Dan Star's Federal Court Judgements

ADMINISTRATIVE LAW

The conundrum of whether a decision was of an administrative or of a legislative character – a decision not to vary or revoke certain rules

In *Applied Medical Australia Pty Ltd v Minister for Health* [2016] FCA 35 (5 February 2016), the Court dismissed an application for judicial review by a manufacturer and supplier of medical devices for surgical procedures (Applied Medical). The main decision that was the subject of judicial review was a decision by the Minister's delegate to reject an application to lower minimum group benefits applying for a sub-group in the *Private Health Insurance (Prosthesis) Rules 2015 (No 1)* (Cth).

Applied Medical sought review under both s. 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s. 39B of the Judiciary Act 1903 (Cth). An initial issue considered by the Court (Robertson J) was whether the impugned decision, and a failure to decide, were administrative decisions made under legislation. After considering many authorities, Robertson J concluded at [35] that "while the making of the *Private Health Insurance (Prostheses) Rules* is to be characterised as legislative, as also would be varying or revoking those Rules in whole or in part, deciding to grant or deciding not to grant an application under s. 72–10(2) of the *Private Health Insurance Act 2007* (Cth) is of an administrative character..." Further, deciding not to act under s. 333–20 of the *Private Health Insurance Act 2007* to vary the list in the *Private Health Insurance (Prostheses) Rules* was held to be of an administrative character (at [42]–[48]).

Accordingly, there was jurisdiction for Applied Medical's application for judicial review of administrative action. However, the Court rejected the various grounds of review including the allegation that there had been an improper exercise of discretionary power in accordance with a rule or policy without regard to the merits of the particular case. In this context, Robertson J said at [112]: "Once the repository of a discretionary power has considered an application for the non-application of the policy or a change in policy and has given a reason, other than the bare restatement of the policy, for rejecting that application, it is difficult to conclude that the discretionary power has been exercised inflexibly in the relevant sense."

What was relevant to the Court's general rejection of the grounds of judicial review was that the minute of the Minister's delegate was not to be regarded as a formal statement of reasons (see at [19]–[20] citing observations of the High Court in *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50 at [25] and [72]).

COMPETITION LAW

Allegation of attempt to induce cartel conduct – consideration also of ss. 2A, 44ZZRJ and 44ZZRD of the CCA

In *Australian Competition and Consumer Commission v Australian Egg Corporation Limited* [2016] FCA 69 (10 February 2016), the Court (White J) dismissed the ACCC's claims that various contesting respondents attempted to induce egg producers represented at a meeting on 8 February 2012 to make an arrangement, or enter into an understanding, to limit the supply of eggs in contravention of s. 44ZZRJ of the *Competition and Consumer Act 2010* (Cth) (the CCA).

The respondents were an industry association (the Australian Egg Corporation Ltd (AECL), its managing director (Mr Kellaway), a public company (Farm Pride Foods Ltd), its former managing director (Mr Lendich) and another egg producing company and its managing director (who was also the Chairman of the AECL). In particular, the ACCC's case was that between 19 January and 8 February 2012, the respondents took action to address concerns with oversupply of eggs and its effect on prices by encouraging certain egg producers to make an arrangement or arrive at an understanding to limit their egg production. The 'purpose condition' or 'cartel condition' in issue was preventing, restricting or limiting goods within the meaning of s. 44ZZRD(3) of the CCA.

One the respondents, Mr Lendich, signed a statement of agreed facts containing admissions with the ACCC that was presented to the Court at the commencement of the trial. The Court ruled that it would hear the submissions concerning the settlement between the ACCC and Mr Lendich after the determination of the liability aspects of the proceeding against the remaining respondents (at [14]–[27]).

The AECL and Mr Kellaway argued that that the CCA did not apply to them. After considering authority and evidence relevant to s. 2A of the CCA, the Court rejected this defence. Justice White held: (i) the AECL is not an agency or emanation of the Crown in the conventional sense (at [97]–[157]); (ii) the AECL is not an 'authority of the Commonwealth' within the meaning of s. 2A of the CCA (at [158]–[167]); and (iii) the AECL carries on a business such that s. 2A abrogates the immunity even if it was otherwise applicable (that is, had AECL been an agency or emanation of the Crown or an authority of the Commonwealth) (at [168]–[181]).

As to whether the contesting respondents attempted to induce a contravention of s. 44ZZRJ of the CCA, the ACCC presented a circumstantial case reying upon documents and cross-examination of such witnesses called by the respondents. The ACCC did not call Mr Lendich as a witness. Proof of an attempt to induce a contravention of s. 44ZZRJ required the ACCC to establish both a physical and mental element (at [68]). The Court held that the ACCC established conduct which, looked at generally, could be characterised as a form of affirmative action directed towards the inducement alleged (at [379]). However, the ACCC failed to prove that the contesting respondents had the intention of inducing a proscribed arrangement or understanding (at [380] and [403]). The ACCC's case was strongest against AECL and its managing director (at [404]). In relation to the AECL, White J held: "I accept the submission made by reference to *Trade Practices Commission v Service Station Association Ltd* [1993] FCA 405; (1993) 44 FCR 206, that trade associations and their officers may legitimately encourage their members to examine their profitability and to make production and pricing decisions in order to maintain profitability. Conduct of that kind, at least when directed to the decisions of industry participants in their own businesses and without any suggestion of cooperative action, does not amount to cartel conduct, or even an attempt to induce cartel conduct."

Note: The editor appeared as lead counsel for the third respondent in this proceeding.

INDUSTRIAL LAW

Penalty under the *Fair Work Act* to be paid to the aggrieved person prosecuting rather than the Commonwealth

In *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4 (22 January 2016) the Full Court overturned the primary judge's orders that penalties under the *Fair Work Act 2009* (Cth) (FW Act) be paid to the Commonwealth and instead ordered that the penalties be paid to the appellant.

The appellant was employed as an organiser for the respondent (the union). The primary judge found that the union contravened s. 351 of the FW Act in respect of three adverse actions taken against him. Her Honour ordered that the union pay the appellant $3000 as compensation for distress and humiliation ([2015] FCA 27) and, subsequently, ordered that he be compensated $36 984.16 less tax for loss of income caused by the termination of his employment. In a separate judgment, the primary judge ordered that penalties of $20 000, $10 000 and $15 000 be imposed on the union, such penalties to be payable to the Commonwealth ([2015] FCA 338).

Under s. 545 of the FW Act, the Court can make an order it considers appropriate including but not limited to injunctions, compensation and reinstatement. A Court may make a pecuniary penalty in addition to one or more orders in s. 545: s. 546(5). Relevantly, s. 546(3) of the FW Act allows the Court to order that a penalty or part of a penalty be paid to the Commonwealth, a particular organisation or a particular person.

The Full Court (Tracey, Barker & Katzmann JJ) held that the power to order penalties in s. 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant (at [101]). The primary judge erred in ordering the penalties to be paid to the Commonwealth and not to the appellant. In particular, the primary judge erred in finding that the appellant should not receive payment of penalties because it would deliver a 'windfall' to him. The Full Court expressly agreed (at [99]–[100]) with the following passage by Gray J in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at [45]: "The notion that the order to pay a penalty to the initiating party could produce a windfall is a false notion. If the true purpose of such an order is taken into account, and the order is not regarded as compensatory in any way, any notion of a windfall disappears."

Dan Star *is a Victorian barrister and invites comments or enquiries on telephone (03) 9225 8757 or email danstar@vicbar.com.au. The full version of these judgments can be found at www.austlii.edu.au. Numbers in square brackets refer to a paragraph number in the judgment.*