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Administrative law in 2021 and the year ahead in 2022

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As all levels of government in Australia respond to new policy challenges, we see administrative law undergoing a period of significant change. The past 12 months have witnessed the ongoing responses to COVID-19 and natural disasters, as well as a number of Royal Commissions and inquiries. We observe government playing an increasingly central part in Australians' lives and we do not see a return to 'small government' in the near future. These decisions of government necessarily affect Australians' everyday lives, and in administrative law are likely to lead to new legal challenges and mechanisms of review. Administrative law is keeping pace with these new forms of government activity.

We have observed the courts in 2021 grappling with some unusual administrative law issues. First, the High Court considered the circumstances in which s 33(1) of the *Acts Interpretation Act 1901* will allow a decision-maker to re-make an administrative decision where the statute provides for a two-stage decision-making process. Second, in the realm of civil regulation, the Full Federal Court's decision to impose a large pecuniary penalty on Volkswagen indicated a potential a shift in judicial decision-making surrounding corporate misconduct. We also consider cases dealing with derivative Crown immunity, the interpretation of a tax treaty, and a novel duty of care to consider future climate harm in decision-making.

Next we turn to significant cases from 2021 which deal with the application of statutory context to determine the meaning of the text. A criminal law appeal split the High Court 4:3 on the application of the re-enactment presumption, with the majority being prepared to infer that the Victorian legislature should be imputed to intend that the word ‘recklessly’ be construed according to previous case law. The High Court's consideration of Ms Moocroft's removal from Australia is an example of the High Court using a contextual approach to determine that a statutory phrase in the in the *Migration Act 1958* should bear its ordinary meaning and not some narrower legal meaning. We then highlight a decision of the new Chief Justice of New South Wales that indicates on occasion the specific context in which legislation was passed (such as in response to a High Court decision) can affect the meaning of a provision.

Looking ahead to 2022, we highlight a significant upcoming case in the High Court. The case will provide further opportunity to clarify the application of materiality to jurisdictional error, and what applicants will need to show in order to establish that they may have been deprived of a successful outcome.

We conclude that 2022 could be a year of privacy reform and increased regulatory activity in the privacy and data sector, as concerns about information security, hacking, and the use of 'big data' continue. We have seen a number of privacy investigations into the activities of private-sector entities by the Information Commissioner, with a further investigation ongoing. We also provide an update on the *Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021*, an exposure draft of which was released in October last year, which would introduce specific privacy rules for online platforms.

Significant administrative law cases last year

Materiality and jurisdictional error

MZAPC v Minister for Immigration and Border Protection [2021] HCA 17 confirmed that the party seeking to establish a jurisdictional error must also establish that the error is material. This is the first case in which the Court has substantively considered the issue of onus in materiality following *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3. The principle of materiality states that even where a decision-maker commits an otherwise jurisdictional error, the question 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 (at [48]-[49]). The principle of materiality was not in dispute. But which party should bear the onus of proving materiality? This issue split the High Court 4:3, along the following lines:

(a) a majority of Kiefel CJ, Gageler, Keane and Gleeson JJ concluded that the onus of proof is borne by the party seeking to prove that the non-compliance was material and therefore involved jurisdictional error; and

(b) Gordon and Steward JJ (with whom Edelman J agreed in a separate opinion) concluded that the onus of proof is borne by the party asserting immateriality and denying that the non-compliance involved jurisdictional error.

In light of the majority's reasoning in *MZAPC*, applicants will need to put on evidence that they were deprived of a successful outcome – in other words, that the error was material to the decision. Kiefel CJ, Gageler, Keane and Gleeson JJ observed that when considering materiality, '[t]he inquiry is backward looking and concerns what the decision-maker did in the particular case'. By that reasoning, the majority concluded (at [60]):

> *Where materiality of a breach of an express or implied condition of a conferral of statutory decision-making authority is in issue in an application for judicial review of a decision on the ground of jurisdictional error, the onus of proving by admissible evidence on the balance of probabilities historical facts necessary to satisfy the court that the decision could realistically have been different had the breach not occurred lies unwaveringly on the plaintiff.*

Gordon and Steward JJ preferred a two-step process to establish materiality. First, requiring the applicant to establish a connection between the identified error and the decision made, and then, contrary to the majority, requiring the Respondent to show that the error could not have made a difference. Their Honours emphasised the benefits of protecting individuals from unlawful exercises of public power and observed that it is practical to require a decision maker to establish that any error could not have made a difference to the decision that was made.

For government lawyers, *MZAPC* clarified that it is not for a decision-maker or respondent to establish *immateriality* in an identified error. To the extent that this position was not settled after *SZMTA*, the onus now clearly lies on the applicant to establish materiality.

Re-making administrative decisions and the role of section 33(1)

If a decision-maker seeks to re-make an administrative decision, it can be difficult to discern the precise steps required to ensure that the new decision is legally defensible. This is especially the case in multi-stage decision-making processes, where the decision-maker is required to form a state of mind such as a reasonable belief before proceeding to exercise a discretion. It may not be so straightforward as re-exercising the discretion.

In *Minister for Immigration and Border Protection v Makasa* [2021] HCA 1 (***Makasa***), the High Court considered the process set out in s 501(2) of the *Migration Act 1958* (**Migration Act)**, and the question of whether a decision under that section can be re-made in the absence of further information about whether a person passes the character test.

In *Makasa*, the issue was whether the Minister could exercise a power to re-make a decision which had already been set aside by the Administrative Appeals Tribunal (**Tribunal**), on the basis of substantially the same facts as the original decision. In concluding that the Minister could not do so, the High Court considered the interaction between s 33(1) of the Acts Interpretation Act and the power to cancel a visa in s 501(2) of the Migration Act.

In 2009, Mr Makasa, a permanent resident, was sentenced to three concurrent terms of imprisonment, each for two years. In 2011, a delegate of the Minister cancelled Mr Makasa's permanent resident visa on character grounds pursuant to s 501(2) of the Migration Act. After Mr Makasa sought merits review, the Tribunal substituted a decision that Mr Makasa's visa should not be cancelled pursuant to s43(1)(c)(i) of the *Administrative Appeals Tribunal Act 1975* (**AAT Act**).

In 2017, Mr Makasa was convicted of two further offences, neither of which resulted in a sentence of imprisonment. The Minister then personally purported to cancel Mr Makasa's visa, again pursuant to s 501(2), on the basis that Mr Makasa failed the character test solely by reason of the 2009 convictions but also having regard to the 2017 convictions.

On appeal, the Full Federal Court (Allsop CJ, Kenny and Banks-Smith JJ, Besanko J agreeing, Bromwich J dissenting) allowed the appeal and quashed the Minister's decision. The Minister appealed to the High Court, which unanimously dismissed the appeal.

The High Court began by observing that s 501(2) of the Migration Act establishes a two-stage decision-making process, as follows:

(a) the decision-maker forms a reasonable suspicion that the visa holder in question does not pass the character test; and

(b) if the decision-maker forms a such reasonable suspicion – the decision-maker then exercises the discretion either to cancel the visa or not to cancel the visa.

Whether the decision is to cancel the visa or not to cancel the visa, the decision is the end point of an exercise of the power conferred by s 501(2) of the Migration Act. The relevant question is whether that power can be re-exercised having regard to the power to re-exercise decision-making powers in s 33(1) of the Acts Interpretation Act.

Section 33(1) provides that a statutory power 'may be exercised … from time to time as occasion requires'. The section does not itself confer any power, but rather requires that a provision conferring a power be interpreted as authorising the power it confers to be exercised and re-exercised from time to time, overriding the common law doctrine that a statutory power is exhausted by its first exercise. In this context, their Honours observed (at [45]) that s 33(1) does not 'alter the incidents' of the power spelt out in the underlying provision – a decision-maker will still need to comply with the requirements at both stages of the s 501(2) decision-making process when remaking a decision pursuant to that section.

This significantly limits the potential scope of the application of s 33(1) to s 501(2) of the Migration Act. Section 33(1) authorises the re-exercise of both steps of the decision-making process under s 501(2), not just the exercise of the discretion. In the absence of further information modifying the factual basis for the Minister's decision (eg, a sentence of imprisonment for the requisite length), the High Court reasoned that the Minister was purporting to re-exercise the second stage of the decision-making process only, which was 'inimical' to s 33(1) of the Acts Interpretation Act.

The High Court also reasoned that, although the legislative scheme for decisions under s 501(2) does not displace s 33(1) where subsequent events or further information not previously before the decision-maker provide a different factual basis for a decision, the scheme exhibits a contrary intention in the absence of subsequent events or further information.

'Inherent' within the Tribunal's statutory function, according to the High Court's decision, is the intention not to allow further re-exercises of a power by a primary decision-maker after a re-exercise of that power by the Tribunal under paras 43(1)(b) or (c)(i) of the AAT Act on review of an earlier exercise of power by the primary decision-maker. In those circumstances, the High Court noted that the function of the Administrative Appeals Tribunal is to bring finality to the administrative decision-making process, and observed (at [50]) that:

> *[The Tribunal's] function would be reduced to a mockery were the subject-matter of the decision made by the AAT on review able to be revisited by the primary decision-maker in the unqualified re-exercise of the same statutory power already re-exercised by the AAT in the conduct of the review.*

Accordingly, the discretion in s 501(2) can only be re-exercised if subsequent events or further information 'provide a different factual basis' for the decision-maker to form a reasonable suspicion that a visa holder does not pass the character test at the first stage of the requisite two-stage decision-making process. Only then will the discretion to cancel the visa be enlivened. The High Court concluded that the appeal should be dismissed.

The High Court's judgment in *Makasa* reminds us that there is a presumption that decisions made by the Tribunal on merits review will be final. As the Court observed (at [51]), the fact that s 43(6) of the AAT Act 'deems' the Tribunal's decision to be a decision of the original decision-maker should not be read as requiring a Tribunal decision to be treated as no more than an exercise of power by the primary decision-maker which the primary decision-maker is able to re-exercise, simply by virtue of s 33(1) of the Acts Interpretation Act.

It is important to remember that the power to remake decisions in s 33(1) of the Acts Interpretation Act cannot enable a decision-maker to go beyond the limits of the original decision-making power. The words 'as the occasion requires' in s 33(1) implicitly acknowledge that the decision-maker will still be constrained by the underlying statute pursuant to which the original decision was made.

In determining the scope of any power to re-make a decision, government lawyers should carefully step through the process provided for in the enabling statute. If the statute provides a multi-stage decision-making process, the fresh decision will need to follow each stage and avoid simply re-exercising a discretionary component of the decision. As was the case in *Makasa*, it may also be necessary to consider whether information has come to light that provides a new factual basis for reaching the state of satisfaction required to re-make the decision.

Civil regulation – Volkswagen's penalty was not 'manifestly excessive'

In the wake of the Financial Services Royal Commission and increasing litigation from Australia's corporate regulators, *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49 (***VW v ACCC***) is the latest instalment in a shift in judicial decision making surrounding corporate misconduct.

Historically, where an entity has admitted contraventions of a regulatory regime, the entity and a regulator may agree on what they think is an appropriate pecuniary penalty and submit that penalty to the court for consideration. Although courts are not bound by the parties' agreed penalty, they have often approved such agreements: see *Trade Practices Commission v Allied Mills Industries Pty Ltd (No 5)* (1981) 60 FLR 38 at 41.

VW v ACCC indicates that in cases involving 'egregious' breaches of Australian law, courts may be increasingly prepared to reject an agreement between the parties and impose a higher penalty if it is appropriate in all the circumstances to do so. In light of *VW v ACCC*, regulators should carefully assess the basis on which they submit a proposed penalty to the court to ensure that the penalty is consistent with the underlying factual matrix and the magnitude of the contravening conduct.

In October 2015 it came to light that that by using prohibited engine control software, Volkswagen was able to falsify its vehicles' emissions ratings and pass pollution tests. Volkswagen had been doing so in a course of conduct stretching over more than four years.

The Australian Competition and Consumer Commission (**ACCC**) commenced proceedings alleging that Volkswagen had contravened s 29(1)(a) of the *Australian Consumer Law: Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166. At the relevant time, the maximum penalty payable for each contravention of s 29(1)(a) by a body corporate was $1.1 million. Volkswagen ultimately admitted 473 contraventions of the Australian Consumer Law. The ACCC and Volkswagen jointly submitted to the Federal Court that a pecuniary penalty of $75 million was appropriate.

The primary judge determined that a penalty of $75 million would be 'manifestly inadequate' and its acceptance by the ACCC reflected an 'overly pragmatic approach' on its part. His Honour concluded (primary judgment at [238]):

> *It seems to me that all that can be said about the $75 million agreed penalty propounded by the parties is that it is the amount which [Volkswagen] is prepared to pay and which the ACCC is prepared to accept in order to settle both of the regulatory proceedings.*

The primary judge instead imposed a penalty of $125 million and in doing so, reasoned as follows:

(a) Volkswagen had 'never shown any contrition for its outrageous contraventions' of the Australian Consumer Law and had not co-operated with the ACCC's investigations into its conduct (at [263] and [265]);

(b) the size and profitability of Volkswagen's business warranted a penalty sufficient to achieve both specific and general deterrence (at [220]-[221]); and

(c) Volkswagen's management personnel were involved in the contravening conduct, magnifying the deliberate nature of the contraventions and adding to the fact that they were systematic, covert, and occurred over a number of years (at [273]).

Volkswagen appealed to the Full Federal Court. The Full Court dismissed Volkswagen's appeal, and concluded that the primary judge's exercise of discretion did not miscarry in any material way and that 'the penalty imposed was not excessive, let alone manifestly excessive' (appeal judgment at [6]). The higher penalty of $125 million stood. On 15 November 2021, the High Court refused Volkswagen's application for special leave to appeal from the Full Court's decision.

VW v ACCC re-affirms that the determination of the appropriate pecuniary penalty for an admitted contravention of a regulatory regime is a matter for the court's discretion. In formulating an appropriate penalty, regulators should assess the gravity of contravening conduct and the particular characteristics of the contravenor against the factors summarised in *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* [2016] FCA 1516 at [87]-[88] which go to the objective seriousness of the contravention and the circumstances in which the conduct was undertaken. In *VW v ACCC*, it was relevant that Volkswagen was a large global company that had engaged in 'systematic, deliberate and covert' deception of Australian consumers (and Australian regulators) for nearly five years.

If a regulator and a contravening entity make submissions jointly proposing an agreed penalty, and if the court is persuaded that the agreed penalty is appropriate, it may be 'highly desirable in practice' for the court to accept the agreement: *Australian Competition and Consumer Commission v Lorna Jane Pty Ltd* [2021] FCA 852 at [13]. However, the legitimate regulatory goal of promoting consistency in outcomes should not cloud the reality that the Federal Court is unlikely to rubber-stamp an 'overly pragmatic' agreement. As the Full Court observed in *VW v ACCC* (at [26]), the public interest in 'predictability of outcomes cannot override the statutory directive' for the court to impose a penalty which it considers to be proportionate to the gravity and circumstances of the wrongdoing.

Specific to the consumer law context it is worth noting that the civil penalty provisions of the *Australian Consumer Law* have been amended since *VW v ACCC*, to increase significantly the maximum penalty for unfair practices. If the same conduct were engaged in today, the applicable penalty for each contravention would be the greater of $10 million or 10% of Australian-connected turnover of the relevant corporate group per contravention (see s 224(3A) of the Australian Consumer Law). If an entity with an Australian-connected turnover comparable to Volkswagen admitted hundreds of contraventions following these amendments, it could potentially mean billions of dollars in aggregate maximum penalties.

Derivative Crown immunity

Historically, the Crown is immune from statute law unless it is expressly bound, or necessarily intended to be bound, by the statute. Accordingly it is a rule of statutory construction that legislative provisions are *prima facie* inapplicable to the Crown. This is the doctrine of Crown immunity. Derivative Crown immunity means that if a statutory provision when applied to a particular individual or corporation would adversely affect some proprietary right or interest of the Crown (whether legal, equitable or statutory), the shield of the Crown's immunity will extend to that person or corporation.

Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd [2021] FCA 720 (***NSW Ports***) indicates the importance of considering the extent to which Commonwealth or State government agencies will be shielded by Crown immunity in their commercial dealings, and also whether derivative Crown immunity may extend to parties with which an agency is dealing.

The *Competition and Consumer Act 2010* (Cth) (**CCA**) provides an example of where the Crown may be bound by statute. Pursuant to s 2A and s 2B the Crown will not be subject to the provisions of the CCA unless it is considered to be 'carrying on a business, either directly or by an authority of [a] State or Territory'. It follows that the Crown will be immune from the CCA's prohibition on 'anti-competitive conduct' (s 45) unless it is deemed to be carrying on a business.

In *NSW Ports*, the State of New South Wales (**NSW**) had entered into deeds with two of the respondent port companies (**NSW Ports**) to encourage them to divert container cargo away from Port Botany and

Port Kembla towards the Port of Newcastle as part of privatising the former two ports. The Australian Competition and Consumer Commission (**ACCC**) alleged that two clauses in the deeds had the purpose and/or effect or likely effect of substantially lessening competition within the meaning of s 45 of the CCA. The ACCC submitted that the State of NSW was carrying on the business of operating the relevant ports, and that it took the decision to privatise two of those ports in the course of carrying on that business. It submitted that in implementing the decision, the State decided to enter into a clause that would protect two bidders for the port leases from the competing business of a third port (at [320]). The ACCC sought pecuniary penalties in respect of the alleged contraventions of the CCA and permanent injunctions preventing NSW Ports from enforcing the impugned clauses.

Jagot J found that the State of NSW had the benefit of Crown immunity. This result followed from her Honour's finding that the State of NSW was not ‘carrying on a business’ for the purposes of s 2B of the CCA. Her Honour observed that the State did not decide to privatise two of the ports in carrying on the business of operating those two ports, or the Port of Newcastle. It decided to privatise the ports as a matter of government policy. The impugned clause served the purpose of ensuring that bidders did not discount on their bids on account of the risk that State policy might change, but ‘had nothing to do with those businesses’ (at [342]). Her Honour observed that the State structured the operation of the ports as three separate businesses through legislation creating three State-owned corporations. When it came to the decision to privatise the ports, the State-owned corporations had no role in this save for being divested of their assets. The privatisation decision occurred ‘outside the context of the operation of any business’ (at [350]). Accordingly, s 45 of the CCA did not apply to the State of NSW in its making and giving effect to the impugned clause in the deed.

Jagot J then considered the role of NSW Ports and whether it also had the benefit of Crown immunity. The issue was whether the application of s 45 to NSW Ports would 'adversely affect some proprietary right or interest of the Crown, legal equitable or statutory' consistent with *Wynyard Investments Pty Ltd v Commissioner for Railways* (1955) 93 CLR 376 at 394. Her Honour observed that, subject to any contrary intention, s 45 would not apply to NSW Ports if it had the effect of divesting the State of NSW of some legal right (at [360]). Her Honour concluded that if s 45 applied to NSW Ports such that it could not give effect to the impugned clause in the deed, this would necessarily divest the State of NSW of its capacity to privatise the ports under the legislation that enabled the privatisation. The NSW legislation vested specific statutory rights in the NSW Treasurer to make decisions authorising privatization, and evinced an intention that the Treasurer’s decision-making power should not be constrained by a Commonwealth law. Equally, the CCA did not evince an intention that s 45 should operate to divest the State of NSW of any legal right.

The result was that s 45 did not apply to the conduct of NSW Ports in making and giving effect to the impugned clause in the deed because it was protected by derivative Crown immunity. The ACCC’s application was dismissed.

The NSW Ports case has a number of implications for both State and Commonwealth government agencies and regulators. First, in commercial transactions to which the CCA might apply, there may be a question as to what actions are being taken as matters of government policy and what is being pursued in the course of the Crown carrying on a business. Second, the decision serves a reminder that legislation may be presumed not to apply to a party engaging in commercial dealings with the Crown if applying the legislation would 'interfere' with a proprietary, legal, equitable or statutory right of the Crown. In *NSW Ports*, the NSW legislation enabled the Treasurer to negotiate and contract on terms that may otherwise involve the other party contravening the CCA.

For regulators, the doctrine of derivative Crown immunity needs to be carefully considered before bringing action against a private entity that is party to a commercial arrangement with the Crown. Following *NSW Ports*, particular attention needs to be paid to the legislation that enabled the decision to enter into an arrangement with the entity, to discern whether the application of the regulatory scheme would interfere with a statutory right of the Crown.

Statutory interpretation I: Applying the 're-enactment presumption'

The High Court in *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26 (***DPP Reference No 1***) had the opportunity to consider the application of the re-enactment presumption to s 17 of the *Crimes Act 1958* (Vic) (**Crimes Act**). The presumption holds that where certain words in an Act have received judicial interpretation, and the legislature has repeated them without any alteration in a subsequent statutory provision, the legislature can be taken to have used those words according to the meaning already judicially attributed to them.

The application of the presumption split the High Court 4:3. Gageler, Gordon and Steward JJ (with whom Edelman J agreed in a separate judgment) concluded that the presumption applied to s 17. Chief Justice Kiefel, Keane and Gleeson JJ jointly dissented and instead considered that 'no occasion' for the application of the principle arose (at [24] and [31]).

The issue before the High Court was the interpretation of the term 'recklessly' in s 17 of the Crimes Act which provides that '[a] person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence', and whether the term 'recklessly' engaged the re-enactment presumption.

The term 'recklessly' was not defined in the Crimes Act, however, in *R v Campbell* [1997] 2 VR 585 (***Campbell***), the Court of Appeal held that in order for a person to be convicted of recklessly causing serious injury for the purpose of s 17, the prosecution must establish that the person foresaw that serious injury *probably* would result from the act or omission which in fact caused the serious injury. Conversely, in *Aubrey v The Queen* (2017) 260 CLR 305 (***Aubrey***), the High Court considered the meaning of 'recklessly' for the purpose of the offence of maliciously inflicting grievous bodily harm in s 35(1)(b) of the *Crimes Act 1900* (NSW), and concluded that recklessness meant foresight of the *possibility* of harm. In *DPP Reference No 1*, the trial judge had directed the jury according to the probability threshold in *Campbell* rather than the possibility threshold in *Aubrey*, and the accused was acquitted, so the meaning of the recklessness threshold was in dispute.

Following the judgment in *Campbell*, two relevant enactments were passed which directly concerned s 17 of the Crimes Act: the *Sentencing and Other Acts (Amendment) Act 1997* (Vic) (**1997 amendments**) and the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) (**2013 amendments**).

The 1997 amendments increased the maximum penalty for recklessly causing serious injury in s 17 of the Crimes Act to 15 years' imprisonment, an increase of 50 percent. The 2013 amendments included definitions of 'injury' and 'serious injury', and inserted new 'gross violence' offences. According to the Explanatory Memorandum, the elements of the new gross violence offences were intended to 'use the elements of the existing offences of causing serious injury intentionally or recklessly under sections 16 and 17 of the Crimes Act', which (at least for s 17) included the element of recklessness. In introducing the reforms, the Victorian government had regard to a report of the Sentencing Advisory Council (**SAC**). The SAC report stated that 'recklessness' in s 17 of the Crimes Act will be made out if the prosecution

proves beyond reasonable doubt that the 'accused foresaw that his or her actions would probably cause serious injury'.

After recounting this series of legislative amendments, Gageler, Gordon and Steward JJ observed (at [50]) that the 2013 amendments 'could only be understood on the basis that the legislature was aware of, and accepted … the *Campbell* interpretation [of] the mental element of recklessness'. In relation to the re-enactment presumption, their Honours reasoned that, where legislation is often amended and judicial decisions carefully scrutinised by those responsible for amendments, the 'presumption may be applicable because the legislative history shows an awareness by Parliament of a particular judicial interpretation' (at [52]).

In the view of Gageler, Gordon and Steward JJ, the presumption applied to s 17 with the effect that the 'foresight of probability' test in *Campbell* should stand – unless specifically addressed by the Victorian legislature – because:

(a) the 1997 and 2013 amendments were significant and substantive, creating a change to the meaning of 'serious injury' in the Crimes Act (at [53]);

(b) 'temporal proximity' between the relevant judicial decision and the introduction of the statutory text is a relevant factor in determining whether the presumption should apply, and the 1997 amendments were made just two years after *Campbell* was decided. The 2013 amendments were contemporaneous with many subsequent decisions of the Court of Appeal which applied *Campbell* (at [54]);

(c) the 1997 and 2013 amendments also followed expert reviews and extensive consultation with stakeholders in the criminal justice system, which is another factor indicating that the presumption may apply. Their Honours considered that it would be 'difficult to imagine' that *Campbell* was not known to those in the field as a decision of 'considerable significance' to the meaning of recklessness. In relation to the 2013 amendments, the SAC report did expressly identify the meaning of recklessness by reference to the *Campbell* standard (at [56]); and

(d) furthermore, Gageler, Gordon and Steward JJ noted that *Campbell* was decided more than 25 years ago, and since that date it has been consistently followed in Victoria. The High Court will be reluctant to depart from long-standing decisions of State courts on the construction of State statutes, particularly where those decisions 'have been acted on in such a way as to affect rights' (at [59]).

Their Honours also concluded that unfairness would follow if the meaning of recklessness was 'changed retrospectively' by the High Court with the result that potentially criminal conduct which had occurred previously (conduct that has either not been charged, or has been charged but not yet tried) would attract the lower 'foresight of possibility' standard of recklessness in *Aubrey* contended for by the DPP (at [59]).

Edelman J agreed with the joint judgment, and concluded (at [63]) that:

> *Parliament is best understood to have intended to leave the essential meaning and development of the concept of recklessness in s 17 to the judiciary. Parliament has eschewed the strong call to define the concept of recklessness, preferring simply to refer to the developing judicial concept of recklessness by which "in the absence of a contrary indication in the statute,*

> *the statute speaks continuously to the present, and picks up the case law as it stands from time to time.*

The majority judges accordingly determined that the DPP's appeal should be dismissed. The higher standard of recklessness, that of 'probability' as set out in *Campbell*, applied to s 17 by reason of the re-enactment presumption.

Kiefel CJ, Keane and Gleeson JJ, in the minority, disagreed with the majority's reasoning. In relation to the 1997 amendments, the minority considered that there was nothing to suggest that the legislature 'turned its mind to *Campbell*' (at [24]). Their Honours pointed out that although the presumption is directed towards repetition of statutory language, the 1997 amending provision actually made no reference to the word 'recklessly', and merely increased the penalty for recklessness consistent with perceived community expectations. While the 2013 amendments did repeat the word 'recklessly', their Honours concluded that there were other indications that the presumption should not apply, including that the SAC report also alluded to the mental element of foresight that an action 'could cause' serious injury, more consistently with the 'foresight of possibility' standard in *Aubrey*.

Statutory interpretation II: Was Ms Moorcroft 'removed' from Australia?

In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* [2021] HCA 19, the High Court considered the question of whether the phrase 'removed … from Australia' in para (d) of the definition of 'behaviour concern non-citizen' in the Migration Act should be construed as either:

(a) meaning that a person is taken out of the country in fact; or

(b) requiring that the removal was legally effected in accordance with Div 8 of Pt 2 of the Migration Act.

The High Court concluded that 'removed … from Australia', in this context, means the administrative act of removal and does not denote a more specific legal meaning of 'removed in accordance with the Migration Act'. This decision is an interesting and instructive contrast with the next case we will consider (*Sydney Seaplanes Pty Ltd v Page* [2021] NSWCA 204), in which the NSW Court of Appeal concluded that the surrounding context indicated instead that the ordinary or literal meaning of a statutory phrase should be displace in favour of a narrower, legal meaning.

On 24 December 2017, after four years in Australia, Ms Moorcroft left the country for her home country of New Zealand. She intended to come back a few months later. On her arrival back in Australia, Ms Moorcroft was given a Special Category visa. However, the next day her visa was cancelled. On 4 January 2018, Ms Moorcroft was taken to Brisbane Airport and required to depart from Australia.

Ms Moorcroft successfully had the purported cancellation decision quashed by the Federal Circuit Court, by consent, because the Minister accepted that Ms Moorcroft was not an unlawful non-citizen on 4 January 2018 and that as such, there was no power to remove her. Subsequently, Ms Moorcroft attempted to re-enter Australia. However, when she arrived on 29 January 2019 she was refused a Special Category visa because she was deemed a 'behaviour concern non-citizen'. Paragraph (d) of the definition of 'behaviour concern non-citizen' in s 5(1) of the Migration Act provides:

> *"behaviour concern non-citizen" means a non-citizen who:*
>
> *…*

(d) has been removed or deported from Australia or removed or deported from another country …

Neither 'removed' nor 'deported' is a defined term in the Migration Act.

Ms Moorcroft again went to the Federal Circuit Court, which dismissed her application, finding that she had been removed from Australia on 4 January 2018 and that the fact of her removal meant that she was a 'behaviour concern non-citizen' within para (d). On appeal, Collier J in the Federal Court allowed Ms Moorcroft's appeal, and concluded that:

> *[30] … whether [Ms Moorcroft] falls under the definition of "behaviour concern non-citizen" must depend on whether he or she has been "removed" from* ***Australia within the meaning of the Migration Act*** …
>
> *[31] Although the literal meaning of "remove" may encompass all physical removals from Australia, the relevant statutory context, in particular Pt 2 Div 8 of the Migration Act, demonstrates that "remove" has a more confined meaning in the Migration Act than simple* ***physical*** *removal …* [emphasis in original]

The High Court unanimously rejected this reasoning. The joint judgment began by examining the text of para (d) of the definition of 'behaviour concern non-citizen' in its surrounding context, beginning with the other elements of that definition. The Court observed that it is significant that the definition as a whole refers to 'governmental acts': paras (a) to (c) are concerned with judicial acts (conviction, sentences to death or imprisonment, findings of guilt and acquittal), while paras (d) and (e) are concerned with executive acts. These elements of the definition are 'apparently convenient proxies for identifying individuals of "concern" by reason of their past behaviour' and this is to be determined by matters of public record (ie, whether they have been required to leave Australia or another country) (see ([16]).

Next, the Court noted that the legal acts referred to in paras (a) to (c) can be quashed or reversed by a court with the result that there is no decision within the meaning of paras (a) to (c). Ms Moorcroft argued for a similar reading of para (d), in the case of a removal subsequently found to have been made on the basis of an invalid decision, as it was in her case. But the Court considered that while assessing whether a decision within the scope of paras (a) to (c) has been quashed is 'a relatively simple matter', by contrast, the lawfulness of a removal or deportation order can raise issues about the 'relevant facts and circumstances, the relevant laws or the application of laws to facts and circumstances' (at [18]). In Ms Moorcroft's case, there was a public record of the quashing order, but that order did not change the 'historical fact' that she had been removed from Australia, which is a 'separate event' from the event of the purported cancellation decision (at [19]). On Ms Moorcroft's construction, delegates would have to engage in a 'complex and time-consuming evaluative assessment as to the circumstances of the person's removal' from Australia, and it is not readily to be supposed that this was Parliament's intention (at [22]).

Further, the High Court reasoned that a literal interpretation of 'remove' avoids the possibility of delegates of the minister being required to assess the legality of actions of foreign governments. The Court noted that where a constructional choice is available, the Court should incline against a construction that would require the Executive on occasion, and ultimately Australian courts, to assess the legality of actions of other governments. It applies in this case because the definition in para (d) involves removal from both Australia and foreign countries.

Finally, the High Court acknowledged that it is possible the literal construction of 'removed' might create harsh consequences in some cases, in that New Zealand citizens may be precluded from obtaining a

special category visa if they were removed from Australia in fact, but not in accordance with the Migration Act. However the Court considered that such consequences were not inevitable, and a literal reading 'simply requires the decision-maker to decide whether the visa applicant has been removed from Australia as a matter of fact'. Where Collier J presupposed that Parliament could not have intended removal from Australia otherwise than in accordance with the Act (such as removal by an official acting in bad faith) to fall within the scope of para (d), 'this presupposition begs the constructional question in issue' (at [28]).

The court upheld the Minister's appeal and concluded that Ms Moorcroft did meet the definition of a 'behaviour concern non-citizen'. Even though her removal from Australia was not in accordance with law, she had still been removed from Australia in fact. The High Court's decision emphasises the need carefully to examine the surrounding context of a provision to determine whether the ordinary or 'literal' meaning of the text should be displaced. In this case, it was not.

Statutory interpretation III: the making of a 'relevant order'

On 5 March 2022, Justice Tom Bathurst stepped down as Chief Justice of NSW. His replacement is the former President of the NSW Court of Appeal, Justice Andrew Bell (Justice Julie Ward replaced Bell P as President).

We highlight the decision of Bell P in *Sydney Seaplanes Pty Ltd v Page* [2021] NSWCA 204 in which his Honour considered the contextual factors that indicated the literal meaning of the words in a statutory provision should instead be given a narrower, legal meaning. This decision is a useful counter-example to *Moorcroft* considered above. On 31 December 2017, a seaplane departing Cottage Point bound for Rose Bay crashed, killing Ms Heather Bowden-Page. The seaplane was operated by the Applicant, Sydney Seaplanes. On 18 December 2019, less than two years after the accident, the Respondent (Ms Page's father) commenced proceedings in the Federal Court of Australia seeking damages pursuant to the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (**Commonwealth Act**), as incorporated into NSW law by the *Civil Aviation (Carriers' Liability) Act 1967* (NSW) (**NSW Act**).

The Federal Court determined that it had no jurisdiction to hear the claim as the flight took place wholly within NSW. One complication for the Respondent was that the Commonwealth Act required a person to bring a claim for damages within two years of the relevant accident, and failure to do so would result in the 'extinguishment' of any right to damages. By the time of the Federal Court's decision, more than two years had elapsed. So the Respondent relied on the *Federal Courts (State Jurisdiction) Act 1999* (NSW) (**State Jurisdiction Act**) to have the proceeding that had been dismissed by the Federal Court "treated as a proceeding in the Supreme Court". If successful, this would assist him to come within the two-year limitation period.

The State Jurisdiction Act, which was enacted in response to High Court's decision in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (***Wakim***), provided in s 11(2) that "a person who was a party to a proceeding in which a relevant order is made may apply to the Supreme Court for an order that the proceeding be treated as a proceeding in the Supreme Court, and the Supreme Court may make such an order". A "relevant order" was defined in s 11(1) as "an order of a federal court, whether made before or after the commencement of this section, dismissing, striking out or staying a proceeding relating to a State matter for want of jurisdiction". A "State matter" was relevantly defined in s 3 as a matter "in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State or a Territory", or a matter "in respect of which a relevant State Act purports or purported to confer

jurisdiction on a federal court". The NSW Act and the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) were each deemed to be a "relevant State Act" in s 3 of the State Jurisdiction Act.

It was not in dispute that the order dismissing the Respondent's Federal Court proceeding fell within the literal meaning of a "relevant order" in s 11 of the State Jurisdiction Act. On that basis, Adamson J (**primary judge**) made an order, under s 11(2) of the State Jurisdiction Act, that the Federal Court proceeding be treated as a proceeding in the Supreme Court, which was within the two-year limitation period. Sydney Seaplanes appealed, relevantly on the basis that the order dismissing the Federal Court proceeding for want of jurisdiction was a 'relevant order' within the meaning of s 11 of the State Jurisdiction Act.

The Court of Appeal allowed Sydney Seaplanes' appeal. Bell P (with whom Leeming JA and Emmett AJA agreed), concluded that the order dismissing the Federal Court proceedings for want of jurisdiction was not a 'relevant order'. This was because although his Honour found that the Federal Court order clearly fell within the *literal* meaning of a 'relevant order', this literal meaning did not correspond to the *legal* meaning of those words in the State Jurisdiction Act. To reach this conclusion, Bell P reasoned as follows:

(a) the 'modern approach' to statutory construction emphasises that Courts will look to the context of a statutory provision in the first instance. More recent statements to the effect that the process of statutory interpretation must start and end with a consideration of the *text* of the statute, 'were not intended to and did not demote or relegate the importance of context' (at [27]-[28]). The statutory context should be understood in a broad sense and extends to the existing state of the law, legislative purpose, and any mischief which the statute was intended to remedy (at [30]). Statutory purpose may also be identified in the long title to an enactment (at [40]);

(b) in this case, the State Jurisdiction Act was enacted in direct response to the 'momentous' decision of the High Court in *Wakim* in which it was held that the component of the cross-vesting scheme by which federal courts were purportedly invested with jurisdiction by State legislation was unconstitutional (at [45]). Bell P noted that the Long Title to the State Jurisdiction Act was '[a]n Act relating to the *ineffective conferral of jurisdiction* on the Federal Court of Australia' (Bell P's emphasis). Further, s 4(1) of that Act defines 'ineffective judgment' as a reference to a judgment of a federal court in a State matter 'in the purported exercise of jurisdiction *purporting to have been conferred on* the federal court by a relevant State Act' (again, (Bell P's emphasis);

(c) turning to s 11, Bell P observed that it is directed to a proceeding in a federal court in which an order is made that the relevant federal court has no jurisdiction to hear and determine it on the basis that it relates to a State matter: '[s]uch an order, being a "relevant order", could be effectuated either by means of a declaration to that effect or by an order dismissing, striking out or staying the proceeding relating to a State matter for want of jurisdiction' (at [49]). Whereas the primary judge decided that the purpose of s 11 was to 'remedy the consequences of the Federal Court's lack of jurisdiction in State matters', Bell P considered that this was too broad in light of the specific context of the legislative response to *Wakim* (at [52]);

(d) instead, Bell P concluded (at [53]-[54]) that in s 11:

> *'the want of jurisdiction being referred to is not any general want of jurisdiction but rather a want of jurisdiction by reason of a constitutionally invalid conferral of jurisdiction of the kind*

> *addressed in* Wakim*' … In the present case, the Federal Court never had jurisdiction to entertain a case involving a claim for damages in relation to an intra-state air carriage of the kind brought by the Respondent. The State Jurisdiction Act was not directed to a situation where a party simply invoked the jurisdiction of the Federal Court by mistake.*

The consequence was that Bell P concluded that the *literal* meaning of the definition of 'relevant order' must be read down in a way that is consistent with the purpose of the Act and the definition of 'ineffective judgment', which is directed to a case where the jurisdiction of the federal court in question has been *purportedly* but ineffectively conferred by a State Act. The Federal Court's jurisdiction had not been purportedly conferred in this way – Mr Bowden-Page had simply commenced his proceeding in the wrong Court. The result was that the appeal was allowed and Mr Bowden-Page could not bring himself within the two-year limitation period.

As Bell P remarked by way of conclusion, this is a case that highlights how, on occasion, the broader statutory context encompassing legislative purpose and history, sometimes requires the literal or ordinary meaning of words to be read more narrowly than may, when regard is had solely to the text of the legislation, appear to be appropriate.

'The same circumstances': Ms Addy's working holiday tax returns

In *Addy v Commissioner of Taxation* [2021] HCA 34 the High Court unanimously upheld Ms Victoria Addy's appeal against the Commissioner for Taxation regarding the construction of Article 25(1) of the *Convention between Australia and the United Kingdom for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion* (**UK tax convention**). The Court held that in circumstances where a more burdensome tax rate applied to Ms Addy under the *Income Tax Rates Act 1986* (Cth) (**Rates Act**) than to an Australian national in the same circumstances, taxation of her income contravened Article 25(1) of the UK Convention.

Ms Addy, who, unusually for a working holiday visa holder, was also deemed to be a resident of Australia for tax purposes, was taxed on income she earned between 2015 and 2017 while holding a *Working Holiday (Temporary) (Class TZ) (Subclass 417)* visa (**working holiday visa**). During the course of her stay in Australia, Ms Addy derived a total taxable income of $26,576 working in casual employment as a food and beverage waiter in Sydney. Article 25(1) of the UK tax convention provides that nationals of a Contracting State (such as the United Kingdom) shall not be subjected in Australia to 'other or more burdensome' taxation than is imposed on Australian nationals 'in the same circumstances, in particular with respect to residence'.

During the time of Ms Addy's stay, the Rates Act applied a 15% income tax rate to 'working holiday taxable income' derived by people holding a working holiday visa on amounts up to $37,000, with a maximum tax liability of $5,550. On the other hand, an Australian national deriving income during the same period was entitled to a tax-free threshold for the first $18,200 and was then taxed at 19% up to $37,000, with a maximum tax liability of $3,572.

The key aspect of Article 25(1) of the UK tax convention which was considered by the Court in this decision was the phrase 'in the same circumstances', as the Rates Act did not charge a higher tax rate on Ms Addy on the basis of her nationality alone, but on the basis of her Visa status. The Commissioner argued that a comparison of 'the same circumstances' could not be drawn between an Australian national and a non-national like Ms Addy who held a working holiday visa, as the two could never be to be 'in the same circumstances'. This is because an Australian national could technically not hold a working

holiday visa, but an applicable foreign national could hold such a visa. The Commissioner argued that the differing tax rates applied to Ms Addy were not made on the basis of her nationality, but on the basis of a differing visa.

The Court unanimously rejected the Commissioner's submission, as it was clear that a working holiday visa depended on a visa holder not being an Australian national. The Court held that applying the ordinary taxation laws to an Australian national in substantially similar circumstances, deriving the same income from the same source (that is, 'in the same circumstances' in all respects relevant to taxation excluding nationality), would result in that Australian national being taxed at the lower rates under the Rates Act, compared to Ms Addy. As a result, the Court held that more burdensome taxation was imposed on Ms Addy owing to her nationality and for that reason, the taxation contravened Art 25(1) of the UK tax convention.

As a result, Ms Addy was entitled to be taxed at the more favourable rates applicable to her level of income that apply to Australian nationals who are resident of Australia, not the rates normally applicable to individuals who hold working holiday visas.

A duty of care to consider climate detriment

In *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560, the Federal Court considered whether to allow an interlocutory injunction application to prevent the Minister for the Environment from approving an application to extend a coal mine in Northern NSW.

The Applicants are eight children who argued that the Minister owed each of them a novel duty of care when exercising her power under s 130 and s 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) so as not to cause them harm in the future by approving the project. In addition, apprehending that the Minister would fail to discharge the duty by exercising her discretion in favour of the approval of the Extension Project, the Applicants sought declaratory and injunctive relief designed to preclude the Minister from failing to discharge the duty of care as claimed.

The Minister denied that there was any reasonably foreseeable risk of injury to the Applicants from the approval of the Extension Project and that the relevant salient features pointed overwhelmingly against the recognition of the novel duty of care contended for by the Applicants. Additionally, the Minister alleged that if a duty of care exists, there is no reasonable apprehension that the duty will be breached by exercising her powers under the EPBC Act and that therefore, there was no proper basis to grant injunctive relief.

The Court held that the Minister had very substantial control over the real risk of harm to the Applicants that would flow from approval of the extension project and that accordingly, the Minister was subject to a duty of care in exercising her powers to approve the project. However, the Court was not satisfied that the Applicants had proven that it was probable that the Minister would breach the duty of care when exercising her powers under the EPBC Act.

The Court also noted that the Minister was likely to take into account the new duty of care before making the administrative decision to approve the project or not under the EPBC Act in the future. If the Minister did not take that new duty into account when making a decision, judicial review could then be sought. As such, the Court held that it would be overly speculative to assume what decision the Minister would make on the application and refused to grant the injunctive relief to the Applicants.

If these principles were picked up by the Full Court, this judgment may have altered the liability landscape for both government agencies and large companies who are involved in projects which create carbon dioxide emissions. However, after we delivered this presentation, on 15 March 2022 the Full Federal Court overturned this judgment on appeal: *Minister for the Environment v Sharma* [2022] FCAFC 35. We propose to provide an update on the Full Court's reasoning in a separate case note.

Other developments in 2021

Stradford v Vasta: Testing the boundaries of judicial immunity

The Federal Court is currently considering an appeal brought against Judge Salvatore Vasta by the Applicant Mr Stradford, seeking millions of dollars in damages against the Judge after he imprisoned the Applicant for contempt of Court in 2018. On appeal to the Federal Court in the matter of *Stradford and Stradford* [2019] FamCAFC 25, the Full Bench of the Court found that the Applicant had been falsely imprisoned on the basis that he had breached previous Court orders and was in contempt of court.

The Applicant claims that during his imprisonment he experienced abuse and mistreatment to such a degree that he can no longer work more than 20 hours per week due to psychiatric injuries. He further argues that he was denied any chance to plead his case before the Court in 2018, was denied procedural fairness, and that Judge Vasta had pre-emptively found in contempt of Court without providing an opportunity for the Applicant to provide information which would have confirmed otherwise, thereby preventing his injuries. The Applicant also argues that the Judge acted for an improper purpose by using the threat of imprisonment to pressure the Applicant to settle the property case between him and his former wife.

Counsel for the Respondent argues that the orders were a result of human error and that a stay of orders imprisoning the Applicant was issued for his release as soon as that error was brought to the attention of the Judge. The Respondent also argues that a Court upholding the Applicant's arguments would lead to an undesirable situation where any inferior judge of a lessor Court who made an error in gaoling someone could be held liable for civil action.

The case is rare and is expected to provide insight into the boundaries of the longstanding principle of judicial immunity. Under this principle, action cannot be brought personally against a Judge for a decision, or for anything said or done in the exercise of his or her jurisdiction. The case also potentially tests the limits of the principle of finality, which preserves the finality of judicial decisions (subject to an appeal) and prohibits the re-opening of finalised court decisions.

Changes to the structure of federal courts and tribunals

In news about the structure of courts, the Federal Circuit and Family Court of Australia (**FCFC**) came into being on 1 September 2021. The FCFC merges the Family Court of Australia and the Federal Circuit Court of Australia. Previously, the Family Court, and the Federal Circuit Court had an overlapping family law jurisdiction.

The new FCFC comprises 2 divisions:

(a) The FCFC (Division 1) is a continuation of the Family Court of Australia.

(b) The FCFC (Division 2) is a continuation of the Federal Circuit Court of Australia.

The FCFC preserves the cohort of judges of the previous Family Court and Federal Circuit Court. The FCFC operates under a single Chief Justice with the support of one Deputy Chief Justice, who each hold a dual commission to both Divisions of the FCFC. There is also a second Deputy Chief Judge (General and Fair Work) of the FCFC (Division 2). The Chief Justice and Chief Judge have the power to make the rules of court for their respective divisions for the first 18 months of the new court's operation.

The Administrative Appeals Tribunal is also undergoing changes, with the *Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Act 2022* receiving Royal Assent in February 2022.

Key changes resulting from this legislation include:

(a) standardising the way parties must give evidence or produce documents in the Social Services and Child Support Division;

(b) introduction of conferences to assist with case management in certain matters within the Social Services and Child Support Division;

(c) clarification about who will be automatically considered a party to certain applications (eg, the Military Rehabilitation and Compensation Commission will be a party rather than the Veterans' Review Board); and

(d) changes to time limits to apply for reinstatement of an application on the basis that it was dismissed in error, by introducing a 28-day time limit for a party to the proceeding to seek reinstatement.

The year ahead in 2022

Significant High Court cases to be determined in 2022

In the upcoming case of *Nathanson v. Minister for Home Affairs & Anor,* the High Court will have the opportunity to clarify the application of the materiality doctrine to procedural fairness in the context of a migration case. The High Court will consider whether a majority of the Full Federal Court, consisting of Steward J (now of the High Court) and Jackson J, correctly applied the materiality test when their Honours found that it required the Appellant to point to specific submissions, or evidence, that he would have put forward had he not been denied procedural fairness.

The Appellant, Mr Nathanson, had his visa cancelled by a delegate of the Minister on 6 August 2018 on the grounds that he failed to meet the character test in s 501(3A) of the *Migration Act 1958* (Cth). Mr Nathanson was unsuccessful before the Administrative Appeals Tribunal (**Tribunal**). During the course of that proceeding, evidence pertaining to Mr Nathanson's history of domestic violence came to the fore as a significant issue. Essentially, it was determined that the Minister's representative made closing submissions that articulated the relevance of evidence about his domestic violence in a different way to the Minister's opening submissions, and that Mr Nathanson did not have a proper opportunity to respond.

The issue before the Full Federal Court was whether Mr Nathanson's lost opportunity to make submissions or adduce further evidence on the issue of his history of domestic violence was a jurisdictional error that was also material to the Tribunal's decision. Steward and Jackson JJ, adopted an arguably narrower view of materiality, requiring that materiality would only assist the Appellant if the absence of error would result in a *realistic possibility* of a different outcome. Their Honours also required the Appellant to point to submissions he would have made, or evidence he would have adduced, that

could have realistically and probably changed the outcome. Their Honours assessed the submissions that the Applicant put before the Full Court on appeal and found that it was unlikely that they would have changed Tribunal's ultimate decision, and dismissed his appeal.

Wigney J in dissent, adopted a broader view of materiality. His Honour concluded that in this context, the *possibility,* as opposed to probability or even realistic possibility, of a different outcome is enough to engage the principle of materiality. Furthermore, Wigney J reasoned that the Appellant should not be held to a high degree of specificity in the arguments he would have made if he had been afforded procedural fairness. Instead, Wigney J was prepared to look at the factual record at trial and infer whether it was possible for an open-minded Tribunal to be persuaded to reach a different decision had procedural fairness been afforded.

On appeal, the Appellant will emphasise Wigney J's line of reasoning, and has filed written submissions arguing that – in effect – the majority was incorrectly focusing on assessing the *probability* as opposed to *possibility* of a different outcome, and was also wrong in requiring the Appellant to point to what he would have said, as opposed to inferring what he could have said if procedural fairness was afforded. The Respondent has filed written submissions consistent with the majority's view of materiality, namely that the circumstances of this case required the Appellant to point to some specific arguments he would have made that could, realistically, have resulted in a different outcome.

The appeal is listed for hearing before the High Court in Canberra on 10 March 2022.

Other developments on the horizon

2022 may be the year of personal privacy

Last year saw significant developments in the protection of individual privacy as concerns about the misuse of personal information, IT security, hacking and the use of 'big data' continued. We see this trend continuing in 2022. In 2021, we observed the Office of the Australian Information Commissioner (**OAIC**), the Australian privacy regulator, initiating investigations into the complex systems of entities that handle personal information, both on and off-shore. Below we explore the results of three of those investigations.

First, in *Commissioner initiated investigation into 7- Eleven Stores Pty Ltd* [2021] AICmr 50, the OAIC investigated and found privacy breaches relating to the way in which 7-Eleven was collecting biometric data. From 15 June 2020 to August 2021, 7-Eleven implemented a 'consumer satisfaction survey'. As part its rating of consumer satisfaction, 7-Eleven collected the facial data of all participants, sending the data to a server which deleted them after seven days. The proposed purpose was to guard against disingenuous survey answers. The OAIC found that this contravened the Australian Privacy Principles because sufficient consent was not obtained prior to collection. 7-Eleven claimed that consent was obtained by way of a sign at all 7-Elevens about the use of facial recognition software for the collection and storage of facial images. OAIC determined this was not enough to imply consent, and instead there should have been a notice on or around the iPad used to complete the survey. OAIC ordered that 7-Eleven destroy all data it had collected in relation to this breach.

Second, the OAIC also investigated Uber's handling of a data breach in *Commissioner Initiated Investigation into Uber Technologies, Inc. & Uber B.V.* [2021] AICmr 34. The investigation was triggered by a 2016 cyber-attack which saw the data of 1.2 million Australians taken and ransomed by hackers. Despite this attack occurring on Uber's servers stored overseas, the OAIC concluded that Uber were required to comply with the *Privacy Act 1988* (**Privacy Act**) - but had not done so - in either protecting

Australian data or in the handling of the breach. The OAIC ordered that Uber must make its data protection, retention and deletion protocols compliant with Australian standards and present a report of these change to the OAIC from an independent assessor.

Third, Clearwater AI was found to have breached the *Privacy Act 1988* in *Commissioner initiated investigation into Clearview AI, Inc.* [2021] AICmr 54 when it scraped biometric information from the internet and used it in a facial recognition tool which it then made available to law enforcement. The OAIC determined that Clearwater AI had breached its obligations regarding gaining consent to collect information, collecting information fairly, notifying individuals of the collection of information, ensuring the personal information disclosed was accurate and not complying with the practices, procedures and systems required to comply with the Privacy Act. The OAIC ordered Clearwater AI to cease the collection of data and destroy any relevant personal information it already had collected.

Finally, the OAIC is continuing this series of regulatory actions with an ongoing investigation into Singtel Optus Pty Ltd. The OAIC is investigating after conducting enquiries into data breaches involving publication of Optus customer details in the White Pages, after individuals had asked for their details not to be published. OAIC states that investigations such as this can 'determine whether such matters involve systematic issues that can be prevented by ensuring the right practices are in place'. As the volume and complexity of collected data inevitably expands, we see this as one of the growth areas in Commonwealth regulatory activity in 2022.

Update on the Online Privacy Bill

In October 2020, the Federal government released terms of reference and a high level issues paper for a review into the Privacy Act. Following on from the announcement, in October 2021, the government released an exposure draft of the *Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021* (**Online Privacy Bill**) as well as a new discussion paper designed to inform a broader Privacy Act Review.

The new Online Privacy Bill proposes changes to existing privacy legislation and policy, which if passed through Parliament, could have a significant impact on the reshaping of privacy laws in Australia. In its current form, the Online Privacy Bill proposes to amend the maximum penalty for corporations that engage in serious or repeated interference with privacy to whichever of the following is greatest:

(a) AU$10 million;

(b) three times the benefit of the misconduct; or

(c) 10% of the organisation's turnover in the 12 month period up to the conduct.

The Online Privacy Bill also proposes to provide the OAIC with a variety of new powers and mechanisms, including:

(a) new information-gathering powers for the OAIC and an infringement notice mechanism for non-compliance; and

(b) new declarations that the OAIC can issue when making a privacy determination – including the right to require the respondent to prepare and publish a statement about its conduct, and the right to require the respondent to be audited by a qualified independent advisor.

The Online Privacy Bill also proposes to introduce a new framework to deliver on the government's commitment to introduce specific privacy rules for online platforms. In particular, the Bill proposes to equip the Information Commissioner (or an industry group) with the ability to develop an 'online privacy (OP) code; for 'OP organisations'. These will specify industry privacy codes for the online industry.

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.

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