

8TH ANNUAL AIJA TRIBUNALS CONFERENCE

Sydney, 9-10 June 2005

SESSION SIX

SOME RECENT JUDICIAL DEVELOPMENTS IN THE WORK OF TRIBUNALS

PROFESSOR GREG REINHARDT, EXECUTIVE DIRECTOR OF THE
AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION

1.1 NON-PARTY ACCESS OF TRIBUNAL RECORDS

Two recent decisions of single judges of the Supreme Court of Victoria raise the interesting question of the extent to which (and how) tribunals may limit access to their records by non-parties.¹

The first of the decisions is *The Herald and Weekly Times Limited v The Victorian Civil and Administrative Tribunal*²

In that case the plaintiff, the proprietor of the a Melbourne daily newspaper, sought to challenge several rules made by the defendant tribunal (VCAT) pursuant to a rule making power conferred by section 157 of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act).

Section 157 provides:

1. The Rules Committee may, at a meeting, make rules regulating the practice and procedure of the Tribunal, including any rules required or permitted to be made by this Act or necessary to be made to give effect to this Act.
2. Without limiting the matters in respect of which rules may be made, rules may be made for any matter referred to in Schedule 2.
3. The power to make rules is subject to the rules being disallowed by the Parliament.

The schedule contains a list of 17 unnumbered topics upon which rules may be made, including

"Contents of register of proceedings and availability and procedure for inspecting and obtaining copies of register of proceedings and proceeding files."

¹ Reference is made to the monograph edited by Dr Ros MacDonald and Professor Brian Fitzgerald of Queensland University of Technology "Courts for the 21st Century: Public Access, Privacy and Security", November 2003. Particular reference can be made to the article by Anne Wallace in Chapter 2 entitled "Overview of Public Access and Privacy Issues- the Courts' perspective". See also Wallace A., "Courts on-line: Public Access to the Electronic Court Record" (2000) 10 *Journal of Judicial Administration* 94.

² [2005] VSC 44, Bongiorno J.

Section 146 of the VCAT Act provides a right of access to the parties and to the public in relation to VCAT files. It provides:

1. The principal registrar must keep a file of all documents lodged in a proceeding until the expiration of the period of 5 years after the final determination of the proceeding.
2. A party in a proceeding may inspect the file of that proceeding without charge.
3. On paying the prescribed fee (if any) any person may:
 - (a) inspect the file in that proceeding; and
 - (b) obtain a copy of any part of the file.
4. The rights conferred by this section are subject to:
 - (a) any conditions specified in the rules;
 - (b) any direction of the Tribunal to the contrary;
 - (c) any order of the Tribunal under section 101; and
 - (d) any certificate under section 53 or 54.

The rules said to be *ultra vires* the VCAT Act in essence denied access to files and in the case of anti-discrimination and guardianship matters unless a discretion was exercised by designated persons.

It was argued that the rules in question were not rules regulating the "practice and procedure" of VCAT. Reference was made to the decision of the High Court in *Gosper v Sawyer*³ and to the decision of the Full Court of the Victorian Supreme Court in *White v White*⁴. Bongiorno J noted:

"In the present case the subject matter of the impugned rules is the right, granted by ss 146(2) or 146(3) of the *VCAT Act*, as the case may be, to inspect and/or copy a VCAT proceeding file. These rules affect the exercise of that right, not merely the way in which the right is exercised. Indeed, subject to their individual differences, they go as far as denying the existence of the right conferred by the statute unless an administrative discretion is exercised in favour of the applicant for inspection. Thus if these rules are valid, the exercise of the right of access to proceeding files, granted by the statute, can be controlled to the point of prevention, by the implementation by VCAT of rules which its Rules Committee has made."⁵

His Honour referred to *Melbourne Corporation v Barry*⁶ and to *Swan Hill Corporation v Bradbury*⁷ In the latter case, Latham CJ said:⁸

³ (1985) 160 CLR 548.

⁴ [1947] VLR 434.

⁵ At [14].

⁶ (1922) 31 CLR 174.

⁷ (1937) 56 CLR 746.

" ... under a power to make a by-law regulating a particular subject matter, a municipal council has no power to prescribe that the subject matter shall not be allowed to come into existence unless the council from time to time grants its approval in each particular case. It follows that the by-law cannot be supported under the power to make by-laws regulating the erection of buildings."

His Honour concluded that a rule which denies access to a statutory right unless a third party exercises a discretion to permit access was not a rule regulating practice and procedure.⁹

It was further argued for VCAT that s 157(2), read with Schedule 2, having regard to the use of the words "in respect of", which are to be construed broadly in accordance with authority, justified the making of the rules. Bongiorno J noted that the logical conclusion to this argument would be that Rules could abolish the statutory right of access completely.¹⁰ Moreover the schedule could not provide any greater power than section 157(2).

It followed that the rules were *ultra vires* the VCAT Act. Moreover it could not be said that the rules imposed "conditions" on access.

The second of the decisions is a response to a new regime implemented by VCAT in response to the decision of Bongiorno J. The case is *The Herald and Weekly Times Limited v Victorian Civil and Administrative Tribunal and ors*¹¹

Hansen J noted¹²:

"The Tribunal moved quickly to establish a new regime in relation to inspection of proceeding files. On Monday 7 March, the first business day after the decision of Bongiorno J, a journalist employed by the plaintiff was advised by the senior registrar that the Tribunal had a new procedure for accessing files in the Anti-discrimination List, namely that Deputy President Coghlan would review any requested proceeding file in that List before a non-party was able to inspect it. The journalist located on the Tribunal's website home page a "New VCAT Privacy Guideline as at 7 March 2005" stated to be published in accordance with the decision of the Supreme Court on 4 March 2005."

The guideline provided:

"Who Can Read VCAT Proceeding Files?"

VCAT proceeding files can hold the original application to VCAT, VCAT orders, correspondence between the parties and VCAT and documents provided to VCAT by the parties.

This information held at VCAT is generally available to any person who identifies a particular case and asks to inspect the file.

⁸ 56 CLR at 752.

⁹ [2005] VCS 44 at [17].

¹⁰ At [20].

¹¹ [2005] VSC 188, Hansen J, 1 June 2005.

¹² At [18]

The exception created by law are files concerning the *Freedom of Information Act* 1982 which are not open for inspection or copying by any person (VCAT Act – Schedule 1, Clause 30).

In individual cases VCAT may restrict or deny access to files under section 146 of the VCAT Act. Parties to cases may apply to VCAT to have access to the proceeding file which concerns being restricted or denied.

Generally requests from a party for access to a file will be immediately granted in all but the Guardianship List. Files about proceedings finalised over a year ago may not be available for a day while the file is retrieved from off-site archive. Requests for Guardianship List files will be referred to a VCAT member to decide access.

Any request from a non-party for access to a file in the following VCAT lists (Civil Claims, Domestic Building, General (excluding FOI), Land Valuation, Planning and Environment, Real Property, Residential and Retail Tenancies) will be immediately granted subject to retrieval from archive.

Any request from a non-party for access to a file in lists where parties regularly raise concerns about protection of their privacy (Anti-Discrimination, Credit, General (health records and privacy), Guardianship, Occupational and Business Regulation and Taxation) will be referred to a VCAT member who will consider whether a direction should be made under section 146(4)(b) of the VCAT Act.”

Upon an application made by a journalist employed by the plaintiff for access to proceedings in the anti-discrimination list, the matter was referred to Deputy President Coghlan who, having considered the matter, made an order that only parties to the proceeding might inspect the files in the proceedings.

The plaintiff sought judicial review. It argued in essence that once an application to inspect had been lodged no direction could be given on the initiative of the Tribunal but only upon the application of a party; there had to be an extant direction.

VCAT sought to rely upon section 80 of the VCAT Act as the source of power for making the making of a direction regarding access in accordance with section 146 of the Act (section 146(1)(b)). Section 80 provides:

1. The Tribunal may give directions at any time in a proceeding and do whatever is necessary for the expeditious or fair hearing and determination of a proceeding;
2. The Tribunal’s power to give directions is exercisable by any member; and
3. The Tribunal may give directions under this section requiring a party to produce a document or provide information in a proceeding or review of a decision despite anything to the contrary in section 106(1) or any rule of law relating to privilege or the public interest in relation to the production of documents.

Hansen J rejected the plaintiff’s argument that once an application for inspection was lodged no direction could be issued by the Tribunal on its own initiative in relation to inspection. His Honour noted:

“The impracticality of the plaintiff’s submissions is immediately apparent. The first proposition that there must be an extant direction would, considered alone, have the consequence that every time a document as to facts or allegations was filed in, say, the Anti-discrimination List a member of the Tribunal would have to consider whether a direction to the contrary should be made. This may sound extreme but it is a logical and practical consequence of the plaintiff’s submission. That is because one will not know, and a party or the parties will most probably not be warned, before a non-party makes a request to inspect a file. Under the plaintiff’s interpretation, a latent trap would run against a party who might otherwise have opposed inspection. The Tribunal is responsible for the due administration of justice in proceedings before it, and could hardly stand by in such circumstances knowing that numbers of proceeding files contained information of a highly personal and sensitive or confidential nature the publication of which could cause personal suffering and have a detrimental effect on the resolution of the proceeding. I see nothing in s 146, whether considered alone or in the context of the Act as a whole, that would indicate that Parliament intended that the power to make a direction could not be made after the making of a request to inspect.”¹³

Ultimately, of course, the ability of a tribunal to control access to and copying of documents will depend upon the statute under which it is established and the true construction of that statute. Where there is power to confer a discretion in relation to access and copying, however, questions may arise as to the exercise of that power and any guidelines in place for the exercise of the discretion. There will also be the question of the extent to which the person exercising the discretion is bound to give reasons for the exercise of the discretion which takes us into uncharted waters.

It is suggested that a research project in the area may be warranted.

1.2 WHAT CONSTITUTES A DECISION UNDER AN ENACTMENT?

This matter was considered by the High Court in the case of *Griffith University v Tang*¹⁴. What was specifically in issue was the provisions of the *Judicial Review Act 1991 (Qld)* (Review Act) where review depends upon whether there is “a decision of an administrative character made... under an enactment”. This is to be found in the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* (ADJR Act).

The appellant University had excluded the respondent from its PhD programme on the ground that she had "undertaken research without regard to ethical and scientific standards" and had thereby engaged in "academic misconduct".

How was the decision to be characterized?

Gummow, Callinan and Heydon JJ noted that the expression in question “has given rise to a considerable body of case law under the ADJR Act, some of it indeterminate in outcome. The focus has been upon three elements of the statutory expression. The first is "a decision"; the second, "of an administrative character"; and the third, "made ... under an enactment”¹⁵.

¹³ At [67]

¹⁴ [2005] HCA 7

¹⁵ At [59]

Their Honours referred to several authorities, including decisions of the High Court,¹⁶ and noted with approval a line of authority in the Federal Court commencing with the judgment of Lockhart and Morling JJ in *Chittick v Ackland*¹⁷.

Gummow, Callinan and Heydon JJ said of the decision to be reviewed under legislation:

“The decision so required or authorised must be "of an administrative character". This element of the definition casts some light on the force to be given by the phrase "*under an enactment*". What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review upon those aggrieved?”¹⁸

They continued:

“The answer in general terms is the affecting of legal rights and obligations. Do legal rights or duties owe in an immediate sense their existence to the decision, or depend upon the presence of the decision for their enforcement? To adapt what was said by Lehane J in *Lewins*, does the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute?

If the decision derives its capacity to bind from contract or some other private law source, then the decision is not “made under” the enactment in question.”¹⁹

The decision sought to be reviewed was not made under the *Higher Education (General Provisions) Act* 1993 (Qld) or any other enactment. It followed that the decision could not be reviewed under the Review Act.

Gleeson CJ agreed, stating:

“The question in the present case turns upon the characterisation of the decision in question, and of its legal force or effect. That question is answered in terms of the termination of the relationship between the appellant and the respondent. That termination occurred under the general law and under the terms and conditions on which the appellant was willing to enter a relationship with the respondent. The power to formulate those terms and conditions, to decide to enter the relationship, and to decide to end it, was conferred in general terms by the

¹⁶ *Glasson v Parkes Rural Distributions Pty Ltd* (1984) 155 CLR 234, *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 and *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 77 ALJR 1263.

¹⁷ (1984) 1 FCR 254, 264.

¹⁸ [2005] HCA 7 at [79].

¹⁹ At [80]- [81] (endnotes omitted).

Griffith University Act, but the decision to end the relationship was not given legal force or effect by that Act.²⁰

Kirby J dissented In his view:

“Where bodies, such as Australian universities, specifically the appellant, are recipients of large amounts of public funds, they cannot complain when, like other statutory authorities and public decision-makers, they are rendered accountable in the courts for the lawfulness of decisions they make "under" public enactments. It is not unreasonable that such bodies should be answerable for their conformity to the law. Relevantly, the law includes the law of procedural fairness ("natural justice"). Universities, in formal and important decisions about disciplinary matters affecting students and others, should be places of procedural fairness. So far as the law provides, they should be held to account in the courts in response to complaints - certainly those of a serious nature - that the ordinary legal entitlements have been denied to a person with the requisite interest”.²¹

It is suggested that one’s instinctive view is that a decision made by a body established by statute unless specifically required to be made by statute should not be regarded as a decision made under an enactment. It cannot be that every decision made by such a body is subject to judicial review.

1.3 CONTEMPT

Finally, mention this morning of dentists reminded me of the recent decision of Morris J at VCAT where his Honour imprisoned a dentist for breach of an order that he not practice dentistry. The decision is *Dental Practice Board of Victoria v Varnavides*²². Of particular note is the refusal of the respondent to give an undertaking that he would cease to practise dentistry. Not surprisingly, in those circumstances, imprisonment for contempt was justified.

Greg Reinhardt

June 2005.

²⁰ At [23].

²¹ At [170].

²² [2005] VCAT 810.