The Courts

Standing to challenge film censorship decisions

In Ogle & Anor v Strickland & Ors (4 August 1986) Mr Justice Sheppard held that the applicants, an Anglican minister and a Roman Catholic priest, had no standing to bring proceedings before the Federal Court under the Administrative Decisions (Judicial Review) Act. The applicants were seeking review of decisions relating to the registration of the imported film 'Je vous salue Maria' (Hail Mary). The decisions were made pursuant to the Customs (Cinematograph Films) Regulations. In reaching its decision the Court concluded that, notwithstanding their special position as ministers of religion, the applicants did not stand in any different position from countless other members of the community who, with varying degrees of commitment, profess the Christian faith. The Court considered two recent decisions of the High Court - Australian Conservation Foundation Inc. v Commonwealth of Australia (1980) 146 CLR 493 and Onus v Alcoa of Australia Ltd (1981) 149 CLR 27. There was a question whether the decision in Onus' case, in particular, required a finding that the applicants in Ogle had the requisite standing. In Onus' case the appellants were members of the Gournditch-jmara Aboriginal community and, as such, were custodians, according to the laws and customs of that community, of its ancestral relics. Certain relics were found on the respondent's land and those relics were protected by the Victorian Archaeological and Aboriginal Relics Preservation Act 1972. The appellants were held to have standing to institute proceedings to enforce the Relics Act in respect of relics on the respondent's land.

Mr Justice Sheppard in Ogle considered that perceptions of factual similarities with other cases are rarely of assistance and may lead a court into error.

The decision has been appealed to the Full Court of the Federal Court and is listed for hearing in Sydney on Friday 24 October 1986.

Discounting lump sum compensation payments

In Blackwell v Commonwealth of Australia (18 July 1986) the Full Court of the Federal Court (Northrop, Keely and Wilcox JJ.) set aside a decision of the AAT allowing a discount of 4.5% for the benefit of present receipt of future payments in the calculation of a lump sum payment under the Compensation (Commonwealth Government Employees) Act 1971 in respect of partial incapacity for work. (The AAT's decision was reported at (1985) Admin Review 46.) The Full Court held that the AAT had been incorrect in its conclusion that the High Court had decided in Todorovic v Waller (1981) 150 CLR 402 that, as a matter of law, a discount rate must be adopted. The Full Court also considered that Todorovic's case should be used only for assistance in determining a rate of discount as a

matter of fact and not to provide a particular discount figure by which a calculation of lump sum compensation must be adjusted. The matter was remitted to the AAT to be heard again with such further evidence as the Tribunal may admit. The Commonwealth has been granted special leave from the High Court to appeal against this decision.

Constitutional right of religious freedom

In Lebanese Moslem Association & Ors v Minister for Immigration and Ethnic Affairs (25 July 1986) applications were brought under the AD(JR) Act and section 39B of the Judiciary Act challenging a decision of the Minister refusing to grant permanent resident status to, and ordering the deportation of, the Imam of the Lakemba Mosque in Sydney. Allegations were made that the Imam was the focus of political and ideological divisions within the Lebanese community, and the basis on which the Minister acted was essentially that, whether through his own fault or otherwise, the Imam's presence in Australia brought trouble. The Court (Mr Justice Pincus) rejected a number of arguments raised in the application under the Administrative Decisions (Judicial Review) Act, including arguments relating to natural justice and unreasonableness. It also rejected an argument based on the Human Rights Commission Act that the Minister had breached articles of the International Covenant on Civil and Political Rights. The Court then focussed on section 116 of the Commonwealth Constitution, which states:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The question was whether the guarantee provided an inhibition on the exercise of the Minister's powers under the Migration Act. The Court concluded that the respondent's actions indicated his desire not to interfere with the religious observances of the members of the Moslem Association and not to put a stop to important aspects of them. However, the Court considered that the section 116 guarantee required the respondent to take two matters into account. First, the respondent had no right to exercise his powers in such a way as to put an end to expressions of a purely religious character on the part of the Imam. Secondly, the respondent's decision should not be brought about by an opinion formed by him that the Association's members might be better served religiously by an Imam other than the one they had chosen.

His Honour concluded that the respondent did not take these matters into account. He then added:

> I do not hold that the (Imam) could not have been lawfully deported. My conclusion in his favour is limited to the point that s.116 required that matters be considered which were not considered.

The matter was remitted to the respondent for reconsideration.

'The Platters' case (1)

Conyngham & Ors v Minister for Immigration and Ethnic Affairs (17 July 1986) related to the entry into Australia of a group of American entertainers called 'The Platters'. The application, made under the Administrative Decisions (Judicial Review) Act, challenged a decision refusing approval of sponsorship of the visit of the group to Australia which was preliminary to the determination of applications for the issue of temporary entry permits under section 6 of the Migration Act 1958. Section 6 empowers the Minister to issue temporary entry permits but does not specify criteria to be applied in considering particular cases. However, the Minister had adopted a statement of policy and procedures in relation to the temporary entry into Australia of entertainers and related personnel. Mr Justice Wilcox held that there had been a denial of natural justice in the making of the Minister's decision, that relevant considerations had not been taken into account and that the decision was unreasonable. His Honour regarded the case as an exceptional one and, pursuant to section 16(1)(d) of the Administrative Decisions (Judicial Review) Act, ordered the Minister to approve the applications.

'The Platters' case (2)

The decision of Mr Justice Wilcox noted above was taken on appeal to the Full Court of the Federal Court in Minister for Immigration and Ethnic Affairs v Conyngham & Ors (25 July 1986). The appeal related to the nature of the relief to which the respondents were entitled. The appellant contended that the only appropriate relief was the setting aside of the decision and the remission of the matter to the Minister with a direction that he decide the matter according to law. The Court held that section 16(1)(d) of the Administrative Decisions (Judicial Review) Act confers power on the Court, in appropriate cases, to order a decision maker to decide a matter in a particular way. Sheppard J. (with whose judgment Beaumont and Burchett JJ. agreed) said:

> If the decision-maker, although his discretion has miscarried, is left with a residual discretion under the statute to decide the ultimate question favourably or unfavourably to the successful applicant, the order which the Court makes should, notwithstanding the width of s.16 of the Act, usually, if not invariably, be one which remits the matter for further consideration according to law. Where, as here, what has transpired has amounted to a constructive failure to deal with the real application which has been made, it will sometimes be appropriate, (for example, in cases of substantial urgency from the point of view of the aggrieved party) to require the decision-maker to make a decision forthwith or within a limited time.

The Full Court allowed the appeal and varied the orders made by Mr Justice Wilcox.

Migration queue-jumping policy

In Tang & Anor v Hurford (20 December 1985) Mr Justice Sheppard dismissed an application under the Administrative Decisions (Judicial Review) Act to review decisions refusing residential status and ordering the deportation of the applicants. Tang was married to an Australian citizen and was the son of naturalised Australian parents in ill health. Khoi Tri Tang v Hurford (4 July 1986) was an appeal to the Full Court of the Federal Court against the decision of Mr Justice Sheppard. The Full Court allowed the appeal. It set aside the decision under review, and remitted the matter to the respondent for reconsideration in accordance with the law. Although the Full Court agreed with Mr Justice Sheppard that paragraph 6A(1)(e) of the Migration Act 1958 could not assist the appellant as he was not the holder of a temporary entry permit, it held that paragraph 6A(1)(b) was applicable as the appellant had married an Australian citizen. Paragraph 6A(1)(b) provides than an entry permit shall not be granted to a non-citizen after his entry into Australia unless he is the 'spouse, child or aged parent of an Australian citizen'. Mr Justice Davies (with whose judgment Mr Justice Evatt agreed) said that if the Minister's policy statement of 18 October 1985 ('the queue-jumping policy') was to be read as placing persons married to Australian citizens or permanent residents in the same position as all other non-citizens, then that policy would be inconsistent with the provisions of section 6A of the Act which required a distinction to be drawn between cases where the applicant for an entry permit was the holder of a temporary entry permit and cases where the application for an entry permit ought to be considered notwithstanding that the applicant was a prohibited non-citizen. The Minister's statement included the following:

> The Migration Act and migration policy provide eligibility concessions for foreign nationals who have married an Australian citizen or permanent resident or who have an Australian citizen child. But eligibility to apply for residence does not carry an automatic entitlement to residence. In such circumstances, the interests of the resident family or child are taken into account and are weighed, along with other factors, in the eventual decision.
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> Marriage to an Australian or the existence of an Australian citizen child do not confer upon illegal immigrants the right to choose their country of residence. Each case will be treated on its own merits.
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> Similar considerations apply in respect of de facto relationships.

Mr Justice Pincus reached a contrary conclusion on this point but held that the decision maker had failed to take into account relevant considerations.

ADMINISTRATIVE LAW WATCH

Veterans' Review Board

The Veterans' Review Board (VRB) was established following the Council's Report No. 20, Review of Pension Decisions Under Repatriation Legislation, and commenced to operate from 1 January 1985. Case notes and other information about the VRB can be obtained from its quarterly bulletin VeRBosity and statistics are produced on a four-weekly basis. The VRB's procedures are published in the Veterans' Review Board Procedure Manual (1985) and the VRB's Annual Report for 1985-86 was tabled in the Parliament on 24 September 1986.

At 30 June 1986, veterans' affairs was the jurisdiction attracting the second largest number of appeals to the AAT and the number of appeals in the jurisdiction was increasing, against the trend in most other areas. The VRB is the first tier tribunal in this high volume jurisdiction and it currently receives appeals at the rate of over 1,300 a month. Its operations are co-ordinated by a Principal Member, which has enabled the development of effective procedures and optimal use of resources on a national basis. This is evident from a number of aspects of its appeals processing record. For example, a high deferral rate and a substantial number of adjournments is a feature of the hearing process of administrative tribunals generally, but the VRB has reduced the volume of its deferred hearings to around 7% and only 19.3% of its hearings are actually adjourned. Inefficiencies can also arise through delay between the hearing of an appeal and the publication of the decision. The VRB presently publishes around 90% of its decisions within 1 month of the hearing. At 1 August 1986 there were only 68 cases throughout Australia which had been heard more than 1 month previously and the decisions in which had not been published.

Statistics relating to the rate at which appeals are finalised by the VRB reveal that the rate has more than doubled since the Board's first 6 months of operation. For the 6 months ending 21 June 1985 appeals were processed at an annual rate of 5,440 cases. The table below indicates a steady increase in the processing rate since that time:

12 weeks ending:	Annual processing rate equivalents
13.09.1985	6838
6.12.1985	9269
28.02.1986	7900
13.05.1986	9880
15.08.1986	11176