

Updates in administrative law



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Mental Health Review Tribunal



For MHRT Member training only.
October, 2023

Topics

- Brief refresh on administrative law basics
- Application of administrative law to the MHRT
- “Reasonableness” of decision
- What is a fair hearing – provision of relevant information
- Apprehended bias – Judge’s previous decisions
- Apprehended bias – considering external information
- Adequacy of reasons
- Judicial immunity



Quick poll

What do we mean by administrative law?

- (a) A group of laws that governs the office-related processes for courts and tribunals
- (b) The body of law that regulates government decision making
- (c) I'm honestly not too sure



What is administrative law?

- Body of law that:
 - structures and controls the exercise of public power.
 - regulates government decision-making.
- Includes dealing with issues arising in respect of:
 - authority to make decisions (e.g. delegations, statutory powers).
 - what factors were, and were not, taken into account in coming to a decision.
 - review of decisions (e.g. the legality of the decision, merits review).



Quick poll

Where does administrative law come from?

- (a) Legislation/statute – there are Acts that set out the law
- (b) Case law – it is what Judges say the law is based on a set of principles
- (c) A combination of both legislation and case law
- (d) It is set out in guidelines agreed by lawyers



Sources of administrative law

- Legislation:
 - *Judicial Review Act 1991* (Qld) – relates to review of administrative decisions
 - *Acts Interpretation Act 1954* (Qld) – assists interpretation of legislation, including exercise of statutory power
- Case law:
 - administrative decision-making often contains a range of internal and external review processes (e.g. referral to Queensland Ombudsman, Office of the Information Commissioner) – not so much Queensland Supreme Court case law.
 - cases often sourced from Commonwealth courts and may contain more complex circumstances – e.g. migration law.



Relevance of administrative law to MHRT

- While MHRT decision-making has some quasi-judicial features, many of the decisions it makes are administrative in nature.
- Characteristics of lawful administrative decisions:
 - within jurisdiction
 - s705, chapters 12 and 13
 - procedural matters in chapter 16
 - statutory discretion must be exercised reasonably/rationally
 - procedural fairness (natural justice):
 - fair hearing
 - free from bias.
- Plus MHA2016 s733(3)(a) – in conducting a proceeding, the MHRT must observe the rules of natural justice.



Reasonableness

- Where the statutory framework allows a decision-maker to exercise their discretion, there is a requirement that they do so rationally / reasonably.
- What is required for a decision to be unreasonable?
- We will look at the case of *BP Refinery (Kwinana) Pty Ltd v Tracey* [2020] FCAFC 89.
- BP was negotiating a new enterprise agreement with employees.
- In the context of those negotiations, one employee, Mr Tracey, made and distributed a video which allegedly depicted BP representatives as Nazis.
- Mr Tracey was dismissed from his employment.



A screenshot from the subject video



Quick poll

Was the decision to terminate Mr Tracey in these circumstances reasonable?

- (a) Yes – it was reasonable
- (b) No – it was not reasonable



Fair Work Commission and Federal Court

- Mr Tracey took the matter to the Fair Work Commission.
- FWC: a reasonable person would consider the video inappropriate and offensive and that was a breach of BP's policies. Therefore, Mr Tracey's termination was valid.
- Full Bench of FWC: looking at all the facts, the FWC's decision that the video was offensive or inappropriate was not reasonable.
- Federal Court: agreed with the Full Bench of FWC. A decision may be one that permits a range of conclusions, but, on the facts, there may still be a decision outside the permissible range.
- Held: Mr Tracey's dismissal was unfair and he was reinstated.



Fair hearing

- Requires the subject person have the opportunity to:
 - be heard on the critical relevant factors on which a decision will turn
 - understand and respond to information that is adverse to the affected person's interests.
- In an MHRT context (both at common law and MHA2016):
 - provide prior notice of a hearing and allow person to attend to hear oral evidence
 - allow person to give evidence / present their case
 - allow the person access to the documents before the panel (subject to a CO, VIS provisions).



Presentation of all information to the subject person

- *Khazaal v Attorney-General* [2020] FCA 448.
- Mr Khazaal charged with terrorism-related offence.
- Sentenced to 12 years, non-parole period of 9 years.
- Attorney-General refused parole requests after non-parole period.
- Mr Khazaal challenged decision on the basis of procedural fairness:
 - A-G did not provide sufficient notice of adverse information taken into account.
 - Mr Khazaal did not have an opportunity to make meaningful submissions about that information.



Adverse information

- Mr Khazaal was provided with a letter which contained adverse information which would be considered.
- The letter referenced reports from various organisations and outlined the main factors or issues arising from those reports. It specifically noted that copies of the reports would not be provided.
- Mr Khazaal argued the contents of the letter were at such a general level as to make meaningful comment impossible.
- He also argued that the A-G had before him adverse information that was credible, relevant or significant but which was not disclosed to Mr Khazaal (i.e. passages from the reports).



Relevant principles

- Federal Court set out relevant principles (having regard to a review of prior cases):
 - it is impossible to lay down a universally valid test in relation to the content of the requirement of procedural fairness.
 - ultimate question is - what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made.
 - the person does not need to be put on notice of the decision maker's mental processes, provisional views, opinions, doubts or subjective appraisals.
 - depending on the circumstances, it may not be necessary to disclose all the precise details of the information, and it may be enough to disclose the gravamen or substance of the information
 - may not need to disclose issues in respect of which the person is already on notice or information, the substance of which, is already known to the person.



Court findings

- Federal Court examined the parts of the letter Mr Khazaal had said were too general and considered each in turn.
- Found that in each case the information provided allowed Mr Khazaal to understand the nature of the adverse information and provide a meaningful response to it.
- Federal Court then examined the parts of the reports that Mr Khazaal said contained information that was not provided to him.
- Found that in each case the information was sufficiently captured in the contents of the letter or was otherwise not significant or material to the decision.
- Overall, Mr Khazaal failed to demonstrate that the A-G failed to afford him procedural fairness despite not providing all the information before him, and Mr Khazaal's challenge to the A-G's decision was dismissed.



Bias

- Decision-maker should be impartial, open to persuasion and able to determine a matter on its merits.
- Also necessary to maintain confidence in the Tribunal and acceptance of its decisions.
- Bias: a predisposition to approach the issues in the case otherwise than with an impartial and unprejudiced mind.
- May be inferred from a person's behaviour, statements, personal interests and past or present associations.
- Actual vs apparent.



Decision-maker's previous decisions

- *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104
- The appellant lodged an application for a protection visa which was rejected by a delegate of the Minister.
- Appellant sought review by the AAT. AAT found the appellant's evidence vague, unconvincing and contradictory and upheld the original decision.
- Appellant appealed to the Federal Court without success.
- Appellant appealed to the Full Court of the Federal Court alleging actual or apprehended bias on the part of the primary judge using previous decisions made by that judge as his evidence.



Quick poll

Was how the decision-maker made other decisions, and the outcomes of those decisions, sufficient to show bias?

- (a) Yes – those factors were enough to show bias
- (b) No – those factors were not enough to show bias



Decision-maker's previous decisions cont.

- Full Court dismissed the appeal on the basis that the appellant had not established bias by the primary judge.
- Actual: the appellant's case did not approach the strong grounds necessary to prove a case of actual bias.
- Apprehended: there was no evidence of conduct by the judge which satisfies the test for apprehended bias.
- Full Court said that evidence of conduct which establishes the character, reputation or conduct of the judge in other cases can be relevant to an *apprehended* bias case but not *actual* bias.
- Evidence as to tendency or coincidence suggesting a person behaved in a particular way because their character/reputation/conduct caused them to have a particular state of mind – which is *actual* bias.



Relying on external knowledge

- Whenever a decision-maker intends to rely on knowledge from outside the “record” in the case at hand, it is advisable to ask:
 - where did I get this information from?
 - is it reliable (e.g. is it based on experience which is not reflective of general experience, outdated information, information which is incomplete or contestable)?
 - does fairness dictate that I disclose this knowledge to the parties, and give them an opportunity to make submissions about how I should take it into account?



When external knowledge may result in bias

- *KWLD v State of Western Australia* [2020] WASCA 94
- District Court Judge made an order varying the person's bail conditions after personally seeking information about the person, some of which was not disclosed to the parties.
- Person appealed to the Supreme Court.



Quick poll

Did the District Court Judge's actions result in bias?

- (a) Yes – the Judge relied on external information and created actual or apprehended bias
- (b) No – the Judge's actions did not lead to any actual or apprehended bias



When external knowledge may result in bias

- Supreme Court: It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations from a stranger with reference to a case they have to decide.
- Supreme Court found there was apprehended bias



Adequacy of reasons

- MHRT is required to provide written reasons on receipt of a request from an eligible person.
- The MHA2016 does not specify what is meant by “written reasons”.
- *Acts Interpretation Act 1954*: reasons must also include:
 - findings on material questions of fact; and
 - evidence or other material on which those findings were based.
- Does the length of written reasons come into decision-making about their adequacy?



Are short reasons inadequate?

- *Lodhi v Attorney General (Cth)* [2020] FCA 1383
- Mr Lodhi sentenced to 20 years imprisonment for terrorism offences – began sentence in April 2004.
- He made multiple applications for parole, one of which in April 2020. The AG must not grant a person convicted of a terrorism offence parole unless “exceptional circumstances”.
- AG refused application for parole and gave short reasons – approximately 6 paragraphs.



Quick poll

Were 6 paragraphs sufficient for reasons?

- (a) Yes – 6 paragraphs could be sufficient, it depends on what was written
- (b) No – 6 paragraphs isn't enough to adequately convey everything that needs to be covered in reasons



Are short reasons inadequate cont.

- Court noted that to be deficient, reasons must fall short of what was legally required in the statutory framework in which decision made.
- Reasons were sufficient – case was simply whether the AG was satisfied that exceptional circumstances existed.



Do short reasons demonstrate lack of meaningful consideration?

- *Goodwin v Commissioner of Police* [2020] FCA 950
- Mr Goodwin was terminated from the AFP due to workplace conduct.
- Mr Goodwin sought judicial review and the grounds of review included that:
 - the reasons given in the termination letter were inadequate; and
 - the lack of detail was evidence the Commissioner had not given relevant matters meaningful consideration.
- Court found that brevity of the reasons did not mean Commissioner had not given meaningful consideration to Mr Goodwin's submissions.
- Court noted that, while not determinative, clarity and cogency tend to indicate issues considered where the subject of active, intellectual engagement.



MHRT member immunity

- s766 MHA2016: A member of the Tribunal has, in the exercise of jurisdiction under this Act, the same protection and immunity as a Supreme Court judge in the performance of a judge's functions.
 - Civil liability: common law – no action maintainable against a Judge for anything said or done in the exercise of jurisdiction, Judge's words protected by absolutely privilege, orders/sentences cannot be subject of civil proceedings against the Judge.
 - Criminal liability: Criminal Code s30 – judicial officer not criminally responsible for anything done or not done in exercise of officer's judicial functions.
 - Administrative acts: Supreme Court of Queensland Act s27 – a Judge has, in the performance/exercise of administrative functions, the same protection and immunity as a Judge has in a judicial proceeding in the Court.



Extent of judicial immunity

- *Stradford v Vasta*
- Mr Stradford (a pseudonym) was involved in a property dispute with his ex-wife.
- In hearing that dispute, Judge Vasta sentenced Mr Stradford to 12 months' imprisonment for contempt: failing to divulge all his financial information as required. He served 6 nights.
- Mr Stradford appealed and the Federal Court found he had been falsely imprisoned and it was an "affront to justice".
- Mr Stradford sued Judge Vasta (and the Cth and State Governments) claiming he experienced abuse and mistreatment during his imprisonment.
- Judge Vasta defended the matter and while he conceded his decision to imprison Mr Stradford was affected by error, he denies any abuse of power and claims judicial immunity.



Extent of judicial immunity cont.

- *Jorgensen v Vasta*
- Mr Jorgensen was before Judge Vasta in relation to a civil matter.
- Believing he had breached court orders, Judge Vasta found Mr Jorgensen guilty of contempt and sentenced him to 12 months' imprisonment.
- 2 days in custody before the decision was overturned by the Federal Court.
- Mr Jorgensen sued Judge Vasta for damages for false imprisonment, claiming the imprisonment caused mental harm.



Extent of judicial immunity cont.

- In late August 2023, the Federal Court ruled that Judge Vasta must pay Stradford damages for false imprisonment and deprivation of liberty.
- Court:
 - It is highly unusual, at least in modern-day Australia, for a judge to be held liable for false imprisonment.
 - Judge Vasta lost the protection of judicial immunity because he acted without, or in excess of, jurisdiction.
- Awarded: \$309,450 in damages split between the state government, Federal government and Judge Vasta.
- Judge Vasta alone must pay a further \$50,000 for exemplary damages to “reflect the Court’s disapproval of the Judge’s conduct and treatment” of the man.
- The Jorgensen matter will now proceed.





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