Recent developments

Anne Thomas

Appointments to the High Court of Australia

The Government has announced the appointment of Justice Stephen Gageler AC as the 14th Chief Justice of the High Court of Australia. Justice Gageler will commence as Chief Justice on 6 November 2023 upon the retirement of Chief Justice Susan Kiefel AC.

Justice Gageler has served on the High Court since 2012. Prior to this, he was the Commonwealth Solicitor-General.

The Government has also announced the appointment of Justice Robert Beech-Jones to the High Court of Australia. Justice Beech-Jones will fill the vacancy created by the appointment of Justice Gageler as Chief Justice, and will also commence on 6 November 2023.

Justice Beech-Jones has served on the Supreme Court of New South Wales since 2012. In 2021 he was appointed Chief Judge of the Common Law Division of the Supreme Court of New South Wales and a Judge of Appeal.

We congratulate Justice Gageler and Justice Beech-Jones on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-high-court-australia-22-08-2023>

Independent Review of the National Legal Assistance Partnership — consultation open

The Independent Review of the National Legal Assistance Partnership ('NLAP') led by Dr Warren Mundy has released an Issues Paper inviting submissions on future funding arrangements for the legal assistance sector.

Legal assistance is essential to ensure access to justice and equality before the law, especially for vulnerable people facing disadvantage.

The current NLAP is a $2.4 billion agreement between the Commonwealth and state and territory governments to fund vital legal assistance services for the most vulnerable people in Australia.

The NLAP includes funding for services delivered by Legal Aid Commissions, Community Legal Centres, and Aboriginal and Torres Strait Islander Legal Services.

With the current NLAP due to expire in 2025, Dr Mundy was appointed in June 2023 to conduct an independent and transparent review into how future arrangements could better provide access to justice for all who need it.

The Issues Paper summarises current legal assistance funding and invites discussion to inform potential future funding agreements. The Paper highlights the reviewer's particular

focus on the adequacy of legal assistance funding arrangements and access to legal assistance for Aboriginal and Torres Strait Islander peoples.

The review will be completed by early 2024 with its findings informing decisions on future funding arrangements for legal assistance.

The Issues Paper is available on the Review's website at <https://nlapreview.com.au/the-independent-review-of-the-nlap>.

Submissions in response to the Issues Paper close on 27 October 2023.

<https://ministers.ag.gov.au/media-centre/independent-review-national-legal-assistance-partnership-consultation-open-18-08-2023>

Government taking decisive action in response to PwC tax leaks scandal

The Australian Government has announced a package of reforms to prevent tax adviser misconduct.

The PwC scandal exposed severe shortcomings in Australia's regulatory frameworks. By increasing penalties, giving regulators stronger powers to investigate and prosecute perpetrators, and boosting transparency, collaboration and coordination within government, the Government is acting to restore public confidence and help prevent this from happening again.

The package of reforms cover three priority areas:

- strengthening the integrity of the tax system
- increasing the powers of our regulators
- strengthening regulatory arrangements to ensure they are fit for purpose.

Legislation to strengthen the integrity of our tax system and increase the powers of regulators will be introduced this year, with consultation on the reforms beginning shortly.

These reforms build on the work already underway to improve government processes in the wake of the PwC tax leaks scandal, including:

- new legislation to strengthen the Tax Practitioners Board introduced to Parliament earlier this year
- a $30 million funding boost for the Tax Practitioners Board to increase compliance activities in the October 2022–23 Budget

- action to strengthen Commonwealth procurement frameworks by directing PwC to remove any staff involved with the confidentiality breach from contract work until the outcomes of the Switkowski review are known and by enabling departments to terminate contracts with parties that receive adverse findings against them from a legal body.

<https://ministers.ag.gov.au/media-centre/government-taking-decisive-action-response-pwc-tax-leaks-scandal-06-08-2023>

Final Report of the Royal Commission into the Robodebt Scheme

On 7 July 2023, Commissioner Catherine Holmes AC SC, delivered the Final Report of the Robodebt Royal Commission to the Australian Government.

The Royal Commission found that 'Robodebt was a crude and cruel mechanism, neither fair nor legal, and it made many people feel like criminals. In essence, people were traumatised on the off-chance they might owe money. It was a costly failure of public administration, in both human and economic terms' (page xxix, 'Overview of Robodebt').

The Government will now consider the recommendations presented in the final report carefully and provide a full response in due course.

The report can be accessed at <https://robodebt.royalcommission.gov.au/publications/report>.

<https://ministers.ag.gov.au/media-centre/final-report-royal-commission-robodebt-scheme-07-07-2023>

Appointment of Sex Discrimination Commissioner of the Australian Human Rights Commission

The Government has appointed Dr Anna Cody as Sex Discrimination Commissioner of the Australian Human Rights Commission.

In this role Dr Cody will promote and advance the rights of Australians by tackling discrimination on the grounds of sex, sexual orientation, gender identity, intersex status and all other protected attributes in the *Sex Discrimination Act 1984* (Cth).

Dr Cody will also play a critical role in the Commission's delivery of the *Respect@Work: Sexual Harassment National Inquiry Report (2020)*.

Dr Cody's five-year appointment will commence on 4 September 2023.

We congratulate Dr Cody on her appointment.

<https://ministers.ag.gov.au/media-centre/appointment-sex-discrimination-commissioner-australian-human-rights-commission-06-07-2023>

Commencement of the National Anti-Corruption Commission

On 1 July 2023, the National Anti-Corruption Commission ('NACC') formally commenced operations. The NACC is established under the *National Anti-Corruption Commission Act 2022* (Cth) ('*NACC Act*').

The NACC:

- investigates serious or systemic corrupt conduct across the Commonwealth public sector by ministers, parliamentarians and their staff, statutory officer holders, employees of all government entities and government contractors;

- operates independent of government, with discretion to commence inquiries on its own initiative or in response to referrals from anyone;

- is overseen by a statutory Parliamentary Joint Committee, empowered to require the Commission to provide information about its work; and an independent Inspector who will investigate corruption issues and complaints about the NACC, and look at how the NACC uses its powers;

- has the power to investigate allegations of serious or systemic corruption that occurred before or after its establishment;

- has the power to hold public hearings in exceptional circumstances and where it is in the public interest to do so;

- is empowered to make findings of fact, including findings of corrupt conduct, and refer findings that could constitute criminal conduct to the Australian Federal Police or the Commonwealth Director of Public Prosecutions; and

- operates with procedural fairness and its findings will be subject to judicial review.

The *NACC Act* also provides strong protections for whistleblowers and exemptions for journalists to protect the identity of sources.

The inaugural Commissioner of the NACC is the Hon Paul Brereton AM RFD SC. Ms Nicole Rose PSM and Dr Ben Gauntlett are the Deputy Commissioners alongside acting Deputy Commissioner Ms Jaala Hinchcliffe (former Integrity Commissioner of the Australian Commission for Law Enforcement and Integrity ('ACLEI')). Mr Phillip Reed has been appointed the Chief Executive Officer of the NACC, and Ms Gail Furness SC has been appointed the Inspector of the NACC.

From 1 July to close of business on Monday 14 August 2023, the NACC received 624 referrals. Approximately 13% of the referrals relate to matters well publicised in the media: see <https://www.nacc.gov.au/news-and-media/update-reports-and-assessment-15-Aug-2023>.

<https://ministers.ag.gov.au/media-centre/commencement-national-anti-corruption-commission-30-06-2023>

President of the Australian Law Reform Commission

The Honourable Justice Mordecai Bromberg has been appointed President of the Australian Law Reform Commission ('ALRC') for a five-year term commencing on 10 July 2023.

Justice Bromberg replaces the Honourable Justice Mark Moshinsky, who has been Acting President of the ALRC and will continue as a part-time Commissioner.

The ALRC plays an important role in ensuring our laws continue to work in the best interest of the Australia people. Its recommendations to government help to simplify the law, promote new or better ways to administer the law, and improve access to justice.

Justice Bromberg has been a judge of the Federal Court of Australia since 2009. In 2005 Justice Bromberg became the founding president of the Australian Institute of Employment Rights and now chairs the Advisory Board of the Centre for Employment and Labour Relations Law at the University of Melbourne.

We congratulate Justice Bromberg on his appointment.

<https://ministers.ag.gov.au/media-centre/president-australian-law-reform-commission-20-06-2023>

Public interest disclosure reform

The *Public Interest Disclosure Amendment (Review) Act 2023* (Cth) passed Parliament and came into effect on 1 July 2023.

Key measures in the legislation include improvements in protections for public sector whistleblowers and witnesses through expanding the immunities and scope of the public interest disclosure scheme to those who 'could make' a disclosure.

The scheme now has a stronger focus on serious integrity wrongdoing, such as fraud and corruption, which makes the scheme easier for agencies to administer.

Additionally, the legislation enhances the oversight of the scheme by the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security.

This Act implements 21 of the 33 recommendations of the 2016 *Review of the Public Interest Disclosure Act* by Mr Philip Moss AM and is also informed by other parliamentary committee reports.

Following passage of the Act, the Australian Government has commenced consultations on a second stage of reforms. This will involve redrafting the *Public Interest Disclosure Act 2013* (Cth) to address the underlying complexity of the scheme and to provide effective and accessible protections to public sector whistleblowers.

More information about the Act and its passage 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-15-06-2023>

Appointments to the Copyright Tribunal of Australia

The Government has announced three members of the Copyright Tribunal of Australia. Professor Michael Fraser AM, Ms Fiona Phillips and Ms Alida Stanley have been appointed as part time, non-judicial members of the Tribunal, each for three-year terms.

The Copyright Tribunal is an independent specialist body, established under the *Copyright Act 1968* (Cth), that primarily hears disputes about remuneration payable to copyright collecting societies under copyright licencing schemes. Non-judicial members provide specialist expertise to assist the Tribunal in determining disputes.

We congratulate Professor Fraser, Ms Phillips and Ms Stanley on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-copyright-tribunal-australia-08-06-2023>

Appointments to the National Native Title Tribunal

The Government has announced the appointments of Mr Kevin Smith as President, and Ms Katie Stride as Registrar, to the National Native Title Tribunal.

Mr Smith will be the first First Nations person to be appointed as President of the Tribunal. He has over 28 years of professional experience in native title and First Nations law.

Mr Smith has replaced the outgoing President, the Hon John Dowsett AM KC. Mr Smith's five-year appointment commenced on 10 July 2023.

Ms Stride is currently a National Judicial Registrar — Native Title, in the Federal Court. She has replaced outgoing Native Title Registrar, Mrs Christine Fewings. Ms Stride's five-year appointment commenced on 7 August 2023.

We congratulate Mr Smith and Ms Stride on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-national-native-title-tribunal-08-06-2023>

Administrative Appeals Tribunal appointments and reform process

The Australian Government has appointed two new Deputy Presidents and made short-term reappointments of 32 members and two Deputy Presidents to the Administrative Appeals Tribunal ('AAT').

The appointments provide the AAT with continuity, stability and support to ensure its ongoing operation during the reform process, announced in December last year.

Appointments to the AAT

The Hon Justice Lisa Hespe and the Hon Justice Geoffrey Kennett have been appointed as new Deputy Presidents for two-year terms.

Justice Hespe was appointed to the Federal Court of Australia in 2022, preceded by a 27-year career as a lawyer, including five years as a Senior Member of the AAT.

Justice Kennett was also appointed to the Federal Court of Australia in 2022. Prior to that appointment, Justice Kennett had an extensive career in the Australian Public Service, including as Counsel Assisting the Solicitor-General of the Commonwealth, before being called to the NSW Bar in 1998. He was appointed Senior Counsel in 2010.

Justices Hespe and Kennett bring extensive experience and expertise across a range of relevant practice areas and will enhance the AAT's capacity to consider matters within its jurisdiction.

We congratulate Justices Hespe and Kennett on their appointments.

Short-term reappointments to the AAT

Thirty-four reappointments have also been made to the AAT on a short-term basis until 22 December 2023. This includes 32 members and two Deputy Presidents, Ms Jan Redfern PSM and Mr Ian Molloy.

Deputy Presidents

- Ms Jan Redfern PSM
- Mr Ian Molloy

Members

- Mr David Barker
- Mr Michael Biviano
- Mr Peter Booth
- Mr Michael Bradford
- Dr Christhilde Breheny

- Ms Nicole Burns
- Ms Justine Clarke
- Ms Christine Cody
- Mr Damian Creedon
- Mr Brendan Darcy
- Ms Nicola Findson
- Ms Tania Flood
- Ms Margaret Forrest
- Mr Nicholas Gaudion
- Mr Peter Haag
- Ms Linda Holub
- Ms Noelle Hossen
- Ms Penelope Hunter
- Ms Christine Kannis
- Mr Roger Maguire
- Ms Deborah Mitchell
- Mr Peter Newton SC
- Professor Julie Quinlivan
- Ms Tamara Quinn
- Mr Frank Russo
- Ms Roslyn Smidt
- Mr David Thompson
- Mr Ian Thompson

- Mr Dominic Triaca
- Mr Peter Vlahos
- Brigadier Anthony Warner AM LVO (Rtd)
- Mr Paul Windsor

We congratulate the above on their appointments.

Reform process

The Government is continuing work to develop legislation to establish a new federal administrative review body.

The recent consultation process received 120 formal submissions and 287 short-form responses to the public issues paper.

These submissions, together with contributions from stakeholders at events held during the consultation period, will inform the design of the new body, as will the advice from the Expert Advisory Group chaired by former High Court Justice the Honourable Patrick Keane AC KC.

Information about the reform process is available on the Attorney-General's Department website at <https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>.

<https://ministers.ag.gov.au/media-centre/administrative-appeals-tribunal-appointments-and-reform-process-02-06-2023>

Justice Emilios Kyrou AO appointed Judge of the Federal Court and President of the Administrative Appeals Tribunal

The Governor-General, His Excellency General the Hon David Hurley AC DSC (Retd), has appointed the Hon Justice Emilios Kyrou AO as a Judge of the Federal Court of Australia and as President of the Administrative Appeals Tribunal ('AAT').

On 16 December 2022, the Australian Government announced it would replace the AAT with a new administrative review body. The President will lead the AAT through this important reform and will be the inaugural President of the new administrative review body, once established, for the remainder of the term of the appointment.

The proposed term of appointment is five years.

Justice Kyrou has been selected though a transparent and merit-based process. His Honour has the experience and capacity to lead a trusted federal administrative review body in a fair, efficient, accessible and independent manner.

Justice Kyrou has been a Judge of the Supreme Court of Victoria since 2008 and from 2014 has been a Judge of the Victorian Court of Appeal.

Justice Kyrou is widely recognised for his integrity, legal excellence, independence and intellectual capacity. He is an experienced leader and administrator, and is an expert in administrative law. On Australia Day this year Justice Kyrou was appointed an Officer of the Order of Australia 'for distinguished service to the judiciary and to the law, to professional associations and to the community'.

Justice Kyrou's appointment as a Justice of the Federal Court commenced on 8 June 2023 and his appointment as AAT President commenced on 9 June 2023.

<https://ministers.ag.gov.au/media-centre/president-administrative-appeals-tribunal-24-05-2023>

Kristina Stern SC appointed as a Judge of Appeal of the Supreme Court of NSW

The NSW Attorney General, Mr Michael Daley, has announced the appointment of Dr Kristina Stern SC as Judge of Appeal of the Supreme Court of NSW.

'Dr Stern is widely recognised as a leading public law and commercial silk,' Mr Daley said. 'She is one of the most highly regarded lawyers in her fields and is a fantastic addition to the Supreme Court.'

Prior to moving to Australia Dr Stern was at the London bar for 10 years, before which she lectured in law at Kings College London and completed her PhD at Cambridge University.

Dr Stern has appeared in significant complex commercial and administrative law disputes. She is chair of the NSW Bar Association Inquests and Inquiries Committee and has appeared at numerous inquests and inquiries.

Dr Stern has replaced Justice Paul Brereton who now leads Australia's new National Anti-Corruption Commission.

We congratulate Dr Stern on her appointment.

<https://dcj.nsw.gov.au/news-and-media/media-releases/2023/kristina-stern-sc-appointed-as-a-judge-of-appeal-of-the-supreme-.html>

Bolstering Australia's national privacy and FOI regulator

The Australian Government will appoint a standalone Privacy Commissioner to deal with growing threats to data security and the increasing volume and complexity of privacy issues.

Currently, the Australian Information Commissioner, Ms Angelene Falk, holds a dual appointment as the Privacy Commissioner. Ms Falk will remain the Information Commissioner and head of the Office of the Australian Information Commission.

A merit-based selection process to fill the role of the Privacy Commissioner will commence. Ms Falk will continue as the Privacy Commissioner until the process is finalised.

In light of the recent resignation of Mr Leo Hardiman PSM KC as Freedom of Information Commissioner, the Government has appointed Ms Toni Pirani as acting Freedom of Information Commissioner, effective 20 May 2023.

<https://ministers.ag.gov.au/media-centre/bolstering-australias-national-privacy-and-foi-regulator-03-05-2023>

Consultation on major reform of Australia's anti-money laundering and counter-terrorism financing laws

The Australian Government has commenced consultation on reforms to Australia's anti-money laundering and counter-terrorism financing ('AML/CTF') scheme.

The purpose of the AML/CTF regime is to assist businesses to identify risks in the course of providing their services that might go towards assisting money laundering, which funds serious crimes such as terrorism, child abuse and the illicit drug trade.

The existing AML/CTF regime is complex, resulting in inefficiencies for business and government. Lawyers, accountants, trust and company service providers, real estate agents and dealers in precious metals and stones (known as 'tranche-two entities') are particularly vulnerable to exploitation by transnational, serious and organised crime groups and terrorists.

The Government has accepted all recommendations of the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Adequacy and Efficiency of Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime* (Report, March 2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC/Report>.

The Committee made four recommendations, including that the AML/CTF regime be extended to tranche-two entities.

The Government has released the first of two consultation papers on the proposed reforms. The first consultation paper proposes reforms that will simplify and modernise the operation of the regime. The second consultation paper proposes extending the AML/CTF regime to tranche-two entities.

<https://ministers.ag.gov.au/media-centre/consultation-major-reform-australias-anti-money-laundering-and-counter-terrorism-financing-laws-20-04-2023>

Appointment of Open Government Forum members

The Australian Government has announced the membership of Australia's Open Government Forum.

The Forum will play a crucial role in helping Australia remain a member of the multilateral Open Government Partnership ('OGP') by designing the Third National Action Plan.

The OGP is a multilateral initiative that aims to secure commitments from governments to promote transparency, empower citizens, fight corruption and harness new technologies to strengthen governance.

As an OGP member, Australia is required to produce a national action plan that sets out commitments that the government will deliver within a two- or four-year timeframe. Australia has been a member of the OGP since 2015 and has released two National Action Plans so far.

The Government has engaged with civil society to develop a new Third National Action Plan, which will seek to capture an ambitious plan for open government, transparency and accountability.

Civil society members of the Forum:

- Dr Kate Auty (co-chair)
- Professor Anne Twomey AO
- Ms Anooshe Mushtaq
- Professor Charles Sampford
- Ms Cindy He
- Mr Clancy Moore
- Mr Kyle Redman
- Dr Tania Penovic
- Mr Tim Lo Surdo.

The government co-chair is Simon Newham, Deputy Secretary, Attorney-General's Department. Additional government members will be represented by several other agencies including the Office of the Australian Information Commissioner, the Australian Public Service Commission, the Commonwealth Ombudsman and the Department of Prime Minister and Cabinet.

<https://ministers.ag.gov.au/media-centre/appointment-open-government-forum-members-05-04-2023>

Consultation opens on design of the new federal administrative review body

The Australian Government is asking for public input on the design of a new federal administrative review body.

In December 2022, the Government announced that it would abolish the Administrative Appeals Tribunal and replace it with an administrative review body that is user-focused, efficient, accessible, independent and fair.

The Government has released an issues paper which has been developed in close consultation with the Expert Advisory Group chaired by the Hon Patrick Keane AC KC, a former Justice of the High Court. The paper invites views on a wide range of matters central to the design of the new body, including its structure, membership, powers and procedures.

Further information about the consultation, including links to the issues paper, survey and submission options can be accessed at <https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>.

<https://ministers.ag.gov.au/media-centre/consultation-opens-design-new-federal-administrative-review-body-03-04-2023>

Appointment of the Chief Justice of the Federal Court of Australia

The Hon Justice Debra Mortimer has been appointed as the Chief Justice of the Federal Court of Australia.

Justice Mortimer is only the fifth Chief Justice of the Federal Court and the first female Chief Justice appointed since the Court was established in 1976.

Justice Mortimer has served on the Federal Court since 2013. Her Honour's appointment as Chief Justice commenced on 7 April 2023, upon the retirement of the Hon Chief Justice James Allsop AC, who has been Chief Justice since 2013.

We congratulate Justice Mortimer on her appointment and wish Chief Justice Allsop all the best for the future.

<https://ministers.ag.gov.au/media-centre/appointment-chief-justice-federal-court-australia-31-03-2023>

Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023

On 19 June 2023, the Constitutional Alteration (Aboriginal and Torres Stair Islander Voice) 2023 was passed by the Commonwealth Parliament. The Bill contains the proposed constitutional amendment that will insert in the *Constitution* a new Chapter which recognises Aboriginal and Torres Strait Islander peoples and provides consultation through the Voice.

The passage of the Bill follows months of consultation with First Nations leaders on the Referendum Working Group and legal experts in the Constitutional Experts Group.

The Bill was referred to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum for review. The Committee called for public submissions addressing the provisions of the Bill. The Committee's *Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* recommended that the Bill be passed unamended. The report can be found at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Aboriginal_and_Torres_Strait_Islander_Voice_Referendum/VoiceReferendum/Report>.

Passage of the Bill through Parliament will enable a referendum to be held in the second half of this year.

More about the Bill and its passage can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7019>.

<https://ministers.ag.gov.au/media-centre/constitution-alteration-aboriginal-and-torres-strait-islander-voice-2023-30-03-2023>

Delivering overdue reform of intelligence and criminal justice frameworks

On 29 March 2023, the Attorney-General, the Hon Mark Dreyfus KC MP, introduced into Parliament two bills to deliver reform of Australia's national intelligence community and criminal justice frameworks.

The National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Bill 2023 (Cth), which passed Parliament and came into effect on 12 August 2023, implements recommendations from the 2019 report of the *Comprehensive Review of the Legal Framework of the National Intelligence Community*, led by Mr Dennis Richardson AC.

The Bill (now Act) will apply proper checks and balances to the authorisation of intrusive powers, provide operational clarity to agencies, lessen the Inspector-General of Intelligence and Security's administrative burden and increase transparency by ensuring appropriate access to information.

The Crimes and Other Legislation Amendment (Omnibus) Bill 2023 (Cth) is currently before the Senate. It updates and clarifies the intended operation of certain provisions in the *Crimes Act 1914* and other Commonwealth legislation. The Bill will strengthen proper administration of government, law enforcement and judicial processes by making necessary technical amendments.

<https://ministers.ag.gov.au/media-centre/delivering-overdue-reform-intelligence-and-criminal-justice-frameworks-29-03-2023>

Review of secrecy provisions

The Australian Government has finalised public consultation as part of its review of Commonwealth secrecy offences.

Secrecy offences play an important role in preventing the unauthorised disclosure of information which can undermine national security and harm the public interest. However, multiple reviews have raised concerns about the number, inconsistency, appropriateness and complexity of Commonwealth secrecy offences.

A comprehensive review of Commonwealth secrecy offences was recommended by the Parliamentary Joint Committee on Intelligence and Security.

As part of the review, the Government launched a six-week public consultation process seeking views on the operation of secrecy provisions, including:

- what principles should govern the framing of general and specific secrecy offences in Commonwealth legislation
- whether any general or specific secrecy offences should be amended or repealed
- what defences should be available for general and specific secrecy offences
- what principles should govern the framing of the public interest journalism defence and should any amendments be considered.

The review's final report is due to Government by 31 August 2023.

The consultation paper can be accessed at <https://consultations.ag.gov.au/crime/review-secrecy-provisions/>.

<https://ministers.ag.gov.au/media-centre/review-secrecy-provisions-consultation-paper-released-27-03-2023>

Review into Australia's Human Rights Framework

The Attorney-General, the Hon Mark Dreyfus KC MP, has asked the Parliamentary Joint Committee on Human Rights to conduct a review of Australia's Human Rights Framework. The Committee has been asked to:

- review the scope and effectiveness of Australia's 2010 Human Rights Framework and the National Human Rights Action Plan;
- consider whether the Framework should be re-established, as well as the components of the Framework, and any improvements that should be made;

- consider developments since 2010 in Australian human rights laws (both at the Commonwealth and state and territory levels) and relevant case law; and

- consider any other relevant matters.

The Human Rights Framework was launched in 2010. Its key focus was ensuring that education and information about human rights is readily available to everyone in the Australian community. This included the establishment of the Joint Committee on Human Rights and the requirement that each Bill be accompanied by a Statement of Compatibility with Australia's international human rights obligations.

The review is an opportunity to consider whether these and other components of the Framework remain fit for purpose, or if improvements can be made.

Submissions to the Committee closed on 1 July 2023.

The Committee's report is due on 31 March 2024.

<https://ministers.ag.gov.au/media-centre/review-australias-human-rights-framework-22-03-2023>

Recent decisions

Apprehended bias in a multi-member court

QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] HCA 15

The appellant is a citizen of Burkina Faso who, in 2013, was convicted of a drug importation offence under the *Criminal Code* (Cth) and was sentenced to a term of imprisonment of 10 years with a non-parole period of 7 years. The appellant appealed his conviction, which was dismissed in November 2014. In 2017, while the appellant was serving his sentence of imprisonment, a delegate of the Minister made the decision to cancel his visa on the basis that he did not pass the 'character test' under s 501 of the *Migration Act 1958* (Cth), by reason of the sentence of imprisonment. In 2019, another delegate of the Minister decided not to revoke that cancellation decision. This decision was affirmed by the Administrative Appeals Tribunal ('AAT') in 2020. The appellant applied for judicial review of the decision by the AAT and was unsuccessful before the primary judge, leading to the appeal before the Federal Court.

The appeal was scheduled to be heard on 17 August 2021 before a Full Court constituted by Justices McKerracher, Griffiths and Bromwich. Before the commencement of the hearing, the associate to Justice Bromwich sent an email to the legal representatives of the parties advising them that Justice Bromwich had appeared for the Crown in the appellant's unsuccessful conviction appeal in 2014. At the commencement of the hearing of the appeal before the Full Court, the appellant applied for Justice Bromwich to recuse himself. Justice McKerracher invited Justice Bromwich to 'deal with the application'. Justice Bromwich

explained that he declined to recuse himself from sitting on the appeal for reasons he then elaborated on and also later set out in his written judgement. Justice McKerracher then invited the appellant to continue, and the hearing resumed. The Full Court handed down its decision on 15 September 2021, unanimously dismissing the appeal.

On appeal before the High Court, the question was whether the circumstances were sufficient to have given rise to apprehended bias on the part of the individual judge, Justice Bromwich. The secondary issue was whether the application for Justice Bromwich to recuse himself was appropriately left by Justices McKerracher and Griffiths to be considered and determined by Justice Bromwich alone, or should have been considered and determined by the Full Court constituted by all three judges.

Chief Justice Kiefel and Justices Gageler, Gordon, Edelman and Jagot (Justices Steward and Gleeson dissenting) found that the situation was such that apprehended bias should have been found, allowing the appeal. The majority upheld and applied the two-step test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 to determine whether a fair-minded lay observer might reasonably apprehend that a judge might not bring an impartial mind to the resolution of the question the judge is required to decide — that is, first, to identify the factor which might lead a judge to resolve the question other than on its legal and factual merits; and second, to articulate the logical connection between the factor and the apprehended deviation from deciding that question on its merits.

Chief Justice Kiefel and Justice Gageler found that the appellant's unsuccessful conviction appeal in 2014 was sufficiently connected to the case before the Full Court to give rise to a reasonable apprehension of bias on the part of a fair-minded lay observer of the possibility that Justice Bromwich had formed and retained an attitude to the appellant incompatible with the degree of neutrality required to resolve issues in a subsequent proceeding to which the appellant was a party. The fact that the conviction led to the cancellation of the appellant's visa so as to be 'causally related to the subject-matter of the appeal concerning the non-revocation of the cancellation decision', reinforced the reasonableness of that apprehension: [55].

Justices Gordon and Jagot both emphasised the 'incompatibility' between Justice Bromwich's role as prosecutor appearing personally in the conviction appeal and his later role as a judge of the Full Court hearing the appellant's migration appeal: [64]. Noting that the second proceeding would never have arisen if not for the Crown's successful defence of the conviction at the conviction appeal ([83]), Justices Gordon and Jagot found that there was a connection between the proceedings, and it was 'generally easy' to establish the second limb of *Ebner*. The observer here would understand that the appellant's appeal to the Full Court was the last check on the power and obligation of the Commonwealth Executive under the *Migration Act* to remove the appellant from Australia as a result of his visa cancellation. Consequently, an apprehension of bias might be made more readily by the fair-minded lay observer where the decision relates to a person's right to be at liberty in Australia: [84].

Justice Edelman found that the connection between the two matters was 'more than a loose one': [166]. There was a causal connection between the conviction and the refusal to revoke the visa cancellation. Noting the seriousness of the offence, his Honour found that the subject of the conviction appeal was one connected step to a process which concluded

in the cancellation of the appellant's visa and the judicial review application and appeal, such that a fair-minded lay observer might have had a reasonable apprehension of bias concerning Justice Bromwich's impartiality.

Justices Steward and Gleeson, in dissent, found that there was no 'logical connection' between the earlier conviction appeal in which Justice Bromwich appeared as prosecutor and the visa appeal to be decided on the merits. Noting that the reasonable lay observer would be aware that the appellant's conviction, while a necessary condition to be satisfied in order for his visa to be cancelled, was not, and was never going to be, a matter for the Full Court. There was no rule of automatic disqualification for apprehended bias on the basis of incompatible roles. Justice Steward further noted that the duty to sit should not be displaced without good cause; 'it cannot be set aside because of merely superficial appearances': [216].

However, regarding the recusal application, which did not need to be decided in light of the finding of apprehended bias, the Court made some comments.

Chief Justice Kiefel and Justice Gageler, in their joint reasons, found that existing authority provides no direct answer as to whether the application for Justice Bromwich to recuse himself was appropriately left for Justice Bromwich alone or should have been considered and determined by the Full Court, with procedures adopted by intermediate courts of appeal within Australia varying between and within those courts themselves. They also noted that internationally, a diversity of approaches is evident, but they provide little guidance. Nonetheless, Chief Justice Kiefel and Justice Gageler noted that when it is recognised that actuality or apprehension of bias is inherently jurisdictional, in that it negates judicial power, 'it becomes apparent that the responsibility for ensuring the absence of bias — whether actual or apprehended — lies with a court as an institution and not merely with a member of that court whose impartiality may be called into question'. The duty of any court 'is to be satisfied of its own jurisdiction': [27].

As such, an objection to a multi-member court as constituted, hearing and determining a matter based on an allegation of bias on the part of one or more of its members, raises a question of jurisdictional fact which that court can and must determine for itself in order to be satisfied of its own jurisdiction: [28]. Moreover, once a Full Court consisting of three or more judges is constituted and seized of the hearing on an appeal, the responsibility for the discharge of judicial power involved in hearing and determining the appeal devolves to those three judges acting institutionally as the Full Court.

Justices Gordon, Edelman, Steward and Jagot, each in separate decisions, found that the preferable, if not proper, course is for the judge in question to be given the initial opportunity to decide for themself whether they will recuse themself. If they do not, and an objection is maintained, or there are matters that the other judges consider may give rise to a potential apprehended bias, such that there is doubt about their jurisdiction, the Full Court as a whole may determine the issue.

Justice Gordon held that there were at least three basic reasons why this was appropriate. First, a recusal application raises both professional and ethical obligations for the individual judge; second, it is not improper for a judge to decline to sit without having affirmatively

concluded that they are disqualified, even if their colleagues ultimately were to conclude that the judge is not disqualified; and third, where the judge in question deliberates on a matter of their own recusal together with the other judges constituting the court, it may appear to lack impartiality and transparency.

Justice Edelman, agreeing with Justice Gordon, noted that it is a matter of 'basic ethics' that requires the judge in question to have the first opportunity, and a continuing ability, to recuse themself: [109]. Moreover, this is consistent with the approach taken in single-judge hearings which permits, and usually requires, the first consideration to be made by the subject judge. The ethical obligations which require any application to be directed to the judge at first instance do not 'evaporate' when the judge moves from sitting alone to sitting as a member of a multi-member court.

Justice Jagot noted that in the context of 'an exercise of judicial power, the judge the subject of the issue of bias (apprehended or actual) should always decide the issue whether the judge is to sit, whether as part of a single or multi-member bench', and that this is a 'well-established convention' that results in part from 'the lack of any apparent source of judicial power by judges exercising co-ordinate jurisdiction to make any such order against the other judge': [314]. Moreover, such an approach provides both the court as an institution and the individual judge with the greatest degree of flexibility to decide what course is in the best interests of the administration of justice in any given case.

The power of the legislature

Government of the Russian Federation v Commonwealth of Australia [2023] HCA 20

On 15 June 2023, the *Home Affairs Act 2023* (Cth) commenced. The purpose of the Act was to terminate, on commencement, the relevant lease and any legal or equitable right, title, interest, trust, restriction, obligation, mortgage, encumbrance, contract, licence or charge, granted or arising under or pursuant to a relevant lease, or in dependence on a relevant lease, over a specified parcel of land adjacent to Parliament House in the Australian Capital

Territory. That parcel of land, prior to the Act coming into force, was held by the Government of the Russian Federation ('GRF').

On 23 June 2023, the GRF filed a summons, a notice of constitutional matter and an interlocutory application in the High Court. In the summons, the substantive relief sought was a declaration of constitutional invalidity of the Act, alleging that the Act is not supported by a head of legislative power and is contrary to s 51(xxxi) of the *Constitution* by reason of an alleged failure to provide for the acquisition of property only on just terms. The interlocutory application sought interim relief pending the determination of the application for declarations as to the invalidity or otherwise of the Act.

Justice Jagot did not find the GRF's case for invalidity of the Act to be a strong one, noting the difficulty in identifying a serious question to be tried in circumstances where the Justice identified several constitutional heads of power which provided, on their face, ample support for the terms of the Act, including *Constitution* s 51(xxix) with respect to 'external affairs", s 51(xxxi) with respect to just acquisition, and s 122. In so far as the GRF relied on the

proposed absence of just terms, the Court found that s 6(1) of the Act, which provided that if there was an acquisition of property then reasonable compensation would be paid, clearly overcame that alleged concern.

The Court also made clear that the biggest problem for the GRF's case was a failure to 'confront the reality of the fundamental change in circumstances', being the legislative action that the Commonwealth had taken through the provisions of the Act to terminate the lease in the clearest possible terms which, similarly, also signalled that there was no proper foundation for the granting of the interlocutory injunction. It not being necessary for the Commonwealth to identify an immediate purpose for which it required the land, it was sufficient that the terms of the Act clearly identified a sovereign interest in being able to determine that the land will not be occupied by the GRF.

The Court dismissed the application.

Application of procedural fairness in light of a security assessment

CCU21 v Minister for Home Affairs [2023] FCAFC 87

On 30 September 2019, the applicant's Class XE Subclass 790 Safe Haven Enterprise Visa was cancelled by the Minister for Home Affairs under s 501(3) of the *Migration Act 1958* (Cth) on the grounds that the Minister reasonably suspected the appellant did not pass the character test. This reasonable suspicion was based on an Adverse Security Assessment ('ASA') by the Australian Security and Intelligence Organisation ('ASIO'), which assessed the applicant to be directly, or indirectly, a risk to security. Section 501(6)(g) of the *Migration Act* provided that a person does not pass the character test if the person has been assessed by ASIO to be directly or indirectly a risk to security within the meaning of s 4 of the *Australian Security Intelligence Organisation Act 1979* ('*ASIO Act*').

In July 2020, ASIO subsequently issued a Qualified Security Assessment ('QSA'), which concluded the appellant was unlikely to pose an ongoing serious threat to Australia's territorial and border integrity and thus was not a risk to security. The appellant sought to revoke the earlier cancellation decision on the basis that he passed the character test. The then Minister concluded that the appellant failed the character test because he was 'not of good character' under s 501(6)(c) of the *Migration Act*.

The appeal before the Full Court of the Federal Court raised three questions. First, was the initial Minister's decision to cancel the appellant's visa liable to be set aside because the Minister failed to consider the reputational consequences of Australia breaching its non-refoulement obligations under international law? Second, if no, was the decision liable to be set aside because the Minister had failed to consider the risk posed to the Australian community? And third, if no, was the subsequent decision to refuse to revoke the cancellation decision made in breach of the rules of procedural fairness, or in a way that was irrational or unreasonable?

As to the first question, the Full Court held that it was clear the Minister's decision to cancel the visa assessed whether the national interest required its cancellation but did not consider,

as part of that examination, the reputational consequence for Australia were it to breach its non-refoulement obligations under international law.

The appellant submitted that the Minister could not rationally conclude that the cancellation of his visa was in the national interest without turning his mind to the international reputational consequences. The appellant relied on the decisions in *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (2021) 288 FCR 565 ('*CWY20*') and *ENT19 v Minister for Home Affairs* (2021) 289 FCR 100 ('*ENT19*') to establish this contention. The Court agreed with the appellant that while both *CWY20* and *ENT19* dealt with different provisions, s 501A(2) of the *Migration Act* and cl 790.227 of the *Migration Regulation 1994*, respectively, the same expression 'national interest' is used in s 501(3) and as such, the reasoning in *CWY20* and *ENT19* should be applied — namely, no reasonable decision-maker could lawfully calculate whether it was in the national interest to consider the visa application without considering the implications for Australia of returning the appellant to his country of nationality in breach of Australia's non-refoulement obligations.

However, the Court was not persuaded that it was irrational or unreasonable for the Minister not to consider the international reputation consequences in assessing the national interest given that the mere fact the appellant held a protection visa, without more, would not, on its face, require such a consideration. The Court noted that in this case, there was no evidence of material before the Minister that indicated a real risk of harm to the appellant, if repatriated, of the kind the international conventions sought to prevent, such as death or torture or cruel, inhumane, or degrading treatment or punishment, as articulated under articles 6 and 7 of the *International Convention of Civil and Political Rights*. As such this aspect of the appeal was dismissed.

The Court then turned to the second question. In the Minister's 2019 decision, he had concluded that the appellant posed a risk to the Australian community 'in light of ASIO's assessment that he is directly or indirectly a risk to security within the meaning of section 4 of the ASIO Act'. The Court found that the ASIO assessment was an 'evident and intelligible basis' for the Minister's conclusion. The significance of the ASA was recognised by Parliament by the mere fact that an ASA in itself was sufficient for the appellant to fail the character test without any further consideration (*Migration Act* s 501(6)(g)). Moreover, the Minister was entitled to assume that the ASA had been lawfully made. Consequently, the Court found that there was nothing irrational or unreasonable in the Minister inferring that that which was a serious risk to border and territorial security was also a serious risk to the community: [58]. Additionally, the Minister was entitled to place great weight on the existence of the ASA, and the fact that he did so did not imply that the Minister was acting under the dictation of ASIO: [60].

As to the third question, the subsequent decision of the Minister not to revoke the earlier cancellation decision was based on the ground that the appellant, having failed the character test in light of the appellant's past and present criminal conduct and general conduct, was not of good character under s 501(6)(c) of the *Migration Act*. The Minister had informed the appellant by letter prior to making the decision that she may have regard to the appellant's people-smuggling activities in 'relation to your past general conduct'. As the letter referred to past 'general conduct' only, the appellant did not make submissions to the Minister about the significance of people smuggling from a criminal perspective.

The Court found that while the powers of the Minister under s 501(6)(c) would have permitted her to consider the criminality of the appellant's conduct as an aspect of his general conduct, the terms of her letter suggested otherwise, such that the appellant was entitled to act accordingly: [66]. The Court further found that the Minister had considered the criminal significance of people smuggling in making her decision, which was, necessarily, a breach of procedural fairness. The Court then considered whether the breach was material such that there was a jurisdictional error. In determining this point, the Court applied the High Court's decision in *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17, noting that they could not have regard to the reformulation of the materiality test in the subsequent High Court case *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398, as there was no majority decision on that point.

The *MZAPC* test required an answer as to whether there was a realistic possibility that a different decision could have been made, the onus being on the applicant for judicial review to prove the historical facts from which this conjecture is to be drawn. In this case, the Court found that there was insufficient material before the Minister to conclude that the appellant had committed people-smuggling offences. As such, if procedural fairness had been provided, there was a realistic possibility that the revocation application would have succeeded, establishing jurisdictional error: [101]. Moreover, the Minister could not have rationally or reasonably concluded on the material before her that the appellant had committed any offence.

The Court set aside the Minister's non-revocation decision to be reconsidered according to law.

Materiality requirement where lack of procedural fairness not made out

AML v Longden Super Custodian Pty Ltd [2023] VSCA 118

On 18 December 2017, the respondent and applicant entered into a fixed 12-month residential tenancy agreement, in respect of a property owned by the respondent. On

6 May 2022, the respondent served on the applicant a notice to vacate the property, as the respondent intended to sell it. The applicant did not vacate. On 22 June 2022, the respondent commenced proceedings in the Victorian Civil and Administrative Tribunal ('VCAT'), seeking orders for possession. On 2 September 2022, the Tribunal made orders granting possession of the property to the respondent and requiring the applicant to vacate ('the possession order').

On 12 September 2022, the applicant lodged an appeal in respect of the possession order on grounds that the Tribunal had failed to comply with the principles of procedural fairness by not dealing with his application to adjourn the VCAT hearing. On 31 March 2023, Associate Justice Irving dismissed the appeal on the basis that it had no real prospects of success. On 13 April 2023, the VCAT issued a warrant of possession in respect of the property. On 18 April 2023, the applicant issued a summons seeking an injunction permitting him to remain in the property and an order staying further execution of the warrant of possession pending an appeal from the decision of Associate Justice Irving. On 20 April 2023, Justice Forbes heard the application for the injunction and stay, and subsequently dismissed the

summons and refused the application for an interlocutory injunction and stay, noting that the applicant's prospects of success on the appeal were 'precarious'.

The application to the Court of Appeal from the decision of Justice Forbes raised three grounds, the main one being whether the primary judged erred in concluding that in order to establish a case of error in the decision of Associate Justice Irving, the applicant must demonstrate that, as a consequence of the breach of procedural fairness by the VCAT, he was deprived of a realistic possibility of achieving a different outcome before the Tribunal.

The applicant submitted that based on the decision of the High Court in *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398 ('*Nathanson*'), he was, in fact, not required to demonstrate that the denial of procedural fairness by the VCAT had deprived him of a realistic possibility of a different outcome before the Tribunal.

The Court distinguished the principle in *Nathanson*, finding that that case had to be understood in its context, which involved the operation of the principle of materiality in a case in which a breach of procedural fairness had been established. The Court applied the decision in *Minister for Immigration and Border Protection v SZMTA* (2018) 264 CLR 421, 445, noting that 'it is well established that where there has been a breach of procedural fairness, it must be demonstrated that the breach was material', such that if the applicant had been accorded procedural fairness, there is a 'realistic possibility' that the decision of the VCAT could have been different: [42]. As such, in this case the applicant was required to demonstrate that the lack of procedural fairness operated to deny him an opportunity to give evidence or make arguments to the Tribunal.

In the present matter, the applicant had been presented an opportunity to appear before the VCAT or arrange a representative to appear on his behalf; however, given the substantial business of the Tribunal, the Tribunal had nonetheless proceeded to hear and determine the application of the respondent for possession in the applicant's absence on 2 September 2022. The applicant, moreover, had a right to seek review of the orders made on 2 September 2022, pursuant to s 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), a right which the applicant was aware but did not avail himself of. The existence of this statutory right to have a rehearing of the matter before the VCAT, in the Court's view, further undermined the applicant's assertion that he had been denied procedural fairness in that proceeding. Moreover, Associate Justice Irving had afforded the applicant repeated opportunities to demonstrate how, had he attended the VCAT hearing, he might have advanced an argument or presented evidence that might have affected the outcome of that proceedings, none of which the applicant took advantage of. As such, the Court held that Justice Forbes had correctly identified and applied the applicable test, dismissing the appeal.