RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Data Retention Bill passed by Parliament - joint media release by the Attorney General and Minister for Communications

On 26 March 2015, the Commonwealth Parliament passed Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (the Bill).

'By passing this Bill, the Parliament has ensured that our security and law enforcement agencies will continue to have access to the information they need to do their jobs. No responsible government can sit by while those who protect us lose access to vital information, particularly in the current high threat environment.

At the same time, the Bill contains safeguards to protect our cherished rights and liberties, including through the establishment of additional oversight mechanisms covering the security and law enforcement agencies.

Metadata is the basic building block in nearly every counter-terrorism, counter-espionage and organised crime investigation. It is also essential for child abuse and child pornography offences that are frequently carried out online.

A victim's right to justice, and agencies' ability to solve crimes, shouldn't depend on which service provider is used by the victims and perpetrators.

The Bill ensures that telecommunications providers will be required to retain a defined set of data for a period of two years. This will substantially improve the availability of data should it be necessary for a particular investigation.

The Parliamentary Joint Committee on Intelligence and Security (PJCIS) examined the Bill at length and concluded that the Bill is "a necessary, effective and proportionate response to the serious threat to national security and public safety caused by the inconsistent and degrading availability of telecommunications data."

We also recognise that the right to privacy and the principle of freedom of the press are fundamental to our democracy. For these reasons, the Bill contains new and strengthened safeguards. These include the provision of new oversight powers to the Commonwealth Ombudsman; a reduction in the number of agencies accessing metadata from over 80 to 21; and specific protections for journalists and their sources.

No comparable nations will have greater pre-authorisation approval and post-authorisation oversight requirements for journalists.

The Government acknowledges the important work of two PJCIS inquiries and in particular the efforts of the Chairman and Deputy Chairman of the Committee, Mr Dan Tehan MP and the Hon Anthony Byrne MP. The Government would also like to acknowledge the telecommunications industry, media and other stakeholders who have been part of the ongoing consultation undertaken to achieve this crucial outcome for national security and law enforcement.

This represents the fourth tranche of national security legislation the Abbott Government has successfully implemented since October 2014. Through these laws, the Government has addressed pressing gaps and needs in Australia's national security and law enforcement framework.

We will continue to do everything we can to ensure that our agencies have the resources and powers they need to keep our community safe.'

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/26-March-2015-Data-Retention-Bill-passed-by-Parliament.aspx

Continuation of the Office of the Independent Reviewer of Adverse Security Assessments

On 11 December 2014, the Attorney General announced that the Hon Margaret Stone will continue in the role of the Independent Reviewer of Adverse Security Assessments for a further two-year term.

Ms Stone has served in this role since December 2012. She has performed a valuable function in conducting independent reviews of Australian Security Intelligence Organisation (ASIO) adverse security assessments of people who have been found to be owed protection under international law but are being held in immigration detention in Australia because of an adverse security assessment.

The Government thanks Ms Stone for her willingness to continue in this role, which provides a valuable advisory review mechanism. This is an important safeguard in addition to internal reviews of these cases conducted by ASIO.

To date, the majority of reviews of the Independent Reviewer have confirmed ASIO's initial assessment, highlighting the integrity of the assessment and internal review process. This is a testament to the confidence that successive Governments have rightly placed in the professional judgment of ASIO. In the small number of cases where the Independent Reviewer has recommended a different outcome to the initial assessment, mainly where additional information had come to hand, ASIO agreed with the recommendation and, in several cases, had already reached the same conclusion on the basis of its internal review.

The (then) Minister for Immigration and Border Protection, the Hon Scott Morrison MP, said 'the reviewer has played a helpful and important role in addressing these cases and I look forward to that continuing as the Government processes the legacy caseload of 30,000 people Labor left behind as a result of their border failure and failure to act on processing.'

The Government looks forward to continuing to work with the Independent Reviewer.

Further information about the Independent Reviewer of Adverse Security Assessments, including terms of reference is available at:

http://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/IndependentReviewofAdverseSecurityAssessments.aspx

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/11December2014-ContinuationoftheOfficeoftheIndependentReviewerofAdverseSecurityAssessments.aspx

Super tribunal marks successful first year

(Former) NSW Attorney General Brad Hazzard welcomed strong figures from the state's super tribunal showing that more than 70 per cent of matters in 2014 were resolved at, or prior to, the first hearing.

'It is good news for tens of thousands of consumers and small businesses that disputes in NSW are being resolved speedily and at low cost,' Mr Hazzard said.

'The NSW Civil and Administrative Tribunal (NCAT), which was established on 1 January last year to consolidate the work of 22 former tribunals, has conducted more than 92,000 hearings.

'From neighbours at war over a dividing fence to not getting exactly what you ordered for your mates buck's night, NCAT deals with a diverse range of cases across the state,' Mr Hazzard said.

Along with consumer complaints and tenancy disputes NCAT also assists with guardianship applications for people who are unable to make decisions because of a disability.

Mr Hazzard said NCAT was making digital access easy with two thirds of all applications relating to commercial and consumer disputes being lodged online.

'The NCAT website has been very popular with more than 2.2 million page views last year. I'm pleased to say the website has now been given a fresh new look and feel and been incorporated into the Department of Justice suite of sites making it easier for customers to access services and information in one central place.

'NCAT is a one stop shop for specialist tribunal services in NSW with hearings being offered at 78 locations around the state.

'The NSW Liberal & Nationals Government has a strong track record in delivering quality services to the community and the super tribunal is helping resolve disputes quickly and in a cost effective way,' Mr Hazzard said.

http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2015/Super-Tribunal-.aspx

Review to strengthen Victoria's Charter of Human Rights

The Andrews Labor Government will review Victoria's Charter of Human Rights and Responsibilities to ensure it is robust and effective.

Attorney-General Martin Pakula has appointed Michael Brett Young – CEO of the Law Institute of Victoria (LIV) until 2014 and previously managing partner at Maurice Blackburn – to lead the review.

Introduced by the former Labor Government in 2006, the Charter contains 20 fundamental human rights based on those set out in the International Covenant on Civil and Political Rights.

These include freedom of expression, privacy, liberty, equality before the law, the right to vote and rights in criminal proceedings.

The Charter requires the Victorian Government, public servants, local councils, Victoria Police and other public authorities to act compatibly with these human rights and to consider them when developing policies, drafting legislation and delivering services.

During the last term of government, the Coalition significantly reduced the emphasis placed on the Charter and made cuts to Charter education and training for government departments.

This review is the first step in delivering the Labor Government's election commitment to refresh the Charter and resume public education to embed the values of freedom, respect, equality and dignity in society.

The report – which will include consultation with key stakeholders and submissions from the public – will be delivered to the Government by 1 September 2015, before being tabled in Parliament by 1 October 2015.

Further information on consultations and submissions will be made available shortly. For more information about the Charter, visit:

http://www.humanrightscommission.vic.gov.au/index.php/the-charter

http://www.premier.vic.gov.au/review-to-strengthen-victorias-charter-of-human-rights

SACAT now open

South Australia's central body for dispute resolution opened its doors on 30 March 2015.

Attorney General John Rau said the South Australia Civil and Administrative Tribunal (SACAT) is a huge step forward for the justice system and the South Australian community and is the result of years of work.

'I want our justice system to be fair and accessible to everyone, SACAT will be a one stop shop for most administrative disputes and tribunals.

'The first phase of legislation passed last year moved the Residential Tenancies Tribunal, Guardianship Board and Housing Appeal Panel into the SACAT.

'SACAT will also hear land valuation matters that were previously dealt with by the Supreme Court. This will streamline the process and will offer real benefits for the public and the justice system.'

Mr Rau said the Tribunal's work is divided into three streams that reflect the broad categories of work: community matters, housing and civil matters, and administrative and disciplinary matters.

An experienced Executive Senior Member has been appointed to lead each of these streams while expert members remain on hand to assist the Tribunal with matters that require a specific area of expertise.

'These are the first of many jurisdictions that will move to SACAT over the coming years,' Mr Rau said.

'SACAT will take on the functions administered by a range of bodies and authorities.

'For example, disputes of the return of a bond to a tenant or a family dispute about the best way to make decisions for a parent with mental incapacity will be heard by SACAT.

'It is expected that around 120 Acts will move over to SACAT over time and the Tribunal will continue to adapt as its role expands.'

SACAT President, Justice Greg Parker, said the Tribunal will place great emphasis on accessibility and efficiency for the public.

'SACAT has been provided with the tools to be as flexible as possible so as to handle matters in the most appropriate way, which will be determined on a case-by-case basis,' Justice Parker said.

'Alternative dispute resolution can be used to assist parties to reach an agreement without the need for a hearing. Or, where necessary, SACAT has the power to obtain evidence and manage proceedings.

'A single online form replaces multiple paper applications and there will be a one off application fee of $69. These will replace the diversity of application forms and fees that were previously in place.

'Cases can also be heard in regional areas and via video conferencing or telephone and Tribunal members will continue to attend hospitals for hearings where necessary.

'There is also a public kiosk based at SACAT headquarters at 100 Pirie Street where online applications can be made with the advice and assistance of trained community access officers.'

For more information about SACAT or to lodge an application visit www.sacat.sa.gov.au.

www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives Announcements and News/March 2015 - media releases/20150330-MR-AG-sacatopen.pdf

Privacy law reform report card

12 March 2015 marks the first anniversary of the most significant changes to Australian privacy laws in over 25 years. On 12 March 2014, changes to the *Privacy Act 1988* commenced.

The Office of the Australian Information Commissioner's (OAIC) focus over the past year has been on developing guidance and working with organisations and agencies to ensure compliance.

'Over the last year we have focused on working with business, government agencies and the wider community to ensure that everyone has the tools and information they need to understand and implement the changes,' said the Australian Privacy Commissioner, Mr Timothy Pilgrim.

'I've been particularly pleased with how organisations and agencies have responded positively to the challenge of implementation. This is recognition that good privacy practices are good for business, particularly in building customer trust.'

The changes included the introduction of a new set of unified privacy principles, the Australian Privacy Principles (APPs), changes to the credit reporting provisions and new enforcement powers for the Commissioner.

Over the past 12 months, the OAIC has:

- received 4,016 privacy complaints (a 43% increase on the previous 12 months);
- received 14,064 privacy enquiries;
- received 104 voluntary data breach notifications; and
- commenced 13 privacy assessments.

Since 12 March 2014, the OAIC has encouraged organisations and agencies to focus on being open and transparent with customers about how their personal information is managed, a new requirement in the APPs. The Commissioner has commenced a targeted assessment program of a selection of online privacy policies, with more assessments focusing on APP compliance to come in 2015.

'For the next twelve months our focus will be on governance, assisting organisations and agencies to build a culture of privacy, and ensuring that organisations and agencies are proactive in meeting their compliance requirements. My message for all organisations and agencies is: it is more effective, and ultimately cheaper, to embed privacy in day-to-day processes than it is to respond to issues such as data breaches as they arise,' said Mr Pilgrim.

The OAIC has been undertaking privacy law reform work during a period of significant change within its own structure, as foreshadowed by the Government in the 2014 Budget.

The implementation of such significant privacy reforms could not have been achieved without the commitment of a dedicated and skilled group of staff who worked tirelessly to ensure that businesses, agencies and the OAIC were prepared,' said Mr Pilgrim.

http://www.oaic.gov.au/news-and-events/media-releases/privacy-media-releases/privacy-law-reform-report-card

***Equal Opportunity Act* review released**

The Western Australian State Government has endorsed recommendations of the review into the structure of the Equal Opportunity Commission.

Attorney General Michael Mischin has also announced the appointment of Allanah Lucas as the Commissioner for Equal Opportunity for a three-year term.

Mr Mischin said the report, compiled by the Public Sector Commissioner, made four recommendations on how the objectives of the *Equal Opportunity Act 1984* could best be achieved.

'The commissioner has a range of important functions under the Act. The continuing promotion of equality and elimination of discrimination is vital to achieving equal opportunities in Western Australia,' he said.

'Such a review seemed timely, given the approach of the 30th anniversary of the passage of the Act.

'Almost 50 submissions were received in response to the review, demonstrating broad and strong support for the Office of the Commissioner as an independent statutory body.

'The review did identify opportunities to improve the Commission's effectiveness, recommending the commissioner revise the internal structure of the organisation and make greater use of technology in operational areas such as complaints handling.

'It also found there was an opportunity for the Commission to be more proactive and strategic in its role to advise and assist individuals, businesses, organisations and agencies, and recommended greater collaboration with relevant agencies, such as the Australian Human Rights Commission, the Western Australian Ombudsman and Legal Aid Western Australia.'

The Attorney General said, in relation to the Director of Equal Opportunity in Public Employment (DEOPE), the review found there was an opportunity for agencies' reporting and compliance obligations to be streamlined and rationalised in light of their current obligations under the *Public Sector Management Act 1994*.

'The review recommended the statutory role of the DEOPE be abolished and its statutory functions transferred to the Public Sector Commissioner,' he said.

'This would preserve the important statutory functions of the DEOPE, but accommodate the office within the framework for administration of the public sector under the *Public Sector Management Act 1994*.'

http://www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=9253

Recent Cases in Administrative Law

The 'national interest' and unauthorized maritime arrivals

Plaintiff S297/2013 v Minister for Immigration and Border Protection & Anor [2015] HCA 3 (11 February 2015)

The plaintiff, a Pakistani national, entered Australia by boat at Christmas Island in May 2012. He did not have a visa and was, therefore, an 'unlawful non-citizen' within the meaning of the *Migration Act 1958* (Cth) (the *Act*). By June 2013 amendments to the *Act*, he subsequently became an 'unauthorised maritime arrival'.

Because the plaintiff was an unlawful non-citizen and an offshore entry person (and later an unauthorized maritime arrival) he was barred from making a valid visa application. In September 2012, the Minister lifted the bar and permitted the plaintiff to make an application for a permanent protection visa (PPV). The plaintiff made an application, which was refused by a delegate of the Minister. The plaintiff sought review of that decision by the Refugee Review Tribunal. The Tribunal remitted the plaintiff's application to the Minister for reconsideration because the plaintiff was found to be a refugee. The Minister did not decide the plaintiff's application because of an instrument signed on 4 March 2014, which purported to create a cap on the maximum number of protection visas that could be granted in the financial year ending 30 June 2014. That maximum number having been reached, the grant of a protection visa to the plaintiff in that financial year would exceed that limit.

The plaintiff initiated proceedings in the High Court claiming that various regulatory and other steps, including the cap, which were thought to permit the Minister not to decide the plaintiff's application were invalid or ineffective. In June 2014, the High Court held in favour of the plaintiff and ordered that the Minister consider and determine the plaintiff's application for a PPV according to law (see *Plaintiff S297/2013 v Minister for Immigration and Border Protection & Anor* [2014] HCA 24).

In July 2014, the Minister decided to refuse to grant the plaintiff a protection visa. The only reason for the refusal was that the Minister was not satisfied that the grant of a protection visa to the plaintiff 'is in the national interest' (cl.866.226 criterion) because he was an unauthorised maritime arrival. The Minister's decision record shows that he saw 'the national interest' as requiring refusal of a protection visa to any and every unauthorized maritime arrival.

The plaintiff challenged the validity of the 'national interest' criterion on which the Minister relied and asked for orders directing the Minister to grant the plaintiff a PPV. The plaintiff also contended that amendments made to the *Act* and *Migration Regulations 1994* in late 2014 to convert PPV applications into temporary protection visa (TPV) applications, did not affect his right to a grant of the permanent protection visa he had applied for.

The High Court unanimously found that the decision made by the Minister to refuse to grant the plaintiff a protection visa was not made according to law. The Court found that the *Act* exhaustively states what visa consequences attach to being an unauthorised maritime arrival (that they are barred from making an application for a visa unless the bar is lifted), and the Minister could not refuse an application for a visa only because the plaintiff was an unauthorised maritime arrival, in circumstances where the bar was lifted. It was not necessary for the Court to address the validity of the 'national interest' criterion upon which the Minister relied in refusing the plaintiff's application.

The Court also held that the amendments to the *Act* and Regulations in late 2014 did not convert the plaintiff's application for a PPV to a TPV. The new reg 2.08F(3) (which purportedly converts undecided PPV applications into TPV applications) only applied to applications where 'the Minister had not made a decision'. The Court rejected the defendants' submission that reg 2.08F applied because the Minister's decision involved jurisdictional error and 'is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all.'

The Court held that this phrase must be read in the context of the whole of reg 2.08F(3), including the reference to legally infirm decisions in reg 2.08F(3)(b)(iii). In this context it becomes evident that 'if…the Minister had not made a decision', does not include legally ineffective decisions made by the Minister. Therefore, for the purposes of reg 2.08F, the Minister had made a decision before is commencement. As such the plaintiff's application for a PPV was not affected by these amendments.

Administrative law and the AFL

Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority [2015] FCAFC 7 (30 January 2015) (Kenny, Besanko and White JJ)

This was an appeal from a judgment of a judge of the Federal Court, dismissing applications for judicial review by Mr James Hird, the Senior Coach of the Essendon Football Club (Essendon) in respect of a decision by the Chief Executive Officer (CEO) of the Australian Sports Anti-Doping Authority (ASADA) to issue notices under cl 4.07A of the National Anti-

Doping Scheme (NAD Scheme) to 34 current and former players for Essendon. Essendon did not appeal.

The notices were issued by the CEO as part of an investigation by ASADA, in cooperation with the Australian Football League (AFL), into a supplements program employed by Essendon in 2011 and 2012. Under cl 4.07A, the notices were required to inform each of the 34 players of a 'possible non-presence anti-doping rule violation.'

Mr Hird challenged the Federal Court's decision on a number of grounds. First, he contended that the 'joint' or cooperative investigation conducted by ASADA with the AFL was not authorised by the *Australian Sports Anti-Doping Authority Act 2006* (Cth) (*ASADA Act*). He also contended, among other things, that the CEO acted unlawfully in: (1) disclosing certain personal (NAD Scheme personal information) to the AFL during the interviews of Essendon players and personnel, and (2) facilitating the abrogation of the interviewees' common law rights against self-incrimination and exposure to civil penalties. Mr Hird also argued that the notices issued to the 34 players were invalid as the evidence or information from the investigation on which the notices were based was unlawfully obtained.

Mr Hird did not contest the findings of fact made by the primary judge, although he disputed the primary judge's characterisation of those findings. The primary judge found that the AFL and ASADA each conducted separate investigations in which they cooperated closely with one another and subsequently made separate decisions within their own areas of responsibility. ASADA was clearly conducting an investigation into possible anti-doping violations while the AFL was undertaking its own enquiries, obtaining information for itself (for instance, through the interview process) for the purposes of enforcing its own Player Rules.

The Full Court rejected Mr Hird's contention that primary judge's decision involved any element of mischaracterisation. It further rejected Mr Hird's challenge essentially because it held that the investigation conducted by ASADA, in cooperation with the AFL, was authorised by the *ASADA Act*, the *Australian Sports Anti-Doping Authority Regulations 2006* (Cth) and the NAD Scheme. This legislative scheme envisaged that there would be close cooperation between ASADA and sporting administration bodies, like the AFL, in anti-doping investigations. The legislative scheme enabled ASADA to benefit lawfully from the AFL's use of its compulsory contractual powers, including by requiring Essendon players and personnel to attend interviews at which both AFL and ASADA representatives were present and to answer questions.

The Full Court also affirmed that there was no unlawful disclosure of NAD Scheme personal information by ASADA to the AFL in the interviews of Mr Hird and the 34 Players because each provided information at his interview directly and simultaneously to the AFL and ASADA, the representatives of both being present when the information was given.

The Full Court also held that the CEO did not facilitate the abrogation of the interviewees' common law rights to the privileges against self-incrimination or exposure to penalty. There was no practical unfairness to the appellant or the 34 Players in the way the interviews were conducted and they were not misled in the interview process. The Full Court rejected Mr Hird's submissions about lack of 'free consent' and that there was no waiver of privilege. The Full Court agreed with the primary judge, who found that, upon becoming a player or official, Mr Hird and the 34 Players voluntarily accepted the obligations under the AFL's Player Rules and Anti-Doping Code to attend interviews and answer questions fully and truthfully, or face possible sanction by the AFL. Mr Hird and the 34 Players were all legally represented at their interviews. They and their lawyers were on notice before and at the interviews that the AFL and ASADA proposed to conduct the interviews together and they could have been in no

doubt about the purposes of the interviews. They also knew that the AFL was invoking the compulsory powers conferred by its Player Rules and its Anti-Doping Code when it required answers to the interview questions. The primary judge found, and Mr Hird did not dispute, that neither he nor any of the 34 Players objected to the presence of either the AFL or ASADA at their interviews. No one objected to answering any question, whether on the ground that its answer might incriminate him or expose him to a civil penalty, or otherwise.

Since Mr Hird failed to establish that the information on which the CEO based the decision to issue notices under cl 4.07A of the NAD Scheme was unlawfully obtained, Mr Hird's challenge to the notices failed and the appeal was dismissed.

The AFL's Anti-doping Tribunal decision – the end?

On 31 March 2015, the AFL's Anti-doping Tribunal handed down its decision with respect to the alleged violation by the Essendon 34 players of the AFL Anti-Doping Code.

The Tribunal was comfortably satisfied that the substance Thymosin Beta-4 was at the relevant time a prohibited substance under the Anti-Doping Code.

However, the Tribunal was not comfortably satisfied that any player was administered Thymosin Beta-4. Therefore, it was not comfortably satisfied that the 34 players violated cl.11.2 of the AFL Anti-Doping Code.

The Tribunal's decision and reasons were provided to the parties in accordance with the function performed by the Tribunal. Any publication of the Tribunal's decision and reasons is a matter for the parties.

The AFL Players Association has said it will take time for a decision to be made on whether the Tribunal findings are to be made public. Each of the 34 players must separately decide whether he wants the decision released.

Quarantine laws and a 'blunt attempt to trump'?

Mowburn Nominees & Ors v Palfreyman, Chief Veterinary Officer, Department of Agriculture, Fisheries and Forestry & Ors [2014] QSC 320 (12 December 2014)

The applicants run about 80,000 head of beef cattle on two properties in far north Queensland. On 4 December 2012, a quarantine notice was issued to the applicants, which confined their cattle to the two properties until the date of release.

Eighteen months later, on 6 May 2014, the respondents served a release on the applicants. On the same day, the applicants were served with a quarantine notice under the *Stock Act 1915* (Qld) for suspected infection of a strand of Bovine Johne's Disease (BJD). This notice related to a positive test for bison, not cattle, BJD in a screening on 13 February 2014. That notice was amended on 5 November 2014.

Both of those notices were quashed on 28 November 2014 in *Mowburn Nominees & Ors v Palfreyman & Ors* [2014] QSC 289. The issuing of the notices was held to be an irregular exercise of statutory power and beyond jurisdiction because neither was supported by satisfactory evidence of the jurisdictional fact of suspected infection.

Within six and a half hours of the Court's declaration, the second respondent issued the new notice in identical terms (the third notice). The applicants concede that the new notice cannot

be challenged on the same basis as the earlier notices. However, based on the haste with which it was issued, they contend that the new notice is 'a blunt attempt to trump' the previous declaration of invalidity. The applicants also contend that the quarantine power was not regularly engaged for failure to meet minimum procedural fairness requirements of prior notice and fair hearing by an open-minded decision-maker for stated reasons.

The Court held that there is no general rule of natural justice requiring that reasons for, or an explanation of, an administrative decision be given to those with rights or interests that could be adversely affected by it (*Public Service Board v Osmond* (1986) 159 CLR 656). Nor is there any circumstance in the context of this case that would make provision of preliminary or contemporaneous reasons a requirement of fairness.

The Court further held the test applied in Australia to determine disqualification by pre-judgment or prejudice is an objective one, that is, 'whether a fair-minded lay observer might reasonably apprehend that [the decision-maker] might not bring an impartial and unprejudiced mind to the resolution of the question [he or she] is required to decide' (*Johnson v Johnson* [2000] HCA 48). Pre-judgment or prejudice must be firmly established before disqualification of a decision-maker is justified.

An expectation by a party that the decision-maker is likely to decide issues or facts adversely is an insufficient basis for inferring a reasonable apprehension of bias. The decision-maker's mind must be shown to be so prejudiced in favour of a conclusion already formed that he or she might not alter that conclusion irrespective of the evidence or arguments presented to him or her (*Laws v The Australian Broadcasting Tribunal* [1990] HCA 31).

The Court held that there is a difference between impartiality and neutrality in the context of this case. Clearly the history between the parties created some predisposition in the second respondent to the applicants' stock prior to the date of issue. However, there is nothing to indicate that she was not able to suppress any preconceptions or preliminary opinions and thus decided to issue the third notice solely on the merits of the case in accordance with the statutory power and duty. The relevant concept of impartiality does not demand that decision-makers close their eyes or have a completely blank mind. What they must have is the capacity to give fresh consideration in the light of all relevant facts.

The Court also found there is no basis for believing that the fair-minded observer might reasonably apprehend that the second respondent might not have formed the state of mind for *Stock Act* purposes perversely, prejudicially or partially. The apprehended bias ground was also rejected. The application was dismissed.

Reviewable decisions under the *NDIS Act*

Burston and National Disability Insurance Agency [2014] AATA 456 (4 July 2014)

Luke Burston is a participant in the National Disability Insurance Scheme (NDIS). On 21 February 2014, he attended a meeting with a Planner at the National Disability Insurance Agency (NDIA) to finalise a plan for the support he would receive through the NDIS. Ms Wilcox, a disability advocate, and his mother, Ms Raynor, also attended the meeting. The NDIA Planner agreed to fund most of the support that was asked for on Luke's behalf but did not agree to fund four hours 'one on one support' for him on weekends.

On 8 May 2014, Ms Wilcox wrote to the NDIA, asking for an internal review of the decision 'not to fund the hours of one on one support.'

On 27 May 2014, the Planner wrote to Mr Burston, informing him that the request could not be supported. However based on changes in Mr Burston's circumstances, it was appropriate to amend his plan, under s 48(2) of the *National Disability Insurance Scheme Act 2013* (Cth) (the *Act*), to include six hours of behaviour support so his current needs could be assessed. Her letter was co-signed by an Acting Senior Planner who was a reviewer for the purposes of s 100(6).

Mr Burston applied to the Administrative Appeals Tribunal (the Tribunal) for a review of the Planner's amended decision.

The Tribunal held that it was clear from Ms Wilcox's letter that Ms Raynor was dissatisfied with the decision not to fund weekend support and wanted the NDIA to review its decision. Although she did not say so in so many words, the Tribunal found that she was asking for a review by a reviewer under s 100(6) of the *Act*. However, it was clear, from her letter dated 27 May 2014, that the Planner took the letter to be a request for a review under s 48(2) of the *Act*. The Planner purported to make a decision under s 48(2) by affirming the decision not to fund one on one support and by amending the plan concerning other support. The only decision under s 48(2) that the Tribunal can review is a decision not to review a plan.

The Tribunal further held that the Planner was not a reviewer for the purposes of s 100(6) of the *Act*. Although the letter was co-signed by a Senior Planner, that is not itself enough to convert a decision which the Tribunal cannot review into a decision under s 100(6) which the Tribunal can review.

As such the Tribunal found it did not have jurisdiction to review the decision in the NDIA's letter.