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Update Summary

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VICTORIAN ADMINISTRATIVE LAW

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Updated commentary has been provided by Nick Wood:

Administrative Law Act 1978

Updated:

- The weight of authority is that both rules of natural justice can be waived. See *Minister for Immigration, Citizenship and Multicultural Affairs v NDBR* [2024] FCAFC 114, at [ALA.2.220].
- The nature of a decision-maker's powers informs the content of any duty of procedural fairness. See *AB v Independent Broad-based Anti-corruption Commission* (2024) 98 ALJR 532; [2024] HCA 10, at [ALA.2.240].
- An unrepresented person cannot deliberately take advantage of their status by misbehaving. See *O'Connell v The State of Western Australia* [2012] WASC 96, at [ALA.2.240].
- The application of the test to the fact is "acutely fact sensitive". See *Tedra Australia Pty Ltd v Greater Western Water Corp* [2023] VSC 96, at [ALA.2.260].
- Where the tribunal sits in judgment on the members of a trade or profession, the court has greater power to intervene. See *Morris v Victorian Farmers Federation* [2022] VSC 407, at [ALA.2.280].
- There is no power to extend time. See *Kuek v Victoria Legal Aid* [1999] 2 VR 331, at [ALA.4.60].
- The discretionary remedy of certiorari is available if either form of error is made. See *Melton City Council v Minister for Planning* [2022] VSCA 144, at [ALA.7.60].
- An inferior court would not make a jurisdictional error simply by reason that a superior court might have evaluated a legal argument made to it differently. See *SZRIQ v Federal Magistrates Court of Australia* (2013) 236 FCR 442; [2013] FCA 1284, at [ALA.7.60].
- Attribution of the knowledge of the department to the Minister means that the mistakes of the department are also those of the Minister. See *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2024) 98 ALJR 594; [2024] HCA 11, at [ALA.7.120].
- It has been said that "[b]ad faith is not just a matter of poor execution or poor decision-involving error". See *NAAG v Minister for Immigration, Multicultural and Indigenous Affairs* [2002] FCA 713, at [ALA.7.220].
- The principle of statutory interpretation expounded in *Project Blue Sky* operates in the same way in respect of a condition that is a condition precedent to the exercise of a statutory jurisdiction. See *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 98 ALJR 623; [2024] HCA 13, at [ALA.7.340].
- An inferior court's reasons for judgment must expose the pathway of reasoning. See *AB v Paulet* [2022] VSC 414, at [ALA.7.380].

- Mandamus does not lie to compel the repository of a statutory power to make a *particular* decision in the discharge of their duty. See *McCabe v Westin* [2024] VSC 145, at [ALA.7.440].
- If a decision is arguably affected by jurisdictional error, but there has been a subsequent valid decision on the same subject matter, it may be futile to grant mandamus. See *McCabe v Westin* [2024] VSC 145, at [ALA.7.460].
- The definition of “decision” in s 2 of the Act applies to that expression in s 8. See *Trist v Glenelg Shire Council* (2023) 71 VR 380; [2023] VSC 128, at [ALA.8.40].

New and updated commentary has been provided by **Fiona Batten**:

Charter of Human Rights and Responsibilities Act 2006

Updated:

- The Centre’s reliance on cultural rights protected in s 19(1) of the Charter was misplaced. See *Ned Kelly Centre Ltd v Australian Rail Track Corporation* [2023] VSC 421, at [CHR.6.60].
- The obligation imposed on the Victorian Civil and Administrative Tribunal is to ensure that parties have a fair hearing when exercising its functions. See *Bashour v Australia and New Zealand Banking Group Pty Ltd* [2022] VSC 252, at [CHR.6.100].
- The onus required to discharge a limitation of the privacy right was considered by the Court of Appeal. See *Thompson v Minogue* [2021] VSCA 358, at [CHR.7.400].
- There is no requirement to give direct and express consideration to the matters set out in s 7(2) of the Charter in determining whether an interference with privacy is arbitrary. See *Thompson v Minogue* [2021] VSCA 358, at [CHR.13.40].
- The impact of the Tribunal granting a planning permit on the human rights of neighbouring residents arising from their personal circumstances arose for consideration. See *Bespoke Development Group Pty Ltd v Merri-bek CC* [2023] VCAT 758, at [CHR.13.320].
- Section 38(1) of the Charter had no operation in respect of these rights when deciding under that statutory provision. See *Donohue v Westin* [2022] VSC 37, at [CHR.21.140].
- The plurality stated that the right to a fair “hearing” is not to be construed as meaning only the “trial” of an accused. See *Director of Public Prosecutions (Vic) v Smith* [2024] HCA 32, at [CHR.24.40].
- Edelman J relied on the omission of a particular reference in a statement of compatibility for the *Criminal Procedure Act* as “telling”. See *Director of Public Prosecutions (Vic) v Smith* [2024] HCA 32, at [CHR.28.80].

- Section 32(1) may have an operation beyond the common law principle of legality. See *Director of Public Prosecutions (Vic) v Smith* [2024] HCA 32, at [CHR.32.60].
- Section 32(1) did not alter the construction of section 91 of the IBAC Act. See *HJ v Independent Broad-Based Anti-Corruption Commission* [2021] VSCA 200, at [CHR.32.160].
- A notice is not required to be given if no Charter issue requiring a notice to be given under s 35 properly arises in the proceeding. See *Anderson v Sharpe* [2024] VSCA 166, at [CHR.35.40].
- The obligation to give proper consideration applies when a public authority is making a decision that may interfere with Charter rights. See *Donohue v Westin* [2022] VSC 37, at [CHR.38.180].
- The Attorney-General submitted that this application of s 38(2) of the Charter was ‘plainly wrong’. See *MB v Children’s Court of Victoria* [2023] VSC 666, at [CHR.38.200].
- The Supreme Court concluded that on both the abstract and factual availability constructions, s 39(1) was not satisfied. See *Thorpe v Head, Transport for Victoria* [2021] VSC 750, at [CHR.39.40].

Privacy and Data Protection Act 2014

Updated:

- The words “about an individual” direct attention to the need for the individual to be a subject matter of the information or opinion. See *Privacy Commissioner v Telstra Corporation Ltd* [2017] FCAFC 4, at [PDPA.3.240].
- The Macquarie Dictionary definition of the word ‘establish’ includes “to set up or bring about”. See *Zammit v Racing Victoria* [2023] VCAT 374, at [PDPA.13.100].
- The Tribunal was not satisfied that the grounds for seeking health information were to advance his son’s care. See *SWG v Dean* [2020] VCAT 1222, at [PDPA.28.60].
- Alleged harm to the feelings and reputation of the complainants’ was said to be suffered because of the respondent not providing all relevant documents. See *Smeaton v WorkSafe Victoria* [2024] VCAT 521, at [PDPA.77.40].
- The VCAT was not persuaded that the Parliament intended complainants to be able to claim for costs incurred in proceedings under a different Act. See *Smeaton v WorkSafe Victoria* [2024] VCAT 521, at [PDPA.77.80].
- The VCAT observed there was little guidance available from cases decided under the PDP Act about how to assess the level of compensation to be made for distress and hurt and humiliation. See *NLD v Department of Families, Fairness and Housing* [2023] VCAT 544, at [PDPA.77.80].

- When regard is had to the objects of the *Occupational Health and Safety Act 2004 (Vic)* one needs to be careful not to construe the primary purpose of collection too narrowly. See *KDR Victoria t/as Yarra Trams v Victorian Workcover Authority t/a WorkSafe Victoria* [2024] VCAT 659, at [PAS1.480].
- KDR “made a promise” to its employees that it would not disclose their name to a Health and Safety Representative without the employee’s consent. See *KDR Victoria t/as Yarra Trams v Victorian Workcover Authority t/a WorkSafe Victoria* [2024] VCAT 659, at [PAS1.520].
- When an employer provides information to a health and safety representative, that information is required or authorised by law. See *KDR Victoria t/as Yarra Trams v Victorian Workcover Authority t/a WorkSafe Victoria* [2024] VCAT 659, at [PAS1.700].
- Ms Zammit sent emails to Racing Australia outlining concerns she had with the welfare of horses being trained by Mr Osborne. See *Zammit v Racing Victoria* [2024] VCAT 163, at [PAS1.760].

New:

- **Operation**, has been inserted, at [PDPA.43.40]
- **Complaints under the Freedom of Information Act 1982**, has been inserted, at [PDPA.63.200]
- **Orders for reasonable act or course of conduct**, has been inserted, at [PDPA.77.60]

