RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Make a date for the AIAL National Administrative Law Conference

The 2013 National Administrative Law Conference 'Administrative Law in an Interconnected World' will be held at the Hotel Realm, 18 National Circuit Barton, Canberra on Thursday 18 and Friday 19 July 2013.

Australian public law is increasingly influenced by developments overseas and in international law. Further, modern communications technologies, and the social changes they have helped to bring about, have had a major impact on the practice of Australian administrative law. Consideration will be given to these and general administrative law issues at the Conference, which will involve a mixture of practical sessions and more reflective thought-provoking presentations.

Reviews of counter-terrorism laws released

On 14 May 2013, the Attorney-General Mark Dreyfus QC tabled two important and detailed reviews of counter-terrorism and national security laws - the Council of Australian Governments (COAG) Review of Counter-Terrorism Laws and the second annual report of the Independent National Security Legislation Monitor.

'These reviews are part of the Gillard Government's commitment to protecting Australians, and ensuring national security and counter-terrorism laws are administered in a fair and balanced way,' Mr Dreyfus said.

The COAG Committee examined and made recommendations about the counter-terrorism laws enacted in the Commonwealth and the States and Territories following the 2005 London bombings.

The Independent National Security Legislation Monitor made separate recommendations about Commonwealth national security legislation, including the definition of a 'terrorist act', control orders, the preventative detention regime, and ASIO's powers.

There is some overlap of the provisions that the Monitor and the COAG Review Committee reviewed.

The Government will respond to the reports following consultation with the States and Territories.

'There is no greater responsibility for a Government than protecting its national security. The Gillard Government takes National Security matters extremely seriously,' Mr Dreyfus said.

'Under Australia's counter-terrorism framework four major terrorist attacks on Australian soil have been disrupted.

'In light of the recent terror attack in Boston, it is clear that it is as important now as it ever was to maintain strong capabilities in the fight against terrorism. Our counter-terrorism framework has held us in good stead so far, but we must remain vigilant.'

The Gillard Government created the Independent National Security Legislation Monitor to review Australia's national security laws and counter-terrorism laws on an ongoing basis and determine whether they remain necessary, effective, proportionate and consistent with our international human rights obligations.

The Reviews are available online at:

http://www.coagctreview.gov.au/Pages/default.aspx

http://www.dpmc.gov.au/inslm/

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Second%20quarter/14May2013-Reviewsofcounterterrorismlawsreleasedtoday.aspx.

Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013

On 21 March 2013, the Commonwealth Attorney-General introduced the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 into Parliament.

The Bill will amend the *Sex Discrimination Act 1984* (Cth) to insert new protections from discrimination on the basis of sexual orientation, gender identity and intersex status, and extend the ground of marital status to marital or relationship status to provide protection from discrimination for same-sex de facto couples.

These amendments support the government's commitment to introduce new protections against discrimination on the basis of sexual orientation and gender identity.

The Senate Legal and Constitutional Affairs Committee's report on the draft Human Rights and Anti-Discrimination Bill recommended a number of policy, definitional and technical amendments which will require deeper consideration in the process of consolidating five bodies of anti-discrimination law into one.

The Bill and Explanatory Memorandum are available on the Parliament of Australia website – www.aph.gov.au.

http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx

ACMA issues formal warning to AAPT

The Australian Communications and Media Authority has formally warned AAPT Limited after it failed to protect the privacy of its customers' personal information as required by the Telecommunications Consumer Protections Code (TCP Code).

The ACMA started an investigation following media reports in July 2012 of a security incident involving AAPT customer information being stolen.

The ACMA found that AAPT did not protect the personal information of some of its small business customers whose billing and related personal information it had collected. The personal information was stored in a server offsite managed by a third party, and was the subject of a hacking incident.

'Consumers need to have confidence that the personal information they give their provider is treated appropriately, and is only accessed by those authorised,' said ACMA Chairman, Chris Chapman. 'They also want to know that their details are stored securely with appropriate access restrictions.'

Telecommunications providers are required to comply with the TCP Code and protect their customers' personal information from unauthorised use or disclosure, ensuring it is dealt with in compliance with all applicable privacy laws. This includes having robust procedures in relation to the storage and security of the personal information in their possession.

Since the incident, AAPT has taken steps to improve its processes and staff awareness of the provider's policies about information management and privacy to comply with the privacy requirements in the TCP Code.

Given the prompt action taken by AAPT to remedy the breach, the ACMA considers a formal warning is appropriate in the circumstances.

http://www.acma.gov.au/WEB/STANDARD/pc=PC_600202

Passage of the 'Excision Bill' undermines human rights

The Australian Human Rights Commission has expressed disappointment that the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 has been passed by the Federal Parliament.

This legislation extends the system of third country processing to all asylum seekers who arrive by boat anywhere in Australia. It effectively prevents those people from having their refugee claims assessed in Australia, unless the Minister for Immigration makes a personal decision to exempt them from transfer to a third country.

'By targeting "unauthorised maritime arrivals", the legislation discriminates against vulnerable people and penalises them because of the way they arrive in Australia,' Australian Human Rights Commission President, Professor Gillian Triggs said. 'This undermines Australia's obligations under the Refugee Convention.'

The Commission has repeatedly raised serious concerns about the fate of asylum seekers who are subjected to Australia's third country processing regime.

'Transferring asylum seekers to third countries may lead to breaches of their human rights, including the right to be free from arbitrary detention and the right of children to have their best interests treated as a primary consideration,' Professor Triggs said.

She said children should only ever be detained as a measure of last resort and for the shortest appropriate period of time.

'We have serious concerns about the ongoing detention of children on Manus Island in difficult conditions,' Professor Triggs said. 'We have recommended that the Australian

Government cease transferring asylum seekers to Manus Island, and that asylum seekers currently on Manus Island be returned to Australia.'

The Commission is also very concerned about the thousands of asylum seekers in immigration detention in Australia who remain subject to third country transfer and whose claims for refugee status are not being assessed.

'In the Commission's view, all asylum seekers who arrive in Australia should have their claims for protection processed under Australian law in a timely and efficient manner,' Professor Triggs said. 'They should be transferred into the Australian community unless they have been individually assessed as posing an unacceptable risk that justifies their detention.'

http://www.humanrights.gov.au/news/media-releases/passage-excision-bill-undermines-human-rights

Adverse ASIO security assessment process

The Australian Human Rights Commission has urged the federal Government to adopt two of the recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs in its report on the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012.

'The Commission strongly supports the Committee's recommendation to extend the right to merits review in the Administrative Appeals Tribunal to refugees who have received an adverse security assessment,' said Commission President, Professor Gillian Triggs.

'We also whole-heartedly support enshrining the role, responsibilities and functions of the Independent Reviewer of Adverse Security Assessments in stand-alone legislation.'

Professor Triggs said the Commission has repeatedly raised concerns about the lack of transparency in the ASIO security assessment process.

'This lack of transparency is particularly troubling because refugees with adverse security assessments can face indefinite detention, potential removal from Australia, and separation from family members who may be released from detention into the community,' she said.

Professor Triggs said the Commission remained concerned about the ongoing indefinite detention of 55 refugees who have received adverse security assessments, noting there are currently seven young children of parents with adverse assessments who have spent prolonged periods of time in detention.

http://www.humanrights.gov.au/news/media-releases/adverse-asio-security-assessment-process

Privacy alerts to notify Australians of data breaches

New laws introduced into the Commonwealth Parliament will require businesses and government agencies to notify people when a data breach affecting their privacy occurs.

'With businesses and government agencies holding more information about Australians than ever before, it is essential that privacy is safeguarded,' Attorney-General Mark Dreyfus QC said.

'The new laws will alert consumers to breaches of their privacy, so that they can change passwords, improve security settings and make other changes as they see fit.'

Data breaches can be the result of hacking, poor security and sometimes carelessness.

'Some data breaches have exposed the personal information of tens of thousands of Australians,' Mr Dreyfus said.

'The laws are good for consumers because they protect privacy, and are good for business because they will help create openness and trust.'

The new laws will also require notification of data breaches to the Office of the Australian Information Commissioner.

'To make sure that the new laws have teeth, the Information Commissioner will be able to direct agencies and business to notify individuals of data breaches,' Mr Dreyfus said.

'Last year the Government made the biggest changes to the *Privacy Act 1988* since it began in 1989.

'The Government is serious about privacy and these new laws demonstrate our continuing commitment.'

The laws will apply to all entities covered by the *Privacy Act 1988* including many businesses, but they will not impose an unreasonable burden on business.

The notification requirements do not apply to all data breaches, only breaches that give rise to a risk of serious harm.

The Commissioner will be able to seek civil penalties if there is serious or repeated non-compliance with the notification requirements.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Second%20quarter/28-May-2013---Privacy-alerts-to-notify-Australians-of-data-breaches.aspx

Recent Decisions

Natural Justice and the self represented car enthusiast

Hoe v Manningham City Council [2013] VSC 195 (22 April 2013)

Mr Alex Hoe is a car enthusiast. For the past five or six years, he has kept 8 to 10 motor vehicles in the open spaces of his home in Lower Templestowe without a permit. Since 2010, in response to complaints, the Manningham City Council has pursued a legal strategy to force Mr Hoe to reduce the number of vehicles kept at his home to a maximum of four.

The Council's most recent step was an application to the Victorian Civil and Administrative Tribunal (VCAT) under s 114 of the *Planning and Environment Act 1987* (*the Act*) for an enforcement order. The application alleged that Mr Hoe's land was being used for the additional use as a store or as a car park within s 2 of the Table of Uses, without the necessary planning permit. On 16 August 2012, Senior Member Wright made an

enforcement order requiring Mr Hoe to reduce the number of motor vehicles kept on his land at any one time to no more than four.

Mr Hoe commenced proceeding in the Victorian Supreme Court. Mr Hoe contended, among other things, that he was denied natural justice by VCAT. According to Mr Hoe, the Council's application to VCAT was based on the premise that his separate use of his land constituted either a store or a car park within s 2 of the Table of Uses, that this was the case that he had prepared to meet at the 2012 VCAT hearing, and he was taken by surprise and was unprepared to meet the alternative case that was introduced by VCAT itself based on an 'innominate use'.

The Council contended that, although the concept of an innominate use was introduced for the first time at the 2012 VCAT hearing, VCAT explained the concept to Mr Hoe at his request, Mr Hoe acknowledged that he understood the concept, and Mr Hoe was not disadvantaged in any way because VCAT did not ultimately make a finding on the characterisation of his additional use of his land. The Council added that VCAT's decision that Mr Hoe required a planning permit irrespective of the characterisation of the additional use was indisputably correct. This was because the additional use did not fall within either s 1 or s 3 of the Table of Uses and therefore it was a s 2 use which required a planning permit.

The Court found the introduction on VCAT's own initiative of the issue of an innominate use at the hearing without any prior notice either by the VCAT or the Council constituted a breach of the hearing rule of natural justice. Notwithstanding the Senior Member's explanation of the meaning of the phrase 'innominate use' and Mr Hoe's statement that he understood that explanation, in the circumstances of the present case, more was required of the Senior Member to comply with the hearing rule of natural justice. Of critical importance was:

(a) Mr Hoe was a self-represented litigant;

(b) having prepared to meet a case that the additional use of his land constituted either a store or a car park, Mr Hoe was confronted at the VCAT hearing with new terminology involving another provision of the Table of Uses;

(c) the phrase 'innominate use' does not appear in the Table of Uses and Mr Hoe did not understand its meaning;

(d) although Mr Hoe stated that he understood the Senior Member's explanation of the phrase 'innominate use', he failed to make any relevant submissions about the phrase. This indicates that Mr Hoe did not understand it. Further, based on Mr Hoe's written and oral submissions on appeal, the Court did not believe that Mr Hoe has ever understood the meaning of the phrase; and

(e) even if the Court was wrong and Mr Hoe did understand the meaning of the phrase 'innominate use', it is abundantly clear from the transcript of the 2012 VCAT hearing that Mr Hoe did not understand the legal implications of the additional use of his land constituting an innominate use rather than a store or a car park.

In these circumstances the Court held that it was incumbent on VCAT to take the following additional steps:

(a) to explain to Mr Hoe the legal implications of VCAT's introduction of the concept of innominate use;

(b) to verify that Mr Hoe understood that explanation; and

(c) to verify that Mr Hoe was in a position to continue with the hearing if the scope of the hearing extended to a consideration of whether the additional use of Mr Hoe's land constituted an innominate use.

By failing to take the additional these steps, VCAT breached the hearing rule of natural justice. However, even if there had been compliance with the hearing rule of natural justice, on the undisputed facts, VCAT would have been bound to conclude that Mr Hoe had contravened the Scheme. This is because the additional use of Mr Hoe's land could only fall within s 2 of the Table of Uses, which meant that he required a planning permit. As Mr Hoe has never applied for a planning permit for the additional use, it would be futile to set aside the VCAT's findings and to remit the proceeding to the VCAT to reconsider this issue, on this basis alone.

A new standard of reasonableness in administrative decision-making?

Minister for Immigration and Citizenship v Li [2013] HCA 18 (8 May 2013)

Ms Li was refused a skilled overseas student residence visa (Class DD) by a delegate of the Minister for Immigration and Citizenship (the Minister) on the basis that she failed to satisfied a time of decision criterion set out in cl 880.230(1) of schedule 2 to the Migration Regulations 1994 (Cth) namely:

> A relevant assessing authority has assessed the skills of the applicant as suitable for his or her nominated skilled occupation, and no evidence has become available that the information given or used as part of the assessment of the applicant's skills is false or misleading in a material particular.

The delegate found that some of the employment history provided by her former migration agent to support the assessment of her relevant skills was not genuine. Ms Li claimed that her former migration agent had provided that information without her knowledge or consent.

On 30 January 2009, Ms Li applied to the Migration Review Tribunal (the Tribunal) for a review of the delegate's decision. She also applied to Trades Recognition Australia (TRA) for a new skills assessment. Upon obtaining that assessment, Ms Li's migration agent informed the Tribunal that it was unfavourable but explained that because fundamental errors had been made in it, Ms Li was confident of succeeding on her application to TRA for a review of the assessment. Ms Li's migration agent requested that the Tribunal delay making a final decision on Ms Li's application until the skills assessment review was finalised and undertook to keep the Tribunal informed of the review's progress.

On 25 January 2010, without waiting for advice of the outcome of the migration agent's representations to TRA, the Tribunal affirmed the delegate's decision. The Tribunal acknowledged the migration agent's request for it to delay its decision but did not explain this decision to proceed to a determination beyond saying:

> The Tribunal considers that the applicant has been provided with enough opportunities to present her case and is not prepared to delay any further and in any event, considers that clause 880.230 necessarily covers each and every relevant assessing authority's assessment.

The TRA issued a favourable skills assessment some three months after the Tribunal affirmed the delegate's decision.

Ms Li successfully applied for review of the Tribunal's decision to the Federal Magistrates Court of Australia. The Full Court of the Federal Court unanimously dismissed the Minister's appeal. The Minister then appealed by special leave to the High Court.

The High Court held that the Tribunal's exercise of the discretion under s 363(1)(b) of the *Migration Act 1958* (Cth) not to adjourn the hearing was unreasonable. While Gageler J concluded that the standard to assess unreasonableness in the present context was *Wednesbury* unreasonableness, French CJ and the plurality adopted a wider view. The plurality held that the law presumes that a statutory discretion is intended to be exercised reasonably – ie according to the rules of reason and justice; and unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

The Tribunal's reasons failed to identify any consideration weighing in favour of the abrupt conclusion it brought to the review and none was suggested by the Minister on the appeal. The failure by the Tribunal to discharge its function under s 363(1)(b) of the *Migration Act* according to law meant that the Tribunal had acted beyond its jurisdiction in affirming the delegate's decision.

Non-refoulement and protection obligations

SZOQQ v the Minister for Immigration and Citizenship and Anor [2013] HCA 12 (10 April 2013)

The appellant, an Indonesian citizen from Irian Jaya, was active in the Free Papua Movement from a young age. In 1973 he was detained and tortured by Indonesian officials and, in 1975, he was seriously injured after being shot by Indonesian soldiers. In June 1985, the appellant was granted temporary entry into Australia and was subsequently granted a protection visa in January 1996. In September 1996, while travelling to Indonesia to visit his father, the appellant was detained and assaulted by members of the Indonesian military. The appellant escaped and returned to Australia.

After his return to Australia, the appellant was arrested on 27 May 2000 on a charge of having assaulted his de facto spouse. She died four days later as a result of the injuries inflicted by the appellant. The appellant subsequently pleaded guilty to a charge of manslaughter and was sentenced to seven years' imprisonment with a non-parole period of two years and six months. In March 2003, the Minister cancelled the appellant's protection visa, in accordance with section 501 of the *Migration Act 1958* (Cth). However, in December 2008, after a number of requests from the appellant, the Minister determined that it was in the public interest to allow the appellant to make a further application for a protection visa.

A delegate of the Minister considered that application, and determined that the appellant had a well-founded fear of political persecution should he be returned to Indonesia. However the delegate went on to find that Article 33(2) of the Convention applied to the appellant, such that he was not a person to whom 'protection obligations' were owed because he constituted a danger to the community, having been convicted of a 'particularly serious crime'.

The delegate's determination was affirmed by the Administrative Appeals Tribunal (AAT), and the appellant unsuccessfully appealed the AAT's decision to the Federal Court and the Full Federal Court.

Before the High Court the appellant contended that the proceedings below miscarried because, contrary to the assumption on which his case proceeded, the 'protection obligations' referred to in s 36(2)(a) of the Act are not limited to the non-refoulement obligation in Article 33(1) of the Convention. The appellant submitted that the decision in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6 (2 March 2005) (*NAGV*) means that he is a person in respect of whom Australia has 'protection obligations' under the Convention.

In *NAGV*, the High Court found that the fact the non-refoulement obligation in Article 33(1) of the Convention would not be breached by returning a refugee to his or her country of nationality in certain circumstances, does not mean that he or she is not a 'refugee' within Article 1 of the Convention, and is not a person to whom Australia owes protection obligations under that Convention.

Following *NAGV*, the High Court unanimously held that the proceedings in the AAT and the courts below miscarried and the appellant was a person to whom Australia has 'protection obligations'. It ordered the AAT to review, according to law, the original decision of the Minister's delegate to refuse the appellant a protection visa.

CCTV surveillance – a breach of privacy?

SF v Shoalhaven City Council [2013] NSWADT 94 (2 May 2013)

The applicant, SF, argued that the Shoalhaven City Council had contravened a number of Information Protection Principles (IPPs) set out in the *Privacy and Personal Information Protection Act 1998* (NSW) (*PIPP Act*) when operating a CCTV surveillance program in Nowra's CBD.

The CCTV cameras recorded images of Nowra's CBD that were retained on a computer hard drive located at Nowra Police Station. The cameras and computer equipment at the Police Station were owned and operated by the Council. Police officers at the Station were also able to view live feed footage captured from the cameras. The system required the duty officers at the Station to enter a generic user name and password at the commencement of their shift in order to log into the 'live feed' monitor.

The Council erected signs indicating the presence of CCTV camera coverage in the area where the cameras were located but not all cameras had signs near them.

SF did not consent to being filmed, and before the Administrative Decisions Tribunal (ADT) contended, among other things, that the cameras were intrusive and coercive.

The ADT found that although the Council had authority to collect personal information using CCTV cameras operating in a public place for crime prevention reasons, the Council had not complied with the IPPs when collecting and storing SF's images. Specifically, the ADT found that the Council had failed to comply with s 10, 11(a) and 12(c) of the *PPIP Act*:

- first, under s 10 of the *PPIP Act*, the Council was required to take such steps as are reasonable to ensure that the subject of the CCTV information collection was made aware of the implications for their privacy of the collection process, and of any protections that apply, before or at the time of collection. The ADT found that the Council failed to do this as the signage alerting the public to the presence of the cameras was insufficient.

- second, the ADT found that the Council had not complied with s 11 of the *PPIP Act*. The Council had not taken reasonable steps in the circumstances (having regard to the purpose for which the information is collected) to ensure that the CCTV information that is collected is relevant to that purpose, is not excessive and is accurate, up to date and complete. The ADT held that the vast majority of the information collected under the Council's CCTV program was poor quality, was collateral information and was not relevant to crime prevention.
- third, the Council had not taken reasonable security safeguards against loss, unauthorised access and misuse of the CCTV information as required by s 12(c) of the *PPIP Act*. The use of a generic password rather than an individual user name and password for each authorised user meant that there was no way of knowing which police officer had used the live monitor at the Nowra Police Station. The ADT held that, at a minimum, compliance with section 12(c) would require appropriate training and monitoring of the use of individual user names and passwords to provide an audit trail of users of the system.

The ADT ordered that the Council refrain from any conduct or action in contravention of the *PPIP Act*; and give SF a written apology for the breaches and advise him of the Council's steps to remove the possibility of similar breaches in the future.

Following this decision, the *Privacy and Personal Information Protection Amendment (CCTV) Regulation 2013* was proclaimed. Under this regulation local councils in NSW are now exempt from some obligations in the *PPIP Act* relating to the collection of personal information by using a CCTV camera installed for the purpose of filming in a public place, and the disclosure to NSW Police of that information by way of live transmission.

When is something public under a statutory requirement to make it public?

Lester v NSW Minister for Planning and Ashton Coal Operations Pty Ltd [2013] NSWCA 45

Ashton Coal Operations Pty Ltd (Ashton) runs a coal mining project in the Upper Hunter Valley under a development consent granted by the NSW Minister for Planning in 2002. On 28 February 2011, Ashton requested the Minister, pursuant to s 75W of the *Environmental Planning and Assessment Act 1979* (NSW) (the *Act*), to modify the approval. Relevantly, s 75W provides that a request for the Minister's approval is to be lodged with the Director-General of the Department of Planning.

Ashton's request was accompanied by an environmental assessment which comprised a report and eight appendices.

The Department of Planning posted Ashton's request on its website. The Department also made the environmental assessment available for viewing on its website. Separate links were provided to appendices 1 to 4 and to appendices 5 to 8. However, if a person accessing the Department's website clicked on the link to appendices 1 to 4, the person was provided electronic access to appendices 5 to 8, instead of appendices 1 to 4. The link to appendices 5 to 8 did provide electronic access to appendices 5 to 8. On the same page of the Department's website was a printed message: 'For further information, please contact the planner, Nicholas Hall, via email at Nicholas.Hall@planning.nsw.gov.au'.

Mr Lester appealed against the decision of the Land and Environment Court of NSW dismissing his application for judicial review of the Minister's modification of an approval for a coal mining project in the Upper Hunter Valley. Mr Lester contended, among other things, that the primary judge erred by dismissing his claim that the Director-General failed to

comply with s 75X(2) of the *Act* by failing to make public the environmental assessment which accompanied the request for modification. Section 75X(2)(f), relevantly, requires the Director-General, to make 'requests for modifications of approvals', and any modifications made by the Minister, publicly available.

The Court of Appeal found, among other things, that the environmental assessment which accompanied Ashton's request did not fall within s 75X(2). The Court of Appeal held that the expression 'requests for modifications of approvals' in s 75X(2)(f) must be interpreted not only in its own terms but also in the context of s 75X(2), the process of requesting and approving modifications of approvals in s 75W, and more generally the legislative scheme in Part 3A of the Act, for making applications, undertaking environmental assessment, considering applications and environmental assessments and approving applications. The text and context establishes that the expression 'requests for modifications of approvals' refers only to the request under s 75W(2) lodged with the Director-General and not to any documents (including an environmental assessment) that might accompany such a request.

Consequently, the Director-General was not required under s 75X(2) to make the environmental assessment publicly available. The fact that the Director-General endeavoured to do so, but was not successful in relation to appendices 1-4, cannot have the legal consequence of causing a non-compliance with s 75X(2) or invalidating the Minister's subsequent modification under s 75W(4).

The Court of Appeal also opined that the requirement in s 75X(2) that documents 'are to be made public available' requires that state of affairs (the public availability of the documents) to exist presently, and it is not sufficient to establish the means by which that state of affairs could exist in the future. If the means by which a document is to be made publicly available is by posting the document on the Department's website, the document must be available for viewing by a member of the public when the person accesses the website. If a document is not able to be viewed on the Department's website when so accessed, it is not 'made publicly available' by identifying action a member of the public might take in order to be able to view the document in the future. That action, if taken, might make the document available in the future, but it does not alter the fact that the document was not publicly available at the time of accessing the Department's website.

Furthermore, the Court held that the making available of a document only to, and on request of, an individual member of the public is not making the document 'publicly available' to the public at large.