

# AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL WEBINAR SERIES 2022

Professional Development and Networking for  
the In-House Legal Community

## **Session 7 - Administrative law in 2021 and the year ahead in 2022**

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## Acknowledgement of Country

In the spirit of reconciliation, HWL Ebsworth Lawyers acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community.

We pay our respect to their Elders past and present, and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

## Introduction

- In 2021, Australian courts considered a wide range of public law issues, from remaking decisions under the *Acts Interpretation Act 1901* to civil penalties for corporate wrongdoing.
- We next focus on two High Court statutory interpretation decisions on the ‘re-enactment presumption’, and the issue of whether a word should bear its ordinary meaning or a narrower legal meaning.
- We then turn to consider the year ahead in the courts and in Parliament, and conclude that this could be a year of increased regulatory activity in the privacy and data sector.

## Re-making decisions and s 33(1)

- The High Court in ***Minister v Makasa* [2021] HCA 1** considered the role of s 33(1) of the *Acts Interpretation Act 1901* in re-making decisions where the underlying statute provides for a 'two-stage' decision making process.
- Section 501(2) of the *Migration Act 1958* provides for the formation of a 'reasonable suspicion' and then the exercise of discretion.
- The High Court unanimously concluded that s 33(1) cannot mean the decision-maker is able simply to re-exercise the discretionary component of s 501(2).
- There must also be some factual basis to form the 'reasonable suspicion' which is a pre-requisite to exercising the discretion.

## The new regulatory landscape

- **VW v ACCC [2021] FCAFC 49** marks a shift in regulation of corporate misconduct. Historically, courts have tended to approve pecuniary penalties jointly submitted by a regulator and a contravening party.
- Courts may be increasingly prepared to reject an agreement between the parties and impose a higher penalty.
- In *VW v ACCC* the parties submitted a proposed penalty of \$75 million but the primary judge considered this ‘manifestly inadequate’ and instead imposed a penalty of \$125 million (this was conduct of the ‘worst kind’). The Full Court dismissed VW’s appeal.

## Applying the 're-enactment presumption'

- Where words in an Act have received judicial interpretation and the legislature has subsequently repeated the words, the legislature can be taken to have intended the judicially interpreted meaning.
- The presumption split the High Court 4:3 in ***Director of Public Prosecutions Reference No 1 of 2019 [2021] HCA 26***.
- Gageler, Gordon and Steward JJ (Edelman J agreeing) concluded that amendments to the *Crimes Act 1958* (Vic) 'could only be understood' on the basis that the legislature was aware of, and accepted the interpretation [of] the mental element of recklessness found in *R v Campbell* [1997] 2 VR 585.

## Was Ms Moorcroft 'removed' from Australia?

- In ***Minister v Moorcroft* [2021] HCA 19** the High Court considered whether 'removed ... from Australia' should be construed as either:
  - a person is taken out of the country in fact; or
  - removal legally effected in accordance with the Migration Act.
- The High Court unanimously concluded that in this context 'removed' means the administrative act of removal, not a more specific legal meaning.
- Ms Moorcroft had been removed from Australia in fact, even though there was actually no legal authority to do so.

## What is a 'matter'?

- In ***Hobart International Airport v. Clarence City Council***, the High Court will consider whether there is a 'matter' where a third party seeks declaratory relief as to the interpretation or application of a contract, but where the parties to the contract agree on its interpretation.
- The airports submit that the Full Federal Court erred in finding that a justiciable controversy may exist even where the contracting parties agree as to the interpretation of a contract.
- The councils say they had a role in notifying equivalent amounts to the airports for payment, and are 'participants in the process of receiving the benefits of the contract'.



## The year of regulating privacy

- Last year saw significant developments in the protection of individual privacy and increased government transparency and we see this trend continuing in 2022. In 2021, we saw the OAI, the Australian privacy regulator, initiating **privacy investigations** into the complex systems of entities that handle personal information both on and off-shore.
- In October 2021 the government released an exposure draft of the **Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021**. The Bill would significantly increase the maximum penalty for corporations that engage in serious or repeated interferences with privacy.

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