

## SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

**Case Title:** Johns v Director-General of The ACT Justice and Community Safety Directorate

**Citation:** [2019] ACTSC 311

**Hearing Date:** 17 July 2019

**Decision Date:** 8 November 2019

**Before:** Burns J

**Decision:** See [52]

**Catchwords:** **ADMINISTRATIVE LAW** – JUDICIAL REVIEW – Judicial review of decisions made by The ACT Justice and Community Safety Directorate – plaintiff serving sentence of imprisonment at the time the decisions were made – whether the Court should extend the time for the bringing of an application for prerogative relief and/or relief under the ADJR Act – whether the matters complained of by the plaintiff are “decisions” which may attract relief under the ADJR Act – consideration of the complaints made by the plaintiff

**Legislation Cited:** *Administrative Decisions (Judicial Review) Act 1989* (ACT) ss 5, 10  
*Corrections Management (Detainee Disciplinary) Policy 2012* (ACT)  
*Corrections Management (Email, Internet and Legal Education and Resource Network [LEARN] for prisoners) Policy (No 2) 2010* (ACT)  
*Corrections Management Act 2007* (ACT) ss 183, 184, 222; pt 9.3  
*Court Procedures Rules 2006* (ACT) r 3557  
*Human Rights Act 2004* (ACT) s 19  
*Information Privacy Act 2014* (ACT) sch 1  
*Official Visitors Act 2012* (ACT)  
*Ombudsman Act 1989* (ACT)  
*Spent Convictions Act 2000* (ACT) dictionary  
*Supreme Court Act 1933* (ACT) s 34B

**Cases Cited:** *Griffith University v Tang* [2005] HCA 7; 221 CLR 99  
*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24  
*Minister for Immigration and Multicultural Affairs v Rajamanikkam* [2002] HCA 32; 210 CLR 222

**Parties:** Alan Johns (Plaintiff)  
Director-General of the ACT Justice and Community Safety Directorate (Defendant)

**Representation:** **Counsel**  
Self-represented (Plaintiff)

K Musgrove (Defendant)

J Knowles (Other party)

**Solicitors**

Self-represented (Plaintiff)

ACT Government Solicitor (Defendant)

Australian Government Solicitor (Other party)

**File Number:** SC 249 of 2019

**BURNS J**

1. The plaintiff is seeking judicial review of certain decisions said to have been made by the Director General of the ACT Justice and Community Safety Directorate. The events to which the application relates occurred in February 2019 while the plaintiff was serving a sentence of imprisonment at the Alexander Maconochie Centre (the AMC) in the ACT. The complaints advanced by the plaintiff fall into two categories, being:
  - (a) a decision taken by staff at the AMC to inform members of the Australian Federal Police (AFP) that the plaintiff, as a detainee at the AMC, had written and emailed a manuscript to his brother; and
  - (b) as a result of the plaintiff's actions in writing and emailing the manuscript, staff at the AMC took administrative action against him by withdrawing privileges without following notified policy.
2. In his application, the plaintiff claims declaratory relief and injunctive relief. The injunctive relief sought by the plaintiff was directed towards changing the conditions under which he said he was being detained, and in particular the lifting of restrictions on sending email attachments as a detainee. Under the terms of sentence that he was serving, the plaintiff was entitled to be released from the AMC in August 2019, which I presume has occurred. There is therefore no utility in granting injunctive relief, assuming that the plaintiff would otherwise be entitled to such relief. I will, nevertheless, consider the plaintiff's complaints regarding this issue.
3. The hearing proceeded before me on 17 July 2019. The plaintiff was not represented by a legal practitioner, and the defendant was represented by Ms Musgrove of counsel. The plaintiff relied upon an affidavit which he affirmed on 1 May 2019, and he was subjected to brief cross-examination. The defendant relied upon an affidavit affirmed by Ms Corinne Justason, the General Manager of the AMC, on 18 June 2019. Ms Justason was also subject to brief cross-examination.

**The Plaintiff's affidavit**

4. The plaintiff affirmed that when he arrived at the AMC, he met with Mr Ian Robb, the then General Manager of the AMC, who outlined his expectations for the plaintiff as a detainee. The plaintiff stated that for the entirety of his tenure at the AMC, he worked hard to meet Mr Robb's expectations. Because of the nature of the offence which led

to his imprisonment, and orders made with the consent of the plaintiff in those proceedings, he was able to have limited contact only with family and friends.

5. After his arrival at the AMC, the plaintiff was seen by a number of psychiatrists and was diagnosed with a mental health disorder. He began treatment for that condition, which included medication and regular meetings with ACT mental health specialists in the AMC. On 12 September 2018, he met with an ACT mental health nurse and agreed to a Mental Health Recovery Plan. One of the goals in that plan was that the plaintiff would write and submit three manuscripts over a period of six months. The plaintiff stated that he began writing, and produced two novel length manuscripts. He described one as being “an alternative history fiction novel”, and the other as a memoir exploring aspects of his time in the AMC. Both manuscripts, and a number of other short stories, were all written in his cell on a prison computer system. On 8 November 2018, Mr Robb met with the plaintiff and explained that he would be shortly departing from the AMC, and that his role would be taken on by his deputy, Ms Corinne Justason. The plaintiff said that during this meeting, Mr Robb referred to the memoir which the plaintiff had written, and said that he had read it. He said that he had no issue with its contents. The plaintiff said that he told Mr Robb that he wanted to publish his work, and Mr Robb wished him luck.
6. The plaintiff stated that on 7 February 2019, he submitted a request to Ms Justason that a Canberra-based author, who I shall refer to as SN, be permitted to visit him at the AMC to explore options about publishing his memoir. He assured Ms Justason that his manuscripts did not relate to his charges.
7. On 16 February 2019, the plaintiff was notified that the AFP had executed a search warrant at his brother’s house, and seized all copies of the memoir that the plaintiff had emailed to his brother. The plaintiff said that he immediately demanded a meeting with Ms Justason to ask if she had provided information to the AFP, and if so, on what grounds. The plaintiff also said that at this time his email access to friends and family was frozen. His regular email use was lifted on 22 February 2019, but he was still not permitted to send attachments. On 18 February 2019, the AFP executed a search warrant on his cell at the AMC, and that they seized copies of his memoir and other writings.
8. On 21 February 2019, the plaintiff met with Ms Justason, who confirmed that she had provided information to the AFP. The plaintiff gave Ms Justason a letter dated 20 February 2019 questioning the legality and propriety of Ms Justason’s actions. The plaintiff also requested that she unfreeze his email access, and that she provide him with detailed instructions on her expectations for his behaviour. The plaintiff said that Ms Justason said that she would provide him with written instructions the following day, but that this did not occur.
9. The plaintiff asserted that he had done nothing during his period as a detainee to justify any punitive action against him, and that he was distressed by the actions of Ms Justason in providing information to the AFP (resulting in the execution of search warrants at his brother’s house and his cell in the AMC), and in restricting his email access within the AMC. Between late February 2019 and early March 2019, he complained to persons appointed under the *Official Visitors Act 2012* (ACT) and the *Ombudsman Act 1989* (ACT). He considered their subsequent actions to be ineffectual, and believed that they were biased.

10. The plaintiff stated that on 2 April 2019, he received a letter from Ms Justason in which she asserted that her actions were consistent with the applicable legislation. She also indicated that she would continue to liaise with the AFP, so long as the plaintiff was a detainee at the AMC. The plaintiff stated that he responded by letter dated 18 April 2019 requesting that Ms Justason provide him with details of her authority to communicate his personal information to the AFP, and what specific information she had passed to that organisation. In lieu of further details, he requested an apology and an end to the restriction on sending email attachments. The plaintiff threatened to escalate his complaints if his demands were not met, including commencing proceedings such as the present.

### **The affidavit of Corinne Justason**

11. With regard to the plaintiff's complaint that she had provided information to the AFP regarding the plaintiff, Ms Justason provided some background information regarding the use of the AMC email system by detainees. All detainees are permitted to access the AMC email system, which is owned by the ACT Government and operated by staff at the AMC. When detainees first enter the AMC they are given a personal email account within the AMC system. As part of their induction package on entry to the AMC, detainees are made aware that all incoming and outgoing telephone calls, emails and letters will be subject to monitoring and searching by AMC staff under Part 9.3 of the *Corrections Management Act 2007* (ACT) (the CMA). Emails containing an attachment are quarantined before being sent to the recipient, and the attachments are opened by an AMC staff member and checked to ensure the attachment is not offensive, discloses the commission of an offence, or otherwise poses a security or other risk. A copy of the relevant policy, the *Corrections Management (Email, Internet and Legal Education and Resource Network [LEARN] for prisoners) Policy (No 2) 2010* (ACT) (the Email policy) was annexed to Ms Justason's affidavit.
12. Ms Justason was aware of the existence of a number of orders made under Commonwealth legislation which applied to the plaintiff (the Commonwealth orders). She was not aware of the specific orders, but she was aware that the disclosure of information related to the plaintiff, and the offence/s of which he had been convicted, was prohibited. As part of the AFP's supervision of the Commonwealth orders, the AFP, at the time the plaintiff commenced serving his term of imprisonment, requested that the AMC inform it of anything that might give rise to a belief that the Commonwealth orders were at risk of being breached. This included notifying the AFP if any unusual visitors were added, or sought to be added, to the list of approved visitors or callers to the plaintiff.
13. On 6 February 2019, Ms Justason was notified by one of her staff that a person had sought, for the first time, to book a visit with the plaintiff. That person was not on the approved list of visitors for the plaintiff, and did not appear to be related to the plaintiff. She said that the purpose of the visit was not clear. Ms Justason stated that, consistent with the practice that had developed, she contacted the AFP on 6 February 2019 to indicate that this person had sought to visit the plaintiff and to ask whether the AFP would have any concerns about the person visiting him. Ms Justason said that, in reply, the AFP indicated that they may have concerns if the person appeared to be an author. As a result, on 6 February 2019, contact was made with this person in an attempt to define whether he was in fact the author identified by an Internet search. The person acknowledged that he was an author but claimed to be an "old

friend” of the plaintiff. The application to book a visit with the plaintiff was refused on 7 February 2019.

14. In the course of discussing the matter with the AFP, Ms Justason asked the AFP if they were aware that the plaintiff had been writing a manuscript that he had been sending to his family. Ms Justason stated that she only became aware of the existence of the manuscript through other members of staff at the AMC. She had been informed that the previous General Manager had authorised the plaintiff's manuscript to pass through the email quarantine. The AFP requested a copy of the manuscript. On 12 February 2019, Ms Justason forwarded a copy of the most recent version of the manuscript that the plaintiff had attempted to send via email. On the same date, she also provided the AFP with a copy of the manuscript that the plaintiff had previously sent via email on 20 September 2018.
15. On 15 February 2019, the plaintiff's email access at the AMC was restricted, and his access to communication by telephone was also restricted for a short period. Ms Justason stated that she understood the plaintiff spoke to his brother on 16 February 2019 at which time he was told that the AFP had executed a search warrant on his brother's home. On 18 February 2019 the AFP attended the AMC and conducted a search of the plaintiff's cell. On 19 February 2019, the AFP executed a search warrant on the AMC email server.
16. On 20 February 2019, the plaintiff wrote to Ms Justason asking to meet to discuss the search warrants executed by the AFP on 16 February 2019 at his brother's house, and on 18 February 2019 at the plaintiff's cell. On 21 February 2019, Ms Justason met with the plaintiff, at which time he provided her with a copy of his letter of 20 February 2019 and expressed his belief that the search warrants were illegal. He wanted to know who had sent his manuscript to the AFP, and Ms Justason stated that she had done so. On 2 April 2019, Ms Justason responded to the effect that her actions had been consistent with the provisions of the CMA and any Commonwealth legislation, and that she intended to continue to liaise with the AFP whilst the plaintiff remained in custody at the AMC. The plaintiff was not content with that response, and in a letter dated 18 April 2019 he requested details of the authority she had used to communicate his personal information to the AFP, including what specific content had been passed. Ms Justason responded by letter dated 7 May 2019, again asserting that her actions were consistent with legislative requirements and declining to provide any further information.
17. With regard to the second complaint made by the plaintiff, Ms Justason referred to the Email policy made under the CMA, which states that detainee access to email within the AMC is a privilege and is subject to a number of constraints. Access to email facilities may be removed for a number of reasons, including at the Superintendent's discretion. Ms Justason stated that she made a direction preventing the plaintiff from sending emails when she became aware that the AFP intended to execute search warrants in relation to him and his brother. The reason for this direction, she said, was to ensure that there was no interference with the proper execution of the search warrants and to prevent any action that could be in breach of a court order. The last of the search warrants was executed on 19 February 2019, and the direction preventing the plaintiff from accessing email facilities was lifted on 22 February 2019.
18. On 18 February 2019, Ms Justason made a direction that the plaintiff be prevented from sending emails with attachments or regular mail that included documents or

manuscripts. She directed that these restrictions remain in place until she received assurances from the AFP that the lifting of these restrictions would not contribute to a breach of the Commonwealth orders in place, and would not otherwise be unlawful. Ms Justason stated that the restriction on the plaintiff's ability to send emails with attachments was lifted in early April, but the plaintiff was advised that he was not to attempt to send out the manuscript and that any attempt to do so would result in previous restrictions being reinstated. As at the date of affirming her affidavit, Ms Justason had not received the assurances requested from the AFP.

19. Ms Justason was cross-examined by the plaintiff. She agreed that at some point she became aware of the fact that her predecessor, Mr Robb, had given approval to the plaintiff to send a copy of his manuscript to his brother. Ms Justason agreed that she had not read the manuscript or taken any legal advice about it before she spoke to the AFP. In re-examination, Ms Justason stated that she was unaware whether Mr Robb had read the manuscript or was, himself, aware of the Commonwealth orders in place regarding the plaintiff.

### **Some preliminary issues**

20. The originating application filed by the plaintiff was expressed as an application for relief pursuant to s 34B of the *Supreme Court Act 1933 (ACT)* (Supreme Court Act). This section provides that this Court has power to grant any relief by way of prerogative writ, including an order in the nature of a writ of mandamus, prohibition or certiorari. In his final written submissions, however, the plaintiff sought relief under the *Administrative Decisions (Judicial Review) Act 1989 (ACT)* (the ADJR Act).
21. The respondent submitted that pursuant to r 3557(2) of the *Court Procedures Rules 2006 (ACT)* (the CPR), an application for orders in the nature of prerogative relief must be filed no later than 60 days after the day on which the grounds for the grant of the relief first arose. The communication of information to the AFP by Ms Justason of which the plaintiff complains occurred on or about 7 February 2019. The restrictions on his ability to send emails were imposed in early February 2019, with the final such restriction being imposed on 18 February 2019. The plaintiff's entitlement to seek judicial review under s 34B of the Supreme Court Act therefore expired no later than mid-April 2019, well before he commenced the present proceeding on 17 May 2019.
22. This Court may, pursuant to r 3557(4) of the CPR extend the time for the bringing of an application for prerogative relief, but only in special circumstances. In the present case, the affidavit material did not address the question of delay, but some inferences may be drawn from undisputed facts. First, the plaintiff was at all times a detainee within the AMC. Secondly, he is not legally trained, and was not represented by a lawyer at the time of these events. Thirdly, he was subject to particular restrictions by reason of the Commonwealth orders. In my opinion, these matters justify a finding that there are special circumstances warranting an extension of time.
23. Similarly, an application for an order of review under the ADJR must be made within, in the present case, 28 days after the day a document is given to the plaintiff setting out the terms of the decision or any further time allowed by the Courts: s 10 ADJR Act. In my opinion, and for the reasons given with regard to the extension of time to commence proceedings for prerogative relief, to the extent that the plaintiff seeks relief under the ADJR Act, it is appropriate to extend the time for making such an application to the date this proceeding was commenced.

24. The defendant further submitted that the matters complained of by the plaintiff are not decisions which may attract relief under the provisions of the ADJR Act. An order for review under the ADJR Act may be sought in relation to a “decision to which this Act applies”: s 5(1). The Dictionary of the ADJR Act defines “decision to which this Act applies” as a “decision of an administrative character” made, proposed to be made or required to be “made...under an enactment”. In order for a decision to be “made... under an enactment” it must be required or authorised by the enactment and “confer, alter or otherwise affect legal rights or obligations”: *Griffith University v Tang* [2005] HCA 7; 221 CLR 99 at [79]-[80], [89]. The defendant submitted that the plaintiff had failed to identify a right or entitlement that he alleged was affected by either the purported decision to pass information to the AFP or the decision to temporarily suspend his email access. The defendant further submitted that even if that action is taken to be a “decision” for the purposes of the ADJR Act, the decision did not confer, alter or otherwise affect a legal right or obligation of the plaintiff, and accordingly his claim for relief under the ADJR Act could not be sustained.
25. In my opinion, this submission must be accepted. This would be sufficient to resolve any case based upon the provisions of the ADJR Act, but I will nevertheless consider the merits of the plaintiff’s complaints.

### **The first complaint**

26. The plaintiff submitted that the decision by Ms Justason to notify the AFP that he had written a manuscript and sent to his brother was an improper exercise of the power given by the enactment under which it was purported to be made. He further submitted that there was no evidence or other material to justify the making of the decision. Finally, he submitted that the decision was otherwise contrary to law. By reference to s 5(2) of the ADJR Act, the plaintiff submitted that the decision was an improper exercise of a power because:
  - (a) Ms Justason failed to take a relevant consideration into account in exercising the power;
  - (b) it was an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case; and
  - (c) it was an exercise of power that was an abuse of the power.
27. The plaintiff contended that the following matters were relevant and were not taken into account by Ms Justason in making her decision:
  - (a) the existence of the ACT Mental Health Recovery Plan which included a six month plan to write and submit three manuscripts;
  - (b) the plaintiff’s meeting with the then General Manager of the AMC, Mr Ian Robb, on 8 November 2018 in which Mr Robb condoned the manuscript;
  - (c) the plaintiff’s letter of 7 February 2019 to Ms Justason requesting to meet with SN, clearly explaining that the plaintiff’s manuscript did not contain any sensitive or inappropriate content;
  - (d) the reasons that SN provided to AMC staff for his wish to meet with the plaintiff, namely to broadly discuss literary matters at the plaintiff’s invitation; and

- (e) the contents of the manuscript itself, which clearly did not contain anything that should be interpreted as a criminal offence or a discipline breach within the AMC.
28. With regard to the submission that Ms Justason’s decision was an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case, the plaintiff submitted that whilst there are specific provisions whereby the defendant could have made a report to the AFP, none applied in his case. He accepted that under various statutory provisions (to which it is unnecessary to refer in detail) the defendant was entitled to provide information to the AFP, but none of those provisions applied in the present case. He contended that the Commonwealth orders had not been explained to him, and to the extent that the existence of those orders informed the defendant’s decision to provide information to the AFP, it was unfair and an exercise in bad faith.
29. With regard to the submission that the provision of information to the AFP was an exercise of a power in a way that was an abuse of the power, the plaintiff stated that in his meeting with Ms Justason on 21 February 2019 he asked her by what authority she had provided information to the AFP. He stated that she did not provide “any authorities” and she commented that it was “her decision” and that the plaintiff was “only another detainee to her”. The plaintiff submitted that this was evidence that the decision was arbitrary, and as such an abuse of power.
30. With regard to his submission that there was no evidence or other material to justify the making of the decision to provide information to the AFP, the plaintiff relied upon s 5(3)(b) of the ADJR Act which provides that such a ground is not taken to be made out unless the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist. The plaintiff contended that the defendant based the decision to provide information to the AFP on the existence of a particular fact, being that the content of the manuscript was unlawful, when that fact did not exist, and it was not reasonable to form a suspicion that that fact did exist. In that regard, the plaintiff submitted that the defendant had access to his manuscript and could have reviewed the contents to satisfy itself that no crime had been committed, and no breach of AMC discipline had occurred.
31. The final matter raised by the plaintiff was the submission that the decision was “otherwise contrary to law”, which is a clear reference to s 5(1)(i) of the ADJR Act. The plaintiff submitted that if the Court accepted that there was no reasonable suspicion that a criminal offence or a breach of discipline had occurred, then the passing of information to the AFP was contrary to law. The plaintiff identified the provisions of s 6, and in particular ss 6.1 and 6.2 of the *Territory Privacy Principles* (TPP), as being relevant laws. The TPP is found in Schedule 1 to the *Information Privacy Act 2014* (ACT) (the IPA), and the relevant provisions are set out below.

## 6 TPP 6—use or disclosure of personal information

### *Use or disclosure*

6.1 If a public sector agency holds personal information about an individual that was collected for a particular purpose (the **primary purpose**), the agency must not use or disclose the information for another purpose (the **secondary purpose**) unless—

- (a) the individual has consented to the use or disclosure of the information; or



- (b) TPP 6.2 or TPP 6.3 applies in relation to the use or disclosure of the information.

*Note* TPP 8 sets out requirements for the disclosure of personal information to a person who is not in Australia or an external territory.

6.2 This subsection applies in relation to the use or disclosure of personal information about an individual if—

- (a) the individual would reasonably expect the public sector agency to use or disclose the information for the secondary purpose and the secondary purpose is—
  - (i) if the information is sensitive information—directly related to the primary purpose; or
  - (ii) if the information is not sensitive information—related to the primary purpose; or
- (b) the use or disclosure of the information is required or authorised by or under an Australian law or a court or tribunal order; or
- (c) a permitted general situation exists in relation to the use or disclosure of the information by the public sector agency; or

*Note* The equivalent provision in the Commonwealth APPs includes a provision applying to certain private sector entities (see Commonwealth APP 6, s 6.2 (d)).

- (e) the public sector agency reasonably believes that the use or disclosure of the information is reasonably necessary for 1 or more enforcement-related activities conducted by, or on behalf of, an enforcement body.

- 32. Additionally, the plaintiff called in aid the provisions of the *Human Rights Act 2004* (ACT), and in particular s 19 which provides that anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. He submitted that in making an arbitrary decision, without regard to the evidence, to provide information to the AFP, and by not providing an explanation to him of the authority for providing the information, the defendant treated him without respect for his inherent dignity as a human being.
- 33. In my opinion, there is no merit in any of the submissions advanced by the plaintiff with regard to the first complaint. The sharing of information by the defendant with the AFP is not prohibited by the CMA. Section 222(2) of the CMA provides that it is an offence to divulge protected information about a person, and “protected information” is defined as meaning information about a person that is obtained by a person because of the exercise by the person of a function under the CMA, or because of the involvement of the person in the administration of the CMA. I accept that the information provided to the AFP by Ms Justason falls within the definition of protected information. Certain exceptions to the offences found in s 222(2) are set out in s 222(3). Of significance in the present matter is the exception provided in s 222(3)(e), which provides that the offence of provision does not apply where the information is divulged to a “law enforcement agency”. The term “law enforcement agency” is defined in the Dictionary to the CMA by reference to the definition of the same term found in the Dictionary to the *Spent Convictions Act 2000* (ACT). That definition includes the AFP, so that the provision of protected information by Ms Justason to the AFP was not prohibited by the CMA.
- 34. The divulging of information by Ms Justason to the AFP was also not in breach of the IPA or the TPP. Section 6.2 of the TPP provides that the prohibition on disclosure of personal information for a “secondary purpose” found in s 6.1 does not apply where a

public sector agency reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body. The relevant definition of an “enforcement body” includes the AFP. “Enforcement related activity” is defined in s 14 of the IPA as, relevantly for present purposes:

- (a) the prevention, detection, investigation, prosecution or punishment of –
    - (i) criminal offences; or
    - (ii) breaches of a law imposing a penalty or sanction; or
  - (b) the conduct of surveillance activities, intelligence gathering activities or monitoring activities; or
  - (c) the conduct of protective or custodial activities.
35. Ms Justason was not privy to the nature of the charges of which the plaintiff was convicted, or to the details of the Commonwealth orders. The AFP had requested that it be advised of any activity by the plaintiff that may give rise to a breach of the Commonwealth orders. It was not for Ms Justason to determine whether any of the material in the manuscript breached, or may have breached, those orders. She was hardly in a position to do so. The fact that her predecessor, Mr Robb, apparently took the view that the material in the manuscript was innocuous is beside the point; such a view could not bind Ms Justason in the exercise of her powers. Certainly, the view taken by Mr Robb could not have created any expectation on the part of the plaintiff that the contents of the manuscript would not be brought to the attention of the AFP.
36. I am satisfied that by providing the manuscript to the AFP, Ms Justason was not in breach of any statutory obligation owed by her, or owed by the defendant. I accept that this is not a complete answer to the issues raised by the plaintiff.
37. The terms of the CMA, and its subject matter, strongly suggests that the matters which the plaintiff alleged that the defendant failed to take into account in making the decision to divulge the manuscript to the AFP, as set out at [27] above, were not matters which the defendant was bound to take into account in making such a decision. They were matters which the defendant was entitled to take into account, but not obliged to take into account. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 it was determined that for a matter to be a relevant consideration with regard to the cognate Commonwealth legislation, it must be a matter which the decision-maker is bound to take into account.
38. Neither the defendant nor Ms Justason were obliged to accept the plaintiff's assurances that the material was innocuous. For one thing, the plaintiff himself has said that he was unaware of the exact terms of the Commonwealth orders. Secondly, the plaintiff was a convicted criminal and it would be entirely understandable if corrections officers viewed such reassurances from inmates with a degree of circumspection. The evidence establishes that the primary considerations on the part of the defendant leading to the provision of the manuscript to the AFP were whether the plaintiff's communication of the manuscript to his brother may constitute an offence, or a breach of the Commonwealth orders. None of the five matters to which the plaintiff has referred could have materially affected the defendant's decision on these issues.
39. I confess that I found it difficult to understand the plaintiff's submission regarding the claim that the decision to divulge the manuscript was in accordance with a rule or

policy without regard to the merits of the case. There was simply no evidence that Ms Justason's actions were based on some rule or policy. To the contrary, the evidence established that the decision to divulge to the AFP a copy of the manuscript was based upon the particular circumstances of the plaintiff's case.

40. The plaintiff's submission that the decision involved an abuse of power is also untenable. He particularised this claim by reference to the failure of Ms Justason on 21 February 2019 to explain to his satisfaction the source of her authority to refer the manuscript to the AFP. Logically, this postdated the making of the decision complained of. It would be drawing a very long bow to suggest that Ms Justason's failure to adequately satisfy the plaintiff's demands on 21 February 2019 is evidence that her decision to forward the copy of the manuscript to the AFP on 12 February 2019 was "arbitrary". In fact, the evidence reveals that the process which led to Ms Justason making the decision to divulge the manuscript to the AFP was both logical and explicable.
41. As the defendant submitted, to succeed in a complaint that there was no evidence justifying the making of a decision, the plaintiff must establish that the decision would not have been made without a particular factual finding or evidence: *Minister for Immigration and Multicultural Affairs v Rajamanikkam* [2002] HCA 32; 210 CLR 222. It is not sufficient that this Court be persuaded of a different view of the facts. In the present case, Ms Justason referred the manuscript to the AFP because she was concerned that publication of the contents of the manuscript may involve the commission of an offence or a breach of the Commonwealth orders. It has not been suggested that Ms Justason never held any such concerns. The focus of the plaintiff's case on this ground is that Ms Justason could have satisfied herself that publication of the material would not constitute the commission of an offence or a breach of the Commonwealth orders. In my opinion, this ground of review cannot be made out simply on the basis that Ms Justason's concerns were unreasonable. Once it is established as a fact that she had the concerns to which she referred, the plaintiff cannot succeed on a ground alleging that there was no evidence justifying the making of a decision. I hasten to add that I do not consider Ms Justason's concerns to have been unreasonably held.
42. The plaintiff's complaint that the failure of Ms Justason to explain, to his satisfaction, her reasons for providing the manuscript to the AFP constituted a breach of s 19 of the HRA cannot succeed in circumstances where there was no identifiable duty on the part of Ms Justason to explain her actions to the plaintiff, and her actions were lawful. There can be no suggestion that by not providing him information to which he had no entitlement, the plaintiff was treated without respect for his inherent dignity as a human being.
43. The plaintiff's case for relief under the ADJR Act with regard to the first complaint fails.

### **The second complaint**

44. The plaintiff's second complaint is that the defendant took administrative action against him within the AMC as a result of him writing and emailing his manuscript to his brother. This action consisted of the defendant withdrawing his email privileges without following notified policy. He contended that the defendant's actions constituted a decision for the purposes of the ADJR Act, and that the decision was an

improper exercise of the power given by the enactment under which it was purported to be made: see s 5(1)(e) of the ADJR Act.

45. The basis of the plaintiff's submission is that under s 184(b) of the CMA, a withdrawal of privileges for not longer than 180 days is defined as an "administrative penalty". Under s 183, a presiding officer in disciplinary proceedings under the CMA may, inter alia, impose an administrative penalty. The plaintiff submitted that pursuant to the provisions of the *Corrections Management (Detainee Disciplinary) Policy 2012 (ACT)*, a charge under the disciplinary provisions of the CMA requires a written notice to be served upon the detainee, together with the indicated administrative penalty proposed. The plaintiff submitted that he had not been notified of any disciplinary proceedings, and had not received the required notice.
46. The error in the plaintiff's reasoning lies in the assumption that the temporary withdrawal of his privilege of access to email facilities within the AMC was based upon an allegation that he had committed some disciplinary breach. The imposition of punishment on a detainee for a breach of discipline requires, not surprisingly, that the detainee be provided with particulars of the allegation and an ability to respond. It is abundantly clear, however, that removal or suspension of a detainee's privileges cannot only occur in the context of disciplinary proceedings. The defendant has a wide discretion, subject to the specific provisions of the CMA, in managing the AMC and its detainees. It was accepted by the plaintiff that he had no entitlement under the CMA to have access to email facilities within the AMC. It was accepted that this was a privilege. It inevitably follows that the privilege may be withdrawn. In the present case, the withdrawal of the privilege was not arbitrary. The reason for the withdrawal of the plaintiff's email privileges, was a concern to ensure that publication of material in the manuscript to the plaintiff's brother, with the inevitable potential for wider publication, was not an offence or a breach of the Commonwealth orders.
47. The plaintiff's case for relief under the ADJR Act with regard to the second complaint fails.

### **Relief under the Supreme Court Act**

48. Although the body of the plaintiff's submissions addressed to his complaints purely by reference to the provisions of the ADJR Act, he sought relief as follows:
  - (a) under s 34B(2)(a) of the Supreme Court Act, declaratory relief requiring the defendant to provide him with copies of any existing court orders and/or other applicable restrictions or expectations of his behaviour for the remaining tenure of his incarceration;
  - (b) under the same provision, injunctive relief requiring the defendant to lift all restrictions on his email use.
49. The plaintiff is no longer an inmate at the AMC, having been released in accordance with the terms of the sentences imposed upon him. For this reason alone, it would be inappropriate to grant the relief which he seeks. I will, however, make some further brief comments.
50. As the defendant submitted, the declarations sought by the plaintiff are simply not available. He has not established that the declarations are aimed towards legal controversies regarding rights that are protected or enforced in the courts. On the facts of this matter, none of the plaintiff's rights have been infringed.

51. Similarly, the facts of this matter do not establish any breach of the legal or equitable rights of the plaintiff by the defendant having temporarily restricted his access to email facilities within the AMC. As such, the application could not succeed on its merits.

### **Conclusion**

52. The application will be dismissed. Unless a party seeks a different order within 14 days of publication of these reasons, I order the plaintiff to pay the defendant's costs of the application as agreed or assessed.

I certify that the preceding fifty-two [52] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Burns.

Associate:

Date: