FEDERAL COURT OF AUSTRALIA

Nicholson-Brown and Another v Jennings

[2007] FCA 634

Middleton J

7, 8 December 2006, 3 May 2007

Aboriginals — Heritage protection — Victoria — Inspectors — Power to appoint, suspend and revoke — Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), s 21R.

Administrative Law — Statutory power — Discretion — Of Minister — Considerations taken into account in exercise of — Policy — Criteria under future legislation — Perceived views of community — Whether irrelevant.

Statutory Interpretation — Appointments — Power to suspend or revoke — Where requirement to "consult" before making appointment — Whether consultation required before removal — Power to revoke instrument — Whether limits power of suspension or removal of appointment — Acts Interpretation Act 1901 (Cth), s 33(3), (4).

Section 21R of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the Act) provided that a Commonwealth Minister could, in writing, appoint a person as an inspector, who had certain functions in relation to protecting Victorian Aboriginal cultural heritage. The section required the Minister first to consult a local Aboriginal community, and to be satisfied that the person had knowledge and expertise in the identification and preservation of Aboriginal cultural property and was able to perform the relevant duties.

Two applicants challenged decisions of the Victorian Minister for Aboriginal Affairs (the respondent in each case), under delegation from the relevant Commonwealth Minister, to suspend and then revoke the previous appointment of each applicant as an inspector. In arriving at the decisions, the respondent had taken account of criteria for appointment of inspectors under proposed Victorian legislation, not yet in force, which would replace the relevant Part of the Act, and his perception of the views of the Victorian community in relation to one applicant's recent use of her powers as an inspector under the Act. These considerations were challenged as irrelevant.

Section 33(4) of the *Acts Interpretation Act 1901* (Cth) relevantly provided that where an Act conferred a power to make appointments, the power should be construed (absent contrary intention) as including a power to remove or suspend any person appointed, and to appoint another person temporarily in the place of any person so suspended. This was subject to the proviso that where the power to appoint was only exercisable upon the recommendation, or subject to the approval

or consent, of some other person or authority, the power of removal was (absent contrary intention) only exercisable upon the recommendation or subject to the approval or consent of that other person or authority. The applicants argued that:

(a) the respondent's failure in each case to consult the local Aboriginal community before making the decisions to suspend and revoke the appointment of the applicants invalidated those decisions;

(b) the operation of s 33(4) of the *Acts Interpretation Act* was confined to where a suspension was a temporary necessity and a replacement appointment required;

(c) s 33(3) of the *Acts Interpretation Act* made the respondent's power to remove under s 21R of the Act exercisable only in a like manner and subject to like conditions as the power to appoint an inspector, including the requirement of consultation with a local Aboriginal community.

Section 33(3) of the *Acts Interpretation Act* relevantly provided that where an Act conferred a power to make, grant or issue any instrument the power should be construed (absent contrary intention) as including a power "exercisable in the like manner and subject to the like conditions" to repeal or revoke the instrument.

Held: (1) The power of the respondent to appoint an inspector under s 21R of the Act is not contingent upon the recommendation, or subject to the approval or consent, of a local Aboriginal community, as the concept of consultation is not the same as acting upon a recommendation, approval or consent. Therefore no consultation was required before removal. [16], [51]

Obiter: If there was a requirement of consultation with a local Aboriginal community prior to suspension or removal, breach of the requirement would not lead to invalidity of such suspension or removal. [30]

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; *Bond v WorkCover Corporation (SA)* (2005) 93 SASR 315, applied.

(2) The power to suspend under s 33(4) of the *Acts Interpretation Act* is not confined to where a suspension is a temporary necessity and a replacement appointment is required and it can be employed to exercise a power of suspension and then exercise a power of removal following the suspension. [18]

(3) Section 21R of the Act confers a power to appoint, not a power to make, grant or issue any instrument. [27]

Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW) (1978) 1 ALD 167; *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338; 24 ALR 307; *Barton v Croner Trading Pty Ltd* (1984) 3 FCR 95; *Edenmead Pty Ltd v Commonwealth* (1984) 4 FCR 348, considered.

(4) Section 33(3) of the *Acts Interpretation Act* does not operate to constrain the type of power referred to in s 33(4) of that Act, as they operate exclusively of each other. [28]

Laurence v Chief of Navy (2004) 139 FCR 555, followed.

(5) Section 33(4) of the *Acts Interpretation Act* authorised the respondent to suspend or remove each applicant in the circumstances of this case. [29]

(6) In appointing inspectors under s 21R of the Act, the respondent was required to take account of the statutory criteria, but these were not exhaustive, and were not necessarily the only criteria to be applied. [35]

(7) In exercising a statutory discretion under s 21R of the Act (in light of s 33(4) of the *Acts Interpretation Act*) to suspend or revoke the appointment of an inspector, the respondent, as a Minister, was entitled to take into account matters of policy and implementation of policy, including future legislation not yet in force, and the respondent's perception of the views of the community. [43], [46]

Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507, applied.

Cases Cited

Aboriginal Affairs, Minister for v Peko-Wallsend Ltd (1986) 162 CLR 24.

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564.

Barton v Croner Trading Pty Ltd (1984) 3 FCR 95.

Bond v WorkCover Corporation (SA) (2005) 93 SASR 315.

Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW), Re (1978) 1 ALD 167.

Customs, Collector of (NSW) v Brian Lawlor Automotive Pty Ltd (1979) 41 FLR 338.

Dennis Willcox Pty Ltd v Federal Commissioner of Taxation (1988) 19 ATR 1122.

Edenmead Pty Ltd v Commonwealth (1984) 4 FCR 348.

Glaxsmithkline Australia Pty Ltd v Anderson (2003) 130 FCR 222.

Heslehurst v Government of New Zealand (2002) 117 FCR 104.

Hot Holdings Pty Ltd v Creasy (2002) 210 CLR 438.

Immigration and Multicultural Affairs, Minister for v Jia Legeng (2001) 205 CLR 507.

Jarratt v Commissioner of Police (NSW) (2005) 224 CLR 44.

Laurence v Chief of Navy (2004) 139 FCR 555.

Liquor Licences, Registrar of v Iliadis (1988) 19 FCR 311.

Murphyores Inc Pty Ltd v Commonwealth (1976) 136 CLR 1.

Nguyen v Minister for Health and Ageing [2002] FCA 1241.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

R v Anderson; Ex parte Ipec-Air Pty Ltd (1965) 113 CLR 177.

South Australia v O'Shea (1987) 163 CLR 378.

VEAL of 2002, Applicant v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88.

X v Australian Crime Commission (2004) 139 FCR 413.

Appeal/application

D Mortimer SC with *F McKenzie*, for the applicants.

M Kennedy SC with *L De Ferrari*, for the respondent.

Cur adv vult

3 May 2007

Middleton J.

Introduction

1 These two proceedings were heard together. As they raise similar principles of law based upon sufficiently common facts, it is convenient to deal with both applications in these reasons, although I will make separate orders in each proceeding.

2 Two decisions made by the respondent pursuant to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ("the Act") are sought to be reviewed, namely:

(a) a decision made on 21 April 2006 to suspend each applicant's appointment as an inspector ("the suspension decision"); and

(b) a decision made on 23 June 2006 to remove each applicant as an inspector ("the removal decision").

3 Each decision was purported to be made in exercise of a power under s 21R of the Act and as a delegate of the relevant Commonwealth Minister under s 21B of the Act.

4 To the extent that either applicant requires any extension of time under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to bring their application, because of the view I finally reach on the merits in this matter, I refuse to grant an extension of time as sought. I should indicate that if I was persuaded by either applicant on the merits of their applications, I would have granted the extension of time.

The facts in these proceedings

5 There was no real dispute about the facts in these proceedings. The relevant facts can be summarised as follows:

- In 1991, each applicant was appointed as an inspector under s 21R of the Act after consultation with the relevant local Aboriginal community under the Act. Ms Nicholson-Brown had her appointment renewed in 2003, which renewal appears to have been made for the period ending on 31 December 2008. In relation to Ms Anselmi it is unclear on the evidence as to whether there had been any formal renewal of her initial appointment, and whether her appointment had been made or renewed for any set period.
- From 1991 both applicants held their appointments continuously until the removal decision on 23 June 2006. Their appointment conferred no entitlement to any remuneration or financial benefit.
- On 6 April 2006 the *Aboriginal Heritage Bill 2006* (Vic) ("the Victorian Bill") was introduced into Victorian Parliament, which in conjunction with amendments to the Act was to introduce significant change to the existing legislative scheme as established under the Act. The Victorian Bill later became the *Aboriginal Heritage Act 2006* (Vic) ("the Victorian Act").
- On 10 April 2006, Ms Nicholson-Brown exercised her powers under s 21C of the Act to make an emergency declaration with respect to a site called "Camp Sovereignty" at Kings Domain, Melbourne ("the declaration"). Ms Anselmi was not involved in the declaration.
- By letter dated 21 April 2006, the respondent wrote to each applicant informing them of a review of their inspectorships. In that letter, the respondent wrote:

> The Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill, which is currently before the Commonwealth Parliament, intends to repeal Part IIA of [the Act]. That repeal is linked to the passage and implementation for the Aboriginal Heritage Bill 2006, currently before the Victorian Parliament.
>
> …
>
> In order to smooth the transition to the new arrangements, I am considering removing all persons currently appointed as inspectors under the Commonwealth Act who would not be qualified to be appointed as inspectors under the proposed Victorian Act. I have written to all inspectors in the same terms.

Further, given the manner and circumstances in which the emergency declaration was made on 10 April 2006 under section 21C of the Commonwealth Act in relation to Camp Sovereignty, and the community reaction to the making of that declaration, I am concerned that the community is losing faith in the ability of inspectors to make emergency declarations consistent with the terms and intention of the Commonwealth Act.

In the circumstances outlined above, I seek your input as to why I should not remove you from your appointment as an inspector under section 21R of the Commonwealth Act, including whether you would meet the requirement of being employed in the public service or already holding an appointment as an inspector, enforcement officer, or authorised officer under any other Victorian Act. I request that you provide me with your input by 4 pm 5 May 2006.

Pending the outcome of my consideration of this issue and the receipt of your input, if any, I have decided to suspend your appointment as an inspector, effective immediately. I have also suspended all other inspector appointments. During the suspension of your appointment, you will not be able to exercise any of the powers given to an inspector under the Commonwealth Act. A copy of the instrument of suspension is attached.

I would like to extend my gratitude to you for performing these voluntary duties over the past years, and encourage you to remain involved in the protection and management of Victoria's Aboriginal cultural heritage in the future.

During the suspension of your appointment, issues relating to the making of emergency declarations should be referred to me.

- On 24 April 2006, the Acting Premier and the respondent issued a media release which provided:

MOVE TO SPEED UP REFORM OF ABORIGINAL HERITAGE LAWS

Acting Premier John Thwaites and Aboriginal Affairs Minister Gavin Jennings today announced new arrangements for making emergency declarations of Aboriginal heritage places in Victoria.

Mr Thwaites said the Government's aboriginal Heritage Bill, now before State Parliament, would strengthen the protection of Aboriginal Cultural heritage in Victoria and add rigour to the way that emergency declarations were made.

"The new arrangements will apply to declarations such as the one made that protects the fire in King's Domain," Mr Thwaites said.

"The new interim and permanent arrangements that we're outlining today will ensure that there is a proper process in place for making emergency declarations from now on."

Mr Jennings said under the new legislation emergency declarations would be replaced by stop orders issued by inspectors who are full time members of the public sector and will be subject to appropriate oversight and legal checks.

"In order to smooth the transition to the new arrangements, I have suspended the appointment of the 48 inspectors who currently hold authority under the Commonwealth Act," Mr Jennings said.

"The power to issue emergency declarations will now rest with me as Minister for Aboriginal Affairs until the new arrangements are in place."

> In a complementary move, Mr Thwaites had written to Prime Minister John Howard asking for co-operation in urgently amending [the Act], to remove the ability of inspectors or magistrates, who can also make declarations, to make an emergency declaration.
>
> "This amendment would preserve the delegated power of the Victorian Minister for Aboriginal Affairs to issue emergency declarations pending the ultimate repeal of Part IIA of the Commonwealth Act, which applies only to Victoria," Mr Thwaites said in his letter to the Prime Minister.
>
> Mr Jennings said it was critical that people had confidence in Aboriginal cultural heritage protection laws.
>
> Emergency declarations that lack credibility reduce confidence in Aboriginal cultural heritage claims.
>
> "Given the manner and circumstances in which the emergency declaration was made on 10 April 2006 in relation to Camp Sovereignty, the Government is concerned that the community is losing faith in the ability of inspectors to make emergency declarations consistent with the terms and intentions of the Commonwealth Act."
>
> Mr Thwaites said the 48 voluntary, community based inspectors will be replaced by full time staff of the public sector who will be trained in cultural heritage issues once the legislation is passed.
>
> "These staff will also be subject to the legal and professional obligations of full time public sector employees," he said.
>
> The new legislation will also give the Minister for Aboriginal Affairs the power to revoke a stop order at any time after it is issued if it lacks merit.
>
> Mr Jennings said the Aboriginal Heritage Bill will also bring responsibility for cultural heritage wholly within Victoria.
>
> "The Bill will make it mandatory for heritage management plans to be considered at the initial planning stage for high impact and large scale developments, for example, greenfield projects such as housing developments and substantial mining works or in sensitive areas like coastal dunes and riverbanks," he said.
>
> "Councils and developers are already obliged to consider Aboriginal cultural heritage laws — the updated laws will provide for greater clarity and certainty, reducing delays and costs."
>
> The new Bill will also:
>
> - Establish a Cultural Heritage Council that will advise the Aboriginal Affairs Minister on cultural heritage issues, provide a state-wide voice for Aboriginal people on cultural heritage and also determine which Aboriginal groups represents particular parts of Victoria;
> - Introduce an appeal mechanism through VCAT for developers who disagree with local Aboriginal communities over the impact of development proposals.

- Ms Nicholson-Brown received a copy of the media release prior to receipt by her of the letter from the respondent dated 21 April 2006, whilst Ms Anselmi was first notified of the suspension decision upon receiving the letter from the respondent dated 21 April 2006.
- On 21 April 2006, the respondent suspended all 48 inspectors appointed under s 21R of the Act. Each of the inspectors was informed of the decision and sent a copy of the instrument of suspension by a letter in very similar terms as was sent to each of the applicants.

- On 1 May 2006, Ms Nicholson-Brown's solicitors, Holding Redlich, sent a letter in response to the respondent's letter of 21 April 2006 seeking elaboration upon certain matters in the following terms:

    - First, you say that you are considering removing all persons currently appointed as inspectors under [the Act] who would not be qualified to be appointed as inspectors under the proposed Victorian Act. Can you please, beyond asserting that such removal is necessary to achieve a smooth transition, advise how it is that you see that inspectors such as Ms Nicholson-Brown could interfere with the so called smooth transition.
    - Secondly, you refer to the community "losing faith in the ability of inspectors to make emergency declarations consistent with the terms and intentions of the Commonwealth Act". In our view, it is not really a question as to whether the community is losing faith in the ability of the inspectors to make emergency declarations. Rather, it is a question of whether or not Ms Nicholson-Brown, as opposed to other inspectors, has made declarations which are inconsistent with the terms of the Commonwealth Act. In this regards, are you saying that the emergency declaration made by Ms Nicholson-Brown on 10 April 2006 was not made in accordance with the Commonwealth Act? Further, assuming that you would say that the declaration was not made consistently with the terms of the Commonwealth Act (which we do not accept), do you say that this event alone should disentitle Ms Nicholson-Brown from holding the office of inspector or are there other matters concerning Ms Nicholson-Brown's conduct which you intend to take into account?

- By letter dated 4 May 2006, the respondent replied to Holding Redlich as follows:

    I refer to your letter dated 1 May 2006 seeking further elaboration from me on several matters.

    As advised, I am considering the removal of inspectors in order to achieve a smooth transition to new legislative arrangements. However, I would be pleased to take your client's views into account.

    I note your view that my reference to the community "losing faith in the ability of inspectors to make emergency declarations consistent with the terms and intentions of the Commonwealth Act" is irrelevant. However, in my opinion it is quite relevant.

    You also advise that your client has not accepted that the suspension of her appointment has a proper legal basis.

    As I stated in my letter of 21 April 2006, I have power to suspend appointments as an inspector under s 21R of [the Act] pursuant to the provisions of s 33(4) of the [*Acts Interpretation Act 1901* (Cth)].

    I look forward to your client's input as to why I should not remove her from her appointment as an inspector under s 21R of [the Act].

- On 5 May 2006, Ms Nicholson-Brown's solicitors, Holding Redlich, sent a further letter to the respondent in response to the respondent's letters of 21 April 2006 and 4 May 2006, setting out why Ms Nicholson-Brown should not have been suspended from her position, and why she should not be removed permanently from that position. That letter dealt in some detail with each of the matters raised

in the letter of 21 April 2006, namely achieving a smooth transition, the manner and circumstances of the declaration and the community reaction.

- On 2 May 2006, Ms Anselmi wrote to the respondent asking him not to permanently remove her as an inspector.
- By separate letters dated 23 June 2006, the respondent informed each applicant of the removal decision. In each letter, the respondent stated that he had considered each of the applicant's submissions, and, so far as each letter contains common elements, provided the following reasons as the basis for the removal decision:

> Review of Inspectorship
>
> Thank you for your response … to my letter of 21 April 2006 where I said that I was considering removing all inspectors appointed under [the Act], who would not be qualified to be appointed as inspectors under the new *Aboriginal Heritage Act 2006* (Vic).
>
> As you are aware, under the new Act, a person can only be considered for appointment as an inspector if they are:
>
> - an employee under Part 3 of the *Public Administration Act 2004* (Vic), or
> - an authorised officer, inspector or enforcement officer appointed under another Victorian Act.
>
> After considering the matters raised by the inspectors who responded to my letter, I have decided, with one exception, to remove every inspector who would not meet the requirement under the new Act, and to lift the suspension of those inspectors who would meet this requirement and who wish to retain their appointments. The one exception I have made is due to what I regard to be special circumstances arising from issues relating to the Convincing Ground.
>
> This decision is based on a change of Government policy, which is designed to ensure that inspectors have the oversight, training and support that is available to public servants and authorised officers. The community reaction to the making of the declaration in relation to Camp Sovereignty has reinforced the need for inspectors to have that framework of oversight, training and support as soon as possible. There are also practical reasons for putting in place mechanisms now to ensure an effective transition to the new heritage regime in Victoria. The new Act cannot commence until the Commonwealth Government repeals Part IIA of its Act, at which time inspector appointments under that Act will be defunct. It is therefore necessary to ensure that there are inspectors ready to enforce the new Act as soon as it commences, so there are no gaps in the protection of Aboriginal cultural heritage in the transition between regimes.
>
> It is for these reasons that I have decided to remove the inspectors who would not be qualified under the new Act.
>
> I have also decided to bring forward the process for employing and training people who will be able to be considered for inspector positions under the new Act. In or around October 2006, the Government will advertise a number of new Heritage Officer positions located throughout Victoria, and it will be open to you to apply. These are intended to be Indigenous identified positions in the public service. Persons employed in those positions, along with other persons who are already public servants or authorised officers and are selected, will undergo extensive training in the lead up to the commencement of the new Act. It is

> intended that, subject to consultation with the Aboriginal Heritage Council, those persons will be considered for appointment as inspectors either in anticipation of, or on commencement of, the new Act.
>
> Given the material that you have put to me, including that regarding whether you are a public servant, inspector, enforcement officer or authorised officer under other Victorian Acts and the matters outlined above, I have decided to remove you from your appointment as an inspector under [the Act]. A copy of the instrument of removal is attached. [The Act] provides that a person who ceases to be an inspector must return his or her identity card. I ask that you do this as soon as possible as that Act imposes a penalty for non-compliance.
>
> I note that, pending the repeal of [the Act], emergency declarations may be made by me, the Commonwealth Minister, those inspectors whose suspensions have been listed and magistrates on the application of a local Aboriginal community within the meaning of that Act. If you become aware of a situation which may warrant the making of an emergency declaration, I suggest that you refer the issue to either me or one of those persons or bodies. A list of the inspectors whose suspensions have been lifted will be made available shortly.
>
> Once again, I take this opportunity to thank you for your contribution over the past years as a voluntary inspector.

- The respondent decided to remove 38 inspectors including the applicants. The respondent also decided to lift the suspension of 10 inspectors; nine because they were currently employed under Pt 3 of the *Public Administration Act 2004* (Vic) as full-time public servants, or were currently appointed as inspectors, enforcement officers or authorised officers under Victorian legislation ("the new criteria") (and wished to continue as inspectors); and in the case of one because of special circumstances being that the inspector was involved in ongoing heritage protection issues and should be exempted from the policy implementation. On 23 June 2006, each of the inspectors was sent a letter explaining the decision (removal or lifting the suspension) which enclosed a copy of the relevant instrument giving effect to that decision.
- In the case of Ms Nicholson-Brown, the respondent's letter dated 23 June 2006 was supplemented by a letter from the Victorian Government Solicitor dated 23 June 2006 to Ms Nicholson-Brown's solicitors. That letter responded to a number of matters raised in the letter from Ms Nicholson-Brown's solicitors dated 5 May 2006.

The grounds of the applications

6 Each applicant asserted that the suspension decision and removal decision were not authorised by the Act because the respondent purported to suspend and remove each applicant without complying with the requirements of s 21R of the Act, as affected by s 33(4) of the *Acts Interpretation Act 1901* (Cth) ("Acts Interpretation Act"), in that he did not consult with a local Aboriginal community. The applicants also asserted that the suspension decision was not authorised by the Act because the Act, when properly construed, does not confer a power to suspend inspectors in the circumstances of this case.

7 Further, the applicants alleged that, in making the suspension decision and removal decision:

- a breach of natural justice occurred;
- the respondent took into account irrelevant considerations;

- the respondent failed to take into account relevant considerations; and
- the respondent exercised his power for purposes other than a purpose for which the power was conferred, which constituted an improper exercise of the power conferred by the Act.

The legislative scheme

8 According to s 4 of the Act, the purposes of the Act are the "preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition". Part IIA of the Act specifically deals with Victorian Aboriginal cultural heritage. Of particular relevance to this case, Pt IIA allows for the making of an emergency declaration of preservation where there are reasonable grounds to believe that an Aboriginal place or an Aboriginal object is under threat of injury or desecration: s 21C.

9 An emergency declaration may be made by an inspector, the Minister or a magistrate in particular circumstances: s 21C(1). Once made, an emergency declaration can only be varied or revoked by the person who made such emergency declaration: s 21C(3). Inspectors are appointed under s 21R of the Act, which provides:

> The Minister may, in writing, appoint any person after consultation with a local Aboriginal community to be an inspector for the purposes of this Part if the Minister is satisfied that the person has knowledge and expertise in the identification and preservation of Aboriginal cultural property and is able to undertake the duties of an inspector under this Part.

Changes to the legislative scheme

10 On 4 April 2006 the Victorian Act was introduced into parliament. On 9 May 2006 the Victorian Act was given Royal Assent. The Victorian Act arose as a result of the Victorian Government's decision that there should be a Victorian statute dealing with Aboriginal heritage, rather than continued reliance on Pt IIA of the Act.

11 Under s 160(1) of the Victorian Act a person cannot be appointed as an inspector unless that person satisfies the new criteria. This is an important part of the new arrangements to be put into place in Victoria.

12 The Victorian Act is awaiting proclamation and, as such, is not in force as at the date of judgment. The coming into effect of the new Victorian scheme depends on the coordinated repeal by the Commonwealth Parliament of Pt IIA of the Act, which will be implemented when Sch 2 to the *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 2006* (Cth) ("the Commonwealth Amendment Act") comes into effect. One of the purposes of the Commonwealth Amendment Act is to provide for the repeal of Pt IIA and other provisions in the Act that only apply to places in Victoria to enable the Victorian Government to administer Aboriginal heritage protection in Victoria directly through its own legislation. On 7 December 2006, the Commonwealth Amendment Act received Royal Assent but is still awaiting proclamation, and as such is not in force as at the date of judgment. I am informed by the parties that the respondent has approved 28 May 2007 as the date upon which the Victorian Act is due to commence, and that he has written to the Commonwealth Minister requesting Sch 2 to the Commonwealth Amendment Act be proclaimed to commence on that day.

Were the suspension and removal decisions authorised by the Act?

13 The applicant submitted that each of the suspension decision and removal decision was not authorised by the Act. The applicant contended that the respondent did not comply with the requirements of s 21R of the Act, as affected by s 33(4) of the Acts Interpretation Act.

14 One contention was based on the premise that it was implicit in s 21R of the Act that before the respondent may appoint an inspector under s 21R, he must obtain the recommendation, approval or consent of the local Aboriginal community. The applicant submitted, therefore, that the power to remove an inspector was similarly constrained, having regard to the purposes of the Act, s 33(4) of the Acts Interpretation Act, and as a matter of statutory interpretation of s 21R itself.

15 The first matter to be considered is whether the premise of the applicant's argument is correct; that is, whether the power to appoint is only exercisable upon the recommendation or subject to the approval or consent of a local Aboriginal community. The starting point is the terms of the power conferred by s 21R. Section 21R enables the respondent to appoint inspectors after consultation with a local Aboriginal community. However, it enables the respondent to appoint "any person" after consultation, as long as the respondent is satisfied that the person:

- has knowledge and expertise in the identification and preservation of Aboriginal cultural property; and
- is able to undertake the duties of an inspector under Pt IIA of the Act.

16 In my view, the power of the respondent to appoint an inspector under s 21R is not contingent upon the recommendation, or subject to the approval or consent, of a local Aboriginal community, as the concept of consultation is not the same as acting upon a recommendation, approval or consent. If parliament had wanted to require the Minister to only act upon the recommendation approval or consent of a local Aboriginal community, it would have expressly so provided.

17 The second matter for determination is the effect of s 33(4) on the power conferred by s 21R. Section 33(4), so far as is relevant, provides:

> Where an Act confers upon any person or authority a power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as … including a power to remove or suspend any person appointed, and to appoint another person temporarily in the place of any person so suspended …:
>
> Provided that where the power of such person or authority to make any such appointment is only exercisable upon the recommendation or subject to the approval or consent of some other person or authority, such power to make an appointment to act in an office or place or such power of removal shall, unless the contrary intention appears, only be exercisable upon the recommendation or subject to the approval or consent of such other person or authority.

18 At the outset I observe that s 33(4) is directed to a power both to remove and suspend and the fact that in this case both occurred does not mean that in each case s 33(4) cannot be called in aid to assist in the question of authorisation to suspend and remove. It was also suggested by the applicants that the operation of s 33(4) is confined to where a suspension is a temporary necessity and a replacement appointment is required. I see no reason to so limit s 33(4) in its

use of the term "suspend", and in my view it can readily be employed here where the respondent exercised a power of suspension and then exercised a power of removal following the suspension.

19 In the absence of any contrary intention, s 33(4) of the Acts Interpretation Act makes the power to suspend or remove an inspector exercisable by the authority which has the power to appoint an inspector (here the respondent), subject to the proviso. However, the operation of the proviso in s 33(4) is contingent on the power to appoint being only exercisable upon the recommendation or subject to the approval or consent of some other person or authority. As stated above, the requirement to consult is not the same as a requirement to act only upon a recommendation, approval or consent, and therefore the proviso in s 33(4) does not apply to s 21R. Section 33(4) does no more here than expand the power to appoint to include the power to remove (or suspend) an inspector.

20 I do not need to consider whether there is any contrary intention so that the proviso does not apply, but there may well be a contrary intention in the case of consultation even if the power is included within the ambit of the proviso.

21 It was argued by the applicant that the requirement of consultation can be implied by reference to the purposes of the Act, or as a matter of statutory interpretation of s 21R itself. The stated purposes of the Act are contained in s 4, which have been set out above. There is no basis upon which it can be said that the purposes of the Act will be frustrated if an inspector is removed without consultation with a local Aboriginal community. One of the practical benefits of requiring consultation before making an appointment is that the respondent will be assisted in making his determination as to whether the person is capable of fulfilling the role of an inspector. That benefit does not carry the same significance in relation to the task of suspending or removing an inspector. In fact, such a requirement could be burdensome, particularly if an inspector needed to be removed without delay for performance reasons or misconduct.

22 The applicants relied upon the decisions in *Nguyen v Minister for Health and Ageing* [2002] FCA 1241 and *Registrar of Liquor Licences v Iliadis* (1988) 19 FCR 311 in support of the proposition that an implied power to revoke or suspend an appointment should not be construed as capable of being exercised with less constraints than the express power to appoint. These cases do not assist in the interpretation of the power to suspend or remove as conferred by s 21R as affected by s 33(4) of the Acts Interpretation Act, and do not stand for the broad proposition contended for by the applicants.

23 A separate contention raised by the applicants was that s 33(3) of the Acts Interpretation Act makes the respondent's power to remove under s 21R of the Act exercisable only in a like manner and subject to like conditions as the power to appoint an inspector, including the requirement of consultation with a local Aboriginal community. In essence, the applicant's contention was that the application of s 33(3) and (4) of the Acts Interpretation Act should be read in such a way that subs (3) adds a further limitation to subs (4), in addition to the one which the legislature expressly contemplated (ie the proviso in subs (4)).

24 Section 33(3) of the Acts Interpretation Act provides:

> Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

25 There are two matters requiring consideration before it can be held that s 33(3) applies to s 21R. The first matter is whether an appointment made under s 21R of the Act is an "instrument" within the meaning of s 33(3). In *X v Australian Crime Commission* (2004) 139 FCR 413 at 421, Finn J made the following observation in considering the term "instrument" for the purposes of s 33(3):

> There are two streams of Federal Court authority which have taken inconsistent views on this question. One stream would limit the class of instruments to which the term applies to instruments of a legislative character. The other would extend it to executive or administrative instruments. This conflict has recently been reviewed at length by Emmett J in *Heslehurst v Government of New Zealand* (2002) 117 FCR 104 at [12] ff (for the purposes of s 33(3)) and by the Victorian Court of Appeal in R v Ng (for the purposes of s 46). Both decisions rejected the limitation of these provisions to legislative instruments. Ng, I would note, has recently been applied by Ryan J in *Glaxsmithkline Australia Pty Ltd v Anderson* (2003) 130 FCR 222 at [28].
>
> In my respectful view, the conclusions of Emmett J and of the Court of Appeal are compelling and ought be followed.

I am prepared to accept in favour of the applicant that the conclusions of Emmett J and of the Court of Appeal ought to be followed by me for the purposes of these proceedings.

26 The second matter is whether the Act confers a power to make, grant or issue such an instrument or merely confers a power on the Minister to make a decision which is to be evidenced in writing: see *Laurence v Chief of Navy* (2004) 139 FCR 555. In that case, at 558, Wilcox J drew the following distinction in relation to the power in question:

> I see a conceptual distinction between a power to issue an instrument, which itself has an operative legal effect, and a power to make a statutory decision which is immediately operative but, in the interests of good administration, is thereafter recorded in writing.

27 My own view is that s 21R confers a power to appoint, not a power to make, grant or issue any instrument. Section 21R does not talk in terms of the relevant act (the appointment) being made "by" or "pursuant to" any form of writing, but confers a power to make a decision to appoint, which incidentally to that decision, is to be in writing: see discussion in *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167 at 172; affirmed by the Full Court in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338; 24 ALR 307; *Barton v Croner Trading Pty Ltd* (1984) 3 FCR 95 at 110; and *Edenmead Pty Ltd v Commonwealth* (1984) 4 FCR 348 at 352-353.

28 However, even if I am wrong about this matter and the focus of s 21R is upon the document being the operative act of appointment, in my view, s 33(3) does not operate to constrain the type of power referred to in s 33(4) of the Acts Interpretation Act. In *Laurence* 139 FCR at 558, Wilcox J briefly discussed the distinction between the type of power referred to in s 33(3) and the type of power referred to in s 33(1) of the Acts Interpretation Act. He concluded that the two subsections referred to different types of power, and therefore operated exclusively of each other. This distinction is similarly applicable as between s 33(3) and (4), the former relating to the general making, granting or issuing of an instrument, the latter relating to the making of an appointment.

29 Section 33(3) is an enabling provision, which may or may not need to be relied upon in any given circumstance. However, the other enabling provision is s 33(4). I cannot see any reason to conclude that s 33(3) operates to constrain the effect of s 33(4) in interpreting s 21R. In my view, therefore, s 33(4) authorised the respondent to suspend or remove each applicant in the circumstances of this case.

30 I should indicate that even if I came to the conclusion that there was a failure to adhere to a requirement of consultation with a local Aboriginal community prior to suspension or removal, I would not consider that such failure would vitiate the decision to remove or suspend. I readily accept that the Act has given express and considerable prominence to the role of the local Aboriginal communities, and that the Act envisages that consultation with such communities be undertaken in defined circumstances. However, I must look at the power here being exercised, which is not one of appointment, but of suspension and removal. Such powers may need to be exercised in a variety of circumstances, without there necessarily being any relevance in seeking the views of local Aboriginal communities, such as for instance if a particular inspector was considered no longer to be a fit and proper person. I do not accept that the input of the local Aboriginal community is of the same significance in circumstances of suspension or removal, or that consultation would be regarded as an essential or mandatory requirement to effect a suspension or removal. If necessary to decide, I would take the view that if there was a requirement of consultation with a local Aboriginal community prior to suspension or removal, breach of that requirement would not lead to the invalidity of such a suspension or removal: see generally *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-391; and *Bond v WorkCover Corporation (SA)* (2005) 93 SASR 315 at 331-336.

Review of the suspension and removal decisions

Irrelevant considerations

31 Each applicant claimed that the respondent, in making each of the suspension and removal decisions, took into account the following irrelevant considerations:

- The respondent's and the Victorian Government's desire to smooth the transition to proposed new legislative arrangements not yet in effect;
- The changed qualifications for appointment as an inspector under proposed new legislative arrangements not yet in effect;
- A change in government policy; and
- The views of the Victorian community generally and the reaction of the Victorian community to the making of the declaration.

32 It was not disputed by the respondent that he took those matters, amongst others, into account in making his decisions. The respondent sought to impose under the Act the new criteria which were to be introduced under the Victorian Act when the Commonwealth Amendment Act and the Victorian Act came into operation. The thrust of the applicant's submission was that these new criteria were factors outside the subject-matter, scope and purposes of the Act and were therefore matters to which the respondent was not entitled to have regard.

33 It is well established that, in the absence of any express limitation in a statute, a consideration will be considered irrelevant only where there is "in the subject-matter, scope and purpose of the statute some implied limitation on the

factors to which the decision-maker may legitimately have regard": *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 and the cases there cited.

34 I must focus upon the Act itself as a whole to determine whether there is some limitation on the power of the respondent. Whilst I am concerned with the interpretation of a Commonwealth Act, it must be recalled that I am concerned primarily with Pt IIA which deals with Victorian Aboriginal cultural heritage. The Act envisages that the Commonwealth Minister may delegate his powers to a State Minister, which has occurred in this case. In my view, the Act envisages that a delegation could be made to the respondent in respect of the power to appoint inspectors in relation to Victorian Aboriginal cultural heritage, and envisages that the State Minister be given the discretion to exercise the power in view of the specific needs in Victoria of Aboriginal cultural heritage. The question here is whether the Act imposes a limitation on the respondent so as to prevent him from adding the new criteria in considering the appointment suspension or removal of inspectors. If the new criteria are inconsistent with the scheme in respect of inspectors and s 21R, then putting aside any proposed legislation, taking into account the new criteria would necessarily be taking into account an irrelevant consideration.

35 The Act does not contain any express limitation on the exercise of the respondent's power to suspend and remove. As I have said, I accept that the Act gives prominence to the role of Aboriginal people in deciding what should occur in respect of areas and objects of importance to them. In appointing inspectors under s 21R, the respondent has an obligation to consult a local Aboriginal community, in an endeavour to appoint people with the appropriate expertise and knowledge, and to ascertain whether the person is able to perform the duties of an inspector. These criteria must be taken into account, but are not necessarily the only criteria to be applied. I do not regard these criteria as the exhaustive criteria to which the respondent may have regard.

36 Further, there is nothing which would defeat the purposes of the Act if no inspectors were appointed, or all inspectors were temporarily suspended, or even if they were all removed. Section 4 of the Act sets out its purposes, which purposes can obviously be fulfilled without the appointment of inspectors. The Act applies to areas and objects in Australia, not just to Victoria. Part IIA and the appointment of inspectors under the Act only applies to Victoria. Whilst the appointment of inspectors may further the purposes of the Act, they are not necessary for the implementation of such purposes generally.

37 The principal power given to an inspector is that conferred by s 21C; that is to make an emergency declaration. The Commonwealth Minister, the respondent, and any other delegates of the Commonwealth Minister or of the respondent may also exercise the power to make an emergency declaration, as may a magistrate (although only on application by a local Aboriginal community).

38 I observe that an inspector has a role in connection with the power given to police officers to enter, search and seize under s 21S. In fact, unless at least one inspector was appointed under s 21R, the power given under s 21S(2) in particular could not be effective in relation to seizure because it is premised on the basis of a belief of the inspector named in the warrant. However, the fact that at any given time s 21S is restricted in its operation because not one

inspector is appointed cannot impose upon the respondent a mandatory duty to appoint an inspector under s 21R where the power is clearly stated to be discretionary.

39 It was argued by the applicants that imposing the new criteria would be contrary to the scheme of the Act and would be an anathema to the independent exercise of a power, like a power to make an emergency declaration. Undoubtedly, an inspector has a power separate to that of the respondent to make a declaration under s 21C, which if made can only be revoked or varied by the inspector. I do not agree, however, that, even if an inspector were a full-time public servant, this separate power could not be appropriately exercised or, perhaps more relevantly, is a power that the Act envisaged could not be exercised by an inspector whose appointment satisfied the new criteria.

40 There are many instances where important and significant decisions need to be made, and full-time public servants or servants of the Crown are regarded as capable of exercising independent judgements in making such decisions. Without statutory permission, it is not to be assumed that a public servant or servant of the Crown in whom a statutory power has been reposed will follow orders given by a superior. In fact, if a public servant or servant of the Crown did not exercise for himself or herself a discretion given to him or her to exercise, then the decision made would be invalid: see, eg *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 201-202. There is nothing in the nature of the powers to be exercised, the context of their exercise, or the character of the office of inspector which leads to the conclusion that the new criteria could not be applied to the appointment of an inspector. In this case I do not see that the appointment of a public servant, who otherwise satisfies the criteria in s 21R, is an appointment that would be contrary to the scheme of the Act as a whole, or Pt IIA dealing with Victorian Aboriginal cultural heritage.

41 I observe that, to the extent it is relevant, at least nine of the inspectors must have been public servants who satisfied the new criteria before the suspension decision, having been appointed under the Act and having been presumably regarded as being able to fulfil the function of inspector. I make this observation in view of the fact that the suspension of nine inspectors was lifted because they already satisfied the new criteria to be applied by the respondent.

42 Therefore, in my view, putting aside any question of change of legislation, the new criteria could be applied under the Act in the appointment, suspension and removal of inspectors by the respondent.

43 Matters of policy and implementation of policy (including change in qualifications for appointment), and the views of the Victorian community or the respondent's perception about those views, are ones which the respondent, upon which a discretionary power has been conferred, may take into account. In *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 565 per Hayne J (with whom Gleeson CJ and Gummow J agreed at 538-539) discussed the nature of the types of matters a Minister with a discretionary power might take into account:

> Conferring power on a Minister may well indicate that a particularly wide range of factors and sources of information may be taken into account, given the types of influence to which Ministers are legitimately subject.

See also *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 13-14; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438; *South Australia v O'Shea* (1987) 163 CLR 378.

44 The Act envisages that in relation to Pt IIA of the Act, and s 21R in particular, it could well be a Victorian Minister that would have to exercise the discretion to appoint, suspend, or remove inspectors. The Act therefore envisages that the Victorian Minister (here the respondent) could take into account his or her own policy and political considerations in respect of his or her decision to appoint, suspend or remove inspectors under s 21R.

45 It is significant to recall the respondent was concerned with the smooth transition to the introduction of the Victorian Act and with community reaction generally and specifically in response to the declaration. These are not matters which the court itself makes an assessment of in the context of these proceedings, in the sense of determining whether the course set by the respondent was justified or appropriate. It may be, for instance, that the community reaction was incorrectly gauged by the respondent. However, it seems to me that the respondent was perfectly entitled to act upon what his perceptions were concerning community reaction, this being an influence to which the respondent was legitimately subject.

46 If the respondent was entitled to apply the new criteria even before the proclamation of the Victorian Act (as in my view he was), then the remaining question is just one of timing and according natural justice to those adversely affected by the introduction of the new criteria. In my view the respondent was entitled to act in the way he did, effectively "speeding" reform to Aboriginal cultural heritage in accordance with the Victorian Bill before the Victorian Parliament.

47 Accordingly I do not accept that the matters raised by the applicant were irrelevant considerations.

Failure to take into account relevant considerations

48 It was submitted that the respondent, in making the suspension and removal decisions, failed to take into account the following relevant considerations:

- Matters arising from consultation with the local Aboriginal community;
- Each applicant's knowledge and expertise in the identification and preservation of Aboriginal cultural property;
- Each applicant's ability to undertake the duties of an inspector under Pt IIA of the Act; and
- Whether, after the removal decision was made and taking into account that all inspectors appointed under the Act had been removed from their positions, there would remain in place in Victoria an effective system to fulfil the purposes of the Act, including the continued ability to make declarations under the Act on a State-wide basis in a timely manner.

49 In the absence of express requirements, a court will not find that the decision-maker is bound to take a particular matter into account unless the implication is to be found in the subject-matter, scope and purpose of the relevant statute.

50 Each decision was made because of the policy decision to accelerate the introduction of the new criteria, the need for a smooth transition to the proposed legislative regime and in view of community reaction to the declaration which in the respondent's view reinforced the need to ensure immediate change. Undoubtedly the making of the declaration by Ms Nicholson-Brown was the catalyst for the response of the respondent on 21 April 2006, but it is to be recalled that the new legislation was introduced into the Victorian Parliament on

6 April 2006, and a change to Aboriginal heritage laws was to be implemented as a matter of government policy in any event upon the proclamation of the Commonwealth Amendment Act and the Victorian Act.

51 The respondent did not need (as a matter of law) to consult with the local Aboriginal community before exercising his power to suspend or remove an inspector. The fact that each of the applicants met the criteria set out in s 21R, namely having the appropriate knowledge and expertise and being able to undertake the duties of an inspector, was accepted by the respondent. The issue became the introduction of the new criteria as an additional requirement and whether each of the inspectors (namely the applicants) satisfied such criteria, or were otherwise to be exempted. Further, the respondent considered the position that would arise upon the removal of most of the inspectors (noting that the suspensions of 10 inspectors were lifted), in that declarations could be made under s 21C by the respondent.

52 In my view, there has been no failure to take into account the relevant considerations relied upon by the applicants.

Improper purpose

53 The applicants also contended that the respondent exercised the power to suspend and remove the applicants for purposes other than those for which the power was conferred.

54 In essence, the applicants relied upon the matters contended for in relation to taking into account irrelevant considerations and failing to take into account relevant considerations. For the same reasons I do not accept the contentions of each applicant on these grounds, I also reject any contention that the respondent exercised the power to suspend and remove for purposes other than those for which the power was conferred.

Breach of natural justice

55 Each applicant relied upon two bases for an allegation that there had been a breach of natural justice, namely:

(a) that each applicant was given no notice at all of the suspension decision; and

(b) that each applicant was given no opportunity to be heard in relation to certain matters "which formed the reasons, or part of the reasons, for the removal decision".

56 In addition, Ms Nicholson-Brown argued that the respondent failed to consider the matters raised in the letters of her solicitors sent to the respondent.

57 I am prepared to assume for the purposes of this case that natural justice or procedural fairness needed to be accorded to each applicant. The real question to determine is the practical content of natural justice or procedural fairness in this case: see, eg *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 51 per Gleeson CJ.

58 In looking at the practical content, I regard the suspension decision as forming part of the broader decision-making process that concluded upon the removal decision. I accept that preliminary decisions, particularly if made public, may damage reputations even if they have no other adverse effects. This can prevent a preliminary decision (here the suspension decision) from being treated as part of a broader decision-making process: see, eg *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 578.

59 However, whatever are the concerns or perceptions of the applicants, this is not a case of misconduct or breach of discipline, where the preliminary inquiry had the potential to directly and irreversibly affect reputation to the extent necessary to treat the suspension and removal decisions separately to determine whether natural justice or procedural fairness has been accorded.

60 In the case of Ms Nicholson-Brown, it was contended that she was subject of a direct slur by the respondent in both the suspension decision and removal decision. In the case of Ms Anselmi, who was not involved in the declaration, she asserted harm to her reputation through association. It was contended on her behalf that because of the actions of Ms Nicholson-Brown, the respondent effectively told the public that by suspending and removing Ms Anselmi he had no confidence in Ms Anselmi.

61 Both applicants filed affidavit material, but only to express that they were "concerned" about the impact of the actions of the respondent upon their reputation, and upon any future role that they may wish to undertake pursuant to the Victorian Act. The evidence relied upon only related to their own perceptions and concerns. No other evidence was introduced as to loss of, or impact on, reputation. In fact, from some other affidavit material relied upon by the applicants, it seems that their good standing in the community remains firmly intact.

62 Each of the suspension decision and removal decision of the respondent was to implement a policy decision already made prior to the introduction of the Victorian Act, which was accelerated, but which was by not directed to or intended to be directed to either of the applicants as individuals. I am not satisfied on the evidence that either decision was based upon, or intended to be based upon, any particular misconduct, inappropriate behaviour or incompetence of either applicant, or made to punish either applicant. The suspension decision was the first step in the process of accelerating change to implement government policy, not one to single out any particular person.

63 Whatever may be the perceptions of the applicants, or their concerns about reputation, I am not satisfied that their reputations have been sufficiently adversely affected by the suspension decision. The media release issued on 24 April 2006, whilst implicitly being critical of the existing process in speaking of the new arrangements ensuring a "proper process" will be in place, and being subject to appropriate "oversight and legal checks", merely recites the purpose of the new regime, which is to strengthen the protection of Aboriginal cultural heritage and add rigour to the way emergency declarations are made.

64 The primary basis for the suspension decision was in "order to smooth the transition to the new arrangements", and the power to issue emergency declarations was to rest with the respondent.

65 I observe that the respondent, as a further reason to suspend all appointments, stated in the letters to all inspectors on 21 April 2006 and in the media release that given "the manner and circumstances" in which the declaration was made, he was concerned the community may have lost faith in the ability of inspectors to make emergency declarations. There is no evidence as to "the manner and circumstances" referred to, and I do not assume it relates to any specific wrongful or inappropriate conduct which the respondent himself considered was undertaken by Ms Nicholson-Brown. I do assume that some members of the community would have been aware of the making of the declaration and the involvement of Ms Nicholson-Brown. However, the terms of the letter and

media release refer to the respondent's concern of community reaction, and did not separate out Ms Nicholson-Brown for any different treatment from the other inspectors. The respondent wanted all inspectors to respond in relation to one particular matter, namely whether they would meet the new criteria. The terms of the letter to Ms Nicholson-Brown (in essentially the same terms as to all other inspectors) did not indicate that the respondent was casting any slur on Ms Nicholson-Brown as the person who made the declaration. The issue was not the question of the general appropriateness of a person to be an inspector, and whether any inappropriate conduct had occurred; the real issue was the introduction of the new criteria. This inquiry itself has nothing to do with the declaration, although the inquiry was accelerated because of the manner and circumstances of the making of the declaration.

66 There could be no complaint by the applicants if the current legislative regime had come to an end upon the proclamation of the Commonwealth Amendment Act and the Victorian Act and the new criteria were applied in the appointment, suspension or removal of inspectors. The complaint arises because before this occurred, a decision had been made to remove inspectors because of the declaration. Whilst a complaint could be justified if the reputation of the applicants was sufficiently adversely affected, I think one should view this matter more as an acceleration of the end of the current legislative regime, which applied to all inspectors, including the applicants. It did not involve an evaluation of the applicants themselves or their conduct, nor was it intended to involve such an evaluation.

67 After the suspension, the views of the applicants (and all the inspectors) were considered, and taken into account to the extent relevant to the implementation of the decision to remove. In this case, the applicants had the opportunity to show cause why they should not be removed, along with all the other inspectors, on the basis of the policy being implemented. In other words, they were not being asked to respond to whether the new criteria should be applied, but were to be heard on the application of the new criteria in the policy to each of them. Of course, the mere presence of policy considerations does not necessarily mean natural justice or procedural fairness does not need to be applied to individual interests affected. It may be necessary to consider the interests of the individual in the implementation of the policy and to determine its impact upon the individual. In my view, this is exactly the process entered into by the respondent in considering all the inspectors individual positions in light of the policy change.

68 On this basis, the response of the respondent to the letters of Ms Nicholson-Brown's solicitors was appropriate and adequate. The respondent replied to the complaints of Ms Nicholson-Brown by reference to the policy decision, and did not bring into consideration the specific conduct of Ms Nicholson-Brown as this was not a matter for consideration. It cannot be said, in these circumstances, that the response was inadequate, because on my analysis the matters raised that were not adequately responded to from Ms Nicholson-Brown's point of view, could not have affected the outcome of the decision; see generally *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 19 ATR 1122 at 1129-1130; 79 ALR 267 at 276-277. There was no material which was relevantly taken into account which was not made available to each applicant, as was the case in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225

CLR 88. In view of the opportunity provided to and availed by each applicant to respond to the respondent after the suspension decision, the decision-making process, including the respondent's response to Ms Nicholson-Brown's solicitors letter, viewed in its entirety and in the circumstances of the implementation of a policy decision, did accord natural justice and procedural fairness.

Futility of the proceedings

69 It was submitted by the respondent that, given the legislative regime to be proclaimed in the new future, I should dismiss the applications in any event because the relief sought would be of little or no use. I do not need to consider this matter in view of my conclusions.

Conclusion

70 I will make orders accordingly after the parties have had the opportunity to consider these reasons.

Orders accordingly

Solicitors for the applicants: *Holding Redlich*.

Solicitor for the respondent: Victorian Government Solicitor.

EMRYS NEKVAPIL