SUPREME COURT OF QUEENSLAND

CITATION:	*Nona and Anor v Barnes* [2012] QSC 35
PARTIES:	**GEORGE NONA** (First Applicant) and **LILY-ANNIE AHMAT** (Second Applicant) v **MICHAEL BARNES** (Respondent)
FILE NO/S:	BS 8503 of 2011
DIVISION:	Trial Division
PROCEEDING:	Judicial Review
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	29 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	28 October 2011
JUDGE:	McMurdo J
ORDER:	**Application dismissed.** **Order as to costs to be determined.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – MEANING OF DECISION – where the applicant challenges the respondent's failure to refer its findings to the Director of Public Prosecutions – where the applicant sought reasons why no referral was made – whether the coroner made a decision as defined by the Act requiring him to publish reasons for that decision *Administrative Decisions (Judicial Review) Act 1977* (Cth) *Coroners Act 2003* (Qld) *Judicial Review Act 1991* (Qld) *Attorney-General (Cth) v Queensland* (1990) 25 FCR 125 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR

321

Evans v Friemann

Griffith University v Tang (2005) 221 CLR 99

Legal Aid Commission of Western Australia v Edwards (1982) 61 FLR 419

Salerno v National Crime Authority (1997) 75 FCR 133

COUNSEL: PJ Davis SC with AD Scott for the applicants

M Hinson SC for the Attorney-General

SOLICITORS: Bottoms English Lawyers for the applicants

R Marsh (Crown Law) for the respondent

Crown Solicitor for the Attorney-General

[1] This case arises from an inquest conducted by the respondent, the State Coroner, into the deaths of several persons in the loss of a vessel, the *Malu Sara*, in the Torres Strait in 2005. One of the deceased persons was a brother of the present applicants and they were legally represented at the inquest. The coroner published his findings in February 2009.

[2] The applicants make no complaint, at least at present, about the coroner's findings. Their complaint is that he did not send information, obtained in the course of his investigations, to the Director of Public Prosecutions (DPP), or at the least, that he did not properly consider whether he should do so. By these proceedings, they seek a statement of the respondent's reasons for what the application, as filed, described as "the decision by the … respondent to not give information obtained while investigating the deaths of [the deceased] to any prosecuting authorities under s 48(2) of the *Coroners Act 2003* (Qld)".

[3] The Coroner does not actively defend the proceedings. The Attorney-General has intervened to do so, pursuant to s 51 of the *Judicial Review Act 1991* (Qld) ("the JRA").

[4] The application is resisted by two arguments. The first is that there is no entitlement to a statement of reasons, pursuant to s 38 of the JRA, because there was no "decision" in the sense in which that word is used in the section. As is common ground, the word "decision" in s 38 takes its meaning from the definition of "decision to which this Act applies" in s 4 of the JRA. In particular, the Attorney-General argues, the decision in question was not "a decision of an administrative character made … or required to be made, under an enactment …". The second and alternative argument is that this decision is excluded from the operation of the JRA because it is within the express exclusion in Schedule 2, Item 1 of that Act, namely it is a decision "relating to the administration of criminal justice". In my

conclusion, the first argument should be upheld. The second argument, which is not obviously correct, need not be considered.

[5] Before going to the relevant legislation, it is necessary to say something of the facts. The inquest opened in February 2007. At the end of that year, counsel assisting the inquest made detailed written submissions, including that the conduct of a certain person "should be referred to the Director of Public Prosecutions for consideration as to prosecuting for manslaughter under s 303 of the *Criminal Code* as a consequence of omitting to perform duties that he was under".

[6] In his findings, the coroner concluded that the deaths were "because several people dismally failed to do their duty over many months" and that the loss of the vessel and their deaths was a "totally avoidable disaster". He also wrote:

> "Section 45(5) provides that a coroner must not include in inquest findings any statement that a person is or may be guilty of an offence. I am of the view that a coroner could not reasonably suspect someone has committed an offence without concluding the person may be guilty of the offence. Therefore, in my view, s 45(5) prohibits a coroner from including in inquest findings, the fact that a referral has been made under s 48(2)."

At this point, it is convenient to go to the provisions of the *Coroners Act* to which the coroner referred.

[7] It is necessary to set out s 45 in full:

> "**45 Coroner's findings**
>
> (1) A coroner who is investigating a suspected death must, if possible, find whether or not a death in fact happened.
>
> (2) A coroner who is investigating a death or suspected death must, if possible, find—
>
> (a) who the deceased person is; and
> (b) how the person died; and
> (c) when the person died; and
> (d) where the person died, and in particular whether the person died in Queensland; and
> (e) what caused the person to die.
>
> (3) However, the coroner need not make the findings listed in subsection (2) if—
>
> (a) the coroner is unable to find that a suspected death in fact happened; or
> (b) the coroner stops investigating the death under section 12(2).

(4) The coroner must give a written copy of the findings to—

(a) a family member of the deceased person who has indicated that he or she will accept the document for the deceased person's family; and
(b) if an inquest was held—any person who, as a person with a sufficient interest in the inquest, appeared at the inquest; and
(c) if the deceased person was a child—the children's commissioner; and
(d) if the coroner is not the State Coroner—the State Coroner.

(5) The coroner must not include in the findings any statement that a person is, or may be—

(a) guilty of an offence; or
(b) civilly liable for something.

(6) This section applies whether or not an inquest is held."

[8] Section 48 provides:

"**48 Reporting offences or misconduct**

(1) A reference in this section to information does not include information obtained under section 39(2).

(2) If, from information obtained while investigating a death, a coroner reasonably suspects a person has committed an offence, the coroner must give the information to—

(a) for an indictable offence—the director of public prosecutions; or
(b) for any other offence—the chief executive of the department in which the legislation creating the offence is administered.

(3) A coroner may give information about official misconduct or police misconduct under the *Crime and Misconduct Act 2001* to the Crime and Misconduct Commission.

(4) A coroner may give information about a person's conduct in a profession or trade, obtained while investigating a death, to a disciplinary body for the person's profession or trade if the coroner reasonably

believes the information might cause the body to inquire into, or take steps in relation to, the conduct.

(5) In this section—

disciplinary body for a person's profession or trade means a body that—

(a) licenses, registers or otherwise approves the carrying on of the profession or trade; or
(b) can sanction, or recommend sanctions for, the person's conduct in the profession or trade."

[9] It is relevant to mention also s 46, which permits a coroner, whenever appropriate, to comment on anything connected with a death investigated at an inquest that relates to public health or safety, the administration of justice or ways to prevent deaths from happening in similar circumstances in the future. Corresponding with the prohibition in s 45(5), it is provided by s 46(3) that the coroner must not include in such comments any statement that a person is or may be guilty of an offence or civilly liable for something.

[10] To return to that passage from the coroner's findings, his statement of the effect of s 45(5) was, with respect, accurate. But it is likely to have induced the applicants to believe that the coroner had suspected that someone had committed an offence and that the relevant information had been sent by him to the prosecuting authority under s 48(2).

[11] Nearly two years passed before, in November 2010, the applicants' solicitors wrote to the coroner asking whether he had made a decision "about whether to refer the case to an appropriate prosecuting authority". They wrote that the applicants were distressed "that the people responsible for this tragic disaster [had not been] brought to justice" and that "compounding that distress is the fact that, to date, they have not been told why". They asked the coroner to advise whether "no consideration was given to making a referral because it was felt that s 45(2) of the Act prohibits such consideration" or that instead "consideration was given to referral but it was decided that the case did not warrant such a referral". They further requested that if the latter was the case, the coroner provide a statement of reasons "for that decision".

[12] The coroner replied on 30 November 2010. He said that he "was persuaded by the Tasmanian case of *R v Tennent ex parte Jager* that no submissions could be made by any party including counsel assisting on whether I should make such a referral [and that] without the benefit of submissions I did not feel I could be sufficiently satisfied that the material warranted referral to the DPP. Accordingly I made no referral". He went on to say that he considered that he was *functus officio* so that it was not appropriate for him to do anything further.

[13] The applicants' solicitors responded by saying that the coroner was not *functus officio* and that he should discharge his duty under s 48(2), which they characterised

as a duty to at least consider whether to make a referral to a prosecuting authority. The coroner responded by saying that he was seeking advice from Crown Law.

[14] There was further correspondence from the applicants' solicitors in early 2011, in which they asked for a substantive response. Ultimately, on 17 June 2011, the coroner wrote as follows:

> "As a result of giving careful consideration to my obligations under s 48(2) of the Act I have concluded there was no basis on which I should refer information obtained during my investigation into these deaths to the DPP."

[15] On 5 July 2011, the applicants' solicitors requested a statement of reasons "for your decision communicated in that letter". The coroner replied that he considered that "the decision made by a coroner pursuant to section 48 of the *Coroners Act 2003* is a matter referred to in schedule 2 item 1 of the Judicial Review Act", so that there was no obligation to provide reasons and that he would not do so.

[16] As I have said, the application as filed identified the relevant decision of the coroner as being "to not give information obtained while investigating the deaths … to any prosecuting authorities under section 48(2) …". The submission of the Attorney-General was that this was not a reviewable decision, at least because it did not confer, alter or otherwise affect the legal rights or obligations of the applicants or anyone else. That was held to be an essential quality of a reviewable decision, as defined within s 4(a) of the JRA, in *Griffith University v Tang*.[1]

[17] Section 4 of the JRA defines a reviewable decision, relevantly as follows:

> "In this Act—
>
> *decision to which this Act applies* means—
>
> (a) a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion); or …"

In *Griffith University v Tang*, Gummow, Callinan and Heydon JJ said:

> "The decision so required or authorised must be 'of an administrative character'. This element of the definition casts some light on the force to be given by the phrase '*under* an enactment'. What is it, in the course of administration, that flows from or arises out of the decision taken so as to give that significance which has merited the legislative conferral of a right of judicial review upon those aggrieved?
>
> The answer in general terms is the affecting of legal rights and obligations. Do legal rights or duties owe in an immediate sense

1 (2005) 221 CLR 99 at 130 [89].

> their existence to the decision, or depend upon the presence of the decision for their enforcement? To adapt what was said by Lehane J in *Lewins*, does the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute?
>
> …
>
> The determination of whether a decision is 'made … under an enactment' involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be 'made … under an enactment' if both these criteria are met. it should be emphasised that this construction of the statutory definition does not require the relevant decision to affect or alter *existing* rights or obligations, and it will be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the enactment in question. Affection of rights or obligations derived from the general law or statute will suffice."[2]

[18] Of course, the action of a coroner in sending relevant information to a prosecuting authority could have potential consequences. In an individual case and at a practical level, there could also be consequences from a coroner's decision not to send that information. In the present matter, the applicants have an evident interest in the course which has been taken (or not taken) by this coroner. But that particular interest, substantial as it is, is not sufficient to satisfy the requirement that the decision itself confer, alter or otherwise affect legal rights or obligations. The coroner's decision to not provide information did not itself have that effect. No legal rights or obligations would be affected merely by the receipt (or non receipt) by the DPP of that information. In the ultimate argument for the applicants, that was apparently accepted.

[19] Faced with that difficulty, the applicants argued that the relevant decision was the coroner's conclusion, as he described it, that there was no basis upon which he should refer information to the DPP. This conclusion was a decision, in the sense that it was the end point of the coroner's consideration of the question. At that point, the existence or otherwise of a relevant suspicion by the coroner, it was said, did affect a legal obligation. This was because s 48(2) required the coroner to give the information to the DPP if he held that (reasonable) suspicion, so that the coroner's state of mind, although not then disclosed, had affected the legal obligation under s 48(2).

[20] The arguments thereby parted company in the identification of what constituted the decision. According to the Attorney-General's argument, the decision included the

---

2 (2005) 221 CLR 99 at 128, 130-131 [79]-[80], [89].

overt act of the coroner's correspondence, coupled with his not sending the information. According to the applicants' argument, the decision was complete once the coroner had, within his own mind, reached the view that he should not send the information.

[21] Section 48(2) is unusual in that it requires an act to be done by a person according to his or her own thoughts. The conclusion of the coroner's consideration of the question (the possibility that an offence had been committed) might be characterised in ordinary speech as a decision. However, a reviewable decision must at least be "a decision of an administrative character" and it has long been held that this involves not only the mental process undertaken by a decision maker, but some outward expression of his or her conclusion as an administrative act.

[22] There are several cases decided and consistently followed by the Federal Court upon this point, as to the equivalent terms of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In *Salerno v National Crime Authority*, the Full Federal Court (von Doussa, Drummond and Mansfield JJ) said that the formulation of what constitutes a reviewable decision in *Australian Broadcasting Tribunal v Bond*[3] could be traced to the judgment in *Evans v Friemann*, where Fox ACJ said:

> "The making of a decision by a person is a mental process, which may be communicated orally or in writing, or be apparent from action taken or not taken. The making of the decision might precede, by a very short, or by a long period, communication, or manifestation. There are many variables …
>
> In ordinary usage, the special feature of a decision is its conclusiveness, or finality for the time being, and this is to be contrasted with the thought or consideration which precedes it. On the other hand a decision is not the same as a conclusion; the former normally has an objective, while the latter is more commonly associated with the end result of a process of thinking without the formation of an intention concerning future conduct. It would not be possible, even if the attempt were wise, to substitute a judicial exegesis for the word the legislature has used. For present purposes at least it seems to me to amount to something of significance which is reasonably definite, which is final and conclusive for immediate purposes at least, which is manifested in some way, which emanates from an authoritative or responsible source, and which materially affects another person or persons."[4]

In the same judgment, the Court endorsed what was said by French J (as the Chief Justice then was) with the agreement of Jenkinson J in *Attorney-General (Cth) v Queensland* as follows:

> "… A provisional ruling or determination is also within the class provided it issues in some action or a refraining from some action. But a decision is more than thought, consideration or conclusion. It

---

3 (1990) 170 CLR 321.

4 (1981) 53 FLR 229 at 233, as quoted in *Salerno* (1997) 75 FCR 133 at 138.

> must be manifested in some way which emanates from an authoritative or responsible source …
>
> The ruling in issue is, in one sense, no more than an expression of the Commissioner's opinion. It is an opinion formed upon evidence which although unchallenged, is not completely satisfactory and which may come to be seen in a different light as the inquiry proceeds. Nevertheless, even if regarded as provisional, it has real and practical consequences and will issue in action in the receipt and consideration of evidence relating to the death of Darren Wouters. It is more than mere thought or consideration or conclusion. It has been formally declared as an opinion formed for the purpose of the continuing conduct of the inquiry."[5]

French J there cited, amongst other cases, *Legal Aid Commission of Western Australia v Edwards and Others*, where Toohey J, sitting as a judge of the Federal Court, said:

> "… [W]hile a decision is ordinarily preceded by some thought or consideration on the part of the decision maker, it manifests the end product of that thought or consideration and a conclusion to which they lead in some announced or published ruling or adjudication."[6]

[23] In *Australian Broadcasting Tribunal v Bond*, Mason CJ (with whom Brennan and Deane JJ agreed) referred to one characteristic of a reviewable decision which is that generally, but not always, it will be a decision which is "final or operative and determinative …".[7] The notion that the undisclosed content of a person's state of mind could at that point be a reviewable decision is inconsistent with that quality of finality. And it would be inconsistent with the requirement that there be a decision of an administrative character, because there is no exercise of administrative power constituted solely by a person's mental processes in considering a question. Were it otherwise, the operation of the JRA would be curious indeed. Absent some manifestation of the person's "thought, consideration or conclusion", it is difficult to see how the so-called decision could be challenged and within the period which is prescribed by the JRA,[8] which commences on the day on which the decision is made.

[24] Therefore I have concluded that this identification of the relevant decision, upon the ultimate argument of the applicants, is incorrect. There was a decision, it may be accepted, which was authorised by an enactment in the sense described by Gummow, Callinan and Heydon JJ in *Griffith University v Tang*. That was the decision to not send the information to the DPP, a decision which occurred only once it was manifested. But that was not a reviewable decision, at least because it did not of itself affect legal rights or obligations.

---

5 (1990) 25 FCR 125 at 142, quoted in *Salerno* (1997) 75 FCR 133, 138.
6 (1982) 61 FLR 419, 422.
7 (1990) 170 CLR 321, 337.
8 s 26 of the JRA.

[25] This application must therefore be dismissed. I will hear the parties as to costs, and in particular as to whether the application did not disclose a reasonable basis.[9]

[9] s 50(b)(ii)(A) of the JRA.