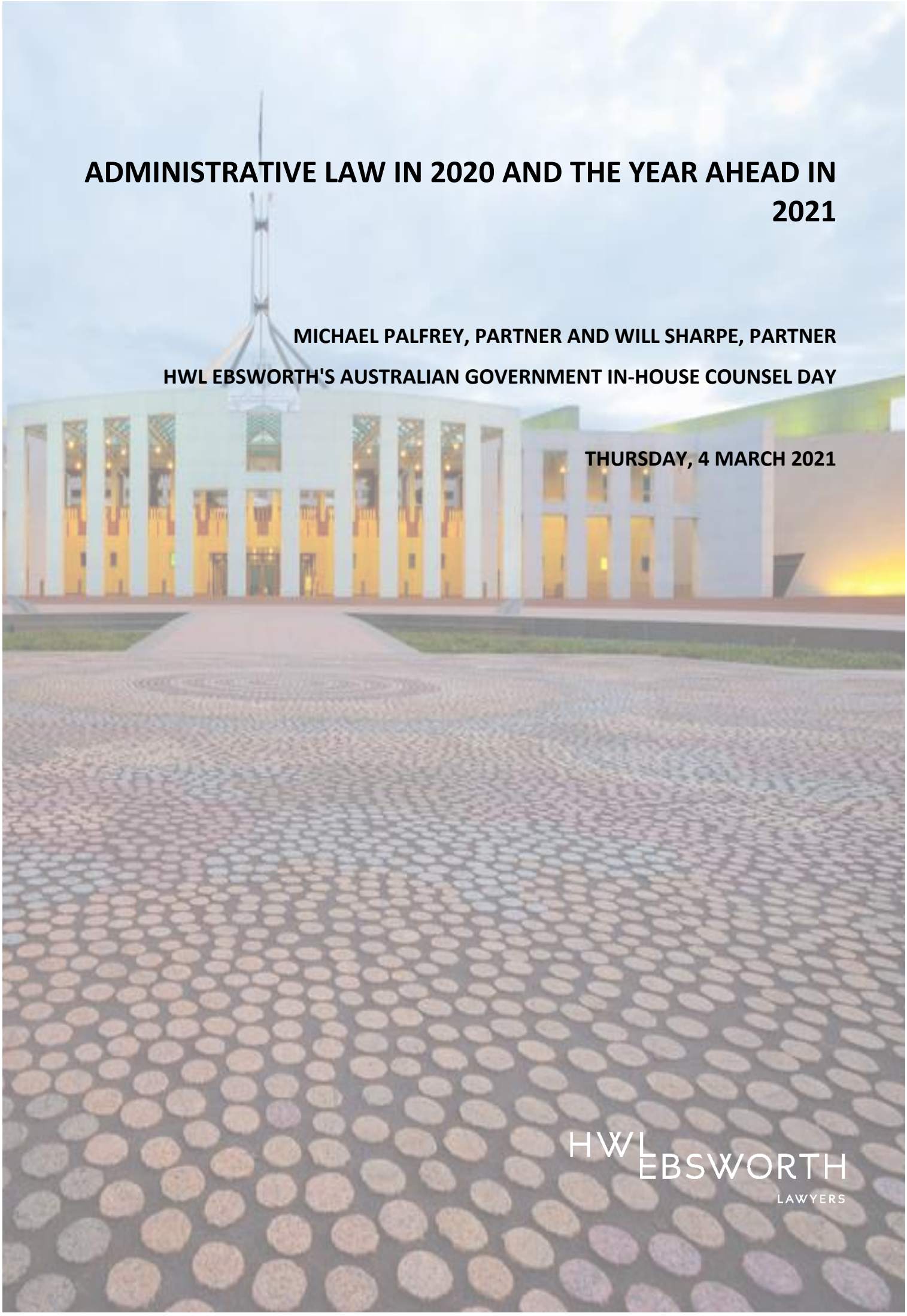

ADMINISTRATIVE LAW IN 2020 AND THE YEAR AHEAD IN 2021

MICHAEL PALFREY, PARTNER AND WILL SHARPE, PARTNER

HWL EBSWORTH'S AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL DAY

THURSDAY, 4 MARCH 2021

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LAWYERS

ADMINISTRATIVE LAW IN 2020 AND THE YEAR AHEAD IN 2021

2020 was a memorable year for many reasons. We've witnessed a global pandemic requiring a concerted response from government, the private sector and civil society which will inevitably, to one degree or another, affect the legal relationships between the individual and the state. The most visible change we've seen in this regard is in the use of emergency powers under biosecurity and emergency legislation to close borders and control the movement of people. On one view, it is remarkable how few challenges there were to lockdown laws and border closures. In the opening section of this paper on administrative law in 2020 and the year ahead in 2021, we survey some legal issues arising out of challenges to lockdowns and State border closures as well as decision-making under biosecurity legislation. We then observe that, amidst the national response to coronavirus, it is perhaps easy to forget that Australian courts issued a number of landmark decisions in 2020. We saw the palace letters released, the 'aliens' power re-interpreted in the case of Love v Commonwealth, and the journalist Annika Smethurst's challenge to search warrants executed on her home. The High Court also had an opportunity to revisit the effect of fraud on an administrative decision-maker, and offered guidance on the scope of legal unreasonableness. In a decision that will continue to have implications for government decision-makers, the Federal Court elaborated on the doctrine of misfeasance in public office in the Brett Cattle case.

2021 appears to us to be no less significant for continuing shifts in the Australian public law landscape. In the courts, the High Court has two new appointments in Justices Steward and Gleeson from the Federal Court, to replace Justices Bell and Nettle. The new bench of the High Court has a busy administrative law list – most of which are migration cases – and will consider issues of statutory interpretation, the materiality test in jurisdictional error, procedural fairness, and the effect of errors in translation in an interview with a visa applicant. This year will also see a range of legislative initiatives in Parliament. The Commonwealth Integrity Commission Bill is likely to be introduced this year, and is set to create the much-discussed federal anti-corruption agency. Privacy and data law is also receiving an overhaul, with a wide-ranging review of the *Privacy Act 1988* (Cth) underway, and a data-sharing bill that will facilitate the sharing of data between government agencies.

We will be watching these developments closely throughout the year and will provide updates and analysis as they evolve. We would also like to thank Neil Cuthbert, Senior Associate, for considerable assistance with preparing this paper.

SIGNIFICANT ADMINISTRATIVE LAW CASES LAST YEAR

Challenges to lockdown laws

Some of the most interesting legal issues in the last twelve months have arisen from the various challenges to lockdown laws and border closures resulting from the coronavirus pandemic.

In March last year, the Commonwealth government made a number of legislative instruments under the human biosecurity provisions of the *Biosecurity Act 2015* (Cth) (**Biosecurity Act**). The enabling provisions of the Biosecurity Act are broad. Section 475 enables the Governor-General to declare that a 'human biosecurity emergency exists' and such a declaration was made on 18 March 2020. One of the consequences of the biosecurity emergency was the ban on overseas travel from Australia, subject to exemptions, which may be granted on a case-by-case basis.

Baker v Commissioner of the Australian Border Force [2020] FCA 836 (***Baker***) considered a decision made by the Australian Border Force under the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (**Determination**) made pursuant to s 477(1) of the Biosecurity Act.

Mr and Mrs Baker (the Applicants) had nine children, three of whom were living in the United States. On 2 June 2020, they requested an exemption to the travel ban under s 7 of the Determination, in order to attend the wedding of their youngest son on 23 June 2020 in New Jersey. On 7 June 2020, the applicants were notified that their application had been refused. On 8 June 2020, the applicants made a second application for an exemption under s 7. The second application was also refused.

Relevantly, the Applicants sought judicial review on two grounds, as follows:

- The decision-makers had asked questions they were not required to consider by s 7 of the Determination; and
- The decision-makers inflexibly applied policy without regard to the merits of the Applicant's case.

As to the first ground, Mortimer J did not accept the submission that either of the decision-makers 'asked the wrong question'. Her Honour observed that by s 7(2) if a person provides a 'compelling reason' for 'needing to leave' Australian territory, then the Determination in effect deems there to be exceptional circumstances. Mortimer J concluded that the language of s 7(2) may not 'exhaust the concept of exceptional circumstances but it is a clear statutory indication of what is included within it'. The fact the delegate used the language of 'critical' reason rather than 'compelling' reason did not amount to a legal error. The Court rejected this ground.

In relation to the second ground, the Applicants pointed to a Department of Home Affairs document, which gave six examples of 'compassionate circumstances' for the purposes of decision-making under the Determination. Mortimer J similarly rejected this ground, and observed (at [46]):

> *The mere fact that some examples are given is not indicative of fettering: it is good administrative practice, designed to assist both prospective applicants to understand how their exemption request might be articulated, and to assist decision-makers in identifying what kinds of circumstances might be "exceptional": see generally Plaintiff S297/2013 v Minister for Immigration and Border Protection [2015] HCA 3; 255 CLR 231 at [19].*

Her Honour concluded that it was a matter for each delegate whether what was set out by the Applicants constituted 'exceptional circumstances', and rejected the application for judicial review.

Since the decision in *Baker*, there have been several other challenges to lockdown laws and border closures, including:

- Clive Palmer mounted a challenge to State border closures – and lost. In *Palmer v Western Australia* [2021] HCA 5, Mr Palmer argued that the Emergency Management Act 2005 (WA) and the directions to close the Western Australian border in light of the coronavirus pandemic contravened s 92 of the Constitution dealing with freedom of movement between States. The High Court ruled that the relevant provisions, in their application to an emergency constituted by the occurrence of a hazard in the nature of a plague or epidemic, comply with the constitutional limitation of s 92 of the Constitution in each of its limbs; and
- In Gerner v Victoria [2020] HCA 48, the High Court rejected a challenge to Victoria's lockdown laws from the operator of a Mornington Peninsula hotel whose business was damaged by the restrictions. The Plaintiffs sought declarations that relevant provisions of the Public Health and Wellbeing Act 2008 (Vic), and directions made under the Act, were invalid as an infringement of a guarantee of freedom of movement which they argued are implicit in the Constitution. The High Court held that no freestanding guarantee of freedom to move wherever one wishes, for whatever reason, is implicit in the Constitution.

The palace letters were released

Amidst the national response to the coronavirus, it is easy to forget that in 2020 the High Court also issued several landmark decisions relating to statutory interpretation and constitutional theory. In *Hocking v Director General of the National Archives of Australia* [2020] HCA 1, the High Court considered an academic historian's request for access to records held by the National Archives comprising 'personal and confidential' correspondence between the Governor-General of Australia and the Queen from 1974 to 1977 (**palace letters**). The question to be resolved was whether the palace letters were Commonwealth records for the purposes of the *Archives Act 1983* (Cth) (**Archives Act**).

The Appellant, Professor Hocking, is a historian and writer specializing in the period of Australian political history in which Sir John Kerr held the office of Governor-General. On 10 May 2016, the Director-General rejected her request for access to the palace letters on the basis that the contents of the file were not 'Commonwealth records' and therefore not subject to public access requests. This decision was upheld on judicial review by the Federal Court at first instance by Griffiths J and on appeal to the Full Federal Court by Allsop CJ and Robertson J, Flick J dissenting.

On appeal to the High Court, a 6:1 majority of the Court held that the palace letters were Commonwealth records because they were the property of the official establishment of the Governor-General, a Commonwealth institution. Specifically, in the context of the Archives Act, Kiefel CJ, Bell, Gageler and Keane JJ, (Gordon J agreeing) concluded that the term 'property' connoted the existence of a relationship in which a Commonwealth institution had a 'legally endorsed concentration of power' (at [172]). Edelman J, whilst agreeing with the majority on the final orders, reasoned on the basis of private law property principles that the letters were property of the Commonwealth because they were kept as institutional documents by the official establishment of the Governor General (i.e. as chattels), which is not an independent legal person, and could be distinguished from Sir John's private or personal records.

In dissent, Nettle J took the view that Sir John's and his agent's control over the correspondence 'could not be attributed to any organ of government', and as a result no part of the correspondence was the 'property' of the Commonwealth or of a Commonwealth institution.

The High Court ordered the Director-General of the National Archives to reconsider Professor Hocking's request for access to the letters. On 14 July 2020, the National Archives released the palace letters in full and online.

Love and Thoms and the 'aliens' power

In another landmark public law decision, the High Court issued a major re-interpretation of the 'aliens' power in Love v Commonwealth [2020] HCA 3 (Love and Thoms). In that case, each of the Plaintiffs was born outside Australia – Mr Love in Papua New Guinea and Mr Thoms in New Zealand, and they were citizens of those countries respectively. They were not citizens of Australia within the meaning of the Australian Citizenship Act 2007 (Cth) (Citizenship Act). Following convictions for criminal offending in Australia, both Mr Love and Mr Thoms had their visas cancelled pursuant to s 501 of the Migration Act 1958 (Cth) (Migration Act).

The Commonwealth argued that, since the Plaintiffs were not citizens, they were necessarily aliens, and therefore the Commonwealth had power to cancel their visas and to remove them from Australia. Conversely, if the Plaintiffs were not aliens for the purposes of s 51(xix), they could not be removed from Australia. The judges of the High Court delivered seven separate opinions, and split 4:3 on this question.

The majority, consisting of Bell J, Nettle J, Gordon J and Edelman J, held that the Plaintiffs were not within the reach of the aliens power. The majority considered Mabo v Queensland, recognising that there is a special and unique connection between Aboriginal and Torres Strait Islander peoples and the land and waters of Australia, and that accordingly Aboriginal and Torres Strait Islander peoples are not within the reach of s 51(xix) of the Constitution. Bell J reasoned, with the rest of the majority broadly agreeing on this point, that recognition of the connection that Aboriginal and Torres Strait Islander peoples have with 'country' is 'incongruent' with describing an Aboriginal Australian 'as an alien within the ordinary meaning of the word' (at [71]). Her Honour observed that although s 51(xix) is 'vital to the welfare, security and integrity of the nation', the power simply cannot extend to Aboriginal Australians, as '…despite the circumstances of birth in another country, an Aboriginal Australian cannot be said to belong to another place' (at [74]).

Gordon J elaborated on this point, observing that the connection with country means that even if an Aboriginal Australian's birth is not registered, or there is no record of citizenship, or an Aboriginal Australian is born overseas without obtaining citizenship, 'they are not susceptible to legislation made pursuant to the aliens power or detention or deportation under such legislation' (at [374]).

By contrast, the judges of the minority (particularly Kiefel CJ) considered that it is 'now regarded as settled' that it is a matter for Parliament, relying on s 51(xix), to define the limits of the concept of Australian citizenship, 'and its antonym, alienage' (Kiefel CJ at [5]).

The Plaintiffs' application was allowed by majority. One consequence of this decision appears to us to be that decision-making under legislation (such as the Migration Act) will on occasion need to pay particular attention to the constitutional concepts underpinning the statute. In the case of Love and Thoms, the significance of the majority view was that the Citizenship Act could not conclusively determine who was an alien for the purposes of s 51(xix) of the Constitution, which in turn had implications for decision-making under the Migration Act.

Validity of search warrants

In Smethurst v Commissioner of Police [2020] HCA 14 (Smethurst), the High Court considered the validity of a search warrant under which material was taken from News Corp journalist Annika Smethurst during a search of her home, and, if invalid, whether an order should be made for the destruction of the documents. Ms Smethurst was successful in establishing that the warrant was invalid, but not in obtaining an order for the destruction of the documents.

On the question of the destruction of the documents, the Court split 4:3 in favour of permitting the AFP to retain the documents seized for the purposes of its investigation. In a joint decision, Kiefel CJ, Bell and Keane JJ explained that the terms of the warrant were not consistent with the requirement that a warrant state the particular offence to which it relates. The warrant had sought to summarise the offence in question, but in doing so both failed to state the nature of the offence, and 'succeeded in misstating it' (at [43]).

The need for a warrant to state the offence to which it relates has its history in the law's refusal to accept 'general warrants' that confer a 'free-ranging power of search' (at [22]). The requirement now has a statutory basis in the Crimes Act 1914 (Cth) (**the** Crimes Act). The 'protective purpose' of the requirement, their Honours explained, is achieved 'by ensuring that each of the issuing officer, the officer executing the warrant and the persons affected by the warrant understand what is the object of the search and the limits to it' (at [27]).

The remaining members of the Court (Gageler, Nettle, Gordon, and Edelman JJ) each delivered separate judgments, but agreed with the plurality that the search warrant was invalid.

The question that split the Court was in relation to the injunction sought by Ms Smethurst that would have required that the AFP either destroy or deliver up the information taken from her mobile phone, or restrain the AFP from making the information available to the prosecutor.

At issue was confidentiality, privacy, infringement of common law rights by trespass, public interest considerations relating to the administration of justice and investigation of a possible crime, and the scope of the Court's jurisdiction to grant an injunction.

Gageler, Gordon, and Edelman JJ would have granted the injunction sought by Ms Smethurst, but would have framed the injunction in a way that would have allowed the AFP to attempt to obtain a lawful warrant to allow them to retain the seized information.

The claim for an injunction was instead sought to protect against the effects of the trespass committed against Ms Smethurst. Keifel CJ, Bell and Keane JJ did not agree that the injunction was able to issue on those grounds, largely because, in their view, Ms Smethurst had not suffered damage by the taking of the information (despite acknowledging it may have serious consequences for her). Ultimately, their Honours found that Ms Smethurst could point to 'no authority which recognises their interest in not being investigated in relation to an offence as a right' (at [85]).

Even if the grant of an injunction could be made, their Honours took the view that it should not. The public interest in both the investigation and the prosecution of crime meant that the grant of the injunction was not appropriate, and the prospect that criminal conduct may be disclosed was a sufficient reason to decline the relief Ms Smethurst sought. Their Honours also noted that there is

no presumption in law that information unlawfully obtained cannot be used in the investigation or prosecution of an offence. There is instead, a public interest in bringing persons to conviction, and this is to be weighed by a court against approving unlawful conduct (at [65]). Their Honours appear to have taken the view that the appropriate time for that weighing exercise is at the point that the information obtained in reliance upon the unlawful warrant is sought to be used in any proceedings against Ms Smethurst for the prosecution of an offence.

Legal unreasonableness and the assessment of 'demeanour'

In ABT17 v Minister for Immigration and Border Protection [2020] HCA 34 (ABT17) the High Court unanimously allowed an appeal from a judgment of the Federal Court of Australia. The appeal concerned a review by the IAA under Part 7AA of the Migration Act of a decision by a delegate of the Minister for Immigration to refuse to grant the Appellant a temporary protection visa. The issue in question in the appeal was whether it was legally unreasonable for the IAA to depart from the delegate's assessment of the Appellant's credibility without inviting the Appellant to an interview to obtain new information.

The Appellant was a Sri Lankan Tamil who arrived in Australia in August 2012. The Minster's delegate decided to refuse his application for a temporary protection visa on the basis that, although the Appellant's evidence in his protection visa interview was credible, due to the improved situation in Sri Lanka the delegate was not satisfied that the Appellant would still face persecution. Upon listening to the interview, the IAA accepted some of the Appellant's claims but considered that some of his evidence was not credible (as the delegate had found) but rather embellished. Further, the IAA accepted the delegate's reasoning that country information indicated a considerable improvement in the circumstances in Sri Lanka since the Appellant's departure, and affirmed the delegate's decision.

In the Federal Court, Bromberg J accepted that 'the IAA must have been aware that … the delegate had the delegate had the opportunity to observe the appellant's demeanour', as opposed to merely 'listening to a tape of the interview' as the IAA did, and that this exposed legal unreasonableness. However, Bromberg J dismissed the appeal based on the Appellant's failure to demonstrate that even if the IAA did obtain further information under s 473DC, the outcome would have a material impact on the outcome of the IAA's decision (we discuss the 'materiality' test in greater detail below).

On appeal to the High Court, Kiefel CJ, Bell, Gageler and Keane JJ (Nettle, Gordon and Edelman JJ agreeing in separate judgments on the final orders, but for different reasons) allowed the appeal, finding that the Federal Court wrongly concluded that country information provided an alternative basis for the IAA's lack of satisfaction that the Appellant would face a serious risk of harm if he returned to Sri Lanka. The majority concluded that the IAA acted unreasonably because, without good reason, it failed to invite the Appellant to an interview in order to 'gauge his … demeanour for itself' before deciding to reject the Appellant's account given in an interview, which the delegate accepted in making the initial decision (at [25]).

The IAA rejected the Appellant's account 'wholly or substantially on the basis' of its own assessment of the manner in which that account was given, based on the audio recording only. Where the IAA's conduct of the review miscarried was in failing to use the powers at its disposal to get and consider

new information in order to supplement the material before it, so as to place itself in as good a position to assess credibility as the delegate (at [30]). The majority observed that an underlying defect was the failure of the delegate to take a video recording of the interview as well as an audio recording, so that the Appellant's demeanour could properly be assessed. Our view is that the High Court's decision in ABT17 is significant for elevating the assessment of an interviewee's 'demeanour' to an integral part of credibility.

*The effect of f*raud on a decision-maker

In Minister for Home Affairs v DUA16 [2020] HCA 46 (DUA16), the High Court revisited the effect of fraud on an administrative decision in the most significant treatment of this issue since SZFDE v Minister for Immigration and Citizenship [2007] HCA 35 (SZFDE). In DUA16 separate submissions provided to the IAA on behalf of the visa applicants in different proceedings, DUA16 and CHK16, were found to be fraudulent because the migration agent had used pro forma submissions. The question was whether this fraud vitiated the decision of the IAA, whether the agent's fraud contributed in an adverse way to the exercise of any duty, function or power of the IAA or whether the IAA's failure to seek correct submissions containing potentially new information constituted legal unreasonableness.

DUA16 and CHK16 had engaged a migration agent to provide submissions on their behalf to the IAA. The agent fraudulently prepared the submissions based on a template from the first written submission the agent had ever prepared. The submission for DUA16 also contained information relevant to a different applicant. The IAA was unaware of the agent's fraud but noticed that the submissions contained incorrect information and disregarded this information. In the case of CHK16, the entirety of the personal information included in the submission provided to the IAA related to the wrong person.

A majority in the Full Federal Court found that the decisions of the IAA were vitiated by the fraud of the agent, and set aside the IAA's decisions in both matters. The Minister appealed on the basis that the fraud had not been shown to have had any effect on the performance of the IAA's statutory functions.

In the High Court, Kiefel CJ, Bell, Keane, Gordon and Edelman JJ unanimously agreed with Griffiths J's dissenting judgment in the Full Court in respect to the finding on fraud.

Considering SZFDE, the Court observed that a ground of review for fraud requires a focus upon how the fraud affected the operation of the particular system of review, and, relevantly in this case, the extent of any effect on the statutory functions and powers of the reviewer. The Court indicated that generally a decision will be invalid if a decision-maker is defrauded in the exercise of statutory power, however this requires that some aspect of the legislative scheme be affected by actual fraud or dishonestly, not merely negligence (at [15]).

Here, the decisions were not vitiated by fraud as the fraud did not 'prevent or affect' the IAA's duty to conduct a review in accordance with the process required under Div 3 of Pt 7AA which specifies in some detail how a review must be conducted (at [20]). As the Court observed (at [18]):

> It is not sufficient to assert that fraud might be said to affect the process of decision-making in some abstract sense. In oral submissions, CHK16 and DUA16 submitted that the agent's fraud had stultified the "core review function" in s 473CC. The only particular aspect of that core review function that was said to have been stultified was that the Authority had requested submissions in a Practice Direction and had received fraudulent submissions.

The Court concluded that in each of the appeals, the agent's fraud did not have an adverse impact on to the exercise of any duty, function, or power by the IAA.

In considering the ground of unreasonableness, the Court dealt with CHK16 and DVO16 differently, which ultimately resulted in different outcomes in respect to each applicant. In relation to CHK16, it found:

> *The circumstances of CHK16's case are extreme….The legal unreasonableness of the failure by the Authority to get new information by requesting the correct submissions pursuant to s 473DC is plain when the alternative approach taken by the Authority is considered. Rather than taking the simple route of asking for the correct submissions, consistently with its own procedures for returning submissions that are too long, the Authority filleted the submissions that plainly concerned the wrong person into generic and non-generic information. The Authority then treated the generic information in the submissions concerning another person as though the information had been correctly provided in relation to CHK16's circumstances. On no view could that have been a reasonable course to take.*

Whereas, in relation to DUA16, it found:

> *DUA16's case is different. In DUA16's case it was not legally unreasonable for the Authority to fail to exercise either its powers under s 473DC to get new information or its powers in the general conduct of the review to get new submissions. The conclusion that the Authority reasonably drew from the submissions with which it was presented, and by having regard to the review material, was that a small amount of the information had been included by mistake. The Authority disregarded these errors and, moreover, pointed out that the requirements in s 473DD of the* Migration Act *for consideration of new information had not been met. The statutory context and the high threshold of legal unreasonableness precludes a conclusion that it could be legally unreasonable for the Authority to fail to get new information in light of what it reasonably identified as errors in submissions. It was reasonable for the Authority to disregard that information and to explain, in the alternative, why the information could not be considered even if it had not been included by mistake.*

Accordingly, in CHK16, the Minister's appeal was dismissed, whereas in, DUA16 the appeal was allowed.

Misfeasance in public office – the case of Brett Cattle

In the class action case Brett Cattle Company Pty Ltd v Minister for Agriculture [2020] FCA 732 (Brett Cattle) the Federal Court found that the former Minister for Agriculture, Fisheries and Forestry's decision to prohibit the live export of cattle to Indonesia in 2011 constituted the tort of misfeasance.

Following extensive public discussion of the treatment of cattle in Indonesia after a segment on Four Corners depicting mistreatment, the Minister decided to make a ban order. The ban order prohibited the export of livestock to Indonesia for six months and was made under the Export Control Act 1982 (Cth) which gave the Minister extensive powers to prohibit export of livestock absolutely, or to particular places, or on conditions. The applicant, Brett Cattle Company, claimed that the Minister committed the tort of misfeasance in public office as the ban was unreasonable or lacked proportionality and/or that the ban order was made recklessly.

Rares J determined that the Minister acted in misfeasance of his office in making a ban order prohibiting all live export to Indonesia. The ban order contained no exceptions, such as only banning export to 12 named abattoirs not complying with standards. In reaching this conclusion, the Court looked to how the Minister made the decision. Significantly, Rares J concluded that the ban order was not supported by departmental and legal advice provided to the Minister, that the Minister had knowledge of the significant economic impact on the industry, and that the Minister failed to explore an appropriate solution with the Indonesian government and failed to take advice from industry constituents on accessing supply chains in Indonesia that complied with animal welfare standards and applicable codes. In circumstances where the Minister had knowledge of these circumstances, Rares J observed that in making the ban order the Minister was 'shutting his eyes' to the risk that the ban order may have been invalid and to the damage that it was calculated to cause persons in the position of Brett Cattle (at [393]).

Brett Cattle has important implications for government decision-makers as it potentially widens the avenues available for challenging decisions on the basis of misfeasance of the decision-maker. 'Reckless indifference' rather than the higher standard of actual malice may suffice. It is also a reminder that the powers of decision-makers are always constrained by the statutory scheme under which they are operating, and even when legislation does not spell out particular qualifications or restrictions, decisions must be proportionate and reasonable. This process may require broad consultation with industry, relevant agencies and legal advisors to ensure that decisions are balanced and appropriately considered.

Effect of remittal following a finding of apprehended bias

Late last year, the High Court had the opportunity to examine the consequences of a finding of apprehended bias and procedural unfairness for the remittal of a matter affected by such findings on appeal. It published its decision on 3 February this year, allowing an appeal from the Queensland Court of Appeal: *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2 (**Oakey v New Acland**).

The First Respondent (New Acland) operated a coal mine in Queensland and applied for additional mining leases and for an amendment to its existing environmental authority. The Appellant (Oakey) objected and the Land Court recommended that both of New Acland's applications be refused. On judicial review, the Queensland Supreme Court rejected New Acland's argument that the Land Court Member's decision was affected by apprehended bias but upheld New Acland's grounds relating to errors of law in the Member's decision. The Supreme Court remitted the matter to the Land Court for reconsideration by a different Member, with a direction that the parties remained bound by the first Member's findings that were not affected by error of law.

On remittal, the Land Court recommended that New Acland's applications be approved subject to conditions. The Chief Executive of the relevant Department subsequently approved New Acland's application to amend its existing environmental authority. Meanwhile, Oakey had appealed the Supreme Court's decision to the Court of Appeal. The Court of Appeal allowed New Acland's cross-appeal, agreeing that the Land Court's first decision was affected by apprehended bias. But rather than setting aside the Supreme Court's partial remittal order in its entirety, the Court of Appeal was concerned to 'head off' re-litigation of issues left untouched by the judicial review proceedings. The Court of Appeal therefore made a declaration that the Land Court failed to accord New Acland procedural fairness in making the first decision, leaving the partial remittal order undisturbed.

Oakey appealed to the High Court, arguing that the Court of Appeal ought to have made an order referring the entirety of the matters the subject of the Land Court's first decision back to the Land Court for full reconsideration (as opposed to letting some aspects of the Land Court's decision stand, which was the effect of the Supreme Court's order undisturbed by the Court of Appeal). The High Court (Kiefel CJ, Bell, Gageler and Keane JJ, Edelman J agreeing) concluded that:

- The Supreme Court's limited referral order, made under s 30(1) of the *Judicial Review Act 1991* (QLD) could not authorise the Land Court to proceed in a manner inconsistent with the statute that governed the making of the decision referred back for further consideration, which in this case was two pieces of Queensland environmental legislation. It was not to the point that the second Land Court member had been directed to adopt findings made in the Land Court's first decision – any recommendations the second Land Court member proposed to make needed to comply with the express and implied conditions and limitations imposed by the Queensland environmental legislation (at [41]); and
- The Supreme Court's qualified remittal orders were the very orders under appeal in the Court of Appeal. Having allowed the appeal on the basis that the Land Court's first decision was affected by apprehended bias, the Court of Appeal should have set aside the orders appealed from in their entirety 'as an incident of the appeal' (at [45]).

The High Court allowed Oakey's appeal, and remitted the entirety of the matters the subject of New Acland's applications back to the Land Court for reconsideration. Oakey v New Acland demonstrates that where a matter has been remitted to a decision-maker following a successful judicial review challenge, the parties should carefully scrutinise the remittal order to assess whether it complies with the statutory framework under which the decision is to be reconsidered, and whether all legal issues have been adequately resolved.

OTHER DEVELOPMENTS IN 2020

Another year of Royal Commissions and inquiries

Apart from the coronavirus pandemic, the other persistent feature of 2020 was the presence of new and ongoing Royal Commissions and inquiries.

On 8 October 2018, the Governor-General established the Royal Commission into Aged Care Quality and Safety (**Aged Care Royal Commission**). In October 2019, the Commission handed down the interim report and on 22 and 23 October 2020 held a final hearing to receive closing submissions from Counsel Assisting. These submissions contained 124 recommendations for the consideration of the Commissioners, relating to the design of a new aged care system, the quality and safety controls

necessary for the system, improving the aged care workforce (including informal carers), research, and regulation. In December 2020, the Aged Care Legislation Amendment (Serious Incident Response Scheme and Other Measures) Bill was introduced into Parliament to amend the *Aged Care Act 1997*. The Bill aims in part to address issues raised in Counsel Assisting's final submissions to the Aged Care Royal Commission. On 26 February 2021, the Aged Care Royal Commission delivered its final report (in some eight volumes), which was tabled in Parliament on 1 March. The report sets out 148 recommendations most of which were canvassed in Counsel Assisting's closing submissions, with recommendations relating to legislative change, expenditure and subsidies, the manner in which care should be provided, and regulation of the aged care sector.

In response to the extreme bushfire season of 2019-20, which resulted in devastating loss of life, property and wildlife, and environmental destruction across Australia, the Royal Commission into National Natural Disaster Arrangements (**Bushfire Royal Commission**) was established to consider national natural disaster coordination arrangements. On 28 October 2020, the Bushfire Royal Commission presented its final report to the Governor-General. The report recommended a national approach to natural disasters, which calls for the Federal Government to complement and support the role of the states and territories. Additionally, the report canvassed the importance of a creating a legislative mechanism for the Federal Government to declare a state of national emergency.

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**), established in April 2019, delivered its interim report on 30 October 2020. The report details accounts and narratives of people with disability and their families, and the cumulative disadvantages experience by particular groups of people with disability, especially First Nations people and members of culturally and linguistically diverse communities. At the time of the interim report, the Chair of the Royal Commission, the former Justice Sackville, wrote to the Prime Minister requesting a seventeen-month extension to the Royal Commission. If accepted, the final report due date will be extended from April 2022 to September 2023.

Prior to the commencement of the Disability Royal Commission, the Federal Government introduced a bill into Parliament amended the *Royal Commissions Act 1902* (Cth) to afford confidentiality indefinitely to people engaging with the Royal Commission. This is significant as it signals a move toward the option of confidentiality as a means to protect and encourage witnesses coming forward in a Royal Commission. We see the potential ramifications of this development as being that private hearings will likely become more common when dealing with sensitive subject matter.

During 2020, an inquiry continued into the fitness of companies related to Crown Casino to hold a gaming licence in New South Wales. On 1 February 2021, the New South Wales Independent Liquor and Gaming Authority published its report, finding that Crown Sydney Gaming Pty Limited was not a suitable person to continue to hold the Barangaroo restricted gaming licence.

Former NSW Supreme Court Judge, Patricia Bergin, had been appointed to conduct the inquiry in 2019. Her findings concerning Crown's fitness to hold the licence had been long anticipated, especially after revelations that emerged from evidence taken in public hearings in October last year. The release of the report was well publicised, and the fallout from the findings continued for several weeks, with high profile resignations from the executive and the Board of Crown.

Among other things, the NSW inquiry recommended that:

- The *Casino Control Act 1992* (NSW) be amended to ensure that licenced casinos prevent any money laundering activities within their casino operations; and
- The Independent Casino Commission be established by separate legislation as an independent casino regulator to meet the existing and emerging risks and challenges for gaming and casinos.

These various Royal Commissions and inquiries respond to the community's desire for greater accountability in public institutions and regulated industries. Our view is that further inquiries of this nature will follow as calls for integrity measures and accountability in a variety of sectors continue to grow.

The biggest civil penalty in Australian history

Also on the topic of integrity, several of the regulators in the corporate and financial sectors – such as the Australian Competition and Consumer Commission (**ACCC**), the Australian Securities and Investments Commission (**ASIC**), and the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) – have been more active in recent times in pursuing outcomes through litigation. This is a direct response to the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

For ASIC, this approach is encapsulated in its policy of 'Why not litigate?', which is now incorporated into ASIC's most recent corporate plan released on 31 August 2020 (ASIC Corporate Plan 2020–24).

While there have been some mixed results, on 21 October 2020, AUSTRAC secured the biggest civil penalty in Australian history: a total of $1.3 billion for breaches of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). The previous record for a civil penalty in Australia was a fine of $700 million that was secured in 2018, also for breaches of anti-money laundering reporting requirements.

We consider that it is possible other sectors will see parallel increases in regulatory activity following the conclusion of a number of ongoing Royal Commissions and inquiries, which we discuss below.

The personal lawsuit against a federal judge

There was a rare challenge to the doctrine of judicial immunity in 2020, when a man decided to personally sue a Federal Circuit Court judge after he was sentenced to a year in prison for contempt in family law proceedings. After being held for seven days in custody, his conviction was overturned by the full bench of the Family Court on the basis that Judge Vasta did not afford the applicant procedural fairness. In previous family law proceedings (appealed in *Stradford & Stradford* [2019] FamCAFC 25), Judge Vasta and the applicant had the following exchange:

> *HIS HONOUR: I have told you, I will put you in jail in contempt of this court if you talk over the top of me. Do you understand? … bring your toothbrush.*

The claim against Judge Vasta alleges that his Honour departed from procedure and made orders he lacked to power to make, and therefore 'lost the protection of judicial immunity.' This challenge to

the decisions the Judge made carrying out his duties could clarify the limits of a judge acting within jurisdiction.

Additionally, the system for dealing with complaints of the federal judiciary has led some to questions about the extent to which the judiciary should be subject to supervision and review by the executive government. Currently, complaints about federal judges are made to the Chief Justice, who then have the ability to be referred to the Attorney-General. Law Council of Australia president Pauline Wright advocates for a system which operates separately to the executive in a stand-alone judicial system established by an act of Parliament.

THE YEAR AHEAD IN 2021

It seems to us that 2021 will bring far-reaching changes to Australian public law and the regulatory landscape, both in Parliament and the courts. It will be a significant year for the High Court, as two new judges are appointed to replace Bell and Nettle JJ. The new bench of the High Court will hear administrative law cases this year relating to procedural fairness, the materiality test in jurisdictional error, statutory interpretation, and the effect of errors in translation. In Parliament, 2021 could see the introduction of the Commonwealth Integrity Commission Bill, as well as substantial changes in privacy and data law.

HIGH COURT APPOINTMENTS

The composition of the High Court is changing in 2021, with the retirement of Nettle J on 1 December 2020 and Bell J on 28 February this year. Justice Steward was appointed from the Federal Court in December 2020 to replace Nettle J, and Justice Jacqueline Gleeson has been appointed from the Federal Court in March 2021 to replace Bell J.

The retirement of Bell J in particular will change the way the High Court makes decisions and particularly alter the composition of joint opinions. Her Honour was appointed to the High Court in 2009, having been a judge of the Supreme Court of New South Wales and later the New South Wales Court of Appeal since March 1999. Justice Bell, along with Chief Justice Kiefel and Keane J, formed what Professor Jeremy Gans of the University of Melbourne has called ‘the most powerful bloc of judges in the court's history’. These three judges are almost always in the majority (ie they rarely dissent), and they often write joint judgments, increasingly together with Gageler J in public law cases. In a 2017 speech entitled ‘Examining the Judge’, Bell J provided a clear statement of her rationale for preferring joint judgments to writing alone:

> *The public service that is done by the delivery of joint reasons is the clear and certain statement of the law. Professional advisers can advise their clients with some confidence as to what the law is, and judges can decide cases with some confidence in the law that they are to apply. If the price of certainty and clarity is the loss of the individual judge's "voice", I suspect that few outside the Academy would count that a bad thing.*

Although his Honour has not sat on the High Court for as long as Justice Bell, the retirement of Nettle J will also mark a change in the High Court’s approach to public law decisions. Justice Nettle was appointed in February 2015 from the Victorian Court of Appeal. His Honour was less likely than Bell J to write with the majority judges, and more often dissented or wrote separate opinions

concurring with the majority either by himself or with Edelman J. In the recent decision of *Northern Land Council v Quall* [2020] HCA 33, Nettle and Edelman JJ agreed with the orders proposed by the majority but dissented on major points of statutory construction. For example, their Honours reasoned that although the Northern Land Council had not validly delegated a statutory function to its Chief Executive Officer, it had validly empowered the CEO to act as its agent.

Justice Gleeson has been a judge in the Sydney Registry of the Federal Court since 2014. Prior to her appointment she was a barrister with a largely commercial law practice. However, a lesser-known fact about her Honour is that she also has a strong public law background, having been General Counsel at the Australian Broadcasting Authority and then Senior Executive Lawyer at the Australian Government Solicitor. Justice Steward was also appointed from the Federal Court, where he had been a judge in the Melbourne Registry since 2018. His Honour is an expert on tax and revenue law.

We will be watching closely to see what approaches the new Justices Steward and Gleeson take in public law cases and will provide updates and analysis throughout 2021.

SIGNIFICANT HIGH COURT CASES TO BE DETERMINED IN 2021

Immigration often makes up the lion's share of public law cases in the High Court, and this year will be no exception. Three upcoming cases will provide an indication of how the High Court – including the new judges – will approach significant issues in statutory interpretation, materiality in jurisdictional error, and procedural fairness.

The 'materiality' test and jurisdictional error

In *MZAPC v. Minister for Immigration and Border Protection* (**MZAPC**) the new bench of the High Court will have an opportunity to re-visit the concept of materiality in jurisdictional error. In 2019, in *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 (**SZMTA**), a majority of a five-member bench (Bell, Gageler and Keane JJ) determined that even where a decision-maker commits an otherwise jurisdictional error, the 'question that remains' for a court on judicial review is 'whether there is a realistic possibility that the Tribunal's decision could have been different' if, for example, procedural fairness had been afforded and no jurisdictional error was committed. If there is no realistic possibility of a different result, a court may hesitate before setting the decision aside. This is an example of the High Court's recent focus on applying the concept of 'materiality' to jurisdictional error, in which the reviewing court will ask whether the error deprived the applicant of a successful outcome – in other words, whether the error was material to the outcome of the decision.

Similarly to the facts in *SZMTA, MZAPC* concerned an alleged denial of procedural fairness by reason of the Tribunal's failure to disclose to the Appellant the existence of a non-disclosure notification made under s 438(1)(b) of the Migration Act by the Secretary of the Department to the Tribunal. The Tribunal made findings adverse to the Appellant's credibility and rejected his claims for protection. The Appellant sought judicial review in the Federal Court, arguing that the Tribunal had relied on adverse information about him covered by the s 438 notification without giving him particulars of that adverse information. The adverse information was an entry in the Appellant's Victoria Police record that he had been convicted, in September 2011, of the offence of 'State false name', as well as the offence of 'Drive whilst disqualified'.

In the Federal Court, Mortimer J dismissed the Appellant's appeal. Her Honour concluded that the majority decision in *SZMTA* means that, subject to any factual findings (direct or by inference) that the Tribunal took the s 438 notification information into account, the Tribunal is to be assumed not

to have done so. The problem for the Appellant was that there was nothing in the Tribunal's reasons that persuaded Mortimer J that either the Tribunal took the s 438 material into account, or that the Tribunal had formed a clear opinion the Appellant had lied. The Federal Court concluded that even if the Appellant had had the opportunity to make submissions about the s 438 material, there was no realistic possibility of a different outcome on the review. In other words, any error on the part of the Tribunal was not material to the outcome of its decision.

On 14 August 2020 the High Court granted the Appellant special leave to appeal from the Federal Court's decision. The Appellant filed reply submissions in November 2020 and the matter is yet to be listed for final hearing, meaning that the bench will include both Steward and Gleeson JJ. On appeal, the central question for the High Court will be whether an applicant for judicial review must rebut a presumption that undisclosed material omitted from the reasons for decision was not considered by the decision-maker. This question is important for the concept of materiality, as it will clarify what a visa applicant in similar circumstances to the Appellant needs to prove in order to establish that a Tribunal decision could realistically have been different had the Tribunal disclosed the existence of a s 438 notification to the applicant.

Translation and jurisdictional error

In *DVO16 v Minister for Immigration and Border Protection* (**DVO16**), the High Court will consider circumstances in which a material translation error occurred in a protection visa interview and the IAA relied on material obtained in the interview in reviewing delegate's decision under Pt 7AA of the Migration Act. The question to be resolved is whether the IAA needs to have actual or constructive knowledge of a material translation error for jurisdictional error to arise.

The Appellant was an Arabic-speaking Shi'a Muslim from Iran who arrived in Australia in 2012 and applied for refugee status. In August 2016, a delegate of the Minister rejected his claims on the basis of concerns about his credibility. On review, the IAA noted that in his written statement, the Appellant claimed he would be persecuted due to his ethnicity. The IAA noted that during an interview with the Appellant, the delegate asked the Appellant what this meant and he responded that he 'did not know'. The IAA declined to seek further information from the Appellant and affirmed the delegate's decision to refuse his protection visa application.

On appeal to the Full Federal Court, Greenwood and Flick JJ considered that although it would have been evident to the delegate that the Appellant was experiencing 'difficulties' with the translation, it would not have been 'self-evident' that there were a series of errors in the translation of a number of questions and responses, and a series of responses that were not translated at all, which only emerged later in a transcript and audio of the interview (the IAA listened to the audio of the delegate's interview). Their Honours reasoned that if the common law rules of procedural fairness had applied, it would likely have been concluded that the Appellant was denied procedural fairness by both the delegate and the IAA because of their reliance on material that was translated in error.

However, Greenwood and Flick JJ concluded that the constraints of Pt 7AA of the Migration Act were such that it was not open to conclude that the IAA either denied the Appellant procedural fairness, or otherwise acted unreasonably in declining to obtain further information. Their Honours observed that the IAA's duty to conduct a 'review' imposed by ss 473CC and 473DB of the Migration Act cannot be construed as a review of 'only factually accurate transcriptions of an interview process'. Nevertheless, Greenwood and Flick JJ distinguished the circumstances of DVO16 from cases where deficiencies in translation services are so 'manifestly apparent' that the interview process could not be said to provide any basis on which a 'review' as defined in Pt 7AA could be undertaken. In a

separate judgment, Stewart J agreed with Greenwood and Flick JJ that the appeal should be dismissed.

On 17 April 2020, the High Court granted special leave for the Appellant to appeal from the Full Court's decision. The Appellant's primary submission is that in the statutory context of a review under Part 7AA of the Migration Act, the IAA need not have actual or constructive knowledge of a material deficiency in the interview process before it could be considered that the deficient interview was 'a manifestly inadequate basis upon which a 'review' can lawfully be undertaken' in the sense identified by Greenwood and Flick JJ. The High Court heard the matter on 10 February 2020 and reserved its decision, meaning that the bench included Steward J but not Gleeson J.

Although particularly relevant to the specific context of Part 7AA of the Migration Act, this case will provide guidance on the extent of knowledge of deficient translation on the part of a decision-maker that may be required to vitiate an administrative decision.

Statutory construction – was Ms Moorcroft 'removed' from Australia?

The upcoming case of *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (**Moorcroft**) will provide an indication of the High Court's approach to statutory interpretation in 2021. The question to be resolved is whether the statutory phrase 'removed or deported from' in s 5 of the Migration Act means either:

- Being taken out of some country by or on behalf of government of that country in fact;
- Being taken out of some country validly or lawfully; or
- Whether it bears different meanings within the same provision, namely, valid or lawful removal or deportation in case of ejection from Australia, and removal or deportation in fact in the case of other countries.

The Minister refused an application by the Respondent, Ms Moorcroft, for a Special Category (subclass 444) visa on the basis that she was a 'behaviour concern non-citizen' as defined in s 5 of the Migration Act following her commission of a number of criminal offences. The background to this decision was that, on 3 January 2018, a delegate of the Minister cancelled Ms Moorcroft's previous Subclass 444 Visa pursuant to s 116(1)(e). On 4 January 2018 she was taken to Brisbane airport and required to depart Australia pursuant to s 198(2) of the Migration Act on the basis that she was an unlawful non-citizen.

Following a judicial review application from Ms Moorcroft, in June 2018 the Federal Circuit Court determined that the cancellation decision was affected by jurisdictional error, and accordingly was void. Ms Moorcroft contended that her removal from Australia in January 2018 was unlawful.. She further contended that if the removal was unlawful, then, retrospectively, it could be deemed that she was not 'removed' because the Minister did not have the power to remove her. The Federal Court allowed her appeal, concluding that although she had been 'physically removed' from Australia, by reason of the later finding of jurisdictional error she was not an unlawful non-citizen at the time, and accordingly was not 'removed' within the meaning of s 5 of the Migration Act.

On 16 October 2020, the High Court granted the Minister's application for special leave to appeal from the Federal Court's decision. In the High Court, the Minister's argument is that the retrospective nullification of the cancellation decision does not entail that Ms Moorcroft was not 'removed' from Australia for the purposes of the Migration Act. The Minister filed reply submissions in February this year and the matter is yet to be listed for final hearing, meaning that the bench will

include both Steward and Gleeson JJ. Whichever way the High Court resolves the question of interpretation on appeal, the case is likely to offer important guidance on the circumstances in which a phrase should be given a specific, statutory meaning as opposed to its ordinary or natural meaning.

OTHER DEVELOPMENTS ON THE HORIZON

Separately to the High Court's busy administrative law list in 2021, this year is likely to bring a number of substantial initiatives in Parliament. Commonwealth agencies will need to prepare for the establishment of what has been informally called the 'Federal ICAC' which could have far-reaching powers to investigate alleged corruption in the public sector. Additionally, privacy and data laws are receiving an overhaul with a review into privacy legislation and a new Bill to facilitate the sharing of data among government agencies.

Exposure draft of the 'Federal ICAC' Bill released

On 2 November last year, the Attorney-General released an exposure draft of the Commonwealth Integrity Commission Bill. The legislation aims to complement the anti-corruption regimes at the State and Federal levels by establishing a specialist agency to investigate public sector corruption, known as the Commonwealth Integrity Commission (**CIC**). The CIC would incorporate the current Australian Commission for Law Enforcement Integrity but also attract new powers and cover a broader range of public sector employees and officials.

The CIC will have a mandate covering 'regulated entities', which includes:

- The Law Enforcement division builds on the current mandate of the ACLEI, covering the Department of Home Affairs, the ACIC, AFP, AUSTRAC, the Department of Agriculture, Water and the Environment, with the addition of the ACCC, ASIC, APRA, and the ATO. The Law Enforcement division would be empowered to conduct public hearings and exercise wide-ranging investigatory powers to monitor conduct by law enforcement officers which perverts the course of justice, is an abuse of office, or that involves 'corruption of any other kind'; and
- The Public Sector division will cover Non-Corporate Commonwealth entities, Corporate Commonwealth Entities, and Commonwealth companies and subsidiaries of Commonwealth companies, as well as parliamentarians and their staff, higher education providers and some publicly funded research bodies. It also covers contracted service-providers and secondees. The Public Sector division would have similar powers to the Law Enforcement division but would not hold public hearings. It would be limited to investigating conduct that perverts the course of justice, is an abuse of office, or constitutes one of a list of specific criminal offences set out in the bill.

Public consultation on the exposure draft closed in mid-February. The bill could be presented to Parliament this year, meaning that the CIC might form part of the next Federal Budget. If passed, the bill will have significant implications for all Commonwealth agencies, and we encourage all agencies to review their integrity policies and procedures.

Privacy and data in 2021

In October 2020 the government released terms of reference and an issues paper for a review into the *Privacy Act 1988* (**Privacy Act**), which could potentially be very wide-ranging given the breadth of

the terms of reference. The terms state that the review will 'examine whether the scope and enforcement mechanisms in the Privacy Act remain fit for purpose', and includes the following specific matters:

- The scope and application of the Privacy Act;
- Whether the Privacy Act effectively protects personal information and provides a practical and proportionate framework for promoting good privacy practices;
- Whether individuals should have direct rights of action to enforce privacy obligations under the Privacy Act;
- Whether a statutory tort for serious invasions of privacy should be introduced into Australian law;
- The impact of the notifiable data breach scheme and its effectiveness in meeting its objectives;
- The effectiveness of enforcement powers and mechanisms under the Privacy Act and how they interact with other Commonwealth regulatory frameworks; and
- The desirability and feasibility of an independent certification scheme to monitor and demonstrate compliance with Australian privacy laws.

If adopted, these reforms are likely to increase the privacy obligations of agencies subject to the Privacy Act, and also enhance the penalties for non-compliance with those obligations. The Attorney-General's Department is currently considering submissions received in response to the issues paper and there will be a further opportunity to provide feedback on an upcoming discussion paper scheduled for release this year.

In other information law news, the Data Availability and Transparency Bill 2020 was introduced into Parliament on 9 December 2020. The bill does not propose to require or mandate the sharing of information. Rather, it creates a framework in which government agencies ('data custodians') can share public sector data to 'accredited users' such as other government agencies, state and territory authorities, and non-government entities such as universities. Public sector data is broader than the category of personal information, and includes any data lawfully collected, created or held by or on behalf of a Commonwealth body. Under the terms of the bill, public sector data may be shared for the purposes of the delivery of government services, informing government policy and programs, and for research and development purposes.

The bill will establish the National Data Commissioner (currently within the Department of Prime Minister and Cabinet) as an independent regulator to monitor the framework. Agencies will also be subject to a compliance scheme within the bill to ensure that appropriate safeguards are upheld in the sharing of public sector data.

As much of people's personal and business activities move online, we see the data and information sector becoming increasingly regulated to balance the rights and responsibilities of individuals, government agencies, and private sector organisations.

This paper was written by Will Sharpe, Partner, Michael Palfrey, Partner and Neil Cuthbert, Senior Associate.

WILL SHARPE
PARTNER
T: 02 6151 2241
E: wsharpe@hwle.com.au

MICHAEL PALFREY
PARTNER
T: 02 6151 2164
E: mpalfrey@hwle.com.au

NEIL CUTHBERT
SENIOR ASSOCIATE
T: 02 6151 2194
E: ncuthbert@hwle.com.au