Recent developments

Anne Thomas

Public interest disclosure reform

On 30 November 2022, the Government introduced the Public Interest Disclosure Amendment (Review) Bill 2022, which aims to strengthen protections for public sector whistleblowers.

The Bill will:

- enforce a positive duty to protect whistleblowers on principal officers and to provide ongoing training and education to public officials in their agency;
- strengthen protections for disclosures and introduce protections for witnesses, including expanding the definition of detriment that will attract remedies;
- enhance the oversight roles of the Ombudsman and Inspector-General of Intelligence and Security;
- facilitate the reporting and sharing of information related to public interest disclosures to ensure they can be properly addressed;
- improve the allocation and investigation processes for authorised officers and principal officers; and
- remove solely personal work-related conduct from the scope of disclosable conduct.

The Bill will ensure immediate improvements to the public sector whistleblower scheme are in place before the National Anti-Corruption Commission commences in mid-2023.

The Bill implements 21 of the 33 recommendations of the 2016 Review of the Public Interest Disclosure Act by Mr Philip Moss AM.

A second stage of reforms to the *Public Interest Disclosure Act 2013* is planned to commence next year to address the underlying complexity of the scheme and provide effective and accessible protections to public sector whistleblowers.

More information about the Bill can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6958>.

<https://ministers.ag.gov.au/media-centre/public-interest-disclosure-reform-30-11-2022>

Parliament votes to restore standing of the Australian Human Rights Commission

On 27 October 2022, the Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Bill 2022 was passed by Parliament and came into effect on 10 November.

The Act amends the *Australian Human Rights Commission Act 1986*, *Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and *Sex Discrimination Act 1984* to codify a merit-based and transparent selection and appointment process for members of the Australian Human Rights Commission.

The Act ensures statutory appointments to the Commission are made through a merit-based and transparent selection process that is consistent with the United Nations General Assembly Principles relating to the Status of National Institutions, also known as the Paris Principles.

The Act will address the concerns raised by the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation which has deferred the Commission's re-accreditation as an 'A'-status National Human Rights Institution.

As Australia's national human rights institution, an independent AHRC is fundamental to Australia's human rights agenda — both internationally and domestically.

More information about the Act can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6917>.

<https://www.markdreyfus.com/media/media-releases/parliament-votes-to-restore-standing-of-the-australian-human-rights-commission-mark-dreyfus-kc-mp/>

AUSTRAC CEO reappointment

The Attorney-General, the Hon Mark Dreyfus KC MP, has announced the reappointment of Ms Nicole Rose PSM as Chief Executive Officer of the Australian Transaction Reports and Analysis Centre (AUSTRAC). Ms Rose's two-year reappointment commenced on 13 November 2022.

Ms Rose was first appointed CEO in 2017 and has ably led Australia's financial intelligence unit and anti-money laundering and counter-terrorism financing (AML/CTF) regulator in its important role of detecting, deterring, and disrupting criminal abuse of the financial system.

Ms Rose has helped develop crucial ties between AUSTRAC and industry, including strengthening the AUSTRAC-led Fintel Alliance — a world-first public−private partnership against money laundering, terrorism financing and other serious crime.

AUSTRAC, under Ms Rose's leadership, has also undertaken several high-profile enforcement investigations and actions against both the banking and casino sectors. This includes a $1.3 billion penalty order for 23 million contraventions of the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* — the largest ever civil penalty in Australian history.

We congratulate Ms Rose on her reappointment.

<https://ministers.ag.gov.au/media-centre/austrac-ceo-reappointment-07-10-2022>

Appointment to the High Court of Australia

The Governor-General, His Excellency General the Hon David Hurley AC DSC (Retd), has appointed the Hon Justice Jayne Jagot as a Justice of the High Court of Australia.

Justice Jagot commenced on 17 October 2022 upon the retirement of the Hon Justice Patrick Keane AC, who retired after nine years of distinguished service on the High Court.

Justice Jagot is the 56th Justice of the High Court and the seventh woman appointed to the Court.

Justice Jagot is regarded as an outstanding lawyer and an eminent judge. She previously served as a Judge of the Federal Court of Australia.

We congratulate Justice Jagot on her appointment.

<https://ministers.ag.gov.au/media-centre/appointment-high-court-australia-29-09-2022#:~:text=Justice%20Jagot%20will%20commence%20on,High%20Court%20will%20be%20women.>

National Anti-Corruption Commission Act 2022

On 28 September 2022, the Attorney-General, the Hon Mark Dreyfus KC MP, introduced the National Anti-Corruption Commission Bill 2022 into the House of Representatives. The Bill passed on 30 November 2022 with a number of Government amendments. The Act establishes a transparent and independent National Anti-Corruption Commission that will investigate and report on serious or systemic corruption in the Commonwealth public sector.

Specifically, the National Anti-Corruption Commission, once formally stood up, in accordance with the Act, will:

- operate independently of government and have broad jurisdiction to investigate serious or systemic corrupt conduct across the Commonwealth public sector;
- have the power to investigate ministers, parliamentarians and their staff, statutory officer holders, employees of all government entities, and contractors;
- have discretion to commence inquiries on its own initiative or in response to referrals from anyone, including members of the public and whistleblowers. Referrals can be anonymous;
- be able to investigate both criminal and non-criminal corrupt conduct, and conduct occurring before or after its establishment;
- have the power to hold public hearings; and
- have a mandate to prevent corruption and educate Australians about corruption.

The definition of corrupt conduct is central to the Commission's jurisdiction and encompasses conduct by a public official that involves an abuse of office, breach of public trust, misuse of information or corruption of any other kind. It also includes conduct by any person that could adversely affect the honest or impartial exercise of a Commonwealth public official's functions.

Other conduct that could adversely affect public administration, such as external fraud, will continue to be dealt with by existing integrity agencies.

The Commission will be the lead Commonwealth agency for the investigation of serious or systemic corruption and will work in partnership with other agencies that form part of the Commonwealth's broader integrity framework, including the Australian Federal Police and the Australian Public Service Commission.

The Commission will have the power to refer corruption issues to other Commonwealth, state and territory agencies for their consideration — for example, where an issue involves broader criminality or official misconduct that falls within the jurisdiction of another independent investigative agency.

The Commission will be able to hold public hearings in exceptional circumstances and if satisfied it is in the public interest to do so. The default position is that hearings will be held in private.

The Commission will be able to conduct investigations on its own initiative or in response to referrals or allegations from any source.

Agency heads will be required to report any corruption issue in their agency to the Commission if they suspect it could be serious or systemic.

The legislation also ensures that there are appropriate safeguards against undue reputational damage and provides protections for whistleblowers and journalists.

A multi-partisan parliamentary joint committee is to oversee the Commission and is empowered to require the Commission to provide information about its performance. The committee will be responsible for approving the appointments of the Commissioner, the Deputy Commissioners and the Inspector. The Inspector is to deal with any corruption issues arising in the Commission and complaints about the Commission.

The Government has committed funding of $262 million over four years for the establishment and ongoing operation of the Commission. This funding ensures that the Commission has the staff, capabilities and capacity to triage referrals and allegations it receives, conduct timely investigations, and undertake corruption prevention and education activities.

The Commission is expected to be established by mid-2023.

Prior to its enactment, the Bill was referred to the Joint Select Committee on National Anti-Corruption Commission Legislation. The Committee reported on the Bill on 10 November 2022. The report can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Anti-Corruption_Commission_Legislation/NACC/Report>.

The Act and second reading speech can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6917>.

<https://ministers.ag.gov.au/media-centre/speeches/national-anti-corruption-commission-bill-2022-28-09-2022>

Government takes steps to eliminate sexual harassment in Australian workplaces

The Government introduced the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 on 27 September 2022. It was passed on 28 November 2022.

This Act implements seven legislative changes recommended by Sex Discrimination Commissioner, Kate Jenkins.

Specifically, the Act:

- places a positive duty on employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible;
- strengthens the Australian Human Rights Commission with new functions to assess and enforce compliance with this new requirement, including the capacity to give compliance notices to employers who are not meeting their obligations;
- expressly prohibits conduct that results in a hostile workplace environment on the basis of sex; and
- ensures Commonwealth public sector organisations are also required to report to the Workplace Gender Equality Agency on its gender equality indicators.

The Government is committed to finalising implementation of all recommendations of the Respect@Work Report as a matter of priority.

The Minister for Employment and Workplace Relations, the Hon Tony Burke MP, is separately progressing the inclusion of a prohibition on sexual harassment in the *Fair Work Act 2009* (Cth).

The Act was referred to the Senate Legal and Constitutional Affairs Legislation Committee prior to its passage. The Committee's report of the 3 November 2022 can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/RespectatWork2022/Report>.

The Bill and second reading speech can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6916>.

<https://ministers.ag.gov.au/media-centre/government-takes-steps-eliminate-sexual-harassment-australian-workplaces-27-09-2022>

Consultation begins on the National Principles to Address Coercive Control

At the 12 August 2022 meeting of Attorneys-General, all jurisdictions agreed to take collective action to address family, domestic and sexual violence. The meeting endorsed a consultation draft of National Principles to address the pattern of abusive behaviour designed to create power and dominance over another person or persons (coercive control).

The draft National Principles to Address Coercive Control are now available for public consultation.

The National Principles will help to create a shared national understanding of coercive control — a pattern of abusive behaviour that a perpetrator uses to create and keep power over another person or persons.

The consultation process is open to everyone. Consultation will also include targeted roundtable discussions and further advice from an Advisory Group comprised of victim-survivor advocates, family and domestic violence experts, and representatives of people at increased risk of coercive control.

The consultation process closed on Friday, 11 November 2022. To access the draft National Principles, visit <https://consultations.ag.gov.au/families-and-marriage/coercive-control/>.

<https://ministers.ag.gov.au/media-centre/consultation-begins-national-principles-address-coercive-control-16-09-2022>

Nomination of Judge Hilary Charlesworth to the International Court of Justice

Her Excellency Judge Hilary Charlesworth has been nominated for re-election as a Judge of the International Court of Justice. The election will take place at the United Nations Headquarters in New York in late 2023.

The Australian National Group will formally nominate Judge Charlesworth as a candidate for the election when nominations open in early 2023. The Australian National Group is an independent body of esteemed Australian jurists who serve as Members of the Permanent Court of Arbitration in The Hague.

Judge Charlesworth is an outstanding candidate, and an eminent scholar and jurist who has made an exceptional contribution to the study and practice of international law. She currently serves as a Judge of the Court after securing a decisive win in elections held in November

2021 following the death of Australian Judge James Crawford, who served as a judge of the Court from February 2015 until his death. Judge Charlesworth is the first Australian woman elected to the Court and only the fifth female permanent judge in the Court's 77-year history.

We congratulate Judge Charlesworth on her nomination.

<https://ministers.ag.gov.au/media-centre/nomination-judge-hilary-charlesworth-international-court-justice-02-09-2022>

Establishment of inquiry into the appointment of the Hon Scott Morrison MP to multiple departments

On 26 August 2022, the Government announced the appointment of the Hon Virginia Bell AC to lead an inquiry into the appointment of former Prime Minister Scott Morrison MP to administer departments other than the Department of the Prime Minister and Cabinet and related matters.

The Solicitor-General's legal advice publicly released on the matter found that the principles of responsible government were fundamentally undermined by the actions of the former Morrison government. The inquiry seeks to restore and strengthen public trust in Australian democracy.

Specifically, the inquiry examined and reported on the facts and circumstances surrounding Mr Morrison's appointment to five departments during 2020 and 2021 and the implications arising from them. It also examined and reported on the practices and policies which apply to ministerial appointments and recommended procedural or legislative changes to provide greater transparency and accountability.

The Terms of Reference are at <https://www.ag.gov.au/about-us/publications/inquiry-multiple-ministerial-appointments>.

The Commissioner reported to the Prime Minister on 25 November 2022. On 30 November 2022, the House of Representatives passed a rare censure motion (86:50) against the former Prime Minister.

Text of the censure can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/26233/&sid=0013>.

<https://ministers.ag.gov.au/media-centre/establishment-inquiry-appointment-hon-scott-morrison-mp-multiple-departments-26-08-2022>

Establishment of the Royal Commission into Robodebt

The Governor-General, His Excellency General the Hon David Hurley AC DSC (Retd), has issued Letters Patent establishing a Royal Commission into the former debt assessment and recovery scheme known as Robodebt.

The Commission will examine, among other things:

- the establishment, design and implementation of the scheme; who was responsible for it; why they considered Robodebt necessary; and any concerns raised regarding the legality and fairness;
- the handling of concerns raised about the scheme, including adverse decisions made to the Administrative Appeals Tribunal;
- the outcomes of the scheme, including harm to vulnerable individuals and the total financial cost to government; and
- measures needed to prevent similar failures in public administration.

The Commission's focus will be on decisions made by those in senior positions. The full scope of the inquiry is outlined in the Royal Commission's Terms of Reference at <https://robodebt.royalcommission.gov.au/about/terms-reference>.

Catherine Holmes AC KC has been appointed the Royal Commissioner. Ms Holmes is a former Chief Justice of the Supreme Court of Queensland.

The Government has allocated $30 million for the Royal Commission and the final report will be delivered to the Governor-General by 18 April 2023.

<https://ministers.ag.gov.au/media-centre/establishment-royal-commission-robodebt-25-08-2022>

Review of the Commonwealth Modern Slavery Act 2018

The Government has released for public consultation an issues paper on the effectiveness of the first three years of the *Modern Slavery Act 2018*. The issues paper is part of the statutory review of the Act being completed by Emeritus Professor John McMillan AO.

The review will assist to inform the government's commitments to tackling modern slavery, including the appointment of an Anti-Slavery Commissioner to work with business, civil society, NGOs and state and territory governments to identify and address modern slavery risks in business operations and global supply chains.

The issues paper has revealed significant engagement by business and society with the Modern Slavery Act, with more than 6,000 entities reporting under the Act. However, there is still significant work to do to improve compliance with the Act.

The Government has committed to introducing penalties for noncompliance, which aim to hold eligible companies to account.

The three-month consultation period for the review closed on 22 November 2022.

The issues paper can be viewed at <https://consultations.ag.gov.au/crime/modern-slavery-act-review/>.

The review will be completed by 31 March 2023. The final report will be tabled in Parliament.

<https://ministers.ag.gov.au/media-centre/review-commonwealth-modern-slavery-act-2018-22-08-2022>

Australia joins the Global Cross-Border Privacy Rules Forum

The Government has announced Australia has joined the Global Cross-Border Privacy Rules Forum (Global CBPR), a multilateral initiative that aims to better facilitate the flow of data across borders.

The Global CBPR will establish a certification system to help companies demonstrate compliance with internationally recognised data privacy standards. The forum builds on the APEC CBPR formed in 2011 and is open to participation by non-APEC members.

The Government 'encourages interoperability and cooperation between economies to help bridge differences in data protection and privacy frameworks. We support the development of an open and reliable digital trade environment that strengthens consumer and business trust in digital transactions and promotes global trade by facilitating the secure flow of data'.

<https://ministers.ag.gov.au/media-centre/australia-joins-global-cross-border-privacy-rules-forum-17-08-2022>

Meeting of Attorneys-General progresses actions to address family, domestic and sexual violence

The first meeting of Attorneys-General under the Albanese government was held on 12 August 2022. At the meeting there was agreement on collective action to address family, domestic and sexual violence. The meeting endorsed a Consultation Draft of National Principles to address the pattern of abusive behaviour designed to create power and dominance over another person or persons (coercive control). The principles represent a significant step towards a shared national understanding of coercive control.

The Draft National Principles will be released for public consultation shortly. Further information can be found on the Attorney-General's Department website at <https://www.ag.gov.au/families-and-marriage/families/family-violence>.

The meeting also endorsed the five-year Work Plan to Strengthen Criminal Justice Responses to Sexual Assault. The plan urges states and territories to work together to improve the experiences of victim-survivors in the criminal justice system and harmonise and better define laws around sexual assault. It focuses on the following priority areas:

- strengthening legal frameworks to ensure victim-survivors have improved justice outcomes and protections, wherever necessary and appropriate, across Australia;

- building justice sector capability to better support and protect victim-survivors; and
- supporting research and greater collaboration to identify best practices, and to ensure actions are supported by a sound and robust evidence base.

More information about the Work Plan can be found at <https://www.ag.gov.au/crime/sexualviolence>.

The Attorneys-General also discussed progress towards model defamation reform, issues of youth justice, and indigenous justice reform.

<https://ministers.ag.gov.au/media-centre/meeting-attorneys-general-progresses-actions-address-family-domestic-and-sexual-violence-13-08-2022>

Release of the Australian Law Reform Commission's inquiry into judicial impartiality and the law on bias

The final report of the Australian Law Reform Commission's (ALRC) inquiry into judicial impartiality and the law on bias was tabled in federal Parliament on 2 August 2022.

The Terms of Reference for this inquiry directed the ALRC to consider whether:

- the law about actual or apprehended bias relating to judicial decision-making is sufficient and appropriate to maintain public confidence in the administration of justice;
- the law provides clarity to decision-makers, the legal profession and the community about how to manage potential conflicts and perceptions of partiality; and
- the mechanisms for raising allegations of actual or apprehended bias, and deciding those allegations, are sufficient and appropriate.

The ALRC considered whether, and if so what, reforms to the laws on judicial impartiality and bias may be necessary or desirable.

The ALRC found that, in general, the Australian public has a high level of confidence in Australian judges and courts and the Australian judiciary is highly respected internationally. Moreover, the report found that the substantive law on actual or apprehended bias does not require amendment.

The ALRC made 14 recommendations to promote and protect judicial impartiality and public confidence in the Commonwealth judiciary, including:

- reforms to the procedures Commonwealth judges use to determine whether they should withdraw from a case when a party raises a potential issue of bias;
- publishing guidance on how litigants should raise issues of bias with a judge and how such issues are decided;

- establishing a Federal Judicial Commission as an additional and accessible oversight mechanism to support litigant and public confidence in judicial impartiality; and
- strengthening institutional structures to support judges and address systemic biases, including through changes to appointment procedures, judicial education, and collection of court user feedback and case data in the Commonwealth courts.

The Government will consult widely on the report and respond in due course.

The final report and further information can be accessed at <https://www.alrc.gov.au/inquiry/review-of-judicial-impartiality/>.

<https://ministers.ag.gov.au/media-centre/release-australian-law-reform-commissions-inquiry-judicial-impartiality-and-law-bias-02-08-2022>

Government response to the Australian Law Reform Commission report on judicial impartiality and the law on bias

On 29 September 2022, the Government released its response to the Australian Law Reform Commission (ALRC) Report 138 — *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, tabled in Parliament on 2 August 2022.

The ALRC report found that, in general, the Australian public has a high level of confidence in Australian judges and courts, that the Australian judiciary is highly respected internationally, and that the substantive law on actual or apprehended bias does not require amendment.

The Government's response to the report addresses the three recommendations directed to the Government and the Attorney-General.

These recommendations are that the Australian Government should:

- establish a federal judicial commission;
- develop a more transparent process for appointing federal judicial officers on merit; and
- collect, and report annually on, statistics regarding the diversity of the federal judiciary.

The Government has given in-principle support to the establishment of a federal judicial commission to address concerns about the conduct of judges and reinforce public trust in the judicial system. The establishment of a federal judicial commission is one of 14 recommendations in the report.

The Government will consult closely with the federal courts and other key stakeholders on the recommended establishment of a federal judicial commission.

The Government notes the remaining 11 recommendations directed at the federal courts, the Council of Chief Justices of Australia and New Zealand, and the Law Council of Australia. The Government will consult with these entities on these recommendations where appropriate.

The Government Response to the Report can be accessed at <https://www.ag.gov.au/legal-system/publications/government-response-australian-law-reform-commission-report-138-without-fear-or-favour-judicial-impartiality-and-law-bias>.

<https://ministers.ag.gov.au/media-centre/government-response-australian-law-reform-commission-report-judicial-impartiality-and-law-bias-29-09-2022>

7 September 2022: Publication of the Commonwealth Ombudsman's Stored Communications and Telecommunications Data Annual Report

On 7 September 2022, the Commonwealth Attorney-General, the Hon Mark Dreyfus KC MP, tabled the Commonwealth Ombudsman's report on oversight of agencies' use of stored communication and telecommunications data powers in Australia from 1 July 2020 to 30 June 2021.

Stored communications are communications that already exist and are stored on a carrier's systems. This includes items like emails and text messages. Telecommunications data is the information about a communication, but not the content of the communication itself — commonly referred to as 'metadata'. This can include subscriber information and the date, time and duration of a communication.

In 2020–21 the Commonwealth Ombudsman reviewed 20 Commonwealth, state and territory law enforcement and integrity agencies' use of these powers against the requirements of the *Telecommunications (Interception and Access) Act 1979* (Cth). The Ombudsman made 29 recommendations, 386 suggestions and 116 better practice suggestions for improvement across the agencies inspected.

During the inspections, agencies proactively identified and disclosed many issues. The Ombudsman found that most agencies were receptive to the findings and demonstrated a commitment to either building or strengthening their culture of compliance.

The report outlines the key issues and areas that were found to be critical to an agency's compliance with the Act in 2020–21. This included agencies':

- record-keeping of internal authorisations for access to telecommunications data;
- policies and procedures for checking (vetting) whether communications and data received are consistent with the parameters of the relevant warrant or authorisation;
- frameworks for use, communication, recording and destruction of communications consistent with legal requirements; and
- availability and quality of training and guidance materials to support officers in complying with legal requirements.

<https://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2022/7-september-2022-publication-of-the-commonwealth-ombudsmans-stored-communications-and-telecommunications-data-annual-report>

New laws to improve Government accountability and transparency

The Auditor-General Amendment Bill 2022 was introduced in the Western Australian Legislative Assembly on 19 October 2022 by the McGowan government. The Bill was passed on 22 November and received assent on 29 November 2022.

The Act provides the Western Australian Auditor-General with unprecedented express statutory rights to access highly sensitive Government information as part of reforms boosting public transparency and accountability.

The Auditor-General serves a critical role in public integrity, as an independent officer of the Parliament who is responsible for scrutiny of the finances and activities of state and local government entities.

The Act overcomes longstanding deficiencies in the existing legal framework that have inhibited successive Auditors-General from accessing highly sensitive information, including that which is subject to Cabinet confidentiality, legal professional privilege, and other claims of public interest immunity.

The new laws provide that the confidentiality of the material will be maintained, including by limiting the further public disclosure of material that is privileged or subject to an immunity.

The main amendments include:

- whereas previously Auditors-General have been able to access Cabinet documents only with the permission of Cabinet, a statutory right of access will exist for the first time;
- Government will give the Auditor-General access to legal advice; and
- instead of having to physically attend the Department of Premier and Cabinet to view Cabinet documents, this highly sensitive Government information will be made available in an electronically secure form in the Auditor-General's office.

The Act ensures that any matters of parliamentary privilege remain the remit of Parliament.

More information about the Act can be accessed at <https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=97E914ED65D118C8482588DF002994D6>.

<https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/10/New-laws-to-improve-Government-accountability-and-transparency.aspx>

Recent decisions

Establishing the materiality threshold for procedural fairness applicants

Nathanson v Minister for Home Affairs [2022] HCA 26

The High Court handed down its decision in the appeal on 17 August 2022. The full bench held that the appeal should be allowed, and the application remitted to the Administrative Appeals Tribunal to be heard and determined according to law.

The appellant, a New Zealand citizen, arrived in Australia in 2010 and was granted a Class TY Subclass 444 Special Category visa in 2013. In 2018, the delegate of the respondent Minister cancelled that visa pursuant to s 501(3A) of the *Migration Act 1958*. The visa was cancelled on the grounds that the delegate was satisfied that the appellant did not pass the character test in s 501(6) of the Act. At the time the appellant was serving a sentence of imprisonment for offences including depriving a person of personal liberty, aggravated assault, stealing, and driving a vehicle in a dangerous manner. The offences were considered serious and the appellant was sentenced to a period of imprisonment for two years and six months.

On 10 January 2019, a delegate of the Minister decided not to revoke the cancellation of the appellant's visa under s 501CA(4) of the Act. In making that decision the delegate was required to comply with the ministerial direction made under s 499 of the Act (Ministerial Direction 65). Ministerial Direction 65 required the decision-maker to consider as a primary consideration, among other things, 'the protection of the Australian community from criminal or other serious conduct', and in considering this also take into account the seriousness of certain offences.

The appellant applied to the Tribunal for review of the delegate's decision. On 28 February 2019, Ministerial Direction 65 was replaced by Ministerial Direction 79, which had one relevant difference, the inclusion of an additional factor for consideration in assessing the nature and seriousness of the non-citizen's conduct: the principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed. In the Minister's closing submissions to the Tribunal, the Minister contended that the appellant had been involved in violent conduct against his wife that was to be considered 'extremely serious' in light of new Ministerial Direction 79. The Tribunal did not draw the appellant's attention to this allegation or give the appellant any opportunity to address it.

On 4 April 2019, the Tribunal affirmed the delegate's decision, having found that the appellant had been involved in two incidents of violent conduct against his wife, and in light of Ministerial Direction 79 that conduct was to be regarded 'seriously'.

On 18 October 2019, Colvin J of the Federal Court of Australia dismissed the appellant's application for judicial review of the Tribunal's decision, as the course taken by the Tribunal, while procedurally unfair, did not constitute jurisdictional error as it was not material to the Tribunal's decision. The subsequent decision of the majority of the Full Court of the Federal

Court of Australia also dismissed the appellant's appeal, finding that the primary judge was correct to find that unfairness was not material, as the appellant failed to articulate a specific course of action which could have realistically changed the result.

The question on appeal before the High Court was whether the procedural unfairness by the Tribunal was in fact material such that it involved jurisdictional error. Chief Justice Kiefel and Keane and Gleeson JJ, in a joint judgment, held, in light of the decision of the Court in *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590 ('*MZAPC*'), that materiality of a breach requires consideration of whether the decision that was in fact made could have been different had the relevant condition been complied with 'as a matter of "reasonable conjecture" with the parameters set by the historical facts that have been determined' ([32]). The plurality held that the standard of 'reasonable conjecture' is undemanding and, where a Tribunal errs by denying a party a reasonable opportunity to present their case, this does not require demonstration of how that party might have taken advantage of the lost opportunity ([33]). In this case, there was no need for the appellant to establish the nature of any additional evidence or submissions that might have been presented to the Tribunal, had the hearing been procedurally fair.

Justice Gageler made the additional clarifying remark that 'the onus on which the applicant bears to establish materiality is no greater than to show that, as a matter of reasonable conjecture within parameters set by the historical acts established *on the balance of probabilities* (emphasis added), the decision *could* have been different had a fair opportunity to be heard had been afforded' ([47]). He further added that 'establishing that threshold of materiality is not onerous'.

Justice Gordon, likewise, emphasised that there was no additional or separate onus on the appellant to demonstrate that the error could realistically have resulted in a different decision ([63]). This was due to the fundamental nature of the error — denial of procedural fairness. Justice Gordon went on to note that as the majority in *MZAPC* acknowledged, there are categories of error which necessarily result in invalidity such as where the error is so egregious that it will be jurisdictional regardless of the effect the error may have had on the conclusion of the decision-maker. A serious denial of procedural fairness, such as involving a denial of an opportunity to be heard in relation to an important issue in the context of an evaluative decision (as in this case), falls into this category. However, Gordon J was unwilling to pin this down as a decisive rule; rather, she stated that whether a denial of procedural fairness would be material in all cases would depend on each situation ([78]). The more serious the error the more obvious it will be that the conjecture that the decision could have been different if a fair opportunity to be heard had been afforded is both open and reasonable ([83]).

Justice Edelman, while in agreement with the rest of the bench, noted his position taken in *MZAPC*, contrary to the primary joint judgment in that case, that the onus of proof regarding materiality is not borne by the applicant for judicial review but, rather, the respondent who alleges that the error is not material.

What it takes to be 'reasonably satisfied'

Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2) [2022] FCA 1121

The case was heard before Bromberg J in the Federal Court of Australia. The matter concerned an application for judicial review of a decision of a delegate of the first respondent, the National Offshore Petroleum Safety and Environmental Management Authority ('NOPSEMA'). NOPSEMA regulates offshore petroleum activities in Australian waters and, as part of its functions, approves environment plans under reg 10(1)(a) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth). The decision of the delegate made on the 14 March 2022 was purportedly made under reg 10(1)(1) to accept the environment plan submitted by the second respondent, Santos NA Barossa Pty Ltd, under reg 9. To accept the environment plan, NOPSEMA was required to be 'reasonably satisfied' that the plan met the criteria specified in the Regulations, including that the plan demonstrated that the 'titleholder' (Santos in this case) had carried out the consultation required by the Regulations and, in particular, reg 11A.

The effect of NOPSEMA's acceptance of the environment plan was that Santos was permitted to carry out petroleum activity — namely, the drilling and completion of eight production wells as part of the Barossa Project, the focus of which is the offshore gas-condensate field in the Timor Sea. Without NOPSEMA's acceptance, the petroleum activity would be a strict liability offence under reg 6.

The applicant, Mr Tipakalippa, claimed that he and the Munupi clan, of which he is an elder, were not consulted by Santos in relation to the environment plan. The Munupi clan is one of the traditional owners of the Tiwi Islands, with 'sea country' in the Timor Sea, extending to and beyond the area identified for the petroleum activity. As such, they were 'relevant persons' for the purposes of consultation required under reg 11A — that is, persons 'whose functions, interests or activities may be affected by the activities to be carried out under the environment plan'.

The issue raised in the applicant's first ground of review was whether a precondition to the valid acceptance of the environment plan was infected by legal error — namely, was NOPSEMA 'reasonably satisfied' that the environment plan met the criteria set out under reg 10A of the Regulations, including the requirement to consult under reg 11A.

In applying the principles in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 and *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 ('*Connell*'), for assessing whether a decision-maker had the state of satisfaction required by statute as a precondition of jurisdiction, Bromberg J noted that there are other forms of error beyond those mentioned by Latham CJ in *Connell* that may also infect a state of satisfaction. In this case, relying on the observation of the Full Court in *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* (2018) 262 FCR 527 [109], Bromberg J found that a failure to consider a matter that the statute required be considered may also undermine the lawfulness of the state of satisfaction required ([67]). Likewise, legal unreasonableness is also an applicable form of error.

Considering the phrase 'reasonably satisfied' under reg 10(1)(a), Bromberg J held that these words dictated the standard of satisfaction that NOPSEMA was required to apply in making the decision required of it. In considering that standard, Bromberg J found that the requirement of 'reasonable satisfaction' and the requirement that a decision-maker proceed reasonably were not unrelated, such that 'the first feeds into the second and the standard of reasonableness required will be set by their combination and governed by the requirements or objectives of the scheme in question' ([74]). Consequently, there is no fixed standard of legal unreasonableness (or reasonableness); rather, it is fact dependent and, depending on the statutory task required of the decision-maker, may be applied more stringently in some cases than in others.

Justice Bromberg stated that 'the nature of the task required of the decision-maker in reaching a state of satisfaction will also have a bearing' on whether it was reached reasonably. For example, where the state of satisfaction to be reached requires significant subjectivity, such as in relation to a matter of opinion or policy or taste, unreasonableness will be harder to establish.

Moreover, in making the assessment as to whether the decision was beyond power because it was legally unreasonable, where there are reasons of the decision-maker that provide an understanding as to how and why a state of satisfaction was reached have been provided, Bromberg J stated that these should form the focus of the assessment ([77]), as it is this reasoning used by the decision-maker that is the basis for the satisfaction reached.

Turning to NOPSEMA's decision, Bromberg J found that the regulatory task required of the Authority was to be 'reasonably satisfied' in relation to each of the criteria under reg 10A and, in respect of the requirement to consult, that the titleholder had consulted with each and every relevant person. The task of NOPSEMA was therefore, in part, to assess whether the environment plan had 'demonstrated' that every relevant person had been consulted. There was no subjective element to this task.

Justice Bromberg dedicated a portion of his judgment to analysing the method used by Santos to identify the relevant people the titleholder was required to consult. He found that the method set out in the environment plan was erroneous, as it failed to identify with sufficient accuracy the types of interests that could be affected by the project, such that it could not have effectively identified all relevant persons. As such, the environment plan could not demonstrate that consultation had occurred with each relevant person, including the applicant and the Munupi clan. Moreover, the environment plan itself did not assert that all relevant persons had been identified and consulted. Despite this, the reasons of NORPSEMA, on the other hand, noted that it was satisfied based on the environment plan that the consultation requirement had been met.

Justice Bromberg found that, irrespective of NOPSEMA's reasons, due to the absence of information necessary to demonstrate that each relevant person had been consulted, NOPSEMA was not in a position to form the requisite state of satisfaction and, as such, could not have been reasonably satisfied that the criteria under the Regulations had been met ([156]). The acceptance it gave was, therefore, not lawfully given.

The applicant's second ground contended was that, if the titleholder does not comply with the consultation requirement in regulation 11A, a decision to accept the environment plan which is affected by that noncompliance is invalid. This argument was rejected by Bromberg J as a misinterpretation of the regulatory scheme — namely, that the requirement to consult in reg 11A could not be relevantly distinct from the state of satisfaction NOPSEMA was required to have under regs 10 and 10A. Specifically, the jurisdictional fact of reg 10(1) — that is, the requisite state of satisfaction — is not that there has been compliance with the criteria to the satisfaction of the Court but that there has been compliance to the reasonable satisfaction of the decision-maker.

The Court ordered that the decision of NOPSEMA on 14 March 2022 pursuant to reg 10(1)(a) be set aside.

The matter has since been appealed to the Full Court. The decision of the Full Court was handed down on 2 December 2022 in which the appeal was dismissed. The Court finding that the orders made by Bromberg J were not affected by legal error.

State and territory legislation cannot impose criminal liability on the Commonwealth executive without clear statutory intention to do so

Aboriginal Areas Protection Authority v Director of National Parks [2022] NTSCFC 1

The Chief Executive Officer of the Aboriginal Areas Protection Authority ('the Authority') charged that the Director of National Parks (the Director) conducted works at Gunlom Falls, Kakadu National Park, between 22 March and 30 April 2019 in breach of s 34 of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ('the Sacred Sites Act').

The works involved the realignment of the walking track at Gunlom Falls. The area on which the works were carried out is designated a 'sacred site' under the Sacred Sites Act. The area is also a Commonwealth reserve under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'), for which the Director had the functions to administer, manage and control (s 514B(1)(a) EPBC Act). The Director carried out the works without an Authority certificate or a Minister's certificate as required under the Act. No ministerial approval for the works was required under the EPBC Act.

The case was stated as a special case and referred to the Full Court of the Supreme Court of the Northern Territory under s 21(1) of the *Supreme Court Act 1979* (NT). The question of law to be answered by the full bench was: do the offence and penalty prescribed by s 34(1) of the Sacred Sites Act not apply to the Director (a) as a matter of statutory construction; or (b) because they are beyond the legislative power of the NT Legislative Assembly?

The full court held that the offence and penalty under s 34(1) of the Sacred Sites Act did not apply to the Director as a matter of statutory construction.

The Court considered the application of the presumption set out in *Cain v Doyle* (1946) 72 CLR 409, 425, and more recently in *Bropho v Western Australia* (1990) 171 CLR 1, that a statute will not impose criminal liability on the executive, including government instrumentalities with the same legal status, without the clear legislative intention and purpose to do so ([25]).

In order to determine whether the presumption applied, the Court considered:

1. whether the Director was an entity to which the presumption against the imposition of criminal liability on the executive government applies; and
2. if so, whether the Director is intended to have the same legal status as the executive government in relation to the operation of the presumption; and
3. if so, whether the Sacred Sites Act, either expressly or by implication, disclosed a legislative intention to impose criminal liability on the Commonwealth executive government.

The presumption applies to the 'Crown' which can identify as the executive branch of government represented by the ministry and the administrative bureaucracy which tends to its business. The administrative bureaucracy includes authorities and instrumentalities of the Crown, including those with separate legal personality such as statutory corporations, provided they have the same legal status as executive government in the relevant aspects (see [41]−[42]).

The Court noted that, in determining whether an incorporated entity is part of the executive, other considerations such as the presence or absence of a statutory ability on the part of the executive to control the membership and/or activities of the entity is of central importance. The higher the degree of control, the more likely the intention is that the entity is to be treated as an alter ego of the Crown. However, this examination only turns upon the existence of a statutory ability of control rather than the extent to which that control is actually exercised. Other considerations include whether the entity performs government functions, whether it is funded by the executive and whether it is accountable to the executive in terms of finances and outcomes ([48]).

The Director was held to be a body corporate under s 514 of the EPBC Act and considered a corporate Commonwealth entity for the purposes of the *Public Governance, Performance and Accountability Act 2013* (Cth). The Director has the functions to administer, manage and control Commonwealth reserves (s 514B(1)(a) EPBC Act) and is generally subject to ministerial control — specifically, the Director must perform its functions and exercise its powers in accordance with any directions given by the Minister. The Director's functions are funded by the executive government to which the Director is accountable to and for. Moreover, the Court found that the intention of the statutory scheme for Commonwealth reserves was to enable the Commonwealth to administer, manage and control these reserves through the Director, rather than an incorporated Director to perform its functions independently of the Commonwealth. As such, the legislative intention is for the Director to have the same legal status as the federal executive government and enjoy the same privileges and immunities including the presumption against criminal liability to the extent that it is withdrawn or modified under the statutory scheme ([65]).

The Court held that, while the Sacred Sites Act did purport to bind the Territory Crown, and to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities (s 4(1)), this was insufficient to bind the Commonwealth. As a result, the Sacred Sites Act could not impose criminal liability in the Director. However, the Court did note that this immunity could still be removed by the NT Legislative Assembly by the enactment of legislation in sufficiently clear terms.

The Authority has sought leave to appeal to the High Court.