RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

President of the Australian Human Rights Commission reports on JA v Commonwealth (Department of Defence)

A young sailor (Mr JA) in the Australian Navy was arrested for being absent without leave and was detained for seven days pending a hearing by a service tribunal.

The President of the Australian Human Rights Commission found that Mr JA's detention was unlawful because it was not in accordance with the procedure established by the *Defence Force Discipline Act 1982* (Cth) (the *DFDA*).

In particular, s 95(2) of the *DFDA* required that when a person has been arrested for an offence under the *DFDA* and delivered into the custody of a commanding officer, the commanding officer or an officer authorized in writing by the commanding officer shall either charge the person with a service offence or release the person from custody within 24 hours.

Mr JA was not properly charged with a service offence because he was not charged by the commanding officer or an officer authorized in writing by the commanding officer. His continued detention was unlawful, and therefore in breach of Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR).

The President also found that Mr JA's detention was arbitrary, contrary to Article 9(1) of the ICCPR, because it was not necessary and not proportionate to Defence's legitimate aim of applying military discipline. A day and a half after his initial detention, Mr JA was taken to Frankston Hospital and detained there. From that time no action was taken to progress the hearing of the charge against him, which was the reason for his detention. His detention from that date until he was released was arbitrary.

Mr JA made a number of other complaints, which were not substantiated. The President was not satisfied that he had not been informed of the reasons for his arrest, or that the conditions of his detention amounted to cruel, inhuman or degrading treatment.

The Commission recommended that Defence pay Mr JA compensation in the amount of $15,000 and provide him with an apology.

In response to the Commission's findings, Defence confirmed that it had amended its procedures to ensure that members of the Defence Force who are charged in accordance with s 95(2) of the *DFDA* are charged by a proper officer authorised in writing. It has also made amendments to the Australian Defence Forces Discipline Law Manual.

Defence also confirmed that it had made an offer of settlement to Mr JA.

A copy of this report: JA v Commonwealth (Department of Defence) is available online at http://www.humanrights.gov.au/publications/ja-v-commonwealth-department-...

https://www.humanrights.gov.au/news/media-releases/president-reports-ja-v-commonwealth-department-defence

President of the Australian Human Rights Commission President reports on Swamy v Percival

A man employed at a lead smelter in Alexandria, Sydney was subjected to discrimination in employment because of his religious beliefs, the Australian Human Rights Commission has found.

Mr Ganesh Swamy, a Hindu, complained that he had been harassed by his team leader Mr Brad Percival because of his religious beliefs.

Mr Swamy and his employer participated in a conciliation conference but the matter was ultimately unable to be settled by conciliation. Unlike other kinds of discrimination, there is no statutory right for a person to bring an action in a Commonwealth court alleging discrimination on the basis of religion. Where matters of this nature cannot be conciliated, it is necessary for the Commission to conduct an inquiry. During the course of the inquiry, the Commission found that the employer had not engaged in discrimination on the basis of religion. The findings in this report are limited to findings in relation to Mr Percival.

The Commission recommended that Mr Percival pay compensation in the amount of $2,000.

A copy of this report: Swamy v Percival is available online at http://www.humanrights.gov.au/publications/swamy-v-percival.

https://www.humanrights.gov.au/news/media-releases/president-reports-swamy-v-percival

Child Abuse Royal Commission granted a two year extension

The Commonwealth Government has extended the Royal Commission into Institutional Responses to Child Sexual Abuse for a further two years.

The Governor-General will be asked to amend the current Letters Patent to enable the Royal Commission to deliver its final report by 15 December 2017.

The Attorney-General met the Chair of the Royal Commission, the Hon Justice Peter McClellan AM, on two occasions since the beginning of this year, to discuss the future program and additional needs of the Commission. On both of those occasions, Justice McClellan was assured, given the importance of the work in which it was embarked, the Government would look favourably upon any request for an extension of the Royal Commission reporting date.

Justice McClellan has assured the Government that this extension will be sufficient for the Commission to complete its work.

The extension will give the Commission the capacity to hear more stories from victims, conduct more public hearings and issue additional interim reports.

Institutions responsible for the care of children will be able to continue to learn from the ongoing work of the inquiry and be better able to prevent child sexual abuse from happening.

The Commission will continue to consult with experts, stakeholders and the community so that any recommendations made by the Commission are practical and respond to contemporary issues in child protection.

The Government will provide additional funding of up to $125 million as part of the extension for the Commission and associated costs.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/ThirdQuarter/2September2014-ChildAbuseRoyalCommissionGrantedATwoYearExtension.asp

New ACT privacy laws introduce Territory Privacy Principles

On 1 September 2014, the ACT introduced a new set of Territory Privacy Principles (TPPs). The new *Information Privacy Act 2014* (ACT) gives the Office of the Australian Information Commissioner (OAIC) responsibility for investigating, resolving complaints, providing advice and conducting privacy assessments of ACT public sector agencies.

'The OAIC welcomes the introduction of these new laws and principles that promote responsible and transparent handling of personal information by public sector agencies and contracted service providers,' Australian Privacy Commissioner Timothy Pilgrim said.

Mr Pilgrim said that the first priority for ACT public sector agencies will be to make sure their privacy policies are up to date.

'We will work with ACT public sector agencies to assist them to implement the new principles across government. We will be expecting agencies to take steps to update their privacy policies to ensure that they meet the requirements of the TPPs.'

ACT public sector agencies were previously covered by the *Privacy Act 1988* (Cth), but the ACT government chose to introduce the ACT-specific TPPs when federal privacy laws changed in March 2014.

The TPPs are very similar to the Australian Privacy Principles (APPs), but have been written to apply specifically to ACT public sector agencies. The TPPs cover areas such as:

- open and transparent management of personal information, including privacy policies
- collection, and notification of collection, of personal information
- use and disclosure of personal information
- access to and correction of personal information.

The Privacy Commissioner also said that the OAIC is committed to ensuring that ACT residents have all the information they need in order to understand their rights.

'If someone has a privacy concern, they can call our Enquiries line on 1300 363 992, and we will be happy to answer questions or help them with their complaint.'

The OAIC website gives information about the legislation (including the OAIC's role) for individuals, and about how to make a privacy complaint against an ACT public sector agency.

In preparation for the changes, the OAIC has also produced Privacy agency resource 3: Information Privacy Act 2014 — Checklist for ACT agencies, to help agencies assess their compliance with the new principles, and Privacy fact sheet 42: Australian Capital Territory Privacy Principles, which provides the principles in full.

http://www.oaic.gov.au/news-and-events/media-releases/privacy-media-releases/new-act-privacy-laws-introduce-territory-privacy-principles

Report into Serious Invasions of Privacy in the Digital Era released

The Australian Law Reform Commission's Final Report, *Serious Invasions of Privacy in the Digital Era* (Report 123, 2014) was tabled in Parliament on 3 September 2014 and is now publicly available.

The Terms of Reference for this Inquiry required the ALRC to design a tort to deal with serious invasions of privacy in the digital era. In this Report, the ALRC provides the detailed legal design of such a tort located in a new Commonwealth Act and makes sixteen other recommendations that would strengthen people's privacy in the digital environment.

ALRC Commissioner for the Inquiry, Professor Barbara McDonald, said 'The ALRC has designed a remedy for invasions of privacy that are serious, committed intentionally or recklessly and that cannot be justified as being in the public interest—for example, posting sexually explicit photos of someone on the internet without their permission or making public someone's medical records. The recommendations in the Report also recognise that while privacy is a fundamental right that is worthy of legal protection, this right must also be balanced with other rights, such as the right to freedom of expression and the freedom of the media to investigate and report on matters of public importance.

The ALRC has closely considered submissions from industry and the community, as well as common law principles and developments in other countries. The recommendations, taken together, would better protect people's privacy in the digital environment, while protecting and fostering freedom of speech and other public interests.'

The Report also recommends that a new Commonwealth surveillance law be enacted to replace existing state and territory laws, to ensure consistency of surveillance laws throughout Australia, and a number of other reforms to supplement the statutory cause of action.

During the course of the Inquiry, the ALRC produced two consultation papers, received 134 submissions and undertook 69 face to face consultations with media, telecommunications social media and marketing companies amongst other organisations, many expert academics, specialist legal practitioners, and judges, public interest groups and government agencies. Two legal roundtables in Sydney and London were also conducted.

ALRC President, Professor Rosalind Croucher thanked Professor McDonald for her work on this complex Inquiry. 'The ALRC had a very tight timeframe of ten months to complete this Report, and the quality of the work produced is a great credit to Commissioner McDonald and her team. I want to take this opportunity to thank all those who contributed their time and expertise to this Inquiry. Wide reaching consultation and engagement is a benchmark of the ALRC's work and contributes in a fundamental way to the quality of our recommendations. I consider that this Report will provide a significant contribution to the understanding of the law in relation to privacy and its sophisticated analysis will play a distinct role in the development of the common law and statutory protections of privacy.'

http://www.alrc.gov.au/news-media/alrc-releases-report-serious-invasions-privacy-digital-era

Recent Cases in Administrative Law

A failure to comply with the logical framework

FTZK v Minister for Immigration and Citizenship [2014] HCA 26 (27 June 2014)

On 8 December 1998, the appellant, a citizen of the People's Republic of China (the PRC), applied for a protection visa under s 36 of the *Migration Act 1958* (Cth), claiming to be a person in respect of whom Australia owed protection obligations under the Refugees Convention (the Convention).

The appellant claimed to have left the PRC because he had been persecuted on the ground of his religious beliefs. After the appellant left the PRC, he was implicated by two alleged co-accused in the crimes of kidnapping and murder of a 15-year-old school boy.

In refusing the appellant a protection visa, the Minister found, that notwithstanding that the appellant was a refugee, he was excluded from protection by Article 1F(b) on account of his alleged involvement in the crimes of kidnapping and murder in the PRC.

Article 1F(b) relevantly provides that the Convention shall not apply to any person with respect to whom there are serious reasons for considering that he or she has committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee.

The appellant then applied to the Administrative Appeals Tribunal (AAT) for a review of the Minister's decision. The AAT held that it was not in dispute that the crimes alleged against the appellant were serious non-political crimes for the purposes of Article 1F(b). Further, the AAT was satisfied, on the basis of the timing of the appellant's departure from the PRC, the lies he told to obtain a business visa and to obtain protection under the Convention, and the appellant's conduct in escaping from detention and living unlawfully in Australia, that there were serious reasons for considering that the appellant had committed serious non-political crimes.

The appellant then appealed to the Full Federal Court, which dismissed his appeal. By grant of special leave, the appellant then appealed to the High Court.

The High Court unanimously held that the reasons of the AAT revealed jurisdictional error.

The High Court held that a correct application of Article 1F(b) to the facts required the AAT to consider whether the evidence was probative of 'serious reasons for considering' that the appellant had committed one or more of these crimes. The AAT took into account (and treated as determinative) the timing of the appellant's departure from the PRC, the lies he told to obtain a visa and to obtain protection under the Convention, and the appellant's conduct in escaping from detention and living unlawfully in Australia.

However, the High Court found that once it was recognised that the appellant had a well-founded fear of persecution for a Convention reason, an equally probable explanation for all those factors was his desire to escape China and live in Australia. None of these factors was logically probative of the appellant's commission of the alleged crimes.

Therefore, the AAT's process of reasoning did not comply with the logical framework imposed on its decision making by Article 1F(b). Accordingly, the AAT misconstrued the test it had to apply.

The High Court quashed the AAT's decision and ordered that a differently constituted AAT review the Minister's decision according to law.

The common law rules of evidence and the Administrative Appeal Tribunal

Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93 (25 July 2014)

On 3 January 2012, a delegate of the Civil Aviation Safety Authority (the Authority) cancelled the appellant's helicopter licence after he was involved in a helicopter crash in the Northern Territory.

The appellant sought merits review of the Authority's decision in the Administrative Appeals Tribunal (the AAT). The AAT affirmed that decision. The appellant then sought judicial review by the Federal Court. This was dismissed and the appellant then appealed to the Full Federal Court.

Before the Full Court, the appellant contended, among other things, that the AAT committed a jurisdiction error by failing to apply the standard of proof set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (the *Briginshaw* rule) in making grave or serious findings. The appellant argued that the requirement for the AAT to apply the *Briginshaw* rule was not a rule of evidence but rather a principle of law that the Tribunal was bound to apply.

The Full Court held that the rule in *Briginshaw* is a common rule of evidence derived from curial proceedings and s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* provides that the AAT is not bound by it or the other common law rules of evidence. What procedures the AAT decides to follow in any particular case, and whether the AAT decides to either apply or inform itself by reference to the common law rules of evidence, is a matter which has been left by the legislature to the AAT itself to determine. The manner in which the AAT proceeds cannot be pre-determined by any generally expressed 'principle of law', which is to be applied to some indeterminate fact findings which may be characterized as 'grave' or 'serious'.

While cases maybe found where the AAT has applied the principle in *Briginshaw*, these cases are nothing more than the AAT proceedings in a manner which applies the common law rules of evidence. Section 33(1)(c) simply provides that the AAT is not 'bound' to apply these rules; it is not a prohibition upon the AAT applying those rules if it sees fit.

Standing and improper purpose – the rival property developer and the Minister

Boerkamp v The Hon Matthew Guy [2014] VSC 167 (14 April 2014)

The Eastern Golf Club is moving from Doncaster to the Yarra Valley. On 19 October 2012, the plaintiff, a successful property developer and an environmentalist, applied to the Victorian Civil and Administrative Tribunal for a review of the Yarra Ranges Shire Council decision to grant a permit to the Club to build a new a golf course in the Yarra Valley. This was the second tribunal proceeding, after the plaintiff and a local environmental group had successfully appealed the Local Council's decision to approve the development.

However, before the second tribunal proceeding could be heard, the defendant, the Victorian Minister for Planning, approved the golf course (Amendment C130) under his powers in the *Planning and Environmental Act 1987* (the *PE Act*).

The plaintiff commenced proceedings in the Victorian Supreme Court challenging the Minister's decision to approve Amendment C130.

Standing

In his defence, the Minister first contended that the plaintiff did not have standing to seek or obtain the relief because he did not have any special interest in the validity of the Amendment C130 (*ACF v The Commonwealth* (the *ACF* case) (1980) 146 CLR 493). In the *ACF* case, the High Court held that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty. A private citizen who has no special interest is incapable of bringing proceedings for that purpose, unless he is permitted by statute to do so.

The plaintiff contended that the test in the *ACF* case is not the test for determining standing under the *PE Act*. The plaintiff contended that, among other things, he had a special interest in the validity of Amendment C130 by reason of (a) being a party to the second tribunal proceeding; (b) his interest in the environment of the Yarra Valley (including using it for recreational purposes); and (c) the impact that run off resulting from Amendment C130 may have on his commercial interests in the Yarra Valley.

The Court found that under the *PE Act* the threshold for standing is far easier to satisfy than the standing requirements described in the *ACF* case. The *PE Act* provides for members of a 'community' who are merely interested in or concerned with a proposal to participate in the planning process in appropriate circumstances. This means that persons who might otherwise be described as having a 'mere' intellectual or emotional concern may participate in the permit process and object to a permit, where their concern is genuine, demonstrable and based on proper planning considerations.

The Court held, in this case, having commenced the second tribunal proceedings and seen it rendered futile by the Minister's decision, that the plaintiff had a greater interest than an ordinary member of the community. The Court also found that his commercial and environmental interests in the Yarra Valley also meant he had standing.

Abuse of process

The Minister also contended that the second proceeding was an abuse of process because the plaintiff's true reason for bringing it was to increase his prospects of acquiring the Doncaster site, which was to be sold to a competitor, by delaying the move to the Yarra Valley and consequently, the settlement on the Doncaster site. It was alleged that, by lodging the objection, the plaintiff was trying to bring about a situation in which he might be able to take the 'prize' of the Doncaster land, in effect, by holding the Club to ransom by using the legal system to create crippling delays.

While the Court found that the plaintiff's dealings with the Club over the sale of the Doncaster site were troubling (including evidence of him offering to withdraw his objection to the Yarra Valley permit if the Doncaster land was sold to him), the evidence before the Court was insufficient to persuade it that the second tribunal proceeding was brought for a collateral and improper purpose.

Using an irrelevant consideration for an impermissible purpose

Duffy v Da Rin [2014] NSWCA 270 (15 August 2014)

On 15 September 2012 the appellant, Kevin Duffy, was elected as a councillor on Orange City Council. On 7 December 2012 the respondent, John Da Rin, applied to the Administrative Decisions Tribunal (the Tribunal) for an order dismissing the appellant from his office. The respondent alleged that the appellant was not qualified to be a councillor

because he was not entitled to be enrolled as an elector for Orange City Council (s 274 of the *Local Government Act 1993*). To be enrolled as an elector under the *Local Government Act*, he was required to be 'a resident of the ward' in which he stood for election (s 266(1)(a)) and a person is resident if 'the person's place of living' was in the ward (s 269(1)).

Until late April 2012 the appellant's residence and place of living was a property in Borenore, outside the electoral boundary. From late April, the appellant stayed in a spare room in his son's house in Orange. On 17 July 2012, the appellant notified the Australian Electoral Commission of his change of address. The closing date for the election was 30 July 2012.

The Tribunal found that the appellant had not established 'his place of living' in Orange and therefore was not 'resident' for at least one month before enrolling, as required to be eligible for election under the *Parliamentary Electorates and Elections Act 1912* (NSW) (the *State Elections Act*). The Tribunal ordered that the appellant be dismissed as an Orange City Councillor.

The appellant sought judicial review of the Tribunal's decision in the NSW Court of Appeal. The appellant contended, among other things, that the Tribunal had committed a jurisdictional error by (1) taking into account irrelevant considerations in deciding that his son's house was not his place of residence; and (2) by determining his 'place of living' by reference to the appellant's continuing connection with his previous residence.

The Court found that the impugned considerations taken into account by the Tribunal (including the appellant's motivation for moving to Orange and the degree to which he had severed connection with his former place of living) were not irrelevant as the appellant himself expressly relied on these in his evidence.

The Court explained that the phrase 'irrelevant considerations' is dependent on a construction of the relevant statute in order to identify matters, which the decision-maker is prohibited from taking into account: *Minister for Aboriginal Affairs v Peko Wallsend Ltd* [1986] HCA 4 (*Peko*). The conventional view is that if matters to which regard is had do not fall within the category of those prohibited by statute, they will be categorised as either mandatory or permissible considerations, and a complaint as to the weight accorded to them will not invoke any possible error of law: see M Aronson and M Groves, Judicial Review of Administrative Action (5th ed, Law Book Co, 2013) at [5.30] and [5.140].

However, the Court held that this statement is primarily designed to emphasize the importance of judicial restraint in reviewing statutory decision-making, whereas Mason J in *Peko* recognised the need for flexibility:

> It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory.... I say 'generally' because both principle and authority indicate that in some circumstances a court may set aside an administrative decision, which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is 'manifestly unreasonable'.

In the Court's view, this analysis is incomplete in that it did not address the weight given to permissible considerations and any possible flexibility with respect to impermissible considerations. 'Considerations' have different qualities, which are not recognised by a simple classification as permissible, mandatory or prohibited. Two considerations may each be relevant but may pull in opposite directions. A particular consideration may be relevant to one aspect of the reasoning process but not to other aspects. Thus a consideration, which

is only relevant for a specific purpose or in respect of a particular issue, may be impermissibly used for a different purpose or with respect to another issue. Such misuse could constitute an error of law.

The Court found that in this case, the error of the Tribunal was to accord particular significance to connections with the appellant's Borenore property as diminishing the significance of physical occupation of premises in Orange.

Under s 269 of the *Local Government Act*, a person can have a place of living while 'temporarily residing' away from what might be described as his or her permanent home. No doubt some degree of continuity or permanence is required, but any assessment of that element should have been guided by the one-month residence requirement in the *State Electoral Act*. It may be that short periods of absence during that relatively short period would be significant, but the mere fact that the place of living was not intended to be maintained permanently or indefinitely would not by itself preclude that place being a 'place of living' for the purposes of the *Local Government Act*.