Recent developments

Robin Creyke and Katherine Cook

Appointment of Inspector-General of Intelligence and Security

The Commonwealth Attorney-General, the Hon Christian Porter MP, has announced the substantive appointment of the Hon Dr Christopher Jessup QC as the Inspector-General of Intelligence and Security.

Dr Jessup has been acting as the Inspector-General since 18 January 2021 while arrangements for his permanent appointment were made.

The Inspector-General assists Ministers to oversee and review the activities of Australia's intelligence agencies to ensure they act legally and with propriety, comply with ministerial guidelines and directions, and respect human rights.

Dr Jessup holds qualifications in economics, law and applied science. He was appointed Queen's Counsel in 1987 and has over 30 years of experience at the bar.

The Attorney-General congratulated Dr Jessup on his appointment as Inspector-General and said he was confident that Dr Jessup will execute this office with the diligence and integrity he had shown as a judge of the Federal Court. Dr Jessup's five-year appointment commences on 8 February 2021.

<https://www.attorneygeneral.gov.au/media/media-releases/appointment-inspector-general-intelligence-and-security-4-february-2021>

Appointments to the Administrative Appeals Tribunal

The Morrison government said it was pleased to announce the appointment of two division heads and 12 new members of the Administrative Appeals Tribunal (AAT) for a period of three years.

The government has made the following appointments as division heads:

- Ms Fiona Meagher — Deputy President and Division Head of the National Disability Insurance Scheme (NDIS) Division; and
- Ms Karen Synon — Deputy President and Division Head of the Social Services and Child Support Division.

Division heads play a critical role in assisting the AAT President in the leadership of the AAT. The Social Services and Child Support Division is the second largest division of the AAT, while the workload of the NDIS Division has been growing since the commencement of the NDIS in 2013.

The government also made the following new appointments:

- one part-time senior member, the Hon John Rau SC;
- four full-time members: Ms Rachel Da Costa, Ms Namoi Dougall, Mr Justin Gibbs and the Hon Jane Prentice; and
- seven part-time members: Professor Stephen Cordner, the Hon Philip Dalidakis, Ms Genevieve Hamilton, Dr Jessica Henderson, Ms Angela Julian-Armitage, Ms Amanda Paxton and Ms Naomi Schmitz.

These new appointments will commence on 22 February 2021, except for those of Mr Gibbs, who will commence on 22 March 2021; and Professor Cordner, who will commence on 1 July 2021. All the appointees are highly qualified to undertake the important task of conducting merits review of government decisions.

Mr Porter, on behalf of the government, congratulated all appointees and said he looked forward to the contribution they will make to the Tribunal.

<https://www.attorneygeneral.gov.au/media/media-releases/administrative-appeals-tribunal-appointments-18-December-2020>

Reappointments to the Administrative Appeals Tribunal

The Attorney-General, the Hon Christian Porter MP, has announced the reappointment of five Justices of the Federal Court of Australia and two Justices of the Family Court of Australia as part-time Deputy Presidents of the Administrative Appeals Tribunal.

The terms of appointment are for five years or until their judicial appointment ceases. The Federal Court of Australia Justices who have been reappointed are:

- the Hon Justice Berna Collier;
- the Hon Justice Andrew Greenwood;
- the Hon Justice Susan Kenny AM;
- the Hon Justice John Middleton; and
- the Hon Justice Richard White.

The Family Court of Australia Justices are:

- the Hon Justice Victoria Bennett AO; and
- the Hon Justice David Berman.

Additionally, the government has also appointed Family Court of Australia Justice Timothy McEvoy as new part-time Administrative Appeals Tribunal Deputy President.

The Tribunal serves an important function of providing independent merits review, and the government is committed to ensuring the Tribunal has the resources it needs to provide high-quality merits review with minimum delay.

Federal Court and Family Court judges are appointed to the Tribunal to hear more legally complex matters before the Tribunal on an ad hoc basis, where their expertise is required. All judges retain their judicial appointments.

Mr Porter, on behalf of the government, congratulated all appointees and said he looked forward to the contribution they will make to the Tribunal.

<https://www.attorneygeneral.gov.au/media/media-releases/re-appointments-administrative-appeals-tribunal-11-december-2020>

Enhancing protections for journalists and public sector whistleblowers

The Morrison government has announced a range of measures designed to strengthen protections for journalists and public sector whistleblowers which will further enhance the freedom of the press.

The Attorney-General, the Hon Christian Porter MP, said:

> Transparency is a key foundation of a healthy democracy and these reforms support the right of journalists and whistle-blowers to hold governments at all levels to account by shining a light on issues that are genuinely in the public interest.

The government has accepted all the recommendations directed at the government by the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) recent press freedom inquiry. The recommendations:

- ensure that only Supreme Court or Federal Court judges can issue search warrants against journalists for disclosure offences;
- ensure warrants can only be issued against journalists for disclosure offences after consideration by a Public Interest Advocate;
- enhance reporting requirements in relation to warrants exercised against journalists; and
- require the government to consider additional defences for public interest journalism for secrecy offences.

The reforms complement strong action already taken by the government to protect journalists, including the Ministerial Directions to the Australian Federal Police and Commonwealth Director of Public Prosecutions. These directions require police to consider broader public interest implications before investigating journalists; and for prosecutors to seek the consent of the Attorney-General before prosecuting journalists for a range of disclosure offences.

The PJCIS also recommended that the government release its response to the *Moss Review of the Public Interest Disclosure Act (PID Act)*, which recommended improvements to the regime governing disclosures made by public sector employees.

The government accepted 30 of the review's 33 recommendations and has also today outlined further reforms that it intends to consider, including some suggested by the PJCIS.

The reform will focus the Act on more serious wrongdoing and misconduct, strengthen the oversight role of the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security, require agencies to support public officials when making disclosures, and improve the Act's interaction with other investigative processes.

The government will also make further reforms to enhance the clarity and effectiveness of the Act and make the protections more consistent with those available under the private sector scheme. The Attorney-General, the Hon Christian Porter MP, said:

> The PID Act was introduced by Labor in 2013 and is an important piece of legislation, but it has been widely criticised for being confusing and impenetrable — not only for judges and lawyers, but most significantly for public servants who rely on it for guidance and support.
>
> Our reforms will ensure the Act is clear and understandable and provides an effective legal framework that supports and protects public sector whistle-blowers, while balancing important national security considerations with regard to the unauthorised release of sensitive information.

The government thanked members of the PJCIS and Mr Philip Moss AM for their thorough approaches to these important reviews. The government extended those thanks to the many stakeholders that made valuable contributions to both inquiries.

<https://www.attorneygeneral.gov.au/media/media-releases/enhancing-whistle-blower-protections-16-december-2020>

Director-General of the Office of the Special Investigator

The Attorney-General, the Hon Christian Porter MP, congratulated Mr Chris Moraitis PSM on his appointment as Director-General of the Office of the Special Investigator. The Attorney-General said:

> Mr Moraitis brings his extensive public sector background to this important new role.
>
> He has been Secretary of the Attorney-General's Department since September 2014 and immediately before being appointed to lead my department, he had a long and distinguished career in the Department of Foreign Affairs and Trade, including serving as Australia's High Commissioner to Papua New Guinea between 2006–2009 and diplomatic postings in Paris, Madrid and Geneva.
>
> I thank Mr Moraitis for the support he has provided me since I was appointed Attorney-General in December 2017 and for his very significant and much appreciated contribution to the Government. This period has been particularly intensive with major Government reforms and, since the last election, adding industrial relations to the department's functions.
>
> I wish Mr Moraitis every success in his new role.

<https://www.attorneygeneral.gov.au/media/media-releases/secretary-attorney-generals-department-16-december-2020>

Amendments strengthen role of Defence and Veteran Suicide Commissioner

The Morrison government has listened to families and veterans' groups and agreed to further strengthen the design of the National Commissioner for Defence and Veteran Suicide Prevention.

Amendments to be introduced into the Senate this week will:

- further reinforce the independence of the National Commissioner;
- confirm the National Commissioner's role extends to considering attempted suicides and other lived experiences;
- incorporate a requirement for a review of the National Commissioner function after three years;
- acknowledge the valuable contribution that families and others affected by deaths by suicide will make to the National Commissioner's work, where they wish to contribute; and
- confirm the National Commissioner's ability to make recommendations about support services for families and others affected by a suicide death.

The Attorney-General, the Hon Christian Porter MP, said:

> The National Commissioner is a critical reform that addresses the unacceptably high rates of suicide among Australian Defence Force members and veteran communities in Australia …
>
> That work is simply too important to delay, which is why the Government has listened to families and veteran groups and agreed to amend its legislation to ensure it can pass through the Senate this week.
>
> Key among the 23 amendments are additional safeguards that further guarantee the independence of the Commissioner, giving the office the same standing as other independent statutory bodies such as the auditor general's office.
>
> Clarifying the Commissioner's powers to review attempted and suspected suicides will also ensure that the lived experiences of veterans and their families are appropriately considered.
>
> While the Government has shown its willingness to be flexible on these issues, the ball is now firmly in Labor's court to get behind these reforms so that work can begin as quickly as possible to prevent suicides among our defence and veteran communities.

The amendments implemented all the recommendations made by the Senate Foreign Affairs, Defence and Trade Legislation Committee in its report released on 30 November 2020. It also goes further by responding to feedback in the 94 submissions provided during a four-week consultation period held over 27 August – 24 September 2020, as well as input from states and territories.

Additionally, updates have been made to the terms of reference for the Independent Review of Past Defence and Veteran Suicides, which confirm that the National Commissioner can consider any past member or veteran death by suicide, or suspected suicide, as part of the review.

The office of the National Commissioner would be established immediately after royal assent to the Bill. As the Attorney-General said:

> The Government has already announced the appointment of Dr Bernadette Boss CSC as the interim National Commissioner for Defence and Veteran Suicide Prevention.
>
> With the passage of this Bill through the Senate, Dr Boss' appointment is formalised. Importantly, she will have powers equivalent to a Royal Commission to investigate past and future suicides and make recommendations to Government about steps that could be taken to improve the wellbeing of defence members and veterans.
>
> A critical difference with the National Commissioner compared to Royal Commissions is that, unlike Royal Commissions which examine issues at a fixed point in time, the National Commissioner is being established as a permanent office that can continually monitor the implementation of its own recommendations.
>
> This will ensure that much-needed long-term solutions to the issues surrounding the well-being of ADF members and veterans are being delivered. It will also allow the National Commissioner to investigate and examine new issues which arise in the future.
>
> Families and others directly affected by the death by suicide of an ADF member or veteran will be front and centre of the work of the National Commissioner. They will now have an opportunity to be heard in a safe and supported environment where their personal experiences can help others at risk.

<https://www.attorneygeneral.gov.au/media/media-releases/amendments-role-defence-veteran-suicide-commissioner-8-december-2020>

Government response to the *Comprehensive Review into Intelligence Legislation* (Richardson review)

The Morrison government has released the unclassified version of the *Comprehensive Review of the Legal Framework of the National Intelligence Community* (Richardson review), along with the government's response to the review.

The review, undertaken by Mr Dennis Richardson AC, is the most substantial review into the legislation governing Australia's intelligence community since the Hope royal commissions in the 1970s and 1980s.

Mr Richardson found that the key principles underpinning Australia's intelligence and security legislation are sound and enduring.

The government has continuously strengthened the laws that govern the National Intelligence Community to deal with emerging threats, changes in technology and agencies' operating environments.

Since the 9/11 terrorist attacks in 2001, the Australian Parliament has passed more than 124 Acts amending the National Intelligence Community's legislative framework.

The Richardson review affirms that this framework has been well maintained and is largely fit for purpose and that the National Intelligence Community is well adapted to meeting current and future challenges. The Attorney-General said:

> The review shows not only do our agencies work tirelessly to keep Australia safe, they are just as focused on making sure they do so within the limits of the law.
>
> The Government will ensure that these agencies continue to have the powers necessary to keep Australians safe against new and emerging threats. They will be backed by the oversight necessary to maintain the trust and confidence of all Australians.
>
> The Government will take forward a number of targeted reforms based on the Richardson review and has agreed in full, part or principle to 186 of the 190 unclassified recommendations.
>
> The Government's response to the Richardson review lays out a pathway for the evolution, rather than revolution, of Australia's intelligence and security agencies.

The Attorney-General said the centrepiece of those reforms would be the creation of a modernised legislative framework to govern electronic surveillance activities:

> The use of these powers is subject to strict safeguards, independent oversight and a range of transparency and accountability mechanisms. However, the review found that the existing framework has become unnecessarily complex, and in many ways has been outpaced by technology, and requires major reform.

The new framework will replace the parts of a number of existing Acts that govern electronic surveillance powers, including the *Telecommunications (Interception and Access) Act 1979* (Cth), the *Surveillance Devices Act 2004* (Cth) and the *Australian Security Intelligence Organisation Act 1979* (Cth). Consultation with industry and the public on this new framework will be led by the Department of Home Affairs.

The Attorney-General said:

> The *Telecommunications (Interception and Access) Act* was developed in 1979. It has lasted remarkably well, but is no longer fit for purpose in the digital world of the internet, smartphones and end-to-end encryption.
>
> This will be one of the biggest national security legislative projects in recent history — requiring the repeal and rewriting of nearly 1,000 pages of laws.

The government will also take forward a range of other notable recommendations, including:

- a new framework for ASIO's offshore activities in order to strengthen ministerial accountability;
- streamlining the emergency warrant framework;
- ensuring that oversight is better embedded into intelligence legislation when it is created; and
- establishing an independent panel to provide technical expertise and assistance to the Inspector-General of Intelligence and Security.

The Morrison government worked with Mr Richardson to ensure that the majority of his report could be released publicly. Together, the public release of the over 1,300-page declassified report and the 52-page government response would better enable informed debate on the role of our intelligence community and the government's forthcoming reform agenda. Mr Richardson's report should give the Australian public great confidence in our National Intelligence Community.

The Morrison government thanked Mr Richardson for his thorough and considered work on this important review, and acknowledges the work and support of the review Secretariat staff.

<https://www.attorneygeneral.gov.au/media/media-releases/government-response-richardson-review-4-december-2020>

The new *National Emergency Declaration Act 2020*

Australian will be in a stronger position to respond to major emergencies as a result of new laws to declare national emergencies passed by the Australian Parliament on 15 December 2020.

The *National Emergency Declaration Act 2020* (Cth) clarifies the process for declaring a national emergency. As the Commonwealth Attorney-General said:

> This means that national resources can be more rapidly deployed in order to help Australians affected by emergency situations, including natural disaster.

Under these new laws, a declaration can be made in circumstances where an emergency has arisen that has caused, is causing, or is likely to cause, nationally significant harm to:

- the life or health of an individual, or group of individuals, animals or plants;
- the environment;
- property, including infrastructure; or
- disruption to an essential service.

Once declared, it will allow for key actions at the Commonwealth level to assist in the emergency situation, including:

- streamlining the exercise of existing Commonwealth emergency powers to ensure a quicker response;
- empowering Ministers to suspend, vary or substitute 'red tape' procedural requirements when doing so would benefit the community, such as to assist people in disaster-affected areas to access disaster payments or other services;
- enabling the Prime Minister to require Commonwealth entities to report on stockpiles, resources and response options; and

- creating a new power in the *Telecommunications Act 1997* (Cth) requiring telecommunications providers to give the Commonwealth, states and territories such help as is reasonably necessary, such as sending emergency alerts.

The Attorney-General also said:

> When an emergency situation arises, rapid response is critical not just from state and territory governments which are on the front-line of emergency response but from all levels of government.
>
> These new laws will mean the Commonwealth is better able to respond with a national emergency declaration, wherever the situation is arising, and state/territory governments can focus on delivering immediate assistance.

The Act implements key recommendation 5.1 from the *Royal Commission into National Natural Disaster Arrangements Report*, which was released on 30 October 2020.

The Royal Commission's report highlighted a range of benefits that would be achieved through the establishment of a framework for declaring national emergencies, including communicating to Australia and the international community the severity of a disaster early, acting as a marshalling call for the early provision of Australian Government assistance and facilitating coordination with state and territory emergency management.

Under the new laws, the Governor-General can declare a national emergency, on the advice of the Prime Minister, for emergencies that are causing nationally significant harm.

The Act provides for states and territories to request, or be consulted on, the declaration of a national emergency unless there are exceptional circumstances which necessitate the Commonwealth making a unilateral declaration.

The Attorney-General said:

> This will allow for quick action to be taken at a national level to deal with rapidly-developing emergencies, particularly in situations where a state or territory is incapacitated or overwhelmed by events.

Emergency declarations will be limited to a maximum of three months, with extensions possible if the initial justification for the declaration continues to exist. A declaration can also be varied if further emergencies arise, allowing the Commonwealth to actively respond to disasters as they evolve.

For a declaration to be made, the emergency must have caused, be causing, or be likely to cause:

- nationally significant harm to the life or health of an individual, or group of individuals, animals or plants;
- nationally significant harm to the environment;
- nationally significant harm to property, including infrastructure; or
- disruption to an essential service.

The Act establishes a collaborative approach to emergency response, requiring states and territories to request, or be consulted on, the declaration of a national emergency unless there are exceptional circumstances which necessitate the Commonwealth making a unilateral declaration, the Attorney-General said.

This means swift action can be taken at a national level to deal with rapidly developing emergencies, particularly in situations where a state or territory is incapacitated or overwhelmed by events.

The Morrison government has listened to stories of resilience, patience and courage in the face of disaster, throughout the Royal Commission into National Natural Disasters and indeed the COVID-19 pandemic.

The Australian community rightly expects and deserves swift and unambiguous action when natural disasters strike. The Act ensures that action can be delivered without delay.

<https://www.attorneygeneral.gov.au/media/media-releases/national-emergency-declaration-bill-passes-ahead-summer-10-december-2020>

Release of Commonwealth Integrity Commission consultation draft legislation

The Morrison government has committed $147 million to the development and operation of a Commonwealth Integrity Commission (CIC) designed to strengthen and complement the existing multi-agency approach to integrity, anti-corruption and law enforcement at a federal level.

The process has already started with the expansion of the Australian Commission for Law Enforcement Integrity (ACLEI) and will ultimately enhance the integrity framework of the Commonwealth Public Service and ensure it remains free from criminal corruption.

ACLEI'S jurisdiction will be expanded from 1 January 2021 to cover four new agencies and an additional $9.9 million funding and 38 staff were allocated in the 2020–21 Budget to undertake those functions. The second phase will be the establishment of the CIC, which will subsume ACLEI and cover the remainder of the public sector.

As the next stage in the process of enhancing the existing multi-agency framework, the Attorney-General, the Hon Christian Porter MP, has released draft legislation designed to establish a powerful new public sector watchdog to be known as the CIC.

The draft legislation is the result of detailed planning to ensure the new body has both the resources and powers it needs to investigate allegations of criminal conduct that could occur across the public sector and that the new body works with a variety of other agencies inside the multi-agency Commonwealth framework.

The CIC will have greater investigatory powers than a royal commission. The CIC's powers include the ability to:

- compel people to give sworn evidence at hearings, with a maximum penalty of two years imprisonment for not complying;
- compel people to provide information and produce documents (even if the information would incriminate the person), with a maximum penalty of two years imprisonment for not complying;
- search people and their houses, or seize property (under warrant);
- arrest people;
- tap phones and use other surveillance devices to investigate them; and
- confiscate people's passports by court order.

The Morrison government has also done the detailed design work and comparative analysis of the issues that have arisen with state-based bodies to ensure the CIC avoids the failings of those bodies. Such failings have resulted in multiple instances of unjust and irreparable harm to the reputations of innocent people. The Attorney-General said:

> Australians rightly expect that those working in the public sector — including politicians and their staff — are held to the highest standards of honesty and accountability, which is why the new CIC has been given the most significant powers and resources to detect and deter criminal activity and enhance the public sector's long-term resilience.
>
> The public equally expects that those who come under scrutiny are not denied procedural fairness and are not subjected to trial by allegation. That is why we have taken the time to carefully consider the pitfalls that have undermined confidence in other integrity commissions to ensure innocent people do not suffer unfairly.
>
> The model proposed in the Consultation Bills learns from the significant mistakes of state integrity bodies and strikes the right balance between the need to protect the rights of individuals and the need to establish a powerful investigative body that can guard against potential criminal corruption at the Commonwealth level.
>
> Labor is on the record as supporting a dangerous and unjust model developed by the Greens which argues for a body that represents a NSW ICAC on steroids, without fixing any of the many well publicised structural issues of such a model.
>
> The Greens model, supported by Labor, would see the most extreme coercive powers being used for the most minor code of conduct breaches that would otherwise be minor disciplinary matters.

The government is committed to a comprehensive, national consultation process on the draft legislation.

A series of consultation sessions will be arranged, as well as roundtable meetings with civil society, academia and other stakeholder representatives from all states and territories across the consultation period. Members of the public will also be able to lodge written submissions. The consultation period will run from November 2020 to March 2021 to allow time for comprehensive feedback.

The draft legislation comprises two Bills:

- the draft Commonwealth Integrity Commission Bill, which will establish the CIC as a centralised agency to investigate criminality and corruption in the public sector; and
- the draft Integrity and Anti-Corruption Legislation Amendment (CIC Establishment and Other Measures) Bill, which makes the necessary consequential amendments to existing Commonwealth legislation to support the introduction of the Commonwealth Integrity Commission Bill.

In developing the draft legislation, the government considered feedback from earlier rounds of public consultation, as well as advice from an expert panel that was engaged to advise the government on the reforms.

The CIC will be led by an Integrity Commissioner and two Deputy Commissioners, who will head the watchdog's separate law enforcement and public sector integrity divisions.

As part of the draft legislation, the government also proposes adding new corruption offences to the *Criminal Code Act 1995*. This will ensure that the CIC can comprehensively investigate a range of criminally corrupt conduct that could be committed in the public sector. These can be found in Schedules 1 and 2 of the Integrity and Anti-Corruption Legislation Amendment (CIC Establishment and Other Measures) Bill.

The government's model will ensure that corruption issues occurring across the federal public sector will be investigated appropriately by a well-resourced agency. The $106.7 million in new funding allocated to establish the CIC is in addition to the $40.7 million in existing ACLEI funding that will be absorbed by the CIC upon its commencement.

Submissions on the Bills close on 12 February 2021.

<https://www.attorneygeneral.gov.au/media/media-releases/release-commonwealth-integrity-commission-consultation-draft-2-november-2020>

Privacy Act review — terms of reference and issues paper

The Morrison government has released the terms of reference and issues paper for a wide-ranging review of the *Privacy Act 1988* (Cth).

The government committed to a review following the Australian Competition and Consumer Commission's Digital Platforms Inquiry in 2019. Several recommendations from that inquiry — which the government has already agreed to in principle — will be considered as part of the review.

These include expanding the scope of the Privacy Act to cover technical data and other online identifiers; and strengthening privacy notice and consent requirements.

The review will be conducted by the Attorney-General's Department, and public submissions can be lodged up until 29 November 2020. A further opportunity to comment will also be available following the release of a discussion paper early next year.

'Australians are spending more and more of their time online and more of their personal information is being collected, handled and stored', the Attorney-General, the Hon Christian Porter MP, said.

'Technology is also rapidly evolving in areas such as artificial intelligence and data analytics, which is why it is crucial that we have a privacy regime that is fit for purpose, can grow trust, empower consumers and support the growing digital economy.'

A report of the review will be released following government consideration. It is separate to the work already being undertaken to increase the maximum civil penalties under the Privacy Act and to develop a binding privacy code for social media platforms and other online platforms that trade in personal information.

The issues paper and further information about the review and consultation are available on the Privacy Act review page on the Attorney-General's Department website.

<https://www.attorneygeneral.gov.au/media/media-releases/privacy-act-review-30-october-2020>

Appointments to the High Court of Australia

His Excellency the Governor-General has accepted the advice of the government to appoint the Hon Justice Simon Steward and the Hon Justice Jacqueline Gleeson as Justices of the High Court of Australia.

Justice Steward and Justice Gleeson will respectively fill the vacancies that will arise upon the retirements of the Hon Justice Geoffrey Nettle AC on 30 November 2020 and the Hon Justice Virginia Bell AC on 28 February 2021.

Justice Steward completed a Bachelor of Laws (First Class Honours) in 1990 and a Masters of Law in 2000, at the University of Melbourne. He was admitted to practice as a legal practitioner of the Supreme Court of Victoria in 1992 and signed the High Court Roll in the same year.

Justice Steward was called to the Victorian Bar in 1999 and was appointed Silk in 2009. In 2009 he commenced as a Senior Fellow in the Faculty of Law at the University of Melbourne. He was appointed as a Judge of the Federal Court of Australia in 2017 and commenced his career on the Bench in 2018.

Justice Gleeson graduated from the University of Sydney with a Bachelor of Arts in 1986 and a Bachelor of Laws in 1989. She began practising at the New South Wales Bar in 1991. Justice Gleeson left the Bar in late 2000 to practise as a solicitor, firstly with the Australian Broadcasting Authority and later the Australian Government Solicitor before returning to the Bar in 2007.

Justice Gleeson completed a Master of Laws at the University of Sydney in 2005 and was appointed Senior Counsel in 2012. She was appointed as a Judge of the Federal Court in 2014.

The government congratulates Justice Steward and Justice Gleeson on their appointments.

We also take this opportunity to thank His Honour Justice Nettle and Her Honour Justice Bell for their judicial service.

The Hon Justice Simon Steward

2018 Judge, Federal Court of Australia

2014 Appointed Queen's Counsel

2009–2017 Queen's Counsel / Senior Counsel, Aickin Chambers

2009 Appointed Senior Counsel

1999 Signed Bar Roll, Victorian Bar

1992–1999 Solicitor / Senior Associate, Mallesons Stephen Jaques

1992 Signed High Court Roll

1992 Admitted as a Barrister and Solicitor, Supreme Court of Victoria

Education

2000 Master of Laws, University of Melbourne

1990 Bachelor of Laws (First Class Honours), University of Melbourne

The Hon Justice Jacqueline Gleeson

2014 Judge, Federal Court of Australia

2012 Appointed Senior Counsel

2007–2014 Barrister, private practice

2003–2006 Senior Executive Lawyer, Australian Government Solicitor

2001–2003 General Counsel, Australian Broadcasting Authority

1991 Admitted as Barrister of the Supreme Court of New South Wales

1990–2000 Solicitor/Barrister

1989 Associate to the Honourable Justice Trevor Morling, Federal Court of Australia

1989 Admitted as a Solicitor of the Supreme Court of New South Wales

Education

2005 Masters of Laws, University of Sydney

1989 Bachelor of Laws, University of Sydney

1986 Bachelor of Arts, University of Sydney

<https://www.attorneygeneral.gov.au/media/media-releases/appointments-high-court-australia-28-october-2020>

OAIC issues first six-month COVIDSafe privacy report

Australian Information Commissioner and Privacy Commissioner, Angelene Falk, has released the first six-month report on the privacy protections in the COVIDSafe app.

Commissioner Falk said the report highlights the proactive work by the Office of the Australian Information Commissioner (OAIC) to ensure the system's strict privacy measures are upheld.

'My office has worked to increase awareness and understanding of privacy protections and obligations related to COVIDSafe by developing guidance and providing advice to government, regulated entities and the community', Commissioner Falk said.

'We have also established a robust assessment program to audit the handling of personal information in the COVIDSafe system for compliance with the strict privacy protections the Australian Government put in place.'

The OAIC's COVIDSafe Assessment Program follows the 'information lifecycle' of personal information collected by COVIDSafe.

During the reporting period (16 May to 15 November 2020), the OAIC commenced four assessments:

- Assessment 1 — access controls applied to the National COVIDSafe Data Store by the data store administrator, the Digital Transformation Agency;
- Assessment 2 — access controls applied to the use of COVID app data by state and territory health authorities;
- Assessment 3 — functionality of COVIDSafe against specified privacy protections set out under the COVIDSafe privacy policy and collection notices and against the requirements of the *Privacy Act 1988*; and
- Assessment 4 — compliance of the data store administrator with data handling, retention and deletion requirements under the *Privacy Act 1988*.

The OAIC received 11 enquiries about COVIDSafe during the reporting period. Seven enquiries raised general issues or concerns and four related to a request to download or use the app.

Commissioner Falk said oversight of the operation of the privacy aspects of COVIDSafe is a key priority for the OAIC.

'The privacy protections that accompany COVIDSafe are important outcomes for privacy in Australia', Ms Falk said.

'My office will continue to work to ensure that the protections are being applied so that Australians can be confident in the protection of their personal information within the COVIDSafe system.'

The COVIDSafe Report May–November 2020 can be found at <oaic.gov.au/covidsafe-report-may-nov-2020>.

About the report

On 16 May 2020, the OAIC was granted additional functions and powers in relation to COVIDSafe under Part VIIIA of the *Privacy Act 1988*.

The Australian Information Commissioner and Privacy Commissioner must report on the performance of her functions and the exercise of her powers under or in relation to Part VIIIA every six months.

<https://www.oaic.gov.au/updates/news-and-media/oaic-issues-first-6-month-covidsafe-privacy-report/>

New South Wales Government news

New NCAT facility for Parramatta

For the first time, the NSW Civil and Administrative Tribunal (NCAT) will have its own premises at Parramatta, providing greater access to tribunal services in Western Sydney.

The New South Wales Attorney General, the Hon Mark Speakman SC MP, said the new premises will quadruple capacity in Parramatta from five hearing days a week to 20 hearing days a week.

'The world-class facility will provide specialist tribunal services to meet the needs of one of the fastest growing regions in NSW', Mr Speakman said.

The new state-of-the-art purpose-built facilities will include four hearing rooms equipped with high-definition video conferencing technology, five conciliation rooms, a registry, public service counter and waiting room.

Mr Speakman said construction company Rork Projects Pty Limited will carry out the $2.3 million fit-out on Level 5 of 9 George Street, Parramatta, and that 'the Indigenous-owned company brings to this project 20 years' experience in corporate, education and government refurbishment and fit outs'.

The Member for Parramatta, Geoff Lee, said the project is great news for the local economy and community which will benefit from having a dedicated NCAT registry. As he noted:

> The project will create much-needed jobs for tradies and businesses in and around Parramatta and drive investment.
>
> Moving swiftly to complete the fit out will put the tribunal in a strong position to meet the needs of the local community.

In 2018–19, NCAT held nearly 4,300 hearings at Parramatta and 85,000 hearings in more than 75 locations across New South Wales. More than a third of those took place in regional areas. The ability for NCAT to utilise the new hearing rooms to full capacity will depend on COVID-19 restrictions that may be in place when work is complete in the new year.

NCAT provides a timely and cost-effective way of dealing with a broad range of disputes from building work to decisions on guardianship and administrative reviews of government decisions.

<https://www.dcj.nsw.gov.au/__data/assets/pdf_file/0005/787946/Mark-Speakman-Geoff-Lee-New-NCAT-facility-for-Parramatta.pdf>

Ms Sharon Cook appointed to chair the NSW Law and Justice Foundation

The New South Wales Attorney General, the Hon Mark Speakman SC MP, has announced that Sharon Cook, a highly respected lawyer and champion for women in the legal profession, will chair the NSW Law and Justice Foundation, effective from 30 June 2020, for a three-year term.

Mr Speakman said:

> The Foundation is focused on improving the NSW justice system to provide more fairness to our most vulnerable citizens is to have new leadership for the first time in more than a decade.
>
> The Foundation is fortunate to have legal talent of Ms Cook's stature to lead its work following the departure of the highly accomplished former Supreme Court Justice Paul Stein AM QC.
>
> Ms Cook has been prominent in the legal profession for more than 25 years, working for top tier private law firms before being appointed Chief Legal and Commercial Counsel at National Australia Bank in 2017. She has also been a leader in the legal profession in addressing mental illness and well-being among lawyers.

Ms Cook's legal career started at the Sydney and London offices of what is now King & Wood Mallesons. In 1997 Ms Cook joined Henry Davis York becoming its first female Managing Partner — a position she held for six years until 2014. She then returned to King & Wood Mallesons as Managing Partner, Clients.

In 2012, Ms Cook was named as one of the *Australian Financial Review* inaugural 100 Women of Influence in the board and management category and the following year was awarded the Lasting Legacy award by Lawyers Weekly for having 'acted as a trailblazer for women'. She is also a member of Chief Executive Women.

Mr Speakman paid tribute to outgoing Chair Paul Stein, who led the foundation since 2005. Mr Stein was a distinguished barrister who took silk in 1981 before being appointed as a judge of the District Court in 1983, the Land and Environment Court in 1985 and the Supreme Court in 1997:

> Mr Stein has had an outstanding career. I thank him for his outstanding contributions to the Foundation and for playing a crucial role in improving access to justice for disadvantaged people in NSW.

<https://www.dcj.nsw.gov.au/news-and-media/media-releases/new-chair-for-law-and-justice-foundation>

COVID-19 — video tech for witnessing legal documents

The *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) is a special power introduced in March 2020 in New South Wales to provide for altered arrangements for witnessing of signatures and the attestation of certain documents governed by New South Wales law.

The New South Wales Attorney General, the Hon Mark Speakman SC MP, announced that video conferencing technology like Skype, WhatsApp, FaceTime and Zoom can now be used in the witnessing of important legal documents like wills, powers of attorney and statutory declarations under a new regulation made by the Governor under the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW).

Mr Speakman said that the new temporary regulation will help reduce face-to-face contact during the COVID-19 pandemic:

> Thousands of legal documents are executed every day in the presence of one or more witnesses, but COVID-19 restrictions have made it difficult for many people to do so in person.
>
> Our first priority is always the safety and wellbeing of NSW residents, which is why we are changing the way these documents can be witnessed while the pandemic endures.
>
> Under the new regulation, a witness must see a person signing the document in real time to confirm the signature is legitimate, but now they can do so using video conferencing technology.

The witness will sign the document, or a copy of the document, to confirm they witnessed the signature. This could be done on a hard copy that is scanned and sent to the witness or on an identical counterpart of the document the signatory signs.

Traditional methods of signing and witnessing these documents remain valid while the regulation is in force. These changes will make it easier for people to stay home and reduce physical interactions, while still completing important transactions.

To facilitate the witnessing of New South Wales statutory declarations during COVID-19, the categories of people who are authorised to witness documents has been expanded in line with federal legislation.

Stakeholders including the judiciary, the Law Society of NSW, the NSW Bar Association, Justice of the Peace associations and other relevant professional bodies were consulted on the changes. The government will continue to consult with stakeholders about options for allowing certain documents to be signed and executed electronically.

<https://www.dcj.nsw.gov.au/news-and-media/media-releases/covid-19.-video-tech-for-witnessing-legal-documents>

New report details oversight of New South Wales Government COVID-19 response and importance of integrity agencies

The NSW Ombudsman's 2019–20 annual report highlights the important role that oversight agencies play in New South Wales, especially at a time of crisis.

The report, tabled in Parliament by Acting Ombudsman Paul Miller, provides a detailed account of the office's work for the year, including its role in monitoring government agencies' responses to the COVID-19 pandemic. 'We prioritised our oversight of those services upon which the most vulnerable members of our community rely, especially our corrective and youth justice system', said Mr Miller. 'We were conscious of the need to ensure that agency responses to protect inmates and staff from COVID-19 needed to be reasonable and proportionate. Reduced in-person visits by families as well as by external bodies like us also meant that there would be fewer "eyes" in the system.'

The NSW Ombudsman also worked to ensure that those subject to hotel quarantine had an avenue of complaint. From March to June 2020, the NSW Ombudsman received 115 contacts about hotel quarantine, including 25 actionable complaints about the Ministry of Health.

The NSW Ombudsman does not have jurisdiction to receive complaints about the NSW Police Force, but where it was contacted about those matters the office assisted by providing information and, where necessary, referring people to the Law Enforcement Conduct Commission.

An important part of the NSW Ombudsman's role is to receive complaints about New South Wales Government agencies and other service providers: *Ombudsman Act 1974* (Cth) and *Community Services (Complaints, Reviews and Monitoring) Act 1993 No 2* (NSW). In the 2019–20 reporting period, the NSW Ombudsman received 33,036 contacts and finalised 13,764 complaints, of which 39 per cent related to New South Wales Government departments and authorities and 33 per cent to custodial services.

'The decline in complaints this year correlates entirely with the impact of COVID on us, on the public and on government service provision', said Mr Miller. 'While contacts to our office were down, receiving and assessing contacts is only a part of our work — our Assessments

Unit, which is responsible for the intake and assessment of those 33,000-odd contacts, comprises just 21 staff in an office of around 120.'

The report provides an account of the office's other work, including undertaking investigations, monitoring systemic issues, assessing Aboriginal programs, receiving notifications of reportable incidents, providing education and training services, undertaking death reviews, providing oversight of the public interest disclosures system, and convening the Child Death Review Team.

'One example of our impact is in asbestos management', said Mr Miller. 'Following special reports tabled by the then Ombudsman in 2017, in 2019 the NSW government established a new statutory advisory committee to the NSW Environment Protection Authority, supported by the allocation of $12.7million funding for the NSW Asbestos Plan.'

During this reporting year, the NSW Ombudsman also participated in the New South Wales parliamentary committee inquiry into the funding processes for independent oversight bodies and the recently released Audit Office review into the financial arrangements applying to four key integrity agencies. Both reviews were directed primarily to the processes by which funding is provided, rather than the quantum of funding. A key focus was on whether existing processes are consistent with the essential independence of these offices.

'In our submissions, we identified serious concerns with the current funding processes', said Mr Miller. 'We suggested that parliamentary statutory offices such as the NSW Ombudsman should have their funding recommended to Parliament through a transparent Parliamentary Committee approach. These questions about funding process are happening now at a time when serious questions are being raised about the adequacy of funding provided to bodies such as ours. Inadequacy of funding, particularly where that shortfall is chronic and worsening, point to a failure in the funding process itself.'

The NSW Ombudsman is an independent integrity office that reports directly to the New South Wales Parliament. Since 1975, the office has been handling complaints about, and investigating maladministration by, New South Wales Government agencies and public officials. The office's functions now also cover a range of activities beyond complaints and investigations. The NSW Ombudsman *Annual report 2019–20* is available on the office's website.

The addendum to this release provides a snapshot and index of the highlights and data relating to specific aspects of the NSW Ombudsman's operations.

<https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0017/110609/Media-Release-New-report-details-oversight-of-NSW-Government-COVID-19-response-and-importance-of-integrity-agencies-27-October-2020.pdf>

Recent decisions

Fraud and unreasonableness

Minister for Home Affairs v DUA16; Minister for Home Affairs v CHK16 [2020] HCA 46 (9 December 2020)

On 9 December 2020, the High Court unanimously dismissed the Minister's appeal in *Minister for Home Affairs v CHK16 & Anor* and allowed the appeal in *Minister for Home Affairs v DUA16 & Anor*.

Each applicant had employed a migration agent to represent them before the Immigration Assessment Authority (IAA). The agent had acted fraudulently by providing pro forma submissions to the IAA and concealing this fact from her clients in the belief that disclosure meant her clients would not have paid for her professional services. In both cases the IAA was unaware of the fraud of the agent. The Minister appealed on the basis that the agent's fraud had not been shown to have any effect on a statutory function of the IAA under Pt 7AA of the *Migration Act 1958* (Cth).

The Court held that in both cases the agent's fraud did not vitiate the IAA's decision because it had not been shown that the agent's fraud had affected a particular duty, function or power of the IAA. The Court confirmed that it is not sufficient to assert that fraud might be said to affect the process of decision-making in some abstract sense. A successful appeal requires 'close attention to the nature, scope and purpose of the particular system of review rather than reliance upon maxims such as "fraud unravels everything"' (at [1]).

In DUA16's case the submissions of the agent contained some information relevant to DUA16's claim but also information that related to a different applicant. The IAA was aware that some of the information related to another person but disregarded the information. In CHK16's case the entirety of the personal circumstances referred to in the submissions concerned the wrong person; they contained no personal information relevant to CHK16's claims.

The IAA was also aware that CHK16 intended to provide submissions, those submissions might contain new information, the IAA hearing was the only opportunity for CHK16 to provide that information and refusal of a protection visa could place his life at risk. The IAA did not request the submissions be provided.

However, the Court upheld the notice of contention of unreasonableness in CHK16's case, concluding that the circumstances meant it was legally unreasonable for the IAA to have failed to request submissions pursuant to s 473DC of the Migration Act.

The Court dismissed the appeal in DJUA16's case on the ground of unreasonableness since the IAA drew the reasonable conclusion that the material relating to another person had been included by mistake.

Relationship between common law doctrines of implied licence and police powers to prevent breach of peace

Roy v O'Neill [2020] HCA 45 (9 December 2020)

The High Court dismissed an appeal from a judgment of the Court of Appeal of the Supreme Court of the Northern Territory concerning the permission, implied by the common law, to enter upon premises and approach a dwelling to engage in lawful purposes (implied licence). The issue arose in the context of police activities to address domestic violence.

In 2017, a Domestic Violence Order (DVO) was issued against the appellant to protect her partner in circumstances where the appellant had consumed alcohol. On 6 April 2018, three police officers visited the unit where the appellant and her partner resided as part of an operation targeting domestic violence. One of the officers called the appellant to the door for the purpose of a DVO check. The appellant answered the door in a state of intoxication and tested positive after being requested to take a breath test.

Regulation 6 of the *Domestic and Family Violence Regulations* (NT) required a defendant to comply with a reasonable direction by an officer to submit to a breath test but did not authorise entry onto premises for that purpose. Section 126(2A) of the *Police Administration Act* (NT) authorised entry onto premises but only if the officer believed on reasonable grounds that a contravention of a DVO had occurred, was occurring or was about to occur.

In proceedings brought for breach of the DVO, evidence from the breath test was excluded on the ground that it was obtained unlawfully. The trial judge held that the police did not have the power to attend at the unit to check the appellant's compliance with the DVO under reg 6, or under s 126(2A), because the officer did not hold the requisite belief. On appeal, the Supreme Court of the Northern Territory agreed with the trial judge that neither provision applied and went on to hold that the police did not have an implied licence for the purpose of investigating whether a breach of the law had occurred.

On further appeal, the Court of Appeal found that the police had a dual purpose in entering the premises: to determine whether the DVO was being honoured and to check on the wellbeing of the appellant's partner. The police officers had an implied licence because the latter purpose involved lawful communication with the occupier of the unit and did not involve an interference with the occupier's possession; or injury to the person or property of either occupier.

Dismissing the appeal, a majority of the High Court (Kiefel CJ and Keane and Edelman JJ; Bell and Gageler JJ dissenting) found that the police officers had an implied licence to enter onto the premises. All Justices of the Court accepted that the common law will not imply a licence for police where entry is for the sole purpose of exercising coercive powers. However, the majority found it could not be inferred from the unchallenged evidence that the officer who administered the breath test intended to do so when he entered onto the premises regardless of the appellant's condition when he first observed or spoke to her. The Court of Appeal was correct to hold that the police had a purpose of enquiring about the welfare of the appellant's partner. The purpose of checking on the welfare of the appellant's partner was a sufficient foundation for an implied licence. Once the officer observed the

appellant's state of intoxication, he had the requisite belief for the purposes of s 126(2A) and was authorised to remain on the premises and to require a sample of the appellant's breath.

State of emergency — acting under direction/behest and right to freedom of movement under the Victorian Charter

Loielo v Giles [2020] VSC 722 (2 November 2020)

At issue in *Loielo v Giles* was a direction made in Victoria on 13 September 2020 continuing the state of emergency in Greater Melbourne in response to COVID-19 outbreaks. The direction had been signed by Associate Professor Michelle Giles, an authorised officer and senior medical adviser in the Victorian Department of Health and Human Services. The Premier of Victoria, the Hon Daniel Andrews, had announced the curfew at 11 am on 13 September; Giles signed the direction later that day.

Giles had only been in the position for six weeks. On the afternoon of 13 September she was given 1,000 pages of documents. She was informed that if she did not sign the document someone more senior to her would do so. She did not seek specific data about the curfew's social/economic effects. She argued nonetheless that the curfew was part of a package of measures introduced at a time of high COVID-19 infection rates — in excess of 500 cases a day — and that, by 13 September, after six weeks of lockdown, that rate of infection had decreased to about 40 per day. Her conclusion was that the reduction in the movement of people must have had an impact.

The plaintiff argued that it was 'plain common sense reality' that it was unlikely, given the Premier's premature announcement, that a medical officer in Giles' position would make an independent decision.

Justice Ginnane rejected a submission that the direction was signed under direction/behest. He acknowledged that it was difficult for Giles to make an independent decision when the Premier had already announced what was to happen. He noted that there is a fine line between stating something has been taken into account and acting under dictation.

Whether the decision was independent is a question of fact. Despite the fact that the direction was pre-prepared by the Premier's office, as this is common public sector practice given that the decision-maker often lacks the time or the skill to draw up legal documents, this did not indicate dictation. In addition, Giles had no communications from the Premier's office; an email from Giles that afternoon indicated her opinion that 'recent experience suggests' curfews can lead to significant falls in case numbers; and, even though Giles was informed that if she did not sign the direction someone higher up would do so, Ginnane J said that did not mean she had not turned her own mind to the issue. He said a person of integrity can still exercise independent judgment in these circumstances.

The second issue was whether the continuation of the curfew was contrary to human rights, particularly the right to freedom of movement. The relevant provisions were that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) requires public authority decision-makers to give proper consideration to a relevant human right (s 38(1)); but a right

can be subject to reasonable limitation, including less restrictive means in the circumstances reasonably available to achieve the limitation (s 7(2)).

Giles had given primary consideration in making her decision to public health issues. Justice Ginnane rejected the submission that Giles should have sought scientific data on the social and economic issues. Justice Ginnane found that a decision-maker cannot get away with reciting that they have 'considered' other issues. They must go further and demonstrate active consideration.

Justice Ginnane found that Giles met the test. The evidence was that Giles had read and considered the legal opinion on the human rights issues; and she had systematically gone through the public health and human rights considerations and assessed each one against the Charter sections. She had also adopted a four-stage approach to her decision-making: understand the rights affected; turn her mind to the impact of the decision on human rights; identify countervailing interests; and balance the private and public rights.

In those circumstances, Ginnane J considered that she had not given undue emphasis to public health issues but had considered the wider economic and social issues. Moreover, he found that, although the decision had to fall within the range of reasonably available options and it had been argued that the hotspots approach was such an alternative, it was not a 'less restrictive means' given that the evidence was that such an approach had not been successful during the Stage 3 lockdown.

Accordingly, Giles's decision-making was lawful under both the common law ground of dictation and under the Charter. Justice Ginnane noted, however, that, had he found to the contrary, he would have been prepared to issue a declaration that the premature announcement by the Premier was unlawful. In a similar New Zealand case (*Borrowdale v Director-General of Health* [2020] NZHC 2090) the New Zealand High Court, while finding no breach of human rights legislation, had issued a declaration that the lack of clarity surrounding the restrictions in one of the relevant New Zealand orders concerning their lockdown contravened the rule of law.

When should new information be taken into account during a review by the Immigration Assessment Authority?

Aus17 v Minister for Immigration and Border Protection & Anor [2020] HCA 37 (14 October 2020)

The appellant was a Sri Lankan citizen of Tamil ethnicity from the Jaffna District. While in Australia, he applied for a protection visa. Central to his application were claims that he feared mistreatment at the hands of the Eelam People's Democratic Party (the EPDP) as well as at the hands of the Sri Lankan Army. While the delegate of the Minister for Immigration and Border Protection accepted the appellant's evidence provided in support of those claims to be generally credible, the delegate found that the appellant did not face a real risk of the mistreatment he feared — in part, because the delegate found that:

- the appellant was no longer a person of interest to the EPDP; and

- the individuals within the Sri Lankan Army who might want to harm the appellant did not extend to the 'army establishment' but were confined to soldiers located at a particular army camp who were colleagues of a soldier killed in a car accident in which the appellant had been involved.

The Minister's delegate refused to grant the appellant a protection visa. This was a 'fast track reviewable decision' which the Minister then referred to the Immigration Appeals Authority (the Authority).

During the Authority's review, the appellant's representative provided the Authority with documents which were supportive of the appellant's claims and post-dated the delegate's decision. One was a letter from Mr Vinayagamoorthy, a lawyer and former member of the Sri Lankan Parliament for the Jaffna District. The letter stated that the appellant and his family were known to Mr Vinayagamoorthy and went on to recount historical events corroborative of the appellant's claims. The letter added, '[e]ven still the EPDP and the Army visit his house to make inquiries about his whereabouts'.

The letter was new information. Section 473DD of the *Migration Act 1958* (Cth) relevantly provides that the Authority must not consider 'new information' unless:

- the Authority is satisfied that there are exceptional circumstances to justify considering the new information (s 473DD(a)); and
- the applicant satisfies the Authority that the new information was not, and could not have been, provided to the Minister before the Minister made the decision (s 473DD(b)(i)) or that it is 'credible personal information' which was not previously known and, had it been known, may have affected the consideration of the applicant's claims (s 473DD(b)(ii)).

In this matter, while the Authority found that the letter was 'new information', it did not take it into account in reaching its decision. The Authority said:

> I accept the letter of support from Vinayagamoorthy could not have been provided to the delegate as it was written after the delegate's decision. However, the information it provides recounts the claims already provided by the applicant and in that regard there is no reason to believe that the applicant could not have obtained a letter outlining this information earlier and provided it to the Minister. I am not satisfied that any exceptional circumstances exist that justify considering the new information.

In doing so, the Authority assessed the letter against the criterion in s 473DD(b)(i), finding that it was not met. The Authority went on to assess the letter against the criterion in s 473DD(a), finding that criterion also was not met. It did not assess the letter against the criterion in s 473DD(b)(ii).

The Federal Circuit Court held that the Authority fell into error by not considering both sub-paragraphs of s 473DD(b) so as to inform its consideration of s 473DD(a). However, the Federal Court allowed the Minister's appeal from the Federal Circuit Court's decision. The appellant then appealed to the High Court.

The High Court unanimously overturned the Federal Court's decision, holding that the Authority erred by not considering both sub-paragraphs of s 473DD(b) and then taking those assessments into account in its consideration of s 473DD(a). The High Court held that s 473DD requires the Authority to assess new information against the criteria in both ss 473DD(b)(i) and 473DD(b)(ii) and then, providing that at least one of those criteria are met, take that assessment into account in its consideration of whether there are exceptional circumstances under s 473DD(a), before concluding that it is prohibited from considering the new information.

The High Court found that s 473DD would be at war with itself, and the purpose of s 473DD(b)(ii) would be thwarted, if the circumstance that there was new information from a referred applicant meeting the description in either s 473DD(b)(i) or s 473DD(b)(ii) were able to be ignored by the Authority in assessing the existence of exceptional circumstances justifying consideration of that new information in order to meet the criterion specified in s 473DD(a). The High Court held that logic and policy demand that the Authority assess such new information as it might obtain from the referred applicant first against the criteria specified in both s 473DD(b)(i) and s 473DD(b)(ii) and only then against the criterion specified in s 473DD(a).

Unreasonableness in departing from a delegate's assessment of credibility

ABT17 v Minister for Immigration and Border Protection & Anor [2020] HCA 34 (14 October 2020) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Ederlman JJ)

The appellant, a Sri Lankan Tamil, arrived in Australia by boat on 27 August 2012. In 2015, he lodged an application for a temporary protection visa, which was refused by a delegate of the Minister for Immigration and Border Protection.

During the appellant's interview with the delegate (the visa interview), the appellant, at the delegate's request, removed his shirt and showed the delegate scarring on his back which he said was inflicted by Sri Lanka Artillery (SLA) officers. The appellant also disclosed to the delegate that he had been sexually tortured during the incident in which he was detained by the SLA for six days in May 2011, in addition to being locked up, deprived of food and beaten. While the delegate found that the appellant's evidence during the visa interview was plausible, the delegate was not satisfied that the appellant faced a well-founded fear of persecution based on country information concerning improved circumstances relating to Tamils in Sri Lanka.

The delegate's decision was referred to the Authority for review as a 'fast track reviewable decision' (s 473CA of the *Migration Act 1958* (Cth)). After reviewing the audio recording of the interview, the Authority accepted some of the appellant's claims but found that others were exaggerated and embellished. As the Authority did not accept the appellant's account of events and considered there was otherwise no credible information to indicate he was of interest to Sri Lankan authorities, it concluded that the appellant did not have a well-founded fear of persecution and affirmed the delegate's decision. The Authority further held that this conclusion was supported by the country information considered by the delegate.

The appellant's application for judicial review was dismissed by the Federal Circuit Court.

On appeal to the Federal Court, the appellant contended that the Authority's decision was legally unreasonable because it made credibility findings contrary to those of the delegate without inviting the appellant to an interview. However, the Federal Court held that it was not necessary to decide this issue and dismissed the appeal on the basis that any failure to interview the appellant was not material to the Authority's decision because it was independently supportable by the country information relied on by both the delegate and the Authority.

Before the High Court the appellant again contended that the Authority 'acting with due appreciation of its responsibilities' and with knowledge that it had power under s 473DC of the Act to interview the appellant, and thereby observe his demeanour and the scarring the appellant had shown to the delegate, could not reasonably have concluded that the review was able fairly to be completed 'on the papers'. It followed, the appellant submitted, that the Authority's failure to exercise its power under s 473DC to interview the appellant was legally unreasonable. The Minister contended that it was not unreasonable for the Authority to make credibility findings that differed from those made by the delegate. Nothing in the delegate's reasons supported an inference that the delegate's acceptance of the appellant's claims as 'plausible' depended 'to any significant extent' on the appellant's demeanour.

The High Court unanimously held that in the circumstances of this case it was legally unreasonable for the Authority to depart from the delegate's assessment of the appellant's credibility.

The plurality (Kiefel CJ; Bell, Gageler and Keane JJ) held that the legal unreasonableness arose from the Authority having departed from the delegate's assessment of the appellant's credibility without exercising its power under s 473DC of the Act to invite the appellant to an interview to obtain new information.

The plurality found that the Authority will act unreasonably if, without good reason, it does not invite a referred applicant to an interview in order to gauge his or her demeanour for itself before it decides to reject an account given by the referred applicant in an audio recorded interview which the delegate accepted in making the referred decision wholly or substantially on the basis of its own assessment of the manner in which that account was given. Here, the breach of the reasonableness condition by the Authority lay not in evaluating the review material for itself to arrive at a different assessment of credibility from the delegate's but in failing in the circumstances to use the powers at its disposal to get and consider new information in order to supplement the review material so as to place itself in as good a position to assess credibility as the delegate had been.

Implied delegation and agency

Northern Land Council v Quall [2020] HCA 33 (7 October 2020)

The issue in *Northern Land Council v Quall* (*Quall*) related to whether the Northern Land Council (NLC) could depute its power under s 203BE(1)(b) of the *Native Title Act 1993* (Cth) (NT Act) to the Chief Executive Officer of the NLC to seek registration of the Kenbi

Indigenous Land Use Agreement (Kenbi ILUA). The land involved was the Cox Peninsula, south of Darwin.

Under s 203BE(5), the certification function was located in a representative body, the local Land Council. Registration required certification that all reasonable efforts had been made to ensure that all those who held native title in relation to land or water subject to an ILUA had been identified and had authorised the making of the agreement.

The NT Act did not contain an express delegation power. Related legislation, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALR Act), did contain an express power to delegate but not in relation to the certification function. Section 27(1) of the ALR Act did state in s 27(1) that a Land Council 'may do all things necessary or convenient to be done for or in connection with the performance of its functions'.

The High Court unanimously allowed the appeal. The majority (Kiefel CJ; Gageler and Keane JJ) held that s 27 of the ALR Act impliedly authorised the delegation of authority under s 203BE(1)(b); the minority (Nettle and Edelman JJ) held that the power could not be delegated but the power was lawfully exercised, as the CEO had acted as an agent.

The minority's decision aligns with existing cases which recognise that, despite the *delegatus non delegare* principle, in large organisations, including statutory corporations, it is unrealistic to expect the nominated decision-maker to exercise all the functions statutorily bestowed on the head of the organisation or statutorily nominated officers. As a consequence, in cases of administrative necessity, agency is regularly relied on (*O'Reilly v Commissioner of State Bank of Victoria* (1982) 153 CLR 1), even when there is an express power of delegation. The High Court in *Quall* unanimously held that there was administrative necessity involved in the certification function in s 203BE(5).

The majority held that s 27(1) of the ALR Act impliedly permitted delegation to the CEO of the certification function. A key reason was that, despite the statutory repository of the certification function being in the NLC, a representative body, that body was not appropriate to undertake the function. That was due to the burden of receiving and assessing extensive and potentially contentious evidence and because of the potential for conflicts of interest to occur. As a consequence, and following the statutory construction required, the majority opinion was that power to delegate to the CEO was implied. The matter was remitted to the Federal Court to decide whether, as a matter of fact, the power had impliedly been delegated.

The findings of the minority included that, as the NLC was a representative body, it had been recognised by the Minister as able to perform satisfactorily the functions of a representative body, and there was no express power of delegation, the statutory indications told against the function being delegated. The CEO, acting as agent, could perform the certification, but the final approval and application for registration must be undertaken by the NLC.

Substantial statutory compliance

Downer Utilities Australia Pty Ltd v Commissioner of the Anti-Dumping Commission [2019] FCA 11 (2 August 2019)

Anti-dumping or countervailing duty was imposed under the *Customs Tariff (Anti-Dumping) Act 1975* (Cth) (Anti-Dumping Act) on steel items from China. The applicant had paid interim dumping and countervailing duty on items of steel covered by the Act. The steel comprised one small test sample of the steel and four substantive consignments for use in a solar power plant. The interim dumping duty on the four items exceeded $1.5 million.

The statutory scheme provided that an assessment was made by the Commissioner for a provisional decision or, if that decision was to reject the application, by a review panel. The final decision was made by the Minister. There were time limits for lodgement of an application to the Commissioner. If the applicant did not seek review of the provisional decision, it was taken to be the final decision.

The review application was lodged in time but, due to an error with the online assessment form, although the critical data had been entered he did not work out the total interim duty paid. The Commissioner rejected the application because it did not include the test consignment and did not estimate the excess duty paid. The applicant sought judicial review of the Commissioner's decision which had been upheld by the panel.

The applicant submitted before the Federal Court that the panel made two errors: it did not apply the *de minimus no curat lex* maxim to the first descriptive error — namely, omitting reference to the test sample; and that it did not apply the same maxim or the principle of substantial compliance to the failure to specify the estimate of the excess duty.

Justice Steward expressed the opinion that there was little difference in this case between the maxim and the substantial compliance principle, although the latter principle is broader and, subject to statutory exclusion, applies to any document with mandated contents.

Justice Steward found that the maxim and the substantial compliance principle could apply in the context of the provision concerning the description of the consignments, the first claimed error. Imprecision may be of no moment in such an application precisely because the Commissioner is by statute under an obligation to undertake a subsequent investigation. The provision referred to the nature of the goods imported and not the number of goods imported.

As to the second claimed error, the estimate of excess duty, the relevant legislation involves revenue laws — namely, to pay the liability imposed and not one dollar more or less. The maxim and the principle could never be applied to the discharge of a final liability to pay duty. That was the case, even if the online spreadsheet frustrated compliance. The language left no room for any other conclusion. There may, however, be a remedy in breach of procedural fairness. The panel's decision on the second claimed error was set aside.

Subconscious bias

CNY17 v Minister for Immigration and Border Protection [2019] HCA 50; 94 ALJR 140 (13 December 2019)

FSG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 29 (11 March 2020)

In *CNY17 v Minister for Immigration and Border Protection* (*CNY17*), CNY17 was seeking a protection visa. He was in detention on Christmas Island and, later, in a prison in Albany, Western Australia. A review of the decision not to grant the visa was made by the Immigration Assessment Authority (IAA). The IAA decided entirely on the papers and upheld the decision to refuse the visa. Those papers, as required under the *Migration Act 1958* (Cth) Pt 7AA, included information held by Department of Home Affairs on the applicant that the Secretary considered relevant. That information included 48 pages of material which the High Court found was irrelevant and prejudicial. Many of the documents had not been seen by CNY17.

That material contained assertions that CNY17 had a 'history of aggressive and/or challenging behaviour when engaging with the department'; had been involved 'in many incidents while in detention'; had been refused a bridging visa 'on several occasions'; had been 'recommended for detention in a prison pending a police investigation into a riot'; had been the subject to security investigations but was no longer of interest; that the Department had recommended officers not to engage with the applicant (and others) while in prison; and that he was the subject of ongoing investigations.

The High Court unanimously concurred that bias could occur unconsciously and that bias must be decided taking into account all the circumstances. Relevant factors are the nature of the material and who is the decision-maker.

The majority (Nettle, Gordon and Edelman JJ) allowed the appeal. In doing so they took into account the prejudicial and irrelevant nature of the material and that the IAA members were likely to give weight to the Secretary's opinion that the material was relevant. They found that, in the circumstances, the knowledgeable bystander might conclude from the circumstances that the decision-maker *might* not bring an impartial and independent mind to the decision.

Kiefel CJ and Gageler J dissented on the ground that a professional decision-maker such as the IAA ordinarily can put such information aside and not let it inform their decision. In this instance they found the subconscious bias of the IAA was only conjectural.

The High Court also addressed the question of an express disavowal by the decision-maker that the material had impacted on their decision. In *CNY17*, the IAA had stated simply that it took account of all the material. No express disavowal had been made. Four members of the High Court (Edelman J not commenting) had expressed the view that the knowledgeable bystander can infer subconscious bias whether or not the decision-maker has read the prejudicial material and whether or not the decision-maker has consciously ignored it and said so.

In *FSG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (*FSG17*), the Full Court of the Federal Court expressed the opinion that the absence of an express disavowal meant that any comments on that issue by the High Court were obiter. Nonetheless, the Court found that the information was so prejudicial as to amount to apprehended bias albeit subconscious, despite the disavowal.

In *FSG17*, the IAA had received material considered material by the Secretary, including detailed charges of 'alleged persistent sexual abuse of a 13 year old child' for some three years. The information was irrelevant to the claim for protection. At the time of the IAA hearing, there had not been a conviction on the charge. There had been an express disavowal by the IAA that their decision had been influenced by that information.