The Courts

Exclusion of decisions of the Governor-General from review

In Krongthong Thongchua v Attorney-General for the Commonwealth (27 May 1986) the Full Court of the Federal Court considered the question whether a decision of the Attorney-General to decline to recommend to the Governor-General that a prisoner be released on licence under section 19A of the Crimes Act was subject to review under the AD(JR) Act. Section 3(1) of the latter Act defines a decision to which the Act applies as 'a decision of an administrative character .... other than a decision by the Governor-General...'

The question to be answered was whether the exclusion of decisions by the Governor-General covers only the formal acts of the Governor-General or also covers ministerial advice given to the Governor-General under section 19A. Mr Justice Neaves and Mr Justice Burchett held that section 3(1) covered the giving of ministerial advice to the Governor-General under section 19A, since to hold otherwise 'would be to enable the review of the decision made by the Governor-General under the guise of reviewing the ministerial advice'. Furthermore, whether or not the Attorney-General's decisions should be subject to review by the court should not depend on whether the advice is favourable or unfavourable. The exclusion from the operation of the Act of decisions by the Governor-General 'extends to the action of the Attorney-General in considering whether he is prepared, in the circumstances of the particular case, to advise the grant of a licence'. Nor could the advice of the Attorney-General, even when it was in the negative, be thought to fall within section 3(3) of the Act which provides for review by the court in certain circumstances of 'a report or recommendation before a decision is made'. The court said that the Minister's advice is a necessary part of the decision itself.

Mr Justice Fox dissented, taking the view that it did not seem possible 'to regard the refusal or adverse decision by the Attorney-General as constructively a decision of the Governor-General'.

Deportation orders, natural justice and policy considerations

In Pushparany Sinnathamby & Ors v Minister for Immigration and Ethnic Affairs (5 June 1986) the members of the Full Court of the Federal Court differed as to the weight which should be given in the particular circumstances of the case to a ministerial policy concerning prohibited non-citizens and as to the applicability of the rules of natural justice in those circumstances. By a majority the court dismissed an appeal against a decision of Mr Justice Morling upholding a deportation order concerning 5 appellants. The appellants were Sri Lankans of Tamil extraction who arrived in Australia on transit visas from Singapore to Fiji and who then sought

refugee status, or alternatively permanent resident status on compassionate and humanitarian grounds, under section 6A of the Migration Act. The case was considered on the basis of the position of one appellant who was in all relevant respects considered to be in the same position as the others.

The appellant's first contention was that there had been a breach of the rules of natural justice, in that the department had not told her that it would regard as an important circumstance disentitling her to favourable consideration its view that her behaviour amounted to 'subterfuge' in attempting to obtain permanent residence in Australia. The majority (Mr Justice Fox and Mr Justice Neaves) did not consider that the views of Mr Justice Mason in Kioa v Minister for Immigration and Ethnic Affairs (1985) 62 ALR 321, to the effect that the rules of natural justice required that an applicant be informed of a consideration personal to the applicant which was to be taken into account against him or her, in order that the applicant might have an opportunity to rebut it, required the decision maker to give an opportunity to comment in circumstances, as in this case, where the information had been supplied by the applicant. In the words of Mr Justice Fox, 'to do so would amount to a general requirement that a decision-maker make known in each case his view or evaluation of the material that an applicant puts forward'.

On the other hand, Mr Justice Burchett was of the opinion that the appellant should have had her attention drawn to it. His Honour took the view that the principle stated by Mr Justice Mason in Kioa, that a decision maker who intends to reject an application by reference to some consideration personal to the applicant, was not limited to the circumstance where the information came from a source other than the applicant.

The majority also rejected the appellant's second major contention that the decision maker had applied the Minister's policy concerning prohibited non-citizens without regard to the merits of the case and had not taken account of relevant considerations. Mr Justice Burchett took the view that there were good reasons in this case not to apply the policy so strongly.

Natural justice and conciliation proceedings

In Koppen v The Commissioner for Community Relations (2 June 1986) Mr Justice Spender was called upon to decide whether the rules of natural justice applied to conciliation conferences held under section 22 of the Racial Discrimination Act 1975. He held that they did and that in the circumstances of the case the person chairing the conference could reasonably be suspected of not being unprejudiced and impartial.

The applicant in this case was the defendant in proceedings brought in the Queensland Supreme Court under the provisions of the Racial Discrimination Act. Section 24 of that Act provides that civil proceedings may be instituted by a person aggrieved by an act that the person considers to have been an

unlawful act of racial discrimination under the Act. One precondition of such proceedings is the giving of a certificate by the Commissioner (or a member of the Human Rights Commission) to the effect that a compulsory conference has been held in an endeavour to settle the relevant matter, and that the matter has not been settled at the date of the certificate. The applicant had sought to challenge the validity of several such certificates in the Supreme Court which ruled that, in view of the confidentiality provisions of the Act concerning proceedings at a compulsory conference, the validity of the certificates could only be challenged in the Federal Court. As a result of its findings on the issue of natural justice, the Federal Court decided that the certificates were of no effect.

His Honour held that there may be a duty to observe the rules of natural justice in relation to some proceedings which do not culminate in a decision which affects rights, interests or legitimate expectations, and which do not involve the making of findings. He distinguished cases such as Testro Bros Pty Ltd v Tait (1963) 109 CLR 353 which dealt only with investigatory, and not conciliatory, bodies. The policy reasons for not implying a duty to observe the rules of natural justice in relation to certain investigatory bodies did not apply to a compulsory conciliation body whose proceedings by their nature were concerned with allowing an individual to know the nature of the complaint against the individual and to have the opportunity to place that person's version of events before an unbiased conciliator. In particular there were no reasons of administrative convenience to supplant the duty to act fairly, nor did the conciliation proceedings allow for a further step at which procedural fairness could be accorded before the initiation of legal proceedings. The occurrence of a compulsory conference and the issue of a certificate concerning its occurrence and unsuccessful outcome were preconditions to the taking of civil action and therefore exposed the individual to the hazard of legal proceedings. This was enough to attract the requirement to observe the rules of natural justice.

Natural justice and provision for appeal to the AAT

The decision of the Full Court of the Federal Court in Marine Hull & Liability Co Ltd v Hurford (18 June 1986) is an interesting illustration of the different approaches that can be taken when questions arise as to the applicability and content of the rules of natural justice.

The Full Court was considering an appeal from a decision of Mr Justice Wilcox ((1985) 62 ALR 263). His Honour had held that, in giving directions under section 62 of the Insurance Act 1973 that an insurer should not issue or renew insurance policies, the Treasurer was bound to act fairly and to accord natural justice to the insurer. However, he also held that the Treasurer's failure to give an opportunity to the insurer to be heard before the directions were given did not render the directions invalid. The intention of the legislature was

held to be that the insurer's right to appeal to the AAT should be the only means by which the giving of such directions could be challenged. An appeal to the AAT involved a full review on both the facts and the law in which the AAT had all the powers and discretions conferred on the original decision maker, and a decision of the AAT was also subject to an appeal to the Federal Court on a point of law.

The Full Court unanimously dismissed the appeal but the members differed in their reasoning. Mr Justice Morling was the only member of the court who took the same approach as the judge at first instance. He applied the decision in Twist v Randwick Municipal Council (1976) 136 CLR 106 which involved a statutory right of appeal de novo to a court. Not only was there an unrestricted right of review by the AAT on all matters of fact and law, but any damage which might ensue from the Treasurer publishing in the Gazette a notice concerning the directions given could be prevented by seeking a stay of that action by the AAT, which under the insurance legislation could be done at the stage of a reconsideration by the Treasurer as well as at the stage of an appeal to the AAT.

It was held by Mr Justice Fox and Mr Justice Davies that there was no evidence of a denial of natural justice. Mr Justice Fox considered that in certain circumstances a denial of natural justice might arise because an insurer had not been given an adequate opportunity to be heard before directions were issued by the Treasurer. However, he said that in the present case the evidence did not disclose a denial of natural justice. Mr Justice Davies said that, in giving directions under the Insurance Act, the Treasurer was under a duty to accord procedural fairness. However, the requirements of procedural fairness were satisfied by the provisions of the Act relating to investigations before directions issued, by the right to obtain re-consideration of the directions and by the right to obtain review by the AAT of any directions.

STATISTICAL TRENDS

Statistics for the first half of 1986 indicate that a significant number of cases continue to arise in the migration and tax jurisdictions. The number of applications to 11 June 1986 is half that of the full year 1985.

Table 2

No. of applications under the AD(JR) Act

Jurisdiction	Oct 1980– Dec 1981	1982	1983	1984	1985	1 Jan 1986 – 11 June 1986
Income Tax Assessment Act 1936	–	5	25	42	31	34
Customs Legislation*	3	9	6	35	38	5
Migration Act 1958	14	26	33	36	73	47
Public Service Act 1922	7	31	15	12	10	1
Broadcasting and Television Act 1942	1	5	4	7	12	1
Repatriation Act 1920	6	2	5	9	7	–
Telecommunications Act 1975	3	2	9	3	7	–
Compensation (Commonwealth Government Employees) Act 1971	5	4	5	3	2	1
Other	41	34	62	77	58	30
TOTAL	80	118	164	224	238	119

* Includes legislation relating to dumping and countervailing duties.

ADMINISTRATIVE LAW WATCH

Administrative review system criticised

A recent Bulletin article by Richard Farmer (10 June 1986 - see 'Recent Publications') argued, principally on the basis of 5 decisions of the AAT, that 'strange decisions by Courts and government tribunals are adding hundreds of millions of dollars to Australia's welfare bill', and that 'the total cost to the federal budget of extra welfare payments following decisions of the AAT is conservatively estimated at more than $1 billion a year'. In Admin Review's opinion the argument of the article was based on several misconceptions.

First, extrapolations cannot be made from an AAT decision made on the facts in a particular case to indicate likely additional amounts of government expenditure. One decision on the facts on the existence or otherwise of a de facto relationship, for example, does not determine the outcome of any other application concerning the same legislation.

Secondly, the AAT must decide what is the correct or preferable decision in a particular case on the basis of the facts as found by the AAT, the relevant legislation and taking into account any relevant government policies. It is not its role to try to reduce the costs to government involved in determining equitably citizens' entitlements under legislation. Thirdly, the AAT is required, as part of its duty to review cases on the merits, to interpret the legislation. In many cases, including several of those relied on in the Bulletin article, the meaning and/or application of the legislation is difficult to determine. (Two of the cases concerned are discussed above: see Hastings and Bewley, pp. 130-1 and 133-4). Problems of interpretation may commonly indicate that the legislation requires amendment. Fourthly, where government is dissatisfied with the AAT's interpretation of legislation, it is open to it to appeal to the Federal Court on a point of law. This has happened in several of the cases mentioned in the article. (In practice, it may be noted, AAT decisions have been upheld in a substantial majority of appeals to the Federal Court.) Alternatively, it may be necessary for the government to sponsor amending legislation, as occurred in relation to the legislation concerning the issue of benefit classification certificates: see above p.134.

Admin Review takes the view that the benefits to the public, to the government and to the administration of having a