RECENT DECISIONS

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What facts can the AAT consider when reviewing a decision?

Shi v Migration Agents Registration Authority [2008] HCA 31 (30 July 2008**)**

The recent decision of the High Court in *Shi v Migration Agents Registration Authority* considered whether a Tribunal is limited to reviewing a decision with reference to circumstances that existed at the time it was originally made or could it take into account events which occurred up to the date of its own review.

The appellant, Mr Shi, was a migration agent whose registration had been cancelled by the Migration Agents Registration Authority (MARA) after finding a number of defects in Mr Shi's dealings with clients. The MARA found that Mr Shi had breached the Code of Conduct under s 303(1) *Migration Act 1958* in relation to applications for protection visas and was satisfied that Mr Shi was not a fit and proper person to provide immigration assistance.

On 31 July 2003, Mr Shi successfully applied to the Administrative Appeals Tribunal for a stay of the cancellation decision, subject to a condition that he not engage in any business relating to protection visas. On 2 September 2005, the Tribunal set aside the decision of the MARA to cancel Mr Shi's registration as a migration agent and instead issued a caution. In reaching this decision, the Tribunal found no evidence that Mr Shi had breached the Code since the MARA's decision of 31 July 2003 and that his recent rate of success had been very high. The Tribunal based its decision on evidence existing at the date of its own decision, rather than the date of the MARA's decision in 2003.

The MARA appealed to the Federal Court which ruled in its favour and was confirmed by the majority of the Full Court of the Federal Court on appeal.

Facing the High Court on appeal was the question of whether the Full Court erred in finding that the Tribunal was limited to the facts and circumstances that existed at the time of the MARA's decision. Could the Tribunal consider the facts and circumstances that existed at the time of its own decision?

The MARA argued there was a presumption of law which applied to bodies such as the Tribunal where the rights of parties to a review application are determined on the basis of the materials that existed at the time of the original decision. The Court rejected this contention in four separate judgments which were relatively unanimous on the question of the 'temporal element' as it applied to merits review. Each judgment supported the principle that the rights of parties to an application for review, under s 43 AAT Act, are to be determined by the Tribunal on the basis of the facts and circumstances present at the date of its decision (absent some indication to the contrary).

An 'indication to the contrary' is ascertained by reference to the enactment under which the original decision was made, and the nature of the particular decision in question. Accordingly, each judgment focused upon the terms of s 303(1) Migration Act which enables the MARA to cancel or suspend the registration of a migration agent.

In Kiefel J's view (with whom Crennan J agreed), the language of subsection (f) suggested a determination was to be made in the present tense, meaning that the agent's intervening conduct between the date of the original decision and the date of the Tribunal's determination could be taken into account. Her Honour was of the view that the second of these grounds involved statutory language suggestive of a fixed point-in-time and that a decision to cancel a migration agent's licence could occur if the MARA becomes satisfied that the agent had not complied with the Code. Her Honour determined that part of the MARA's decision relating to subsection (h) was referable to conduct which had occurred to a fixed-point-in-time and accordingly, the Tribunal was restricted to a consideration of events as they existed at the time of the MARA's decision when determining whether there had been compliance with the Code.

In a joint judgment, Hayne and Heydon JJ held that once it is accepted that the Tribunal is not confined to the record before the primary decision-maker the material before the Tribunal will include information about conduct and events that occurred after the decision under review. Their Honours held that the AAT Act did not provide a temporal limitation in relation to the material for consideration although it could be found by recourse to the enactment under which the original decision was made.

Justice Kirby held that each of the grounds in s 303(1) were expressed in the present tense, which necessarily allow the Tribunal to take into account supervening events in its determination under s 43 and therefore the language of the section clearly contemplated that the circumstances may change between the MARA's initial decision and a subsequent decision of the Tribunal.

Court takes a step closer to finding a right to privacy

Giller v Procopets [2008] VSCA 236

In handing down its decision on 10 April 2008, the Victorian Court of Appeal considered two possible causes of action: a tort of privacy and the tort of intentional infliction of harm causing mental distress.

The Court held that the plaintiff, Ms Giller was entitled to equitable compensation for breach of confidence by her former partner (the defendant), who showed a video of their sexual encounters to her friends, family and employer. The case represents a closer step towards recognising a right to privacy in Australia at common law and has ramifications for informants and media outlets who publish material that was originally created in the confidence of a sexual relationship and they may be liable for a breach of an equitable duty of confidence.

While the traditional view (in *Victoria Park Racing v Taylor* [1937] 58 CLR 479) is that there is no tort of invasion of privacy in Australia, more recent cases such as *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 have held that there was no Australian authority that stood in the way of developing a tort of invasion of privacy.

In this case, the defendant filmed himself and the plaintiff engaging in sexual relations, at first using a hidden camera, and later with the plaintiff's knowledge. When the relationship ended, the defendant threatened and attempted to distribute the tapes to the plaintiff's friends, family and employer, claiming that she was immoral, unethical and a prostitute. In separate criminal proceedings, the defendant was convicted of stalking and breaching an intervention order which restrained him from distributing the videotapes.

The plaintiff then brought a civil action against the defendant for assault, interests in property and chattels, and for distributing the videotapes. She pleaded three causes of action related to the tapes, namely: breach of confidence; intentional infliction of emotional distress; and invasion of privacy.

At first instance, Gillard J of the Victoria Supreme Court held that a relationship of confidence exists between sexual partners indulging in a sexual activity in the privacy of their own home and that such relationship is not to be divulged to others without the consent of both parties. However, his Honour held that although the defendant intended to cause harm and the plaintiff had suffered distress, annoyance and embarrassment, there could be no equitable damages for mere distress arising out of the breach of confidence that fell short of a psychiatric injury. He rejected the other two causes of action, saying that English and Australian law had not recognised a cause of action based upon breach of privacy or intentional infliction of emotional distress.

On appeal, the Victorian Court of Appeal relied on *Lenah Game Meats* and extended privacy protections through existing causes of action. It unanimously accepted that there was a relationship of confidence in a sexual relationship. In doing so, Neave J quoted Gleeson CJ in that case who stated:

> If the activities filmed were private, then the law of breach of confidence is adequate to cover the case… There would be an obligation of confidence upon the persons who obtained [film], and upon those into whose possession they came, if they knew, or ought to have known, the manner in which they were obtained.

Further, the Court unanimously overturned the trial judge's decision that equitable damages were not available to Ms Giller and that damages could be awarded for 'mere distress' not amounting to psychiatric injury due to breach of confidence. The Court noted that the case for equitable compensation is clearer where commercial advantage was gained by publication. Compensatory damages may be awarded if the plaintiff had been embarrassed by the exposure of private information, rather than the defendant had profited from the wrongful use of the information. Analogies were drawn with torts of defamation and deceit, where damages for upset and distress may be awarded.

In her judgment, Neave J (with Maxwell P agreeing) adopted a line of English authority, including *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22*,* where model, Naomi Campbell successfully sued in breach of confidence for distress suffered when a newspaper published details and photographs of her attendance at Narcotics Anonymous meetings. Her Honour also cited *Douglas v Hello! Ltd* [2005] EWCA Civ 595*,* where unauthorised wedding photographs of actors, Michael Douglas and Catherine Zeta-Jones' wedding were found to have been published in breach of confidence, resulting in distress.

President Maxwell would have allowed the plaintiff's claim for intentional infliction of harm to succeed as the next logical step in the cause of action recognised in *Wilkinson v Downton* [1897] 2 QB 57, known as the tort of intentional infliction of injury. His Honour stated that there need not be a high threshold for the severity of conduct or distress required for such a tort and cited English authority. He considered that there was no decision in Australia or any comparable jurisdiction which would mean the claim was untenable and noted that it had been 70 years since the High Court had considered the *Wilkinson* tort.

Justice Neave did not make a specific finding but noted that the English courts were moving towards the American position of recognising such a tort and stated that if the Australian courts were to follow suit, the test must be actual and not merely imputed intention to inflict harm. She suggested that such a tort could potentially be applied to a broad range of situations including harassment based on race, gender and sexual orientation, bullying,

practical jokes and the insensitive management of medical patients, employees and consumers. However, given there was other legislative redress, her Honour concluded that it would be better for the legislature to determine how the balance should be struck between providing compensation for victims and recognising the exigencies of life.

Process of conducting an investigation

Joan Royle v Cheetham Salt Limited [2008] AIRC 709 (3 October 2008)

In the recent Australian Industrial Relation Commission (AIRC) decision of *Joan Royle v Cheetham Salt Limited* the employer was found to have grounds to terminate Mrs Royle. However, the AIRC decided that because of unfairness in the investigation procedure, Mrs Royle was still entitled to compensation.

In this case, the AIRC found that an investigation may not provide a 'fair go all round' if: an employee is not given fair warning about the potential consequences of a meeting before being asked whether they want a witness present open ended questions are asked which do not clearly put the allegations to an employee. The AIRC found that there needs to be a balance between clarity of the allegations and the desire to obtain a general account of matters from an employee. The process does not provide the opportunity for the parties to consider or discuss the allegations before responding if the employee is provided with allegations and dismissed in the same meeting.

The AIRC found that if there had been a break between the first meeting and the employer reaching its decision it may have been more balanced. The letter of termination failed to give a complete account of the reasons for termination. In this case the reasons provided to the employee were 'generic' and less detailed than those provided to the Union. The AIRC observed that the employer had the resources to implement 'impeccable' procedures.

ASIC investigations and waiver of privilege

AWB Limited v Australian Securities and Investments Commission [2008] FCA 1877 (23 December 2008)

A recent Federal Court decision considered ASIC's obligations when it receives privileged material from employees or former employees of a company under investigation.

The case was an application under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for a review of ASIC's decision to make information obtained during an investigation available to the Australian Federal Police ('AFP'). At issue was whether ASIC could disclose to the AFP information that might be subject to a claim for privilege by the company. The Court held that ASIC could pass on the privileged information to the AFP.

ASIC was investigating the activities of AWB Ltd ('AWB') and others in connection with wheat sales to Iraq under the United Nations Oil for Food Programme. As part of its investigation, and pursuant to s 19 *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'), ASIC examined a number of current and former AWB employees. Other employees and former employees also voluntarily provided witness statements. It was accepted that the examinees (not being officers or directors) did not have the authority to claim or waive AWB's privilege. AWB was concerned, however, that an examinee might inadvertently or deliberately disclose privileged information to ASIC and AWB's lawyers sought to attend the examinations for the limited purpose of seeking to protect AWB's privilege, but this was not permitted.

The AFP requested that ASIC provide it with copies of the witness statements and examination transcripts. AWB learned of AFP's request not from ASIC, but from some of the examinees. AWB made submissions to ASIC regarding any possible claims of privilege it might have over the statements and transcripts, including suggestions for safeguarding that privilege. In accordance with its power under s 127(4) of the ASIC Act, ASIC disclosed the material to AFP. While certain conditions were attached to the disclosure, none of AWB's suggestions were adopted.

AWB sought a review of ASIC's decision. Central to AWB's claims against ASIC was its argument that, if a person might disclose to ASIC material over which another person claimed privilege, ASIC must give that other person an opportunity to protect that privilege.

Gordon J held that s 127(4) of the ASIC Act permitted ASIC to provide the AFP with information over which AWB might have a claim of privilege, even where ASIC had obtained that information from someone other than AWB. Her Honour noted that the ASIC Act does not abrogate privilege (as established in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543), so ASIC cannot compel a s 19 examinee to disclose information over which the examinee claims privilege. However, the examinee may waive that privilege in the course of the examination by disclosure inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. ASIC has no obligation to prevent this waiver.

The decision leaves companies whose employees or former employees provide information to ASIC in a difficult position, particularly as the company may not be aware that the employee or former employee is doing so. While the employee may not be able to waive privilege on behalf of the company, and ASIC should not seek to compel disclosure of privileged material, such material may still be disclosed and used by ASIC and other parties to whom ASIC gives the information.

A 'solution' suggested by Gordon J was for a company to authorise an examinee or other person providing information to ASIC to assert the company's privilege, though her Honour noted that this could only occur where the third party has prior notice of the examination or other exercise of power by ASIC. One disadvantage with this approach is that authorising a person to assert privilege would also give them the power to waive the company's privilege and the company, not being represented at the examination, would have no control over this.

Court required to inspect document before making decision

Marjorie Heather Osland v Secretary to the Department of Justice [2008] HCA 37 (7 August 2008)

The High Court of Australia held that the Victorian Court of Appeal, in considering whether public interest overrode legal professional privilege attaching to advice that Mrs Osland should not be pardoned for murder, should have inspected the documents in question before making its decision.

In 1996, Mrs Osland was convicted of murdering her husband, Frank Osland in 1991, allegedly after years of violence. She was sentenced to 14 1/2 years' imprisonment, with a non-parole period of 9 1/2 years. The High Court dismissed her appeal against conviction and sentence in 1998. Mrs Osland then submitted a petition for mercy to the Victorian Attorney-General, seeking a pardon from the Governor.

On 6 September 2001, Attorney-General Rob Hulls announced that the Governor had refused the petition. In a press release Mr Hulls noted that legal advice had been received from three senior counsel (including Susan Crennan QC, now a Justice of the High Court,

who did not hear this appeal). Mrs Osland sought access under the Victorian *Freedom of Information Act* (FOI Act) to various pieces of advice related to her request for a pardon. The Department of Justice refused access to the documents, both initially and upon internal review saying the documents were exempt from disclosure by reason of s 30 (relating to internal working documents) and s 32 (relating to legal professional privilege) of the *Freedom of Information Act 1982* (Vic).

That decision was overturned by the President of the Victorian Civil and Administrative Tribunal, Morris J. He found that the documents fell within s 32, but that the 'public interest override' provided by s 50(4) of the FOI Act nevertheless required access be given to all the documents in dispute. The Secretary successfully appealed to the Court of Appeal. In that appeal, Mrs Osland maintained her action only in relation to the advice from the three senior counsel, known as Document 9. The Court of Appeal held that Morris J correctly decided that legal professional privilege had not been waived in respect of Document 9 but erred in dealing with the public interest override. He had inspected the documents but the Court of Appeal did not.

Mrs Osland appealed to the High Court. She argued that Mr Hulls had waived the legal professional privilege of Document 9 because his press release disclosed the substance and gist of the advice and the conclusions reached in it. Mrs Osland argued that the Court of Appeal erred in concluding that there was no basis for applying the public interest override under s 50(4) without having inspected the documents for itself.

The Court, by a 5-1 majority, allowed the appeal. It held that legal professional privilege had not been waived in relation to Document 9 by Mr Hulls' press release, but that the Court of Appeal should have examined the documents in question before deciding that, in the circumstances of the case, there was no basis for the application of s 50(4). It remitted the matter to the Court of Appeal for further hearing to enable it to inspect the documents to consider whether public interest overrode legal professional privilege.

ACMA finds that TCN 9 breached child's privacy

The Australian Communications and Media Authority (ACMA) has found the licensee of TCN, TCN Channel Nine Pty Ltd, breached the *Commercial Television Industry Code of Practice 2004* (the Code) by broadcasting material that invaded the privacy of a child.

ACMA received a complaint in relation to the broadcast of a segment of *A Current Affair* on 30 May 2005 regarding truancy amongst school children. ACMA first received a complaint about the matter in July 2007. The segment featured footage of the complainant's twelve year old son at home and in a skate park, as well as an interview with the complainant and with other children.

ACMA found the licensee breached clause 4.3.5 of the Code as it did not exercise the special care required by clause 4.3.5.1 of the Code before using material relating to a child's personal or private affairs in the broadcast of a report of a sensitive matter concerning the child and that there was no identifiable public interest reason for that material to be broadcast.

In response to the breach finding, the Nine Network (Nine) has undertaken to implement a number of new procedures for similar stories, including the important precedent of obtaining formal written consent where a story involves children. It will also explore further measures to ensure compliance with clause 4.3.5.1 of the Code, such as pixelating or otherwise masking the identity of children. It will provide full training to all relevant news and current affairs staff on the specific findings of ACMA's investigation and the measures required to comply with the provisions of the code relating to the privacy of children.

ACMA noted that Nine's last breach of the privacy provisions of the Code occurred three and a half years ago and did not involve footage of children. ACMA will monitor Nine's future compliance to ensure that the above measures are, firstly, implemented and secondly, result in heightened sensibilities in dealing with matters of privacy.

A copy of ACMA's *investigation report 1882* is available on the ACMA website.

28 November 2008

When charity does not begin at home

Walsh v St Vincent de Paul Society Queensland (No.2) [2008] QADT 32

This case tested one of the exemptions under the *Anti-Discrimination Act 1991* (Qld), being the requirement that under s 25(1) a person may impose genuine occupational requirements for a position, being that a person be of the Catholic faith to carry out the duties of a position.

Ms Walsh, the complainant, had been a voluntary worker with the St Vincent de Paul Society of Queensland lay organisation since 1997 and had been elected President of the Migrants and Refugees Logan Conference for three years in 2004. Ms Walsh had always admitted she was not of the Catholic faith but said she had a Christian belief in Mary, the Holy Trinity and the Holy Catholic Church. Her voluntary duties involved distributing furniture and household items to assist refugees. In early 2004, the Society's Gold Coast diocesan president gave Ms Walsh an ultimatum that she either had to become a Catholic, resign her position or leave the Society. Ms Walsh put in a complaint to the Queensland Anti-Discrimination Commission that she was being discriminated against on the basis of her religious belief.

In its submissions, the Society relied on its constitution, entitled 'Society St Vincent de Paul The Rule' (1991 edition) but there was no specific requirement therein that the President of a Conference be a Catholic. In 2005 The Rule was amended to make it a requirement that such a President be of the Catholic faith.

The Tribunal found that the Society was not a religious body but that it was a Society of lay faithful, closely associated with the Catholic Church, and one of its objectives (perhaps its primary objective) being a spiritual one, involving members bearing witness to Christ by helping others on a personal basis and in doing so endeavouring to bring grace to those they helped and earn grace themselves for their common salvation. The Tribunal was of the view that was not enough to make the Society a religious body within the meaning of the exemption contained in sub-sections 109 (a), (b) or (c).

The Society was ordered to pay Ms Walsh compensation including an amount for depressive disorders brought on by the discrimination she had suffered and costs.