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Administrative law in 2022 and the year ahead in 2023

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Administrative law in 2022 and the year ahead in 2023

In 2022, we have noticed not as many landmark administrative law cases from the High Court as in previous years. In the cases we have seen handed down in the past 12 months, the High Court has continued to develop the jurisprudence on jurisdictional error, particularly focusing on the concept of materiality in the case of *Nathanson* [2022] HCA 26, in which the High Court held that a breach of procedural fairness will ordinarily be material to the outcome of the decision. We have also seen the High Court deal with jurisdictional error in the context of a failure to comply with statutory conditions before making a decision in *Stanley* [2023] HCA 3. The Full Federal Court has provided further guidance on the line between testing an applicant's evidence and a reasonable apprehension of bias in *Chen* [2022] FCAFC 41. There were also some important cases on procedural fairness and the disclosure of information. Upcoming cases in the High Court will deal with non-statutory administrative action done pursuant to guidelines published under legislation, and will further elaborate on the principles of apprehended bias.

The consequences of the pandemic continue to be felt, though as lock-downs and restrictions have been lifted the number of cases challenging public health orders and other pandemic related decisions has also declined (see *Varnhagen v State of South Australia (No 2)* [2022] SASCA 118). The past year also saw the continued emergence of climate change litigation. As we discussed last year, the Sharma litigation had imposed a duty of care to children when exercising power under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) to approve or not approve extension of a coal mine to take reasonable care to avoid causing personal injury or death arising from emissions of carbon dioxide and subsequent global warming. This was overturned on appeal by the Full Federal Court. In *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2022] QLC 21 the Queensland Land Court made recommendations that the relevant Queensland Ministers not grant approval for a new coal mine as "climate scenario consistent with a viable mine risks unacceptable climate change impacts to Queensland people and property." In our view, climate change will continue to be the subject of litigation in an increasing range of government decision making contexts in the future.

We think it is both interesting and significant that in 2022 it appears that the courts have not necessarily been the dominant venue for scrutinising administrative action. That is not to predict a waning of the courts' role. New judicial appointments, including that of Justice Jagot to the High Court, mean that the judiciary is as well-equipped as ever to grapple with public law issues. Equally, in Parliament, there has been a number of legislative initiatives in 2022 resulting from a change in government.

We have observed that in this era of large-scale policy initiatives, often rolled out within short timeframes in response to emergencies or other critical incidents, different avenues for scrutiny are emerging to grapple with new forms of administrative action. The past 10 years have seen a marked increase in the establishment of Royal Commissions and inquiries, and 2022 continued and even amplified this trend with the establishment of the Royal Commission into the so-called 'Robodebt Scheme' and the Royal Commission into Defence and Veteran Suicides, and the extension of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

It has been nearly twenty years since Justice Spigelman wrote about the adoption of an 'integrity branch' in Australia.[1] While still not formally distinct from the executive branch, the next few years could well see a reinvigoration of the role of 'integrity agencies' charged with oversight of government institutions, including the establishment of a National Anti-Corruption Commission from mid-2023 under the *National Anti-Corruption Commission Act 2022*, an increased role of the Privacy

[1] James J Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724.

Commissioner coming out of a recent review into the *Privacy Act 1988* (**Privacy Act**), and a new merits review body to replace the Administrative Appeals Tribunal (**Tribunal**).

Table of Contents

2022 in the Courts **5**

High Court appointments 5
Supreme Court appointments 5
Materiality and jurisdictional error 6
Jurisdictional error in sentencing assessments 8
Secrecy, procedural fairness and Ch III limitations 9
Drawing the line in apprehended bias cases 11

Other developments in 2022 **14**

The Age of Inquiries continues 14
Robodebt Royal Commission 14
Royal Commission into Defence and Veteran Suicides 15
Disability Royal Commission 16
Abolishing the Administrative Appeals Tribunal 16

The year ahead in 2023 **17**

Significant High Court cases to be determined in 2023 17

Other developments on the horizon **20**

Passage of the *Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022* 20
Facebook v Information Commissioner – 'carrying on business in Australia' 21
The review of the *Privacy Act 1988* 22
National Anti-Corruption Commission 23

2022 in the Courts

2022 was a significant year in Australian courts for the range of appointments of new judges who have particular expertise in administrative law.

High Court appointments

On 17 October 2022 Justice Jayne Jagot was sworn in as a Justice of the High Court of Australia replacing the retiring Justice Patrick Keane. Justice Jagot now becomes the fifty-sixth Justice of the High Court and the seventh woman appointed to the Court.

Justice Jagot was a Judge of the Federal Court of Australia from 2008 until her appointment to the High Court of Australia in 2022. Colleagues have commented on her remarkable contribution to the Federal Court over those years. One colleague observed that Justice Jagot's elevation to the High Court was equivalent to "losing a limb" for the Federal Court.

Prior to the bench, Justice Jagot started as a solicitor in 1992 with Mallesons Stephens Jaques, now King & Wood Mallesons. Her Honour specialised in planning and environmental law. She was promoted to Partner in 1997 and then admitted to the bar in 2002. Four years later, in 2006, Justice Jagot was appointed as a Judge of the Land and Environment Court of New South Wales.

Justice Jagot's appointment to the High Court of Australia is the first time there has been a female majority of High Court Justices.

Significantly for Commonwealth lawyers, it also means that there is a very strong administrative law bench, as Justice Jagot joins Justice Gageler (former Solicitor-General) and Justice Gleeson (former Commonwealth lawyer) among others. Some commentators have noted that this also, potentially, comes at the expense of some criminal law expertise following Justice Bell's retirement in February 2021. We see Justice Gageler, who is now the most senior puisne on the Court, continuing to play a leading role in public law decisions and his Honour may often be joined by Justices Gleeson and Jagot.

Supreme Court and Federal Court appointments

Interestingly, we have recently seen State and Territory governments seek to appoint administrative lawyers to their Supreme Courts as those jurisdictions continue to experience a trend in rising public law cases.

In New South Wales, Anna Mitchelmore SC was appointed to the NSW Court of Appeal in March 2022.

Justice Mitchelmore was an associate to the Justice Michael McHugh in the High Court of Australia in 2001. Her Honour worked as an assistant adviser to then Federal Attorney-General the Honourable Daryl Williams before she practised at Gilbert + Tobin in dispute resolution. She commenced at the Bar in 2006 on Sixth Floor Wentworth and Selbourne Chambers where she practised for 16 years. Justice Mitchelmore practised mainly in administrative, constitutional, criminal, local government and environmental cases, migration law and native title. In September 2021 she was appointed as a part-time commissioner of the NSW Law Reform Commission.

Justice Mitchelmore has been involved in several significant administrative law cases since being appointed to the Court of Appeal, including:

(a) *Olde English Tiles Australia Pty Ltd v Transport for New South Wales* [2022] NSWCA 108, dealing with complex issues of statutory interpretation relating to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW); and

(b) *Quach v New South Wales Civil and Administrative Tribunal (No 2)* [2022] NSWCA 177, dealing with issues of federal jurisdiction under the *Civil and Administrative Tribunal Act 2013* (NSW).

Between March and December 2022, Geoffrey Kennett SC was a Judge of the Supreme Court of the Australian Capital Territory (**ACT**). In 1985 Justice Kennett began his career in the Australian Public Service. He held various roles notably as counsel assisting the Solicitor-General of the Commonwealth before being admitted to the Bar in 1998. At the Bar Justice Kennett specialised in administrative, constitutional, customs, native title, taxation and competition and consumer law matters. He served for several years as chair of the Administrative Law Committee of the Law Council of Australia and a member of its Constitutional Law Committee.

On the ACT Supreme Court, Justice Kennett was involved in several significant public law cases, including:

(c) *Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd* [2022] ACTCA 42, dealing with circumstances where issue estoppel does not apply and so does not cure an admitted jurisdictional error; and

(d) *Zapari Property Coombs Pty Ltd v Commissioner for Australian Capital Territory Revenue* [2022] ACTSC 189, dealing with statutory interpretation of the ACT planning legislation.

On 19 December 2022, after approximately nine months on the ACT Supreme Court, Justice Kennett was then appointed to the Federal Court of Australia.

We think these appointments are part of a significant trend in State and Territory public law, as both of these judges have spent an overwhelming majority of their careers practising federal administrative law, often representing Commonwealth government agencies. It is likely that this experience will allow Justice Mitchelmore, and Justice Kennett (now on the Federal Court), to bring to bear an appreciation of government processes and the practicalities of administrative decision-making.

Materiality and jurisdictional error

Turning to recent significant caselaw from the past 12 months, the High Court's recent focus on materiality in jurisdictional error requires applicants to not only establish a legal error which goes to the jurisdiction of the decision-maker, but also to show that error could have deprived them of a successful outcome – in other words, the error has to be material to the outcome of the decision.

As the High Court's jurisprudence on materiality demonstrates, there are few circumstances in which materiality may absolve a legal error. The need for an objective basis in the actual decision-making process to displace the potential impact of the error has so far restricted immateriality to where:

(a) an alternative, independent basis for the decision is included in the reasons for decision;

(b) the error related to a consideration which was ultimately decided in favour of the applicant in any event; or

(c) the error did not affect the arguments put to the decision-maker and the issues on which the decision was based.

As we foreshadowed in our previous presentation in March 2022, the High Court had a further opportunity in mid-2022 to clarify the application of the concept of materiality in procedural fairness in

the context of a migration case. In *Nathanson v Minister for Home Affairs* [2022] HCA 26 (**Nathanson**), the High Court considered whether a majority of the Full Federal Court 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* (**Migration Act**). Mr Nathanson was unsuccessful before the 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.

Each of the High Court judges allowed Mr Nathanson's appeal. The plurality of Kiefel CJ, Keane and Gleeson JJ (with whom Gageler J agreed) held that establishing the materiality of a breach of procedural fairness does not require establishing how a further opportunity to be heard would have been used to change the outcome. In this case, even though evidence of domestic violence had been addressed in the hearing, the significance of the evidence on the decision had not been. That he had been denied an opportunity was enough in itself to suggest the possibility of a different result.

The nature of the error was an important factor in *Nathanson*. Procedural fairness proceeds on the assumption that denying an applicant a reasonable opportunity to present their case may have changed the outcome. Although an applicant will bear the onus of demonstrating that a breach of procedural fairness is material, when determining the above question the Court must consider whether the decision that was in fact made could have been different had the relevant condition been complied with 'as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined' (at [32] per Kiefel CJ, Keane and Gleeson JJ). For the plurality, as a breach of procedural fairness had been established, the reasonable conjecture involved in establishing a different decision could have been made was 'undemanding'. For Gordon J, a serious denial of procedural fairness would give rise to jurisdictional error regardless of the effect the error may have had on the decision. For Edelman J, even if the breach of procedural fairness was not sufficiently serious so as to require materiality to be established, that onus required 'almost nothing'.

The judgments in *Nathanson* reinforce that, while distinct, the requirement for a breach of procedural fairness to involve 'practical injustice' may involve similar considerations to that involved in establishing a breach's materiality. As an element of procedural fairness, practical injustice establishes the unfairness of the decision-making process. It requires showing how the procedures adopted effectively denied the applicant a reasonable opportunity to put their case. This usually, but not always, involves demonstrating that a further opportunity would have allowed submissions which may have been relevant to the decision. As Gageler J suggested, a breach of procedural fairness, almost by default, could reasonably affect the result unless there was something in the historical facts of how the decision was made to suggest otherwise.

Decision-makers under a statutory scheme can, and should, continue to use the requirements of lawful decision-making to inform their processes, considerations and reasoning. That should include being able to identify the evidence and arguments which are material to their decisions, and giving some consideration to what difference it would make to the decision if a different view of the evidence or arguments was taken. But there is still little to be gained by trying to rely on materiality to avoid the consequences of legal error.

Jurisdictional error in sentencing assessments

The High Court in *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3 (***Stanley***) had the opportunity to consider jurisdictional error in the context of sentencing powers of an inferior court. This case was a chance for the court to apply the approach laid out in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 to the consequences of non-compliance with statutory conditions on decision-making.

The Court split 4:3 on whether failing to consider whether an intensive corrections order would better serve the interests of the community in sentencing decisions. The importance of the text, including the mandatory nature of the language used, the context of the condition both within the legislation and the extrinsic materials, comparisons with other elements of the legislation, and the discretionary nature of the power conditioned were all considered, but still allowed contrasting conclusions to be reached among the judges. The intended consequence of breach of a statutory condition, like the existence of jurisdictional error generally, remains hard to predict with precision in many cases.

In *Stanley*, the Appellant challenged the severity of her sentence, which was an aggregate term of imprisonment of three years with a non-parole period of two years. On appeal, the Appellant argued that the term of imprisonment should be served in the community by way of an intensive correction order (**ICO**) rather than full-time detention. The District Court had a discretion to make an ICO under section 7(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Sentencing Procedure Act*). Section 66(1) provides that community safety must be the "paramount consideration" when deciding whether to make an ICO. Section 66(2) provides that, when considering community safety, the court is to assess whether making the ICO or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending. The District Court dismissed the appeal and the Appellant subsequently sought relief in the nature of certiorari from the Court of Appeal. The Court of Appeal concluded, by majority, that non-compliance with s 66(2) was not a jurisdictional error of law and that its jurisdiction consequently did not extend to the correction of such an error.

The application split the High Court 4:3. Justices Gordon, Edelman, Steward and Gleeson (writing in a joint judgment) concluded that the jurisdiction to make an ICO requires a subsequent and separate decision to be made after a sentence of imprisonment is imposed and as properly construed, s 66 imposed a limit upon the jurisdiction of the sentencing court to decide whether a sentence of imprisonment is to be served by way of full-time detention or intensive correction in the community. Chief Justice Kiefel, and Gageler and Jagot JJ dissented in three separate opinions.

The issue before the High Court was whether a failure by a judge of the District Court to make the assessment required by s 66(2) in declining to make an ICO is a jurisdictional error of law reviewable by the Supreme Court of NSW and, if so, whether the District Court Judge failed to make that assessment. Significantly, the Full Bench of the High Court did not disagree on the broad principles to be applied in determining whether the District Court's error went to its jurisdiction (see the summary by Gageler J at [14]-[19]) . It was the application of those principles to this particular case which split the Court.

The majority concluded that the appeal should be allowed. Their Honours considered (at [54]) that the District Court, in failing to undertake the assessment mandated by s 66(2) of the relative merits of full-time detention as against intensive correction in the community, misconstrued s 66 and thereby both misconceived the nature of her function under s 7 and disregarded a matter that the Sentencing Procedure Act required to be taken into account as a condition or limit on the Court's jurisdiction.

The majority considered that the District Court Judge did not refer to s 66 specifically or in substance and it could not be inferred that any assessment of community safety had occurred based on whether the risk of reoffending would be better reduced by full-time imprisonment or by an ICO (at [113]-[114]). The failure to consider the paramount consideration in s 66(1) by reference to the assessment of

community safety in s 66(2) demonstrated a misconception of the function being performed when deciding whether to make an ICO by failing to ask the right question within jurisdiction. The majority judges accordingly determined that the Appellant's appeal should be allowed and that given the invalidity, there had been no decision on the issue of an ICO at all.

The minority, comprising the separate opinions of Kiefel CJ, Gageler J and Jagot J, disagreed with the majority's reasoning and each concluded that s 66 is not expressed in terms to condition the authority of a sentencing court to make or refuse to make an ICO under s 7(1) and as such non-compliance with s 66(2) does not result in the sentencing court exceeding the limits of the decision-making authority conferred on it by s 7(1).

Secrecy, procedural fairness and Ch III limitations

There were a number of important cases last year dealing with limitations imposed due to the need for separation and independence of Ch III courts or courts exercising commonwealth jurisdiction. Many of these also concerned the role of the courts in maintaining and reviewing secrecy of government information.

SDCV v Director-General of Security [2022] HCA 32 (***SDCV***) held that it was permissible for information to be kept secret from the Appellant in an appeal from a Tribunal decision. SDCV's visa had been cancelled on character grounds, in part due to concerns they posed a security risk. The Tribunal's decision affirming the cancellation had been based, at least in part, on information certified by the Minister administering the *Australian Security Intelligence Organisation Act 1979* as prejudicial to the interests of security. That information was not disclosed to the Appellant. On appeal to the Federal Court, s 46 of the *Administrative Appeals Tribunal Act 1975* (**AAT Act**) allowed the information to be accessed and reviewed by the court, but also provided that the court had to "do all things necessary to ensure that the [certified] matter is not disclosed to any person other than a member of the court …".

The majority of the High Court, in a 4:3 decision, held that restricting information from the Appellant in this way was not contrary to the requirements of procedural fairness inherent in a chapter III court. The majority of Kiefel CJ, Keane and Gleeson JJ, and Gageler J writing separately, contrasted the position of the Appellant under s 46 of the AAT Act with other proceedings where the information could have been kept secret to both the Appellant *and* the Court on public interest immunity grounds. The Appellant, by having chosen to bring their appeal under the AAT Act, was entitled to the benefit of having the information in question before the Court, but that came with the disadvantage of not being able to see that information for themselves. The plurality also emphasised that the restrictions on access to the information was an incident of the statutory regime conditioning the Appellant's right to hold a visa. The integrity and independence of the Court was not undermined by continuing to respect the limitations on procedural fairness imposed on the tribunal.

The result in *SDCV* may therefore be dependent on the appeal route taken and the migration context in which it arises, not least given the clear abrogation of procedural fairness by statute at all stages of the proceedings. However, as decided in *Graham v Minister of Immigration and Border Protection* [2017] HCA 33, legislation cannot deny a court exercising jurisdiction under or by reference to s 75(v) of the Constitution, the ability to enforce the limits and constraints on the lawful exercise of decision-making powers conferred by legislation.[2] It remains to be seen if there are circumstances in which denying an applicant access to material information may butt up against those limits in an appropriate case.

The abrogation of procedural fairness was also in issue in *Tereva v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 142 (***Tereva***). The Tribunal in

[2] *Graham* at [48] and [50].

that case had revoked the mandatory cancellation on character grounds of the applicant's visa. The Minister, however, had set aside this decision under s 501BA of the Migration Act, being satisfied that the applicant did not pass the character test and the cancellation of their visa was in the national interest. Subsection 501BA(3) explicitly provided that the rules of natural justice did not apply to the Minister's decision. The Full Federal Court (Mortimer, Bromwich and Thomas JJ, writing separately but largely agreeing) upheld the validity of s 501BA(3), relying on the High Court's acceptance in *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41 at [74] that procedural fairness at least can be excluded by "plain words of necessary intendment".[3] The nature of the national interest left little scope to argue that the applicant's participation was otherwise a necessary element of the Minster's powers under the Act. One of the grounds argued in *Tereva* was that the Minister's decision was invalid due to unreasonableness. This was primarily put on the basis that the decision was disproportionate, with the consequences of the visa cancellation, including having to leave Australia after living here for over 40 years, disproportionate when compared to the circumstances of the offence which lead to the initial mandatory cancellation. Mortimer J, at least, was prepared to accept that proportionality, as a distinct ground of legal unreasonableness, may warrant further exploration as a matter of legal principle, but in any event was not established on the facts. Given the Minister did not have to, but could have, accorded procedural fairness to the applicant as a matter of discretion, it may also have been argued that the exercise of that discretion was itself unreasonable in the circumstances.

The use of secrecy provisions in legislation is currently being reviewed by the Attorney-General's Department.[4] A recent review suggested that there are 11 general secrecy offences and 487 specific secrecy offences in Commonwealth legislation. There are also over 200 non-disclosure duties which constitute a specific secrecy offence because a breach of these duties is criminalised by section 122.4 of the Schedule to the *Criminal Code Act 1995*. Section 122.4 will sunset on 29 December 2023. The review follows from a number of earlier reviews, including the 2010 Australian Law Reform Commission (**ALRC**) report on Secrecy Laws and Open Government in Australia, and more recent recommendations by the Parliamentary Joint Committee on Intelligence and Security and the Royal Commission into Defence and Veteran Suicide.

The limitations imposed by Chapter III of the Constitution have also been considered in the context of State tribunals. *Burns v Corbett* (2018) 265 CLR 304 held that a State Parliament cannot confer judicial power in matters involving Commonwealth jurisdiction on a Tribunal or other body which is not a court of the State. This has given rise to difficult determinations of which bodies come within the term of a court of a state within the meaning of s 77(ii) and 77(iii) of the Constitution, and when matters are with respect to matters within ss 75 or 76 of the Constitution so as to fall within the scope of Commonwealth jurisdiction. *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16 (***Citta***) considered that later question.

Citta involved a complaint to the Tasmanian Anti-discrimination Tribunal. In their defence to the complaint, the respondents to the complaint asserted that the State Act was inconsistent with the *Disability Discrimination Act 1992* (Cth) and hence inoperative under s 109 of the Constitution. The Tribunal can make binding determinations and determine the limits of its jurisdiction as an exercise of judicial power, but was not a court of the State given the nature of the appointment of its members and the non-judicial roles it played. The High Court held that, even though the Full Court of the Tasmanian Supreme Court had set aside this constitutional defence as 'misconceived', the defence was genuinely raised in answer to the complaint in the Tribunal and was not incapable on its face of legal argument. The complaint was therefore a matter arising under the Constitution or under a Commonwealth law within the meaning of ss 76(i) and 76(ii), and hence outside the jurisdiction of the Tribunal as a non-court of the State.

[3] Quoting from *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596 at 598.
[4] Available at https://www.ag.gov.au/crime/publications/review-secrecy-provisions.

Citta addresses difficult questions relating to the impact of Chapter III on state bodies, as well as questions of the meaning of matter and the scope of matters within Commonwealth jurisdiction. It suggests that there will continue to be important questions arise as to the allowable jurisdiction of non-courts at the State, and perhaps Territory, level.

Drawing the line in apprehended bias cases

The rule against bias is a fundamental aspect of procedural fairness in judicial and administrative decision-making. The legal test for apprehended bias is whether a fair-minded lay observer with knowledge of the material objective facts might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question at hand: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (***Ebner***) at [6].

Judicial impartiality is receiving increased scrutiny. On 2 August 2022, the Attorney-General tabled in Parliament the report of the ALRC on judicial impartiality in federal courts, Without Fear or Favour: Judicial Impartiality and the Law on Bias (ALRC Report 138). The ALRC concluded that the current law on bias does not require amendment. However, the ALRC made 14 recommendations relating to enhancing transparency, judicial appointments and education, and the establishment of a federal judicial commission.

The ALRC inquiry was prompted by a decision of the Full Court of the Family Court in July 2020, *Charisteas v Charisteas* (2020) 60 Fam LR 48, in which a majority of the Full Court did not find apprehended bias in a family law dispute although the wife's counsel had had personal contact with the primary judge during the proceeding, during which time they met for coffee, talked over the phone and exchanged text messages (the High Court subsequently allowed an appeal and ordered a re-trial).

Apprehended bias can have dramatic consequences. In the ACT last year, in the case of *Gindy v Capital Lawyers* [2022] ACTCA 66, a matter that involved 88 days of hearings and a judgement of over 700 pages had to be retried due to hostile remarks and other apparently discriminatory treatment of the self-represented plaintiff and her legally-trained husband.

Just as fundamental is the impartiality of administrative decision-makers. Although the rule against bias applies equally in relation to non-curial proceedings, the application of the principle must take account of the different decision-making context.

In the context of immigration matters, the inquisitorial role of the Administrative Appeals Tribunal (Tribunal) may involve robust and forthright testing of a visa applicant's claims and such testing may not in and of itself sustain a finding of apprehended bias, and occasional displays of impatience and irritation or occasional sarcasm or rudeness on the part of the Tribunal do not generally establish disqualifying bias: *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 (***SZRUI***) at [24].

The recent decision of *Chen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 41 (***Chen***) provides an example of a Tribunal member's conduct crossing the line established in *Ebner* and *SZRUI*. In *Chen*, the Full Federal Court unanimously allowed an appeal from the former Federal Circuit Court of Australia and determined that a decision of the Tribunal was vitiated by apprehended bias.

Mr Chen applied for a Temporary Graduate visa in 2019. In his previous student visa applications, Mr Chen had failed to disclose a criminal matter for which he was sentenced to a good behaviour bond. He disclosed the matter in this Temporary Graduate visa application.

After a delegate of the Minister refused Mr Chen's application on the basis that he provided false or misleading information in his student visa applications, Mr Chen sought review in the Tribunal. He was assisted by a migration agent and sought to give evidence through a Mandarin interpreter although the Tribunal limited the use of the interpreter. The hearing took around 35 minutes and at its conclusion the member affirmed the delegate's decision and gave ex tempore reasons.

On appeal, Mr Chen relevantly alleged that the Tribunal's decision was affected by apprehended bias, by reason of 'the Tribunal's frequent interruptions, apparent closed mind to the evidence, scornfullness [sic], exaggeration, observation that the applicant's evidence was "unusual", refusal to allow the applicant to use an interpreter…'.

The Full Court considered the Tribunal member's conduct cumulatively and in totality, and found that a fair-minded and appropriately informed lay observer might reasonably apprehend that the Tribunal member might not have brought an impartial mind to the resolution of the review. In forming this view, the Full Court highlighted several problematic features of the Tribunal hearing.

First, the Full Court accepted Mr Chen's submission that the member opened the hearing on a 'hostile note' and unfairly accused Mr Chen of 'playing games' by persisting with his request to use an interpreter. The transcript of the Tribunal hearing revealed the following exchange:

> MR CHEN: *No, actually, I can speak English but my English is not reaching the legal level. That's why I require a —*
>
> MEMBER: *What do you mean "the legal level"? What's your IELTS score – overall band score?*
>
> MR CHEN: *Seven*.
>
> MEMBER: *Seven. I wonder if you're playing games with me, Mr Chen. Someone with an overall band score of seven has a good command of English, however, you want us to use an interpreter for everything, do you?*

The Full Court observed that in this exchange, which occurred at the outset of the hearing, the member 'used a loud and intimidating tone, which was redolent of disbelief.' The member's comment about playing games may have been reasonably understood as accusing Mr Chen of deliberately trying to mislead the member as to his proficiency with the English language by pretending to need the assistance of an interpreter, despite the fact that Mr Chen had explained that he was concerned his language skills were not sufficient for a legal setting (at [57]).

Second, the member persisted in asking irrelevant questions which stemmed from an irrelevant assumption, about the date on which Mr Chen had engaged a migration agent. When Mr Chen began to respond as to when he engaged a migration agent, the member interrupted him and said in a critical tone, '[s]o you don't do anything for two weeks'. However, as the Full Court noted, Mr Chen made clear, when he was given a chance, that he had appointed the migration agent about one week after he received notice of the Tribunal hearing but he did not notify the Tribunal of that appointment until a few days before the hearing. The Full Court described this aspect of the hearing as involving 'gratuitous and unjustified criticism' of Mr Chen's preparation of his case (at [63]).

Third, the Full Court agreed with Mr Chen that the Tribunal member displayed little or no interest in the central legal issue in the proceeding, which was whether Mr Chen's failure to disclose his criminal matter in his previous student visa application was purposely false. The Full Court reasoned that it was 'difficult to understand' why the Tribunal member did not at any point ask Mr Chen why he made an incorrect declaration as to his convictions in his earlier student visa application, whereas in his 2019 visa application he freely answered the same question correctly. The Court further observed that

the fact Mr Chen freely provided the correct information in his 2019 visa application could be said to indicate that the incorrect declaration in his student visa application did not involve purposeful falsity (at [66]). The Tribunal's failure to explore this issue supported a finding that a fair-minded observer might reasonably apprehend that the Tribunal did not have an open mind. The Full Court allowed Mr Chen's appeal and remitted the matter to the Tribunal.

When considering whether a decision-maker has engaged in conduct that might lead to a reasonable apprehension of bias, Chen indicates that courts will look to the totality of a decision-maker's conduct. Persistently asking irrelevant questions, interrupting a witness, and pursuing gratuitous criticism of the witness and their evidence – of the kind displayed in Chen – are all indicators of where courts will draw the line.

In early 2023 apprehended bias arose again in *Asset Energy Pty Ltd v Commonwealth Minister for Resources* [2023] FCA 86, in which the Federal Court quashed a decision of the Commonwealth-New South Wales Offshore Petroleum Joint Authority (**Joint Authority**). The person who made the Decision as the Commonwealth member of the Joint Authority was the then Prime Minister, the Hon Scott Morrison MP, acting on the basis that he was also a Minister for Industry, Science, Energy and Resources. Asset Energy argued that the decision was affected by bias in the form of predetermination. The Commonwealth consented to the decision being quashed on the basis of apprehended bias. The Court determined that a reasonable apprehension of bias arose from the public comments made by Mr Morrison that he did not support Asset Energy's licence being extended. Mr Morrison had said on a number of occasions to journalists that he did not support an extension of the licence, and that his view on that issue was 'rock solid'. Jackson J concluded that Mr Morrison's comments might lead a fair-minded observer to reasonably apprehend that when he did come to deliberate on the matter, his mind might have been closed to persuasion (at [30]).

A significant upcoming case about bias in the High Court is *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, in which the Appellant requested that Justice Bromwich of the Federal Court recuse himself by reason of being prosecuting Counsel in the Appellant's previous criminal matter.

On 8 November 2017, the Appellant's visa was cancelled by a delegate of the Minister, under s 501(3A) of the Migration Act. On appeal to the Federal Court, it transpired that Bromwich J had previously been the Director of Public Prosecutions (**DPP**), whose role included appearing as Senior Counsel for the Crown from time to time. His Honour had been Senior Counsel for the Crown in an appeal by the Appellant against his criminal conviction (the conviction was then the ground for cancelling the Appellant's visa).

After the commencement of the proceedings in which the Appellant sought to overturn the cancellation of his visa, counsel for the Appellant sought the recusal of Bromwich J, citing *Ebner* (2000) 205 CLR 337, to which we refer above. The Appellant argued that because Bromwich J had been Senior Counsel for the Crown in the Appellant's criminal appeal, his Honour had personal knowledge of the Appellant's criminal history independent of the visa cancellation proceeding and also that Bromwich J had personally argued for the Appellant's convictions to stand. The Appellant's position was that this meant his Honour might not bring an impartial mind to the question at hand, being the judicial review of the decision to cancel the Appellant's visa.

Bromwich J rejected the Appellant's recusal application, finding that he only had knowledge of the Appellant's criminality limited to that of the judgment of the Court of Criminal Appeal, which was also available to the other members of the Full Federal Court.

The Appellant now appeals to the High Court. In the High Court, the Appellant has submitted that:

(a) Bromwich J's previous involvement with the DPP did constitute apprehended bias, because his previous role as an advocate was fundamentally incompatible with his later role of appellate judge in the Appellant's case.

(b) The consideration of whether Bromwich J's previous record and involvement with the Appellant constitutes apprehended bias, is a matter that should have been decided by the Full Federal Court, not Bromwich J sitting as a single judge.

The Minister submits:

(a) the Full Federal Court appeal did not require the making of any decision about how the Appellant should be treated on the merits, as it was a judicial review of a mandatory decision to cancel his visa;

(b) the Full Court appeal was not related to the Appellant's criminal appeal, and the issues in the visa cancellation proceeding were distinct from the issues in the criminal appeal; and

(c) Bromwich J only appeared in the Appellant's criminal appeal, not the proceeding that led to his prosecution – his Honour therefore was not involved in 'bringing' the initial prosecution against the Appellant.

This case will elaborate on the principles which apply to decision-makers that have had some prior personal involvement in the decision before them, and is likely to provide guidance on whether recusal applications in such cases should be heard by that decision-maker alone or by the full bench or panel of the decision-making body.

The High Court heard QYFM's appeal on 13 December 2022.

Other developments in 2022

The Age of Inquiries continues

Following the significant expansion in Royal Commissions and inquiries we have seen over the last ten years the age of inquiries continues, and Commonwealth agencies have ever more frequently been tasked with responding to notices to produce and appearing as witnesses before commissions of inquiry.

Robodebt Royal Commission

Last year saw the establishment of the inquiry into the so-called Robodebt Scheme. On 18 August 2022, the Governor-General, the Honourable David Hurley AS DSC issued Letters Patent, establishing the Royal Commission into the Robodebt Scheme. Ms Catherine Holmes AC SC was appointment Royal Commissioner and is required to produce a final report to the Governor-General by 18 April 2023.

Prior to the Royal Commission, the Community Affairs References Committee of the Senate produced a report describing a 'massive failure of public administration'. Established in 2015, the Scheme raised an estimated $1.7 billion in debts against over 430,000 Australians. The Senate Committee's view was that there remains a fundamental need to ensure 'there is rigour in the methods used to determine the existence of debts.'

Through the powers afforded in the *Royal Commissions Act 1902* (Cth), the Royal Commission summonsed witnesses to appear before the Commission at hearing. The initial hearing took place between 31 October 2022 and 11 November 2022, primarily investigating the statutory legitimacy and framework of the policy. The second hearing block continued this investigation between 5 and 16

December 2022, including an appearance by the Hon. Scott Morrison MP before the Commission. The second block investigated the impacts on the individuals and the Federal government's response. The third hearing block, between 23 January and 3 February 2023, focussed on the policy considerations. Finally, hearing 4 is currently taking place between 20 February and 10 March 2023.

With the fourth and final hearing block nearly concluded, the Commissioner will soon begin compiling evidence from the witnesses that testified before the Commission to prepare her final report. Following an extension on 16 February 2023, the Robodebt Royal Commission's final report is now due on 30 June 2023.

The history of the Robodebt scheme and the Royal Commission raises significant issues for Commonwealth lawyers. As the legal actions taken to challenge the scheme suggest,[5] the question of what information might be used as the basis for a decision depends on the legislation in question. The appropriate role of statistical information, use of algorithms and other forms of automated or augmented decision-making is going to require extensive consideration of the legislation in question. Even legislative amendments might have to be highly tailored to the remaining legislative scheme and the particular use of information being contemplated.

One of the early concerns that arose in the Commission hearings is the role of draft legal advices, both from in-house government lawyers and also from external providers. It is likely that the Commission will make it clear that there is little difference between advice that is provided in draft or final version - both may require the agency to take action in response. The role of legal advice in the formulation and approval of policy shifts may become more important, and questions such as whether and when to seek legal advice, and the use of advice once received, subject to increased scrutiny.

There have also been concerns raised around the transparency and effective oversight of policy design and implementation. The Commission may consider the role of public engagement, not only involving consultation at early stages of policy design but also in evaluating the operation and effectiveness of programs and responding to concerns raised once they have been introduced. The role of the Ombudsman, public interest immunity, responding to Freedom of Information requests, privacy issues and model litigant obligations have also been raised in this context.

The Commission may also consider the role of Tribunal decisions and the government's response to decisions raising concerns about the scheme. As we will discuss below, the reform of the Tribunal may be an opportunity to consider the precedential impact of Tribunal decisions on government decision making and program reviews. Transparency of Tribunal decisions, at least where privacy and other legitimate concerns can be alleviated, may also be reconsidered.

Royal Commission into Defence and Veteran Suicides

The second significant inquiry in 2022-23 concerns Australian Defence personnel and veterans. The Royal Commission into Defence and Veteran Suicides was established on 8 July 2021 by his Excellency, General the Honourable David Hurley AC DSC. Under the Letters Patent, Nick Kaldas APM, the Hon James Douglas KC, and Dr Peggy Brown AO have been appointed as Royal Commissioners.

Since its establishment, the Royal Commissioners provided an interim report on 11 August 2022 and are required to produce a final report by 17 June 2024. In their interim report, the Commissioners recognised 'the unique nature of military service, and the ongoing impact such service may have on the physical and mental health of defence members and veterans'. In this sense, it is recognised that there is an overrepresentation of veteran deaths by suicide and that this investigation is vital in deterring and understanding further tragic losses from veterans and serving members. For the

[5] See consent orders in *Amato v The Commonwealth of Australia* (Federal Court VID611/2019) and the settlement approval in *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634.

veteran is someone who is serving or has served as a member of the Permanent Forces or a Reservist within the *Defence Act 1903*.

The First Hearing Block for this Royal Commission commenced in Brisbane on 29 November 2021. Since, there have been 7 additional Hearings around the country, including in Wagga Wagga, Sydney, Canberra, Townsville, Hobart and Darwin. The ninth and final Hearing Block is set to commence in Perth on 15 May 2023.

In their interim report, to achieve 'long-lasting and effective change' the Royal Commissioners submitted 13 recommendations, including to simplify and harmonise veteran compensation and rehabilitation legislation, eliminate the backlog of claims, improve the administration of the claims system, and to improve the administrative release of information.

On Thursday 16 February 2023 during parliamentary question time steps the Federal government announced that they have taken steps to action the 13 recommendations outlined in the interim report. Veteran Affairs Minister Matt Keogh recently confirmed that the backlog of claims is currently around 42,000, spurring the Government to prioritise the reduction of the backlog. While Minister Keogh did not specify when new legislation would be introduced to enforce this reduction, it has been noted as a high priority. Since the report, the Chief of Defence Force has publicly reinforced that serving or ex-members will not be penalised for engaging with this Royal Commission. These steps indicate the action so far resulting from the interim report and more is expected following the ninth and final hearing in March 2023.

Disability Royal Commission

Thirdly, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability(Disability Royal Commission), initially established on 4 April 2019, has been extended. The Disability Royal Commission focuses on 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. Following the extension, the final report will now be delivered by September 2023, nearly four and a half years after the Royal Commission was established.

Abolishing the Administrative Appeals Tribunal

On 16 December 2022, the newly elected Federal government announced its intention to abolish the Administrative Appeals Tribunal and establish a new Federal Administrative Body. We think this is probably the most significant change in administrative law in 2022-23, and will have implications for almost all Commonwealth agencies.

The first step will be the creation of a new piece of legislation empowering the new Federal Body – a change projected to be introduced to Parliament in 2023. The taskforce leading this new legislation will be led by the Attorney-General's Department, informed by an Expert Advisory Group chaired by former High Court Justice, the Hon Patrick Keane AC KC.

One of the key stated intentions of these measures is to create a 'transparent, merits-based system of appointment'. This system is highlighted in the newly published Guidelines for appointments to the Administrative Appeals Tribunal. The Guidelines create a set of criteria that the Tribunal President, the Registrar and the Attorney-General will use in the appointment (and re-appointment) of judicial and non-judicial members.

Under the Guidelines, the appointment of judicial members will be made by the Attorney-General, the Tribunal President and the relevant Chief Justice. Appointments of non-judicial members will be made

through various assessments and a panel report provided to the Attorney-General for approval. Among others, the selection criteria include:

(a) ability to conduct hearings and other Tribunal proceedings;

(b) decision-making and reasoning;

(c) writing and communication skills; and

(d) leadership in key roles.

The changes seek to avoid vacancies and delays that have caused backlogs in Tribunal caseloads. Backlog relief will also be afforded through the appointment of 75 new members, annual re-evaluation of staffing requirements and biannual expressions of interest sought for non-judicial members.

While the new system of appointments will be fundamental, the changes also seek to increase capacity, provide consistent funding and remuneration arrangements, and establish an updated case management systems to streamline communication between parties and the Tribunal.

For applicants, the decisions previously handed down by the Tribunal will continue to remain valid, and cannot be revied again once decided. The cases currently before the Tribunal will continue as most are expected to be completed prior to the changes coming into effect. Any remaining cases will transition to the new Federal Administrative Body without requiring applicants to re-apply.

However, many of the details and arrangements relating to the new system of review remain to be determined. In particular, we think the following issues will be of particular significance to Commonwealth agencies as respondents to review applications:

(a) Will the jurisdiction of the new body be substantially the same as that of the Tribunal?

(b) Will the new body incorporate a 'two tier' system of review, with a second tier of review being heard by multiple members?

(c) Will the new body maintain the current system of alternative dispute resolution whereby registrars convene case conferences prior to a final hearing before a member?

(d) Following the move to substantially remote and online appearances during the pandemic, will this remain or will there be a return to in-person appearances before the new body?

Our view is that, whatever form they ultimately take, these changes will have impacts for all Commonwealth agencies whose decisions are subject to merits review.

The year ahead in 2023

Significant High Court cases to be determined in 2023

The new bench of the High Court (which now includes Justice Jagot), will determine a number of significant public law cases in 2023, including *QYFM* discussed above.

The other case that we think will have a significant impact on administrative law this year is *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* in which the High Court will be asked to consider whether a decision of a Departmental officer not to refer a request for the Minister to exercise a power conferred by s 351(1) of the Migration Act is amenable to judicial review. A decision not to refer such a request to the Minister for consideration is a non-statutory administrative action.

The Appellants, Davis and DCM20, were refused visas by a delegate of the Minister. Guidelines released by the Minister outlined that requests for further intervention by the Minister under s 351 of the Migration Act are to be directed to officers from the Department of Home Affairs, and outlined the criteria for requests to be referred to the Minister for 'possible consideration.' The Appellants made repeated requests for Ministerial intervention under s 351 of the Act to Departmental officers, but the Department did not refer any of the requests to the Minister because they did not satisfy the criteria outlined in the Guidelines. The Appellants applied for judicial review of the assessments made by the officers, arguing that the decisions not to refer requests to the Minister were themselves judicially reviewable, and were affected by legal unreasonableness. The primary judge in each case proceeded on the basis that the assessments were eligible for judicial review, but did not consider that the decisions were legally unreasonable.

In the Full Federal Court, the appeal was heard by a five-member bench comprising Kenny, Besanko, Griffiths, Mortimer, and Charlesworth JJ, each of whom wrote separate, largely concurring judgments. The Full Court dismissed the Appellants' appeal.

Charlesworth J, with whom the other members of the Full Court largely agreed (Griffiths J wrote the other main opinion agreeing with Charlesworth J's proposed orders but for slightly different reasons), concluded that:

(a) the Appellants had a legal right to have their Ministerial intervention requests brought to the attention of the Minister for consideration, which was able to be enforced by the writ of mandamus (at [262]-[263]). This meant there was 'matter' for the Federal Court to determine;

(b) the High Court's jurisdiction under s 75(v) of the Constitution is not, in terms, limited to the supervision of power conferred by statute, and the subject matter raised by the appeals is 'plainly justiciable' (at [300]);

(c) the principles of legal reasonableness apply to decisions made under the Guidelines to screen out requests and decline to refer them to the Minister for consideration, even if in a strict sense these are not statutory decisions made 'under' the Migration Act (at [302]); and

(d) however, the decisions of the Departmental officer not to refer Mr Davis's request for Ministerial intervention to the Minister were not, on the facts of this particular case, legally unreasonable because the Departmental officer did undertake an assessment against the highly evaluative "compassionate circumstances" criteria (at [327]). DCM20's appeal was rejected on the facts on different grounds (at [356]-[364]).

The Appellants have now appealed to the High Court. Mr Davis contends that:

(a) the decision by the Departmental officer to finalise his request for Ministerial intervention under s 351 of the Migration Act without referring it to the Minister for further consideration was legally unreasonable; and

(b) the Guidelines are unlawful in so far as they purport to authorise Departmental officers to 'screen out' requests made to the Minister for intervention under s 351 of the Act and thereby prevent the Minister from receiving or being made aware of such requests.

DCM20 now also raises a similar legal unreasonableness argument.

The High Court heard the Appellants' appeals on 19 October 2022 and we anticipate judgment to be delivered in the first half of 2023. We expect that *Davis* will be one of the most significant public law cases in Australia this year. The case will clearly have implications for statutory schemes where departmental officers act in some way as gate-keepers or filters in referring matters to the relevant decision maker for consideration. But it may more broadly have implications for any judicial review of

any exercise of Commonwealth executive or non-statutory power, and perhaps even the exercise of executive power at the State level.

Extending judicial review of the exercise of non-statutory executive power will perhaps place greater stress on requirements of matter and standing, and potentially open up review to government action including contracting and expenditure. For example, *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5 suggests that third parties affected by the entering into and enforcement of contracts may have sufficient standing to give rise to a matter involving the interpretation of government contracts.

The Environment Centre NT Inc v Minister for Resources and Water (No 2) [2021] FCA 1635 (***Environment Centre NT***), which we did not include in last year's paper, raises a number of interesting issues that may take on greater cogency after the decision in *Davis*. That case involved challenges to a legislative instrument and several decisions arising from the Government's strategic plan for the Beetaloo Basin Gas reserves. One of the issues in that case was whether a decision to approve funding was made under the *Industry, Research and Development Act 1986* (**IRD Act**) while subject to the *Public Governance, Performance and Accountability Act 2013* (**PGPA Act**) or, instead, was an exercise of executive power under s 61 of the Constitution.

Griffiths J held, relying on the then recent decision of the Full Federal Court in *Davis*, that regardless of the source of authority to approve the expenditure, the approval decision was subject to review for legal unreasonableness. His Honour stated, however, that he was not suggesting that all non-statutory powers were subject to review for unreasonableness. But in this case, the decision "was made in the context of a heavily regulated statutory regime for Ministerial expenditure decisions" and "against the background of the making of [a legislative instrument] ... and as an antecedent step to the execution of [various contracts]" both made under provisions of the IRD Act (at [110]). His honour held, however, that it was not unreasonable for the Minister to fail to consider various climate and economic risks.

Environment Centre NT is also interesting because of the role played by common law model litigant obligations. Griffiths J accepted that:

> *Where the Commonwealth or one of its officers or agencies is under a statutory duty to act reasonably in the exercise of a discretionary power (as is the case with s 34 of the IRD Act), the failure to comply with common law model litigant standards may inform the Court's assessment as to whether the exercise of that statutory power was unreasonable in a legal sense. Naturally, each case will necessarily turn upon its own particular facts and circumstances. Not every departure from common law model litigant standards will lead to a conclusion of legal unreasonableness. The significance of the departure and the circumstances and context in which it occurred are all important matters.*

In that case, entering into contracts was held to be unreasonable as:

(a) the government was on notice that the legislative instrument and approval decisions on which it was based were being challenged, and there had been communication about giving an undertaking that the contracts would not be entered into until proceedings were finalised;

(b) entering into the contracts deprived the Applicants with the ability to seek injunctions or other relief to prevent entry into the contracts, and

(c) there is no evident or intelligible justification for the timing of the contracts lead to a finding of unreasonableness.

As a result, a declaration was issued setting aside the decision to enter into the contracts in question and declaring the contracts void.

In our view, cases like this are likely to become more common if the High Court in *Davis* opens up the scope of judicial review of executive decisions.

Other developments on the horizon

In our paper last year we observed that 2022 could be the 'year of personal privacy'. Consistent with that description, in the last 12 months we have seen the regulation of personal privacy brought very much into the mainstream following several significant data breaches and a number of legislative and regulatory responses. This trend of increasing regulatory activity will likely continue in 2023 and beyond following a significant review of the Privacy Act and the granting of new powers to the Office of the Australian Information Commissioner.

Passage of the *Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022*

In September 2022, Optus was the target of a highly sophisticated cyberattack. It was determined that as many as 10 million customer accounts were exposed. The alleged attacker, who chose to call themselves “Optusdata”, threatened to sell the collected data unless Optus paid them $1 million in cryptocurrency. Unsurprisingly, Optus refused to pay the ransom and in retaliation, Optusdata posted 10,000 customer records (including names, emails, postal addresses, phone numbers, dates-of-birth, passport number, driver’s licence numbers and Medicare numbers) online for a brief period before eventually removing them and apologising.

In the following month, hackers obtained the supposedly “secure” private medical information of Medibank customers. One file titled “abortions” and containing patrons’ information on miscarriages, terminations and ectopic pregnancies was posted on the dark web. Another labelled “naughty-list” comprised details of people who underwent medical treatment for HIV, drug addition, alcohol abuse and mental health issues. The hackers, who claimed they had access to Medibank servers for a month before the attack, demanded $10 million USD before they began to release the data of the thousand most prominent media personalities as well as those with interesting diagnoses.

After Optus and Medibank experienced these serious data breaches, in October last year the *Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022* was introduced to Parliament. The Bill passed both the Senate and the House of Representatives on 28 November 2022 and gained Royal Assent on 12 December 2022 and commenced on 13 December 2022. It is now the *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* (**Privacy Enforcement Act**). The Privacy Enforcement Act will create two major amendments (among others) to the Privacy Act:

(a) the Privacy Enforcement Act will increase civil penalties for serious or repeated interferences with privacy in s 13G of the Privacy Act to not more than the greater of: $50 million, three times the value of any benefit obtained through the misuse of the information, or if the value of the benefit obtained cannot be determined, 30 per cent of an entity’s domestic turnover in the relevant period; and

(b) the concept of an ‘Australian link’ in s 5B of the Privacy Act will be refined. Currently, an overseas organisation must comply with the Privacy Act if the entity has an ‘Australian link’. An overseas organisation will have an Australian link if the organisation carries on business in Australia and it collects or holds personal information in Australia. The Privacy Enforcement Act will remove the condition that an organisation has to collect or hold personal information in Australia.

Under the Privacy Enforcement Act, the OAIC will obtain enhanced powers to request and share information as well as to conduct compliance reviews of data breach systems. The OAIC will also be able to issue infringement notices - effectively a power to issue a regulatory instrument enforced with

a criminal offence. This allows the OAIC to handle smaller cases of non-compliance without relying on criminal prosecution.

While this legislation has now come into force and amended the Privacy Act, what remains to be seen in 2023 is how the Office of the Australian Information Commissioner will administer these changes and utilise its new regulatory powers.

Facebook v Information Commissioner – 'carrying on business in Australia'

In an appeal commenced last year (which is no longer on foot), the High Court was asked to consider whether Facebook carries on business in Australia for the purposes of s 5B(3)(b) of the *Privacy Act*. The case also dealt with whether Facebook also 'collected personal information in Australia' for the purposes of the former s 5B(3)(c), although this paragraph has now been removed by amendments to the Privacy Act brought in by the Privacy Enforcement Act which commenced on 13 December 2022.

This appeal arose from proceedings brought by the Australian Information Commissioner (the 'Commissioner') against Facebook Inc (the North American entity of Facebook) and Facebook Ireland Limited (subsidiary entity that provides the Facebook platform for users outside of North America) for breaches of the *Privacy Act*. Since Facebook Inc is incorporated in Delaware, leave was necessary before the proceedings could be served overseas. The Commissioner successfully established a prima facie entitlement to all or any of the claimed relief. Facebook Inc then conditionally appeared to set aside the service. This was refused by the primary judge.

In the Full Federal Court, Perram J (with whom Allsop CJ and Yates J agreed), concluded that an inference was available that Facebook Inc was carrying on business in Australia and that it collected the relevant personal information in Australia, because:

(a) By installing cookies on users' Australian devices, there was a prima facie case that Facebook Inc was carrying on business in Australia (at [43]); and

(b) Facebook Inc offered a service called 'Graph API' to Australian developers, which was an interface provided to Australian application developers including "a facility which allows third party applications to utilise the Facebook login". Because Facebook Inc offered these services to developers in Australia and provided the Facebook login to them, there was an inference open that this also constituted carrying on a business in Australia (at [65]).

The Full Court reasoned that there was therefore a prima facie case that an Australian link was present, such that the *Privacy Act* applied to extra-territorial conduct by Facebook Inc. The Full Court concluded that the primary judge was correct to refuse Facebook Inc's application to set aside service upon it.

On appeal to the High Court, Facebook submitted that it had no commercial presence in Australia, no contracts with Australian users or other contract counterparties, no premises or property, and earned no revenues from Australia. On this basis, Facebook submitted that it could not be said to be carrying on business in Australia. Facebook's submissions on this point relevantly concluded that 'Justice Perram's judgment says you carry on business in a jurisdiction even if you have no, as it were, commercial engagement with any person in that jurisdiction. We say all cases up until this case have been to the contrary…'.

On 7 March 2023, the High Court revoked special leave because of a procedural amendment to the Federal Court Rules 2011 which meant that the Information Commissioner no longer needed the Court's leave to serve Facebook overseas. Nevertheless, cases of this kind are likely to arise in future and could broaden the circumstances in which multi-national companies are deemed to be 'carrying on business in Australia' and are therefore covered by the Privacy Act.

The review of the *Privacy Act 1988*

In our presentation last year we noted that in October 2020, the Federal government released terms of reference for a wide-ranging review into the Privacy Act. The Attorney-General's Department published the final report of the review on 16 February 2023.

The report considers whether the Privacy Act and its enforcement mechanisms are fit for purpose in an environment where Australians now live much of their lives online. The review highlighted the vulnerability of people's information in the digital age, referencing many recent high-profile data and privacy breaches and establishing this as a key challenge facing countries globally. There have been significant developments in data protection laws internationally in recent years to respond to the technological developments in personal information handling.

In the lead up to the review three major data hacks took place in Australia. First was the Optus Data Breach and the second data breach related to MediBank, which we refer to above. The third was the Australian Clinical Labs Data Breach. The Pathology Company suffered a data breach which exposed 223,000 customers' data, including their medical and health records, credit card numbers and Medicare numbers .

The review highlighted these three data breaches as significant and high-profile, and warranting a legislative response. The proposals in the final report included the following:

(a) that the core principles of the Privacy Act should be maintained though supplemented with greater certainty where possible. The report recommended some new principles such as the 'fair and reasonable test' – requiring that the collection, use and disclosure of personal information must be fair and reasonable in the circumstances, which would be an objective test (at p 3). However, the flexibility of this and existing APP principles would be complemented by increased certainty through more detailed Office of the Australian Information Commissioner (OAIC) guidance and increased use of APP codes and emergency declarations;

(b) the need to clarify the fact that personal information is an expansive concept which includes technical and inferred information, such as IP addresses and device identifiers, where it relates to a reasonably identifiable individual (at p 25). The report proposes that protection should apply to personal information that has been de-identified, in recognition of the fact that de-identified information can be re-identified (at p 38);

(c) in recognition of the increasing privacy risks posed by small businesses and the benefits of improved privacy protection for Australians and the economy, the report recommends that the small business exemption should be removed. This would require all Australian businesses to comply with the Act, regardless of annual turnover (p 61);

(d) the report proposes that APP entities should minimise the amount of personal information they collect and retain. This would be achieved through enhanced OAIC guidelines for entities on the reasonable steps they should take to destroy or de-identify personal information so that they can be in a better position to meet their obligations (p 3);

(e) the report proposes several individual rights modelled on the European Union's General Data Protection Regulation (GDPR). This includes transparency requirements for automated decisions that use personal information and have a significant effect on individuals. Entities would need to provide information about types of personal information used in automated decisions-making systems and how such decisions are made;

(f) the report includes proposals to support entities disclosing personal information overseas, including introducing a mechanism to prescribe countries' laws and binding schemes as

providing substantially similar protection and making standard contractual clauses available to APP entities (p 4);

(g) this Report also proposes reforms to strengthen enforcement of the Act (p 4). These include new civil penalties and new powers for the IC (Information Commissioner) in relation to investigations, public inquiries, and determinations. To address concerns about the appropriate resourcing requirements of the OAIC, the Report proposes that the feasibility of industry funding models be further explored; and

(h) the report also recommends increasing the avenues available to individuals to seek remedies in the courts. Specifically, the report includes a proposal that a statutory tort for serious interferences with privacy be introduced which would not require proving actual damage to establish a cause of action. The direct right of action would be available to any individual or group of individuals who have suffered loss or damage as a result of privacy interferences by an APP entity. Loss or damage would need to be established within the existing meaning of the Privacy Act, including injury to the person's feelings or humiliation (pp 273-277).

The Attorney-General's Department is currently seeking feedback to inform the Federal government's response to the Privacy Act Review Report. The deadline for feedback is 31 March 2023. We anticipate that there could be further substantial changes to the Privacy Act following this review.

National Anti-Corruption Commission

The National Anti-Corruption Commission (**NACC**) is a federal body newly established under the *National Anti-Corruption Commission Act 2022* (**NACC Act**) that will have broad jurisdiction "to investigate public sector corruption and will have prevention and education functions to improve anti-corruption efforts in the Commonwealth public sector". The Bill for the NACC Act was introduced on 30 November 2022 under the newly elected Albanese Government and received Royal Assent on 12 December 2022. The Federal Government expects the Commission will begin operations in mid-2023.

Prior to the introduction of the NACC Act, the Commonwealth used a multi-agency anti-corruption approach within the Australian Public Service (APS) and Parliament. The only agency that had dedicated Commonwealth jurisdiction under the multi-agency regime was the Australian Commission for Law Enforcement Integrity (**ACLEI**). The Consequential Amendments Act brings ACLEI and the anti-corruption functions of the other agencies under the newly created NACC .

The NACC will have jurisdiction to investigate acts that can be considered 'corrupt conduct' by any 'Public Official'. Section 8(1)(a) of the NACC Act defines 'corrupt conduct' as any conduct that directly or indirectly adversely or could adversely affect any public official's honest or impartial exercise of powers or performance of their functions and duties.

The Commissioner will have power to conduct a corruption investigation only if they are of the subjective opinion that the issue could involve corrupt conduct that is 'serious or systemic', which have their ordinary meaning.

Further, s 8(4) and s 8(5) provide for retrospective action by the NACC. Conduct that satisfies the meaning of corrupt will still be within the scope of NACC even if it occurred before the commencement of the Act. Similarly, if the person involved in the conduct is no longer a public official at the commencement of the Act the NACC will still have jurisdiction to investigate. Conduct will not be considered 'corrupt' for the purpose of the section if it is undertaken by the Governor-General, State governors, judges, and royal commissioners.

The NACC will have ability to hold public and private hearings or examinations. Hearings will be held in private unless the Commissioner decides otherwise. The threshold for holding the hearing in public

will be where the Commissioner is satisfied that there are exceptional circumstances that justify holding the hearing in public and it is in the public interest to do so.

The Commission will have power to accept submissions from any source, including the public. Commonwealth agency heads will have mandatory referral obligations to refer to the Commission where the agency head suspects the corrupt conduct could be serious or systemic and heads of intelligence agencies will be able to make a mandatory referral either directly to the Commission or to the Inspector-General of Intelligence and Security (IGIS).

In the establishment of the NACC, we see a further step towards a fourth branch of government, the 'integrity' branch of government, which Justice Spigelman predicted over 20 years ago. Agencies will need to ensure that they have the procedures in place to engage with the NACC from mid-year.

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