Recent developments

Anne Thomas

Government response to the independent review of the coal mining industry long service leave framework

The government released its response to the independent review of the Coal Mining Industry (Long Service Leave Funding) scheme ('Coal LSL scheme'). Established in 1949, the scheme has over $2.1 billion in funds under management on behalf of over 130,000 employees.

The independent review was undertaken by KMPG, commencing in June 2021, to look at the arrangements through the scheme that provide for portable long service leave entitlements in the black coal mining industry. The review report, *Enhancing Certainty and Fairness: Independent Review of the Coal Mining Industry (Long Service Leave Funding) Scheme*, was handed to government in December 2021.

The review found that, for the large majority of employees engaged in permanent positions in the black coal mining industry, the Coal LSL scheme meets its fundamental objective by connecting eligible employees with their portable long service leave entitlement. However, the review also identified that the scheme has areas for improvement and made 20 recommendations.

The government has accepted all 10 of the recommendations directed to it and will take action to legislate based on the suggested reforms set out in the report. These reforms are aimed at safeguarding employee entitlements, including casual employees covered by the scheme; removing unnecessary administrative burdens on businesses and individuals; and positioning the scheme to meet the needs of the industry in the future.

The government will support the scheme in implementing the remaining recommendations, which will make it easier for employees and employers to understand and comply with the scheme. The government has also undertaken to work with stakeholders to implement the recommendations in a timely manner.

'The government is focused on having the right settings in place to make sure that hard-working coal workers receive their lawful long service leave entitlements through the Coal LSL scheme', said Senator Amanda Stoker.

The report can be accessed at <https://www.ag.gov.au/industrial-relations/independent-review-coal-lsl-scheme>.

The government's response can be accessed at <https://ministers.ag.gov.au/media-centre/government-response-independent-review-coal-mining-industry-long-service-leave-framework-ag-16-02-2022>.

Next level for the National Archives' digitisation

An industrial-scale digitisation hub has been announced as part of a $67.7 million funding package from the government to boost the critical functions of the National Archives.

The digitisation hub will be a state-of-the-art facility which will enable the fast-track of digital preservation of at-risk records, making them available online for all Australians now and into the future.

The additional $67.7 million in funding is part of the government's response to the Functional and Efficiency Review of the National Archives of Australia ('Tune review'). It represents a substantial investment in the functions and activities of the National Archives, providing for:

- digitisation and preservation of the National Archives' at-risk collection over an accelerated four-year time frame;
- additional staffing and capability to address backlogs of 'access applications' for Commonwealth records and to provide improved digitise-on-demand services;
- improved guidance for agencies to assure better management of government information, data and records; and
- investment in cybersecurity capacity and further development of the National Archives next-generation digital archive, to facilitate the secure and timely transfer of records to National Archives' custody as well as their preservation and digital access.

The digitisation hub follows the Tune review's recommendation to implement centralised storage and preservation of the national archival collection. The industrial-scale digitisation hub will digitise collection material, relocated from across the nation, into storage facilities with significantly improved preservation and digitisation capacity.

The new hub will be located in Mitchell, Canberra, at the National Archives repository.

<https://ministers.ag.gov.au/media-centre/next-level-national-archives-digitisation-14-02-2022>

Public consultation to progress further Respect@Work recommendations

The government has commenced public consultations on options for further legislative reforms recommended as part of the Sex Discrimination Commissioner's Respect@Work report, which can be found at <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

The Respect@Work report made 13 recommendations to amend Commonwealth legislation. Six of these recommendations have already been implemented through the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth), which commenced on 11 September 2021.

The current consultation process will inform the government's next steps in legislative reform for the remaining recommendations that will protect Australians from sexual harassment at work.

The proposals for consultation are to:

- provide that creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited (recommendation 16(c));
- introduce a positive duty on employers to prevent sexual harassment from occurring, provide the Australian Human Rights Commission with the function of assessing compliance with the positive duty, and equip the commission appropriately to enforce that duty (recommendations 17 and 18);
- provide the Australian Human Rights Commission with a broad inquiry function to inquire into systemic unlawful discrimination, including sexual harassment (recommendation 19);
- allow unions and other representative groups to bring representative claims to court (recommendation 23); and
- insert a cost provision into the *Australian Human Rights Commission Act 1986* (Cth) to provide that a party to proceedings may only be ordered to pay the other party's costs in limited circumstances (recommendation 25).

The Attorney-General said that the government is seeking views on whether these legislative recommendations can and should be implemented and, if so, what are the options and practical challenges associated with implementation.

To follow the implementation progress of the recommendations, visit <https://www.ag.gov.au/rights-and-protections/publications/implementation-governments-roadmap-respect-detailed-status-update>.

A consultation paper outlining the options to progress the legislative recommendations has been released and can be accessed at <https://consultations.ag.gov.au/rights-and-protections/respect-at-work/user_uploads/consultation-paper-respect-at-work.pdf>.

The accompanying survey (<https://consultations.ag.gov.au/rights-and-protections/respect-at-work/consultation/>) is now open and will close on Friday, 18 March 2022.

<https://ministers.ag.gov.au/media-centre/public-consultation-progress-further-respectwork-recommendations-14-02-2022>

Appointments to the Administrative Appeals Tribunal

The Attorney-General, Senator the Hon Michaelia Cash, has announced the reappointment of Mr Terrence Baxter OAM as a part-time member and the promotion of Ms Simone Burford to full-time Senior Member at the Administrative Appeals Tribunal.

The appointees are highly qualified to undertake the important task of conducting merits review of government decisions.

We congratulate Mr Baxter and Ms Burford on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-administrative-appeals-tribunal-11-02-2022>

Statement regarding the President of the Administrative Appeals Tribunal, the Hon Justice David Thomas

The Attorney-General, Senator the Hon Michaelia Cash, has announced the resignation of the Hon Justice David Thomas as President of the Administrative Appeals Tribunal (AAT).

Justice Thomas was appointed as President of the AAT and a judge of the Federal Court of Australia on 27 June 2017. He will remain as a judge of the Federal Court.

Arrangements are in place for Federal Court judges the Hon Justice Susan Kenny AM and the Hon Justice Berna Collier to act as AAT President.

<https://ministers.ag.gov.au/media-centre/statement-regarding-president-administrative-appeals-tribunal-hon-justice-david-thomas-31-01-2022>

Appointment to the Defence Force Discipline Appeal Tribunal

The Hon Justice Michael John Slattery has been appointed as a member of the Defence Force Discipline Appeal Tribunal. The Tribunal hears appeals from persons who have been convicted or who have been acquitted of a service offence by a court martial or Defence Force magistrate.

Justice Slattery is a judge of the Supreme Court of New South Wales since 2009. He has previously served as Judge Advocate General of the Australian Defence Force and Judge Advocate General of the Royal Australian Navy.

We congratulate Justice Slattery on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-defence-force-discipline-appeal-tribunal-12-01-2022>

Appointment of Independent Reviewer of Adverse Security Assessments

The Attorney-General, Senator the Hon Michaelia Cash, has announced the appointment of Mr Philip Moss AM as the new Independent Reviewer of Adverse Security Assessments. Mr Moss's appointment will be for three years commencing on 17 January 2022, replacing Mr Robert Cornall, who has been in the role of Independent Reviewer of Adverse Security Assessments since 2015.

As the independent reviewer, Mr Moss will conduct reviews of the Australian Security Intelligence Organisation's adverse security assessments given to the Department of Home Affairs in relation to people who:

- remain in immigration detention;
- have been found by the Department of Home Affairs to be owed protection obligations under international law; and
- are ineligible for a permanent protection visa, or have had their permanent protection visa cancelled, because they are the subject of an adverse security assessment.

Mr Moss brings a wealth of expertise and knowledge to the role, having been in legal practice and government administration. He is a former Integrity Commissioner and head of the Australian Commission for Law Enforcement Integrity. Mr Moss is currently a part-time judicial member of the ACT Sentencing Administration Board and an Air Force Reserve Group Captain legal officer attached to the Afghanistan Inquiry Response Task Force.

We congratulate Mr Moss on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-independent-reviewer-adverse-security-assessments-12-01-2022>

Appointment to the Federal Court of Australia

The Attorney-General, Senator the Hon Michaelia Cash, has announced the appointment of his Honour Judge Patrick O'Sullivan to the Federal Court of Australia. Judge O'Sullivan has been appointed to the Adelaide registry and his appointment commenced on 20 January 2022.

Judge O'Sullivan was admitted as a solicitor and barrister of the Supreme Court of South Australia in 1981, after graduating with a Bachelor of Laws from the University of Adelaide and completing a Diploma in Legal Practice from the South Australian Institute of Technology. In 1988, he was appointed Crown Counsel to the Hong Kong government and later Senior

Crown Counsel in 1990. He was appointed Queen's Counsel in 2008 and is a past president of both the Australian Bar Association and the South Australian Bar Association. Judge O'Sullivan was appointed as a judge of the District Court of South Australia in 2018.

We congratulate Judge O'Sullivan on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-federal-court-australia-10-12-2021>

Reappointment of Solicitor-General

Dr Stephen Donaghue QC has been reappointed Solicitor-General for a term of five years.

Dr Donaghue has served as the Commonwealth Solicitor-General, the second law officer of the Commonwealth, and the principal legal counsel to the Australian Government since he was first appointed in December 2016 and took up the position in January 2017. During his current tenure, Dr Donaghue has appeared before courts in significant litigation and provided trusted advice on key government policies and on questions of law; in particular, on constitutional and other public law matters. He has also played an active role in identifying, raising and managing awareness of whole-of-government legal risk, including through his role on the Significant Legal Issues Committee.

Dr Donaghue holds a doctorate of philosophy from the University of Oxford as well as a Bachelor of Laws (First Class Honours) and a Bachelor of Arts from the University of Melbourne. Prior to his appointment as Solicitor-General, Dr Donaghue had practised as a barrister at the Victorian Bar since 2001. He was appointed Senior Counsel in 2011 and subsequently Queen's Counsel in 2014.

We congratulate Dr Donaghue on his reappointment.

<https://ministers.ag.gov.au/media-centre/reappointment-solicitor-general-26-11-2021>

Keeping Australia safe from high-risk terrorist offenders

The Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021, designed to continue to protect the Australian community from the evolving threat opposed by convicted terrorist offenders, has been passed by Parliament.

The Bill establishes an extended supervision order ('ESO') scheme which enables terrorist offenders released into the community at the end of their custodial sentence to be subject to tailored close supervision, based on the level of risk they pose to the community.

'Such individuals are typically radicalised and do not change their extremist views while in prison, despite deradicalisation efforts', said the Attorney-General, Senator the Hon Michaelia Cash. Minister for Home Affairs, the Hon Karen Andrews MP, stated that this Bill will 'ensure the police have the powers they need to keep the community safe and manage individuals who remain high risk'.

Under an ESO, a state or territory Supreme Court may impose conditions on a terrorist offender at the end of their sentence proportionate to the risk they pose to the community. Conditions include restrictions on movement and access to devices, requirements to not associate with particular individuals, and participation in specified rehabilitation and treatment programs. A breach of a condition will be an offence punishable by up to five years imprisonment.

This Bill comes at an important time where there is a significant number of convicted terrorist offenders reaching the conclusion of their prison sentences and due for release in the coming years. Since 2001, 95 people have been convicted of terrorism-related offences. Fifty-four of these people are currently serving custodial sentences, 18 of whom are due to be released over the next five years.

<https://ministers.ag.gov.au/media-centre/keeping-australia-safe-high-risk-terrorist-offenders-22-11-2021>

Professor Hilary Charlesworth AM elected to the International Court of Justice

Professor Hilary Charlesworth has been elected to the International Court of Justice.

Professor Charlesworth was nominated for election by the Independent Australian National Group, a body of eminent Australian jurists who serve as members of the Permanent Court of Arbitration in The Hague.

The election took place at the United Nations headquarters in New York on 5 November 2021 to fill the vacancy resulting from the passing of Australian judge his Honour Judge James Crawford AC SC, whose term was due to conclude on 5 February 2024.

<https://ministers.ag.gov.au/media-centre/professor-hilary-charlesworth-am-elected-international-court-justice-06-11-2021>

Commonwealth Ombudsman investigation into the Department of Veterans' Affairs' communication with veterans making claims for compensation

The Acting Commonwealth Ombudsman, Ms Penny McKay, has released the report *The Department of Veterans' Affairs' Communication with Veterans Making Claims for Compensation*. The report examines the appropriateness of the Department of Veterans' Affairs' (DVA) administrative framework to support its communication with veterans making claims for compensation for injuries or conditions related to their service, including DVA's approach to communicating with and assisting at-risk veterans.

Ms McKay acknowledged in the report that DVA had progressed several initiatives to improve service delivery and the administrative framework guiding communication with veterans throughout the claims process.

The report makes eight recommendations aimed at improving transparency and quality of information provided to the veteran community and guidance for DVA staff in supporting roles. All eight recommendations have been accepted by DVA.

<https://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2022/20-january-2022-commonwealth-ombudsman-investigation-into-the-department-of-veterans-affairs-communication-with-veterans-making-claims-for-compensation>

Monitoring whistleblowing in NSW depends on good reporting and compliance

The NSW Ombudsman annual report for the 2020–2021 financial year, *Oversight of the Public Interest Disclosures Act 1994*, has been released. The report shows that investigating agencies (which include the Independent Commission Against Corruption ('ICAC'), the Ombudsman and the Law Enforcement Conduct Commission) received 964 public interest disclosures ('PIDs') in the 2020–21 financial year.

Six hundred and seventy-nine of those PIDs were made to ICAC by heads of public sector agencies who are required by law to report evidence of possible corrupt conduct.

Three hundred and forty-five PIDs were received by public authorities concerning reports of wrongdoing from their own staff.

In presenting the report to Parliament, the NSW Ombudsman, Paul Miller, highlighted the ongoing importance of whistleblowing as a means of exposing corrupt conduct and other forms of wrongdoing.

The report also raises concerns that not all public authorities are complying with their obligations under the *Public Interest Disclosure Act 2013* (Cth) to report information about PIDs to the Ombudsman.

'The accuracy of the data we report relies on public authorities properly identifying and recording internal disclosures of wrongdoing as PIDs', said Mr Miller.

The report can be accessed at <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0018/123651/Oversight-of-Public-Interest-Disclosures-Act-1994_Annual-Report-2020-21.pdf>.

<https://www.ombo.nsw.gov.au/news-and-publications/news/monitoring-whistleblowing-in-nsw-depends-on-good-reporting-and-compliance>

Victorian Ombudsman launches investigation into public and community housing complaint handling

The Victorian Ombudsman has launched an investigation into how public and community housing complaints are handled, to improve processes and ensure fairness.

The investigation will examine whether the current complaint-handling processes are effective, fair, and sufficiently tenant-focused.

The office of the Ombudsman has received more than 1,000 complaints within the last year about public and community housing. Some of these complaints concerned the lack of basic

necessities, such as running water and electricity, and reasonably maintained, clean and safe premises. Others are around lack of information concerning how to complain or that tenants feel they are not being listened to when they raise concerns.

The issues raised by these complaints will also be considered in light of the Review of Social Housing Regulation which was commissioned by the Victorian Government. While the Ombudsman's investigation, findings and recommendations are independent, it will aim to contribute to the complaints-handling aspect of this review.

The investigation will focus on how complaints from public and community housing tenants are handled. It aims to meet with both the tenants themselves and community services, as well as the Department of Families, Fairness and Housing and the Housing Registrar.

A report will be made public during the first half of the year.

<https://www.ombudsman.vic.gov.au/our-impact/news/victorian-ombudsman-launches-investigation-into-public-and-community-housing-complaint-handling/>

'Unjust' — Victorian Ombudsman findings on Department of Health border exemption scheme

The Victorian Ombudsman's report on its investigation into decisions made under the Victorian Border Crossing Permit Directions, made in response to the COVID-19 pandemic, has been tabled in Parliament.

The report found that the narrow exercise of discretion under the border exemption scheme resulted in unjust outcomes and has recommended that the government publicly acknowledge the distress caused to affected people.

Victoria operated a traffic light system from January 2021, where every person wanting to enter the state required a permit or an exemption. In July changes were made to this model and, when the border between Victoria and New South Wales was shut, thousands of people were left stranded and unable to get an exemption.

The investigation revealed that, of the 33,252 exemption applications to the Department of Health that were received between 9 July and 14 September 2021, only eight per cent were granted.

The Ombudsman, Ms Deborah Glass OBE, did not criticise the decision to close the borders as the decision was made in light of public health advice, in consideration of the human rights implications, and allowed for the exercise of discretion. However, while a discretion to approve exemptions was available, it was exercised narrowly and most applications did not even reach a decision-maker. The consequence of this was 'vast, and unfair, for many thousands of people stuck across the border', said the Ombudsman, and that it appeared 'the Department put significant resources into keeping people out rather than helping them find safe ways to get home'.

The team responsible for border exemptions was increased from 20 staff in early July 2021 to 285 staff in September 2021. Nonetheless, those responsible for categorising and prioritising applications were expected to complete 50 per hour — an average of almost one every 30 seconds. Moreover, the evidence needed to grant an exemption was extensive: from statutory declarations and proof of residence or ownership of animals to letters from doctors. The effect of a complex and constrained bureaucracy led to some outcomes that 'were downright unjust, even inhumane'.

The result 'was some of the most questionable decisions I have seen in my over seven years as Ombudsman', said Ms Glass.

The Ombudsman has recommended that the State government improve policy and guidance for future similar schemes and consider ex gratia payments on application to help cover the financial costs of not being able to travel home.

The report can be accessed at <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-decision-making-under-the-victorian-border-crossing-permit-directions>.

<https://www.ombudsman.vic.gov.au/our-impact/news/unjust-victorian-ombudsman-findings-on-department-of-health-border-exemption-scheme/>

Ombudsman Western Australia appointed for a further five-year term

Mr Chris Field, the Ombudsman Western Australia, has been appointed for a fourth five-year term commencing 26 March 2022. Mr Field was first appointed to the position in 2007. He is Australia's longest serving Ombudsman and the only Ombudsman in the 50-year history of the Ombudsman institution in Australia to be appointed to four terms of office.

Mr Field is also President of the International Ombudsman Institute. On 27 May 2021, he commenced his four-year term as president. Mr Field is the first Australian to be elected as president in the International Ombudsman Institute's 43-year history. The institute, established in 1978, is the global organisation for the cooperation of 205 independent Ombudsman institutions from more than 100 countries worldwide.

Over Mr Field's next term, the office of the Ombudsman will commence a range of important new functions, including a national preventive mechanism under the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* as well as continuing to assist in the consideration of a range of proposed functions. Two new roles will also be created: an Assistant Ombudsman for Aboriginal Engagement and Collaboration; and a research, policy and projects officer with a special focus on ensuring the office stands with the LGBTIQA+ community. The new and proposed functions will see the office grow to over 100 staff.

The office of the Ombudsman will also continue its program of major own-initiative investigations in relation to key human rights issues, undertaken with all the powers of a standing royal commission.

We congratulate Mr Field on his reappointment.

<https://www.theioi.org/ioi-news/current-news/western-australia-ombudsman-appointed-for-a-further-five-year-term>

Recent decisions

Australia's international obligations can, as a matter of reasonableness, be part of the national interest consideration

Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20 [2021] FCAFC 195

This decision concerned two matters. One was *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (*'CWY20'*), on appeal from a judgment of the Federal Court, *CWY20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1855. The other was *QJMV v Minister for Home Affairs* (*'QJMV'*), concerning two grounds (Grounds 5 and 5A) in an originating application for judicial review within the Court's original jurisdiction. Both appeal and application concerned a decision made respectively under s 501A(2) of the *Migration Act 1958* (Cth): the decision of the Acting Minister in *CWY20* to refuse a visa application; and the decision by the Minister in *QJMV* to cancel a visa.

CWY20 is a national of Afghanistan who arrived at Christmas Island in July 2013 and was taken to immigration detention. He was granted a bridging visa on 21 August 2013 and released into the community. In December 2013, he was charged with multiple offences of a sexual nature against children. He was remanded in custody and his bridging visa was cancelled. On 3 March 2014, the respondent was convicted and sentenced to a term of imprisonment. Upon serving his sentence, the respondent applied for a Safe Haven Enterprise (Class XE) visa. This application was initially refused by the then Minister for Home Affairs and the decision was subsequently set aside by the Administrative Appeals Tribunal.

On 16 July 2020, the then Acting Minister set aside the Tribunal's decision under s 501A(2) of the Migration Act, refusing the visa application. In making his decision the Acting Minister was aware that the respondent was a national of Afghanistan and consequently a person in respect of whom Australia had protection obligations, such that to remove the respondent to Afghanistan would be in breach of Australia's international non-refoulement obligations. The Acting Minister concluded that it was in the national interest to refuse to grant the respondent's application for a visa. Consideration of Australia's international non-refoulement obligations was a 'countervailing consideration' but was not considered specifically as part of the national interest under s 501A(2)(e) of the Act.

The Acting Minister's decision of 16 July 2020 was subject to judicial review before Griffith J in the Federal Court of Australia. Griffith J set aside the Acting Minister's decision on the ground that the Acting Minister made a jurisdictional error in failing to consider the implications of Australia being in breach of its international non-refoulement obligations as part of the national interest consideration, which was a precondition to the exercise of power to refuse to grant the visa. Specifically, the primary judge found that the Acting Minister was required to address all relevant components of the national interest which arose squarely on the material before the decision-maker, and in the particular circumstances of this case this included Australia's international obligations relating to non-refoulement.

QJMV is also a national of Afghanistan. Between July 2011 and February 2020, he lived in Australia as a holder of a permanent resident visa. In late 2015, the applicant was found guilty of two charges of 'indecent act with child under 16' and was subject to a community correction order. He was subsequently convicted in April 2017 of contravening the order. On 6 February 2020, a delegate of the Minister cancelled the applicant's visa under s 501A(2) of the Migration Act. On 7 May 2020, the Administrative Appeals Tribunal set aside the delegate's decision. On 7 December 2020, under s 501A(2) of the Migration Act, the Minister set aside the decision of the Tribunal and cancelled the applicant's visa.

In making the decision the Minister was aware that the respondent was, as a national of Afghanistan, a person in respect of whom Australia had protection obligations such that to remove the respondent to Afghanistan would be in breach of Australia's international non-refoulement obligations. The Minister concluded, similarly to the Acting Minister's reasons, that it was in the national interest to refuse to grant the respondent's application for a visa. Consideration of Australia's international non-refoulement obligations was a 'countervailing consideration' but was not considered specifically as part of the national interest under s 501A(2)(e) of the Act.

On 9 November 2021, the Full Court of the Federal Court of Australia handed down its decision in both cases, dismissing the appeal in *CWY20* on all five grounds raised and rejecting the two grounds under the application in *QJMV* for consideration. The issues raised in these matters before the Full Court were as follows.

The notice of contention in the appeal and Ground 5 in the application submitted that the decisions of the Acting Minister and Minister respectively were affected by jurisdictional error because they had asked themselves the wrong question: namely, s 501A(2) provided the decision-maker with a residual discretion to set aside the original decision and cancel a visa that had been granted to a person or refuse an application for a visa where the Minister was satisfied of each of the three subjective jurisdictional facts referred to in s 501A(2)(c), (d) and (e) — that is, the Minister reasonably suspects the person does not pass the character test; the person does not satisfy the Minister that the person passes the character test; and refusal or cancellation is in the national interest. In both matters it was submitted that, on the proper construction of s 501A(2), no residual discretion is conferred on the decision-maker as to whether to refuse to grant or cancel a visa.

The Full Court found that there is in fact a discretion under s 501A(2) to refuse or cancel a visa and, contrary to the respondent's and applicant's arguments, this discretion arises after the matters in s 501A(2)(c), (d) and (e) have been considered. According to the Full Court, this conclusion is supported by the use of the word 'may' in s 501A(2), contrasted with the fact that the word 'must' has been used elsewhere in pt 9 in situations where it is clear Parliament intended to create an obligation. Moreover, the High Court in *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 [58] had proceeded on the basis that s 501A(2) conferred a discretion subsequent to the matters in s 501A(2)(c), (d) and (e) being satisfied.

Under Grounds 1A and 2B of the appeal it was submitted that the primary judge had erred in finding that the Acting Minister had not considered the significance of Australia's non-refoulement obligations in his assessment of the national interest, just because it was not material to his assessment of that particular subject. The Full Court found that the primary judge was correct in concluding that Australia's non-refoulement obligations should have received active consideration on part of the Acting Minister in considering the national interest element. Moreover, it was clear that this had not occurred as a matter of fact from the Acting Minister's reasons, which nowhere suggested that these considerations were relevant to the Acting Minister's state of mind concerning the national interest. Grounds 1, 2A and 3 in the appeal and Ground 5A in the application were concerned with whether the Acting Minister and Minister had made a jurisdictional error in not considering the implications of Australia's non-refoulement obligations as part of determining whether they were satisfied that a refusal or cancellation of the respective visa was in the national interest, such that the Acting Minister's and Minister's reasoning was unreasonable.

The Full Court held that, once the issue of the character test is determined, the power in s 501A(2) is exercised by reference to broad criteria. It is a power that may only be exercised by the Minister personally (s 501A(5)) and it is a non-compellable power — that is, the Minister does not have a duty to consider whether to exercise the power, whether or not the Minister is requested to do so or in any other circumstances (s 501A(6)).

Where the Minister elects to exercise their discretion, the relevant criteria in s 501A(2)(c), (d) and (e) must be met. The criterion in s 501A(2)(e) that the Minister is satisfied that the refusal or cancellation is in the national interest is broad one, and it is largely for the Minister, and not the courts, to determine what is and what is not in the national interest. Nonetheless, that power has boundaries and it is the responsibility of the court to identify those boundaries when required.

The Court noted that, in reaching that state of satisfaction as to the national interest, it must be attained reasonably ([140]), as identified by the primary judge in *CWY20* (see [53], [141]). In the particular circumstances of these matters, it was necessary for the Acting Minister and Minister to recognise the implications of Australia breaching its non-refoulement obligations in their assessment of the national interest, although the precise weight to be accorded to it and how it was to be balanced against other relevant factors was for the Acting Minister and Minister alone. Nonetheless, failure to consider these implications gave rise to a possible distortion in the subsequent balancing exercise, as was noted by the primary judge in *CWY20.*

While the weighing process is clearly a matter for the Minister, the Full Court held that a Minister, 'acting rationally and reasonably, could not have concluded that Australia's breach of its international legal obligations was immaterial to his assessment of Australia's national interest' ([166]) in the particular circumstances of both *CWY20* and *QJMV*.

While it was not argued before the primary judge that Australia's non-refoulement obligations were a mandatory relevant consideration in the consideration of the national interest under s 501A(2)(e), the primary judge did emphasise the significance of the particular circumstances in *CWY20* that did indicate it was a reasonable consideration, which was affirmed by the Full Court and also applied in *QJMV*— namely, in both the appeal and application, both persons were recognised as persons to whom Australia owes protection obligations; and refusing or cancelling their respective visas would put Australia in breach of those obligations because they would have to be returned to their country of origin where there was an accepted risk that they would be killed. The decisions made by the Acting Minister and Minister, respectively, meant that the respondent and applicant would be refouled in breach of Australia's obligations under international law. Moreover, an adverse decision to the person in each case meant that they are unable to make any application for a visa in the future. The significance of these issues was raised in the decision-making process, albeit just not considered as an aspect of national interest.

The Court concluded that compliance with international law obligations was an aspect of the national interest consideration in both cases, albeit it is not a mandatory relevant consideration in respect of the power in s 501A(2) in the sense of a consideration to be taken into account in every case ([155]).

Agreeing with Besanko J's judgment, Allsop CJ stated that Australia's international obligations and violations of those obligations can 'be seen to bear directly and naturally on the conception of the "national interest"' ([10]) and were 'intrinsically and inherently a matter of national interest' ([15]).

Breadth of health orders not affected by the principle of legality

Kassam v Hazzard [2021] NSWCA 299

On 8 December 2021, the New South Wales Court of Appeal handed down a unanimous decision, dismissing the appeal.

Between 20 August and 23 November 2021 the NSW Minister for Health and Medical Research made three orders ('the Orders') under s 7(2) of the *Public Health Act 2010* (NSW) in response to the emergence of the delta strain of the COVID-19 virus:

- Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (Order No 2) 2021 ('Order No 2');
- Public Health (COVID-19 Aged Care Facilities) Order 2021 ('Aged Care Order'); and
- Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021 ('Education Order').

Under s 7(5) of the Public Health Act, each of the Orders expired at the end of 90 days after it was made, unless repealed earlier. Order No 2 was repealed on 11 October 2021, the Aged Care Order was repealed on 1 November 2021 and the Education Order was scheduled to expire on 23 December 2021.

Order No 2 conditioned the movement of 'authorised workers' residing in 'areas of concern' from leaving the designated area in which they resided for the purposes of their work or employment, upon having received at least one dose of an approved COVID-19 vaccine or having been issued with a medical certificate exempting them from the requirement to be at least partially vaccinated.

The Aged Care Order and the Education Order had a similar effect, albeit they applied to 'authorised workers' at aged care facilities and schools irrespective of where they resided. At first instance, the plaintiffs contended that their orders were invalid on several grounds, all of which were dismissed by Beech-Jones CJ at common law.

The issues brought before the Court of Appeal were:

i. whether the applicants warranted the grant of leave to appeal;

ii. the significance of whether the Orders were characterised as administrative or legislative; and

iii. whether the Orders were authorised under s 7 of the Public Health Act.

In relation to the leave to appeal issue, Bell P, with Meagher and Leeming JJA agreeing, granted leave to appeal only in relation to those grounds in each of the appellant's submissions which involved the proper construction of s 7 of the Public Health Act, as this concerned a matter of public importance. Specifically, questions of construction in relation to s 7 of the Public Health Act have ongoing significance given the continuation of the Education Order at the time of the hearing and the fact that the COVID-19 virus continues to mutate and the risk to public health caused by the pandemic has not abated. In respect of the other grounds raised by the appellants, these involved challenges to the process by which the Orders were made, or the legal reasonableness of those orders and the Minister's purpose in making them. The Court held that an appeal on these grounds would manifestly lack utility as Order No 2 and the Aged Care Order had been repealed and the Education Order was set to shortly expire.

The second issue raised by the appellants was that s 7 of the Public Health Act only authorised administrative action but, as the Orders were legislative in their effect, they were invalid. Bell P held that, while there are some circumstances where the characterisation of an action, instrument or order as either administrative or legislative is rendered important by statue — for example, where an instrument of a particular character needs to be laid before Parliament — this was not the case here. Rather, the question of validity of the Orders did not turn on whether they were of an administrative or legislative character: the question is simply whether the Orders were authorised by s 7 of the Public Health Act. Bell P noted that the power in s 7 of the Public Health Act was rather broad and, in conjunction with the subject matter and nature of the risk it is designed to address, should not be narrowly construed.

The appellants also contended that the Orders were not authorised by s 7 of the Public Health Act because they amount to or resulted in an interference with six fundamental rights contrary to the principle of legality — that is, the courts must not impute to the legislature an intention to interfere with fundamental rights; such an intention must be clearly manifested by unmistakeable and unambiguous language. Bell P noted that the principle of legality is subject to much debate and controversy concerning its nature and sphere of operation, such that it should be kept in perspective and applied with care. More specifically, the principle will not necessarily be engaged or enlivened if the interference with fundamental rights authorised by a statute is slight or indirect or temporary. Bell P went on to deal with each of the rights alleged to have been infringed.

Right to bodily integrity

The right to bodily integrity is recognised at common law. However, Bell P concurred with the primary judge that this right was not infringed or impaired by the Orders. The Orders proceeded on the basis that there will be citizens who chose not to be vaccinated. Vaccination was not a requirement under the Orders; rather, it was a condition on which a worker would be able to take advantage of an exemption — namely, to leave a particular area under Order No 2 or to enter a particular place under the Aged Care Order or the Education Order. Nothing in the Orders required, still less coerced, workers to be vaccinated. Consequently, the right to bodily integrity was not impaired by any of the Orders and they were not rendered invalid on the basis that, contrary to the principle of legality, such impairment was not expressly or impliedly authorised.

Right to earn a living or a right to work

In agreement with the primary judge, Bell P found that there is no common law right to work in any strict sense which would engage the principle of legality. Bell P drew on the observation of Barwick CJ in *Forbes v New South Wales Trotting Club Limited* (1973) 143 CLR 242, 260–1, which has been subsequently cited with approval, that 'to convert the doctrine that … there should be no unreasonable restraint on employment into a doctrine that every man has a "right to work", is, in my opinion, to depart radically from … the common law'. Consequently, to the extent that people's ability to work was directly or indirectly affected by the Orders, they were not invalid by reason of the principle of legality.

Right not to be discriminated against

Bell P similarly agreed with the primary judge's reasoning that 'protection from discrimination is not a right, freedom or immunity protected by the principle of legality. The failure of the common law to protect against discrimination is reflected in the necessity for legislation to be passed to prohibit it'.

Right to privacy

As with the right to work, the right to privacy was not considered a right which the common law has to date recognised such that it could engage the principle of legality.

Privilege against self-incrimination

Bell P agreed with the conclusion of the primary judge that the privilege against self-incrimination did enliven the principle of legality. However, it was not violated by any of the Orders which required workers to provide evidence of identity, residence and vaccination status in order to travel outside a specified area or to participate in certain types of work. On a proper construction of the Orders it could not sensibly be said that the purpose of requiring the production of evidence was in order to obtain admissions of criminal conduct.

Right to silence

The right to silence may only engage the principle of legality where it is used in the context of the right to refuse to answer questions from law enforcement officers or judicial officers, which is similar to the privilege against self-incrimination; it could not sensibly be seen to have been infringed by any of the Orders.

State Emergency and Rescue Management Act definition of 'emergency'

Lastly, the appellants argued that the COVID-19 pandemic was an 'emergency' within the meaning of s 4 of the *State Emergency and Rescue Management Act 1989* (NSW) ('SERM Act') such that any orders to address that emergency should have been made under s 8 of the Public Health Act. However, as reasoned by Bell P, s 8 of the Public Health Act is only engaged where there is a 'state of emergency' that arises following a declaration by the Premier that a state of emergency exists, which is different from an 'emergency' in the definition under s 4 of the SERM Act. Moreover, this distinction makes clear the interrelationship between s 7 and s 8 of the Public Health Act and when each section will be applicable. Consequently, where there is a declaration of a 'state of emergency' the power in s 8 is invoked as opposed to s 7. In this case, in the absence of a declaration by the Premier of a state of emergency, s 8 was not an available source of power to make any of the Orders. Consequently, this argument was held to fail.

Defining 'decisions' under the Administrative Law Act 1978 (Vic)

Keasey v Director of Housing [2022] VSCA 7

On 2 February 2022, the Victoria Court of Appeal handed down its unanimous decision, agreeing with the decision of the primary judge, Derham AsJ, and refusing leave to appeal.

In response to the COVID-19 pandemic, the *Residential Tenancies Act 1997* (Vic) was amended by the insertion of pt 16, headed 'COVID-19 temporary measures'. The effect of this amendment changed the process by which a landlord could evict a tenant under a residential tenancy agreement, essentially making it harder, while also giving to the Victorian

Civil and Administrative Tribunal ('VCAT') a greater decision-making role in the process. Under the provisions, a landlord is prohibited from issuing a notice to vacate to a tenant and any notice given is of no effect. A tenancy agreement is not terminated unless, relevantly (amongst other things), the landlord applies to the VCAT for an order terminating a tenancy agreement under s 548 of the *Residential Tenancies Act 1997* (Vic) and the VCAT makes an order under s 549(1) of the Act, where satisfied of various stipulated matters, terminating the tenancy agreement. The VCAT can also make a possession order if it is reasonable and proportionate to do so.

The applicant and another person are tenants under a tenancy agreement, with the respondent being the Director of Housing. The tenancy agreement is governed by the Residential Tenancies Act. On 11 May 2020, following the laying of criminal charges against the applicant, the Director of Housing, as landlord, filed an application in the VCAT under s 548 of the Residential Tenancies Act, seeking to terminate the applicant's tenancy agreement on the basis that the rental property was being used by the tenant or another person for an illegal activity and as a place in which to traffic heroin.

The Director of Housing also sought a possession order under s 549(4). At the time of the hearing at first instance, the criminal charges were yet to be heard.

The applicant requested under s 8 of the *Administrative Law Act 1978* (Vic) that the Director provide reasons in writing for the decision to commence the application in the VCAT. The question in the application for leave to appeal was whether the decision of the Director to apply to the VCAT under s 548 of the Residential Tenancies Act was a 'decision' under the Administrative Law Act with the consequence that the Director was, on request, obligated to give reasons.

The applicant submitted that a decision to make an application under s 548 of the Residential Tenancies Act is a decision under the Administrative Law Act. Although anterior to any ultimate decision that the VCAT may make, the decision to apply to the VCAT determined a question affecting their rights because it was sufficiently related to any VCAT decision that may be made such that certiorari may issue.

The Court, in its joint judgment, agreed with the reasoning and conclusions reached by Derham AsJ, at first instance, that making an application under s 548 of the Residential Tenancies Act was not a decision under the Administrative Law Act, such that leave to appeal must be refused.

The Court noted that the correct starting position was to determine what was meant by 'decision' as defined in s 2 of the Administrative Law Act, rather than the principles as to when certiorari might be available for anterior decisions. The Court held there were three elements to this definition of 'decision': first, a decision has a degree of finality about it; second, the decision has some legal force derived from either the common law or statute; and, third, it must be determinative of a question affecting rights.

The making of the application by the Director to the VCAT did not determine how the application was to be decided, as this was a matter for the VCAT to determine having heard from the parties. The VCAT does not review the decision of the Director to make an application but decides for itself on the merits whether an order terminating the tenancy should be made.

The Court acknowledged that the application was a precondition to the VCAT being able to make an order under the Residential Tenancies Act, but the mere fact of the application did not influence, let alone determine, how the application would be determined on its merits. The VCAT, in arriving at its decision, is not concerned with why the Director commenced proceedings; neither was it bound by the Director's belief that the rental premises were being used in the trafficking of heroin. The VCAT is required to focus on whether it is satisfied that the statutory conditions for terminating the tenancy agreement have been met based on the evidence and submissions before it. The Director, in making an application under s 548 of the Residential Tenancies Act, will have to consider whether there is a proper basis for making the application, including whether the VCAT could be satisfied that it is reasonable and proportionate to make the orders sought. However, in doing so, the Director does not determine these matters and is not making a decision as defined in the Administrative Law Act.

Additionally, the making of the application to the VCAT did not change the applicant's rights under the tenancy agreement. It neither deprived the applicant of property nor interfered with the applicant's rights under the tenancy agreement. Rather, the tenancy agreement continued on foot and was unaffected by the application; it was 'neither less secure nor conditional' as a result of the application. The making of the application did not alter the Director's rights or otherwise alter or reduce the rights of the applicant to remain as a tenant and continue to enjoy exclusive possession.

Consequently, the decision to commence proceedings was not legally operative to determine any question that materially affected the rights of the applicant. It put in train a process, but in doing so it did not, in itself, determine or affect the rights of the applicant or any other person.

It was conceded that in certain contexts it is possible for a decision which is legally operative and relevantly determinative to be made before an ultimate decision is made such that some decision processes may yield more than one decision. However, in approaching construction of the Administrative Law Act the Court noted that the Act is facultative in nature and designed to overcome technical requirements associated with the common law writs; thus must be construed in that context.

Here, an overly inclusive approach to the meaning of 'decision' in the Administrative Law Act would be liable to 'encourage the atomisation of a single decision-making process into a series of separate decisions each giving rise to an obligation to provide reasons, potentially disrupting the orderly decision-making sequence' such that, in light of the Court's reasoning above, 'it is plain that the decision of the Director to commence an application' under s 548 of the Residential Tenancies Act in the VCAT is not a decision for the purpose of the Administrative Law Act ([26]).