



The state of play in administrative law 2008

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Current issues in constitutional law

Presented by:

Andrew Buckland

Senior Executive Lawyer, AGS

T 02 6253 7024 F 02 6253 7303

andrew.buckland@ags.gov.au



Andrew Buckland

Senior Executive Lawyer, AGS

Andrew is the Senior Executive Lawyer in charge of the AGS Constitutional Litigation Unit. He has run a number of significant constitutional cases in the High Court and advises on constitutional and federal jurisdiction issues.

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CURRENT ISSUES IN CONSTITUTIONAL LAW

This paper discusses recent cases in two developing areas of constitutional law relevant to administrative lawyers:

- The position of the Commonwealth in State administrative tribunals; and
- Constitutional limits on restricting the disclosure of information for or in proceedings, particularly judicial review of administrative action.

1. THE POSITION OF THE COMMONWEALTH IN STATE ADMINISTRATIVE TRIBUNALS

A number of issues can arise whenever the Commonwealth is sought to be brought before a State administrative tribunal, including:

- does the relevant State legislation apply to the Commonwealth as a matter of statutory construction?
- is the relevant State legislation inconsistent with any applicable Commonwealth legislation?
- is the relevant State legislation contrary to the Commonwealth's implied constitutional immunity from State laws?

This paper is, however, concerned with a fourth issue. That is, the Commonwealth would contend that a State body that is not a 'court' within s 77(iii) of the Constitution cannot exercise *judicial* power (cf administrative power) against the Commonwealth. This proposition has recently been accepted by Kenny J sitting as part of the Full Court of the Federal Court,¹ which followed an earlier decision of the NSW Court of Appeal accepting an analogous proposition concerning the capacity of State administrative tribunals to conclusively determine constitutional issues.²

The capacity of State tribunals to exercise judicial power in various matters is likely to be of increasing practical importance, as State tribunals are given greater responsibility, and sometimes have exclusive responsibility over certain areas of the law. So, for example, the matter on which Kenny J sat (*Commonwealth v Anti-Discrimination Tribunal (Tas)*)³ involved a complaint against the Commonwealth was referred to the Tasmanian Anti-Discrimination Tribunal in 2007, alleging that the Commonwealth (Centrelink) had discriminated against the complainant. The Commonwealth brought proceedings in the Federal Court, arguing that the Tasmanian Tribunal could not hear the complaint against the Commonwealth, because the Tribunal exercised judicial power but was not a 'court'. Kenny J held that, contrary to an earlier decision by Heerey J, the Tasmanian Tribunal was not a

¹ *Commonwealth v Anti-Discrimination Tribunal (Tas)* [2008] FCAFC 104.

² *Attorney-General (NSW) v Radio 2UE Pty Ltd* (2006) 236 ALR 385.

³ [2008] FCAFC 104.

'court' for these purposes, that it purported to exercise judicial power, and that as a result it could not hear this complaint against the Commonwealth.

Is the State tribunal a 'court'?

The first issue then is whether the State tribunal is a 'court' for the purposes of s 77(iii) of the Constitution. Section 77(iii) provides that the Commonwealth may confer federal jurisdiction on the 'courts of any State'. One category of federal jurisdiction is matters to which the Commonwealth is a party. Therefore, if a State tribunal is a 'court' for these purposes, then it will be able to exercise judicial power against the Commonwealth, relying on s 39(2).

Trust Company v Skiwing

A recent decision on this issue is that of the NSW Court of Appeal in *Trust Company of Australia Ltd v Skiwing Pty Ltd*.⁴ In that case, Spigelman CJ (with Hodgson and Bryson JJA agreeing) held that the NSW Administrative Decisions Tribunal was not a 'court' within s 77(iii) of the Constitution. That meant, in that case, that the NSW Tribunal could not determine (in the exercise of judicial power) matters arising under the *Trade Practices Act 1974* (Cth) because as noted above the Commonwealth can relevantly only confer federal jurisdiction on State 'courts' (s 77(iii)).

The main points in Spigelman CJ's reasoning are as follows:

- The constitutional expression 'court of a State' is a more stringent requirement than whether a State body is a court for the purposes of a State statute ([29]). The integrated judicial system provided for by the Commonwealth Constitution requires a 'high degree of similarity' (albeit not identity) between the federal courts and State courts ([47]).
- To be a 'court' within s 77(iii), a State body must be and appear to be an independent and impartial tribunal ([48]). Accordingly, a State court 'must - exclusively, or at least predominantly - be constituted by judges' ([49], [59]).
- The fact that a State body exercises (State) judicial power is a necessary, but not sufficient, condition for the body to be characterised as a court ([19]-[21]).
- The relevant question is the characterisation of a State Tribunal as a whole, rather than a particular division ([36]).

Commonwealth v Anti-Discrimination Tribunal (Tas)

The case of *Commonwealth v ADT* was argued after judgment in *Skiwing* and in some respects takes a slightly different approach. In that case, as noted above, Kenny J held that the Tasmanian Anti-Discrimination Tribunal (ADT) could not be characterised as a 'court of a State' (at [226]), the other members of the Court not deciding. The key points in Kenny J's reasoning were:

⁴ [2006] NSWCA 185 (13 July 2006).

- 'independence and impartiality is the irreducible minimum for a court of a State within s 77(iii) of the Constitution' ([227]). (Kenny J explained Spigelman CJ's further conclusion that to be a court a body must be constituted at least predominantly by judges, as 'no more than another way of framing the question whether a tribunal meets minimum criteria of independence and impartiality ([237]).')
- Whether a body will be relevantly independent and impartial will often depend on ([228]):
 - the powers and functions of the body,
 - the provisions for appeal and review of its decisions,
 - its pre- and post-federation history, and
 - the nature of the constitutional or legislative 'institutional arrangements and safeguards' for securing independence and impartiality
- whilst it may be going too far to say that provisions as to tenure and remuneration are critical, 'a tribunal [such as the ADT] that owes its existence to a Ministerial determination under a modern statute, the members of which may be removed at any time by the Minister at will, is unlikely to be a 'court of a State' within s 77(iii) of the Constitution'.

Consequences

The key result of these cases would appear to be that a State tribunal that does not enjoy a sufficient degree of independence from the executive (which may be demonstrated by, for example, security of remuneration and security of tenure) and impartiality in its decision making processes will not be a court. If it does enjoy such independence and impartiality then the question whether it is a court will depend on balancing other indicia that the body is or is not a court.

Unresolved issues about definition of 'court'

One issue left unresolved by both decisions is whether the members of a tribunal must have legal qualifications in order that the body be a court. Cases such as *Skiwing* and *Commonwealth v ADT* appear inconsistent with old *obiter dicta* that a State 'court' could consist *entirely* of laymen with no security of tenure.⁵ However, there may be some room for debate on the levels of legal training that are required of members of a body for that body to be a court (and/or the members to be 'judges').

Consequences if a State tribunal is not a 'court'

What are the consequences if a State tribunal is not a 'court' within s 77(iii) of the Constitution? The Commonwealth's position, at its broadest, is that the State

⁵ *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49 (Gibbs CJ).

tribunal cannot exercise federal judicial power, because this can only be exercised by 'courts'. That in turn means that a State tribunal cannot exercise judicial power against the Commonwealth because one head of federal jurisdiction is matters in which the Commonwealth is a party (s 75(iii) of the Constitution).

The Commonwealth's position in this respect was endorsed by the NSW Court of Appeal decision in *Attorney-General (NSW) v Radio 2UE Pty Ltd* (2006) 236 ALR 385. The Court held in that case that an implication from the Commonwealth Constitution prevented a State tribunal that was not a 'court' from exercising judicial power in relation to any of the matters in s 75 and s 76 of the Constitution ([55]-[56]). Although that case concerned matters arising under the Commonwealth Constitution or involving its interpretation (s 76(i)), the Court's reasoning would seem to apply equally to matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party (s 75(iii)). Similarly, as already noted, the Commonwealth's arguments to this effect were recently accepted by Kenny J in *Commonwealth v ADT* (at [222]) (the rest of the Court not deciding).

Determining whether State tribunal's powers are 'judicial'

This analysis makes it very important to work out whether a State tribunals powers are judicial in nature. This is a large and complex topic, but it is possible to make three brief points.

- First, judicial power tends to consist of adjudicating on existing rights and liabilities, rather than creating new rights and liabilities. For example, a State industrial body making an award creates new rights and liabilities, and therefore is not exercising judicial power.
- Secondly, judicial power tends to consist of applying legal standards, rather than general policy considerations. For example, review of the merits of an administrative decision is unlikely to involve the exercise of judicial power.
- Finally, judicial power involves making final and binding decisions. A very important factor here is how a State tribunal's decisions are enforced. In some State tribunals, a decision can be enforced like a court decision on registering the tribunal's decision in a court. This factor will be a very strong indication that the State tribunal is exercising judicial power (by analogy with *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245).

2. CONSTITUTIONAL LIMITS ON RESTRICTING THE DISCLOSURE OF INFORMATION IN COURT PROCEEDINGS

The second developing area of law is based on several recent cases scrutinising legislative provisions that restrict access to, and disclosure of, sensitive information, including in relation to proceedings for judicial review of administrative action. In considering the constitutional validity of such provisions at the Commonwealth level, there are several guiding constitutional principles derived from the separation of judicial power from legislative and executive power in Ch III of the Constitution, namely:

- Parliament cannot 'confer upon an administrative tribunal the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction' (see eg *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [9], [73]) **(the 'reviewability' principle)**;
- Parliament cannot authorise Ch III courts to exercise judicial power in a manner inconsistent with the essential character of a court or with the nature of judicial power (*Chu Kheng Lim v MILGEA* (1992) 176 CLR 1 at 27) **(the 'judicial process' principle)**
- Thus, Parliament cannot 'direct' or 'usurp' the exercise of judicial power (see generally *Nicholas v The Queen* (1998) 193 CLR 173) **(the 'interference' principle)**.

Validity of secrecy provisions

A number of Commonwealth Acts contain secrecy provisions to the effect that officers of the Commonwealth must not, or at least cannot be compelled to, disclose information to a court (and other persons). Perhaps the most well-known of such provisions is s 16 of the *Income Tax Assessment Act 1936*.⁶

There is no necessary constitutional obstacle to such legislation (see eg *Elbe Shipping SA v Giant Marine Shipping SA* [2007] FCA 1000). In particular, although such legislation may ultimately have a practical effect on the curial function of finding facts and the outcome of litigation,⁷ it does not necessarily infringe the interference principle because:

A law does not usurp judicial power [simply] because it regulates the method or burden of proving facts.⁸

The Federal Court (Dowsett J) has recently affirmed that this is so, even where the executive has a discretion to consent to production, stating:⁹

Once it is accepted as it must be, that Parliament may legislate to exclude certain matters from being received in evidence, there seems to be no reason why it should not be able to empower an identified person to determine whether or not the Act's

⁶ Considered in a number of cases including *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1.

⁷ As recognised by eg the Full Federal Court in *Kizon v Palmer* (1997) 72 FCR 409 at 446 in upholding the validity of prohibitions on disclosure of information to a court in the *Telecommunications (Interception) Act 1979* (Cth).

⁸ *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1 at 12, 17-18; *Nicholas v The Queen* (1998) 193 CLR 173 at [20], [235]; *Rann v Olsen* (2000) 172 ALR 395 at [190]. See also *Lodhi v Regina* [2007] NSWCCA 360 at [62], noting that the approach applicable to the admissibility of evidence is analogous to that of disclosure of evidence, both of which are matters of procedure subject to legislative amendment.

⁹ *Elbe Shipping SA v Giant Marine Shipping SA* [2007] FCA 1000 at [28]-[29]; see also *F H Faulding & Co v Commissioner of Taxation* (1994) 54 FCR 75; *Northern Territory v GPAO* (1999) 196 CLR 553 at 568-570, 592 ([93]). And see by analogy *Lodhi v Regina* [2007] NSWCCA 360 where the application of the *National Security Information (Criminal and Civil Proceedings) Act 2004* depended on a certificate issued by the Attorney-General.

protection should be invoked or waived. ... It is said that the legislation subordinates exercise of the judicial power to an executive discretion. While such a proposition has the typical appeal of a rhetorical flourish, it fails to address the fundamental problem that the authorities recognize the power of Parliament to legislate in connection with rules of evidence.

Finally, the plaintiffs submit that s 60 'compromises the integrity of the judicial system, because it goes to the question of the power of the court to make orders with which the executive or, in this case, with which people will comply.' The administration of law is, no doubt, a public function of primary importance in a civilized society, but other functions are also important. Whilst the courts balance the interests of one litigant against another, Parliament must balance the interaction between different public functions. It is for Parliament to determine the balance between the right of a litigant to lead evidence and the objects identified in s 7 of the Act. ...

Further, the exercise of such a discretion would (normally) be subject to judicial review,¹⁰ and would not amount to an impermissible dictation by the executive to the judiciary contrary to the interference principle.¹¹

There are, however, likely to be some limits to the circumstances and/or manner in which legislation can operate to prevent the disclosure of information for court proceedings, including because of the need for any such limits to be related to a constitutional head of legislative power, and because of the judicial process and interference principles.¹² Furthermore, the extent to which legislation can prevent the disclosure of information on which an administrative decision has been based may raise particular issues in relation to the reviewability principle, discussed further below.

Who can determine whether information falls within a secrecy provision?

Legislation restricting disclosure of information typically applies to a prescribed class of information held by the executive, and it is for the courts to determine whether particular information falls within the class prescribed.¹³ That is because of the reviewability principle - the executive cannot conclusively determine whether information is within the class prescribed by legislation because that would involve the exercise of judicial power.

¹⁰ See by analogy *Traljesic v Attorney-General (Cth)* (2006) 150 FCR 199.

¹¹ See eg *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 242 ALR 191 at [34], [174]; and *Hussain v Minister for Foreign Affairs* [2008] FCAFC 128 at [151]. See also the quote from *Elbe Shipping* above.

¹² In respect of the latter see eg *Elbe Shipping Elbe Shipping SA v Giant Marine Shipping SA* [2007] FCA 1000 at [15], [27]; *Lodhi v Regina* [2007] NSWCCA 360 at [72].

¹³ Interesting constitutional questions might arise if the legislation purported to give a member of the executive an unfettered discretion as to the information in their possession that could be withheld from production (cf *Plaintiff S157* at [102]), or empowered a member of the executive to give a certificate conclusively establishing that information fell within the statutory criteria (cf *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 242 ALR 191 at [94], *Cheikho v Regina* [2008] NSWCCA 191).

This can lead to a 'catch-22' situation if there is a dispute as to whether any particular information falls within the prescribed class. That is because, at least in some cases it may be necessary for the court to consider the information itself in order to determine if it falls within the prescribed class. That is, whilst the legislation purports to prohibit disclosure of the information to the court, in order to determine if the prohibition applies the information must be disclosed to the court. Such a situation arose in late 2005 in relation to a challenge to a decision under the *Migration Act 1953* where the issue was access to information protected by s 503A of that Act.¹⁴

What if the information formed (part of) the basis of an administrative decision under review?

Merits review - material before review body but not applicant

The extent to which an administrative decision maker is required to accord procedural fairness by, for example, disclosing information is of course subject to legislative control. However constitutional issues arise where the administrative decision maker is a Ch III judge. That is because the Constitution prevents Ch III judges from performing non-judicial functions (as 'persona designata') that are incompatible with either a judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power (**the incompatibility doctrine**).¹⁵

Whether a Ch III judge can preside over merits review proceedings in which the applicant for review is denied access to relevant information was the subject of a recent decision of the Full Court of the Federal Court. That case concerned the Security Appeals Division of the AAT in proceedings, presided over by a Federal Court judge, for review of a decision to cancel the applicant's passport on security grounds. The Attorney-General had, pursuant to s 39A of the AAT Act, certified that disclosure of particular information would be contrary to the public interest on grounds specified in the section; and as a result the AAT was required (by s 39B) not to disclose the information to anyone other than a member of the AAT. The Full Federal Court rejected a challenge, based on the incompatibility doctrine, to the validity of s 39B of the AAT Act, stating:

[W]e doubt that ordinary members of the community would regard a Ch III judge who presides over an appeal to the Security Appeals Division of the Tribunal as having compromised his or her integrity merely by following the procedures laid down in ss 39A and 39B. The Tribunal operates independently of the executive. In this case, it had the capacity to overturn both the passport decision and the assessment. It operated under a statutory regime, whereby the rules of procedural fairness had been specifically abrogated by the legislature, but for reasons that the legislature must have clearly

¹⁴ *Eshchenko v MIMIA* [2005] FCA 1435/1436, and *Eshchenko v MIMIA (No 2)* [2005] FCA 1435. The proceedings ultimately settled and the issue was never finally resolved by the court.

¹⁵ *Grollo v Palmer* (1995) 184 CLR 348 at 365; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17-18.

regarded as compelling. The Security Appeal Division deals with matters of great importance and sensitivity. It should not be forgotten that the Attorney-General, as first law officer of the Commonwealth, is charged with the vital task of protecting the community from the threat of terrorism, and that much of the information relevant to that task will be highly confidential. Further, the individual judge may exercise his or her discretion whether or not to preside over such an appeal.¹⁶

Judicial review - material not before court

Further issues arise in relation to judicial review proceedings where legislation purports to prevent the disclosure of information relevant to the legality of an administrative decision. In civil and criminal cases, the fact that critical information may not be available to the court or the parties may result in the relevant proceedings being stayed.¹⁷ However the same result may not follow in proceedings for judicial review of administrative action, because of the reviewability principle. In particular, there is an interesting question as to the extent to which a non-disclosure provision could apply to information relevant to the making of an administrative decision, in circumstances where that information went to whether the decision maker had committed a jurisdictional error. (One analysis of the question may be to say that, in such a case, what constitutes jurisdictional error is affected by what information is protected from disclosure.)

Judicial review - material before court but not applicant

Finally, there have been a number of cases recently considering the extent to which legislation can validly provide for a court to act on the basis of information provided to it but which it is prohibited from disclosing to a party to the proceedings.

In that regard, there is no general principle of law that requires courts to act only on the basis of information that is disclosed to all of the parties. So, for example, in *Alister v R*, Gibbs CJ, Wilson, Brennan and Dawson JJ accepted that sometimes courts must consider material that has not been disclosed to one or more of the parties. Their Honours said, in relation to a claim for public interest immunity:¹⁸

The disposal of any point in litigation, without the fullest argument on behalf of the parties, is a course to which every court reacts adversely, however untenable the point in issue may first appear, and however unlikely it is that argument will assist it. The present case evokes the same reaction. But it is the inevitable result when privilege is rightly claimed on grounds of national security.

¹⁶ *Hussain v Minister for Foreign Affairs* [2008] FCAFC 128 at [166].

¹⁷ See eg *Rann v Olsen* (2000) 172 ALR 395; *Regina v Lodhi* [2006] NSWSC 571 at [90] (cf *Lodhi v Regina* [2007] NSWCCA 360 at [27]).

¹⁸ *Alister v R* (1984) 154 CLR 404, 469, quoted with apparent approval by Gummow and Crennan JJ in *Thomas v Mowbray* (2007) 237 ALR 294, at [124]. See also *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 61, cited with apparent approval in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 242 ALR 191 at [24].

There are some common law examples of a party has been permitted to rely upon evidence in support of its case without that evidence being disclosed to the other party.¹⁹ The validity of State legislation to similar effect was recently upheld by the High Court in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 242 ALR 191. In that case the Court dismissed a challenge to the validity of s 76(2) of the *Corruption and Crime Commission Act 2003 (WA)*. That section empowered the Supreme Court, when determining a judicial review application, to have regard to information that the Commissioner of Police had certified should not be disclosed to the applicant for review. It was argued that s 76(2) was invalid because it required the Court to proceed in a fashion that denied procedural fairness to one of the parties. That was said to be inconsistent with the judicial process to such an extent as to render the Supreme Court unfit to be a repository of federal jurisdiction.²⁰

Although the decision only concerns the validity of *State* legislation,²¹ comments by some members of the Court would appear to apply equally in relation to the validity of any similar Commonwealth legislation. In particular, the members of the majority did not appear to place any significance on the fact that the court could see and use the information denied to the applicant for review, and indeed (at least) Gleeson CJ arguably saw this fact as an advantage, stating (footnotes omitted):

... [I]t is likely that judicial review proceedings under s 76 may give rise to problems of confidential information, including information that would reveal the identity of police informers or compromise current police investigations. Parliament sought to address those problems in s 76(2). ... An alternative would have been to make no specific provision about confidentiality, but to leave the general law to apply. Claims for public interest immunity against disclosure of information of the kind just mentioned are well known. The consequence of success of such a claim is that information which is subject to the immunity is not available as evidence to be taken into account in deciding the outcome of the proceedings. ... [T]here would almost certainly be cases in which a successful claim for public interest immunity by the Commissioner of Police would have the practical consequence of making it impossible for the Court to exercise the review function contemplated by s 76(1). The Court would not be able to have regard to some, or perhaps any, of the information on which the Commissioner's belief was based. In that event, the application for review may be bound to fail. ... **[T]his consideration of how s 76 would work without s 76(2) assists to place in proper perspective the appellant's arguments based on *Kable v Director of Public Prosecutions*.**

Andrew Buckland

Senior Executive Lawyer
Australian Government Solicitor

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¹⁹ See, e.g., *Nicopoulos v Commissioner of Corrective Services* (2004) 148 A Crim R 74, [92]; *R v Khazaal* [2006] NSWSC 1061.

²⁰ This being said to engage the principle in *Kable v DPP (NSW)* (1996) 189 CLR 51.

²¹ A point expressly made by Crennan J at [186].