

Emoji, invalidity and administrative review: 😊, 😞 or 🤖?

Does 👍 indicate contractual acceptance? Is 😞 inappropriate in the workplace? Courts increasingly [deal with such questions](#) in cases ranging from employment, to defamation, to family law. The Australian Law Reform Commission has even floated the idea of [using emoji in legislative drafting](#). Emoji are on the way up 🚀 – all the way to the High Court.

Until this year, only Justice Steward had referred to emoji in a High Court judgment: *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27, (2021) 273 CLR 346 at 393, [145]. Now, following the Court's unanimous judgment in *Miller v Minister Immigration, Citizenship and Multicultural Affairs* [2024] HCA 13, (2024) 98 ALJR 623, the authors of administrative law textbooks can add "emoji" to their 📖 indices.

How did the High Court come to consider emoji in an administrative law matter?

Miller's visa was cancelled under s 501(3A) of the *Migration Act 1958*. He applied to the Tribunal for review of the decision not to revoke the cancellation of his visa, within the nine day 🕒 limit for such applications. However, his application did not contain "a statement of reasons for the application" required by s 29(1)(c) of the *Administrative Appeals Tribunal Act 1975*.

In a unanimous judgment, Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ considered whether non-compliance with s 29(1)(c) invalidated the application. In answering "the *Project Blue Sky* question whether there is to be discerned a legislative purpose to invalidate an application that fails to comply with that specific condition", the Court said: 🤖.¹

(Or, to use the Court's words: "Multiple considerations point inexorably to a negative answer").

The Court noted that "the very fact of the making of the application carries with it the necessary implication that the applicant is dissatisfied with the decision". Further, a statement of reasons provided under s 29(1)(c) "need not be information of the slightest assistance to the Tribunal".²

The Court concluded: "invalidity of the application would give rise to the farcical (and, in terms of public administration, highly inconvenient) prospect of a contestable preliminary issue in a proceeding before the Tribunal as to whether markings contained in an application (which might be in a language other than English or in the form of a scribble or an **emoji**) conveyed sufficient information to comply with s 29(1)(c)."³

Miller is unlikely to be the last administrative law case to consider emoji. As Kirley and McMahon note, "emoji are gaining recognition as an alternate literacy vehicle for people challenged by traditional forms of writing and speaking".⁴ Could emoji find a place in the practice and procedure of the nascent Administrative Review Tribunal (ART)?

The *Administrative Review Tribunal Act 2024* has been carefully drafted to minimise the farce or inconvenience of invalid applications to the ART. Section 34 provides that applications to the ART (1) "may be made in writing or in any other manner specified for the application in the practice directions"

¹ "No".

² [32]-[33].

³ [38].

⁴ Elizabeth Kirley and Marilyn McMahon, ["The Emoji Factor: Humanizing the Emerging Law of Digital Speech"](#) (2018) 85 *Tennessee Law Review* 517, 529.

and (2) “must include the information specified for the application in the practice directions”. However, failure to comply with subsection (2) *does not affect* the validity of the application: s 34(3). 😊

The President of the ART may make practice directions in relation to “the accessibility of the Tribunal and the responsiveness of the Tribunal to the diverse needs of parties to proceedings”.⁵ Might the President make practice directions encouraging the use of emoji, either generally or in certain jurisdictional areas? While practice directions “must be made in writing” this would not prevent drafting practice directions partly *in* emoji.

Using emoji in the ART, where appropriate, would be consistent with the ART’s general principles of accessible and informal procedure,⁶ and would promote statutory objectives of providing an independent mechanism of review that is “accessible and responsive to the diverse needs of parties to proceedings” and “with as little formality...as a proper consideration of the matters before the Tribunal permits”.⁷

Although the High Court has yet to *use* emoji in a judgment, the time may come. While on the Federal Court, Justice Gleeson included 😊 in at least one judgment.⁸ The transcript of *Miller* in the High Court records both Gordon and Jagot JJ referring to “emoji with a teardrop” 😓,⁹ but it may be unrealistic to expect emoji to proliferate in the Commonwealth Law Reports any time soon. After all, “the law is and should be a serious business”.¹⁰

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⁵ s 36(1)(k).

⁶ ss 50-51.

⁷ s 9.

⁸ *Drew v Lynch, in the matter of Mirage 3.4D Pty Limited* [2019] FCA 632 at [60].

⁹ [2024] HCATrans 9.

¹⁰ Justice Jagot, “Notes on Judging”, Speech, National Judicial College of Australia Conference, 26 March 2023, 7.