Court.

With dedicated judges, the Court of Appeal will develop specific judicial expertise in appeals, leading to efficiencies and consistent, high-quality judgments.

'This new Court of Appeal will be a significant change to the way appeals are managed in the Supreme Court', Attorney-General Chapman said.

'Judges will be appointed to the Court of Appeal on a permanent basis and, as a result of only presiding over appeals, would develop specialist knowledge and skill.

'Presiding over an appeal is a different judicial function to that of a trial judge and this would allow for this expertise to be fully harnessed.

'Dedicated courts of appeal have been operating successfully in many other jurisdictions for several years', Ms Chapman said.

'Our interstate counterparts have advised us that this model is an effective way of delivering decisions promptly and efficiently.'

While targeted consultation will occur over the coming weeks, the proposed structure consists of:

- a General Division of the Supreme Court, which will consider civil and criminal matters; and
- the Court of Appeal, which will comprise a President and a number of other appointed judges.

It will replace the current system of appeals being heard by Supreme Court judges sitting on rotation on the Full Court of the Supreme Court (referred to as the Court of Criminal Appeal for criminal matters).

'The appeals system is an important part of keeping our justice system fair by ensuring there is a process to challenge decisions, where there are grounds to do so', Ms Chapman said.

'Appeal decisions are also a source of case or common law, setting precedents for the lower courts, so there are many potential benefits of this reform for our justice system.'

Consultation on the Supreme Court (Court of Appeal) Amendment Bill 2019 will occur with key stakeholders over the coming weeks.

<https://www.agd.sa.gov.au/newsroom/south-australia-get-new-court-appeal>

New protections for whistleblowers in South Australia

New laws to protect whistleblowers in South Australia come into effect 1 July 2019.

The new laws strengthen transparency and accountability in government, protect the identity of informants and allows them to pass on information to the relevant authorities without fear of reprisal.

The new *Public Interest Disclosure Act 2018* will commence on 1 July 1 2019, replacing the *Whistleblowers Protection Act 1993*.

It creates two types of protection — those for any person wishing to report public interest information on environmental and health matters, and protections purely for public servants wishing to disclose allegations of public sector maladministration, corruption or misconduct.

Protections under the new Act only apply for those cases where the disclosure is made to a relevant authority (this can include the allocated responsible officer for an agency who has been trained to receive the information and who must then take appropriate action, as well as the Office for Public Integrity and the Commissioner for Public Sector Employment).

If an informant has not been notified of proposed actions and the outcomes of those actions within the required time frames, they are entitled to disclose the information to the media or a member of Parliament with the same level of protection under the Act.

Attorney-General, Vickie Chapman, said the change would give the community confidence in their public officials and was an important — and overdue — reform for South Australia.

'This was a key recommendation from Commissioner Bruce Lander's review of whistleblower laws in 2014, and I am proud that this government has managed to introduce it', Ms Chapman said.

'We are now in a position where public sector employees who want to disclose information about public sector maladministration, corruption or misconduct can come forward and speak up, with the full protection of the law.'

Attorney-General Chapman said that, while new Act provides added protections for those who make an appropriate public interest disclosure, it also makes it a criminal offence to victimise these same people, carrying a maximum penalty of a $20,000 fine or imprisonment for two years.

'These are important changes, and we will be urging all public sector employees to familiarise themselves with the new Act, and their responsibilities, should they wish to disclose potential corruption, misconduct or maladministration', Ms Chapman said.

<https://www.agd.sa.gov.au/newsroom/new-protections-whistleblowers>

Improving openness and transparency

Improvements to Tasmania's right to information laws have been delivered with the passing of the *Right to Information Amendment (Applications for Review) Bill 2019*.

The Bill ensures applicants and external parties can apply to the Ombudsman for review of certain decisions in relation to applications for assessed disclosure under the *Right to Information Act 2009*.

A recent decision of the Supreme Court in Tasmania clarified that a decision made by a Minister or a Minister's delegate under the Act in respect of whether or not to release information in possession of the Minister is not currently reviewable by the Ombudsman.

These changes will further the objectives of the *Right to Information Act* by allowing both applicants and external parties to request the Ombudsman to review decisions on whether or not information should be provided under the Act, regardless of whether the application for that information is made to a Minister or a public authority.

The Hodgman majority Liberal government remains committed to improving the openness, accountability and transparency of the operations of government in Tasmania and has acted to address this matter in addition to adopting a number of other measures since coming to government.

<http://www.premier.tas.gov.au/releases/improving_openness_and_transparency>

Recent decisions

Khalil v Minister for Home Affairs

[2019] FCAFC 151 (30 August 2019) (Logan, Steward, and Jackson JJ)

The appellant, Mohamed Youssef Helmi Khalil, is a citizen of Egypt who applied for an Australian visa. His application was refused under s 501 of the *Migration Act 1958* (Cth) because a delegate of the Minister determined that he did not pass the character test for the purposes of that section. Mr Khalil applied to the Administrative Appeals Tribunal for review of that decision.

On 10 January 2018, the Tribunal listed the matter for hearing on 19 February 2018. Early on the morning of 19 February, Mr Rodgers (Mr Khalil's lawyer) emailed Mr Khalil saying that he (Mr Rodgers) would not be able to attend the hearing because of a commitment in the District Court of Western Australia. Mr Rodgers also emailed the Tribunal and the Minister's solicitors on the same morning asking 'that the hearing be deferred' and also saying 'given the position i [sic] am in with the current trial, I would have great difficulty in continuing to represent Mr Khalil'.

The hearing was adjourned by the presiding Deputy President for 24 hours to allow Mr Khalil to receive and consider papers for the hearing. When the hearing resumed, Mr Khalil protested that he had no time to consider the documents in any detail. The Deputy

President said that 'Unfortunately, because of the legislation a decision has to be handed down by Monday, so we have to proceed with the hearing today and try and make the best of an unhappy situation' and proceeded with the hearing.

The Tribunal dismissed the application on 26 February 2018. Mr Khalil applied to the Federal Court of Australia for judicial review of that dismissal. The primary judge dismissed the application for judicial review, and Mr Khalil then appealed to the Full Federal Court.

Although not contended before the primary judge, before the Full Federal Court it was argued that, among other things, there was a straightforward path of reasoning which leads to a finding of jurisdictional error.

The Court found that it is plain from the extracts from the transcript of the hearing that the Tribunal was proceeding on the basis that not only did it have to deliver its decision on the review by Monday, 26 February 2018, but it also needed to provide written reasons by that time. That is particularly clear from the transcript of the hearing on 20 February 2018 in which the Deputy President said that he would be 'delivering a written decision which will set out all the facts and the considerations, so he will get a written decision, and that has to be by next Monday'. The Tribunal equated the requirement that it make a decision by the following Monday with the requirement that it produce written reasons for the decision.

The Court found that the Tribunal was incorrect to proceed on that basis. The Court held that the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) draws a clear distinction between the decision of the Tribunal under s 43 — which is, relevantly, what causes the 84-day period to stop running — and the reasons for decision. Section 43(2) of the AAT Act, the Tribunal was only required it to give its reasons, oral or in writing, within a reasonable time of the decision. Therefore, it is clear that the Tribunal misdirected itself as to the law when it proceeded on the basis that it had to both deliver a decision and produce written reasons by 26 February 2018.

However, the Court noted that not every error of law is a jurisdictional error: see *Tsvetnenko v United States of America* [2019] FCAFC 74 at [33][40]. In a statutory decision-making process, jurisdictional error is a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it: *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 at [24] (Kiefel CJ, Gageler and Keane JJ): 'The question is always one of construction of the legislation: which breaches of a provision does the legislation, either expressly or, more commonly, impliedly, treat as depriving the decision maker of power?' (*Hossain* at [67] (Edelman J, Nettle J agreeing)).

The Court opined that it might be argued that the error was only one as to the timing of delivery of reasons, not the nature of the task. But in the Court's view, on the proper construction of the AAT Act, and in the context of the serious constraints imposed on the review by the combination of that 84-day limitation and Mr Rodgers' abandonment of Mr Khalil on the morning of the hearing, that was an error of such gravity (see *Hossain* at [25]) that it should be characterised as jurisdictional. No contrary intent appears in the AAT Act (or the Migration Act) and, in the absence of such intent, 'an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law' (*Craig v the State of South Australia* [1995] HCA 58, 179).

Further, in ascertaining the materiality of the error, it is necessary to keep in mind the distinction between the decision to adjourn and the decision that is challenged — namely, the outcome of the review. It is clear from the excerpts from the hearing of the Tribunal

quoted above that the Tribunal's error was material to the former decision. Was it also material to the latter? That is, could the decision made under s 43 of the AAT Act have been different if the Tribunal had appreciated that it did not need to deliver written reasons for the decision until a reasonable time after Monday, 26 February 2018?

In the Court's view it could have been. If the Deputy President had appreciated the true distinction between his obligation to make a decision and his obligation to give reasons, he could not have been fairly criticised if he had declined to hold the hearing on that day, so as to reserve sufficient time for consideration over the weekend. But it can be concluded on the basis of the common experience of courts and tribunals that writing out reasons in publishable form takes much longer than the mental process of identifying the correct decision and what the reasons for it will be. In fact, on 26 February 2018 the Tribunal delivered detailed written reasons some 25 pages long. In the Court's view it could be inferred from the concerns that the Deputy President did express about the time it was going to take to produce his reasons that, if he had been able to write reasons after 26 February, he would have adjourned the hearing at least until Thursday, 22 February, and quite possibly to Friday, 23 February.

It is true that, even then, Mr Khalil could not have presented any additional information orally at the hearing unless he had set it out in a written statement given to the Minister at least two business days before the hearing (Migration Act, s 500(6H)) and that he could not have relied on any further document in support of his case unless he gave a copy to the Minister at least two business days before the hearing (s 500(6H)). But those restrictions did not prevent him from making (at least) oral submissions based on the material that was before the Tribunal or, perhaps more to the point in the circumstances, having oral submissions made on his behalf (*Jagroop v Minister for Immigration and Border Protection* [2014] FCAFC 123, [102][103]). While he would undoubtedly have faced difficulties in procuring an alternative legal representative as quickly as he needed to, and had been unable to do so within the 24 hours allocated to him, the possibility of securing such representation with a little extra time was not an unrealistic one. Any such representative would have to master a volume of material running to some 370 pages which, while not an insubstantial task, was eminently achievable for a hearing of this nature.

In the Court's view the possibility that the outcome would have been different if Mr Khalil had secured that new representation was a real one. His offending, while serious and undoubtedly of an extent which meant he did not pass the character test, was not at the extreme end of the scale. There was material which could have formed the basis for submissions about matters such as the interests of his minor children and his wife; and counselling and rehabilitation programs he had completed. Yet, in the circumstances, the hearing on 20 February 2018 consisted of little more than crossexamination by the solicitor acting for the Minister and a brief statement by Mr Khalil at the end of the hearing, consisting of emotively expressed generalities. Consistently with this, the Tribunal's reasons placed a great deal of emphasis on the seriousness of the offending and little emphasis on the interests of his children and other factors.

The Court held this is not to say that the Tribunal's decision on the merits was incorrect — that is not the question for present purposes. It is enough to say that a moderately skilled advocate would have been able to make significantly more of the material that Mr Khalil did in the circumstances. *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 is an example of a case where the manner in which a hearing is conducted on behalf of an applicant can affect relatively intangible factors, such as the impressions formed by a decision-maker and the coverage, detail and emphasis of submissions, in such a way as to potentially make a difference to the outcome of a hearing, so as to merit judicial review ([38] [44] (Kiefel, Bell and Keane JJ) and [66] (Gageler and Gordon JJ)).

In all the circumstances, the Court consider that, if the Tribunal had not misdirected itself on the subject of when it was required to produce reasons for its decision, the outcome for Mr Khalil could, realistically, have been different and a jurisdictional error is established.

Nursing and Midwifery Board of Australia v HSK

[2019] QCA 144 (26 July 2019) (Morrison and McMurdo JJA and Boddice J)

The appellant, Nursing and Midwifery Board of Australia (the Board) has regulatory responsibility for registered practitioners in the health profession comprising nursing and midwifery. A guiding principle in the performance of its regulatory functions is the protection of the public by ensuring that only suitably trained and qualified practitioners remain registered in that health profession.

The respondent, a 24-year-old nurse, was registered by the Board on 22 January 2016. While employed as a registered nurse at an acute mental health unit in regional Queensland, she engaged in behaviour which involved boundary violations with a male patient of the unit. The respondent admitted that conduct.

Upon notification of that boundary violation, the Health Ombudsman imposed conditions upon the respondent's registration. Subsequently, the Board removed those conditions and imposed further conditions on the respondent's registration on the basis the respondent has or may have an impairment within the meaning of s 178(1)(a)(ii) of the *Health Practitioner Regulation National Law 2009* (the National Law). The basis for those conditions was evidence that the respondent had been diagnosed with depression in 2012. In determining to impose conditions on the basis of impairment, the Board relied on the contents of a health assessment undertaken by a psychiatrist, Dr Prior, pursuant to a requirement of the Board issued pursuant to s 169 of the National Law.

At the time it imposed conditions, the Board also had a report from a psychiatrist, Dr Chung, who examined the respondent at the request of her legal representatives. Dr Chung formed a different opinion. In doing so, Dr Chung noted that a factual basis for Dr Prior's opinion was erroneous, on the history given to Dr Chung.

The respondent sought an administrative review by Queensland Civil and Administrative Tribunal (QCAT) of the Board's decision to impose conditions on her registration on the grounds that the respondent had an impairment within the definition of the National Law.

On the review, a central issue was the Board's acceptance of Dr Prior's opinion in imposing conditions on the respondent's registration. Having regard to the opinion of Dr Chung of the history relied upon by Dr Prior, the Board made application to QCAT for a direction that the respondent undergo a further health assessment by Dr Prior. The Board contended that a further health assessment would provide Dr Prior with an opportunity to assess changes in the respondent's condition and differences in the respondent's recollections as to the event in dispute. The Board further submitted a further assessment was important because both psychiatrists had concluded that the respondent suffered a major depressive disorder. Their different opinions as to the need for ongoing conditions was dependent upon an acceptance or rejection of the disputed history.

The respondent, who had refused to attend a further health assessment voluntarily, contended there was no power to compel such an examination in a review.

On 31 October 2018, QCAT dismissed the Board's application for a direction that the respondent attend a further health assessment. QCAT found it did not have power under the National Law to require a health practitioner to attend a medical examination. QCAT's very

broad power to make directions was procedural in nature. It did not give QCAT a power to direct attendance for a medical examination (the first decision).

On 12 December 2018, the review was heard by QCAT. Both Dr Prior and Dr Chung gave evidence at that hearing. On 19 December 2018, QCAT ordered the conditions imposed on the respondent's registration by the Board be set aside (the second decision). In doing so, QCAT accepted the evidence of the respondent that the history relied upon by Dr Prior was erroneous and concluded it was impossible to rely to any significant extent upon the opinions expressed by Dr Prior as to the respondent's ongoing impairment.

The Board then sought judicial review of QCAT's decision in the Court of Appeal. The central issue on the appeal was whether QCAT erred in law in holding there was no power, in the course of determining the administrative review, to direct that the respondent undergo a further health assessment.

The Court held that s 62 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) provides that, in determining the review of a reviewable decision, QCAT may give a direction at any time in the proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding. The Board relied on this broad directions power to support its contention that QCAT had power to direct the respondent to attend a further health assessment. Alternatively, the Board also relied on s 169 of the National Law. That provision gives the Board the power to require a registered practitioner to undergo a health assessment. Finally, the Board submitted QCAT has the functions, and therefore the powers, of the Board in determining the review.

The Court held that, while s 62 of the Act contains a broad power, the power is to be exercised in the context of what is necessary for a speedy and fair conduct of the proceeding in question. That context supports a conclusion that the power is procedural. For example, if a registered practitioner refused to voluntarily consent to a further health assessment, procedural directions could include staying the proceeding until the registered practitioner voluntarily attended upon a health assessment.

A direction requiring an interference with the liberty of an individual litigant has generally been viewed as requiring specific statutory authority (*S v S* [1972] SC 24, 46–47). The need for a specific statutory power to make directions involving a compulsory act which interferes with an individual's liberty has been recognised in legislation concerning claims for the recovery of damages as a consequence of the sustaining of personal injuries (*WorkCover Queensland Act* 1996 (Qld) s 286).

As such the Court held there was no error of law in QCAT's finding that s 62 of the Act did not authorise the making of a direction that a registered practitioner undergo a further health assessment as part of a review of a reviewable decision.

The Court further found that QCAT also correctly concluded that s 169 of the National Law did not provide a power to order a further health assessment as part of the determination of a reviewable decision. A reading of that section, in the context of the National Law as a whole, supports the conclusion that the power given to the Board to require a registered practitioner to undergo a health assessment is limited to the investigative phase of the Board's concern that a registered practitioner has, or may have, an impairment.

Minister for Home Affairs v G

[2019] FCAFC 79 (21 May 2019) (Murphy, Moshinsky and O'Callaghan JJ)

G was born in Australia. G has a severe language disability, borderline low IQ and Autism

Spectrum Disorder. His parents are citizens of Albania. In 2004 and 2005 they applied for protection visas. They were unsuccessful and were therefore barred by s 48A of the *Migration Act 1958* (Cth) from applying again without a favourable exercise of the Minister's discretion under s 48B of the Migration Act.

G, however, made his own application for a protection visa. It was refused. On review, in September 2012, the then Refugee Review Tribunal (RRT) found that G faced a real chance of significant harm in Albania. The complementary protection basis for the grant of a protection visa was that the risk of harm arose as a consequence of a blood feud between G's family and another family. The RRT also made findings about the difficulty for G in accessing health and related services in Albania. G was granted a protection visa in January 2013, following the Tribunal findings.

Although G's claim for protection was in large part based on the circumstances of his parents, only G is the holder of a protection visa. G became a permanent resident, while his parents have remained with no certain migration status and, indeed, his father remained in immigration detention at the time of the hearing below. G's mother has a bridging visa which enables her to live in the community with G and his brother and to work.

The permanent residence status of G meant he was eligible to apply for Australian citizenship, which he did on 10 February 2015. On 16 July 2015, his application was refused by a delegate of the Minister. G applied to the Administrative Appeals Tribunal for review of the delegate's decision. The Tribunal affirmed the delegate's decision.

G then applied to the Federal Court for judicial review of the Tribunal's decision. The primary judge found that Australian citizenship instructions were inconsistent with the *Australian Citizenship Act 2007* (Cth) and unlawful. The Court declared:

> Part of section 5.12.5 of the Australian Citizenship Instructions (as re-issued on 1 July 2014) emphasised in bold below is inconsistent with the Australian Citizenship Act 2007 (Cth) and unlawful:
>
> Children under 16 applying individually in their own right would usually not be approved under s 24 unless they are permanent residents at the time of application and decision and also meet the following policy guidelines:
>
> ...
>
> - are under 16 when applying, living with a responsible parent who is not an Australian citizen and consents to the application, and the child would otherwise suffer significant hardship or disadvantage — see section 5.17 Ministerial discretion — significant hardship or disadvantage (s 22(6)) ...

The Minister appealed the primary judge's decision to the Full Federal Court.

The Full Court found that the primary judge erred in concluding that the Australian Citizenship Instructions are inconsistent with the Australian Citizenship Act and unlawful. The Full Court held that it is established that an executive policy relating to the exercise of a statutory discretion must be consistent with the relevant statute in the sense that it must allow the decision-maker to take into account relevant considerations; it must not require the decision-maker to take into account irrelevant considerations; and it must not serve a purpose foreign to the purpose for which the discretionary power was created (see *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 (*Drake (No 2)*), 640 (Brennan J); *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, [24] (Gleeson CJ)).

The Full Court further held that an executive policy will also be inconsistent with the relevant statute if it seeks to preclude consideration of relevant arguments running counter to the policy that might reasonably be advanced in particular cases (*Drake (No 2)*, 640). Thus,

an executive policy relating to the exercise of a statutory discretion must leave the decision-maker 'free to consider the unique circumstances of each case, and no part of a lawful policy can determine in advance the decision which the [decision-maker] will make in the circumstances of a given case' (*Drake (No 2)*, 641). However, as Brennan J stated in *Drake (No 2)* at 641, '[t]hat is not to deny the lawfulness of adopting an appropriate policy which guides but does not control the making of decisions, a policy which is informative of the standards and values which the [decision-maker] usually applies'.

Having regard to these principles, the Full Court's view was the primary judge erred in concluding that part of s 5.12.5 of the Australian Citizenship Instructions (namely, the words appearing in italics in the primary judge's declaration set out above) was inconsistent with the Australian Citizenship Act and unlawful. In this case the Australian Citizenship Act confers a broad and unfettered discretion in s 24(1) to approve or refuse to approve a person's application under s 21 to become an Australian citizen. The breadth of the discretion is confirmed by s 24(2), which provides that the Minister may refuse to approve a person's application to become an Australian citizen *despite* the person being eligible to become an Australian citizen under s 21(2), (3), (4), (5), (6) or (7). Further, the relevant eligibility category for present purposes — namely, that set out in s 21(5) — contains little by way of criteria. In contrast with the eligibility criteria in s 21(2), which are more detailed, s 21(5) provides that a person is eligible to become an Australian citizen if the Minister is satisfied that the person:

(a) is aged under 18 at the time the person made the application; and

(b) is a permanent resident at the time the person made the application and at the time of the Minister's decision on the application.

The Full Court therefore found the breadth of the discretion in s 24(1) is not inimical to the adoption of an executive policy, even a detailed executive policy, to guide the exercise of the discretion. To the contrary: the breadth of the discretion tends to support the view that there is no inconsistency between s 5.12.5 of the Australian Citizenship Instructions and the Australian Citizenship Act. Moreover, the adoption of a policy in such a case promotes values of consistency and rationality in decision-making, and the principle that administrative decision-makers should treat like cases alike (see *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50, [54]).

Secondly, the Full Court held that s 5.12.5 of the Australian Citizenship Instructions allows the decision-maker to take into account relevant considerations and does not require the decision-maker to take into account irrelevant considerations. The primary judge focused on the reference, in the third bullet point in s 5.12.5, to the applicant suffering 'significant hardship or disadvantage' if not granted citizenship. This third bullet point relates to a limited class of applications under s 21(5): children under 16 who are living with a responsible parent who is *not* an Australian citizen. If and to the extent that the primary judge considered 'significant hardship or disadvantage' to be an irrelevant consideration (in the sense that it was impermissible for the Minister to take it into account when exercising the discretion to approve or refuse to approve an application for citizenship), the Full Court disagreed with the primary judge.

The Full Court held neither the text of the legislation nor the objects of the Act suggests that the Minister cannot take this matter into account in exercising the discretion. The use of the expression 'significant hardship or disadvantage' in s 22(6) should not be read as excluding consideration of this matter in the exercise of discretion under s 24(1). The Full Court did not infer that the use of the expression in one context, and its absence in the other, is explicable only on the basis that it was intended to be excluded from the latter.