'Document of an Agency' and 'Personal Affairs'

Bleicher v Australian Capital Territory Health Authority (Federal Court - 13 August 1990, Sydney) concerned an appeal from a decision made by the Tribunal in connection with an application made under the Freedom of Information Act 1982. Mrs Bleicher had unsuccessfully applied for a permanent position with the ACT Health Authority as an occupational therapist. That employer had had regard to written comments on her work history records. She applied to have these amended under the FOI Act. The matter came before the AAT and was resolved by an agreement that the records be amended by attaching two further papers provided by Mrs Bleicher.

On a later date Mrs Bleicher applied for access to four documents used at the AAT hearing, and upon being given access to the copies held by the Authority, requested their amendment. The Authority refused and Mrs Bleicher appealed to the AAT. The Tribunal relied on two matters:

- none of the subject documents was a document of the agency; once filed in proceedings before the Tribunal the documents became documents used in the administrative proceedings of the Tribunal;

- the documents did not contain information relating to the 'personal affairs' of the applicant.

On appeal Mr Justice Wilcox rejected the first reason for decision on the basis that the copy documents in the Authority's possession could be subject to an amendment order, and there was no reason why an appropriate note should not be added to the copies. The judge held that the Tribunal had applied the wrong test in considering whether the subject documents fell within the expression 'personal affairs' and relied on the Full Federal Court's decision in Dyrenfurth (1988) 80 ALR 533 (handed down after the Tribunal's decision in this matter).

The Court in that case said 'In our view, it cannot be laid down by way of definition that an assessment of the capacity or previous work performance of an employee or prospective employee necessarily contains "information relating to the personal affairs" of that person. Equally, however, it is not permissable to construe the phrase ... as being incapable of application to information contained in an assessment of capacity of work performance'.

The Courts

Access to Commonwealth Cabinet records

Northern Land Council v Commonwealth (Federal Court 6 August 1990).

This case provides an interesting summary of the current practice of recording the outcome of Cabinet decisions as well as considering the law relating to the disclosure of Cabinet documents in court proceedings.

The Northern Land Council (NLC) sought a declaration setting aside the 1978 agreement which permitted the Ranger Uranium Mine to operate on Kakadu Land Trust Aboriginal land. The case raises many issues, one being the allegation that the Commonwealth, when negotiating the 1978 agreement with the NLC, acted unconscionably and in breach of its fiduciary duty to the NLC, resulting in an agreement that was 'inadequate, unreasonable and unfair to the NLC'.

The negotiations between the NLC and the Commonwealth leading to the 1978 agreement had involved Commonwealth Ministers and consideration by and decisions of Commonwealth Cabinet, hence the application to discover the Cabinet documents. Cabinet decisions, recorded in Cabinet Minutes, were disclosed to the NLC by the Commonwealth. However the Commonwealth resisted disclosing a number of documents including 113 Cabinet note books.

The Acting Director of the Cabinet Office gave evidence of how Cabinet notes are taken. She said that disclosure of those notebooks would, in her view, undermine the conventions of Cabinet confidentiality and collective responsibility. She also stated that matters relating to mining of uranium whether on Aboriginal land, at Ranger or in proximity to national parks, were matters of current political debate. The Secretary to the Department of the Prime Minister and Cabinet agreed with these views.

Mr Justice Jenkinson held that there was a strong probability that the notebooks contained relevant information which might advance the NLC case or damage the Commonwealth case. Accordingly, the public interest in favour of granting inspection (to be limited at that stage to the NLC's legal representatives) outweighed the public interest in favour of denying inspection. In any case, in the judge's view, even if that was incorrect 'there could be little injury to the public interest by disclosure of Cabinet proceedings in giving inspection of what the notebooks record of statements of historical facts, concerning which facts the parties' representatives and others able to give admissible evidence of them will be giving evidence at trial'.

An appeal has been lodged by the Commonwealth against this decision.

Onus of proof - investigation of administrative character

The Secretary, Department of Social Security v Willee (6 July 1990) was an application for review of a decision of a Disciplinary Appeal Committee varying a decision of a delegate of the Secretary to dismiss a Mr Williams from the Australian Public Service (the Committee had reduced the penalty). A review was sought on the grounds that the Committee had erred as to where the onus of proof lay, that irrelevant considerations had been taken into account, and that the decision was unreasonable. The application was dismissed.

Adopting what was said by Mr Justice Beaumont in Thomson (1985) 8 FCR 213 at 223, Mr Justice Foster said 'There is no warrant, in my opinion for asserting a general proposition that the concept of an ultimate onus of proof is inappropriate to proceedings before an administrative tribunal where that tribunal is to determine whether a charge brought against an officer has been proved and, if so, what if any is the appropriate penalty to be imposed. In such circumstances common fairness would require the casting of the customary onus upon the prosecution to prove its case. Such a situation is, in my opinion, significantly different from one where a mere inquiry or investigation of an administrative character is being undertaken'.

Immunity from review - advice to the Governor-General

Butcher v Attorney-General (Cth) (Federal Court - 28 August 1990) was an objection to an application for review of a decision of a Minister refusing to advise the Governor-General to grant Mr Butcher a licence to be at large. The objection was made on the ground that the decisions of the Governor-General are exempt from judicial review under the Administrative Decisions (Judicial Review) 1977.

Mr Justice Spender held that he was bound by the majority decision in Thongchua (1986) 66 ALR 340 that the immunity from review of decisions of the Governor-General extends to the steps taken by the Attorney-General in considering whether he is prepared to advise the Governor-General that the grant of licence be made. The fact that the Minister chooses not to advise the grant of a licence does not change the constitutional character of the advice. The application was therefore dismissed.

The decision in this case was made, not by the Attorney-General, but by the Minister for Justice who, it was said, was acting on behalf of the Attorney-General. Mr Justice Spender referred to the 'unsatisfactory state of the ministerial regime of non-portfolio ministers', expressing doubts as to whether it was correct to say that in this case the Minister for Justice was acting for or on behalf of the Attorney-General within the meaning of the Acts Interpretation Act 1901.

Meaning of administrative decision

Little v Registrar of the High Court (Federal Court - 22 June 1990,) was an objection to an application for review of a decision of the Registrar to strike Mr Little's name from the Register of Practitioners kept under the Judiciary Act 1903. The objection was made on the ground that the decision to be reviewed was not an 'administrative decision' within the meaning of the AD(JR) Act.

The Court found that the decision to strike Mr Little's name off the Register was a decision of an administrative character. The Judiciary Act 1903 gives the control over the right to practise in federal courts to the Supreme Courts of the States and Territories. The Registrar of the High Court is required by the Judiciary Act to amend the Register of

Practitioners so that it accurately reflects the exercise by the Supreme Courts of that power. This, his Honour held, did not involve the exercise of judicial power. The application was therefore competent.

Attorney-General (Commonwealth) v State of Queensland; Federal Court (1990) 94 ALR 515. This case involved construing Letters Patent issued to a Royal Commissioner by both the Governor-General and the Governor of Queensland, to inquire into the deaths of 'Aboriginals and Torres Strait Islanders'. Queensland contended that the Commissioner had no jurisdiction to inquire into the death of a part Aboriginal of European appearance as, it said, he was not an Aboriginal.

The Full Court allowed the appeal, holding that no legal error had been shown in the Commissioner concluding that 'Aboriginal' in its ordinary and natural sense included people of proven Aboriginal descent and that the deceased was an 'Aboriginal' in that sense.

The Court held that the Commissioner's formal ruling that the deceased was an Aboriginal was a 'decision' which had the practical consequence of allowing the enquiry to proceed. The Federal Court had jurisdiction for the entire matter as in so far as it was made under the Commonwealth Letters Patent, it was a 'decision under an enactment' (Royal Commissions Act 1902); in so far as it was made under the Queensland Letters Patent, it was part of the same controversy and fell within the accrued jurisdiction of the Federal Court. The Court would not have had power to restrain, (by prohibition or declaration) an inquiry outside the terms of reference of the State Letters Patent. [Presumably, the Court could also have relied on the general jurisdiction of the Queensland Supreme Court under the relevant cross vesting legislation in this regard.]

Australian Wool Testing Authority Ltd v The Commissioner of Taxation (Federal Court - 18 September 1990) involved objection by the Commissioner to the competancy of an application for review of his decisions that the income of the Authority was exempt from income tax under the Income Tax Assessment Act 1936. The objection was made on the ground that there had been no decision made and that the Commissioner had merely conveyed an expression of opinion, which did not amount to a decision, and that, even if what was done amounted to a decision, it was not a decision under an enactment.

Mr Justice Northrop held, following the remarks of the High Court in ABT v Bond (1990) 94 ALR 11 (discussed at page 105), that the action taken was substantive as it denied the Authority an exemption. The decision was administrative and made under an enactment. The Commissioner argued that if there was a decision it was excluded from review by section 3 and Schedule 1(e) of the AD(JR) Act. Mr Justice Northrop held that the decisions under review were not decisions 'making or forming part of the process of making or leading up to the making of assessments or calculations of tax', and therefore the objection to the application failed.

Unreasonableness - findings of fact

Detsongjarus v Minister for Immigration, Local Government and Ethnic Affairs and Another (Federal Court - 19 September 1990) was an application for review of a decision of the Minister refusing to grant Miss Detsongjarus resident status under the Migration Act 1958. The application for residency was based on a de-facto marriage relationship with a resident of Australia. The application was dismissed.

Mr Justice Pincus considered the circumstances in which 'unreasonableness' may be relied upon under the AD(JR) Act. He accepted that the ground of unreasonableness applies only to the ultimate decision, not to the steps taken along the way to that decision.

However, the judge considered that the ground of unreasonableness could be used in attacking factual views of a decision-maker leading up to the exercise of power as involving an error of law. He added: 'it may be that only ultimate factual conclusions, arrived at by inference from findings of primary fact, can be attacked for unreasonableness'. He also identified the 'no evidence' ground of review as another area of attack.

Deportation proceedings

In Kirakos v Minister for Immigration, Local Government and Ethnic Affairs (Federal Court - 16 October 1990), Mr Kirakos sought an interim order for release from custody and to restrain his further arrest or deportation from Australia pending the final hearing. Mr Kirakos entered Australia in 1974 and since 1976 had been convicted of numerous criminal offences. He was due for release from prison in June 1989 having served a sentence for the last of these convictions, when the delegate of the Minister signed an order that he be deported. As a result Mr Kirakos remained in custody after the expiration of his sentence.

The Department appeared to have difficulty in obtaining travel documents acceptable to the Syrian authorities and it was not till September 1990 that Mr Kirakos was deported. On route via Rome, the Qantas escorts were advised that the Syrian authorities had refused to accept Mr Kirakos who then returned to Australia where he was taken into custody at the airport. Issues in the case included whether Mr Kirakos had 'entered Australia', and whether the Department had authority for keeping him in custody. It was arguable, but not necessary to decide, that removal of Mr Kirakos from the airport into custody constituted 'entry into Australia'. The Court refused to grant an order releasing Mr Kirakos from custody but commented that his custody should not continue for a long period.

Validity of search warrants

Karina Fisheries Pty Ltd v Mitson (Federal Court - 19 October 1990), involved an appeal against the decision of Mr Justice O'Loughlin. At issue was the validity of search warrants issued under s10 of the Crimes Act 1914 and under section 71 of the Proceeds of Crimes Act 1987 authorising entry to certain

premises and vehicles to search and seize documents and other things described in the warrants.

Karina claimed that the section 10 warrants were invalid and of no effect

- as the informant had failed to bring all material facts before the issuing justice and had used material that was either unsourced or misleadingly sourced;

- as the magistrate had applied the wrong test in issuing the warrants; and

- as the material information disclosed was no ground for a belief that a conspiracy existed because it did not state that Karina was to receive a benefit from the acts alleged to have been done by it.

These submissions were not accepted.

Mr Justice O'Loughlin held the section 71 warrants to be invalid on the basis that they did not set out the purpose for which they were issued, and did not contain a reference to the indictable offences that had been or were believed to have been committed.

On appeal the Full Court discussed the nature of search warrants, the obligations placed on the informant and dismissed Karina's objections to the validity of the section 10 warrants. The Court also upheld the the trial judge's decision that the section 71 warrants were invalid, dealing at some length with the issue of the purpose of a warrant: 'where the legislature has required that the warrant state the purpose for which it issued, it has done so in order that a person whose premises are to be entered and searched can see from the face of the warrant itself that the legislative requirement has been complied with... s71(7) is a provision inserted by Parliament for the protection of the citizen. It must, in our view, be construed strictly and failure to comply with it will lead as in the present case to the warrants being declared invalid.'

Failure to state reasons - error of law

Dornan v Riordan (Federal Court - 31 July 1990) was an appeal from a decision of Mr Justice Wilcox. The Full Court only considered that part of the appeal which dealt with the Pharmaceutical Benefits Remuneration Tribunal's failure to give adequate reasons and the consequent order to remit the matter to the Tribunal to give further reasons for its determination. The Full Court agreed with Mr Justice Wilcox that the Tribunal had failed to comply with the National Health Act 1953 by not setting out reasons for its determination. The Full Court said that where it is a requirement of the statute under which the decision is made to give a statement of reasons and there is a substantial failure to state the reasons for a decision, this failure constitutes an error of law.

AD(JR) Act - Entitlement to Section 13 statements

United Airlines v Department of Transport and Communications Federal Court - (31 October 1990) In this case, after the substantive issues were dealt with by way of a consent order,

the Court considered the purpose of a section 13 request for a statement of reasons and whether an applicant, having applied to the Federal Court, no longer satisfied the description of a person entitled to make the application. Mr Justice Hill said 'it cannot be assumed that the need for a section 13 statement evaporates once a decision has been taken to institute proceedings for judicial review... Once a person with standing requests a decision-maker to furnish a statement, then, in my opinion there arises a duty upon the decision-maker to furnish that statement'. The Court held however, that once the consent order was made there was no practical purpose to be served by ordering that a section 13 statement be furnished. The application was dismissed.

Commonwealth Ombudsman

Australian Customs Service - tariff concessions

A manufacturer had imported certain mixing apparatus capable of both batch and continuous operation. Limited local enquiries had indicated that no suitable Australian equivalent was available and the manufacturer sought by-law tariff concession. Customs referred him to other possible suppliers, all but one of whom stated that they were unable to meet his needs. It had originally been thought that the firm that constituted the exception was unable to meet the manufacturer's demand but it subsequently changed its position on this point a number of times. The manufacturer eventually complained to the Ombudsman in 1988 by which stage some considerable time had passed since the by-law tariff concession had been sought and many relevant records had been destroyed. In addition, the recollections of those involved were understandably fading.

Customs at first suggested that its officers must have known at the time what could and could not be made in Australia but its files provided no indication of further manufacturers nor had the complainant been asked to approach any. In all the circumstances, the Ombudsman could draw no clear conclusion on the question whether a suitable local equivalent could be said to be available. He did, however, indicate that Customs should not accept claims regarding capacity to supply a product at face value if such claims were contested. (There was always a risk that a local firm might object simply for tactical reasons).

Customs suggested that the complainant should have sought review by the Industries Commission. The Ombudsman drew no adverse inference from the failure to do so as the Commission's procedure was somewhat cumbersome, was more suited to cases of principle, and may not in this instance have led to a binding decision.

A question arose whether any discretion on the part of Customs should be exercised in favour of, or against, concession orders. It seemed to the Ombudsman that the policy underlying the tariff concession order system was fairly simple. Customs duties served two main functions: raising revenue and protecting local industry. As duties imposed cost burdens on