

## Administrative Law Take Home Exam 2013

The disaster in Queensland has presented a number of issues for Gemma. She is concerned about the department's decision to share personal information to the tax office, as well as the potential for her ex-partner to locate her using the information. Her business is also losing money as a result of the declaration of a national emergency. Four government decisions relate to Gemma's grievances:

1. The Minister's emergency declaration under s 80J *Privacy Act 1988* (Cth).
2. The decision of the Commonwealth Cabinet to declare a state of national emergency.
3. The decision of the Head of Commonwealth Department of Emergency Services (DES) citing s 80P *Privacy Act 1988* (Cth) to publish information online.
4. The decision of the Head of DES citing s 80P *Privacy Act 1988* (Cth) to forward information to the tax office.

### Standing: Decisions 1, 3 and 4

Decisions 1,3 and 4 were purportedly made under the *Privacy Act 1988* (Cth). The Act is not listed under Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the *ADJR Act*'). Gemma may thus seek review of decisions 1,3 and 4 in the Federal Court.<sup>1</sup>

Gemma must satisfy the requirement of standing.<sup>2</sup> First, there must be a 'decision of an administrative character'.<sup>3</sup> Gemma should argue that decisions 1, 3 and 4 were 'final, operative and determinative' decisions made in the course of administration of the DES.<sup>4</sup> The Commonwealth may contend that decision 1 is merely 'a step along the way'.<sup>5</sup> A more detailed analysis of this is redundant since Gemma will also struggle to show she is directly affected by decision 1.

Gemma must show that she is a person 'aggrieved' by the decisions.<sup>6</sup> With respect to decisions 3 and 4, the release of Gemma's private information is likely to directly affect her

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<sup>1</sup>*Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5.

<sup>2</sup>*Ibid*, s 5(1).

<sup>3</sup>*Ibid*, s 3(1).

<sup>4</sup>*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337 (Mason, J).

<sup>5</sup>*Ibid*.

<sup>6</sup>*Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1).

in terms of tax affairs, as well as her desire that her whereabouts remain unknown.<sup>7</sup> This represents a concern amounting to a ‘special interest’.<sup>8</sup>

With respect to decision 1, it will be difficult for Gemma to show she is ‘a person who is aggrieved’. The Minister’s declaration is of little immediate consequence to her, other than it is a precondition to the two subsequent directions.<sup>9</sup> The Commonwealth is likely to argue successfully that Gemma does not have a ‘sufficient interest’.<sup>10</sup>

### **Standing: Decision 2**

The declaration of a national emergency by the Commonwealth Cabinet has resulted in a number of travel restrictions that adversely affect Gemma’s business. The cabinet has purported to exercise its prerogative power. Such a decision is not reviewable under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*.<sup>11</sup> Gemma may seek review of the decision in the original jurisdiction of the High Court<sup>12</sup> or the Federal Court.<sup>13</sup>

Gemma will need to stratify the requirement of justiciability. This will be difficult to do since the decision has been made at the highest level of government, Cabinet. The court is likely to look to the context of the decision.<sup>14</sup> The Commonwealth may argue that like the decision in *Peko*,<sup>15</sup> the declaration of a national emergency is a polycentric decision involving security, economic various human factors. The decision is likely to affect many interests beyond Gemma. Given the nature of the power being exercised, both as a prerogative power and one with respect to a broad range of issues it is unlikely that Gemma will be successful in establishing standing.

### **Grounds for Review: Decision 1**

If Gemma can show standing there are two grounds for review she may advance:

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<sup>7</sup> *Administrative Decisions (Judicial Review) Act 1977 (Cth)* s 3(4); *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

<sup>8</sup> *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 530.

<sup>9</sup> 1998 (Cth).

<sup>10</sup> *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 530.

<sup>11</sup> S 3(1).

<sup>12</sup> *Constitution* s 75(5).

<sup>13</sup> *Judiciary Act 1903 (Cth)* s 39B.

<sup>14</sup> *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 304 (per Wilcox J).

<sup>15</sup> *Ibid.*

### Statutory Precondition

A declaration can only be made under s 80J of the *Privacy Act 1988* (Cth) if the Minister is satisfied of the stated factors.<sup>16</sup> The failure to satisfy a precondition gives rise to a ground of review.<sup>17</sup> The facts suggest a situation in which the Minister was aware that a significant disaster had occurred.<sup>18</sup> En route to the disaster scene the Minister made the declaration. However, Gemma may argue that because the Minister was not physically in the disaster zone when the declaration was made it was impossible for him to be of the state of mind to objectively determine if the disaster was of such a kind as to render the suspension of the normal operation of the *Privacy Act*.<sup>19</sup> As such, Gemma would argue that the Minister did not satisfy the subjective precondition. Gemma may further contend that making the declaration so early after the disaster when the extent and nature of the consequences were unknown was unreasonable,<sup>20</sup> contravening the precondition and invalidating the decision.

### Procedural Error

The declaration may also be reviewed on the ground of procedural error.<sup>21</sup> The *Privacy Act 1988* (Cth) sets out a number of requirements with respect to publication of the declaration. Namely, the declaration must be in writing,<sup>22</sup> signed by the Minister,<sup>23</sup> published on the Department website<sup>24</sup> and in the *Gazette*.<sup>25</sup> The facts indicate the declaration was only communicated by phone and it was not published in the *Gazette*, online or signed. The Minister will rely on the *Project Blue Sky* test and argue that in the context of a natural disaster Parliament would not have intended for the declaration to be invalid because it was not made in the correct form.<sup>26</sup>

### **Grounds for Review: Decision 3**

Decisions 3 and 4 are most relevant to Gemma, as she can more easily establish standing. There are a number of grounds of review available:

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<sup>16</sup> *Privacy Act 1988* (Cth) s 80J(a)-(d).

<sup>17</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(d).

<sup>18</sup> Satisfying *Privacy Act 1988* (Cth) s 80J(a).

<sup>19</sup> The precondition under *Privacy Act 1988* (Cth) s 80J(b).

<sup>20</sup> *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 647.

<sup>21</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s5(1)(b).

<sup>22</sup> *Privacy Act 1988* (Cth) s 80L(1).

<sup>23</sup> *Ibid* s 80L(1)(b).

<sup>24</sup> *Ibid* s 80L(2)(a).

<sup>25</sup> *Ibid* s 80L(2)(b).

<sup>26</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

### Statutory Precondition

There are a number of preconditions to an authorisation under s 80P.<sup>27</sup> Firstly, an emergency declaration must be in place,<sup>28</sup> the validity of which has been discussed above. There must be reasonable belief that Gemma has been involved in the disaster.<sup>29</sup> Such a requirement is a subjective precondition. Gemma may argue that the Head did not meet the requisite threshold hold in determining whether it was reasonably likely that Gemma was involved in the disaster. The Head may counter this and argue that the widespread nature of the tsunami meant his conclusion was reasonable, logical and rational in the circumstances.<sup>30</sup> Furthermore, the Minister would emphasize that the decision was made in good faith.<sup>31</sup> The Minister would also contend that the publication was to identify the missing making it permitted purpose according to the Act and satisfying the other precondition upon his exercise of power.<sup>32</sup>

### Procedural Error

Gemma's strongest argument is that by publishing the information on the internet the Head acted did not follow the procedure set down in law. S 80P(1)(e)<sup>33</sup> limits the publication of personal information to specific entities and does not extend to the internet. Gemma would argue that the statutory regime exists to protect personal information and, as such, an application of the *Project Blue Sky* test would indicate that the decision to publish information on the internet is invalid.<sup>34</sup>

### Improper Purpose & Consideration of Irrelevant Matters

Gemma may argue that the Head sought to make a political statement with respect to funding levels through his publication of the information under s 80P.<sup>35</sup> Given that such considerations are not relevant to the authorisation under the section the Head's decision may be reviewable on the ground of improper purpose.<sup>36</sup> The object of Part VIA is to make special

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<sup>27</sup> *Privacy Act 1988* (Cth).

<sup>28</sup> *Ibid*, s 80P(1).

<sup>29</sup> *Ibid* s 80P(1)(a).

<sup>30</sup> *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 647.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid* s 80H(2)(a)(i)(ii); (d).

<sup>33</sup> *Privacy Act 1988* (Cth).

<sup>34</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(e); s 5(2)(c).

provision for the use of personal information in disasters.<sup>37</sup> The facts indicate that the Head used the situation to demonstrate his opposition to budget cuts. Gemma would argue that the course of action was inconsistent with the object of the Act. However, this may be difficult to make out as the Head can also point to the legitimate rationale – the desire to make information available in an emergency - and argue that ‘an improper purpose will not lightly be inferred [and there is] a presumption of regularity’.<sup>38</sup>

Alternatively, Gemma can advance the ground of irrelevant consideration.<sup>39</sup> The Head’s consideration of budgetary issues in the context of his authorisation under s 80P was inconsistent with the true purpose of the Act.<sup>40</sup> Gemma must show that the Head’s irrelevant considerations were ‘not an insignificant’ aspect of his decision.<sup>41</sup> This is a reasonably high threshold test.<sup>42</sup> As stated, the Head is able to point to real and legitimate motivations behind his authorisation. He may seek to distinguish the present situation from *Thompson* where the decision would not have been made but for the motives that were inconsistent with the objects of the act concerned.<sup>43</sup> Given the threshold that need be satisfied Gemma may struggle to show that irrelevant considerations were enough to invalidate the authorisation.

#### **Grounds for Review: Decision 4**

##### Statutory Precondition

Gemma may mount a strong argument that Head did not meet a precondition of the exercise of power under so 80P of the *Privacy Act 1988* (Cth).<sup>44</sup> As previously established it is a precondition that information only be released for a permitted purpose.<sup>45</sup> The provision is of such a kind that the permitted purpose must objectively exist in order for an authorisation to be made.

The facts show that the Head has released the personal information to assist the Tax Department find ‘missing taxpayers’. Gemma would argue that the use of information for the

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<sup>37</sup> *Privacy Act 1988* (Cth) s 80F.

<sup>38</sup> *Industrial Equity Limited v Deputy Commissioner of Taxation* (1990) 170 CLR 649, 672 (Gaudron J).

<sup>39</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(e); s 5(2)(a).

<sup>40</sup> *Privacy Act 1988* (Cth).

<sup>41</sup> *Privacy Act 1988* (Cth).

<sup>42</sup> *Schlieske; Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board*.

<sup>43</sup> *Thompson v Randwick Corporation* (1950) 81 CLR 87, 106.

<sup>44</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(d).

<sup>45</sup> *Privacy Act 1988* (Cth) s 80p(1)(b); s 80H.

collection of taxes is not a permitted purpose,<sup>46</sup> meaning that the jurisdictional fact is unsatisfied. Following Spiegleman J's reasoning in *Timbarra*, Gemma has a strong argument that the *Privacy Act* has established a strict regime with respect to personal information and has carefully defined 'permitted purpose', the departure from which is an invalid administrative act.<sup>47</sup>

### Irrelevant Consideration & Improper Purpose

Using the reasoning that the true purpose of the legislation is make special provision for information during emergencies, Gemma may argue that the Head has taken into account irrelevant considerations or acted improperly, invalidating the decision. The facts do not suggest any motivation other than to assist the Taxation Department as a reason for the authorisation. This is analogous to *R v Toohey*<sup>48</sup> and *Schlieske*<sup>49</sup> in which an improper purpose was the dominant impetus for a decision. Gemma would argue that the court follow the precedent set in those cases and make a finding of improper purpose.

Alternatively, Gemma could argue the Head's concern for the tax department amounted to an irrelevant consideration. As established, the intended purpose of the provision has no relation to the Tax Department. Gemma would seek to distinguish the current facts from *Murphyores* and argue that unlike the legislation in that case the decision maker is afforded little discretion as Part VIA of the *Privacy Act* is intended to operate in limited circumstances, namely disasters, only. Concern for the Tax Department was the sole motivation behind the decision and, as such, satisfies the requirement of significance.

### **Remedies**

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<sup>46</sup> Ibid s 80H.

<sup>47</sup> *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, 64.

<sup>48</sup> *R v Toohey* (1981) 151 CLR 170.

<sup>49</sup> *Schlieske v Minister for Immigration* (1988) 84 ALR 719.