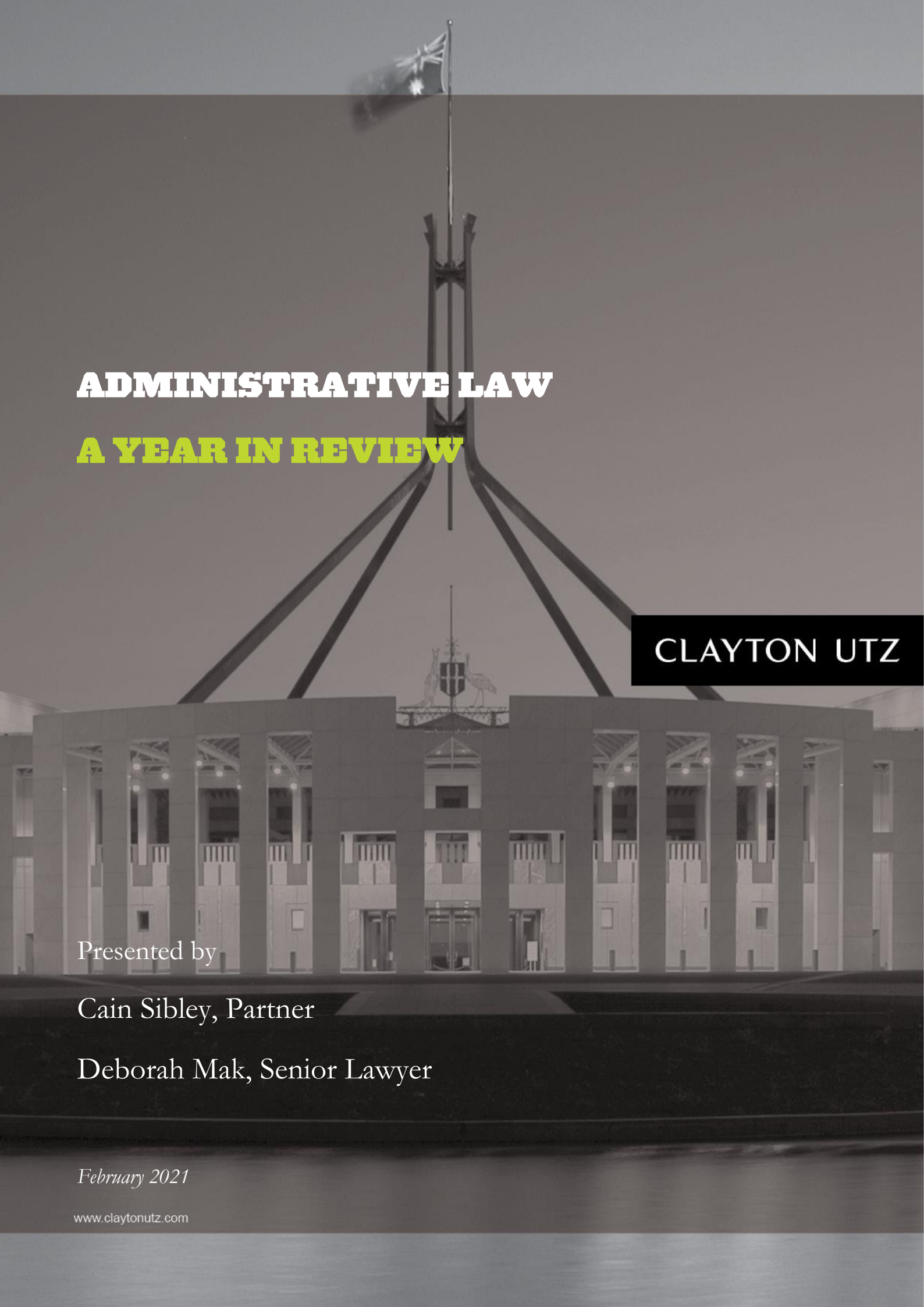

ADMINISTRATIVE LAW

A YEAR IN REVIEW

CLAYTON UTZ

Presented by

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1. Introduction

1.1 It goes without saying that 2020 was a year like no other. While the coronavirus pandemic wreaked havoc on lives and livelihoods, administrative law continued in its (generally) cautious, evolutionary approach.

1.2 Throughout 2020, courts continued to grapple with the concept of materiality and we examine a number of cases on that issue. In addition, procedural fairness received a significant amount of attention as courts refine and apply the standard by which adherence to the hearing rule is judged. As noted in last year's *Year in Review*, we see that there is room for further clarification on whether notice of the substance of an allegation is sufficient or whether detailed particulars are required.

1.3 The reasoning grounds of review also received attention in 2020. We see that the courts have continued with a narrower view of unreasonableness and have typically exercised restraint in scrutinising the reasons of decision-makers.

1.4 In this paper, we also consider how administrative law responded directly to coronavirus issues in challenges to public health orders made in the context of controlling the spread of the virus. We also look at some recent decisions on statutory interpretation and see that there is perhaps a subtle shift away from the more literal trends to construction which have been dominant recently. Finally, our paper also considers developments in information law.

1.5 We are enormously grateful to Isabel Farronato (summer clerk) and Rachael Grivas (Lawyer) who assisted us with the preparation of this paper. Their assistance was invaluable.

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2. Materiality and jurisdictional error

2.1 Last year, we discussed the continuing development of materiality as an organising principle for jurisdictional error. This followed the High Court's decision in *Minister for Immigration and Border Protection v SZMTA* (***SZMTA***), in which the High Court stated that a breach of procedural fairness will not constitute a jurisdictional error if the breach was not "material" and that a "*breach is material to a decision only if compliance could realistically have resulted in a different decision*".[1]

2.2 In 2020, we continued to see the courts applying materiality, including its application in relation to the specific review grounds of procedural fairness (*BWO19, DQM18, Nathanson*) and unreasonableness (*ABT17*). In applying a materiality analysis in *Registered Organisations Commissioner v Australian Workers' Union* [2020] FCAFC 202, Besanko J commented that "*It seems to me that since the decisions in* Hossain *and* SZMTA*, materiality is an issue to be routinely considered, even if in some cases, quickly dismissed*".[2]

2.3 The debate in relation to materiality, how to apply it to determine whether a legal error is a jurisdictional error, and its relevance in the broader context of judicial review continued in 2020.[3] In

[1] (2019) 264 CLR 421 at [45].

[2] at [159].

[3] See the comments of the Full Court in *Meyrick v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 209 at [39]-[40] in relation to the debate on materiality, and the upcoming appeal in *MZAPC*.

particular, courts grappled with the threshold of when a legal error will be a material error and, specifically, when an applicant for review will successfully be able to establish that there was a realistic possibility of a different outcome but for the alleged error. In *DQM18 v Minister for Home Affairs* [2020] FCAFC 110, the Full Court of the Federal Court commented on the effect of the majority of the High Court's decision in *SZMTA* and cautioned against a misapplication of that decision which would have an "*immunising effect*"[4] such that any emphatic consideration of a factor by a decision-maker would mean that other errors in the decision-making process could not be considered to be material.[5]

2.4 Courts also rejected arguments seeking to expand materiality to include all errors that are not technical errors or insignificant errors. In *PQSM v Minister for Home Affairs* [2020] FCAFC 125, the plurality of the Full Court stated that:

> It is putting an unwarranted gloss on SZMTA to say, as the appellant submits here, that the threshold for determining materiality is that there must be a possibility of a successful outcome that is more than 'infinitesimal', or that materiality only rules out 'a very slender technical victory', or even that the question is whether 'the error by the Tribunal was so insignificant that it could not have affected the decision'.

2.5 A number of cases dealt specifically with applying materiality in the context of procedural fairness. In 2020, many of the Full Court decisions that discussed materiality in depth were decisions where procedural fairness was in issue.[6] This is perhaps unsurprising considering that materiality is concerned with the impact that an error could have had on the outcome, and procedural fairness is concerned with an individual's opportunity to respond to information or material adverse to them.

2.6 Courts also acknowledged the continuing tension in ensuring that courts conducting a materiality analysis of an error during judicial review do not inadvertently engage in merits review,[7] and observed that there is a "*significant element of reconstruction*" involved in courts determining whether an error could have affected the outcome of the decision.[8] A review of decisions in judicial review generally demonstrates the manner in which respondents are engaging with the concept of materiality, and relying upon the idea that a legal error may not be a material error and accordingly will not be a jurisdictional error (and articulating that argument with reference to the concept of materiality as discussed in *SZMTA* and *Hossain*). An increasing trend was accordingly to see an argument in relation to materiality feature as an 'in the alternative' type argument that courts were to address in applications for judicial review.

2.7 In *BWO19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 181, the Full Court of the Federal Court held that the Tribunal's failure to afford BWO19 procedural fairness during the Tribunal hearing was a legal error, but not a material error. The Tribunal had affirmed a decision of the Minister to refuse BWO19's application for a protection visa. During the AAT proceedings, the Tribunal member asked BWO19 a series of questions but did not draw to BWO19's attention that it would be open to him not to answer the questions on the basis of

[4] *DQM18* at [117]. See generally [113]-[117] for Bromberg and Mortimer JJ's discussion in relation to materiality.

[5] Bromberg and Mortimer JJ (Snaden J concurring as to result) at [113]-[117].

[6] See, for example: *BWO19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 181; *Nathanson v Minister for Home Affairs* [2020] FCAFC 172.

[7] *PSQM* at [149]-[151]; *Nathanson* at [123].

[8] See: *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 66 at [70] per Katzmann, Mortimer and Bromwich JJ.

legal professional privilege. The Full Court agreed that the Tribunal was required to warn BWO19 about his ability to assert legal professional privilege, and that failing to do so was a failure to afford BWO19 procedural fairness, but this failure did not constitute a jurisdictional error because it was not material to the AAT's decision. This was because the AAT had made adverse findings in relation to the appellant's credibility on several bases (including the appellant's repeated return trips to India and delay in submitting information to the Department), and had referred in its reasons to the appellant's conduct and responses in questioning to a number of matters, including the questioning which could have been said to engage a claim of legal professional privilege.

2.8 In *Nathanson v Minister for Home Affairs* [2020] FCAFC 172, the Full Court of the Federal Court held that it is necessary for applicants seeking to establish a material error in the context of procedural fairness to articulate a course of action that would have been taken by them if they had been afforded procedural fairness that could realistically have changed the outcome.

2.9 Mr Nathanson sought review in the AAT of a decision not to revoke the mandatory cancellation of his visa on character grounds. In the intervening period between the delegate's decision and the AAT hearing, the relevant direction to be considered - Direction 65 - was superseded by Direction 79. Direction 79 amended Direction 65 to made specific reference to how decision-makers should consider violent criminal and other conduct involving women and children. At the beginning of the AAT hearing, the Tribunal member drew Mr Nathanson's attention to the change from Direction 65 to Direction 79. The Tribunal member stated that the amendments would have only "minor relevance" to Mr Nathanson's application.

2.10 During the hearing, the Minister made contentions in relation to allegations of domestic violence perpetrated by Mr Nathanson, relying upon this past conduct to argue that the cancellation of his visa should not be revoked. The contentions relying upon Mr Nathanson's alleged domestic violence had not been made earlier in the proceedings and were made in depth for the first time at the AAT hearing. Mr Nathanson was also subject to cross-examination during the hearing about alleged incidents of domestic violence appearing in police material produced under summons, for which he had not been charged nor convicted. The AAT invited Mr Nathanson to make closing submissions in general, but did not invite Mr Nathanson to make any specific closing submissions in relation to the alleged domestic violence. The AAT affirmed the decision under review, and, in the reasons for its decision, made reference to the incidents of domestic violence.

2.11 A majority of the Full Court (Steward and Jackson JJ) rejected Mr Nathanson's argument that the deprivation of an opportunity to present further material and submissions in relation to the issue of past domestic violence was, in and of itself, demonstrative that the error was a material error. Counsel for Mr Nathanson submitted that while "*loss of bare opportunity would not lead to success, the loss of valuable opportunity would [constitute a material error]*".[9]

2.12 The majority of the Full Court declined to accept this submission as a threshold for a material error in the context of procedural fairness.[10] The Full Court also rejected the submissions made on behalf of Mr Nathanson that any error that is not an error with respect to peripheral material or a technical error will be a material error.[11] Steward and Jackson JJ considered that it was obvious to Mr Nathanson that the domestic violence conduct would be in issue in the AAT proceedings, even if it were not obvious to him specifically how it would be relevant. Mr Nathanson's understanding of

[9] At [120].

[10] Wigney J (in dissent) accepted that Mr Nathanson had not been given fair notice of an issue that turned out to be material to the Tribunal's decision and further considered that that error was a material error.

[11] At [122].

this was demonstrated by him having obtained a statement from the alleged victim of that past family violence conduct.

2.13 This approach to procedural fairness differs slightly from other decisions considered in recent Years in Review, where we have observed a trend of courts considering that the threshold for a requirement to avoid 'practical unfairness' to an individual requires "*practical, direct and non-misleading*" notification of critical factors to an applicant before a decision is made.

2.14 In *Stowers v Minister for Immigration and Border Protection* [2018] FCAFC 174, the Full Court discerned unfairness in the Assistant Minister not putting Mr Stowers specifically on notice as to which particular parts of material before the Assistant Minister might be relied on, or any indication as to how that material could be characterised in considering whether to accept or reject Mr Stowers' representations about the cancellation of his visa. The following year, *Stowers* was considered by the Full Court in *Minister for Home Affairs v Smith* [2019] FCAFC 137. The Full Court considered that Ms Smith had been denied procedural fairness because the Minister had characterised Ms Smith's statements that 'none of the allegations involve illegal recreational drugs' and 'I do not have a drug, alcohol or gambling problem' as a blanket denial of *any* use of drugs. The Minister had subsequently relied upon those statements, characterised in that way, to support a finding that Ms Smith's drug use was a causal factor in her offending. Procedural fairness required that Ms Smith be given an opportunity to respond.

2.15 Relevantly, a materiality analysis was not argued in *Stowers* nor *Smith*. *Nathanson* demonstrates how the application of materiality to procedural fairness in *Nathanson* may impact upon whether or not a denial of procedural fairness sounds in jurisdictional error. This is because a lack of practical, direct and non-misleading notification of critical factors to an applicant may not be sufficient, in and of itself, to constitute a jurisdictional error if the applicant is unable to demonstrate that the lack of procedural fairness would have altered the outcome. Having adopted a materiality approach, Steward and Jackson JJ considered that it was necessary for Mr Nathanson, on review, to articulate a specific course of action that would have been taken had he been afforded procedural fairness which could realistically have changed the outcome of the AAT's decision. On appeal to the Full Court, Mr Nathanson identified three things that he would have done had the importance of the past alleged domestic violence conduct been drawn to his attention.[12] Steward and Jackson JJ considered each of these in turn and concluded that Mr Nathanson had not demonstrated that doing any of these things would have altered the outcome and accordingly, the error was not established to be a material error.

3. Procedural fairness

3.1 The fair hearing rule requires that a person who may be affected by a decision be given the opportunity to present their case prior to the decision being made. In most cases, this requires adequate notice that an adverse decision may be made as well as disclosure of prejudicial allegations. This year, as in recent years, we continue to see courts wrestling with how much needs to be disclosed to a person affected by a decision in order to discharge the obligation of procedural fairness.

[12] Specifically, Mr Nathanson argued that the things he realistically would have done included (1) calling Mrs Nathanson to give evidence; (2) submitting that his domestic violence should not be viewed as being 'very seriously' adverse to his interests because he had not been charged with or convicted of any crime in respect of that conduct; and (3) submitting that even if his domestic violence conduct was to be viewed very seriously in relation to the need for protection of the community, that conduct should not diminish the weight to be given to the best interests of his children.

3.2 *Nathanson* - as discussed above - was an example from 2021 of the potential impact of a materiality analysis in determining whether a denial of procedural fairness constitutes a jurisdictional error. In other decisions however, courts continued to consolidate and apply the requirements for practical procedural fairness. In *Khazaal v Attorney-General [2020] FCA 448* ***(Khazaal)***, the Federal Court considered whether the Attorney-General had denied procedural fairness in making a decision to refuse parole to a person convicted of terrorism related offences. In *Khazaal*, the Court found the appellant failed to demonstrate that the Attorney-General had failed to disclose all credible, relevant and significant adverse information concerning the applicant and parole decision concerning him.

3.3 In doing so, the Court very succinctly stepped through the case law and the general principles regarding the fair hearing rule and the circumstance in which jurisdictional error may arise (see paragraphs [50] to [59]). It concluded that (among other things) disclosures of adverse assessments that had been made about the appellant by other agencies were not made at such a high level of generality to make a meaningful response impossible. In doing so, the Court considered that, while the report did not itself contain any details of any specific incident or observation that was said to support the assessment, the Attorney-General was entitled to rely on it, without inquiring into the specific incidents that may have formed the basis of that assessment.

3.4 The Full Court returned to the issue again later in the year, considering whether an applicant before the Tribunal had been given sufficient notice that his representations in relation to subjective fear of harm if returned to South Sudan were in doubt and sufficient opportunity to respond. In *MQGT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 215* ***(MQGT)*** the Full Court considered whether the Administrative Appeals Tribunal (**Tribunal**) had denied procedural fairness to MQGT, whose humanitarian visa had been cancelled after he committed various criminal offences. In *MQGT*, the Full Court found the circumstances did involve a denial of procedural fairness by the Tribunal when it failed to direct the appellant's mind to the issue of whether had had a subjective fear of harm if returned to South Sudan.

3.5 In doing so, the Full Court found:

(a) there was nothing in the delegate's reasons which should have put MQGT on notice that his representations about his fear of being killed if returned to South Sudan were in doubt

(b) the Minister's statement of facts, issues and contentions did not put MQGT on notice that his representations that he feared he would be killed if he had to return to South Sudan were false, exaggerated or open to doubt

(c) the Tribunal did not ask MQGT anything about his fears of returning to South Sudan; and

(d) MQGT's representations that he would be killed if he had to return to South Sudan were made in circumstances where it was not otherwise doubted that the appellant had fled the war in South Sudan and grown up in a refugee camp before coming to Australia.

3.6 The Full Court accepted that procedural fairness did not require the Tribunal to "*give [MQGT] a running commentary on its thought processes*", but considered that the present case required that the Tribunal put MQGT on notice that his representations in relation to being returned to South Sudan were in doubt, and provide MQGT with an opportunity to substantiate his representations to that effect. The Full Court in *MQGT* considered materiality, but concluded that having regard to the Tribunal's reasons (which indicated its view that an assessment of MQGT's fear of being killed if returned to South Sudan was not necessary in the circumstances)[13] that the

[13] [2020] FCAFC 215 at [14].

materiality of the error was clear. Having regard to this part of the Tribunal's reasons, the Full Court concluded that the denial of procedural fairness could realistically have deprived MQGT of a different outcome, and was accordingly a material - and jurisdictional - error.

4. Reasoning grounds of review

4.1 "Reasoning grounds" of review refer to the process of reasoning engaged in by the decision-maker. Grounds of review which relate to the reasoning process include unreasonableness, failure to consider a relevant consideration, consideration of an irrelevant consideration, logicality and rationality grounds, and no evidence.

4.2 Last year we reported that there had not been any attempts to push unreasonableness into new areas, leaving the standard of reasonableness lower than the 'high water mark' set in *Li.* And previously we have generally seen restraint and a noticeable trend towards more traditional conceptions of the nature, scope and role of the judiciary in reviewing the actions of the executive. Judges have been more forgiving of reasons given by a decision-maker. This trend appeared to continue in 2020. Courts were not prepared to find that short reasons were necessarily inadequate (*Lodhi, Goodwin*) and continually emphasised that where a finding is open to a decision-maker based on the evidence before it, courts conducting review must be careful not to traverse into merits review when reviewing that decision.[14]

4.3 In 2020, the High Court handed down three decisions relating to reasoning grounds: *DUA16* and *ABT17* (unreasonableness) and *Applicant S270* (failure to consider relevant consideration). The Federal Court and Full Federal Court also grappled with unreasonableness, including in *BP Refinery*, which, in a sign of the times, examined legal unreasonableness in the context of the interpretation of a meme.

Unreasonableness in the decision-making process

4.4 *DUA16* and *ABT17* considered legal unreasonableness in a process context. In both cases, it was argued that the decision-maker had made a legally unreasonable error in the decision-making process. In both cases, this related to a failure of the decision-maker to seek additional information or make further enquiries from the applicants.

4.5 In *Minister for Home Affairs v DUA16* [2020] HCA 46 (involving protection visa applicants, including DUA16 and CHK16), the High Court held that the Immigration Assessment Authority's decision not to seek clarification and/or additional submissions from a protection visa applicant, CHK16, was legally unreasonable, in circumstances where it was clear that the original submissions provided contained information in relation to another individual (who was not the visa applicant). CHK16 had engaged a migration agent whose practice was to submit information to the Department using templates of pro forma information, which were not always thoroughly reviewed prior to submission. The result was that CHK16's submissions contained no information in relation to them and instead was entirely comprised of personal information in relation to another person. Although the Authority was not aware at the time of its decision that CHK16's migration agent had acted fraudulently, it was clear that the submissions included a significant amount of information pertaining to a person who was not CHK16 that had been included in error.

4.6 The High Court considered that the circumstances of CHK16's case were "*extreme*", noting that the submissions that had been provided by the agent were in relation to a different person, and none of

[14] See also, for example, *Minister for Immigration and Border Protection v MZZMX* [2020] FCAFC 175.

the personal information related to CHK16. The High Court held that the approach taken by the Authority was legally unreasonable, and rejected the Minister's argument that the lack of enquiry by the Authority was not unreasonable because such enquiries could not have reasonably expected any useful result. The High Court went on to state that the fact that the Authority did not know at the time that the migration agent that had provided the submissions was engaged in fraud did not impact whether the Authority's failure to request additional information in relation to the submissions once it became clear to the Authority that those submissions did not relate to CHK16 and had erroneously included information in relation to another person.

4.7 Another client of the fraudulent migration agent, DUA16, also sought judicial review on the grounds of unreasonableness. DUA16's submissions to the Department had also been prepared using the migration agent's template, but had been updated to reflect instructions provided by DUA16 to the migration agent. As with CHK16, the Authority was not aware of the migration agent's fraud at the time of the decision. The High Court considered that DUA16's case was not affected by legal unreasonableness. While it was apparent from DUA16's submissions to the Authority that additional information had been included in error, the High Court considered that the Authority's approach of expressly disregarding those submissions and noting that the information could not in any event have been considered even if it had not been included by mistake was sufficient.

4.8 *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 also concerned legal unreasonableness, and the Authority's failure to exercise its discretion to obtain additional information under s 473DC of the Migration Act. A majority of the High Court held that it was legally unreasonable for the Authority not to have requested that ABT17 attend an in-person interview before making adverse findings in relation to ABT17's credibility based on a previously recorded audio interview.

4.9 ABT17 lodged an application for a temporary protection visa. As part of the determination of his application, ABT17 was invited to attend an interview with a delegate of the Minister. That delegate was audio - but not visually - recorded. The delegate that conducted the interview accepted the evidence given by ABT17 during the interview that he had been detained, beaten and sexually tortured by the Sri Lankan army on suspicion of being an LTTE supporter. The delegate accepted ABT17's evidence on this point, but considered having regard to the improvement in circumstances for Tamils in Sri Lanka at the time of their decision (being in 2016, three years after ABT17 had lodged the application for the temporary protection visa in 2013), the delegate refused ABT17's application.

4.10 ABT17's application was referred to the Authority for review. The Authority rejected ABT17's evidence in relation to his allegations of mistreatment by the Sri Lankan army on the basis of ABT17's demeanour in the audio recorded interview. The Authority made specific reference to ABT17's evidence being lacking in detail and, at times, vague and hesitant. On this basis, the Authority did not accept that ABT17 had indeed been targeted by the Sri Lankan army and accordingly rejected his claims that he would be at risk of harm if he were to return to Sri Lanka.

4.11 However, ABT17's review in the Federal Court was rejected on the basis that even if the Authority had acted unreasonably, that unreasonableness was not material to the Authority's decision. Specifically, the Federal Court considered that the unreasonableness was not material because both the delegate and the Authority had ultimately decided to reject ABT17's application on the basis of the change in circumstances for Tamils in Sri Lanka.

4.12 The High Court stated that the powers under Part 7AA of the Migration Act which allow the Authority to seek additional information would have, in this case, extended to requesting that the appellant attend a further interview, conducted either in person or via video link, so as to enable the

Authority to assess the appellant's demeanour while giving evidence. A majority of the High Court held that the Authority had acted unreasonably by not inviting ABT17 to an interview, in order to assess ABT17's demeanour, before rejecting ABT17's account of events.[15] The majority suggested that the issue could be remedied in future by ensuring that officers other than the delegates making the decisions conduct the interviews and/or ensuring that the interviews are video recorded.

Unreasonableness in the decision-maker's findings

4.13 In *Animals Australia Federation v Secretary, Department of Agriculture, Water and the Environment* [2020] FCA 905 (***AAF***) and *Lodhi v Attorney General (Cth)* [2020] FCA 1383 (***Lodhi***), the applicants argued unreasonableness with an outcome focus. The applicants in those decisions sought review on the basis that there was no intelligible justification for the decisions under review, in addition to arguing that there was unreasonableness identifiable in the manner in which the decision-maker conducted the decision-making process. This type of unreasonableness might be described as having the character of a choice that is "arbitrary or capricious or to abandon common sense".[16]

4.14 In *AAF,* Rural Export & Trading (WA) Pty Ltd (**RETWA**), a live export company, made an application for an exemption to the Northern Summer Direction - a direction made under the *Australian Meat and Live-stock Industry Act 1997* (Cth), which prohibits the live export of animals from Australia for particular periods during the year, beyond a particular latitude. The Animals Australia Federation (**AAF**) - an organisation dedicated to preventing or relieving the suffering of animals (and, as her Honour Justice Kenny noted in her reasons, featured in the 2018 "60 Minutes" episode on live export practices) - made representations to the Secretary (being the decision-maker on the application for the exemption), to the effect that the Secretary should not grant the application for an exemption. AAF (among other organisations, including the RSPCA and the AVA) made submissions to the Secretary opposing the grant of the exemption on the basis of the conditions under which the export would take place, and in particular, the heat in the Middle East in the northern hemisphere summer. The Secretary refused the first application for the exemption.

4.15 RETWA then lodged a second application for an exemption. The Secretary decided to grant the second application. In doing so, the Secretary did not invite submissions from the AAF, but had regard to the AAF's submissions in relation to the first application.

4.16 The AAF sought judicial review of the Secretary's decision to grant the second exemption to RETWA. The AAF argued that the Secretary, as the decision-maker, had an obligation to afford the AAF procedural fairness to comment on the proposal to grant the second exemption application, having regard to receipt of the AAF's representations in relation to the first exemption application. The AAF also argued that the Secretary's failure to invite submissions from the AAF before making the second decision constituted legal unreasonableness, on the basis that the decision lacked an evidence and intelligible justification.

4.17 None of the three grounds of review were successful. In relation to unreasonableness, the Court did not consider that there was anything in the reasons for the second decision to indicate that the decision-maker had regard to factual or technical information provided by AAF that required the decision-maker to give AAF an opportunity to update it. Further, the decision-maker appeared to have relied upon the information that the AAF presumably would have provided or drawn the

[15] Kiefel CJ, Bell, Gageler and Keane JJ at [25].

[16] *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, per French CJ at [28].

decision-maker's attention to, had it had the opportunity to make submissions, in the form of past reports and future forecasts from the Bureau of Meteorology for the Persian Gulf.

Legal unreasonableness and "memetic status"

4.18 In *BP Refinery (Kwinana) Pty Ltd v Tracey* [2020] FCAFC 89, the Full Federal Court considered reasonableness in the context of the decision-maker's findings in interpreting a meme. BP was in the process of negotiating a new enterprise agreement with its employees. During these negotiations, a BP employee, Mr Tracey, made and distributed a video with extracts from the film *Downfall*, allegedly depicting BP representatives as Nazis at the point where Hitler is informed that he has lost the Second World War.

4.19 The decision turned on the reasonableness of the Fair Work Commission's interpretation of the meme, and specifically, whether it was reasonable to conclude that the video was offensive or inappropriate within the meaning of BP's Code of Conduct. BP argued that the Fair Work Commission's conclusion that the video was satirical, rather than being offensive or inappropriate within the meaning of BP's Code of Conduct, was not permissible because the Full Bench had not identified an error of the kind identified in *House v King,* and had not turn its mind to whether an appellable error existed but had nevertheless reversed the decision of the Deputy President.

4.20 The Full Court upheld the impugned decision. It noted that, "in terms, the Full Bench was not expressing a mere difference of opinion with the Deputy President. It was expressing a legal conclusion that the Deputy President's conclusion was outside the boundaries of legal reasonableness. Contrary to the assumption implicit in BP's arguments a decision may be one that permits a range of conclusions but, on the facts, there may still be a decision that is outside that permissible range; a decision that is not reasonably open and, accordingly, is unlawful".[17] The Full Court agreed that it was not reasonably open for the Deputy President to reach the conclusion he reached in relation to whether the meme was offensive or inappropriate. The Full Court considered the Full Bench's assessment of the video's content, the "memetic status" of the Downfall clip, the context of the EBA dispute and the factual findings, and agreed that the video was satirical in nature and was not offensive or inappropriate within the meaning of BP's Code of Conduct.

Delay - how long is too long?

4.21 The perils of procrastination and the potential for delay to sound in unreasonableness, and accordingly, jurisdictional error, was demonstrated in *Von Schoeler v Boral Timber (No 2)* [2020] FCAFC 13, where a six year delay between the trial and the publication of the primary judge's decision vitiated the decision. Conversely, taking 18 months to exercise the discretion to refuse the Applicant's visa in *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 108 was not considered to be unreasonable, having regard to the multi-stage nature of the decision-making process.

4.22 Consistent with existing authority, it remains the case that undue delay will rarely constitute an error in decision-making or render a judgment unsafe on its own. Applicants will generally be required to establish that the delay has affected the decision in some way by causing an error - for example, the delay has caused the decision-maker to fail to consider all of the evidence before it, or the

[17] *BP Refinery (Kwinana) Pty Ltd v* Tracey [2020] FCAFC 89 at [16].

effect of the delay is such that the parties are unable to derive the relevant benefit of the decision in issue.[18]

4.23 Six years between trial and publication of a decision is an unacceptably long time, constituting undue delay - as was argued by Ms Von Schoeler, and accepted by the Full Federal Court in *Von Schoeler v Boral Timber (No 2)* [2020] FCAFC 13.

4.24 Ms Von Schoeler alleged that she had been sexually harassed by a particular Boral employee in August 2009, and was then subsequently victimised and discriminated against by other Boral employees for complaining about the initial sexual harassment. She made a claim under the *Sex Discrimination Act* 1982 (Cth) (**SDA**). The matter proceeded to a hearing before the Federal Circuit Court in October 2012.

4.25 The Federal Circuit Court delivered its judgment in November 2018. The Federal Circuit Court found that Ms Von Schoeler's allegations of sexual harassment against the Boral employee had been made out but that the claim against Boral had not been established. Ms Von Schoeler appealed to the Full Court. The issues before the Full Court were focused on whether the judgment was unsafe due to the delay in publication, and whether the reasons given for the judgment were inadequate.

4.26 The Full Court (Flick, Robertson and Rangiah JJ) expressed concerns in relation to the adequacy of the primary judge's reasons. Specifically, the Full Court noted that his Honour's reasons did not refer to particular evidence given by particular witnesses, the fact that particular individuals did not give evidence, did not make reference to particular evidence which would appear to have formed the basis for his conclusions, and did not deal with particular allegations contained in the evidence of Ms Von Schoeler which comprised one aspect of her claim. For example, the primary judge made findings preferring the evidence of one witness over Ms Von Schoeler, but made no comments elsewhere in his reasons as to Ms Von Schoeler's reliability and credibility as a witness. The Full Court considered that it could not be assumed that the primary judge had taken into account the demeanour of the witnesses given the amount of time that had elapsed between the hearing and the publication of the decision.[19]

4.27 The Full Court also expressed that the protracted nature of the delay in this case "created requirements in respect of the reasons that would not ordinarily apply".[20] Specifically, the Full Court considered that his Honour was required to:

(a) inform the parties of the reasons why the evidence of a particular witnesses had been accepted or rejected;

(b) explain why the evidence of one witness had been preferred over the evidence of other witnesses; and

(c) explain how, despite the delay, he was able to recollect the oral testimony and demeanour of witnesses in order to demonstrate that delay did not affect his decision.

[18] See: *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470*; Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17.

[19] [2020] FCAFC 23 at [97]-[101].

[20] [2020] FCAFC 23 at [113].

4.28 Further, Full Court considered that the Federal Circuit Court's reasons:

(a) exposed examples of the primary judge appearing to skirt more difficult issues and driving toward simple conclusions (including rejecting Ms Von Schoeler's evidence in relation to particular allegations of bullying by Boral employees);

(b) bore a lack of clarity which suggest that the delay has affected the decision; and

(c) overlooked issues that had been squarely raised in the case.

4.29 Having regard to these matters, the Full Court was satisfied that the reasons demonstrated that the primary judge was unable to satisfactorily determine the case six years after hearing the evidence, and the judgment was unsafe. The Full Court concluded its reasons with the statement, "*[i]t should finally be noted that the delay on the part of the primary judge in delivering his judgment has—regrettably—brought the administration of justice into disrepute*".

4.30 While *Von Schoeler* concerned delay on behalf of courts, the same principles in relation to delay resulting in error have previously been applied in relation to administrative decision-makers.[21] The issue of delay, and whether a failure to exercise a statutory power within a reasonable time would exceed the jurisdiction of an administrative decision-maker was considered by the Full Court recently in *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 108.

4.31 KDSP's application for a visa was refused by the Minister on character grounds pursuant to s 501 of the Migration Act in July 2017. KDSP sought merits review in the AAT, and the AAT set aside the refusal decision in October 2017. In April 2019 - 18 months after the AAT's decision - the Minister personally exercised his discretionary power in s 501A of the Migration Act to refuse KDSP's application for a visa in the national interest, which had the effect of reversing the Tribunal's October 2017 decision.

4.32 KDSP sought judicial review of the Minister's April 2019 decision, arguing that the powers in s 501A of the Migration Act should be read as involving an implied duty to make a decision under that power within a reasonable time.

4.33 O'Callaghan and Steward JJ held that it was unnecessary to consider whether s 501A contains an implied duty to exercise the power within a reasonable time, because the Appellant had not in fact demonstrated than an unreasonable delay had in reality occurred. Their Honours observed that the overall delay was comprised of a series of smaller delays in the staged progression of the decision--making process. Each of the smaller delays was generally between one to two months, with the longest delay being three months, and with each stage of the decision-making process, KDSP's application was progressed in some way. Their Honours stated that:[22]

> In our view there is no evidence of oversight or neglect. There is no evidence of perversity or capriciousness. Rather, by happenstance, events beyond the control of the Minister's Department (the change of Minister and the delivery of AQM18) combined with events that it did control, albeit progressed at perhaps a bureaucratic pace, explain the delay here. That is very much less than an adequate outcome, especially with an appellant in detention… criticisms directed at showing that the Minister's staff were too slow, or took steps that

[21] See: *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 77; (2008) 228 CLR 470 at [5] per Gleeson CJ.

[22] [2020] FCAFC at [193].

another person might consider were unnecessary (such as the new Minister's revised referral arrangement) are not to the point, unless they show the presence of perversity, capriciousness, intentional oversight or neglect.

4.34 O'Callaghan and Steward JJ also rejected KDSP's argument that the total delay should be considered, on the basis that to do so would be to mischaracterise the nature of the delay and the varying reasons for the delay that were derived from the decision-making process.

4.35 Bromberg J resolved the appeal on a statutory interpretation approach, holding that there is no implied duty to exercise the power in s 501A within a reasonable time because the power in s 501A is a step in the performance of a duty implied by s 65 of the Migration Act, which requires the Minister to make a decision to refuse or grant the relevant visa. While the duty in s 65 must be exercised within a reasonable time, "*the obligation upon the Minister to perform that duty does not lapse by the effluxion of time*".[23] Bromberg J also noted that a writ of mandamus may be available to compel the Minister to exercise the duty in s 65, but that a failure by the Minister to specifically exercise the power in s 501A within any particular time period would not give rise to any ground of appeal.

4.36 The impact of the timing of publication of a decision was before the High Court in late 2020, with the hearing of *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17*.[24] In *AAM17*, the appellant argued that he was denied procedural fairness because the Federal Circuit Court did not provide its reasons in a form intelligible to AAM17 in a timely way. Specifically, the Federal Circuit Court provided oral reasons at the time that it pronounced its orders, at which AAM17 was self-represented and assisted by an interpreter. The Federal Circuit Court provided its written reasons almost a month after AAM17 had subsequently appealed to the Federal Court. The High Court has reserved its decision in this matter.

Adequacy of reasons - short but sufficient

4.37 The adequacy of reasons given was challenged in *Lodhi v Attorney General (Cth)* [2020] FCA 1383 and *Goodwin v Commissioner of Police* [2020] FCA 950. The Federal Court found, in both matters, that concise reasons for decision will not be considered inadequate where the decision-maker's reasoning is clear.

4.38 Mr Lodhi was sentenced to a term of imprisonment for 20 years for terrorism offences, and began serving this sentence on 22 April 2004. He has made multiple applications for parole, one of which was made in April 2020. The relevant provision in the *Crimes Act 1914* (Cth) provided that the Attorney-General must not grant a person convicted of a terrorism offence parole unless satisfied that "*exceptional circumstances*" existed. The Commonwealth Attorney-General refused this application. The Attorney-General gave "*very short*" reasons for that decision, in the context of a detailed submission, with 16 attachments, which had been prepared by the Attorney-General's Department.[25]

4.39 Mr Lodhi sought judicial review of the Attorney-General's decision to refuse his application for parole. Mr Lodhi argued firstly that the decision was affected by legal unreasonableness, and

[23] [2020] FCAFC at [125].

[24] On appeal from *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951; see also Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17 & Anor [2020] HCA Trans 210.

[25] [2020] FCA 1383 at [3].

secondly that the Attorney-General had failed to give adequate reasons. The application for review failed on both bases.

4.40 The review ground in relation to the adequacy of the Attorney-General's reasons was aimed at the short reasons (about six paragraphs) given by the Attorney-General in refusing Mr Lodhi's parole. The argument run was essentially that a six paragraph decision was sparse, considering that the Attorney-General's own Department had prepared a detailed brief in relation to the parole application, with 16 attachments.

4.41 The Court emphasised that in order for this ground of review to be made out, the reasons must fall short of what is legally required, having regard to the statutory framework in which the decision is made.[26] Noting that the statutory test in this case was simply whether the Attorney-General was satisfied that exceptional circumstances existed so as to warrant the grant of parole, the Court considered that the reasons given were sufficient to set out the key bases of the Attorney-General's decision. The fact that the reasons were brief did not mean that the reasons were inadequate.

4.42 In *Goodwin v Commissioner of Police* [2020] FCA 950, Mr Goodwin was terminated from his position with the Australian Federal Police following an investigation into complaints made about his conduct in the workplace. As part of the investigation and termination process, Mr Goodwin made submissions in relation to why he should not be terminated, making reference to his previous good conduct as an employee. Mr Goodwin sought judicial review of the Commissioner's decision to terminate his employment. One of Mr Goodwin's review grounds was that the reasons given for the decision to terminate his employment in his termination letter were inadequate, and the lack of detail in the termination letter was evidence that the Commissioner had not given relevant matters meaningful consideration.

4.43 The Federal Court found that the brevity of the Commissioner's decision could not, in this case, infer that the Commissioner had not given meaningful consideration to the matters raised by Mr Goodwin in his submissions. The Court noted that there was no obligation on the Commissioner to provide reasons for the decision to terminate Mr Goodwin, the reasons themselves were "*clear and cogent*" in providing an explanation for why Mr Goodwin had been terminated, and that while the termination letter was brief, it referred to all of the matters raised by Mr Goodwin in his submissions.

Making decisions in accordance with the guidelines

4.44 In *Montenegro v Secretary, Department of Education* [2020] FCAFC 210, Mr Montenegro enrolled at the University of Sydney in a Graduate Diploma in Law. This included four units of study in a course titled *Interpreting Commercial Contracts*, an intensive course which required attendance at 70% of classes which were to occur over four days.

4.45 Mr Montenegro was unable to meet the course requirements due to a medical condition. He was given grade of "Discontinue - Fail" for the course. He sought the re-credit of his FEE-HELP debt accordingly, seeking an exemption due to special circumstances. Mr Montenegro's application for a FEE-HELP re-credit was refused, and he sought review of this decision from the university (which confirmed the original rejection decision) and then the AAT (which affirmed the review decision).

4.46 The *Higher Education Support Act 2003 - Administration Guidelines 2012* (Cth) (**Administration Guidelines**) included paragraphs which set out what would constitute "special circumstances", including circumstances beyond a person's control and circumstances that did not make their full

[26] [2020] FCA 1383 at [89].

impact until on or after the census date. The AAT's reasons for its decision made no express reference to the Administration Guidelines.

4.47 On appeal to the Full Court of the Federal Court, Mr Montenegro argued that the Tribunal had not made a decision "*in accordance with*" the Administration Guidelines, and that he had established "*special circumstances*" within the meaning of the Administration Guidelines, which would warrant a decision to re-credit his FEE-HELP balance for the uncompleted course.

4.48 The Full Court was satisfied that the decision of the Tribunal had not been made "*in accordance with*" the Administration Guidelines.[27] While the fact that the AAT decision made no express reference to the Administration Guidelines was not considered to be determinative, it was identified as a "*starting point*" for such a conclusion.[28] The Court noted that there were a series of matters in respect of which the AAT had been required to reach a state of satisfaction in relation to which there appeared to be no finding in its reasons.

4.49 The Court also rejected the argument advanced by the Respondent that the relevant matters set out in the Administration Guidelines was implicitly addressed throughout the AAT's decision. Flick J stated that:[29]

> The requirement to make a decision "in accordance with" published Guidelines requires a discipline of thought processes which exposes a decision-maker at least directing attention to the facts necessary to reach its conclusions and directing attention as to why those facts are of relevance to the statutory task being discharged. A series of discrete facts not directed to any identifiable statutory requirement, and not relied upon by an administrative decision-maker as part of the statutory task being undertaken, cannot be retrospectively and opportunistically relied upon by someone other than the decision-maker – such as Counsel for a party – to provide the reasons not provided by the decision-maker.

4.50 Flick J also commented on the adequacy of the AAT's reasons.[30] His Honour considered that the AAT's reasoning process could not be determined from its reasons. In reaching this conclusion, Flick J emphasised that "*[t]he task is forever to scrutinise the reasons in fact provided by the decision-maker to ascertain whether those reasons and those findings on "material questions of fact" sufficiently set forth the reasoning process of the decision-maker*". In this particular case, while the AAT did make certain findings of fact, it was not then clear from its reasons as to how it was then directed, in its reasoning process, to find on those facts whether Mr Montenegro should be granted an exemption.

Acting on recommendations and directions

4.51 In *Attorney-General (Cth) v Ogawa* [2020] FCAFC 180, the Full Federal Court examined the Attorney-General's advice to the Governor-General on the issue of whether Dr Ogawa's application for an exercise of Constitutional executive power under s 61 of the Constitution should be granted. The effect of granting Dr Ogawa's application would have seen her receive a full pardon from the

[27] [2020] FCAFC 210 at [35] per Flick J, with Rangiah and Charlesworth JJ agreeing.

[28] [2020] FCAFC 210 at [27] per Flick J.

[29] [2020] FCAFC 210 at [34].

[30] We note that the adequacy of the AAT's reasons was a ground raised only on appeal to the Full Court, and that while the Full Court granted leave for Mr Montenegro's Further Amend Notice of Appeal to be amended to allow this argument to be raised, it was considered not to be necessary to resolve this ground in circumstances where the other grounds had been made out.

Commonwealth Governor-General in relation to four previous convictions. The decision in *Ogawa* agitated issues about the Attorney-General's reasoning in recommendation to the Governor-General, as well as whether the Governor-General's power to pardon could be subject to judicial review.

4.52 Dr Ogawa was convicted in 2009 of two counts of using a carriage service to harass, and two counts of using a carriage service of making a threat to kill. In 2014, Dr Ogawa petitioned the Governor-General for mercy - that is, requesting that the Governor-General exercise his executive power in relation to pardon her for her 2009 convictions.[31] The Governor-General requested advice from the Attorney-General on this issue. The Attorney-General recommended that the Governor-General not pardon Dr Ogawa, and recommended the grant of a full pardon only if as a matter of convention or policy there was satisfaction that Dr Ogawa was morally and technically innocent of the offence. Dr Ogawa relevantly challenged, by way of judicial review, the decision of the Commonwealth Attorney-General to decline to make a favourable recommendation to the Governor-General in relation to Dr Ogawa's petition for full pardon.[32]

4.53 The primary judge (Logan J) had found in Dr Ogawa's favour. Finding that the Attorney-General's advice to the Governor-General could be amenable to judicial review, Logan J also considered that the Attorney-General had misunderstood the nature and extent of the circumstances in which a person may be pardoned. Specifically, Logan J considered that the exercise of the power to pardon is not limited to circumstances in which the Governor-General is satisfied that the petitioner (in this case, Dr Ogawa) is "*morally and technically innocent*". Logan J considered that the executive prerogative in relation to pardons was more flexible than characterised in the Attorney-General's advice to the Governor-General, and granted declaratory relief to Dr Ogawa.

4.54 The Attorney-General appealed to the Full Federal Court. The Full Federal Court found for the Attorney-General. The Full Federal Court decided that Logan J had erred in granting declaratory relief with respect to the Attorney-General's recommendation because, contrary to the primary judge's finding, the Attorney-General's recommendation to the Governor-General was not affected by material legal error. The Full Federal Court found that there was no real prospect that a state of satisfaction could be reached that Dr Ogawa was “innocent” of any of the offences for which she was convicted.

4.55 In doing so, the Full Federal Court commented specifically on the nature of the decision-making freedoms of the Attorney-General, as distinct from other decision-makers, noting that, at [79]:

> *Considerable care must be exercised in undertaking any process of reviewing the advice of the Attorney-General to the Governor-General. Unlike many cases in which judicial review is sought, where it is well recognised that judicial review does not extend to reviewing the merits of a decision, and in circumstances where an analysis by a decision-maker of the legal principles of relevance to the decision sought to be reviewed provides but a background to the actual merits of the decision under review, in the present case it is the very analysis of the relevant legal principles which forms the merits of the decision under review. The “merits” of the advice of the Attorney-General was that no state of satisfaction could be reached in accordance with “[l]ong standing convention” which focusses attention on whether or not Dr Ogawa was “morally or technically innocent”. In the absence of manifest legal error or a denial of procedural fairness, that assessment remained a matter*

[31] The facts are set out in full in the Federal Court's decision in *Ogawa v Attorney-General (No 2)* [2019] FCA 1003.

[32] Dr Ogawa also challenged the Attorney-General’s decision not to refer her matter to the Court of Appeal of the Supreme Court of Queensland under s 672A of the *Criminal Code 1899* (Qld) (Queensland Criminal Code).

within the decision-making freedom entrusted to the Attorney-General. In reaching that decision no legal error or principle was exposed which was susceptible of judicial scrutiny.

4.56 The Full Court also commented, but did not determine, the extent to which the power to pardon in s 61 of the Constitution may be subject to judicial review. The Full Court noted that the law in Australia is "*somewhat unsettled*", and expressed some doubt as to whether it is correct to state that the exercise of Constitutional executive power to grant or refuse a pardon to a petitioner is totally immune from judicial review. The Full Court also commented that, while there may well be some aspects of the power to grant or refuse a petition for a pardon which are essentially political or non-justiciable, this does not necessarily carry the consequence that any legal error manifest in that decision-making process should remain immune from judicial review.

4.57 In *Registered Organisations Commissioner v Australian Workers' Union* [2020] FCAFC 202, the Australian Workers' Union (**AWU**) argued that a decision of the Registered Organisations Commissioner to conduct an investigation was affected by jurisdictional error because the Commissioner, by his delegate, had impermissibly acted upon the advice and direction of the relevant Minister.

4.58 Following the publication of a newspaper article in August 2017 in relation to a $100,000 donation reportedly made by the Australian Workers Union to the organisation "GetUp!" in 2005, the (then) Minister wrote to the Commissioner on two occasions, requesting that the Commissioner give consideration to investigating whether the AWU had complied with its own rules for donations. Those rules required that the National Executive of the AWU approve donations in excess of $1,000. As part of the investigation, warrants were executed at the AWU offices, and at the subsequent hearing, Minister Cash was called to give evidence in relation to the correspondence which remained in issue in the Full Federal Court proceedings.

4.59 Relevantly, one ground of review considered on appeal to the Full Federal Court was the "dictation ground".[33] At a high level, the dictation ground will be made out where it is established that the decision-maker has impermissibly acted upon the advice or direction of another person. Whether that action is "impermissible" will depend upon the statutory context. The primary judge found at first instance that the dictation ground had not been made out in relation to the Commissioner's decision to conduct an investigation.

4.60 The primary judge held that the dictation ground had not been made out. The primary judge was not satisfied, as a matter of fact, either that the referral letters from the Minister to the delegate had been treated by the delegate as a direction to undertake the investigation, or that the referral letters were a material and operative reason for the delegate's decision to conduct the investigation.

4.61 In a notice of contention filed in the Full Court proceedings, the AWU challenged the primary judge's rejection of the dictation ground. The AWU did not dispute the factual findings by Bromberg J but instead challenged the formulation of the dictation ground, arguing that the dictation ground would be made out if the referral letters affected the decision to any extent. Besanko J (in the Full Court judgment) described this this formulation of the test by AWU was "*very broad and, I think, somewhat elusive in nature*".[34] The AWU also argued that s 329FA of the FWRO Act (which provides a power for the Minister to make directions to the Commissioner by way of legislative

[33] The 'dictation ground' is captured in s 5(1)(e) and (2)(e) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), which contains a ground of review of exercising a personal discretionary power at the behest of another person.

[34] [2020] FCAFC 202 at [239].

instrument), should be construed as otherwise prohibiting the Minister from making suggestions or speaking to the Commissioner about specific matters - including the referral letters.

4.62 Justice Besanko, with whom the other members of the Full Court agreed, accepted that the Minister asked the Commissioner to consider investigating the matter "*in any way the Commissioner may consider appropriate*". His Honour also found that, whilst s 329FA of the FWRO Act would preclude the Minister from giving specific directions to the Commissioner, it could not be inferred that Parliament's intended that the responsible Minister under the FWRO Act, and only the responsible Minister, is precluded from communicating with the Commissioner or their delegate. Accordingly, having regard to the statutory context of FWRO Act, Besanko J (with whom Allsop CJ and White J agreed) rejected AWU's arguments in relation to the dictation ground.[35]

4.63 The decision in *Registered Organisations Commissioner* reiterates that the extent to which the holder of a statutory power can take into account or act upon the advice of another without committing a jurisdictional error very much depends upon the particular statutory context.

5. Statutory interpretation

5.1 In 2020, we saw what appeared to be a retreat from the steady march towards a more literal approach to interpretation. Instead courts tended to approach statutory words purposively, with a view to achieving the objects of the underlying legislation, or which otherwise accords with the broader statutory scheme in which the legislative words are situated.

5.2 The release of the Palace Letters in the High Court's decision in *Hocking* saw a majority of the High Court do away with complex reasoning in relation to whether the legal title had vested in the Commonwealth or in Sir John in his personal capacity. A majority of the High Court instead looked to the underlying purpose of the Archives Act to interpret the term "*property*" as used in that Act.

5.3 In *Vincentia MC Pharmacy*, the Full Federal Court looked to the purpose of the statutory scheme in interpreting the meaning of "70 hours per week", finding that the purpose of the scheme favoured a broader interpretation. Having regard to the purpose of the statutory scheme, the Full Court construed "70 hours per week" as meaning "70 hours per *ordinary* week".

5.4 Part 7AA of the Migration Act - which deals with fast track applications for review by the Immigration Assessment Authority - also continued to receive attention in the statutory interpretation space (as well as more general grounds of review, as has been discussed elsewhere in this paper). In particular, a number of decisions considered the meaning of "new information" and "*submissions*", and the context in which the relevant provisions of Part 7AA would enable the Authority to seek new information and additional submissions from a referred applicant.

5.5 Elsewhere in statutory interpretation, following the landmark decision in *Love and Thoms* in March2020, and the question of the reach of the aliens power to deport and detain Australian Aboriginal non-citizens was raised again in *McHugh*. As in *Love and Thoms*, the Court in *McHugh* applied the tripartite test from *Mabo* to determine whether a write of haebus corpus should issue in relation to Mr McHugh.

5.6 In terms of upcoming decisions to look out for, *Minister for Immigration and Border Protection v EFX17* was heard before the High Court in December 2020.[36] *EFX17* raised questions

[35] [2020] FCAFC 202: Allsop CJ at [1]; Besanko J at [256]; White J at [260].

[36] On appeal from *EFX17 v Minister for Immigration and Border Protection* [2019] FCAFC 230.

of statutory interpretation and the meaning of the word "give" in s 501CA(3) of the Migration Act. Section 501CA(3) requires that the Minister "give" an individual whose visa has been cancelled pursuant to s 501(3A) a written notice that sets out the original decision and particulars of the relevant information. EFX17 argued that "give" should be construed to consider the recipient's capacity to understand the information given to them at the time, and effectively that to "give" an individual a document under s 501(3A) the Minister would also be required to ensure that the individual understood that document. EFX17 argued that this construction would be available having regard to the requirement for former visa-holders to make representations to the Minister in order to request revocation of that mandatory cancellation. The Minister argued that the provision should not be interested so as to distinguish between notification to persons with differing levels of education or literacy.[37]

5.7 In our last Year in Review, we suggested keeping an eye out for the High Court's decision in *CXXXVIII v Commonwealth of Australia,* which was to examine the validity of a notice to produce in circumstances where (it was argued that) the notice imposed obligations which with the appellant could not possibly comply. The parties in *CXXXVIII* reached agreement in August 2020 (which included agreeing to the notice to produce issued to the appellant being withdrawn) and the matter did not proceed to a hearing as a result.[38]

The Palace Letters released - whose letter is it anyway?

5.8 Perhaps one of the most high-profile decisions of the High Court in 2020 was the decision in *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19, which led to the release of the "Palace Letters": correspondence between the then-Governor-General Sir John Kerr and the Queen in 1974-1975, in the lead up to the Governor General's dismissal of then-Prime Minister Gough Whitlam. The correspondence was marked as being personal and confidential. The Official Secretary to the Governor-General retained that correspondence, and provided it to the predecessor to the National Archives of Australia on Kerr's retirement.

5.9 Section 31 of the *Archives Act 1983* (Cth) (**Archives Act**), which was enacted after Kerr's retirement, provides that Commonwealth records within the care of the National Archives must be made available for public access when within "open access period". "Commonwealth record" pursuant to s 3(1) is defined as including a "record that is the property of the Commonwealth or of a Commonwealth institution". In turn, "commonwealth institution" is defined to include "the official establishment of the Governor-General".

5.10 In the Full Federal Court, Chief Justice Allsop and Justice Robertson decided against the release of the letters on the basis that the letters were "private or personal records of the Governor-General".[39] The Full Federal Court approached the issue on the basis that the release of the letters would ultimately turn on whether the legal title to the letters vested in the Commonwealth as a body politic (making them a Commonwealth records) or in Sir John as an individual (making them personal) at the time of the creation or receipt by him.

5.11 The High Court took a different approach. The majority (Kiefel CJ, Bell, Gageler and Keane JJ, with Gordon J agreeing) considered that the question for the Court was whether the word "*property*" in the Archives Act should be taken to refer to rights corresponding to ownership or possession as at common law, or whether the word has a special meaning within the Archives Act connoting the

[37] See: Appellant's submissions and outline of oral argument at https://www.hcourt.gov.au/cases/case_b43-2020.

[38] CXXXVIII v Commonwealth of Australia & Ors [2020] HCATrans 102.

[39] [2019] FCAFC 12, with Flick J in dissent.

existence of a "*legally endorsed concentration of power to control custody over the relevant Commonwealth record*."

5.12 At [94], a majority of the High Court found that, for the purposes of the Archives Act, a record was the "property" of the Commonwealth or a Commonwealth institution if that institution or the Commonwealth enjoyed a "legally endorsed concentration of power" to control the physical custody of the record. This meant that the question of legal title to the letters at common law was irrelevant to whether the letters were the "property" of a Commonwealth institution under the Archives Act. The majority therefore held that, given the office of the Governor-General had a legally endorsed concentration of power to control the custody of the documents when they were deposited with the National Archives, the letters were Commonwealth records that were required to be made available for public access in accordance with the "open access" period.

5.13 Conversely to the majority's purposive approach, Edelman J, although coming to the same conclusion as the majority, held that the word "property", not being defined in the Archives Act, should be construed according to its ordinary legal meaning, namely a collection of rights, and most fundamentally a right to exclude others from possession of the object.

What is "new information"?

5.14 The High Court also considered the meaning of the term "new information" in *Minister for Immigration and Border Protection v CED16* [2020] HCA 24. *CED16* is the latest in a series of cases which have come before the High Court in relation to the decision-making and review process prescribed under Part 7AA of the Migration Act for fast track reviewable decisions of the Immigration Assessment Authority.[40]

5.15 While *CED16* had a complex and protracted litigation history, the question for the High Court ultimately centred on what Edelman J described as being the "*short, and mundane issue of the meaning of two words, 'new information*'".[41] Specifically, the Court had to determine whether the certificate purportedly issued pursuant to s 473GB of the Migration Act was "new information" which the IAA was forbidden from considering.[42]

5.16 In accordance with past High Court decisions including *Plaintiff M174/2016* (2018) 264 CLR 217, the High Court held that the words "new information" in Part 7AA of the Migration Act means information which relates to material or documentation of an evidentiary nature. The High Court held that although a certificate under s 473GB is an instrument which (if valid) enlivens statutory consequences in relation to the use and disclosure of the information to which the certificate relates, a certificate is not in and of itself a document which communicates information of an evidentiary nature. The High Court therefore held that the certificate was not "new information" and that the IAA had therefore not fallen into jurisdictional error in its decision.

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[40] See also: *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 225-232 [13]-[38]; *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at 1094-1096 [3]-[17]; 373 ALR 196 at 198-201; *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 144-145 [2]-[8]; 375 ALR 47 at 48-50.

[41] [2020] HCA 3 at [28].

[42] Section 473GB of the Migration Act proscribes a process whereby the Secretary of the Minister's Department may identify material provided from the Minister's Department to the Authority upon referral of a fast track reviewable decision that is considered to be contrary to the public interest. A s 473GB certificate identifies particular documents or information to the Authority which the Secretary considers should not be disclosed. The Authority can still disclose the information to which the s 473GB certificate relates to the relevant applicant, but must make a non-publication direction limiting the disclosure of the information.

5.17 The interpretation of the term "new information" in Part 7AA also arose in *DUA16* and *ABT17*, considered earlier in this paper. In *DUA16*, a majority of the High Court was satisfied that "new information" could include additional written submissions requested by the IAA, sought to clarify a matter. In *ABT17*, a majority of the High Court held that a visa applicant could be required to attend a video-link or in person interview for the purposes of the IAA delegate obtaining "new information".

Haebus corpus, Australian Aboriginal non-citizens and the "aliens" power in 2020: *Love, Thoms* and *McHugh*

5.18 One of the other high profile High Court decisions last year was the decision in *Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3 (***Love and Thoms***). As discussed in our last Year in Review, *Love and Thoms* saw a majority of the High Court hold that an Aboriginal Australian who is not a citizen is not an alien within the meaning of s 51(xix) of the Constitution, and so is beyond the reach of the aliens head of power. The majority agreed with Mr Love and Mr Thoms, who argued that s 189 of the Migration Act could not apply to them as "aliens" even though they were not Australian citizens in circumstances where their recognised Aboriginality (by descent, self-identification and community acceptance) established a special connection to Australia. They argued that because of this special connection, the legislative power to treat an Aboriginal Australian as an alien must be read down and construed accordingly.[43] The decision in *Love* was perhaps the most significant High Court decision in relation to Aboriginal Australians since the decision in *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1, and adopted and applied the tripartite test applied in *Mabo* to find that non-citizen Aboriginal Australians could not be deported.

5.19 Later in 2020, Mr McHugh raised a similar argument before the Full Court of the Federal Court in *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 223. Mr McHugh was born in the Cook Islands. He never knew his biological father and was abandoned by his biological mother shortly after his birth. He arrived in Australia when he was seven years of age. He self-identifies as being an Aboriginal Australian and the evidence before the Court was that he has been recognised as an Aboriginal Australian by the Ardyaloon Community of the Bardi Jawi people. Mr McHugh does not know whether he is of Aboriginal descent, having never known his biological parents.

5.20 Like the appellants in *Love and Thoms,* Mr McHugh was also subject to removal from Australia by virtue of s 501 of the Migration Act. He sought that the Federal Court issue a writ of *habeus corpus*, to determine whether his imprisonment and detention was lawful. Specifically, Mr McHugh argued that his detention pursuant to s 189 of the Migration Act could not be lawful because the provision could not be interpreted as authorising the detention of an Aboriginal Australian.

5.21 The Full Federal Court considered the whether Mr McHugh's detention pursuant to s 189 was lawful, in circumstances where he claimed to be an Aboriginal Australian non-citizen. Applying the High Court's decision in *Love and Thoms*, the Full Court noted that "*[t]he power in s 189 is only for the purpose of, relevantly here, deportation. The lawful status of the non-citizen generally rested on the holding of a visa; now, after Love and Thoms, it can also rest on the non-alien status by being an Aboriginal Australian. No power of deportation exists over a citizen or a non-citizen, but non-alien, Aboriginal Australian*".[44] The Full Court held that the power in s 189 of the Migration Act to detain unlawful non-citizens, read in the context of the decision of *Love* and construed so as not

[43] [2020] HCA 3: Nettle J at [285]; Gordon J at [390], Edelman J at [398].

[44] Allsop CJ at [51].

to exceed legislative power pursuant to s 15A of the *Acts Interpretation Act*, could not be interpreted to authorise or permit detention of a non-citizen Aboriginal Australian. Accordingly, in order to exercise the power in s 189, an officer would need to first have a reasonable suspicion that the person being detained was not an Aboriginal Australian.[45]

5.22 In *Vincentia MC Pharmacy Pty Ltd v Australian Community Pharmacy Authority* [2020] FCAFC 163, the Full Court of the Federal Court applied a purposive approach in adopting a broader meaning of "70 hours per week" in the context of the full 52 weeks per year, finding that a pharmacy would still be considered to be open to 70 hours per week for the purposes even where there were some weeks that it would have reduced opening hours due to public holidays.

5.23 Vincentia MC Pharmacy was granted approval to supply pharmaceutical benefits from premises at a medical centre. The second respondent, Choice Pharmacy, is a pharmacy located 150m from Vincentia MC Pharmacy. Choice Pharmacy sought judicial review of the approval on the basis that the Authority had erred in finding that Vincentia MC Pharmacy was located in a "large medical centre" as defined by s 5(1) of the *National Health (Australian Community Pharmacy Authority Rules) Determination 2011 (Cth)* as amended by *National Health (Australian Community Pharmacy Authority Rules) Amendment Determination 2015 (No.1)* (**Pharmacy Rules**). A large medical centre pursuant to the Pharmacy Rules is relevantly one which "operates for at least 70 hours per week" and "has one or more prescribing medical practitioners at the centre for at least 70 hours each week."

5.24 Choice Pharmacy contended that "70 hours each week" for the purposes of s 5(1) of the Pharmacy Rules required that a "large medical centre" to be open and operating for 70 hours for each consecutive period of seven days during a 52 week period, including any week on which a public holiday falls. At first instance, that submission was accepted.

5.25 Vincentia MC Pharmacy appealed to the Full Federal Court. On appeal, the Full Court held that there were two possible meanings of "at least 70 hours each week" - the narrow meaning accepted at first instance, or a broad meaning, being that a large medical centre must operate for at least 70 hours each *ordinary week*, being a week upon which no public holiday falls.

5.26 At [54], Perry and Stewart JJ held that where more than one meaning is available, s 15AA of the *Acts Interpretation Act 1901* (Cth) required the court to give the words the meaning that would best achieve the objects of the relevant legislation. Their Honours decided that the purpose of the Pharmacy Rules is to address specific community needs for medicines which are not being met in circumstances where nearby pharmacies are not open for extended hours. In this context their Honours gave the words of s 5(1) of the Pharmacy Rules the broad meaning - being any ordinary week, rather than every week - and held that Vincentia Pharmacy was accordingly a "large medical centre".

6. Bias

6.1 While there were no great disruptions to existing lines of authority on bias, it continued in 2020 to be, as usual, a topic attracting many interesting facts and arguments. This included the accidental

[45] Allsop CJ at [52]. While it was not contested that the *legal* burden is on the Minister as the detainee to establish the lawfulness of the detention, Besanko J considered that the *evidential* burden was on the person detained to contest the lawfulness of their detention, which in this case, would still require Mr McHugh to discharge that burden by showing that he was an Aboriginal Australian (at [90]). Mortimer J, referring to the decisions in *Ruddock v Taylor* [2005] HCA 48 and *Burgess v Commonwealth of Australia* [2020] FCA 670 considered that there was a requirement for the offices to hold a reasonable suspicion throughout the detainee's detention (at [298]-[300]). Either way, the question of lawfulness of detention was considered by their Honours to turn on the detainee's Aboriginality (having regard to the tripartite test).

provision of prejudicial material, arguments advanced based on a judge's previous history of decision-making, private enquiries made by a primary judge without the knowledge of the parties, and comments made by jury members.

6.2 The Full Court of the Federal Court (Logan, Markovic and Anastassiou JJ) considered bias in the context of materiality again in *AAL19 v Minister for Home Affairs* [2020] FCAFC 114. In *AAL19* the Full Court confirmed that *CNY17* is authority for the proposition that *'in given circumstances, even though conduct has resulted in the immaterial being furnished to an administrative decision-maker, it can nonetheless ground a reasonable apprehension of bias'.*

6.3 AAL19's application for a safe haven enterprise visa was refused by a delegate of the Minister, and was subsequently referred to the Immigration Assessment Authority pursuant to Part 7AA of the Migration Act. AAL19's safe haven enterprise visa (**SHEV**) application, as before the delegate at first instance, was accompanied by a statutory declaration, in which he described outstanding charges against him for sexual assault and false imprisonment.

6.4 Part 7AA requires the Secretary of the Department to provide all material they consider to be relevant to the referred decision Authority upon referral. Upon referral of AAL19's SHEV application, the Authority was provided with an email that stated that the Minister's Department had been advised by Victoria Police that AAL19 had been arrested and charged with one count of sexual assault, and one count of false imprisonment. At the time that the email was provided to the Authority, the charges remained outstanding. It was common ground between the parties on appeal that this email was provided by way of administrative error, and was not relevant to the issue for determination by the Authority, being whether AAL19 was a person to whom protection obligations were owed for the purposes of his visa application.

6.5 Nevertheless, at the time of the Authority's review, AAL19 had already made submissions which were before the Authority in relation to the outstanding charges.

6.6 AAL19 relied on *CNY17* to argue that the information contained in the email was so prejudicial that a reasonable apprehension of bias had been made out, notwithstanding that the Authority did not appear to rely on the information in its decision. The Full Court rejected AAL19's ground of appeal in relation to bias. While the Court agreed that *CNY17* is authority for the general proposition put by AAL19, the Court distinguished the facts of *CNY17* from the facts in *AAL19* on the basis that it was AAL19 himself (or rather, his representative on his behalf) that had brought the existence of the outstanding charges to the Department's attention.

6.7 In *CMU16 v Minister for Immigration and Border Protection* [2020] FCAFC 104, CMU16 sought to rely upon evidence of the primary judge's previous decisions to support the grounds of actual and/or apprehended bias. The Full Court dismissed CMU16's application, holding that the Appellant had not established the *'strong grounds necessary to prove a case of actual bias',* and that a reasonable apprehension of bias by the trial judge was not made out on the facts. The Full Court also did not consider that the primary judge's previous decisions were relevant on a tendency or coincidence basis.

6.8 The Full Court observed that evidence of conduct which establishes the character, reputation, or conduct of the judge in other cases can be relevant to an apprehended bias case (although the evaluation will generally be limited to evidence of the conduct of the judge in the case in question), but that:

(a) tendency evidence can play no role in establishing apprehended bias because it is evidence by which it is sought to prove that the person in question had a particular state of

mind or behaved in a particular way in the present case, because of their character, reputation, conduct that caused them to have an actual bias in the situation in question; and

(b) coincidence evidence can play no role in establishing apprehended bias because it is evidence by which it is sought to prove that the person in question had been caused by similarities in previous events or circumstances and the present events or circumstances to have an actual bias in the situation in question.

6.9 CMU16 subsequently made an application for special leave to appeal to the High Court, which was refused on the basis of insufficient prospects of success.

6.10 In another interesting bias decision, the Court of Appeal of the Supreme Court of Western Australian in *KWLD v State of Western Australia* [2020] WASCA 94 held that apprehended bias was made out after judge made private factual enquiries about matters relevant to the exercise of the court's discretion to grant or refuse bail in the absence of the parties, and without knowledge. KWLD sought a variation to the conditions of their bail. Before deciding the variation, the judge made a number of private factual inquiries (with a community corrections officer, court staff and the manager of a dentistry practice that the Appellant had attended) regarding the Appellant's performance on bail. The enquiries with the dentistry practice were not disclosed to the parties at the hearing. Having regard to these private enquiries, the Court of Appeal was satisfied that a fair-minded lay observer might reasonably have apprehended that the primary judge might not bring an impartial and unprejudiced mind to the exercise of his discretion to grant or refuse bail.

6.11 In *Higgins v R* [2020] NSWCCA 109, the NSW Court of Criminal Appeal was required to consider whether derogatory and racist descriptions of the accused, made by jurors empanelled in Ms Higgins' trial, were not necessarily inconsistent with the task that a jury is required to perform. The Court was ultimately not satisfied that actual bias was established on the evidence or that (applying *Johnson v Johnson* (2000) 201 CLR 488 and *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337) the material before the Court established that jurors individually or collectively might have exhibited bias against the Appellant during her trial.

6.12 In obiter, the Court of Appeal noted the unique context in which jury deliberation occurred and commented that 'an unambiguous and audible expression of an opinion [regarding the guilt of an accused] some two or three weeks of a criminal trial is not only not evidence of bias or prejudice but is also not inconsistent with the duty that the jury is required to perform' and that 'given the "human condition" and our "accumulated predispositions and prejudices"' it was not surprising that what had emerged on appeal had taken place in the jury room.

7. Information decisions

7.1 Unsurprisingly, the development of information law has continued to affect administrative decision-making, particularly in relation to access to, and protection of, information.

Privacy decisions

7.2 *Flight Centre Travel Group (Privacy)* [2020] AICmr 57 (25 November 2020) is a salient reminder of the need to comply with the Australian Privacy Principles (**APPs**) contained in the Privacy Act, and to take appropriate steps to manage personal information and minimise privacy risks, for example, by undertaking privacy impact assessments.

7.3 In 2017, Flight Centre Travel Group Pty Ltd (**Flight Centre**) inadvertently disclosed customer information to staff at a "design jam" event attended by travel agents. The personal information included the details of customers' credit cards, passport numbers, usernames, passwords and dates of birth. The Information Commissioner found that Flight Centre had interfered with the privacy of about 6,918 individuals by:

(a) failing to take steps to ensure compliance with the APPs, including by managing privacy risks by undertaking a privacy impact assessment

(b) disclosing individuals' personal information to third parties without consent; and

(c) failing to take steps to protect individuals' personal information from misuse and loss and from unauthorised access, modification or disclosure.

7.4 However, the Information Commissioner did not require the Flight Centre to take any specified steps and also considered that there was no evidence before the Commissioner to support a declaration that the Flight Centre redress any loss or damage suffered, or that any individuals would be entitled to a specified amount by way of compensation. In reaching this conclusion, the Information Commissioner considered it relevant that:

(a) the Flight Centre had taken action upon becoming aware of the data breach (including restricting access to personal information, investigating the incident, and implementing changes to its practices and procedures);

(b) the Flight Centre had offered services to individuals to mitigate their risk of harm such as identity theft and credit monitoring coverage. Flight Centre had also offered to pay the reasonable costs of passport replacement for customers who elected to do so;

(c) the breach itself occurred prior to the introduction of the mandatory reporting requirements of the Notifiable Data Breaches Scheme in Part IIIC of the Act;

(d) monitoring was put in place to detect misuse of the information, including credit card information;

(e) indicated that it would no longer be participating in similar events in the future; and

(f) had had its business significantly adversely impacted by COVID-19.

Recent decisions relating to information access

7.5 In *Mullen v Aged Care Quality and Safety Commissioner* [2020] FCAFC 78, the Full Court of the Federal Court considered whether access to documents requested under the *Freedom of Information Act 1982* (Cth) (**FOI Act**) were exempt from disclosure. In doing so, the Court considered whether documents the Administrative Appeals Tribunal had deemed to be exempt from the statutory process could be required to be disclosed pursuant to section 86-9 of the *Aged Care Act 1997* (Cth).

7.6 In dismissing the appeal the Court held that section 86-9 of the Aged Care Act does not describe a category of information that may be disclosed on request, even if it would otherwise be protected information. Unless and until the power conferred by section 86-9 is exercised, the disclosure of protected information contemplated by section 86-9 is not authorised. That is, unless and until the power has been exercised in respect of protected information of the kind listed in section 96-9, the information remains exempt information for the purposes of the FOI Act (at [22], [25]).

8. Challenges to public health directions

8.1 With an unprecedented pandemic and the extraordinary events that came with it, it made sense that 2020 would also see some unprecedented and extraordinary measures designed to stop the spread of the pandemic, and further, that there would be challenges to those measures.

8.2 Our analysis in this paper focuses on challenges in Australia, although we note that there have been interesting challenges to the validity of restrictions in other countries as well. This includes New Zealand (where the New Zealand High Court granted declaratory orders after finding that there was an "*unlawful limitation of certain rights and freedoms*" after lockdown measures were imposed for a nine days after being announced by the New Zealand Prime Minister but before being ordered by the Director-General of Health),[46] and the United States (where U.S. District Court Judge William S. Stickman IV struck down key aspects of Pennsylvania's COVID-19 emergency order as unconstitutional. However, the Third Circuit Court of Appeals stayed this decision on appeal).[47]

8.3 In *Gerner v Victoria* [2020] HCA 48, Mr Gerner sought to challenge the validity of the lockdown restrictions imposed on the Greater Melbourne area on the basis that the Constitution guarantees an implied freedom of movement. Mr Gerner - a small business owner from Melbourne, whose revenue was significantly impacted by lockdown restrictions - commenced proceedings in the High Court, seeking a declaration that the lockdown directions imposed during the Victoria state of emergency were invalid. The issue for the Court was whether the Constitution provided an implied freedom for the people in and of Australia to move within the State, in which they resided, for the purpose of pursuing personal, recreational, commercial and political endeavour, free from arbitrary restriction of movement. The High Court unanimously did not consider that such an implied freedom existed and found against Mr Gerner.

8.4 Mr Gerner argued that the directions restricting movement made under the *Public Health and Wellbeing Act 2008* (Vic) (**PHW** Act) were invalid as an infringement of the guarantee of freedom of movement and represented an impermissible burden upon the freedom of movement. Mr Gerner argued that the impact of a qualified freedom for the people in and of Australia to move within the state where they reside should be assessed in accordance with the Lange test. The Lange test refers to the decision of *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and the test developed by the High Court in relation to the implied freedom of political communication.

8.5 Victoria rejected the notion of an implied freedom and contended that there was simply "*no foothold*" in the text or structure of the Constitution to support a general implied freedom of movement.

8.6 In a unanimous verdict (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ), the High Court rejected Mr Gerner's argument that there was an implied freedom of movement, for three primary reasons:

(a) Such an implied freedom does not arise from the way that the Constitution created a unified country out of several colonies and the text of the Constitution does not support the implication of such an implied freedom. For example, the High Court noted that section 106 of the Constitution expressly preserved the concurrent legislative power of the States with respect to quarantine;

[46] *Borrowdale v Director-General of Health* [2020] NZHC 2090.

[47] *County of Butler v Wolf* Civil Action No. 2:20-cv-677 (W.D. Pa. Sep. 14, 2020).

(b) The implied limitation on legislative power recognised in *Lange* protects political communication, not communication in general. Mr Gerner had not established that the limitations placed on movement in Victoria restricted political communication. However, the High Court acknowledged that a statute said to limit freedom of movement so as to burden political communication may be invalid If it amounts to an impermissible burden on political communication; and

(c) There is no basis for an implied freedom of intrastate movement in section 92 of the Constitution, as previously rejected in *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556. The Court commented that the inclusion of section 92 in the Constitution was directed towards preventing restrictions of the free flow of goods across State borders, rather than interfering with the internal management of the States. The Court also rejected an interpretation of section 92 which treated the phrase "among the States" as meaning "throughout the Commonwealth", finding that this had been rejected by the framers of the Constitution and that it would be a "distinctly unsound approach" to interpret the Constitution in such a way.

8.7 It is evident from the High Court's decision that the Court was unwilling to create or identify a new implied constitutional freedom in these circumstances. Accordingly, we will need to wait to see whether the High Court (and/or other courts) are willing to accommodate an argument in favour of an implied freedom of movement in the future. In this regard, we note that the ban on international travel is presently the subject of a legal challenge, brought by LibertyWorks in the Federal Court.

8.8 Loielo v Giles [2020] VSC 722

8.9 Ms Loielo (the plaintiff) owned and operated a restaurant in Victoria. Like Mr Gerner in the High Court, she argued that the introduction of the lockdown restrictions in Melbourne had significantly impacted her revenue, and accordingly sought to challenge the validity of those restrictions.

8.10 Specifically, Ms Loielo challenged the 9:00pm to 5:00am curfew imposed on 'greater Melbourne'. The curfew was imposed as part of the *Stay At Home Directions (Restricted Areas) (No 15)* direction, which was made by the Chief Health Officer (the defendant) pursuant to s 200(1) of the PHW Act on 13 September 2020. The 9:00pm to 5:00am curfew was, at the time it was made, an easing of the previous curfew (being 8:00pm to 5:00am) which was in effect from 5 August 2020 to 12 September 2020. On 27 September 2020 - the day before the hearing was due to commence - the Premier of Victoria, Premier Andrews announced the end or revocation of the curfew with effect from the following day. Ms Loielo's challenge was accordingly limited to the curfew as it was imposed between 13 September 2020 and 27 September 2020.

8.11 Ms Loielo argued that the PHW Act did not authorise the imposition of a curfew, the Chief Health Officer had acted at the direction or behest of the Premier, that the decision to impose the curfew was unreasonable, irrational or illogical and that the directions breached the Ms Loielo's rights to liberty and freedom of movement in an unreasonable and disproportionate way.

8.12 The challenge to the curfew decision was relevantly based on the traditional grounds for judicial review of administrative decisions, relevantly the grounds of unreasonableness and irrationality.

8.13 Ms Giles also challenged the curfew on the basis that:

(a) under s 111(a) of the Public Health and Wellbeing Act, the spread of infectious diseases is to be managed in a fashion which minimises restrictions on the rights of any person; and

(b) pursuant to s 9, any decision in respect of a health emergency must be proportionate to the level of public risk, and not arbitrary.

8.14 For the following reasons, Ginnane J found that the curfew decision was not unreasonable, illogical, or in breach of the Public Health and Wellbeing Act:

(a) the decision fell within a range of possible lawful decisions;

(b) the decision was based on the defendant's specialised knowledge and a wealth of expert information;

(c) the defendant did take into account the social and psychological wellbeing of the community;

(d) the plaintiff failed to demonstrate that the decision went beyond the purpose of the Public Health and Wellbeing Act; and

(e) a logical or rational person with the same information as the defendant may reasonably have made the same decision to impose a curfew.

8.15 The human rights element of the litigation centred around whether the plaintiff's right to freedom of movement under s 12 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) was breached.

8.16 Ginnane J held that the right to liberty in s 21 was not engaged. As such, the issues which remained were:

(a) whether the curfew was proportionate and reasonably limited, in accordance with s 7(2) of the Charter; and

(b) whether Associate Professor Giles adequately considered the human rights implications of the curfew before imposing it (s 38(1)).

8.17 In relation to the latter question, Ginnane J held that, given that the defendant received specific legal advice as to the human rights impacts of any proposed curfew, and that Ms Giles' evidence was that she had considered this advice, it could not be said that the defendant had failed to adequately consider the human rights impacts of the decision.

8.18 Ginnane J held that, notwithstanding that the protection of human rights is "at least" as important during times of emergency as otherwise,[48] the curfew decision did not involve an imposition on human rights which breached s 7(2) of the Charter. Ginnane made this decision based on the following factors:

(a) the human right of freedom of movement was significantly burdened and limited by the curfew;

(b) given the time sensitivity attending the decision to impose a curfew, the decision was rational and based on the defendant's experience as an infectious diseases physician;

[48] *Loielo v Giles* [2020] VSC 722, 82 [244]

(c) given the circumstances which existed at the time, pursuant to s 7(2)(e) there were not other reasonably available means of reducing infections which would have resulted in a smaller burden on the freedom of movement.

8.19 In the decision in *Palmer v State of Western Australia (No 4)* [2020] FCA 1221, the Federal Court assessed the risk that COVID-19 would spread into the Western Australian population if the border restrictions were removed. The Federal Court's findings were only concerned with the health risks posed by COVID-19 on the Western Australian community. The Federal Court found that the border closures imposed were the most effective way of preventing the importation and subsequent spread of COVID-19 in Western Australia. In reaching this conclusion, Rangiah J found that other containment measures, such as mandatory mask wearing, PCR testing, hotspot declarations and exit and entry screening would be less effective than the border restrictions in preventing the importation of COVID-19.

8.20 Mr Palmer's separate constitutional challenge to the validity of the WA border closure also did not succeed. At the hearing before the High Court, Mr Palmer referred the High Court to the findings of the Federal Court to support a submission that where the risk to Western Australia from a particular state is low, the border restrictions are not within the so-called precautionary principle or go further than the precautionary principle. Accordingly, Mr Palmer submitted that the Court would need to determine the purpose of the directions and if on its proper construction, the purpose was directed to dealing with the COVID pandemic then the reasonable necessity test would apply.

8.21 The High Court dismissed the proceedings on 6 November 2020, finding that the *Emergency Management Act 2005* (WA) and the *Quarantine (Closing the Border) Directions* (WA) complied with the relevant constitutional limitations, and accordingly, the exercise of power pursuant to the relevant provisions in the Emergency Management Act did not raise a constitutional question.

8.22 The New South Wales Court of Appeal's decision in *Padriac Gibson (on behalf of the Dungay family) v Commissioner of Police (NSW Police Force)* [2020] NSWCA 160 concerned a challenge to an order prohibiting a public gathering in July 2020. In deciding the challenge to that order, the Court was required to examine the public health considerations associated with public gatherings at the time.

8.23 Mr Gibson challenged an order made by the primary judge pursuant to s 25(1) of the *Summary Offences Act 1988* (NSW) (**Summary Offences Act**) on application by the respondent Commissioner to prohibit a proposed public assembly in the Sydney CBD on 28 July 2020. The stated purpose of the proposed assembly was "*[t]o protect against Aboriginal deaths in custody and demand justice for David Dungay Jnr*".

8.24 Mr Gibson's challenge to the primary judge's orders prohibiting the public assembly involved issues of statutory construction in relation to the Court's jurisdiction as well as judicial review grounds attacking the lawfulness of the Commissioner's exercise of his power to make the application prohibiting the protest.

8.25 In relation to jurisdiction, section 25(2) of the Summary Offences Act sets out a process of conferral and consideration by the Commissioner of Police when making an application to prohibit a proposed public assembly. Mr Gibson argued that the proper process for making an application to prohibit a public assembly in the Summary Offences Act had not been followed, and that abiding by this process was a necessary pre-condition to the lawful exercise of any jurisdiction by the NSW Supreme Court in determining the resolution of a dispute between the Commissioner and another entity in relation to an application to prohibit a public assembly.

8.26 In relation to other review grounds, Mr Gibson also argued that there was no genuine consideration by the Commissioner's delegate of the matters put by the applicant arguing against the making of an application by the Commissioner to prohibit the proposed public assembly, and that the decision-making process had been tainted by apprehended bias.

8.27 The Court of Appeal considered that it was only necessary to determine the jurisdictional issue. The Court concluded that, as a matter of statutory construction, "*the legislature has clearly evinced an intention that the Court will be the ultimate decision maker as to whether to prohibit or authorise a public assembly which is either opposed or not "not opposed" by the Commissioner*" and that "*it is unlikely that the legislature intended to deprive the Court of that jurisdiction because of the non-fulfilment of a procedural step, especially in circumstances where the proposed assembly is,* ex hypothesi*, contentious*".[49]

8.28 In circumstances where the Court of Appeal concluded that compliance with the procedure in s 25(2) was not a precondition to the lawful exercise of the Court's jurisdiction to make an order under s 25(1), the Court of Appeal did not consider it necessary to consider the applicant's other arguments in relation to genuine consideration and apprehended bias. The Court did note, however, that there may be other remedies available for a protest organiser where the Commissioner had failed to comply with the procedure in s 25(2), and noted that a failure to give proper consideration to issues, or to confer with protest organisers and take into account relevant matters, would be relevant to the making of submissions in relation to the exercise of the Court's discretion to prohibit a public assembly. The Court of Appeal noted that it would be open to a Court to stay, or refuse, and application for prohibition of a public assembly if it was satisfied as to non-compliance with s 25(2), or to make an adverse order for costs against the Commissioner even if the public assembly was ultimately prohibited.

9. The decisions dealing with challenges to public health orders and directions demonstrate a strong emphasis on the context of the making of those orders. However, courts have also emphasised the need for decision-makers to maintain transparency and clarity in their decision-making, even (and especially) in these extraordinary times. We observe that while the public health orders and directions ultimately survived the various legal challenges, a consistent theme emerging from the court's decisions was that decision-makers must be careful to exercise their powers properly and carefully, and that the extraordinary circumstances should not adversely impact on ongoing compliance with the usual principles of robust administrative decision-making.

10. Things to watch in 2021 and beyond

10.1 Over the past year there have been a number of developments that may have significant impacts on administrative law:

(a) Materiality is likely to continue to be a dominating theme in judicial review. The High Court has given special leave to appeal in *MZAPC*. The Court will be called upon to clarify some divergent views in the Federal Court regarding the role of materiality.

(b) In 2021, we will see two incoming appointments onto the High Court. Justice Nettle retired in November 2020 and Justice Bell will be retiring at the end of this month. Replacing those vacancies are Justice Simon Steward and Justice Jacqueline Gleeson, respectively. Both Justice Steward and Justice Gleeson were appointed from the Federal Court.

[49] *Gibson v Commissioner of Police* [2020] NSWCA 160 at [59].

(c) In 2020, the Australian Government commenced its review of the *Privacy Act 1988* (Cth) (**Privacy Act**), to ensure to ensure privacy settings empower consumers, protect their data and best serve the Australian economy. The Attorney General's Department is currently considering submissions received in reply to a number of issues, including (for example):

(i) updating the definition of 'personal information' to capture technical data and other online identifiers

(ii) strengthening existing notification requirements

(iii) strengthening consent requirements and pro-consumer defaults

(iv) introducing a direct right of action to enforce privacy obligations under the Privacy Act

(v) whether a statutory tort for serious invasions of privacy should be introduced; and

(vi) whether the Privacy Act should include a 'right to erasure'.[50]

A discussion paper is scheduled to be released in 2021 and there will be an opportunity to provide feedback.[51]

[50] Attorney-General's Department *Review of the Privacy Act 1988 (Cth) - Issues paper* (30 October 2020) <https://www.ag.gov.au/integrity/publications/review-privacy-act-1988-cth-issues-paper>

[51] Attorney-General's Department *Review of the Privacy Act 1988* <https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988>