Recent developments

Katherine Cook

New Independent National Security Legislation Monitor

Commonwealth Attorney-General Christian Porter has announced that Mr Grant Donaldson SC will be appointed Australia's acting Independent National Security Legislation Monitor (INSLM).

The INSLM independently reviews the operation, effectiveness and implications of Australia's national security and counter-terrorism laws.

The government continues to modernise and strengthen legislation to address the evolving terrorist and espionage threat at home and abroad.

'The INSLM has an important role in reviewing legislation as to whether the laws contain appropriate protections, are proportionate to terrorism or national security threats and remain necessary', the Attorney-General said.

'Mr Donaldson will be appointed for an initial period of three months while preparatory arrangements for his permanent appointment are made.'

'An eminent barrister with experience in commercial, private and criminal law, Mr Donaldson brings a wealth of legal and public policy expertise to the role.'

Mr Donaldson served as the Solicitor-General for Western Australia from 2012 to 2016, and has held senior leadership positions in the Western Australian Bar Association and the Legal Practice Board of Western Australia. A former Rhodes Scholar, Mr Donaldson is a Fellow of the Australian Academy of Law and has been a Visiting Fellow at the Law School of the University of Western Australia since 1991.

The Attorney-General congratulated Mr Donaldson on his appointment and thanked Dr James Renwick CSC SC for his valuable contribution in reviewing Australia's national security and counter-terrorism laws, over the course of his term.

<https://www.attorneygeneral.gov.au/media/media-releases/new-independent-national-security-legislation-monitor-8-july-2020>

Appointment of Deputy Commonwealth Ombudsman

The Morrison government has congratulated Penny McKay on her five-year appointment as a Deputy Commonwealth Ombudsman.

As Deputy Ombudsman, Ms McKay will assist the Commonwealth Ombudsman with strategic leadership and day-to-day management, in addition to the development of policies, systems and processes for effective and timely investigations and compliance audits.

Ms McKay is currently First Assistant Secretary of the Integrity, Security and Assurance Division at the Department of Home Affairs. Ms McKay's 23-year public service career spans state and commonwealth jurisdictions and includes senior roles with the Australian Commission for Law Enforcement Integrity, the Commonwealth Director of Public Prosecutions and the ACT Department of Justice and Community Safety.

Ms McKay commenced on 10 August 2020. She replaces Ms Jaala Hinchcliffe, who was appointed as Integrity Commissioner in February 2020.

Ms McKay's qualifications include a Bachelor of Laws and a Bachelor of Business (Management). She was admitted to practise in 1999. She has held the position of First Assistant Secretary at the Department of Home Affairs since March 2020, serving as an Assistant Secretary from 2018 to 2020.

Ms McKay has served as General Counsel for the Australian Commission for Law Enforcement Integrity (2014–2018); the Director of the Royal Commission into the Protection of and Detention of Children in the Northern Territory (secondment 2016–2017); and Principal Legal Officer, Commonwealth Director of Public Prosecutions (2008–2014).

<https://www.attorneygeneral.gov.au/media/media-releases/appointment-deputy-commonwealth-ombudsman-24-july-2020>

New National Children's Commissioner appointed

The Morrison government is pleased to announce the appointment of Ms Anne Hollonds as the new National Children's Commissioner.

Ms Hollonds is currently the Director of the Australian Institute of Family Studies and replaces Australia's inaugural Children's Commissioner, Megan Mitchell, who served in the role for seven years.

As Children's Commissioner, Ms Hollonds will promote discussion and awareness of issues affecting children; conduct research and education programs; consult directly with children and representative organisations; and examine Commonwealth legislation, policies and programs that relate to children's human rights.

The Attorney-General, Christian Porter, said Ms Hollonds had an extensive background in the area of child and family welfare, including front-line engagement with families, children and young people as a therapist and through her roles as CEO of The Benevolent Society and Relationships Australia.

Ms Hollonds will complete her appointment as Director of the Australian Institute of Family Studies before taking up her five-year appointment on 2 November 2020.

The President of the Australian Human Rights Commission will continue to manage the responsibilities of the Children's Commissioner role until Ms Hollonds commences.

Ms Hollonds' qualifications include a Bachelor of Arts (Psychology), a Bachelor of Social Studies and a Master of Business Administration.

She has been a registered psychologist since 1992 and is a current and former member of a variety of advisory boards on child and family welfare, including the National Children's Mental Health and Wellbeing Strategy Steering Group and the National Mental Health Commission.

Ms Hollonds has served as Director of the Australian Institute of Family Studies since 2015.

Prior to this she has held senior roles with Our Watch, The Benevolent Society and Relationships Australia.

<https://www.attorneygeneral.gov.au/media/media-releases/new-national-childrens-commissioner-appointed-28-july>

Reappointment of the Registrar of the Administrative Appeals Tribunal

Ms Sian Leathem has been reappointed as the Registrar of the Administrative Appeals Tribunal (AAT) for a further two-year term to 6 April 2022.

Ms Leathem commenced as the Registrar of the AAT on 7 April 2015.

Ms Leathem has played a key role in supporting the President of the AAT, the Hon Justice David Thomas, in implementing the restructure of AAT's corporate and support services, progressing the digital strategy that includes a single case management system and completing the Registry Transformation Program. Recently, she has supported the President in ensuring the AAT has been responsive in adjusting its procedures and operations to fit the circumstances brought about by the COVID 19 pandemic.

Following her initial appointment in 2015, Ms Leathem oversaw the amalgamation of the AAT with the former Migration Review Tribunal, Refugee Review Tribunal and Social Security Appeals Tribunal on 1 July 2015.

Prior to her appointment as Registrar of the AAT in 2015, Ms Leathem was the inaugural Principal Registrar of the New South Wales (NSW) Civil and Administrative Tribunal and Registrar of the NSW Workers Compensation Commission. Ms Leathem was also formerly Assistant Registrar of the AAT and has significant legal policy experience across the Commonwealth and NSW Public Service.

Ms Leathem holds a Bachelor of Arts, Master of Arts (Merit) and Bachelor of Laws (Honours) from the University of Sydney and an Executive Masters of Public Administration from the Australian and New Zealand School of Government.

<https://www.attorneygeneral.gov.au/media/media-releases/reappointment-registrar-administrative-appeals-tribunal-26-june-2020>

Rapid detection, assessment and notification critical in data breaches

An increase in data breaches caused by ransomware attacks and impersonation is among the key findings in the latest statistics report from the Office of the Australian Information Commissioner (OAIC).

The OAIC's Notifiable Data Breaches (NDB) Report for January to June 2020 shows a slight fall in the number of eligible breaches reported (518) against the previous six-month period (532) but an increase of 16 per cent compared to the same period last year.

Australian Information Commissioner and Privacy Commissioner, Angelene Falk, said malicious or criminal attacks including cyber incidents remain the leading cause of data breaches involving personal information in Australia.

'Malicious actors and criminals are responsible for three in five data breaches notified to the OAIC over the past six months', Commissioner Falk said.

'This includes ransomware attacks, where a strain of malicious software is used to encrypt data and render it unusable or inaccessible.'

The report shows the number of data breaches caused by ransomware rose from 13 in the previous six-month period to 33 between January and June, Commissioner Falk said.

'We are now regularly seeing ransomware attacks that export or exfiltrate data from a network before encrypting the data on the target network, which is also of concern', she said.

'This trend has significant implications for how organisations respond to suspected data breaches — particularly when systems may be inaccessible due to these attacks.'

'It highlights the need for organisations to have a clear understanding of how and where personal information is stored on their network, and to consider additional measures such as network segmentation, robust access controls and encryption.'

Across the reporting period approximately 77 per cent of notifying entities were able to identify a breach within 30 days of it occurring.

However, in 47 instances the entity took between 61 and 365 days to become aware and assess that a data breach had occurred, while 14 entities took more than a year.

'Organisations must be able to detect and respond rapidly to data breaches to contain, assess and notify about the potential for serious harm', Commissioner Falk said.

'A number of notifications also fell short of the standards required, in failing to identify all the types of personal information involved and not providing advice to people affected on how to reduce their risk of harm.'

'In these cases, we required the organisation to re-issue the notification. We will continue to closely monitor compliance with assessment and notification obligations as part of our system of oversight.'

In other findings:

- The insurance industry entered the top five sectors for the first time since the report began, notifying 35 breaches.
- Health service providers continued to be the top reporting sector (115 notifications), followed by the finance and education sectors.
- The number of notifications resulting from social engineering or impersonation has increased by 47 per cent during the reporting period to 50 data breaches.
- Actions taken by a rogue employee or insider threat accounted for 25 notifications, and theft of paperwork or storage devices resulted in 24 notifications.

The number of notifications per month varied widely across the reporting period, ranging from 63 in January to 124 in May — the highest number of data breaches reported in a month since the NDB scheme began in February 2018.

While the increase coincided with widespread changes in working arrangements due to the COVID-19 outbreak, Commissioner Falk said the OAIC had not found evidence to suggest the increase in May was the result of changed business practices.

'The report shows that more human error data breaches were reported in May, accounting for 39 per cent of notifications that month, compared to an average of 34 per cent across the reporting period', she said.

'While no specific cause for this change has been identified, it reinforces the need for organisations and agencies to take reasonable steps to prevent human error breaches, including training for staff who handle personal information.'

'Organisations must also continue to assess and address any privacy impacts of changed business practices, both during their response to the COVID-19 outbreak and through the recovery.'

<https://www.oaic.gov.au/updates/news-and-media/rapid-detection-assessment-and-notification-critical-in-data-breaches/>

Information Commissioner launches investigation into the timeliness of freedom of information in Victoria

Victorian Information Commissioner, Sven Bluemmel, has commenced an investigation into the timeliness of freedom of information (FOI) in Victoria.

This own-motion investigation is the first of its kind to be undertaken under the *Freedom of Information Act 1982* (Vic) (FOI Act).

The FOI Act was enacted to promote openness, accountability and transparency in the Victorian public sector by giving the public the right to access government information. There are around 1,000 public sector organisations subject to the FOI Act, including Victorian Government departments, local councils, statutory authorities, public hospitals, universities and TAFE colleges.

Delay in providing access to information is the most common complaint made to the Office of the Victorian Information Commissioner (OVIC).

In 2018–19, 18 per cent of decisions on FOI requests were made outside the statutory timeframe. The number of delayed FOI decisions in 2019–20 is anticipated to increase due to COVID-19 and other factors.

'Providing timely access to information is more than just a compliance exercise', said Mr Bluemmel.

'Enhancing the public's right to access information helps level the playing field and redistribute the balance of power from government to the public. It equips citizens, the media, advocacy groups and others with information that allows them to scrutinise decisions and actions taken by government.'

The investigation will examine the FOI practices of selected agencies to identify causes for delay in releasing government information. OVIC is reviewing data and complaint information to determine which agencies will be subject to investigation.

The Information Commissioner invites members of the public who have experienced delays to share their experience. Submissions received may assist the Information Commissioner in identifying agencies that will be subject to investigation.

At the conclusion of the investigation, the Information Commissioner may submit a report for tabling in the Parliament, setting out any findings and recommendations to improve timeliness in FOI practices across Victoria.

The investigation report and recommendations are expected to be completed in mid-2021.

<https://ovic.vic.gov.au/mediarelease/information-commissioner-launches-investigation-into-the-timeliness-of-freedom-of-information-in-victoria/>

Western Australian Ombudsman elected president of world body — the International Ombudsman Institute

Western Australian Ombudsman, Chris Field, has been elected President of the International Ombudsman Institute (the IOI). It is the first time in the 42-year history of the IOI that an Australian has been elected President.

The IOI, established in 1978, is the global organisation for the cooperation of 205 independent Ombudsman institutions from more than 100 countries worldwide. The IOI is organised in six

regional chapters — Africa, Asia, Australasian and Pacific, Europe, the Caribbean and Latin America and North America.

His appointment also marks the first time that a President has been elected by IOI members. Historically, presidents were elected by the IOI World Board. A new voting system, applicable for the first time in the 2020 election, provided the opportunity for every IOI member globally to vote for the position of President.

Chris will commence his four-year term as President at the rescheduled 12th World Conference and General Assembly of the IOI in Dublin, Ireland.

Chris will bring significant experience to the role of President. He is currently Australia's longest serving Ombudsman and has previously served on the IOI World Board as Second Vice President between 2016 and 2020, Treasurer between 2014 and 2016 and President of the Australasian and Pacific Ombudsman Region between 2012 and 2014.

In addition to his role as Ombudsman, he concurrently holds the roles of Energy and Water Ombudsman; Chair, State Records Commission; and Chair, Accountability Agencies Collaborative Forum (a forum comprising the Ombudsman; Chief Psychiatrist; Information Commissioner; Commissioner for Equal Opportunity; Inspector of Custodial Services; Commissioner for Children and Young People; Director, Health and Disability Services Complaints Office; Director, State Records Office; Director of Equal Opportunity in Public Employment; Chief Mental Health Advocate; and the Commissioner for Victims of Crime).

He has for the last 14 years been an Adjunct Professor in the School of Law at the University of Western Australia, where he teaches the advanced administrative law unit Government Accountability — Law and Practice — a course he founded with Professor Simon Young (co-author of the university textbook Lane and Young, *Administrative Law in Australia*). Chris is also the author of a range of publications on the Ombudsman and administrative law.

Of his appointment as President, Chris said he hoped to 'continue the productivity, professionalism and collegiality that have defined the Board's work and will seek to continue the outstanding leadership provided by his close colleague, current President, Peter Tyndall, Ombudsman and Information Commissioner for Ireland'.

To do so, he will work alongside his IOI World Board colleagues, an Executive Committee of the Board comprising himself; First Vice President, Mr Viddhavat Rajatanun, Chief Ombudsman of Thailand; Second Vice President, Ms Diane Welborn, Ombudsman for Dayton and Montgomery County, Ohio; Treasurer, Ms Caroline Sokoni, Public Protector of Zambia; and Regional Presidents for Europe and the Caribbean and Latin America.

Chris will also work closely with Mr Werner Amon, Austrian Ombudsman and Secretary General of the IOI. The Austrian Government generously provides funding to the office of the Austrian Ombudsman for a staff secretariat to support the work of the IOI, led by the Secretary General, who is also one of three Austrian Ombudsmen.

His goals for his term as President are:

1. contribute leadership on behalf of the global Ombudsman community with respect to issues that nations face regarding integrity and good governance;
2. focus the work of the IOI on promoting access to justice; contributing to the rule of law; advancing human rights; protecting minorities, first peoples and the vulnerable; standing strongly with Ombudsmen under threat; and supporting developing democracies and emerging Ombudsman institutions;
3. further develop the IOI's relationship with the United Nations, including promoting the Venice Principles. The Venice Principles, adopted by the Venice Commission (the Council of Europe's Commission for Democracy through Law), represent the first independent, international set of standards for the Ombudsman institution. They are the equivalent of the United Nation's Paris Principles, which set out the standards against which national human rights institutions are judged; and
4. ensure inclusion of every IOI region and member so that all voices are fairly represented and heard.

'It is an extraordinary honour to be elected by my peers as President and also humbling to be the first Australian to hold the office of President', said Chris.

Recent decisions

Are decisions of the SA Ombudsman reviewable?

King v Ombudsman & Anor [2020] SASCFC 90 (15 September 2020) (Parker, Doyle and Tilmouth JJ)

The appellant (Mr King) sought judicial review in relation to, among other things, a completed investigation and report of the first respondent (the Ombudsman) (the 2016 Investigation).

The 2016 Investigation concerned the conduct of Mr King in his capacity as General Manager of the Anangu Pitjantjatjara Yanjunytjatjara (the APY) — an office created under the *Anangu Pitjantjatjara Yanjunytjatjara Land Rights Act 1981* (SA) (the APY Act). The APY is an agency for the purposes of the *Ombudsman Act 1972* (SA) (the Ombudsman Act). The second defendant (Mr Adamson) was the named complainant in respect of the 2016 Investigation. He is an Anangu person and member of the APY and was until April 2017 the Chairperson of the Executive Board.

In the 2016 Investigation report the Ombudsman found that Mr King had acted in a manner that was 'wrong' in failing to provide copies of the handwritten notes of certain Executive Board meetings to Mr Adamson. The Ombudsman also made a finding that Mr King failed to cooperate with the investigation in a timely manner and to provide documentation as requested of him.

Mr King sought various forms of relief, including a declaration that the Ombudsman had no jurisdiction to conduct the 2016 Investigation. Mr King contended that the Ombudsman

had no jurisdiction to investigate the complaints by reason of s 13(3)(a) of the Ombudsman Act, which proscribes any investigation of an administrative act in respect of which the complainant has a right of appeal, reference or review under an enactment.

The respondents contended, among other things, that the claim must fail because the Ombudsman's powers of investigation and report under the Ombudsman Act are not amenable to judicial review. Notably, the Ombudsman contended that in circumstances where the report, opinions and recommendations of the Ombudsman have no legal effect, they are not amenable to judicial review on the grounds relied upon by Mr King.

At first instance, the primary judge dismissed the proceedings on the grounds that none of the contended jurisdictional errors had been established. Her Honour did not consider it necessary to determine the respondents' contentions that the Ombudsman's findings were not amenable to judicial review.

Mr King then appealed to the Full Court of the South Australian Supreme Court (the Full Court).

The Full Court found that relief in the nature of *certiorari* will not ordinarily be available to quash an Ombudsman's report. The nature of the reporting power — and, in particular, the absence of any direct legal consequence flowing from its exercise — will ordinarily be fatal to the availability of that form of relief. However, it does not follow that there are no constraints upon the Ombudsman's powers to investigate and report that might warrant judicial intervention. Judicial intervention will be available in circumstances where the Ombudsman does not have jurisdiction to conduct the relevant investigation (for example, pursuant to the Court's jurisdiction under s 28 of the Ombudsman Act) or where the Ombudsman has acted in excess of his coercive powers during the conduct of the investigation. Intervention in such circumstances might result in declaratory or injunctive relief, or perhaps relief in the nature of prohibition. While it should be acknowledged that there are some provisions of the Ombudsman Act which provide a measure of reputational protection, an Ombudsman's report will often result in reputational harm to the agency and people responsible for the administrative act under investigation, and in some cases that action may well have ramifications for the employment and promotional prospects of relevant individuals.

The Full Court also found that subs 30(1) of the Ombudsman Act provides the Ombudsman (and any member of staff) with an immunity from liability. However, the Court did not agree that the carve-out from s 30(2) (that neither the Ombudsman nor any members of the Ombudsman's staff can be called to give evidence before a court in legal proceedings) provides a proper basis for divining the extent of judicial review that is available in respect of the Ombudsman's functions. The Court found there must be scope for judicial review to the extent that the Ombudsman either acts in excess of his coercive powers in the conduct of his investigations or fails to observe one of the express constraints upon his powers (such as the obligation to give an opportunity to comment upon the subject matter of a report). While s 30(2) does not contemplate the compellability of the Ombudsman as a witness in those proceedings, it does not provide a basis for concluding that the Ombudsman's reporting power was not intended to be subject to judicial review on the ground of a failure to observe an implied constraint.

Does a Defence Force magistrate have jurisdiction to hear the charge during peacetime?

Private R v Brigadier Michael Cowen & Anor [2020] HCA 31(9 September 2020) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)

On 12 June 2019, the plaintiff was charged by the Director of Military Prosecutions (DMP) with one count of assault occasioning actual bodily harm against a woman with whom he had previously been in a relationship. The alleged offending occurred in Brisbane. The plaintiff was and is a member of the Australian Defence Force (ADF) and the complainant, at the time of the alleged assault, was also a member of the ADF. Neither was on duty or in uniform at the time of the alleged offending.

On 26 August 2019, the plaintiff appeared before a Defence Force magistrate on a charge under s 61(3) of the *Defence Force Discipline Act 1982* (Cth), which provides that a Defence member is guilty of an offence if the person engages in conduct outside the Jervis Bay Territory and that conduct would be an offence if it took place in the Jervis Bay Territory. Assault occasioning actual bodily harm is an offence under s 61(3) by reason of s 24 of the *Crimes Act 1900* (ACT).

The plaintiff objected to the Defence Force magistrate's jurisdiction to hear the charge. The Defence Force magistrate dismissed the objection on the basis that it is sufficient to confer jurisdiction on a service tribunal that the accused was a member of the armed forces when the charged offence was allegedly committed.

The plaintiff commenced proceedings in the original jurisdiction of the High Court seeking prohibition to prevent the Defence Force magistrate hearing the charge against him. The application concerned, among other things, the extent to which the defence power conferred on the Commonwealth Parliament by s 51(vi) of the *Constitution* supports the conferral of jurisdiction by the Defence Force Discipline Act upon military service tribunals to hear and determine charges relating to conduct that also constitutes an offence under ordinary criminal law and that is committed in a time of peace when civil courts are reasonably available. Section 51 of the *Constitution* relevantly provides: 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.'

Before the High Court, the plaintiff contended that it is not reasonably necessary for the maintenance of military discipline to make all civil offences committed by Defence members subject to military jurisdiction in peacetime when the civil courts are available to deal with those offences. The plaintiff, urging the application of what was described as the 'service connection' test, whereby a service tribunal may exercise jurisdiction only where the circumstances of the particular case are sufficiently connected to the military service of the accused, argued that this test is not satisfied in the circumstances of the present case.

The Commonwealth contended that plaintiff's approach is ad hoc and impressionistic, and not capable of drawing a clear line between those circumstances which present a sufficient

connection to the requirements of military discipline and those which do not. It was therefore said to be unsuitable as a test to determine the existence of the jurisdiction of a service tribunal to deal with a particular case. The Commonwealth further submitted that it is central to the very existence and maintenance of the ADF as a disciplined and hierarchical force (*White v Director of Military Prosecutions* [2007] HCA 29) that its members be required to observe the standard of behaviour demanded of ordinary citizens and that those standards be enforced by service tribunals (*Re Tracey; Ex parte Ryan* [1989] HCA 12). It is self-evident that soldiers whose conduct amounts to the commission of a criminal offence manifest qualities of attitude and character that may detract from the maintenance of a disciplined and hierarchical defence force (*O'Callahan v Parker* [1969] USSC 134).

The High Court unanimously held that the Defence Force magistrate had jurisdiction to hear the charge.

A majority of the Court held that s 61(3) of the Defence Force Discipline Act, in obliging Defence members to obey the law of the land, is, in all its applications, a valid exercise of the defence power. The majority held that expressions 'service connection' and 'service status', while a convenient shorthand, distract from the question which arises in relation to the scope of s 51(vi) of the *Constitution*. The test of the validity of a law purporting to be made under s 51(vi) is whether the measure can reasonably be seen to conduce to the efficiency of the defence forces of the Commonwealth, and that will not be so where 'the connection of cause and effect between the measure and the desired efficiency [is] so remote that the one cannot reasonably be regarded as affecting the other' (*Farey v Burvett* (1916) 21 CLR 433, 441). To similar effect, in *Marcus Clark & Co Ltd v The Commonwealth*, Dixon CJ expressed the test of validity as being whether 'the measure does tend or might reasonably be considered to conduce to or to promote or to advance the defence of the Commonwealth' (1952) 87 CLR 177, 216). If that question is answered in the affirmative in relation to the impugned law in the present case, it is valid in all its applications, and there is no occasion to consider whether the 'service connection' test is satisfied in the circumstances of any particular case.

The Court found that the system of military justice established under s 51(vi) stands distinctly outside of Ch III of the *Constitution*. The fact that decisions of service tribunals are amenable to review under s 75(v) of the *Constitution* 'points away' from the conclusion that such tribunals exercise judicial power (*Attorney General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 579).

The Court held that, whether service tribunals exercise judicial or administrative power, the power is required to be exercised judicially — that is, in accordance with the requirements of reasonableness and procedural fairness to ensure that discipline is just. The High Court is invested with jurisdiction by s 75(v) of the *Constitution* to supervise the exercise of power by officers of the Commonwealth to ensure that their powers are exercised judicially.

Procedural fairness in the South Australian ICAC

C v The Independent Commissioner Against Corruption [2020] SASCFC 57 (26 June 2020) (Kourakis CJ; Stanley and Bleby JJ)

On 22 March 2017, the plaintiff attended the Independent Commissioner Against Corruption's (the Commissioner's) offices in response to a summons and underwent an examination. The plaintiff was legally represented and made a claim of privilege against self-incrimination with respect to the whole of his evidence. The Commissioner subsequently made a non-communication direction to the effect that any evidence given by the plaintiff that would enable him to be identified must not be communicated to any person (with certain exceptions) in the course of the examination. On 22 June 2017, the Commissioner varied that direction without reference to the plaintiff, which meant that the fact the plaintiff had given evidence was communicated to the relevant staff of the Office of the Director of Public Prosecutions (DPP). The DPP declined to lay charges against the plaintiff.

On 9 August 2018, the plaintiff was told by the Commissioner that the corruption investigation had concluded. However, on 6 November 2019, the Commissioner said that, on 6 July 2018, he had modified the assessment of the investigation so that it was assessed as a matter raising issues of serious and systemic misconduct and maladministration in public administration.

On 19 December 2019, the Commissioner further varied the non-communication direction to enable any evidence given by the plaintiff, or information that might enable him to be identified as a person who gave evidence before the Commissioner, to be communicated to certain people, including his superiors.

The plaintiff applied for judicial review of seven decisions, acts or omissions which he claimed occurred in the course of action taken, or purported to be taken by the Commissioner, under s 24 of the *Independent Commissioner Against Corruption Act 2012* (SA) (the ICAC Act). The plaintiff contended, among other things, that the defendant, in making the decisions to vary the directions, denied the plaintiff procedural fairness, which was a jurisdictional error. The plaintiff contended, by reference to accepted orthodoxy, that procedural fairness must be accorded where it is contemplated that an administrative decision will be made that in some way abrogate a person's rights and interests. In this case, the plaintiff's rights and interests related to his reputation. The plaintiff also relied on cl 3(10) of Sch 2 the ICAC Act, which requires, among other things, that the examiner give a non-disclosure direction if a failure to do so might prejudice the reputation of a person.

The plaintiff sought relief in the nature of certiorari and/or declarations as to the decisions made by the Commissioner, in addition to an injunction restraining the use of the plaintiff's evidence compulsorily obtained in the corruption investigation from being used as part of a maladministration or misconduct investigation.

The Court summarily dismissed the plaintiff's application for judicial review. The Court held that the plaintiff's application did not disclose a reasonable basis for the claim.

The Court found that, prior to making the variation of 19 December 2019, the Commissioner

did not have an obligation to accord procedural fairness to the plaintiff in respect of the putative risk to the plaintiff's reputation.

The Court found that the requirement to give procedural fairness to an examinee or any person whose reputation might be affected adversely would unreasonably encroach upon and hinder an effective and expeditious investigation. Therefore, such an obligation would be unworkable.

The Court also held that the concept of 'prejudic[ing] the ... reputation' of a person within the meaning of subcl 3(10) of Sch 2 of the ICAC Act does not extend to prejudicing the person's reputation in the eyes of those to whom disclosures are required, as a matter of law, to be made for the purposes of discharging natural justice obligations in the course of the investigation itself.

The Court further held that the limited disclosure (mainly to the plaintiff's superiors) meant that any interim damage to the plaintiff's reputation within that small circle is more likely to be capable of being remedied at the conclusion of the investigation by a finding of no maladministration or misconduct, should that be the result.