Recent developments

Katherine Cook

Use of force in immigration detention

Fourteen complaints about the use of force in immigration detention form the basis for a comprehensive thematic report by the Australian Human Rights Commission tabled in Parliament.

The report considers the practices of handcuffing detainees, use of physical force within centres including arm and elbow locks, operations conducted by the Emergency Response Team (ERT), and the use of face masks.

'The Department of Home Affairs has a duty of care to people in immigration detention. Force should only ever be used as a last resort where alternatives such as negotiation and de-escalation techniques have been exhausted. Any use of force should be limited to what is essential in the circumstances and should be used only for the shortest amount of time necessary', said Commission President, Emeritus Professor Rosalind Croucher.

In nine of the 14 complaints, the Commission found that the manner or degree of force used was contrary to the human rights of the detainees. In one case, handcuffs were applied to a detainee over a significant wrist wound for eight and a half hours while he was transferred between detention centres.

In another case, male ERT officers entered the bedroom of a young woman aged 19 years unannounced and refused her the opportunity to get dressed without them being present.

In a third case, a mother was separated from her husband and their one-month-old daughter for 32 hours during an operation that involved the transfer of a number of family groups from one detention centre to another.

In five of the 14 complaints, the Commission did not find that a breach of human rights had been established.

'There needs to be effective oversight of the use of force in immigration detention. This requires robust authorisation procedures, filming of all pre-planned uses of force in their entirety, and appropriate record keeping so that incidents can be properly assessed', said President Croucher.

The Commission made 24 recommendations, including recommendations aimed at reforming the way in which:

- security risk assessments are carried out;
- use of force incidents are recorded;
- handcuffs are used, including when medical issues arise; and
- transfers of detainees occur between detention centres.

The Department of Home Affairs said that it had made a number of changes to its internal policies since receiving a preliminary report of the Commission's findings. It also said that it would take further action in the future to implement other recommendations in the report.

<https://www.humanrights.gov.au/about/news/media-releases/media-statement-use-force-immigration-detention>

OAIC annual report on digital health

The national privacy regulator has released a snapshot of its activity across the digital health sector in 2018–19, including the My Health Record system.

The Office of the Australian Information Commissioner (OAIC) is the independent regulator of the privacy provisions under the *My Health Records Act 2012* (Cth) and the *Healthcare Identifiers Act 2010* (Cth).

The annual report of the Australian Information Commissioner's activities in relation to digital health 2018–19 shows an increase in privacy enquiries and complaints as the My Health Record system moved from a self-register model to an opt-out model in February 2019.

In 2018–19, the OAIC received 145 enquiries and 57 complaints about the My Health Record system, compared to 14 enquiries and eight complaints the previous financial year. Most complaints were received before the end of the opt-out period on 31 January 2019.

It also received 10 enquiries about the Healthcare Identifiers Service and five complaints.

During the reporting period, the OAIC provided detailed privacy advice on the My Health Record system to stakeholders including the Australian Digital Health Agency and to the Senate Community Affairs References Committee and Legislation Committee.

The OAIC also conducted privacy assessments of regulated entities in the digital health sector. In 2018–19, it opened three new assessments of digital health privacy practices, including assessments of private hospitals, pharmacies, and pathology and diagnostic imaging services.

In 2018–19, the OAIC received four mandatory data breach notifications from the My Health Record System Operator (the Agency):

- two notifications related to unauthorised access to a My Health Record by a third party conducting fraudulent Medicare-claiming activity;
- one notification involved incorrect Medicare enrolment resulting in unauthorised access to a My Health Record.

An enquiry into the fourth notification confirmed that a data breach had not occurred.

The OAIC received 31 mandatory notifications about data breaches involving Medicare records, including:

- 27 notifications that involved intertwined Medicare records, where healthcare recipients with similar demographic information shared the same Medicare record and Medicare provided data to the incorrect individual's My Health Record; and
- four notifications that resulted from findings under the Medicare compliance program, where Medicare claims made in the name of a healthcare recipient, but not by that healthcare recipient, were uploaded to their My Health Record.

The OAIC assesses each notification it receives to determine whether appropriate action has been taken by the notifying organisation and whether further action is required by the entity or the OAIC.

The OAIC also carries out proactive guidance and education activities relating to digital health. In 2018–19, this included:

- developing guidance material for healthcare providers about protecting patients' personal and health information;
- working with health sector organisations to promote good privacy practice and improve providers' understanding about preventing and responding to data breaches;
- developing online resources to help consumers make informed decisions about opting out of the My Health Record system; and
- promoting consumer awareness of the privacy controls available within their My Health Record through videos, a website and other resources.

More information is available in the 2018–19 Australian Digital Health Agency annual report.

<https://www.oaic.gov.au/updates/news-and-media/oaic-annual-report-on-digital-health/>

Investigation into FOI processing by the Department of Home Affairs

The Office of the Australian Information Commissioner (OAIC) has opened an investigation into the Department of Home Affairs' compliance with the *Freedom of Information Act 1982* (Cth) in processing requests for non-personal information.

Australian Government agencies and ministers have a statutory obligation to process FOI requests within 30 days. There are provisions which allow for extra time in certain circumstances.

In 2018–19, 56 per cent of the 734 FOI requests to the Department for non-personal information were not dealt with in the required timeframe.

The OAIC has received a number of FOI complaints and review applications related to the Department's compliance with statutory timeframes for processing requests for non-personal information.

One of the objects of the FOI Act is to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

Under the FOI Act, the Information Commissioner may initiate an investigation into an agency's performance of FOI functions or exercise of powers.

Once the investigation is completed the OAIC will publish the outcomes.

<https://www.oaic.gov.au/updates/news-and-media/investigation-into-foi-processing-by-the-department-of-home-affairs/>

Statement relating to NSW mobile phone detection cameras

The *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) provides the overarching legislative framework for New South Wales (NSW) government agencies holding personal information. All NSW agencies are required to comply with the 12 Information Protection Principles (IPPs) which are set out in the PPIP Act. The PPIP Act also gives NSW citizens rights such as to complain about privacy breaches.

The NSW Privacy Commissioner's role is to provide advice and assistance to public sector agencies in adopting and complying with the IPPs and privacy codes of practice.

Following the initial notification by Transport for NSW of the proposed trial of mobile phone detection cameras the Privacy Commissioner raised a number of concerns, including:

- actions planned to be taken by Transport for NSW to mitigate privacy risks;
- the role of contractors in delivering the program; and
- ensuring the trial and any future rollout would be conducted in accordance with NSW privacy legislation.

The Privacy Commissioner supports the aim of using digital technology to protect the safety of citizens within a robust privacy-respectful framework.

The Privacy Commissioner provided advice and assistance to the agency to ensure that privacy rights were considered and appropriate risk mitigation strategies put in place to minimise privacy harm to the public such as:

- minimising the retention of images;
- cropping or pixilation of images when viewed for verification purposes;
- the use of strong encryption and other security measures; and
- the need for strong contractual requirements on any provider to comply with the PPIP Act.

The Privacy Commissioner also sought information on the enforcement phase of the program, including Transport for NSW's proposed privacy audit processes and policy and compliance arrangements. Transport for NSW has agreed to provide an update on the program after three months, including confirmation that the privacy controls are effective.

The Privacy Commissioner, Ms Samantha Gavel, said, 'It is important that Transport for NSW are transparent in communication and engagement with the community on the introduction of the cameras and that citizens are appropriately notified about the collection of their personal information, to assure the community about the value of and privacy protections in the program'.

<https://www.ipc.nsw.gov.au/media-releases/statement-relating-mobile-phone-detection-cameras>

Brisbane Council ban on Extinction Rebellion may contravene anti-discrimination laws

The Queensland Human Rights Commission has expressed its concern about decision by the Brisbane City Council last week to ban Extinction Rebellion from booking council meeting facilities and says the ban could contravene the *Anti-Discrimination Act 1991* (Qld). The urgency motion, put forward by Lord Mayor Adrian Schrinner and passed at last week's meeting, argues that council facilities are not 'suitable meeting places for organisations that advocate or incite illegal activities'. It goes on to state that 'the Extinction Rebellion organisation falls into this category and disallows them from booking council meeting facilities in the future'. The *Anti-Discrimination Act 1991* (Qld) prohibits discrimination on the basis of political belief or activity in areas including the provision of goods and services. Queensland Human Rights Commissioner, Scott McDougall, says the restriction on members of Extinction Rebellion may amount to unlawful discrimination.

'Denying access to Council services on the basis of someone's political belief or involvement in protest activity impedes several fundamental human rights that will be protected under the Human Rights Act from 1 January 2020', says Commissioner McDougall. 'However, existing discrimination laws already prohibit discrimination on the ground of political activity and, on the face of it, the ban would appear to be unlawful.'

Similar cases which have come before tribunals, such as an hotel refusing to host a gathering by a political party whose views the manager disagreed with (see *Vuga v Persal & Co Trading Pty Ltd* [2017] QCAT 368), have been found to breach the Act. The Commissioner spoke with the Lord Mayor last week, and the Lord Mayor is aware of the Commissioner's concerns. No complaints have yet been lodged at the Commission.

<https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0015/23244/2019.10.23-Council-ban-on-Extinction-Rebellion-may-contravene-anti-discrimination-laws.pdf>

ACT complaints rise and over $2 million paid to victims of crime: annual report

Complaints to the ACT Human Rights Commission are up by almost 10 per cent, according to the Commission's 2018–2019 annual report.

ACT Human Rights Commission President, Dr Helen Watchirs, said, 'We are assisting more Canberrans. The Commission has continued to expand its frontline services to complainants, victims of crime and people experiencing vulnerability. Commissioners and staff work hard, delivering training and informing people about our services, in more than 100 public activities and events'.

Highlights from this reporting period include:

- The percentage of complaints received rose almost 10 per cent compared to last year and 35 per cent compared to 2016–17.
- The number of complaints about children and young people doubled.
- Complaints about health services in the ACT rose by almost 8 per cent on last year.
- There was an increase in both the number of Aboriginal and Torres Strait Islander clients making complaints; and applying for financial assistance scheme (FAS) payments as victims of crime:
    - Complaints from Aboriginal and Torres Strait Islander clients, handled by the Discrimination, Health Services, Disability and Community Services Commissioner, rose to 54 in 2018–2019 (up from 40 in 2017–2018 and nine in 2016–2017).
    - Fifteen per cent of FAS applications received in 2018–19 were from Aboriginal and/or Torres Strait Islander applicants, up from 10 per cent in 2017–18.
- Eighty-eight per cent of people who completed a Commission survey at the closure of a complaint said the process was fair, accessible and understandable.
- The victim services team under the Victims of Crime Commissioner helped almost 1700 people affected by crime:
    - 453 new FAS applications were received;
    - $2.56 million in FAS payments was disbursed to over 350 Canberrans, including $2.2 million paid to victims in recognition of the harm cause by violent crime; and
    - the court support volunteer program provided over 250 hours of court support to almost 100 clients.
- The Public Advocate advocated for and/or monitored the situation of more than 1300 Canberrans.

'We provided over 50 comments on Cabinet submissions, pieces of legal advice or submissions to hearings. Through this work, we regularly advise government and other bodies on legal issues relevant to human rights; we review the effect of ACT laws, policies and practices on human rights; and remind authorities of their human rights obligations.

This year, we also launched the Commission's first cultural safety charter. With this charter, we have committed to providing Aboriginal and Torres Strait Islander peoples with a safe environment in which their cultural rights and spiritual values are accepted.'

<https://hrc.act.gov.au/media-release-complaints-rise-over-2million-paid-to-victims-of-crime-annual-report/>

Recent decisions

No secret evidence

HT v the Queen & Anor [2019] HCA 40 (13 November 2019) (Kiefel CJ; Bell, Keane, Nettle, Gordon and Edelman JJ)

The appellant pleaded guilty in the District Court of New South Wales to 11 counts of financial fraud offences, which each carried a maximum penalty of either five years' or 10 years' imprisonment. A factor of significance on sentencing was the assistance that the appellant had provided, and was anticipated to provide, to a law enforcement authority as a registered police informer. The sentencing judge was required by the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSP Act) to take such assistance into account.

An affidavit, Exhibit C, outlining the appellant's assistance was admitted into evidence in the sentencing proceedings. It included, among other things, criminal intelligence of a highly sensitive nature. The Crown saw Exhibit C, but the appellant's counsel was presented with two options: if he wished to be privy to the information, it would have to be highly redacted and consequently would be a lot shorter; if he was not privy to the information, it would be a lengthy document, inferentially one more favourable to the appellant. Unsurprisingly, the appellant's counsel chose the latter course and did not see Exhibit C.

After reading Exhibit C, the sentencing judge specified a combined discount of 35 per cent for the assistance and guilty pleas and sentenced the appellant to an aggregate sentence of three years and six months' imprisonment, with a non-parole period of 18 months. The sentencing judge indicated that his task in determining the discount was difficult given the defence counsel had no knowledge to enable him to make submissions.

The Crown appealed to the Criminal Court of Appeal on the ground that the sentence was manifestly inadequate. On appeal, the appellant's counsel sought access to Exhibit C. The NSW Commissioner of Police, supported by the Crown, opposed access to Exhibit C on the basis of public interest immunity (PII). The Court of Appeal upheld the PII claim, holding that the information came within a particular class of documents to which PII attaches. However, the Court of Appeal also allowed disclosure of one sentence from Exhibit C to the appellant's counsel, which concerned the evaluation by the police of the appellant's assistance. The Court of Appeal upheld the appeal and proceeded to determine the appropriate discount for the appellant's assistance under the *Criminal Appeal Act 1912* (NSW) (CA Act). It increased the combined discount for her assistance and guilty pleas to 40 per cent but also increased the aggregate sentence to six years and six months' imprisonment, with a non-parole period of three years and six months.

By grant of special leave, the appellant appealed to the High Court.

The respondents — the Crown and the Commissioner of Police — submitted that the appellant had not been denied procedural fairness because the appellant's counsel had consented to Exhibit C being dealt with as closed evidence during the sentencing proceedings and Exhibit C was not adverse to the appellant.

The appellant contended that no true choice had been made and the Crown was under a duty to provide material relevant to the sentence; and that material relating to mandatory considerations in the CSP Act, which is within the knowledge of the authorities and not the offender, should be placed before the court.

The High Court unanimously held that the appellant was denied procedural fairness by the Court of Appeal. The appellant and her legal representatives were denied access to confidential evidence which it had taken into account when deciding to allow the appeal and exercise its discretion under s 5D(1) of the CA Act to resentence the appellant. Having been denied access to Exhibit C, the appellant was denied a reasonable opportunity of being heard, including testing and responding to evidence which was relevant to whether the sentence was manifestly inadequate. The fact that the information in Exhibit C was not adverse to the appellant was not the point. The appellant had no way of knowing whether it detailed all the assistance that she had provided and the risks she had taken in providing that assistance.

The High Court further held that it is plainly correct that the appellant's counsel was given no real choice with regard to being privy to the information in Exhibit C. Additionally, the consent was given for the purposes of sentencing in the District Court, not for the proceedings in the Court of Appeal.

The High Court did not consider the denial of procedural fairness to be justified by PII, not least because PII procedure respects common law procedures of natural justice. If it is determined that documents are not to be produced then they are not available to either party and the court may not use them. The doctrine of PII does not extend to permitting material to be admitted in evidence in proceedings but kept confidential from one party to those proceedings.

In the circumstances of this case, the High Court held that the proper exercise of its discretion should have led the Court of Appeal to dismiss the Crown's appeal against sentence and that the denial of procedural fairness was, alone, a reason for doing so.

Procedural fairness in the IAA is not the same as in the AAT

BVD17 v Minister for Immigration and Border Protection & Anor [2019] HCA 34 (9 October 2019) (Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon, and Edelman JJ)

The appellant, a Sri Lankan citizen, arrived in Australia as an unauthorised maritime arrival in October 2012 and applied for a protection visa. The Minister for Immigration and Border Protection (the Minister) referred a decision by his delegate to refuse the application to the Immigration Assessment Authority (the Authority) for 'fast-track' review. The Authority affirmed the delegate's decision.

Relevantly, Pt 7AA of the *Migration Act 1958* (Cth) establishes a scheme for the ministerial referral of decisions refusing protection visas to certain applicants to the Authority for review. Within Pt 7AA, s 473GB relevantly applies to a document or information given to the Minister or an officer of the Department in confidence. Where s 473GB applies to a document or information given by the Secretary of the Department to the Authority, s 473GB(2)(a) obliges the Secretary to notify the Authority in writing that s 473GB applies in relation to the document or information. The Authority may then, under s 473GB(3), have

regard to any matter contained in the document or to the information and may, in certain circumstances, disclose any matter contained in the document, or the information, to the referred applicant. Section 473DA(1) provides that Div 3 of Pt 7AA, together with ss 473GA and 473GB, 'is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the [Authority]'.

In this case, in the Authority's statement of reasons it found that the appellant had fabricated his claims to have been of interest to authorities in Sri Lanka. The Authority placed weight on the absence of corroboration of one of the appellant's claims in the file of the Department of Immigration and Border Force (the Department) which related to an application for a protection visa which had been made by another member of the appellant's family (the relative's file).

The relative's file had been before the delegate at the time of making the decision to refuse the appellant a protection visa, but the delegate had not relied adversely on the contents of the file in making that decision. The relative's file had been included in the review material given to the Authority by the Secretary to the Department under s 473CB of the Migration Act and had been accompanied by a notification given to the Authority under s 473GB(2)(a) by a delegate of the Secretary. The notification stated that s 473GB applied to the documents and information in the relative's file and expressed the view of the delegate that the documents and information in the relative's file should not be disclosed to the appellant because they had been given to the Minister or to an officer of the Department in confidence. In the course of the review, the Authority did not disclose any of the documents or information in the relative's file to the appellant. The Authority also did not disclose the fact of having been given the notification under s 473GB(2) of the Act to the appellant.

The Authority's written statement of its reasons for decision records that the Authority had regard to the review material and to particular country information, which it specifically identified as 'new information', and that no further submissions or new information were provided to it. The statement made no reference to the notification under s 473GB(2)(a) of the Act and made no reference to the exercise of any discretion by the Authority under s 473GB(3) to refer the matter to the appellant.

The appellant then applied to the Federal Circuit Court for judicial review of the decision of the Authority on grounds that the Authority's failure to disclose the documents and information in the relative's file to him was both procedurally unfair and legally unreasonable. The Federal Circuit Court dismissed the application.

The appellant then appealed from the decision of the Federal Circuit Court to the Federal Court. The appeal was on a single ground, albeit the ground had two limbs. The ground was that the Federal Circuit Court erred in failing to find either that the Authority failed to consider the exercise of the discretion conferred by s 473GB(3)(b) at all; or that, if the Authority did consider exercising that discretion, the Authority's failure to exercise the discretion to disclose the documents and information was legally unreasonable. The Federal Court dismissed the appeal.

By special leave, the appellant appealed to the High Court. The thrust of the appellant's argument was that the reasoning in *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 (*SZMTA*) concerning the operation of s 438(2)(a) that gives rise to an obligation of procedural fairness within the scheme of Pt 7 (that applies to the Administrative Appeals Tribunal (AAT)) is transferable to the operation of s 473GB(2)(a) within the equivalent scheme that applies to the Authority (Part 7AA). In *SZMTA* the High Court accepted that the giving of a notification under s 438(2)(a) of the Migration Act triggers an obligation of procedural fairness on the part of the AAT to disclose the fact of notification to an applicant for review under Pt 7.

By majority, the High Court found that s 473DA of the Migration Act precludes an equivalent procedural fairness obligation on the part of the Authority to disclose to a referred applicant in a review under Pt 7AA the fact of notification under s 473GB(2)(a). In defining the content of the Authority's obligation to afford procedural fairness, s 473DA(1) extends the exhaustiveness of its operation to the entirety of the performance of the overriding duty imposed on the Authority by s 473CC(1) to review a fast-track reviewable decision referred to it under s 473CA. The reasoning in *SZMTA*, that the obligation of procedural fairness which conditions performance of the overriding duty of the AAT to conduct a review under Pt 7 can arise outside the scope of the discrete subject matters of the provisions to which s 422B(1) and (2) (the equivalent to s 473DA that applies to the Authority) refer, can therefore have no application to the Authority. Unlike s 473DA, s 422B is not framed in a way that excludes common law procedural fairness from the conduct of an AAT review.

The High Court unanimously found there was insufficient evidence to infer that the Authority failed to consider exercising the discretion conferred by s 473GB(3)(b).

Reasons for decisions — perfection is not required

New South Wales Land and Housing Corporation v Orr [2019] NSWCA 231 (19 September 2019) (Bell P, Ward JA and McCallum JA)

The applicant landlord and respondent tenant were parties to a social housing tenancy agreement within the meaning of the *Residential Tenancies Act 2010* (NSW). The tenant was charged with and convicted of cultivating cannabis at the property she tenanted and put on a good behaviour bond. In response, the landlord applied to the New South Wales Civil and Administrative Tribunal (NCAT) to have the tenancy terminated on that basis. The NCAT found that s 154D(3)(b) of the Residential Tenancies Act was engaged because the tenant suffered a disability (post-traumatic stress disorder) for the purposes of the section and a termination order would likely result in her suffering undue hardship. The effect of this was that s 154D(1), which mandates a termination order, was not engaged and the NCAT had a discretion to terminate under s 91 of the Act. The NCAT did not exercise its discretion to terminate the tenancy.

The tenant was again charged with and convicted of cultivating cannabis at the property. The landlord applied again to the NCAT to have the tenancy terminated. The NCAT on this occasion found that s 154D(3)(b) was not engaged because the respondent would not suffer undue hardship by reason of termination. The NCAT proceeded on the basis, however, that, contrary to its conclusion, s 154D(3)(b) was in fact engaged. The NCAT then considered whether, on that basis, the s 91 discretion to terminate should be exercised. The NCAT determined that it should and the tenancy was terminated.

The tenant appealed to the NCAT Appeal Panel. The Appeal Panel found that, while the NCAT had erred in its interpretation of 'undue hardship' for the purposes of s 154D(3)(b), the NCAT had not erred in its exercise of its discretion under s 91.

The tenant then appealed to the NSW Supreme Court. The primary judge held that it was not apparent from the NCAT's reasons either *that* it took hardship (a mandatory relevant consideration) into account or *how* it took hardship into account in exercising the s 91 discretion. In particular, the primary judge held that it was questionable whether the NCAT could have exercised its s 91 discretion unaffected by the error in the meaning it gave to 'undue hardship' for the purposes of s 154D(3)(b). On these bases the primary judge allowed the appeal.

The landlord sought leave to appeal to the Court of Appeal. The issues on appeal were:

1. whether the NCAT had not considered a mandatory relevant consideration (namely, hardship) such that the discretion miscarried;

2. whether the NCAT failed to indicate that the process of evaluation for the purposes of s 91 had been properly carried out such that the discretion miscarried; and

3. whether the NCAT's reasons were inadequate for failing to indicate whether the errors in (1) and (2) occurred.

The majority of the Court of Appeal (Bell P and Ward JA) granted leave to appeal and held the NCAT did take hardship to the tenant into account in reaching its decision. The majority observed that the quality of a court or tribunal's reasons can vary immensely depending upon a range of considerations, including the experience and skill of a judicial officer or tribunal member, the complexity of the subject matter, the quality of the submissions made before the court or tribunal, the availability of transcript, the urgency of the matter and the time the judicial officer or tribunal member has to compose his or her reasons. Further, good judgment writing is an art, not a science (see TF Bathurst, 'Writing Better Judgments' (Speech delivered to the COAT NSW Annual Conference, Efficient, Informal and Fair: Tribunals Delivering Under Pressure)). In the context of appellate review of the adequacy of reasons, the function of an appellate court is to determine not the optimal level of detail required in reasons for a decision but, rather, the minimum acceptable standard: *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33 [48]. The standard is not one of perfection: *Bisley Investment Corporation v Australian Broadcasting Tribunal* (1982) 40 ALR 233, 255. The question as to what constitutes adequacy of reasons from a tribunal such as NCAT, which, according to its annual report for 2017–2018, received and finalised over 66 000 applications that year alone, is also of general importance.

The majority noted its conclusion that hardship was taken into account is squarely rooted in the text of the NCAT's decision. The NCAT considered the evidence of hardship and found that the tenant may suffer hardship if the tenancy were terminated. The NCAT had remarked that the case was finely balanced: the two matters in the balance were hardship, on the one hand, and what the NCAT member considered to be the degree of the tenant's fault, on the other. The NCAT stated its consideration of whether 'in all the circumstances' it should exercise its discretion. The NCAT had given weight to reports in support of the tenant relating to hardship. Further, the NCAT had afforded to the tenant a two-month extension prior to termination in recognition of the hardship a termination order would occasion.

The majority further held that the NCAT's reasons did disclose to the requisite standard how the consideration of hardship was taken into account. While the consideration of fault in assessing 'undue hardship' was found to be erroneous, fault is a relevant, if not mandatory, consideration in the exercise of the s 91 discretion. Aspects of the tenant's case on hardship were not supported by evidence. The evidence of hardship was outweighed by other discretionary considerations.

Finally, the majority held that the NCAT's reasons did not fail to disclose reasoning that would have persuaded the primary judge that the discretion was not infected by the error that it was accepted had been made as to the test of 'undue hardship' (*Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378).