Recent developments

Anne Thomas

Commonwealth Ombudsman appointment

The Attorney-General, the Hon Mark Dreyfus, has announced the appointment of Mr Iain Anderson as the Commonwealth Ombudsman. The role of the Commonwealth Ombudsman is integral to ensuring Australian government entities act with integrity.

Mr Anderson replaces Mr Michael Manthorpe, who retired from the role last year, and will commence his appointment as Ombudsman on 1 August 2022.

Mr Anderson is a highly experienced public servant with 31 years of service. His experience extends across a variety of Commonwealth departments and agencies and across a wide range of legal and social policy areas. Mr Anderson is currently a Deputy Secretary at the Attorney-General's Department.

We congratulate Mr Anderson on his appointment.

<www.ag.gov.au>

Extension for the Royal Commission into Defence and Veteran Suicide

The Morrison Government has announced an extension for the final report of the Royal Commission into Defence and Veteran Suicide until 17 June 2024. The additional 12 months is in recognition of the broad scope of the Royal Commission's inquiries and to account for the ongoing impact of COVID 19.

'We recognise the important work the Royal Commission is doing to look at systemic issues of defence and veteran suicide, and the need to provide the Royal Commission with the time to do so in a trauma-informed way,' the Attorney-General, Senator the Hon Michaelia Cash, said.

'This extension will allow more individuals to come forward and share their experience with the Royal Commission. I thank all those who have already come forward,' she said.

The Royal Commission has so far heard evidence from witnesses with lived experience of defence and veteran suicide, witnesses with specialist expertise, veteran ex-service organisations, support organisations and the Commonwealth.

A national legal advisory service and legal financial assistance scheme has been set up and is available for people or entities giving evidence or engaging in other ways with the Royal Commission.

Further information on the Royal Commission, including the Terms of Reference and information on how to make a submission, is available at the Royal Commission into Defence and Veteran Suicide website.

<www.ag.gov.au>

Fair Work Commission appointment — Mr Paul Schneider

The Attorney-General, Senator the Hon Michaelia Cash, has announced the appointment of Mr Paul Schneider to the Fair Work Commission.

Mr Schneider has been appointed as a Commissioner and will commence in the role on 2 May 2022.

Fair Work Commission members are appointed until the age of 65.

Mr Schneider is the Industrial Relations Manager of OSM Australia Pty Ltd. Mr Schneider has undertaken senior human resource roles with Seven West Media, Svitzer Australia, Upstream Production Solutions, Downer EDI Mining and McDermott Australia.

Mr Schneider has a Bachelor of Business and a Master of Business (Human Resource Management and Industrial Relations) from Victoria University.

We congratulate Mr Schneider on his appointment.

<www.ag.gov.au>

Reappointment of Aboriginal and Torres Strait Islander Social Justice Commissioner

Ms June Oscar AO has been reappointed as the Aboriginal and Torres Strait Islander Social Justice Commissioner in the Australian Human Rights Commission. Ms Oscar's reappointment will be for a period of two years and commenced on 3 April 2022.

Ms Oscar is a Bunuba woman from Fitzroy Crossing. She has long been a champion for Indigenous social justice, women's issues, addressing Fetal Alcohol Spectrum Disorder, and the preservation of Indigenous language. Ms Oscar was appointed as an Officer of the Order of Australia in 2013 and was awarded the Desmond Tutu Reconciliation Fellowship for significant achievements in contributing to acts of Global Reconciliation in 2016.

Since her appointment in 2017, Ms Oscar has led the Wiyi Yani U Thangani (Women's Voices) multi-year initiative, which has focused on what Aboriginal and Torres Strait Islander women and girls consider to be their strengths, challenges and aspirations.

We congratulate Ms Oscar on her reappointment.

<www.ag.gov.au>

Australia ratifies International Forced Labour Protocol

The Federal Executive Council has approved the ratification of the International Labour Organization (ILO) *Protocol of 2014 to Forced Labour Convention 1930 (No. 29)* (the Protocol). Australia has communicated formal ratification to the Director-General of the ILO in Geneva for registration. The Protocol is the most contemporary international labour

standard to address forced labour and cements the international community's longstanding commitment to combatting modern slavery in all of its forms.

The Attorney-General, Senator the Hon Michaelia Cash, said that Australia highly values our cooperation with other ILO members and has long committed to ratifying the Protocol.

In December 2021, the Western Australian Government passed legislation which brought its laws into line with the Protocol, and the other state and territories, allowing the government to progress ratification of the Protocol.

The Protocol adds new elements to the ILO *Forced Labour Convention 1930 (No. 29)*, aimed at tackling the complexities of modern slavery and addressing the root causes of forced labour, with obligations to:

- prevent and suppress forced labour;
- protect victims and provide access to appropriate and effective remedies; and
- penalise the perpetrators of forced labour and end their impunity.

Ratifying the Protocol builds on Australia's comprehensive response to modern slavery in all its forms, including through the National Action Plan to Combat Modern Slavery 2020–25, the *Modern Slavery Act 2018* (Cth), and Australia's international engagement to eradicate forced labour from societies around the world under Australia's International Engagement Strategy on Human Trafficking and Modern Slavery, launched by the Minister for Foreign Affairs, Senator the Hon Marise Payne.

'Australia's leadership on combatting forced labour, and other forms of modern slavery, including as co-Chair with Indonesia of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, is a key priority within Australia's foreign policy to uphold the international rules-based order, promote human rights, advance gender equality, counter security threats and strengthen economic growth and resilience, particularly to ensure a free and prosperous Indo-Pacific region' Minister Payne said.

'We are committed to working with all stakeholders to shine a light on these insidious crimes. We want to ensure that states are not ignorant of, or ignoring, such activity occurring within their borders, and that Australian businesses are undertaking appropriate due diligence on the risks of modern slavery existing within their supply chains,' Minister Payne said.

On 31 March 2022, Assistant Minister for Customs, Community Safety and Multicultural Affairs, the Hon Jason Wood MP, announced the commencement of the government's statutory review of the Commonwealth *Modern Slavery Act 2018*. The review is to be conducted by Emeritus Professor John McMillan AO.

<https://www.homeaffairs.gov.au/about-us/our-portfolios/criminal-justice/people-smuggling-human-trafficking/review-of-the-commonwealth-modern-slavery-act-2018>

Appointments to the Administrative Appeals Tribunal

The Australian Government has announced the appointment of members to the Administrative Appeals Tribunal.

The following new appointments are:

Deputy President:

- The Hon Michael Mischin.

Senior Members:

- Ms Joanne Collins;
- Mr Graham Connolly;
- Ms Ann Duffield;
- The Hon Pru Goward;
- Ms Dominique Grigg;
- Ms Katherine Harvey;
- Mr David James;
- Mr Wayne Pennell; and
- Ms Karen Vernon.

Members:

- Mr Lee Benjamin;
- Ms Cheryl Cartwright;
- Ms Kate Chapple;
- Mr David Cosgrave;
- Ms Tegen Downes;
- Mr Edward Howard;
- Mr Peter Katsambanis;
- Ms Brygyda Maiden; and
- Mr Peter Papadopoulos.

Further to the new appointments the Government has promoted and/or extended the terms of the following members:

- Dr Denis Dragovic;
- Mr Bernard McCabe;
- Mr Justin Owen;
- Ms Antoinette Younes;
- Mr Mark Bishop;
- Mr Andrew George;
- Ms Linda Kirk;
- Ms Gina Lazanas;
- Ms Karen Synon;
- Ms Rebecca Bellamy;
- Mr John Cipolla;
- Ms Susan De Bono;
- Ms Kruna Dordevic;
- Ms Fiona Hewson;
- Mr Marten Kennedy;
- Mr Giovanni Longo;
- Mr Donald Morris;
- Ms Susan Trotter;
- Ms Rachel Westaway;
- Ms Donna Petrovich;
- Ms Jennifer Cripps Watts;
- Dr Bridget Cullen;
- Ms Kate Buxton;
- Ms Denise Connolly;
- Ms Kim Parker; and
- Ms Lana Gallagher.

All of the appointees are highly qualified to undertake the important task of conducting merits review of government decisions.

We congratulate all appointees on their appointments.

<www.ag.gov.au>

Appointment of the President of the Administrative Appeals Tribunal and a Federal Court of Australia judge

The Hon Justice Fiona Meagher has been appointed as President of the Administrative Appeals Tribunal (AAT) and as a Judge of the Federal Court of Australia, fulfilling the statutory requirement for appointment as President of the AAT.

Justice Meagher's appointment as President of the AAT will commence on 1 April 2022, for a period of seven years.

Justice Meagher brings to the role extensive experience in legal practice and the work of the AAT, having served at the AAT since her appointment as a Member in 2015. She was promoted to Senior Member in 2018, and then Deputy President and Division Head of the National Disability Insurance Scheme Division in 2020.

Justice Meagher became a Member of the Mental Health Review Tribunal Queensland in 2014 and was the Presidential Delegate for the period June 2017 to November 2018.

We congratulate Justice Meagher on her appointment.

<www.ag.gov.au>

Appointment to the Federal Court of Australia

On 18 March 2022 and 1 April 2022, the Australian Government announced the appointments of Ms Lisa Hespe SC and Ms Elizabeth Raper SC, respectively, as judges of the Federal Court of Australia.

Ms Hespe has been appointed to the Victorian Registry to replace Justice Paul Anastassiou following his resignation taking effect on 29 April 2022. Ms Hespe will commence on 27 April 2022. Ms Hespe was admitted as a solicitor and barrister in the Supreme Court of Victoria in 1995 and was appointed as Senior Counsel in 2021. In 2017, Ms Hespe was appointed as a part-time Senior Member of the Administrative Appeals Tribunal.

Ms Raper has been appointed to the Sydney Registry to fill the vacancy as a result of the retirement of the Hon Justice Geoffrey Flick on 18 October 2021. She will commence on 2 May 2022. Ms Raper was admitted as a solicitor in the Supreme Court of New South Wales in 1999. She was appointed Senior Counsel in 2019.

We congratulate Ms Hespe and Ms Raper on their appointments.

<www.ag.gov.au>

Appointment of Freedom of Information Commissioner

Mr Leo Hardiman PSM QC has been appointed the Freedom of Information Commissioner. His term will commence on 19 April 2022.

Mr Hardiman brings a wealth of experience to the role. For more than 30 years, Mr Hardiman has advised the Commonwealth in many areas. He was previously Deputy Chief General Counsel and National Leader of the Office of General Counsel with the Australian Government Solicitor and has held a variety of other counsel roles within the Australian Taxation Office and the Department of Employment and Workplace Relations.

We congratulate Mr Hardiman on his appointment.

<www.ag.gov.au>

New leadership for the National Archives of Australia

The Australian Government has appointed Mr Simon Froude as the Director-General of the National Archives of Australia.

The Director-General is the accountable authority of the National Archives, responsible for its supervision and management. The National Archives carries out valuable work, overseeing the management of government records and ensuring that Australian Government information of enduring significance is secured, preserved and available to government agencies, researchers and the community.

Mr Froude is currently Director of State Records of South Australia. In this role he is responsible for overseeing records and archival management, freedom of information and privacy across the South Australian public sector.

Mr Froude's considerable knowledge and experience in archives and records management, teamed with his change management, strategic and leadership capabilities, will enable him to lead the National Archives through the next phase of its transformation.

Mr Froude's appointment is for five years commencing on 23 May 2022.

The Government also announced the appointment of five members to the National Archives of Australia Advisory Council.

The Council provides advice on matters relating to the functions of the National Archives with each member providing guidance and support which is integral to the work of the National Archives.

The five members include reappointed Ms Suzanne Hampel and new appointees Ms Rachel Connors, Dr Anthony Dillon, Ms Alice Spalding and Ms Amy Low. All members have been appointed for a three-year term.

We congratulate Mr Froude and the five Council members on their appointments.

<www.ag.gov.au>

Senate Standing Committees on Legal and Constitutional Affairs report on the performance and integrity of Australia's administrative review system

On 30 June 2022, the Senate Standing Committee on Legal and Constitutional Affairs handed down its report on the performance and integrity of Australia's administrative review system.

On 20 October 2021, the Senate referred an inquiry into the performance and integrity of Australia's administrative review system to the Committee for inquiry and report, with particular reference to:

a. the Administrative Appeals Tribunal, including the selection process for members;

b. the importance of transparency and parliamentary accountability in the context of Australia's administrative review system;

c. whether the Administrative Review Council, which was discontinued in 2015, ought to be re-established; and

d. any related matter.

The Committee's report noted that the work in its substantive interim report, tabled on 31 March 2022, was sufficient and set out in full the issues raised which had enabled the Committee to conclude its examination of the terms of reference and make appropriate recommendations.

The interim report set out 3 recommendations:

a. as a matter of urgency, the Commonwealth Government re-fund the Administrative Review Council and allow it to fulfil its statutory duties in accordance with Part V of the *Administrative Appeals Tribunal Act 1975*;

b. the Attorney-General develop and legislate a process for the appointment of members to the Administrative Appeals Tribunal; and

c. the Attorney-General disassemble the current Administrative Appeals Tribunal (AAT) and re-establish a new, federal administrative review system.

On 30 June 2022, the Senate Committee noted that re-referral of the inquiry in the 47th Parliament is not necessary.

The interim report can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Adminreviewsystem/Interim_Report>

<www.aph.gov.au>

New politics: a better process for public appointments

On 17 July 2022, the Grattan Institute released a report titled *New politics: A better process for public appointments*, by Daniel Wood, Kate Griffiths and Anika Stobart.

The report looks at the politicisation of public appointments and the effect of which can compromise the performance of government agencies, promote a corrupt culture and undermine public trust in the institutions of government. The report recommends among other things that the federal and state governments establish a transparent, merit-based selection process for all public appointments, overseen by a new Public Appointments Commissioner.

This report is the first of Grattan Institute's *New politics* series, examining misuse of public office for political gain. Subsequent reports will investigate pork-barrelling and the politicisation of taxpayer-funded advertising.

<https://grattan.edu.au/report/new-politics-public-appointments/>

Former chief justice to lead Law Reform Commission

Former Chief Justice of NSW, the Hon Tom Bathurst AC QC, has been appointed to lead the State's independent law reform advisory body, the NSW Law Reform Commission, from 1 June 2022.

The NSW Law Reform Commission is an independent statutory body constituted under the *Law Reform Commission Act 1967* (NSW). It provides legal policy advice to Government on issues referred by the Attorney-General, including comprehensive analytical reports and recommendations for legislative reform.

Mr Bathurst is replacing outgoing Chairperson Alan Cameron AO, who has led the NSW Law Reform Commission over the past seven years.

Mr Bathurst's appointment will run until 31 May 2025.

Mr Bathurst said he was honoured to take on the role, which will provide an opportunity to look at the law from a different perspective.

'The NSW Law Reform Commission undertakes significant work in researching, interrogating the law and advising on reform,' Mr Bathurst said.

We congratulate Mr Bathurst on his appointment.

<https://dcj.nsw.gov.au/news-and-media/media-releases/2022/former-chief-justice-to-lead-law-reform-commission.html>

New police oversight commissioner

On 28 April 2022, the NSW Attorney-General, Mark Speakman, announced the appointment of Justice Peter Johnson, as Chief Commissioner and Anina Johnson as Commissioner of the State's Law Enforcement Conduct Commission (LECC).

The LECC is an independent integrity body that provides oversight of the NSW Police Force and NSW Crime Commission. Its primary role is to detect, investigate and expose misconduct and maladministration in these bodies.

Mr Johnson will commence a five-year appointment as Chief Commissioner on 4 July 2022, while Ms Johnson will commence her five-year term as Commissioner on 16 May 2022.

Mr Speakman said the new appointments bring a significant body of experience and knowledge to the LECC.

Mr Johnson is a current serving NSW Supreme Court judge with an outstanding knowledge and experience in criminal law. He brings to the role 17 years of experience of decision-making in criminal cases on the Supreme Court, as well as extensive experience in grappling with the issues related to police misconduct.

Ms Johnson is the current Deputy President of the NSW Mental Health Review Tribunal — a role which requires significant decision-making capacity and the ability to use oversight and investigatory power judiciously.

The appointments replace the outgoing Chief Commissioner, Reginald Blanch QC, and the former Commissioner, Lea Drake.

Mr Blanch will continue as Chief Commissioner until Mr Johnson commences his appointment.

We congratulate Mr Johnson and Ms Johnson on their appointments.

<https://dcj.nsw.gov.au/news-and-media/media-releases/2022/new-police-oversight-commissioner.html>

Three new judges for the Supreme Court

On 30 March 2022, the NSW Attorney-General, Mark Speakman, announced the appointment of Dr Elisabeth Peden SC and Mr Mark Richmond SC to the NSW Supreme Court, and Mr Jeremy Kirk SC to the NSW Court of Appeal.

Dr Peden is currently a barrister at Third Floor Wentworth Chambers, where she specialises in contract, property and equity law. She commenced her new role on 6 April.

Mr Richmond practises at Eleven Wentworth Chambers, where he specialises in taxation, commercial and administrative law. He commenced in the Supreme Court on 19 April, filling a vacancy following the retirement of Justice Nigel Rein on 18 March.

Mr Kirk also practises at Eleven Wentworth Chambers, where he specialises in administrative, commercial and constitutional law. He commenced on the Court of Appeal bench on 21 April and filled a vacancy left following the retirement of Justice John Basten on 16 April.

We congratulate Dr Peden, Mr Richmond and Mr Kirk on their appointments.

<https://dcj.nsw.gov.au/news-and-media/media-releases/2022/three-new-judges-for-the-supreme-court.html>

Independent Review of the Public Trustee Tasmania — report

On 25 May 2022, the Tasmanian Government released their response to the Independent Review of the Public Trustee Tasmania.

The government and the Trustee support, or support in principle, all 28 recommendations of the review.

The implementation of the actions and reform program to respond to the review recommendations is being carried out as a matter of priority within government and the Public Trustee, with a clear focus on delivering the following key elements:

- progressing a clear cultural and policy shift of the Public Trustee towards a human rights and supported decision-making approach, to be embedded in the guardianship and administration legislative framework through the next tranche of significant legislative reforms;
- funding arrangements that support the implementation of the review recommendations;
- increasing and strengthening oversight of the Public Trustee, through a revised and updated Ministerial Charter that clarifies the government's policy expectations and service delivery requirements for the Public Trustee; and
- supporting the Public Trustee in the significant work underway to progress improvements to its internal operational and administrative practices, reflecting the clear shift in focus to an improved and revised client and customer-centric service delivery model.

The response can be found at Government Response to the Independent Review of the Public Trustee Tasmania (justice.tas.gov.au)

The independent review into the administrative and operational practices of the Public Trustee can be found on the Tasmanian Government Department of Justice website.

<https://www.justice.tas.gov.au/news_and_events/review-of-the-public-trustee>

Recent decisions

The existence of jurisdiction versus the exercise of jurisdiction

Citta Hobart Pty Ltd v Cawthorn [2022] HCA 16

The circumstances leading to the High Court appeal involved a complaint of discrimination by Mr Cawthorn, the respondent that was made in the Anti-Discrimination Tribunal, a body constituted under the *Anti-Discrimination Act 1998* (Tas) (the 'State Act'). The complaint was brought against the appellants, the developer and owner of the land for the Parliament Square development in Hobart. The respondent complained that the appellants had discriminated on the basis of disability, both direct and indirect, under ss 14, 15 and 16(k) of the State Act, in the provision of a facility which did not have adequate wheelchair access. Before the Tribunal, the appellants argued that, among other things, the *Disability Discrimination Act 1992* (Cth) (the 'Commonwealth Act') covered the field in relation to disability discrimination standards so that s 109 of the *Constitution* rendered the State Act inoperative to the extent that it imposed any additional duties on the appellants.

The Tribunal dismissed the respondent's complaint on the basis that the existence of the s 109 issue meant that the dispute arose in federal jurisdiction because there was a matter arising under the *Constitution*, for which it did not have authority to decide. The Full Court of the Supreme Court of Tasmania assessed the s 109 issue and concluded that the argument that the State Act is inconsistent with the Commonwealth Act was 'misconceived'. The Supreme Court set aside the order of the Tribunal and remitted the complaint to the Tribunal for hearing and determination.

The central question in this appeal was whether the Tribunal was denied jurisdiction to exercise judicial power due to the appellants' allegation which raised a 'matter' under the *Constitution*. On 4 May 2022, Kiefel CJ and Gageler, Keane, Gordon, Steward and Gleeson JJ, and Edelman J in a separate judgment, handed down their decision, allowing the appeal and setting aside the orders of the Full Court.

Before turning to the main question, the plurality first considered the threshold issue raised by the Australian Human Rights Commission intervening on the appeal, whether the jurisdiction conferred on the Tribunal by the State Act to hear and determine a complaint of discrimination referred to it involved the exercise of judicial power.

In considering this aspect, the plurality noted that the limits of power conferred by statute are those expressed in or implied into the statue and construed in light of the *Constitution*, irrespective of whether the repository of the power is a court or non-court tribunal, and whether the power conferred is judicial or non-judicial. Moreover, a failure to observe the legislated limits of jurisdiction conferred on a court or non-court tribunal established by state legislation is subject to compulsion or restraint under an appropriate judicial remedy granted within the supervisory jurisdiction of the Supreme Court of that state ([20]), just as a court or non-court tribunal established by Commonwealth legislation is subject to compulsion or restrain by mandamus or prohibition under the original jurisdiction of the High Court.

Thus, having a judicially enforceable duty to comply with the limits of its own jurisdiction, a court or non-court tribunal must therefore have power to take steps needed to ensure compliance, which is implied, if it is not otherwise expressed in legislation. Whether this power to ensure that it remains within the limits of its jurisdiction can be characterised as either judicial or non-judicial depends on the nature of the power which it is being required to exercise to determine the claim or complain before it. Determining when that claim or complaint in respect of which a state tribunal's jurisdiction is sought to be invoked is or is not a 'matter', described in s 75 or s 76 of the *Constitution*, is an exercise of judicial power.

The Court concluded that here the opinion of the Tribunal that the complaint referred to it was beyond its jurisdiction to hear and determine was a judicial opinion and the order by the Tribunal dismissing the complaint for want of jurisdiction was an order made in the exercise of state judicial power.

Edelman J determined on the other hand that, in deciding whether federal jurisdiction exists, a court, or tribunal, is not exercising federal jurisdiction. It is merely taking a step anterior to the exercise of any judicial power by reaching an opinion as to its own jurisdiction. Its determination is anterior to but is not an exercise of judicial power ([63]).

The plurality subsequently turned to consider the limits of the Tribunal's jurisdiction. It held that the limit on the Tribunal's jurisdiction, conferred by the State Act, is to be construed in accordance with the state interpretation legislation to exclude jurisdiction with respect to any 'matter' that falls within s 75 or s 76 of the *Constitution*.

A 'matter' within s 75 and s 76 of the *Constitution* has been held to be a justiciable controversy about a legal right or legal duty having an existence that is not dependent on the commencement of a proceeding in a forum in which that controversy might come to be adjudicated ([31]). The plurality held that this could include where a Commonwealth law is relied on as the course of a claim or a defence that is asserted in the court (*Constitution* s 76 (ii)) or where the invalidity or inoperability of a Commonwealth or state law is asserted in the course of the controversy in reliance on the *Constitution* (*Constitution* s76(i)), as in this case. Consequently, the plurality found that the subject matter of the complaint and the defence of the appellants under s 109 of the *Constitution* was a single justiciable controversy, as the determination of the constitutional defence was essential to the determination of the claim, and thus a 'matter' under s 75 and s 76 of the *Constitution*.

The plurality went on to reject the appellant's assertion that there still needed to be a degree of 'arguability' to meet the description of a matter under s 76 (i) or 76(ii). However, taking time to note this did not suggest that an incomprehensible or nonsensical claim or defence incapable of giving rise to a 'matter' would not equally be struck out or summarily dismissed where asserted in a proceeding where federal jurisdiction was otherwise attracted under s 75 or s 76 of the *Constitution.*

Edelman J added that it is not necessary in order to identify the existence of a 'matter' under the *Constitution* for a court or tribunal to resolve the issue. It is sufficient that the court or tribunal considers that the dispute arises, albeit it must properly be raised or otherwise involve a real question. If not it will be an abuse of process ([67]).

In conclusion, the plurality found that, because the claim of the respondent and the defence of the appellant was a single justiciable controversy comprising a matter under s 76(i) and s 76(ii) of the *Constitution*, the hearing and determination of that claim and defence was beyond the jurisdiction conferred on the Tribunal by the State Act and the Tribunal was correct so to decide. The Tribunal thus had the power to determine its jurisdiction but not the jurisdiction to determine the complaint.

Misunderstanding is not the same as being unresponsive

Plaintiff S183/2021 v Minister for Home Affairs [2022] HCA 15

The decision of Gordon J was handed down on 21 April 2022, upholding the plaintiff's application on the ground the delegate unreasonably exercised its discretion, and made orders for writs of certiorari and mandamus.

The plaintiff is a citizen of Turkey who was granted a Student (Subclass 572) visa on 8 January 2015. On 3 August 2016, the plaintiff made a valid application for a Protection (Subclass 866) visa. In the visa application the plaintiff claimed to be a lesbian and that if she was returned to Turkey she would be killed or forced to marry a man, which she said would be worse than death. Between August 2016 and 3 March 2020, the plaintiff engaged in sporadic correspondence in broken but intelligible English with the Department of Home Affairs about her application. During this period her father died, her mental health declined, she become homeless, she attempted to take her own life and was hospitalised. This information was known to the department.

On several occasions the department emailed the plaintiff inviting her to attend a visa interview. The email of the 6 January 2020 invited the plaintiff to an interview in Melbourne, despite the fact the plaintiff was in New South Wales. On 14 February 2020, the plaintiff received a further two letters requesting further information pursuant to the application and on 17 February 2020 a further email rescheduling an interview to be held in Sydney. The plaintiff's response to the correspondence reaffirmed that she was homeless with no money and with no means to make it to Melbourne.

On 17 March 2020, the delegate refused to grant the plaintiff a protection visa. The delegate's reasons referred to the plaintiff's failure to attend her protection visa interview in Melbourne and her failure to contact the department to explain why she did not attend or to request that the interview be rescheduled, which was a 'further reason for concern about the credibility of [the plaintiff's] protection visa claims'. Consequently, because the delegate had not been able to interview the plaintiff and having considered the information before her, she could not be satisfied that the plaintiff's claims were credible, she rejected them in their entirety.

The plaintiff's application for writs of certiorari and mandamus were based on four grounds that the delegate's decision was affected by jurisdictional error.

Ground 2 concerned the delegate's decision to exercise the discretion under s 62 of the *Migration Act 1958* to refuse to grant the plaintiff a protection visa without taking any further action to obtain additional information from the plaintiff was unreasonable.

The information before the delegate indicated that the plaintiff was homeless, had no money, struggled to communicate in English and had been experiencing serious mental health issues requiring hospitalisation. Moreover, it was clear from the face of the plaintiff's correspondence that she did not realise the department was offering her an interview in Sydney as opposed to Melbourne.

Gordon J noted that the question with which the legal standard of reasonableness is concerned is whether, in relation to the particular decision in issue, the statutory power, properly construed, has been abused by the decision-maker and is a question concerned with both outcome and process. This could occur where, for example, a decision is 'so unreasonable that no reasonable person could have arrived at it' ([31]).

Gordon J held that no reasonable decision-maker could have ignored the plaintiff's misunderstanding, particularly having regard to her circumstances:

> It must be accepted that, if a visa applicant is unresponsive, there may come a point where it is reasonable for a decision-maker to exercise the discretion…and make a decision to refuse to grant a visa. But no reasonable decision-maker could have decided that that point had been reached when the plaintiff had obviously misunderstood what was being offered to her and no one attempted to correct her misunderstanding. ([37])

In finding for Ground 2, Gordon J held it unnecessary to consider the remaining grounds. However, he did note in relation to Ground 3, which contended that the Minister had failed to provide certain information to the visa application as required under s 57 of the Migration Act, that 'relevant information' under s 57(2)(a) does not include a failure to respond to a letter seeking further information.

The Court provided a writ of certiorari should issue to quash the impugned decision and the Minister be compelled to determine the visa application by a writ of mandamus.

The implied entitlement disclosure condition and the specificity required under a notice

Mosaic Brands Ltd v Australian Communications and Media Authority [2022] FCAFC 79

On 13 May 2022, the Full Court of the Federal Court of Australia handed down its judgment in this matter, dismissing the appeal.

The case concerned a notice issued on 13 August 2020 by the Australian Communications and Media Authority (ACMA) to Mosaic Brands Limited (Mosaic) pursuant to s 522 of the *Telecommunications Act 1997* (Cth). The notice required Mosaic to provide to ACMA certain information and produce specified documents relevant to the performance of ACMA's telecommunications functions — specifically, those conferred under the *Spam Act 2003* (Cth) to investigate potential contraventions.

At first instance, the primary judge dismissed Mosaic's application, which challenged the validity of the notice on the ground that it did not specify in detail what information or documents Mosaic was required to provide. The primary judge held that there was an implied entitlement disclosure condition in s 522(2) of the Telecommunications Act which

requires that the notice specify, with reasonable clarity, that the information required to be give and/or the documents required to be produced relate to the performance or exercise of one or more of ACMA's functions, and in this case the notice complied with that implied entitlement disclosure condition.

On appeal, the issues for consideration were, first, whether a notice issued pursuant to s 522 of the Telecommunications Act is subject, as a condition of validity, to an implied entitlement disclosure condition; second, if it is, the content of that condition; and, third, whether the notice satisfied that condition.

The Court held the primary judge was correct in finding the entitlement disclosure condition was implied in s 522 of the Act based on the text of that provision in its context and given its purpose for the following reasons:

1. Section 522(1) imposes a limit on the power to issue the notice (that is, information and/or documentation that is relevant to the performance/exercise of ACMA's functions).

2. The breadth of the range of functions and powers in relation to which a s 522 notice can be issued necessitates the identification of the relevant function or power on the face of the notice.

3. Potential consequences flow from a failure of the recipient to comply with the notice (that is, s 522(4), which makes it an offence for noncompliance).

Consequently, these features combine to warrant disclosure of the entitlement to issue a notice and that the recipient should be informed of such matters. Absent this condition, a recipient of a notice could not properly assess the notice issued to determine whether the ACMA has the power to require the production of the documents, or the information sought ([78]).

Mosaic accepted the existence of the condition but submitted that, for that notice to be valid, it must convey with reasonable clarity the information/documents that must be provided and state that ACMA is entitled to require the specific information/document as described. The Court distinguished the authorities relied on by Mosaic in its submissions, holding that where such a condition is implied the content of the notice turns on the particular statutory scheme under consideration, as there is no universal rule. The matter cannot be resolved by 'simply transposing the reasoning from one statutory scheme into another' ([61]).

The Court made several observations of the present statutory scheme which, it held, dictated the content of the notice. Entitlement under s 522 of the Act for the ACMA to obtain information and documents from other persons is drafted in very broad terms while the use of the power in s 522 is directed to the performance of ACMA's functions or the exercise of its powers, which, in the *Australian Communications and Media Authority Act 2005* (Cth), are very broad. The exercise of the condition must, consequently, be considered in the context of the breadth of the functions and powers to which s 522 applies. Additionally, s 522(5) is the only provision which identifies what must be contained on the face of a notice issued under s 522 — namely, the notice must set out that the recipient commits a criminal offence if they contravene a requirement of the notice.

Consequently, the Court held that to be valid, a notice issued pursuant to s 522 does not require the level of detail contended by Mosiac. Rather, all the notice requires is sufficient detail to enable a relationship to be discerned between the information and documents sought and the functions and powers being exercised by the ACMA, which will necessarily vary depending on the nature of the power or functions to which the information or document is sought ([99]). Here, it was an investigative function of the ACMA under the Spam Act, which, as correctly held by the primary judge, was readily apparent on the face of the notice.

Act of Grace payments: can a delegated power be split?

Ashby v Commonwealth of Australia [2022] FCAFC 77

On 12 May 2022, the Full Court of the Federal Court of Australia handed down a joint judgment dismissing the appeal.

The appellant, James Ashby, was employed as a media advisor to the Speaker of the House of Representatives, Peter Slipper, between December 2011 and October 2012. In 2012, the applicant sued the Commonwealth of Australia and Mr Slipper, alleging sexual harassment and misuse of parliamentary entitlements. Before the trial, the appellant reached a settlement with the Commonwealth and discontinued proceedings altogether. Six years later, the applicant applied to the Minister for Finance for an act of grace payment under s 65(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) ('PGPA Act') to cover the legal costs of the proceedings, a sum of $4,537,000. In considering act of grace payments, the Minster had delegated to the Secretary of the Department of Finance the power 'to consider all applications for act of grace payment' but not the power to 'authorise act of grace payments for amounts in excess of $100,000'. The Secretary had in turn delegated this power under the *Public Governance, Performance and Accountability (Finance Secretary to Finance Officials) Delegation 2020 (No 1)* (the 'Delegation').

The appellant's application was considered by a delegate of the Secretary and refused. The delegate who considered the application had power to authorise an act of grace payment capped at $50,000 under the Delegation.

The appellant sought judicial review of the delegate's decision, alleging that s 65 of the PGPA Act could not bestow a power on a delegate only to refuse an application for an act of grace payment and not to grant it. He contended that the power to refuse an application could only be exercised by the person who had the power to grant it — the Minister in this case.

The primary judge dismissed the appellant's construction of the Delegation as 'impracticable' and 'improbable', noting that consideration of whether it was appropriate to make the payment and, if so, deciding whether to authorise the payment did not need to be performed by the same delegate.

The appellant also sought relief under the *Fair Work Act 2009* (Cth) on the basis that the decision contravened s 340(1) of the Act because it was an 'adverse action' taken for a prohibited reason — namely, that the appellant had not exercised his 'workplace right'

to use non-litigious means to seek redress for his grievances against Mr Slipper and the Commonwealth.

The present appeal raised two questions: first, did the primary judge err in his interpretation of the scope of the delegate's authority; and, second, did the primary judge err in concluding that the act of grace payment under s 65 of the PGPA Act was authorised by that Act notwithstanding that the appellant had exercised or failed to exercise a workplace right.

In relation to the first question, the Court held that the appellant had failed to establish any error in the primary judge's reasoning or conclusion such that the appellant's submission on the construction of s 65 of the PGPA Act could not be accepted. The Court took the opportunity to make a several observations — namely, in light of the appellant's submission that statutory functions are indivisible such that it is not possible to delegate the power to refuse an administrative application without also delegating the power to grant an application of the same type, the Court distinguished the cases relied on, noting that those authorities 'concern very different statutory regimes that provide for powers cast in terms that do not permit the binary nature of grant or refusal to be split' ([37]).

The Court, also agreeing with the primary judge, noted that it is permissible, and routine, to delegate steps within a decision-making process, such as an evaluative function, and to separate that function from the ultimate decision-making power. Such as in this case under s 65(1), when considering whether an application for an act of grace payment should result in a payment being authorised, it will first and separately be determined whether any such payment first meets the test of being appropriate by reason of special circumstances having been established. If the delegate forms the view that a payment is appropriate because special circumstances have been established then, if the amount in contemplation is above that delegate's cap, the appropriate delegate to consider approval of a payment would be revealed by that amount.

Regarding the second question, the Court agreed with the primary judge, accepting the respondent's submission that in accordance with s 342(3)(a) of the Fair Work Act, an 'adverse action' does not include an action that is authorised by or under a law of the Commonwealth, of which s 65 of the PGPA Act is such a law. The Court noted that there 'is nothing within the jurisdiction conferred by s 65(1) that requires the Minister's discretion to be subject to constraints under the Fair Work Act.

Where a consideration is mandatory it need not go further than what is put before the decision-maker

Savaiinea v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 56

The joint decision of Collier, Perry and Anastassiou JJ of the Full Court of the Federal Court of Australia was handed down on 7 April 2022, dismissing the appeal.

The appellant, Mr Savaiinea, is a New Zealand citizen who had been granted a Class TY Subclass 444 Special Category (Temporary) visa on arrival to Australia on 16 October 2005. On 18 April 2019, the appellant was convicted of six offences by the Beenleigh District Court relating to a domestic violence incident that occurred on 4 November 2017. For these offences, the appellant was sentenced to a term of imprisonment of three and a half years.

On 6 June 2019, the appellant's visa was cancelled by the Minister, pursuant to s 501(3A) of the *Migration Act 1958* (Cth), on the basis that he did not pass the character test under s 501(6) of the Act (the 'cancellation decision'). The appellant sought revocation of the cancellation decision under s 501CA of the Migration Act. On 17 June 2020, a delegate of the Minister decided not to revoke the cancellation decision (the 'revocation decision').

On 10 September 2020, the Administrative Appeals Tribunal affirmed the revocation decision made by the delegate. In coming to its decision, the Tribunal, amongst other things, took into consideration the protection of the Australian community from criminal or other serious conduct and the best interests of minor children in Australia. The Tribunal concluded that the appellant's domestic violence offending was serious and weighed heavily in favour of non-revocation of the cancellation decision, which even outweighed the best interests of the appellant's daughter that was otherwise moderately in favour of revocation of the cancellation decision.

The appellant applied to the Federal Court for review of the Tribunal's decision. On 30 November 2020, the primary judge dismissed the application. Central to the appellant's case was that the Tribunal had committed jurisdictional error by failing, or at least failing in any meaningful way, to address and make findings in respect of the best interests of the appellant's minor niece and nephews, resident in Australia. The primary judge observed that there were two relevant aspects to the Tribunal's consideration. The first, in light of the observations of French CJ and Kiefel, Bell and Keane JJ in *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 [62]–[64] (*Uelese*) and s 499(2A) of the Migration Act, was that, even if a particular minor resident in Australia was not expressly mentioned in submissions before the Tribunal, that did not relieve the Tribunal of an obligation to consider the interests of those minors in the review of the cancellation decision. The second, in light of *Re Easton v Repatriation Commission* (1987) 6 AAR 558 at 561, was that the ambit of the Tribunal's review is influenced by the steps and procedures that have taken place prior to the review. In this case, the primary judge did not find the Tribunal failed to comply with its obligation as described under *Uelese*. It had considered the interests of the appellant's niece and nephews; however, the attention given to those interests reflected the prominence given to them by the appellant in its case before the Tribunal, which was minimal.

Before the Full Court, the key issue was whether the Tribunal's reasons demonstrated an active intellectual engagement with the material concerning the appellant's niece and four nephews. The Court acknowledged the requirement in *Uelese*, noting O'Bryan J's observations in *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125 [181], that the Tribunal is required to assess the

best interests of the child based on evidence and submissions before it and is not under a general duty to inquire about matters not raised. In this case, there was limited material and submissions before the Tribunal and no evidence that the role of the appellant in the lives of his minor niece and nephews was anything other than non-parental, with engagement limited to family-related events and gatherings. Moreover, the appellant's statement of facts, issues and contentions to the Tribunal did not suggest that the best interests of his minor niece and nephews were relevant. The Court found that the Tribunal had regard to the interests of the appellant's minor niece and nephews to the extent that it could by reference to the material and submissions before it, such that the reasoning and finding of the Tribunal was not affected by jurisdictional error.