The Courts

Workplace Relations and Other Legislation Amendment Act 1996 (No 60 of 1996)

Changes made by this Act include the transfer of the jurisdiction of the Industrial Relations Court of Australia to the Federal Court of Australia. Schedule 16 of the Act, which commenced on 25 May 1997, also makes a number of formal changes in the Federal Court, including the abolition of the Divisions of the Court and the renaming of the Chief Judge as the Chief Justice.

High Court and Federal Court Decisions of Particular Interest

The following case summaries of recent decisions of administrative law interest from the High Court and Federal Court have been contributed by Alan Robertson, Senior Counsel and Member of the Administrative Review Council.

Register of National Estate – Power of Australia Heritage Commission to enter place in the Register – Whether dependent on Commission's own view of identity of place or objective ascertainment of jurisdictional fact – *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 142 ALR 622

Section 23 of the *Australian Heritage Commission Act 1975* provides that the Commission shall enter in the Register a place *"where the Commission considers"* that the place *"should be recorded as part of the National Estate"*. The Commission resolved to enter in the Register an area of some 300,000 hectares which included the Sir Edward Pellew Group of islands. Mount Isa Mines Limited sought judicial review of the decision.

Section 4 of the Act declared that the national estate consisted of 'places' having certain aesthetic, historic, scientific or social significance or other special value. A majority of the Full Court of the Federal Court had said that the status of a place, as provided in section 4, was an objective fact, ascertainable by reference to its qualities and that, in ascertaining whether a particular place had those qualities, the Commission was bound to make an evaluation of the particular place which would involve matters of judgment and degree.

The High Court allowed the Commission's appeal.

After noting that judicial review may be available, in a case such as the present, at general law or under s 75(v) of the Constitution or under the *Administrative Decisions (Judicial Review) Act 1977*, the High Court approved the dissenting judgment of Black CJ. He had said that the final determination of the question of whether or not a place was part of the national estate was one that was committed by the Act to the Commission: it was not a jurisdictional fact.

The High Court said that the Commission's determination of the question whether a place should be recorded as part of the national estate was not subject to review provided the Commission otherwise conducted itself in accordance with law.

Judicial Review of decisions of Casino Control Authority – Challenge to grant of licence to operate casino – Whether jurisdictional error – Privative clause excluding judicial review – *Darling Casino Limited v New South Wales Casino Control Authority and Others* (1997) 143 ALR 55

The NSW Court of Appeal had ordered that the proceedings brought to challenge the Casino Control Authority's decision to grant a licence to operate the Darling Harbour casino be dismissed on the footing that they were barred by the privative clause* in section 155 of the *Casino Control Act* 1992 (NSW). In the High Court the appellant relied upon alleged jurisdictional error and submitted that section 155 did not exclude judicial review on that ground.

The relevant part of section 155 provided –

> "... a decision of the Authority under this Act is final and is not subject to appeal or review".

The High Court dismissed the appeal, although its reasoning proceeded upon a basis quite different from that of the Court of Appeal.

The High Court held that no errors of the requisite quality had been made by the Authority (or by the Minister). It was therefore unnecessary to consider the operation of section 155.

However Gaudron and Gummow JJ reviewed the authorities and said that section 155 would have been effective in the present case because there had been no *"wrong determination as to the existence of a fact"* upon which depended the power of the Authority under section 18, nor any *"wrong construction"* placed upon any relevant provision. But their Honours did point out that section 155 protected only "decisions" under the Act, not *"decisions under or purporting to be under"* the Act. Section 155 would not operate in respect of determinations reached other than upon satisfaction of the conditions which enlivened the Authority's power.

* A privative clause is a provision in legislation which is intended to protect administrative decisions and action from judicial review either by excluding judicial review or by limiting it to particular grounds or by imposing other limitations. The use of a privative clause is discussed in the focus article by the Minister for Immigration and Multicultural Affairs in this edition of *Admin Review*.

Jurisdiction of the High Court – Whether claim by practising homosexuals in Tasmania for a declaration of inconsistency between a Tasmanian law and a Commonwealth law a *"matter"* where no prosecution for an offence – *Croome v Tasmania* (1997) 142 ALR 397

In their statement of claim the plaintiffs pleaded:

> "Each of the plaintiffs has had sexual relations (including sexual intercourse) with each other, and intends to continue to have, sexual relations (including sexual intercourse) with male persons".

The basis of the legal proceedings was that sections 122(a), 122(c) and 123 of the *Criminal Code* (Tas) – the criminal offences of unnatural sexual intercourse and indecent practice between male persons – were inconsistent with section 4 of the *Human Rights (Sexual Conduct) Act 1994* (Cth) and invalid by force of section 109 of the Constitution.

Section 4 of the Commonwealth Act provided that

> "Sexual conduct involving only consenting adults acting in private is not to be subject, by or under a law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.".

Tasmania applied to strike the proceedings out on the basis that no prosecution under the Code was pending or threatened. The plaintiffs' standing was conceded.

The High Court unanimously dismissed the application by Tasmania to strike out the proceedings.

The Court said that there was a *"matter"* founding the jurisdiction of the Court where, as here, the law of a State imposed a duty upon the citizen attended by liability to prosecution and punishment under the criminal law and the citizen asserted that the law of the State was invalid.

Decision of Refugee Review Tribunal – Grounds for Review – *'Merits'* of a case – Section 420 of the *Migration Act 1958* – *Eshetu v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 474

In these proceedings before the Federal Court the applicant, a citizen of Ethiopia, sought such judicial review as was available to him under either the *Administrative Decisions (Judicial Review) Act 1977* or section 476 of the *Migration Act* to review the decision of the Refugee Review Tribunal (RRT) to refuse his application for refugee status.

In the Federal Court, Hill J summarised the position as follows:

> "So zealously does the Australian Parliament desire to implement its United Nations treaty obligations to assist refugees that it has enacted legislation specifically to ensure that it is acceptable for a decision on refugee status to be made by the tribunal which not merely denies natural justice to an applicant but also is so unreasonable that no reasonable decision-maker could ever make it. At least in this court, although not in the High Court, the grounds of judicial review are narrowly confined".

The RRT's decision turned on its disbelief of the applicant about an incident in December 1991. The RRT held that the incident, of detention and torture of students, did not occur in circumstances where, Hill J held, that conclusion was clearly beyond the weight of the evidence and was unreasonable. According to Hill J, the RRT did not make it clear to the applicant that the RRT thought he was lying.

Hill J then considered the relationship between section 420 of the Act, which required the RRT to act according to substantial justice and to the merits of the case, and section 476(2) which excluded judicial review on the ground of breach of the rules of natural justice or unreasonableness. His Honour concluded that the references to fairness and justice in section 420 must be read subject to the provisions of section 476(2) so that if the injustice would involve a breach of the rules of natural justice then judicial review would be precluded.

The application for judicial review was dismissed. It could not be said that the RRT did not undertake a review to ascertain the merits albeit the review was flawed.

An appeal from this decision has been heard by a Full Court of the Federal Court.

Refugees – Whether appellants formed part of a particular social group – *"One child policy"* of People's Republic of China – Convention relating to the Status of Refugees

Article 1 – *"Applicant A" and Another v Minister for Immigration and Ethnic Affairs and Another* (1997) 142 ALR 331

The appellants had come to Australia from China and had one child. They said they feared sterilisation under the *'one child policy'* in China if they returned. The Refugee Convention (Article 1) defined a refugee as *'any person who ... owing to a well-founded fear of being persecuted for reasons of... membership of a particular social group ... is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'*. The term "refugee" is defined by section 4(1) of the *Migration Act 1958* to have the same meaning as it has in Article 1 of the Convention. At the relevant time, section 22A of the Migration Act provided that the Minister may determine in writing that a person is a refugee.

The Minister refused the applications for refugee status. The Refugee Review Tribunal reversed that decision. The Tribunal defined the *"particular social group"* as *"those who having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised as such"*.

On appeal, Sackville J held that the Tribunal had made no error of law. The Full Court of the Federal Court unanimously reversed this decision and affirmed the decision of the Minister.

The High Court dismissed the appeal and held (Dawson, McHugh and Gummow JJ; Brennan CJ and Kirby J dissenting) that the appellants were not refugees. The Court held it was not permissible to define a *"particular social group"* by reference to the act which gave rise to the well-founded fear of persecution.

Freedom of Information

Freedom of Information Act 1982 — Annual Report 1995-96

The Annual Report on the operation of the *Freedom of Information Act 1982* for 1995-96 was released in December 1996.

The Minister's Introduction to the Annual Report notes that the Government is considering the joint report of the Administrative Review Council and the Australian Law Reform Commission, entitled Open *Government: a review of the federal Freedom of Information Act 1982*.

Chapter 1 of the Annual Report notes that there were minor amendments to the Freedom of Information (FOI) Act and Regulations during the reporting year. These included amendments as a consequence of the sale of both Qantas and the Commonwealth Bank by the Commonwealth. A number of amendments made to the *Administrative Appeals Tribunal Act 1975* by the *Law and Justice Legislation Amendment Act (No 1) 1995* affected FOI administration. The amendments made by that Law and Justice Legislation Amendment Act were discussed in an earlier edition of *Admin Review*.

Activity under the FOI Act during the reporting year included:

- a total of 39,327 access requests were received by 87 agencies (which was a 5.25% increase over 1994-95) – the total number of access requests since the FOI Act came into operation was 434,613 at 30 June 1996 — agencies were only asked to supply figures on formal requests, that is, those which met the requirements of section 15 of the Act;
- the majority of the requests were made to the Departments of Veterans' Affairs (31.1%), Social Security (20.5%), Immigration and Multicultural Affairs (17.2%) and the Australian Taxation Office (22.6%); requests made to these agencies usually seek access to documents containing the applicant's own personal information;
- 77.2% of access requests were granted in full, 17.4% were granted in part and 5.3% of requests were refused. Agencies with the highest refusal rates included Telstra Corporation Limited (49 of 124 requests) the Attorney-General's Department (9 of 25 requests), the Australian Securities Commission (15 of 59 requests) and the Department of Administrative Services (6 of 24 requests);
- the time taken to respond to access requests improved over the previous reporting year – over 80.1% of access requests were responded to in less than 30 days (compared to 78.1% in 1994-95) and only 1.2% were still outstanding after 90 days (compared to 2.5% in 1994-95);
- $417,046 was collected in application fees. $4,002 was collected in internal review application fees;
- agencies notified a total of $308,608 in charges in respect of processing of requests and collected $200,166 (64.9% of those charges). Notification is a preliminary assessment of the charge for processing a request; following notification an applicant can withdraw the request, ask that the charge be reduced or not imposed, or agree to pay the charge as assessed;
- 323 applications for internal review were made – applicants challenged 3.9% of agency decisions to refuse access or grant access in part. Of the 273 decisions made following internal review during the year, 67.4% affirmed the original decision and 32.6% resulted in some concession to applicants (mostly access with deletions);
- the AAT reported 118 applications for review concerning FOI in the reporting year (as compared to 113 in the previous year);
- the Commonwealth Ombudsman received 283 complaints about FOI matters in the reporting year (as compared to 288 in the previous year); and