



News and insights

June 2011

Public law report

Welcome to the June edition of the *Public law report* for 2011, which provides essential updates for public sector managers and government lawyers on legislative and policy developments, as well as notes on important decisions by courts and tribunals. We take a look at the latest developments in civil procedure in the federal courts that are designed to encourage parties to resolve disputes before they get to court. We outline the requirements of the Indigenous Opportunities Policy that most Australian Government agencies will have to comply with from 1 July 2011. Our employment law team provides a detailed look at adverse action claims under the Fair Work Act 2009 (Cth), and how they may play out in the public sector. We also note important recent decisions on: the award of exemplary damages for misuse of public power; the power to award costs in FOI appeals; the nature of maladministration in making taxation assessments; and, relevant and irrelevant considerations in administrative decision making. Finally, two interesting decisions relating to appeals by defence personnel are noted, and we briefly discuss the recent amendment to the NSW Constitution to limit the power to prorogue Parliament. ■

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Canberra judged “Best of State”

Our new Canberra workplace was recently recognised at the Australian Interior Design Awards by being awarded the Best in State (ACT) for Commercial Design.

The panel of jurors, comprising some of Australia’s leading designers and architects, viewed Carr Design Group’s design for Norton Rose Group to be the best in the ACT. Our rebranding of the Melbourne office, also designed by Carr, was highly commended.

Carr Design Group Director Sue Carr commented: “I see these awards as recognition of the importance of strong, intelligent design in corporate signage and space branding. Importantly, the end result is the establishment of our client, Norton Rose, as a leader and innovator in workplace environments.”

We are proud to be associated with the award and committed to creating a workplace where innovative thinking and solutions can thrive.

Norton Rose Group’s Canberra office was opened by Senator Stephen Conroy, the Minister for Broadband, Communications and the Digital Economy in March 2011. ■

Commonwealth Civil Dispute Resolution Act 2011: an overview

On 12 April 2011, the Commonwealth Civil Dispute Resolution Act 2011 (the Act) received royal assent. The Act’s substantive provisions will enter into force on a date to be fixed by proclamation, which will be no later than 12 October 2011. The Act has important implications for litigants and legal practitioners bringing or responding to proceedings in the Federal Court of Australia and the Federal Magistrates Court of Australia.

The key effect of the legislation is set out below, along with some important points to note for lawyers practising in the Federal Court and Federal Magistrates Court and a list of the proceedings excluded from the effects of the legislation.

Effect of the legislation

The legislation will encourage civil litigants in the Federal Court and

Federal Magistrates Court to take “genuine steps” to resolve their disputes prior to filing proceedings unless those litigants have sufficient reasons for not doing so or the relevant proceedings are “excluded proceedings”.

The legislation achieves this by requiring both parties to proceedings to file a “genuine steps statement”. For applicants, the statement must be filed at the time of filing the application bringing the proceedings and must set out what steps were taken to resolve the dispute or, if no steps were taken, the reasons why (section 6). For respondents, the statement is to be filed prior to the hearing date specified in the application and will need to set out whether the respondent agrees or disagrees with the applicant’s statement and, if they disagree, their reasons for disagreeing.

The Act does not prescribe the “genuine steps” that a party may take prior to filing, however section 4 sets out a number of examples, including:

- notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute,
- responding appropriately to any such notification,
- providing relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute might be resolved,
- considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process,

- if such a process is agreed to:
 - agreeing on a particular person to facilitate the process
 - attending the process,
- if such a process is conducted but does not result in resolution of the dispute, considering a different process,
- attempting to negotiate with the other person, with a view to resolving some or all the issues in dispute, or authorising a representative to do so.

Under section 4(1A) of the Act, a person will have taken “genuine steps to resolve a dispute” if the steps taken constitute a sincere and genuine attempt to resolve the dispute, having regard to the person’s circumstances and the nature and circumstances of the dispute.

Implications

While the Act does not oblige litigants to take genuine steps, requiring only that litigants file the genuine steps statement, it provides the court with a broad discretion to consider whether the parties in fact took genuine steps to resolve their dispute when it is exercising powers and functions, including the discretion to award costs (section 11).

In addition, the Act imposes a duty on lawyers acting for persons to whom the Act applies, to:

- (a) advise their client of the genuine steps statement requirement, and
- (b) assist them to comply with that requirement (section 9).

The Act empowers the court to have regard to “any failure by a lawyer to comply with the duty imposed by section 9” when exercising its discretion to award costs in a civil proceeding (section 12(2)). Such a failure may result in an order that the relevant lawyer bear costs personally. Section 12(3) states:

“If a lawyer is ordered to bear costs personally because of a failure to comply with section 9, the lawyer must not recover the costs from the lawyer’s client”.

The Act adopts the definition of “lawyer” in the Federal Court of Australia Act 1976 (Cth), which is: “a person enrolled as a legal practitioner of a federal court or the Supreme Court of a State or Territory”. On the basis of that definition, it appears that the duty in section 9 could apply to in-house lawyers whether in government agencies or private sector organisations as well as their external lawyers. In-house lawyers should thus be mindful of this provision.

It is difficult to know at this point how the section 9 duty imposed upon lawyers will be interpreted by courts. However, legal practitioners, including both private and public sector in-house lawyers, should be mindful of the Act, its implications for litigation in the federal courts and the potential for adverse, or even personal, costs orders to be made where it is not complied with.

Excluded proceedings

Part 4 of the Act excludes a number of proceedings from the genuine steps requirement. These are:

- proceedings for an order imposing a pecuniary penalty for a contravention of a civil penalty provision,
- proceedings brought by or on behalf of the Commonwealth or a Commonwealth authority for an order connected with:
 - a criminal offence or the possible commission of a criminal offence
 - a contravention or possible contravention of a civil penalty provision,
- proceedings that relate to a decision of, or a decision that has been subject to review by:
 - the Administrative Appeals Tribunal
 - the Australian Competition Tribunal
 - the Copyright Tribunal of Australia
 - the Migration Review Tribunal
 - the Refugee Review Tribunal
 - the Social Security Appeals Tribunal
 - the Veterans’ Review Board
 - a body prescribed by the regulations,
- proceedings in the appellate jurisdiction of an eligible court,
- proceedings arising from the exercise of a power to compel a person to answer questions, produce documents or appear before a person or body under a law of the Commonwealth,

- proceedings in relation to the exercise of a power to issue a warrant, or the exercise of a power under a warrant,
- proceedings that are, or relate to, proceedings in which the applicant or the respondent has been declared a vexatious litigant under a law relating to vexatious litigants (however described),
- ex parte proceedings,
- proceedings to enforce an enforceable undertaking,
- any other proceedings excluded under the regulations (which are yet to be made), and
- any proceedings under the following Acts or their subordinate regulations:
 - Australian Citizenship Act 2007
 - Child Support (Registration and Collection) Act 1988
 - Fair Work Act 2009
 - Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
 - Family Law Act 1975
 - Migration Act 1958
 - National Security Information (Criminal and Civil Proceedings) Act 2004
 - Native Title Act 1993
 - Proceeds of Crime Act 1987
 - Proceeds of Crime Act 2002.

Conclusion

The Act has important implications for prospective litigants in the Federal Court of Australia and Federal Magistrates Court. While a failure to file a genuine steps statement will not prevent an applicant from initiating proceedings, or a respondent responding to them, such a failure may influence the court's procedural decisions regarding the matter and its discretion to award costs.

The Act also has direct implications for legal practitioners, including the potential for personal costs orders if the section 9 duty is not complied with, and practitioners will need to be mindful of that when advising their clients. ■

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Developments on the home front

The Federal Court of Australia recently considered the operation of s 17(1)(c) of the Defence Home Ownership Assistance Scheme Act 2008 (Cth) (the Act) in *Secretary, Department of Defence v Conroy* [2011] FCA 227.

Background

The Act provides members, or former members, of the armed forces with financial assistance in relation to housing. The respondent, Mr Conroy, first applied for assistance under the Act on 29 July 2008, following his transfer to the Standby Reserve from the regular Army after 20 years of service. He was successful in his application for a subsidy certificate, which was required to receive assistance under the Act.

Following the purchase of a new home, Mr Conroy applied for a second subsidy certificate on 30 October 2009. This application was refused. Mr Conroy successfully sought review of the decision by the Administrative Appeals Tribunal (the Tribunal). The Secretary, Department of Defence, brought an appeal against the Tribunal's decision in the Federal Court. Such an appeal must be "on a question of law".

The case turned on whether Mr Conroy was a member of the Defence Force for the purposes of s 17(1)(c) of the Act at the time of his second application for a subsidy certificate. Section 17(1)(c) states that an applicant who is not a member of the Defence Force is only eligible for a subsidy certificate if the applicant "has not previously applied for a subsidy certificate since he or she stopped being a member of the

Defence Force". Relevantly, s 5 of the Act states that a person who has been engaged as a member of the Reserves is to be treated as such either: until the engagement ends; or, during a service year in which the engagement does not end, the person fails to perform effective service as a member of the Reserves. Such a person would not be considered a member of the Defence Force for the purposes of the Act. Mr Conroy had not performed effective service as a member of the Reserves in any year since he left the regular Army.

The Tribunal held, first, that Mr Conroy was a member of the Defence Force when he made his second application, and, secondly, that the terms of s 5 did not operate generally on the Act, but operated only on s 45, which enabled the Secretary to vary the authorisation of a subsidy granted to a member.

Judgment

The Federal Court allowed the appeal by the Secretary, set aside the Tribunal's decision and ordered that the matter be remitted to the Tribunal for further consideration.

Justice Dowsett noted that a member of the regular Army or the Army Reserve is a member of the Defence Force. However, Dowsett J held that s 5 clearly applied in connection with service in the Reserves for all relevant purposes under the Act, and was not limited in its effect to s 45. Therefore, for the purposes of the Act, in every completed service year since 2008-2009, Mr Conroy's failure to perform effective service meant he was deemed to have ceased to be a member of

the Reserves immediately before the commencement of that year. Further, as Mr Conroy had previously successfully applied for a subsidy certificate after leaving the regular Army, the Tribunal erred in concluding that s 17(1)(c) did not disqualify Mr Conroy from obtaining a second subsidy certificate.

In closing, Dowsett J noted that the Tribunal's approach had precluded the consideration of further issues that may yet prove relevant. ■

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Taking evasive action: limits on the duty to inquire

The duty of the Administrative Appeals Tribunal (the Tribunal) to avoid a failure to make obvious inquiries has been confirmed in a recent decision of the Full Court of the Federal Court of Australia (*Kowalski v Military Rehabilitation and Compensation Commission* [2011] FCAFC 44). Following High Court authority, the Full Court found that a failure to make obvious inquiries may result in jurisdictional error, but found there was no substantive “duty to inquire” as this would result in too great a burden on the Tribunal.

Background

Mr Kowalski was a member of the Australian Army between April 1972 and October 1973, serving as a regimental and mechanical draftsman. While serving, Mr Kowalski developed an ulcer in his intestinal lining for which he was compensated. Several years later, Mr Kowalski developed gastro-oesophageal reflux disease (GORD) which he claimed was caused or contributed to by his service in the Army. Mr Kowalski applied to the Military Rehabilitation and Compensation Commission for compensation. The Commission rejected his claim, and Mr Kowalski applied to the Tribunal.

The Tribunal found that the claim for compensation was to be considered under the Safety, Rehabilitation and Compensation Act 1988 (Cth) (SRC Act), due to its finding in respect of the date on which Mr Kowalski first suffered from GORD. The Tribunal considered whether Mr Kowalski’s time in the Army contributed in a “material degree”, as required by the SRC Act,

to the onset or aggravation of his GORD. The Tribunal made factual findings that there was no such link, namely, that there was no link between Mr Kowalski’s significant weight gain and his Army service, and that he had not consumed excessive amounts of alcohol during his service period. The Tribunal concluded that the symptoms he relied on to demonstrate his GORD were in fact caused by the ulcer.

On appeal to the Federal Court of Australia, the primary judge noted the test set out in *Comcare v Sahu-Khan* (2007) 156 FCR 536 in which Finn J held that the words “in a material degree” required an evaluation of “all relevant contributing factors to determine if the contribution was material”. The primary judge found that while new evidence did show Mr Kowalski was treated for GORD earlier than previously considered, it did not show a sufficient connection between his present condition and Army service, and thus the primary judge did not disturb the Tribunal’s findings of fact.

The appeal to the Full Court raised interesting points of law, including whether the Tribunal had a duty to inquire into the evidence presented before it.

Effect of fresh evidence

Mr Kowalski tendered new evidence to the Full Court, including medical reports from a gastroenterologist, dated 13 May 1987, and a colonoscopy/endoscopy report dated 4 July 1987. These reports were not before the Tribunal during the hearing, nor were they available to the primary judge. The reports only became

apparent as a result of subpoenas in another hearing involving Mr Kowalski.

The first report acknowledged Mr Kowalski’s symptoms were suggestive of reflux disease, and the second confirmed the findings. Mr Kowalski claimed this new evidence showed that he was treated for GORD earlier than previously considered, and that such evidence should have been obtained by the Tribunal and taken into account in making its decision.

Duty to inquire

The medical reports raised the issue of whether the Tribunal was “under a duty to conduct inquiries into their existence” (at [78]). Justice Cowdroy referred to *Bushell v Repatriation Commission* (1992) 175 CLR 408 and found that the Tribunal was obliged to avoid a failure to make obvious inquiries, but that to impose a positive duty to inquire would place too heavy a burden on the Tribunal. Indeed, s 40 of the Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act) does not require a tribunal to conduct investigations on behalf of a party, nor to find evidence to support an applicant’s case.

Addressing this issue, the Full Court referred to authority in the decision of the High Court of Australia in *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, which demonstrated that the Tribunal did not have a duty to inquire when exercising its functions pursuant to the Migration Act 1958 (Cth). In that decision, the High Court considered that a failure to make obvious inquiries was not equivalent to a duty to inquire, although a failure to make obvious

inquiries may result in jurisdictional error. The High Court held “a failure to make an obvious inquiry about a critical fact, could...supply a sufficient link to the outcome to constitute a failure to review” (at [25]).

However, the content of any duty to avoid failing to make obvious inquiries will be informed by the facts of each case, which must (to support a finding of breach of such a duty) indicate that if not for the failure by the Tribunal to identify the evidence which existed, this evidence could have produced a useful result. In each case, there must be something before the Tribunal to indicate what information might be obtained if the Tribunal was to undertake such an inquiry said to be critical to the validity of its decision.

While the AAT Act obliges the Tribunal to review decisions under its jurisdictional remit, whether or not a review requires further inquiry will be a matter of fact in each case. The Full Court was wary of placing too heavy a burden on the Tribunal and did not wish to place an onus on the Tribunal to become “inappropriately involved” in each case. In this case, the facts raised by the new evidence were outweighed by the factors that militated against them producing a different result: namely, the doctor who gave evidence did not recall the information, the specialist witnesses did not describe the matter as significant and, importantly, there was no line of inquiry open to the Tribunal. ■

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Indigenous opportunities policy: revision of Commonwealth procurement templates required by 1 July 2011

By 1 July 2011, all Australian Government agencies subject to the Financial Management and Accountability Act 1997 (Cth) (FMA agencies) must have in place procurement policies and processes to comply with the Indigenous Opportunities Policy (Policy) (we first discussed this in our June 2010 edition of the *Public law report*).

The Policy aims to strengthen Commonwealth procurement policies to maximise Indigenous employment and business opportunities. The Policy commenced with consultations in May 2010 and will be fully operational by 1 July 2011.

From 1 July 2011, the Policy applies to FMA agencies conducting projects valued at \$5 million or more (\$6 million or more for construction) in regions where there are significant Indigenous populations.

The Department of Education, Employment and Workplace Relations (DEEWR) has published on its website (at www.deewr.gov.au/iop) a map setting out the areas with a significant Indigenous population. These areas include Darwin, Jabiru, Katherine, Cape York, Rockhampton, Bourke, Dubbo, Wagga Wagga, Queanbeyan, portions of the Sydney Indigenous Region and all of Tasmania.

The Policy does not apply to funding provided solely through grant processes. However, if an FMA agency's project is a combined grant and procurement activity, the agency must comply with its obligations under the Policy if the procurement aspect

of the activity exceeds the monetary threshold and involves activity in a region or regions with a significant Indigenous population.

From 1 July 2011, where procurements will occur in regions where there are significant Indigenous populations and that meet the requisite financial thresholds, FMA agencies will be required to:

- consult with DEEWR, the Commonwealth Indigenous Coordination Centres or equivalent Commonwealth Office, and community council or group, as appropriate, in the planning stages of those procurements,
- in each procurement process require each tender to include an Indigenous Training, Employment and Supplier Plan (Plan), and
- as part of the contract management process ensure Plans remain current for the duration of the contract and Plans are not suspended during the contract period.

DEEWR has provided model clauses as examples of text that could be included in tender and contract documentation where the Policy is applicable (in Appendix D of DEEWR's Indigenous Opportunities Policy Guidelines 2011 available from its website). Agencies may need to modify or adapt these clauses to ensure consistency with their procurement documentation.

The model clauses require tenders to have a Plan that states how it intends to:

- provide training opportunities to local Indigenous Australians,
- provide employment opportunities to local Indigenous Australians, and
- utilise Indigenous businesses that are small to medium enterprises.

The model clauses require contractors to:

- if the contractor has not already done so, submit a Plan to DEEWR for approval,
- implement and maintain the Plan throughout the duration of the contract, and
- provide DEEWR with an annual Implementation and Outcomes Report that meets the Implementation and Outcomes Report requirements stipulated in the Indigenous Opportunities Policy Guidelines. ■

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Adverse action – a challenge for the public sector

A key difference between unfair dismissal claims and adverse action claims are that adverse action claims are able to be made by continuing employees. In the public sector, adverse action claims are being made when poor performance is being managed or where a disciplinary process is underway. The challenges in these circumstances are varied and include strategies to continue the management of the employee and the development of an appropriate litigation strategy.

This article focuses on adverse action claims initiated by employees and the management issues that arise in relation to these claims.

Adverse action claims brought by employees

Section 342(1) of the Fair Work Act 2009 (Cth) (FW Act) provides that “adverse action” is taken by an employer against an employee if the employer:

- dismisses or threatens to dismiss an employee,
- injures or threatens to injure an employee,
- alters or threatens to alter an employee’s position to the employee’s prejudice, or
- discriminates or threatens to discriminate between an employee and other employees.

Under section 340 of the FW Act, an employer is prohibited from taking adverse action in relation to an

employee’s “workplace right”. Other provisions deal with adverse action taken because of an employee’s industrial activities (section 346) or on discriminatory grounds including temporary absence from work due to illness or injury (sections 351 and 352).

A claim will be successful under the adverse action provisions where it can be demonstrated that the workplace right was just “one” reason for the action. The workplace right is not required to be the sole or dominant reason for the person taking the adverse action.

Importantly, claims can be brought for adverse action that results in termination of employment as well as adverse action that relates to conduct during the course of employment.

A claim can be brought within 60 days where termination of employment is the adverse action claimed or six years where the adverse action relates to conduct during the course of employment.

There is also a reverse onus of proof in that it is up to the employer or other offending person to show that they did not take the action for one of the prohibited reasons in the FW Act. This places a heavy burden on employers or other persons alleged to have engaged in adverse action.

What does an adverse action claim look like?

The first decision of the Full Court of the Federal Court provides a useful example of what a claim looks like

where the employee brings a claim arising from a disciplinary process.

In *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, Mr Barclay was an employee of a TAFE college in Victoria (BRIT) and a sub-branch president of the Australian Education Union (AEU). Mr Barclay sent an inflammatory email to AEU members employed at BRIT suggesting that management was coercing staff into “putting together false/fraudulent documentation or participating in these types of activities” prior to an audit. The CEO of BRIT was concerned that Mr Barclay was going to continue to make these allegations and as a result he was stood down on full pay.

Mr Barclay claimed that his suspension amounted to an adverse action against him, because he asserted that BRIT had stood him down because he was an officer of the union and he was engaged in legitimate union activity.

The Federal Court found that Mr Barclay could not make out his claim of adverse action as he was not stood down because he was an officer of the union and/or because he was engaged in legitimate union activity. The Court accepted that Mr Barclay was stood down because the CEO had genuine concerns about Mr Barclay’s continuing conduct in distributing disparaging information about the TAFE.

In the Full Court of the Federal Court the decision at first instance was overturned (*Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 274 ALR 570). Justices Bromberg and Gray found that BRIT had breached section

346(a) and (b) of the FW Act which make it unlawful to take adverse action against another person because the other person:

- (a) is or is not, or was or was not, an officer or member of an industrial association, or
- (b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b).

The breaches were found to have arisen when BRIT suspended Mr Barclay pending an investigation, refused him permission to enter the workplace and denied him internet access after his email to AEU members.

The key issue in the findings of Justices Gray and Bromberg was not the employer's intention but the real reason for the conduct:

“The search is for what actuated the conduct of the person, not for what the person thinks he or she was actuated by. In that regard, the real reason may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question.”

In this case, Mr Barclay undertook the relevant (industrial) action as an officer of the union and it was therefore in this capacity that BRIT took action in relation to him.

What is clear from this case is that in order for there to be a successful

claim, the real reason the person was treated the way that they were must be because of the particular right (whether it be a workplace right or involvement in industrial action). The stated intention of the employer will not necessarily be enough to defeat a claim.

BRIT has recently applied to the High Court for special leave to appeal the Federal Court's decision. No date for the special leave application has been set.

Disciplinary action

In the case of *Jones v Queensland Tertiary Admissions Centre Ltd* (2009) 190 IR 218, the Applicant, Ms Jones, continued to be employed during the course of the litigation which included a successful application for injunctive relief.

Ms Jones, the CEO of the Respondent, claimed that adverse action was taken against her by her employer because of her involvement in negotiating an enterprise agreement (the workplace right). Ms Jones claimed that the adverse action included:

- commencement of disciplinary investigations without reasonable or adequate cause and where the allegations against her were not bona fide,
- failure to provide natural justice in the investigation process, including unreasonable reliance on the diary notes of a witness and the refusal to set aside the investigation report, and
- the requirement that Ms Jones show cause as to why she should not be subject to disciplinary action, including possible termination of employment.

The Federal Court ultimately found that Ms Jones did have a workplace right, being her involvement in negotiating an enterprise collective agreement as the representative of the employer, and that the show cause letter provided to Ms Jones constituted adverse action as it threatened to dismiss her.

While the Court found that the adverse action was not taken because of the workplace right, there was an indication that a failure of procedural fairness may be adverse action.

This case demonstrates the importance of ensuring that there is a good disciplinary process undertaken and that procedures are followed to the letter.

The risk of injunctive relief

The courts have also shown that they are prepared to make orders for injunctive relief in adverse action claims. This is a risk for employers that does not exist in unfair dismissal claims.

In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Phillips Engineering Aus Pty Ltd* [2010] FCA 611 the AMWU made a successful application for an interim order that an employee whose employment had been terminated by Phillips should be reinstated to his position until the substantive claim could be heard.

Though Phillips maintained that the employee had been dismissed due to redundancy, the Federal Court was satisfied that there was a serious question to be tried in respect of whether the employee's union activities were a reason for

the dismissal and therefore whether Phillips had engaged in unlawful adverse action under section 346 of the FW Act.

Applications for interlocutory relief can be very difficult for departments and agencies to respond to, as an employee's application can be commenced and heard quickly. Interlocutory orders can also be very broad and may include orders to:

- return a suspended employee to the workplace,
- cease a disciplinary process, or
- cease communication between the applicant and other work colleagues.

What do these cases mean for departments and agencies?

The adverse action provisions in the FW Act have changed the dynamics of workplace disputes, particularly in relation to workplace investigations and disciplinary action.

The cases to date show that employees are prepared to challenge managerial decisions, particularly relating to disciplinary action.

Employers must ensure that when they make decisions to demote, transfer, stand-down and dismiss employees and contractors, the decision is not based on the workplace rights or industrial activities of the employee or contractor or on prohibited grounds (discrimination).

Employers should also ensure that processes set out in awards or internal policies are followed during the conduct of investigations

or disciplinary action even when termination of employment is unlikely to occur.

Despite the new laws in relation to adverse action, employers should take disciplinary action where appropriate, provided that that action is initiated on a bona fide basis and in accordance with any procedural rules.

Because of the risks of litigation, advice should be sought early so that an appropriate litigation strategy can be developed, particularly where the employee has no intention of leaving their employment and there are increased risks of adverse action once a claim has actually been made. ■

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Aggravated vs exemplary damages and the misuse of executive power

In *Fernando v Commonwealth of Australia (No 4)* (2010) 276 ALR 586, Siopis J considered a claim for aggravated damages and exemplary damages following a finding that the applicant had been falsely imprisoned by the Commonwealth and that the Second Respondent, a former Minister of the Crown, had engaged in misfeasance in public office in cancelling the applicant's permanent residency visa. (For a note on the earlier decision, *Fernando v Commonwealth of Australia* (2010) 271 ALR 521, see the article in the December 2010 edition of *Public law report* on 'Misfeasance in public office – gaining popularity').

The decision summarises the basis for each head of damages, and is evidence of the firm stance that will be taken by the courts where executive power is abused.

Background

Mr Fernando moved from Sri Lanka to Australia in 1989. He was granted a permanent residency visa in 1995. In 1998, he was convicted of sexual assault and sentenced to eight years' imprisonment. In 2003, he was identified for release on parole, and notified by the Department of Immigration and Multicultural and Indigenous Affairs (Department) that he had 14 days to provide submissions as to why the Minister should not cancel his visa. He posted his submissions within 14 days, but the submissions had not arrived in Canberra within the 14 day period.

The Acting Minister cancelled Mr Fernando's visa prior to receiving his submissions, and Mr Fernando was taken into immigration detention immediately after he was released on parole on 5 October 2003. He was kept in immigration detention until 18 January 2007.

Damages for the successful claims against the Commonwealth on the ground of false imprisonment, and against the Acting Minister on the ground of misfeasance in public office, were assessed at \$3,000 in the first instance. Mr Fernando then sought aggravated and exemplary damages based on the circumstances surrounding the cancellation of his visa, his detention and his treatment while in detention.

Aggravated vs exemplary damages

The same considerations are frequently relevant to both an award of aggravated damages and exemplary damages. As Siopis J explained, the same conduct may give rise to one or the other, or both, but the different rationale for the award of each must be kept in mind.

The rationale for aggravated damages is compensation for the effect of the impugned conduct; that is, the award of aggravated damages recognises that certain conduct had a detrimental effect on the wronged party and seeks to compensate the party accordingly.

The rationale for exemplary damages is punishment and deterrence. It is not designed to compensate the wronged party but to provide punishment of, and meaningful deterrence to, the wrongful party so that the conduct is not repeated. Further, where there is abuse of executive power, exemplary damages serve to vindicate the rule of law.

Mr Fernando sought aggravated damages on the basis of:

- the inordinate length of his detention in the face of his maintained assertion that his visa was unlawfully cancelled, and
- the indignities to which he was subjected during the period of his detention, including being taken to the medical centre in handcuffs.

Justice Siopis held that despite there being conduct that was an affront to Mr Fernando's dignity, the period of unlawful detention was only one day (the rest of his period of detention having been found lawful), and was not sufficient to warrant an award of aggravated damages.

Mr Fernando also sought exemplary damages on the basis of:

- the "contumelious disregard" of his rights by Departmental officials and the Acting Minister, and
- the denial of procedural fairness in the cancellation of his visa prior to receipt of, or consideration of, his submissions.

Justice Siopis characterised the actions of the officials and Acting Minister as “outrageous, arbitrary and [a] high-handed exercise of executive power”. He found that the officials forwarded to the Acting Minister a minute paper recommending the cancellation of his visa when they knew his submissions could not be considered, and that they knew this was a denial of procedural fairness that would render the cancellation unlawful. He also found the Acting Minister acted in conscious and contumelious disregard of Mr Fernando’s rights. He awarded Mr Fernando exemplary damages of \$25,000.

Abuse of power

This case highlights the potential consequences of the misuse of executive power. The Migration Act 1958 (Cth) grants discretion to decision-makers, which can impact the liberty and future of individuals; the safeguard of procedural fairness is their only protection. As Siopis J points out, their protection is heavily dependent on those with power acting diligently and conscientiously in the discharge of their statutory duties. In this case, His Honour found that they did not, and exemplary damages served to vindicate the rule of law, which, His Honour noted, equally protects the popular and unpopular. ■

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Purpose and maladministration in the context of judicial review of administrative action

Recent decisions of the Federal Court point to the continuing need to concentrate on the purpose for which executive power is exercised when seeking to attack an administrative decision as vitiated by maladministration or misfeasance in public office. (For a more general discussion, see the article in the December 2010 edition of *Public law report* on “Misfeasance in public office – gaining popularity”).

In *Denlay v Commissioner of Taxation* (2010) 119 ALD 306, at first instance, and in *Denlay v Commissioner of Taxation* [2011] FCAFC 63 on appeal, the Federal Court held that taxation assessments were not vitiated by the fact they were made in reliance on information that was, as the applicant argued, obtained by the ATO in breach of Australian and foreign law.

In 2008, the Commissioner of Taxation issued to the applicant, Mr Denlay, Amended Assessments for the 2002 to 2007 income years. It was accepted that these Assessments were the product of information that had been stolen from a Lichtenstein bank by a third party, and inquiries prompted by that information.

The applicant argued that:

- by importing the documents into Australia, the ATO Officials had breached the Commonwealth Criminal Code (s 400.9),
- this breach was advertent, leading to the conclusion that there had been conscious maladministration of the Income Tax Assessment Act

1936 (ITAA36) and the Income Tax Assessment Act 1997 (ITAA97) (together, the Taxation Acts), or a deliberate failure to administer the Taxation Acts according to their terms,

- therefore the Assessments were affected by jurisdictional error and not protected by the Taxation Acts against review under s 75(v) of the Constitution.

The applicant failed on all the decisive issues at first instance and on appeal.

The relevant criminal law, s 400.9 of the Criminal Code, made it an offence to import property into Australia where it is reasonable to suspect that the property represents the proceeds of crime in relation to a Commonwealth or foreign indictable offence.

The trial judge held that the ATO officials had not committed an offence under s 400.9, because provisions of the Taxation Acts gave them a defence of lawful excuse as allowed by s 10.5 of the Criminal Code. It was held that the provisions of the Taxation Acts that give the Commissioner power to make an assessment from any information in his possession and to have full and free access to all buildings, places, books, documents and other papers for the purposes of the Taxation Acts, meant that no offence under s 400.9 was committed.

The Full Court was of the view that there was no evidence to support a prima facie case for breach of s 400.9. This conclusion was largely the result of a view that what the ATO brought

to Australia was not “money or other property”, because the disks were not stolen and the information on them was not “property”.

The second issue was whether, if the ATO officials had breached the law, the Assessments were vitiated by jurisdictional error. On this issue, the trial judge and Full Court emphasised the High Court’s finding in *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 (*Futuris*), that for an assessment under the Taxation Acts to be affected by jurisdictional error, so that it is not protected against judicial review, there needs to be conscious maladministration of the Taxation Acts (at 157).

Section 175 of the ITAA36 provides that “the validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with”. In *Futuris*, the High Court held that an “assessment” made in conscious maladministration of the Taxation Acts was not an assessment for the purposes of s 175, and not protected against judicial review under s 75(v) (at 157) (this notably echoes the reasoning in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 that a decision affected by jurisdictional error was not a decision “under the Act” and therefore not protected by the relevant Act’s privative clause).

In *Futuris*, the High Court pointed to the tort of misfeasance in public office as informing both the conclusion that an assessment made in conscious

maladministration of the Taxation Acts is not to be protected from relief under s 75(v), and the content of what is required to obtain such relief. It was held that it is sufficient for the tort that the “public office holder acted knowingly in excess of his or her power” (at 153).

Returning to *Denlay*, the applicant argued that conduct that would constitute misfeasance in public office is informed by s 13 of the Public Service Act 1999 (Cth), which provides that an employee of the APS must comply with all applicable Australian laws. The Court held that even if s 400.9 had been breached, perhaps even advertently, this would not establish conscious maladministration.

The purpose for which ATO officials obtained the information was the administration of the Taxation Acts. The Full Court said:

“Conscious maladministration as explained in *Futuris* relates to the integrity of the assessment. Even if the circumstances in which the information in question became available to the Commissioner’s officers involved unlawful conduct on their part, that would not necessarily deny the integrity of the assessment. What matters for that purpose is the accuracy of the information and the competence and honesty of those officers involved in making the assessment.”

The conclusion is that the test is whether the decision maker has acted in excess of power, and so it is to the statute conferring power on the decision maker that regard must be had. The conscious misuse of this power is what is apt to make a decision characterised by jurisdictional error.

Conclusion

While the cases were decided on the construction of the provisions of the Criminal Code that were relied upon by the applicant, the decisions illustrate some important points. First, the facts that support a claim for the tort of misfeasance in public office will also, often, support a claim for conscious maladministration leading to jurisdictional error and the ability to seek prerogative relief. Secondly, to have a decision set aside by reason of such conduct requires misuse of the power conferred, which is not to be equated with the breach, even advertently, of merely any law that may be applied to the decision maker. ■

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Political prorogation power play prohibited

On 16 May 2011 the Governor of New South Wales assented to the Constitution Amendment (Prorogation of Parliament) Act 2011 No 3 (the Act), an Act to amend the Constitution Act 1902 (Constitution) to restrict the prorogation of the NSW Parliament before a general election. The Act was the response of the newly elected Government to the well publicised prorogation of the NSW Parliament in late 2010.

Background

In NSW, the maximum duration of a Legislative Assembly is fixed by s 24 of the Constitution, which provides that unless dissolved sooner under s 24B, it shall expire “on the Friday before the first Saturday in March” four years after its election.

The Legislative Council is a continuing house, which never ceases to exist, but s 24F of the Constitution provides that its business is suspended from the expiration of the Legislative Assembly until the end of the election.

Both houses of Parliament may, however, be prorogued by the Governor. The effect of prorogation is to cause all Bills that have not passed both houses to lapse, to clear the notice paper of any notices of motion, and, as we now know, to put in doubt the business of some parliamentary committees.

The power to prorogue parliament is inherited from the unwritten British constitution. Its rationale was that Parliament is an advisory council to the monarch, and the monarch could put it out of session and end all its business

when it no longer required its advice. Historically, it was a power used to end the business of unruly Parliaments.

Parliament need not ever be prorogued, especially now s 24F suspends the NSW Legislative Council’s business during general elections; indeed, the Commonwealth Parliament was often not prorogued but simply left to expire.

The Act

Section 10 of the Constitution, prior to amendment, provided that the Governor could prorogue the Parliament whenever she deemed it expedient; by convention, this was done on the advice of the Premier.

The Act removes the reference to the power of prorogation in s 10, and adds a new s 10A. That section still provides that the Governor can prorogue Parliament when the Governor considers it expedient to do so, but also provides that the Premier or Executive Council may not advise the Governor to prorogue Parliament on a date that is before 26 January in the year in which an election is due and that is after the fourth Saturday in the preceding September.

Discussion

The effect of the Act will be to prevent prorogation between the fourth Saturday in September in the year prior to the election and Australia Day in the election year. It will not prevent the use of the power at other times, however.

It also raises some interesting questions about the status of advice of the Premier or Executive Council, and whether, for example, that advice could be restrained by judicial power; or, whether a decision by the Governor to act on advice given in breach of s 10A would be judicially reviewable.

Responsible government requires that there be Ministers responsible to Parliament for the actions of the Executive, and that the Governor therefore only acts, save in exceptional circumstances, on the advice of Ministers.

It may be that if the Governor was advised contrary to s 10A, she would be obliged to refuse that advice. In *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 Isaacs J (later Governor-General) described an exception to the duty to follow Ministers’ advice as “to transparent improprieties, the responsibility for which [she] may transfer to Parliament or the people”. What would happen after any such refusal is an interesting question. ■

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FOI update – the power to recommend costs

In Re Viliamu and Commissioner of Taxation (2010) 119 ALD 400, the Administrative Appeals Tribunal (the Tribunal) considered the circumstances in which it can exercise its discretion to make a recommendation to the Attorney-General that the applicant's costs of a hearing to review an FOI decision be paid by the Commonwealth.

Background

The FOI application under review was made to the Commissioner of Taxation (Commissioner) on or about 17 March 2010 and sought copies of Mr Viliamu's taxation documents for the period 1980 to 1989.

On 14 April 2010, the Commissioner denied the applicant's request on the basis that the information had been destroyed. The next day, following receipt of further submissions on behalf of the applicant by his solicitor, an FOI officer for the Commissioner made a further decision releasing some documentation to the applicant.

On 30 April 2010, the applicant sought a review of the decision and on 10 June 2010, a further decision was made granting the applicant access to 40 further documents. On 28 June 2010, the applicant brought an application for the review of the Commissioner's decision to the Tribunal. During the preliminary stages of the application, the Commissioner released a further 13 folios of documents to the applicant.

The matter before the Tribunal was ultimately settled by consent on 27 September 2010.

The applicant then brought an application to the Tribunal seeking the exercise of its discretion to recommend to the Attorney-General that the Commonwealth pay his costs in accordance with section 66 of the Freedom of Information Act 1982 (FOI Act). Section 66(2) sets out the factors that the Tribunal shall have regard to when exercising its discretion:

- (a) the question whether payment of the costs or any part of the costs would cause financial hardship to the applicant,
- (b) the question whether the decision of the Tribunal on review will be of benefit to the general public,
- (c) the question whether the decision of the Tribunal on review will be of commercial benefit to the person making application to the Tribunal,
- (d) the reasonableness of the decision reviewed by the Tribunal.

Judgment

Senior Member Ettinger declined to make the recommendation to the Attorney-General that the applicant's costs of his application for review to the Tribunal should be met by the Commonwealth.

This was the case notwithstanding her finding, on the threshold issue, that

the applicant had been substantially successful in his claim, reaffirming the position that the test to determine whether an applicant has enjoyed substantial success is whether disclosure of the documents had led to an increased disclosure of information that was not previously available.

In declining to make the recommendation, Senior Member Ettinger found that while the payment of the costs associated with the application would be likely to cause financial hardship to the applicant, the consent decision of the Tribunal could not be said to be of benefit to the general public and the original decision under review was not entirely unreasonable.

Implications

The decision reaffirms that the Tribunal must, as a threshold issue, determine whether it can be considered that the applicant's appeal has been successful, or substantially successful, before considering the additional matters which impact on the exercise of the discretion. In order to make this finding, the Tribunal must determine whether the disclosure has led to an increased disclosure of information that was not previously available to the applicant.

Following the 2010 amendments to the FOI Act, an applicant must first seek a review of an FOI decision by the Information Commissioner before they can bring an application before the Tribunal.

Given that applicants now have the additional step of seeking a review by the Information Commissioner, it will be interesting to see whether the Tribunal will take account of the reasoning and decisions of the Information Commissioner in exercising its discretion to make a recommendation under section 66. ■

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Full Federal Court upholds approval of dispersal of flying-foxes from critical habitat

The Full Federal Court has dismissed an appeal by Bat Advocacy NSW Inc (appellant), which had sought judicial review of a decision made by the Minister for Environment Protection, Heritage and the Arts (Minister) to approve action by the Royal Botanic Gardens and Domain Trust (Trust) for the relocation of a colony of grey-headed flying-foxes from the Royal Botanic Gardens in Sydney (*Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCA 113).

The appellant claimed that the Minister's decision was an improper exercise of power in that the Minister failed to take into account a relevant consideration, namely, the impact that the removal of the colony from the Gardens would have on the flying-foxes as a species.

Background

The Trust proposed to take the action of relocating the flying-foxes by using non-lethal methods to protect trees of

state heritage value in the Gardens that had been damaged by the flying-foxes. The flying-foxes are a listed threatened species in the vulnerable category under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the Act). A person is prohibited under the Act from taking an action that will, or is likely to, significantly impact on such species unless they have an approval from the Minister.

Minister's decision

The Department of the Environment, Water, Heritage and the Arts (Department) provided a recommendation report to the Minister which recommended the grant of approval subject to certain conditions. The report relevantly attached the Department's original decision brief which had included a public environmental report, a draft national recovery plan and other relevant material that addressed the impacts of the action. The Department had noted in the decision brief that since the draft national recovery plan

had not been made or adopted under the Act, the requirement under that Act that the Minister must not act inconsistently with a recovery plan was not a relevant consideration. The decision brief stated, however, that it was appropriate for the Minister to consider the draft recovery plan as part of the decision-making process.

The Minister approved the action proposed by the Trust subject to a number of conditions. At the request of the appellant, the Minister provided a statement of his reasons for granting the approval.

Decision of the Full Federal Court

The appellant asserted that the primary judge erred in failing to find that the Minister failed to take into account relevant mandatory considerations in making the decision to approve the dispersal of the flying-foxes from the Gardens. Those considerations were said to be:

- 1 the impact that removal of the flying-foxes from “critical habitat” would have on the species, and
- 2 the draft national recovery plan.

The appellant submitted that the mere fact that an issue had been discussed in a departmental briefing established no more than that the Minister’s advisers had identified the issue as relevant and invited the Minister to consider it. The appellant stated that no inference could be drawn about whether the Minister himself regarded the issue as important or relevant and given that the briefing paper raised the issue but the Minister did not discuss it in his statement of reasons, the inference was strengthened that in fact he did not treat the issue as a relevant one.

The Full Court held that a statement of reasons required under the Administrative Decisions (Judicial Review) Act 1977 (Cth) did not require a decision-maker to pass comment on all of the material to which his or her attention had been drawn, rather it required the decision-maker to set out his or her findings on “material questions of fact”. The Full Court found that the statement of reasons and documents attached to the Minister’s decision brief made it clear that the primary concern of the Minister, in deciding whether to grant approval and impose conditions, was the effect on the loss of critical habitat and whether that could be justified in the circumstances. Accordingly, the Full Court held that, in the circumstances, the Minister did not have to say anything further about the draft recovery plan in order to establish that he had considered it. The Full Court dismissed the appeal.

The Full Court’s decision affirms judicial authority that failure by a decision maker to refer to a relevant matter in their reasons for a decision will not necessarily be proof that the matter was not taken into account. Rather, whether such an inference should be drawn will depend on the circumstances of the case. ■

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