

## PUBLIC LAW SECTION

### Recent Leading Cases

by Elizabeth Bennett, Emrys Nekvapil and Charles Parkinson



### Followed by Upcoming Events

#### ***Medical Practitioners Board Of Victoria v Lal* [2009] VSCA 109**

(Maxwell P, Weinberg JA and Kyrou AJA – 21 May 2009)

Case summary by Elizabeth Bennett

#### **Issues of importance to CommBar Readers**

This case considered a range of issues of statutory interpretation and procedure. Perhaps most relevant to the Commercial Bar, the Court commented on:

- when issues or arguments not raised in the initial hearing of a matter can be raised on appeal;
- the concept of ‘public interest’ and the role of the media in considering the public interest; and
- whether the words of the Act permitted the exercise of discretion by the Board.

In its findings, the Court confirmed the general rule that an issue not raised below cannot be raised on appeal, unless it is a purely legal point, or there is no prejudice to the other party.

This case is a useful statutory construction case in which the Court examines amorphous concepts such as ‘the public interest’, noting that it admits of no precise definition.

In considering the question of discretion, the Court noted that a Tribunal may misdirect itself if it acts on the basis that it has no discretion simply because it is difficult (or impossible) to think of a circumstance in which the discretion could be properly exercised.

## **The Facts**

Sabi Lal (**Lal**) was a medical practitioner registered to practice by the Medical Practitioners Board (the **Board**).

20 December 2002, Lal was found guilty of five offences committed while he practised as a medical practitioner. The offences were indecent assault, digital rape, attempting to pervert the course of justice and two counts of assault on women. The rape counts arose from a pap smear. The doctor had told the patient that he would merely prepare the patient for the pap smear, which would then be conducted by a female doctor. In fact, Lal performed the procedure. It was found that the procedure was proper and necessary, and that he did not act from a desire for sexual gratification.

The Board suspended and then cancelled Lal's registration Lal subsequently applied for registration, which was refused by the Board. Lal applied to the Victorian Civil and Administrative Review Tribunal (the **Tribunal**) for a review of the decision of the Board to deny his application for registration. The Tribunal found that Lal suffered from Obsessive Compulsive Disorder (OCD) and that his mental illness contributed to the offences that had led to registration being cancelled. The Tribunal found that Lal no longer suffered from the same mental illness. The Tribunal granted Lal general registration as a medical practitioner, subject to certain conditions.

The Board appealed to the Court of Appeal under section 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

## **New Issues on Appeal**

The Court summarised the general approach to circumstances in which an appellate court will entertain new issues on appeal. The Court confirmed that generally substantial issues between the parties are to be settled at trial. The Court will be more reluctant to permit an issue to be raised where it could have been addressed by evidence below. However, where the new point is largely a point of construction, it may be in the interests of justice to entertain the point.

Interestingly, the Court further noted that where a tribunal is bound to take into account a matter that is material to its decision, but does not do so, that failure may be raised on appeal as a question of law even if it was wrongly conceded before the tribunal below.

## **Statutory Construction**

The Court noted that the power to refuse registration of a practitioner would be enlivened under section s 6(2)(d) of the *Health Professions Registration Act 2005* (Vic) where a person has been found guilty of an offence and either:

- his or her suitability to practise as a health practitioner is likely to be affected because of the finding of guilt; or
- it is not in the public interest to allow the applicant to practise as a health practitioner because of the finding of guilt.

The construction of these provisions gave rise to some interesting issues. The issues that are most likely to arise in commercial cases are discussed below.

- **Construction of ‘Public Interest’**

The Court commented that the concept of ‘public interest’ admitted no single definition.

The Court rejected a construction of the ‘public interest’ that took into account the likely media outrage that a convicted rapist had been permitted to be registered as a GP<sup>1</sup>. The Court said that it would be inappropriate to take into account possible media misrepresentation.

The Court further considered the high level of public trust in the medical profession, implicitly concluding that any one incident would be unlikely to tarnish the entire medical profession (however reported).

- **Discretion**

The Court noted the use of the word ‘may’ in the relevant statute gave rise to the inference that Parliament had intended the conferral of a discretion to register a practitioner, even in circumstances where the person had been found guilty of an offence and the Board had concluded that their registration would not be in the public interest. The Court noted that simply because it would be difficult to think of circumstances in which that discretion would be exercised did not mean that the discretion did not exist.

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<sup>1</sup> This concern was not wholly misconceived: See ‘Rapist GP to Practice Again’, *Herald Sun*, 16 October 2008; ‘Rape Dr Savi Lal Allowed to Practice’, *The Australian*, May 21 2009.

## **Habib v Director-General of Security**

[2009] FCAFC 48 (Black CJ, Ryan and Lander JJ – 24 April 2009)

Case summary by Elizabeth Bennett

### **Issues of Importance to CommBar Readers**

This case raised issues of natural justice, and in particular, when a tribunal comes under an obligation to inform an applicant of the possibility of an adverse inference being drawn from their conduct or testimony.

The appeal was dismissed. That dismissal can be seen as fact-specific, and of no general importance. The principles of natural justice elucidated by the Full Court are of more general application. In particular, practitioners in administrative proceedings should consider whether key elements in the reasoning of the Tribunal were disclosed such that the applicant had the opportunity address them.

In analysing whether an element of the decision will attract the requirements of natural justice, practitioners should avoid overly technical analyses, and remember that the Court will resist overt scrutiny of each step in a Tribunal's reasoning.

### **The Facts**

Mr Habib is an Australian citizen who was incarcerated without charge in Guantanamo Bay between 2002 and 2005. Upon his release, Mr Habib was returned to Australia. He was stripped of his passport.

Mr Habib subsequently applied for a re-issue of his passport under s 14(2) of the *Australian Passports Act 2005* (Cth) (the **Passports Act**). The Minister refused to re-issue Mr Habib's passport due, in part, to an adverse security assessment by the Australian Security Intelligence Organisation (**ASIO**).

At the Administrative Appeals Tribunal (the **Tribunal**), Mr Habib sought review of both:

- The Minister's decision not to issue him with a passport; and
- The adverse security assessment by ASIO.

The Tribunal upheld the decisions.

A key element of both decisions was whether Mr Habib still held extreme views and / or supported Usama Bin Laden. Part of the reasoning of the Tribunal was that Mr Habib and / or his wife had lied in some aspects of their evidence. The Tribunal essentially used the falsity of their evidence to draw specific inferences that were fatal to Mr Habib's application. The key issues of the appeal therefore were whether:

- The Tribunal was under an obligation to inform Mr Habib of the use it proposed to make of its conclusions that Mr & Mrs Habib had told untruths; and
- If there is an obligation to disclose, whether it was satisfied.

Of particular concern was the failure to inform Mr Habib that his wife's alleged untruths may be considered relevant to the question of his present views.

The Court concluded in essence that an obligation to inform Mr Habib *did* arise in the circumstances of the case, but that the obligation had been discharged.

- **The obligation to disclose the proposed use of the information:**

The Full Court repeated the well known formulation of the requirement of natural justice; that a person know the substance of the case against him or her and be given the opportunity to respond to adverse material that is credible, relevant or significant.

The Court was concerned to distinguish between 'steps in reasoning' and 'the substance of the case'. The Court emphasised that the steps in reasoning should not be held to microscopic account.

The Court examined a range of authorities and concluded that in the circumstances of the case, fairness required that Mr Habib be alerted to the possibility that specific findings about his present views might be drawn from a finding that he and his wife were not being truthful.

- **Was the obligation satisfied?**

Having found that an obligation existed, the Court went on to consider whether it was satisfied in the circumstances of the case. In this task, the Court noted that the obligation to provide natural justice should not be evaluated minutely 'or in a manner divorced from its context. As we have said, the obligation is a practical one.'

The Court concluded on this analysis that it would have made no difference to the outcome if Mr Habib had have been made aware of the specific inferences.

***Kracke v Mental Health Review Board & Ors (General)*** [2009] VCAT 646  
(Bell J – 23 April 2009)

Case summary by Emrys Nekvapil

## **Importance of decision for CommBar readers**

This was a test case and a landmark decision on the operation of the *Charter of Human Rights and Responsibilities Act 2006* (the **Charter**). For the moment, it is now the necessary starting point for understanding the operation of the Charter.

The Charter now forms a fundamental part of the process of statutory interpretation in Victoria; it potentially applies to any Victorian statute which affects human rights. Kracke sets out the correct approach to interpreting such statutes by reference to the Charter.

Kracke also examines in great detail the right to a fair hearing, and in particular whether and when delay will amount to a breach of that right. The decision runs for 210 pages, and also dealt with various other critical aspects of the Charter's operation, and how it applies to VCAT. Due to space constraints, this case note deals only with the statutory interpretation aspect.

## **Facts and procedural history**

The applicant, Mr Kracke, was placed on an involuntary treatment order under s 12 of the *Mental Health Act 1986* (the **Act**) and later on a community treatment order under s 14 of the Act (collectively, the **orders**). The Act provided that reviews "must" be conducted by the Mental Health Review Board (the **Board**) in respect of each order within specified periods of time. The Board did not conduct the reviews in time: there were significant delays.

Eventually, the Board conducted a review and made a decision confirming the orders. Mr Kracke sought review of that decision in the Victorian Civil and Administrative Tribunal (the **Tribunal**). This decision determined a preliminary issue in the case: whether the orders became invalid because the review periods specified in the Act had been exceeded.

## **Statutory interpretation and rights**

Justice Bell P set out (and justified by reference to much relevant international law) the correct approach to statutory interpretation where rights are affected. First, ordinary principles of statutory interpretation are applied to the Act or subordinate instrument under consideration (see paras [37]-[51]). Then four stages of analysis are required to interpret the legislation against the Charter: engagement, justification, reinterpretation and declaring inconsistency (see generally paras [52]-[66]). The stages must be traversed sequentially: only when the relevant criterion is met at one stage can the interpreter move to the next.

The process as a whole is as follows:

- *Apply ordinary statutory interpretation principles to the relevant legislation*
  - Take context and purpose into account from the outset
  - Interpret the legislation consistently with Australia's international obligations
  - Apply the principle of legality – fundamental rights cannot be overridden by general or ambiguous words.

The result is the **ordinary interpretation**.

- *Does the Charter apply; and, if so, how?*
  - *Engagement (step 1, see paras [67]-[97])* - Identify the scope of the relevant right(s) in issue broadly, focusing on its purpose and the interests it protects. On its ordinary interpretation, does the relevant legislation limit the scope (so identified) of the relevant right(s)? If not, the Charter has no work to do; if so, move to consider justification and proportionality.
  - *Justification and proportionality (step 2, see paras [98]-[197])* – Is this limitation on the relevant right(s) justified, and proportional, under s 7(2) of the Charter? If so, the Charter has no work to do; if not, move to reinterpretation.
  - *Reinterpretation (step 3, see paras [198]-[231])* – Section 32(1) of the Charter requires that “So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights”. If a statutory limitation (*stage 1*) is not justified or proportional (*stage 2*), it must either be reinterpreted (*stage 3*) or declared by the Supreme Court to be incapable of reinterpretation (*stage 4*). Stage 4 is a measure of last resort; so it is preferable for the issue to be resolved by reinterpretation. Thus, the interpreter is obligated to go further under *stage 3* than under the ordinary principles which provide for resolution of ambiguity in favour of a construction that does not interfere with common law or international law rights.
  - *Declaration of inconsistent interpretation (step 4, see paras [232]-[235])* – If the relevant provision cannot be reinterpreted, the Supreme Court may make a declaration of inconsistent interpretation under s 36(2) of the Charter.

**Spencer v Commonwealth of Australia [2009] FCAFC 38**  
**(Black CJ, Jacobson and Jagot JJ – 24 March 2009)**

Case summary by Charles Parkinson

*Constitutional law; acquisition of property on just terms – s 51(xxxi) of the Constitution; whether Commonwealth laws and agreements providing for grants of assistance to states effect or authorise the acquisition of property*

The appellant owns a property that is subject to the provisions of state statutes prohibiting the clearing of native vegetation other than in specified circumstances. The appellant claims that the state statutes have made his property unsuitable for commercial farming and in consequence effected an acquisition or appropriation of certain interests in his property. The appellant claims that the state statutes effected the acquisition or appropriation by effect or authority of two Commonwealth laws, the *Natural Resources Management (Financial Assistance) Act 1992 (Cth)* and the *Natural Heritage Trust of Australia Act 1997 (Cth)*. And by virtue of the fact that these Commonwealth statutes are laws with respect to the acquisition of property which do not provide for just terms as required by s 51(xxxi) of the Constitution, they are invalid to that extent.

Jagot J, with whom Black CJ and Jacobson J agreed, held that the appellant's claim failed because it could not surmount three fundamental problems.

First, the High Court decision in *Pye v Renshaw* (1951) 84 CLR 58 about the operation of ss 51(xxxi) and 96 of the *Constitution* held that (i) if a state statute provides for the acquisition of land on terms which are not just, that is of no legal consequence and (ii) the arrangement with the Commonwealth was immaterial as the state was free to co-operate with the Commonwealth or to accept financial assistance from the Commonwealth.

Second, the Full Court was bound to follow the decision of the New South Wales Court of Appeal in *Arnold v Minister Administering the Water Management Act 2000* [2008] NSWCA 338. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152, the High Court held that intermediate appellate courts should not depart from a decision in an intermediate appellate court in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless convinced that the interpretation is plainly wrong. *Arnold* concerned a similar scheme relating to water rights and was held to be not distinguishable from the present case.

Third, even if the Commonwealth statutes were held to be invalid, the state statutes would continue to operate and impose the same prohibitions upon the appellant's property.

**DPP (Cth) v Barbaro [2009] VSCA 26**  
**(Maxwell P, Vincent and Kellam JJA – 3 March 2009)**

Case summary by Charles Parkinson

*Human rights; right to be brought to trial without unreasonable delay under ss 21(5)(c) and 25(2)(c) of the Charter; whether Charter modifies approach to delay under the Bail Act 1977 (Vic)*

The appellant was charged with drug importation and trafficking. The estimated delay before trial was 2 years.

The appellant was granted bail by a magistrate, but that decision was overturned on appeal to the Trial Division of the Supreme Court on the ground that the appellant represented an unacceptable flight risk. The appellant appealed against that decision to the Court of Appeal.

The relevant issue before the Court of Appeal was whether the right to be brought to trial without unreasonable delay contained in ss 21(5)(c) and 25(2)(c) of the *Charter* required some modification of the accepted approach to delay under the *Bail Act 1977* (Vic).

The accepted approach was stated by Kellam J in *Mokbel v DPP (No 3)* (2002) 133 A Crim R 141 at 142-3, namely that the unacceptability of the risk of flight must be balanced with the likelihood of the allegations against an accused man being brought before a court in the near future. In circumstances where a real risk of flight is present, his Honour held that bail may still be granted because the community will not tolerate the indefinite detention of persons awaiting trial.

In a joint judgment, the Court of Appeal held that the *Charter* does not require any departure from the existing approach to the treatment of delay as an issue in bail applications. The Court of Appeal dismissed the appeal on the basis that as things presently stood, the delay was not unacceptable.

**UPCOMING EVENTS**

**18 June 2009**

Centre for Comparative Constitutional Studies seminar

Speaker: Prof. William G Buss, OK Patto Prof. of Law, University of Iowa, USA

1.00 pm in Room G29, Ground Level, Melbourne Law School

**17 July 2009**

Castan Centre Conference: The Changing Human Rights Landscape

Speakers include: Maxwell P, Al Pound, Robert McClelland, Prof Sarah Joseph, Prof Chris Sidoti, Prof Hilary Charlesworth

State Library of Victoria

**2 October 2009**

2009 Protecting Human Rights Conference

Speakers include: Prof Larissa Behrendt, the Hon Catherine Branson QC, Prof Hilary Charlesworth, Mary Kostakidis, Phil Lynch, Assoc Prof Kristen Walker

Art Gallery of New South Wales, Sydney

**27 November 2009**

International and Comparative Perspectives on Constitutional Law Conference

Speakers include: French CJ, Prof Cheryl Saunders, Stephen Gageler SC

Melbourne Law School