RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Appointment of new Independent Reviewer of Adverse Security Assessments

On 4 September 2015, the Federal Government announced the appointment of Mr Robert Cornall AO as the new Independent Reviewer of Adverse Security Assessments.

The appointment is for a period of two years commencing on 3 September 2015.

Mr Cornall brings a wealth of experience in legal practice, government administration and public policy to this position.

Mr Cornall is a former Secretary of the Commonwealth Attorney-General's Department. He is currently the Chair of the Defence Abuse Response Taskforce. In January 2006, he was appointed an Officer of the Order of Australia for service to the community in developing public policy.

Since the establishment of the Office of the Independent Reviewer in 2012, the majority of reviews conducted have confirmed ASIO's initial assessment. This fact continues to serve as a testament to the confidence that successive Governments have placed on the professional judgement of ASIO and highlights the integrity of the assessment and internal review processes.

Mr Cornall's appointment fills the vacancy left by the Hon Margaret Stone, who commenced as the new Inspector-General of Intelligence and Security on 24 August 2015.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/ThirdQuarter/4-September-2015-Appointment-of-new-Independent-Reviewer-of-Adverse-Security-Assessments-.aspx

Reappointment of Timothy Pilgrim as Australian Privacy Commissioner

On 21 August 2015, the Federal Government announced the reappointment of Timothy Pilgrim PSM as the Australian Privacy Commissioner.

The appointment is for a period of twelve months commencing on 19 October 2015.

Mr Pilgrim was appointed acting Australian Information Commissioner for a three month period in July 2015 while the Government considers options for the future of the Information Commissioner position.

Before his current acting position, Mr Pilgrim served as Privacy Commissioner from July 2010 to July 2015, and was Deputy Privacy Commissioner from 1998 to 2010. During that time, he was involved in several major amendments to the *Privacy Act 1988*, including the extension of the Act to private sector organisations in 2001 and widespread amendments to the Act in 2014.

As Privacy Commissioner, Mr Pilgrim has developed good working relationship with the business community, consumer groups and Australian Government agencies in building awareness of privacy rights and obligations. An example is his extensive consultation with

industry and consumer groups before the 2014 amendments to the Privacy Act commenced, and his continued focus afterwards on working with business to implement the changes to the Act.

Mr Pilgrim has also worked at an international level to ensure that Australia is equipped to deal with global privacy challenges, particularly through cross border cooperation on such matters.

In the January 2015 Australia Day Honour's List, Mr Pilgrim was awarded a Public Service Medal for 'outstanding public service in the development and implementation of major reforms to the Privacy Act.'

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/ThirdQuarter/21-August-2015-Reappointment-of-Timothy-Pilgrim-as-Australian-Privacy-Commissioner.aspx

Milestone amalgamation of key Commonwealth Merits Review Tribunals

On 1 July 2015, a ceremonial sitting of the Administrative Appeals Tribunal was held to welcome the most significant reform to Commonwealth administrative law in 40 years: the amalgamation of the Administrative Appeals Tribunal, the Social Security Appeals Tribunal and the Migration Review Tribunal and Refugee Review Tribunal into a single body, the Administrative Appeals Tribunal.

The ceremonial sitting was attended by key figures in the history of the Administrative Appeals Tribunal, including the current President, the Honourable Justice Duncan Kerr Chev LH, Sir Gerard Brennan KBE QC and the Honourable Robert Ellicott QC.

The Administrative Appeals Tribunal will provide an accessible, efficient and informal process for review of government decisions.

The amalgamation will strengthen the efficacy of Commonwealth merits review and promote high quality and consistent government decision-making; it will promote accessibility of review by simplifying the merits review system and providing a single point of contact for Tribunal users. Key services of each of the amalgamated tribunals will be retained, while allowing for greater sharing and utilisation of members' specialist expertise.

This year also marks the 40th anniversary of the legislative establishment of the Administrative Appeals Tribunal.

The reform is also consistent with key recommendations of the 2012 Strategic Review of Small and Medium Agencies in the Attorney–General's portfolio and the 2014 National Commission of Audit Report, *Towards Responsible Government*.

Justice Kerr continues as President of the amalgamated Administrative Appeals Tribunal.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/ThirdQuarter/1-July-2015-Milestone-Amalgamation-of-Key-Commonwealth-Merits-Review-Tribunals.aspx

More complaints can build better public services: Victorian Ombudsman

The Victorian Ombudsman is helping more people with their complaints about Victorian State government departments, agencies and local councils.

The Ombudsman's annual report for 2014–15 shows that approaches from the public increased to 38,980 in that year, 92 per cent of these were dealt with within 30 days. The office completed 3,256 formal enquiries and investigations, over 500 more than last year.

Victorian Ombudsman Deborah Glass said the ultimate goal of her work was to ensure fairness from the state public sector and improve services.

'Not all complaints require investigation, and many can be resolved quickly and informally. But whether or not they are investigated, all complaints contribute to a picture of dissatisfaction, which can be used to drive improvements in public administration.

'I want to be able to use that data to identify systemic issues that may require investigation, and to feed back to departments and agencies so they can better respond to public concerns,' said Ms Glass.

The report covers Ms Glass' first full year as Ombudsman, during which she has worked to raise awareness of the office.

'Importantly, the proportion of approaches within our jurisdiction rose by 12 per cent last year. That means we're spending more time addressing issues we can assist with and less time directing people to other organisations. We've made a concerted effort to improve understanding of our role, and that's beginning to show in our numbers.

'All too often, those with the greatest need for Ombudsman services are the least likely to use them. Addressing this and making my office much more accessible – including to rural and regional Victoria – is a central aspect of my vision,' she said.

Over the 2014-15 financial year the Ombudsman tabled eight parliamentary reports, including reports on improper conduct in the Office of Living Victoria, excessive force used by authorised officers on public transport, and failings of the Department of Health and Human Services in regulating an aged care facility. Of the 50 recommendations made to government, 96 per cent were accepted.

Looking to the year ahead, Ms Glass urged the Victorian government to deliver promised reforms to legislation governing the work of the office, in order to improve services to the public and government agencies alike.

'I have received an assurance from the government that some of the changes I have requested will be before the Parliament this year, and I wait to see,' Ms Glass said.

Headline data:

- 38,980 approaches to the Victorian Ombudsman;
- 3,256 formal enquiries and investigations completed;
- 34 formal investigations completed;
- eight parliamentary reports tabled;
- 4,269 completed approaches in the Corrections, Justice and Regulation portfolio; (most commonly complained about portfolio);
- 3,410 completed approaches in the local government portfolio.

https://www.ombudsman.vic.gov.au/News/Media-Releases/Media-Alerts/More-complaints-can-build-better-public-services-O

Removing discrimination in South Australia's legislation

A report by the South Australian Law Reform Institute at the University of Adelaide has recommended that up to 14 pieces of legislation that discriminate against lesbian, gay, bisexual, transgender, intersex and queer South Australians be removed.

Speaking on the 40th anniversary of the decriminalisation of homosexuality, Premier Jay Weatherill said he would take action to address these elements of discrimination against LGBTIQ people in South Australian law.

'One of the things that makes South Australia such a great place to live is the fact that we have a rich, diverse community,' Mr Weatherill said.

'Unfortunately, though, elements of our laws still discriminate against people who are lesbian, gay, bisexual, transgender, intersex or queer. That's why we asked the South Australian Law Reform Institute at the University of Adelaide to review our laws and identify legislation that discriminates against members of our community who identify as LGBTIQ.'

'The Institute has identified areas where immediate action can be taken, and other areas that require further consideration.

'In all, we will immediately begin preparing omnibus legislation that will either modify or repeal aspects of up to 14 different pieces of legislation to ensure they are contemporary.'

The review of South Australian laws fulfills a commitment made in the Governor's speech at the start of the Parliamentary year.

Mr Weatherill said the new omnibus legislation would remove aspects of existing laws that are outdated and discriminatory.

'For instance, a person who identifies as a woman, but is not legally recorded as such, may be prevented from taking a position on a Government Board, because they are not recognised as a woman under relevant legislation,' he said.

'There are also pieces of legislation –like the Wills Act –that discriminate by treating married couples differently from those couples or individuals who are not or who cannot get married, including LGBTIQ South Australians.'

Mr Weatherill said legislation relating to the Adoption Act was being considered as part of a separate review of that Act. Where the review identified more complex matters, the Law Reform Institute would continue to develop options for reform to address these.

http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/Sept%202015%20media%20releases/20150910-MR-discrimination.pdf

Resignation of Tasmanian Integrity Commission Chief Executive Officer

The Tasmania Government has received notification from the Chief Executive Officer of the Integrity Commission, Diane Merryfull, that she intends to retire from full-time work and to leave her role on 16 October 2015.

Given the proximity of the independent five year review, the Government and the Chief Commissioner have agreed to appoint an Acting CEO until the review has been concluded.

The Premier is required to consult with the Joint Standing Committee on Integrity in relation to the appointment of an Acting CEO and an announcement will be made as soon as that process is concluded.

Ms Merryfull's retirement continues a period of renewal for the Integrity Commission, with Greg Melick SC recently being appointed as the new Chief Commissioner of the Integrity Commission.

The five year independent review of the Integrity Commission is due to commence early in 2016. Section 106 of the *Integrity Commission Act 2009* provides for an independent review of that Act, which must be commissioned as soon as possible after 31 December 2015. The independent review is to be undertaken by a person appointed by the Governor, and that person must be, or previously have held office as a judge of a court of the Commonwealth or of an Australian State or Territory.

The Government has made it clear that its position reflects that of the Joint Standing Committee on Integrity's recommendation that 'the question of the investigative powers and functions of the Integrity Commission should be considered as part of the five year review, and that until that review, the investigative functions and powers of the Integrity Commission should be retained.'

http://www.premier.tas.gov.au/releases/resignation_of_integrity_commission_chief_executive_officer

Recent Cases in Administrative Law

How serious does serious harm have to be?

Minister for Immigration and Border Protection v WZAPN & ANOR; WZARV v Minister for Immigration and Border Protection & ANOR [2015] HCA 22 (17 June 2015)

WZAPN is a stateless Faili Kurd whose former place of habitual residence is Iran. In 2010, he was refused refugee status by a refugee status assessment (RSA) officer. An Independent Merits Reviewer (IMR) then reviewed that decision. The IMR concluded, among other things, that while there was a real chance of short periods of detention upon WZAPN's return to Iran if he was unable to produce identification, it did not accept that the frequency or length of detention, or the treatment he will receive while in detention would constitute serious harm within the meaning of the s 91R of *Migration Act 1958* (the *Act*).

The then Federal Magistrates Court of Australia dismissed WZAPN's application for judicial review of the IMR's decision. However, the Federal Court allowed WZAPN's appeal on the basis that the threat of a period of detention constitutes serious harm whatever the severity of the consequences for liberty. The Court came to this conclusion from the language and structure of s 91R(2) and international human rights standards. The Court held that serious harm in s 91R(1)(b) is constituted by a threat to life or liberty, without reference to the severity of the consequences to life or liberty.' A decision-maker must ask 'whether the deprivation [of liberty] was on grounds and in accordance with procedures established by law, whether the detention was arbitrary, and whether the applicant was treated with humanity and respect for the inherent dignity of the person.'

The Minister was granted special leave to appeal to the High Court from the decision of the Federal Court.

WZARV is a Sri Lankan citizen of Tamil ethnicity. He came to Australia by boat and was taken to Christmas Island. In 2011, WZARV was refused refugee status by an RSA officer. An IMR then

reviewed that decision. With respect to the possible detention of WZARV upon return to Sri Lanka, the IMR accepted that it was likely WZARV would be interviewed by Sri Lankan authorities upon arrival at the airport, but that it is usual for such questioning to be completed in a matter of hours.

WZARV's application for judicial review to the Federal Circuit Court of Australia and appeal to the Federal Court were dismissed. By grant of special leave, WZARV appealed to the High Court on the ground that, on the construction of s.91R(2)(a) of the Act adopted by the Federal Court in the *WZAPN* proceedings, the IMR had erroneously concluded that WZARV did not face serious harm upon return to Sri Lanka.

The High Court (French CJ, Kiefel, Bell and Keane JJ with Gageler J agreeing) unanimously allowed the Minister's appeal and unanimously dismissed WZARV's appeal.

The High Court held that it is persecution, involving serious harm inflicted by the violation of fundamental rights and freedoms, from which the Convention and s.91R of the Act are concerned to provide asylum. Both the Convention and s.91R of the Act embody an approach which is concerned with the effects of actions upon persons in terms of harm to them. That approach is not engaged automatically upon the demonstration of any breach, or apprehended breach, of human rights in their country of nationality or former habitual residence.

The High Court held that the likelihood of a period of temporary detention of a person for a reason mentioned in the Refugees Convention is not, of itself and without more, a threat to liberty within the meaning of s.91R(2)(a) of the Act. The question of whether a risk of the loss of liberty constitutes 'serious harm' for the purposes of s 91R requires a qualitative evaluation of the nature and gravity of the apprehended loss of liberty.

Apprehended bias and unrelated hearings from ten years before

Frugtniet v Tax Practitioners Board [2015] FCA 1066 (1 October 2015)

On 28 November 2012, the applicant applied to the Tax Practitioners Board for a renewal of his registration as a Tax Agent. His application was unsuccessful and in January 2013, the Board's Conduct Committee (the Committee) terminated the applicant's registration as a tax agent and precluded the applicant from applying for registration for five years. The Committee found the applicant no longer met the requirement to be a fit and proper person because had failed to disclose past misdeeds, which amounted to a 'massive bag of dishonest conduct' (*Frugtniet v Board of Examiners* [2005] VSC 332 (24 August 2005).

The applicant then sought review of the Committee's decisions in the Administrative Appeals Tribunal (AAT). At the start of proceedings the applicant's counsel objected to the AAT as constituted hearing the matter. In 2004, the presiding member had made adverse findings about the applicant in an unrelated social security matter after finding he made false representations to Centrelink. The AAT rejected that objection, and proceeded to hear matter, affirming the two decisions of the Tax Practitioners Board.

The applicant then appealed to the Federal Court.

The Federal Court accepted that the hearing by the AAT, as constituted, amounted to a denial of natural justice and therefore, an error of law.

The Court determined that, in the unrelated social security case some ten years before, the presiding member made adverse findings about the applicant. Accordingly, the Court held that a fair-minded lay observer might reasonably have apprehended that the member might not bring an impartial mind to the question of whether the applicant was a fit and proper

person. While there is a temptation to think that, realistically, the tide of time would have washed from the member's conscious thoughts any adverse disposition towards the applicant, the Court's position was that the fair-minded lay observer is not to be assumed able to speculate on such matters. He or she is a notional person who takes an objective approach. He or she could only go by the record as it stands. It is by reference to that record that justice must be seen to be done.

The court remitted the matter to be heard again before a differently constituted AAT.

Administrative law and horse racing at the Wagga Wagga Show

Michael Christie v Agricultural Societies Council of NSW Ltd (ACN 150 951 670) [2015] NSWSC 1118 (11 August 2015)

On 3 October 2014, the second day of horse events at the 150th Wagga Wagga Show, Mr Christie rode Royalwood Black Swan to victory in the Galloway Champion Hack event. He was also the horse's trainer. The horse subsequently tested positive for prohibited substances.

On 24 March 2015, a disciplinary hearing against Mr Christie, and the horse's owner, Ms Cullen, was conducted by a Committee established under the auspices of the Agricultural Societies Council of NSW Ltd (the ASC).

During the hearing, Ms Cullen confessed that she alone had given the horse the prohibited substances. It was also clear that Mr Christie knew nothing of the administration of the substances to the horse until Ms Cullen had told him about it immediately after the event as the horse was being led away for testing. The Committee disqualified and fined Ms Cullen and Mr Christie received a 12 month suspension from competition.

On 2 April 2015, Mr Christie commenced proceedings by an urgent ex parte application before the Duty Judge of the NSW Supreme Court. Mr Christie wished to participate in an equestrian event at the Sydney Royal Easter Show on 4 April 2015, but had been informed by the Royal Agricultural Society of NSW that because of this suspension he would not be permitted to compete. The Duty Judge granted an interlocutory injunction, which had the effect of rendering the Committee's decision temporarily inoperative. The matter was heard on 16 July 2015.

The ASC argued, among other things, that the Committee's decision was not justiciable under the common law of administrative review. The Committee's decision was private in character and was legally binding on no one, other than through private arrangements; and that private character was not lost even if Mr Christie demonstrated the decision could adversely affect his livelihood.

The Court found that the Committee is a private or domestic tribunal. It is not established by statute but operates under private law arrangements, which may be contractual or something else.

The Court held that the principle guiding whether or not a court will interfere in a decision of a domestic tribunal demonstrated by cases such as *Mitchell v Royal New South Wales Canine Council Ltd* [2001] NSWCA 162 (*Mitchell*) and *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 (*AFL*) requires an examination of the nature or quality of the effect of the decision on someone such as Mr Christie rather than analysing the legal framework for how the decision was made or can be enforced. These cases demonstrate that the effect of a decision will have the necessary quality to enliven the Court's jurisdiction

if, for example, the Court is satisfied that it will have an effect on private legal rights such as rights in property or adverse financial or reputational impact on someone, particularly insofar as their livelihood is concerned.

The Court held that in this case Mr Christie had no contractual relationship with the ASC. He was not a member of either the Wagga Wagga Show Society Inc or the ASC. Furthermore, it was not suggested by anyone that the ASC had a legally enforceable mechanism to ensure that decisions of the Committee were given effect by the ASC's member societies or anyone else. But the fact that the mechanism for enforcing the decision was voluntary does not, having regard to cases like *Mitchell* and *AFL*, take the decision outside the scope of the Court's power to review it. There is no evidence to suggest that the decision would not be enforced; and on the contrary, there was evidence that the decision, again through voluntary arrangements, would have a real impact on Mr Christie. This was because the Royal Agricultural Society of NSW, while not a member of the ASC, had a reciprocal arrangement with the ASC whereby each would enforce the other's disciplinary findings. The adverse effect of that voluntary, reciprocal arrangement on Mr Christie is why the proceedings were first commenced.

The Court held that there was no dispute that the decision had the capacity adversely to affect Mr Christie's ability to earn his livelihood. The adverse effect was potentially both financial and reputational and having been established, and applying the principle in *Mitchell*, the Court concluded that the decision was justiciable.