HIGH COURT BULLETIN

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[2021] HCAB 9 (12 November 2021)

A record of recent High Court of Australia cases: decided, reserved for judgment, awaiting hearing in the Court's original jurisdiction, granted special leave to appeal, refused special leave to appeal and not proceeding or vacated

1: SUMMARY OF NEW ENTRIES

2: Cases Handed Down

Case	Title
Park v The Queen	Criminal Law
The Queen v Rolfe	Criminal Law
Hofer v The Queen	Criminal Practice
Hamilton (a pseudonym) v The Queen	Criminal Practice
Addy v Commissioner of Taxation	Income Tax
Sunland Group Limited v Gold Coast City Council	Local Government

3: Cases Reserved

Case	Title

Wells Fargo Trust Company, National Association (As Owner Trustee) & Anor v VB Leaseco Pty Ltd (Administrators Appointed) & Ors	Aviation
Orreal v The Queen	Criminal Law
NSW Commissioner of Police v Cottle & Anor	Industrial Law
Commissioner of Taxation v Carter & Ors	Taxation
Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited	Torts

4: Original Jurisdiction

Case	**Title**
Delil Alexander (by his litigation guardian Berivan Alexander) v Minister for Home Affairs & Anor	Constitutional Law

5: Section 40 Removal

6: Special Leave Granted

Case	**Title**
Hill v Zuda Pty Ltd as Trustee for The Holly Superannuation Fund & Ors	Superannuation

7: Cases Not Proceeding or Vacated

8: Special Leave Refused

2: Cases Handed Down

The following cases were handed down by the High Court of Australia during the November 2021 sittings.

Criminal Law

Park v The Queen
S61/2021: [2021] HCA 37

Judgment delivered: 10 November 2021

Coram: Kiefel CJ, Gageler, Keane, Edelman and Gleeson JJ

Catchwords:

> Criminal law – Sentence – Plea of guilty – Where appellant sentenced in District Court of New South Wales for multiple offences including taking a conveyance without consent of owner contrary to s 154A(1)(a) of *Crimes Act 1900* (NSW) ("offence") – Where maximum penalty for offence five years' imprisonment – Where offence dealt with as a "related offence" under s 165 of *Criminal Procedure Act 1986* (NSW) – Where sentencing court subject to jurisdictional limit of two years' imprisonment for offence – Where s 22(1) of *Crimes (Sentencing Procedure) Act 1999* (NSW) provided sentencing court may impose lesser penalty than it would otherwise have imposed but for plea of guilty – Where sentencing judge awarded 25% discount for guilty plea for offence – Where indicative sentence of two years and eight months' imprisonment exceeded jurisdictional limit – Whether sentence that court "would otherwise have imposed" can exceed jurisdictional limit.
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> Words and phrases – "aggregate sentence", "appropriate sentence", "discount to the sentence", "guilty plea", "indicative sentence", "jurisdictional limit", "lesser penalty than it would otherwise have imposed", "maximum penalty", "plea of guilty", "sentence in excess of the jurisdictional limit".
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> *Crimes (Sentencing Procedure) Act 1999* (NSW) – ss 21A, 22(1), 53A.
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> *Criminal Procedure Act 1986* (NSW) – ss 168(3), 268(1A).

Appealed from NSW (CCA): [2020] NSWCCA 90; (2020) 282 A Crim R 551

Held: Appeal dismissed.

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The Queen v Rolfe
D2/2021: [2021] HCA 38

Judgment delivered: 10 November 2021

Coram: Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson CJ

Catchwords:

Criminal law – Defences – Where respondent member of Northern Territory Police Force – Where respondent alleged to have fatally shot deceased after being deployed to arrest – Where respondent charged with murder and alternative offences under *Criminal Code* (NT) – Where s 148B of *Police Administration Act 1978* (NT) ("Act") provides person "not civilly or criminally liable" for act done or omitted to be done "in good faith" in actual or purported "exercise of a power or performance of a function under" Act – Where s 5(2) of Act lists "core functions" of Police Force – Where s 25 of Act provides member of Police Force "shall perform the duties and obligations and have the powers and privileges as are, by any law in force in the Territory, conferred or imposed on" member – Whether "function" under s 148B of Act includes core functions listed in s 5(2) of Act.

Criminal practice – Question of law arising before trial – Where trial judge referred four questions to Full Court of Supreme Court of Northern Territory of Australia – Where questions referred on basis of "assumed facts" – Where "assumed facts" not agreed and likely to be disputed at trial – Where Full Court reformulated third question – Whether third question hypothetical – Whether Full Court erred in reformulating third question.

Words and phrases – "assumed facts", "common law powers", "defence", "exercise of a power or performance of a function", "fragmenting the ordinary course of criminal proceedings", "hypothetical", "powers and functions of a police officer", "protection from liability".

Interpretation Act 1978 (NT) – s 55.

Police Administration Act 1978 (NT) – ss 5(2), 25, 124, 148B.

Appealed from NTSC (FC): [2021] NTSCFC 6

Held: Special leave to appeal granted; appeal allowed.

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Criminal Practice

Hamilton (a pseudonym) v The Queen
S24/2021: [2021] HCA 33

Judgment delivered: 3 November 2021

Coram: Kiefel CJ, Keane, Edelman, Steward and Gleeson JJ

Catchwords:

Criminal practice – Trial – Directions to jury – Where appellant charged with ten counts of aggravated indecent assault against three of his children – Where appellant did not seek that counts be tried separately – Where appellant alleged complainants' evidence was inconsistent and had been concocted – Where appellant did not seek anti-tendency direction and no anti-tendency direction given – Where trial judge gave Murray direction requiring jury not to convict on any count unless satisfied that evidence of each child was honest and reliable in relation to that count – Where trial judge directed jury to give separate consideration to each count – Whether trial miscarried because of failure to give anti-tendency direction.

Words and phrases – "anti-tendency direction", "concoction of evidence", "counts tried together", "failure of counsel to seek a direction", "forensic advantage", "forensic strategy", "impermissible tendency reasoning", "miscarriage of justice", "multiple complainants", "Murray direction", "separate consideration direction", "stark contest of credibility".

Criminal Appeal Act 1912 (NSW) – s 6(1).

Appealed from NSWSC (CCA): [2020] NSWCCA 80

Held: Appeal dismissed.

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Hofer v The Queen
S37/2021: [2021] HCA 36

Judgment delivered: 10 November 2021

Coram: Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ

Catchwords:

Criminal practice – Appeal – Miscarriage of justice – Application of proviso that no substantial miscarriage of justice actually occurred

– Where appellant convicted of sexual offences against two complainants – Where appellant's evidence contradicted complainants' testimonies – Where rule in Browne v Dunn not observed by defence counsel – Where prosecutor cross-examined appellant about defence counsel's non-observance of rule – Where prosecutor's cross-examination suggested parts of appellant's evidence a recent invention – Whether prosecutor's questioning impermissible and prejudicial such that it resulted in miscarriage of justice – Whether proviso applied because no substantial miscarriage of justice actually occurred.

Words and phrases – "any departure from a trial according to law to the prejudice of the accused", "appellate court's assessment of the appellant's guilt", "credibility", "cross-examination", "glaringly improbable", "miscarriage of justice", "nature and effect of the error", "proviso", "real chance", "recent invention", "root of the trial", "rule in Browne v Dunn", "serious breach of the presuppositions of the trial", "substantial miscarriage of justice".

Criminal Appeal Act 1912 (NSW) – s 6(1).

Appealed from NSWSC (CCA): [2019] NSWCCA 244

Held: Appeal dimissed.

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Income Tax

Addy v Commissioner of Taxation
S25/2021: [2021] HCA 34

Judgment delivered: 3 November 2021

Coram: Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ

Catchwords:

Income tax (Cth) – Where Art 25(1) of *Convention between Australia and United Kingdom for Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains* ("United Kingdom convention") provides United Kingdom nationals not be subjected in Australia to "other or more burdensome" taxation than imposed on Australian nationals "in the same circumstances, in particular with respect to residence" – Where Pt III of Sch 7 to *Income Tax Rates Act 1986* (Cth) applied new tax rate to persons holding Working Holiday (Temporary) (Class TZ) (Subclass 417) visa ("working holiday visa") – Where new tax rate imposed on working holiday visa holders more burdensome than tax rate imposed on Australian nationals deriving

taxable income from same source during same period – Where new tax rate under Pt III of Sch 7 differentiates between Australian residents for tax purposes who hold working holiday visas and others who do not – Where Commissioner of Taxation assessed United Kingdom national who was Australian resident for tax purposes applying Pt III of Sch 7 – Whether application of Pt III of Sch 7 contravened Art 25(1) of United Kingdom convention.

Words and phrases – "Australian resident for taxation purposes", "bilateral agreements", "discrimination based on nationality", "discriminatory treatment", "double taxation treaties", "hypothetical comparator", "in the same circumstances", "non-discrimination clause", "non-resident taxpayer", "OECD Model Convention", "other or more burdensome", "resident taxpayer", "tax burden", "working holiday maker", "working holiday taxable income", "working holiday visa".

Income Tax Act 1986 (Cth) – ss 4 and 5(1).

Income Tax Rates Act 1986 (Cth) – Pts I and III of Sch 7.

International Tax Agreements Amendment Act 2003 (Cth) – Sch 1.

Appealed from FCA (FC): [2020] FCAFC 135; (2020) 280 FCR 46; (2020) 382 ALR 68

Held: Appeal allowed with costs.

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Local Government

Sunland Group Limited & Anor v Gold Coast City Council

B64/2020: [2021] HCA 35

Judgment delivered: 10 November 2021

Coram: Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ

Catchwords:

Local government – Town planning – Development approvals – Where second appellant purchased undeveloped parcel of land in 2015 – Where preliminary approval granted in 2007 for development project pursuant to *Integrated Planning Act 1997* (Qld) – Where preliminary approval contained "conditions" regarding payment of infrastructure contributions by developers to respondent Council – Where development permits granted in 2016 – Where *Integrated Planning Act* introduced new regime permitting local governments to levy infrastructure charges by notice – Where

s 6. 1. 31(2)(c) of Integrated Planning Act preserved as interim measure existing regime of imposing condition on development approval requiring infrastructure contributions – Where new regime maintained by *Sustainable Planning Act 2009* (Qld) *and Planning Act 2016* (Qld) – Where respondent Council issued infrastructure charges notices in accordance with new regime following issue of development permits – Whether conditions in preliminary approval imposed liability to pay infrastructure contributions – Whether conditions proper exercise of power in s 6. 1. 31(2)(c) of *Integrated Planning Act*.

Words and phrases – "conditions", "development approval", "development permit", "future liability", "infrastructure charges", "infrastructure contributions", "notice alerting the developer to the Council's future intentions", "preliminary approval".

Integrated Planning Act 1997 (Qld) – ss 3. 1. 5, 6. 1. 31.

Planning Act 2016 (Qld) – ss 119, 121.

Appealed from QSC (CA): [2020] QCA 89

Held: Appeal dismissed with costs.

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3: CASES RESERVED

The following cases have been reserved or part heard by the High Court of Australia.

Aviation

Wells Fargo Trust Company, National Association (As Owner Trustee) & Anor v VB Leaseco Pty Ltd (Administrators Appointed) & Ors
S60/2021: [2021] HCATrans 182

Date heard: 4 November 2021

Coram: Kiefel CJ, Gageler, Keane, Edelman and Steward JJ

Catchwords:

> Aviation – Construction of art XI *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (Protocol) – Where *International Interest in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) gives domestic effect to *Convention on International Interests in Mobile Equipment* (Cape Town Convention) – Where art XI(2) of Protocol provides upon occurrence of insolvency-related event, insolvency administrator or debtor shall "give possession of the aircraft object" to creditor – Where appellants owners of aircraft engines leased to first respondent and subleased to second and fourth respondents – Where third respondent appointed administrator of other respondents following insolvency-related event – Where lease imposes on lessees return obligations in respect of aircraft – Where appellants sought compliance with respondents' Art XI(2) obligations to "give possession" – Where third respondent, instead of physically redelivering engines, issued a notice under s 443B(3) of *Corporations Act 2001* (Cth) disclaiming leased engines and leaving engines still attached to aircraft operated by lessees and owned by third parties – Where primary judge held respondents failed to "give possession" of engines – Where respondents successfully appealed to Full Court Federal Court – Whether "give possession" means physical delivery of aircraft objects or merely enables creditor to exercise self-help remedy – Whether respondents failed to "give possession".

Appealed from FCA (FC): [2020] FCAFC 168; (2020) 279 FCR 518; (2020) 384 ALR 378

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Competition Law

Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd & Ors
S33/2021: [2021] HCATrans 142

Date heard: 7 September 2021

Coram: Kiefel CJ, Gageler, Gordon, Steward and Gleeson JJ

Catchwords:

Competition law – Arbitration determination – Third party access – Calculation of user contributions – Where appellant operator of Port of Newcastle – Where provision of access and use of Port shipping channels declared service pursuant to Pt IIIA of *Competition and Consumer Act 2010* (Cth) – Where appellant levies certain charges payable by vessel owner or charterer in respect of use of Port infrastructure – Where first respondent coal mining company exported coal through Port via both own chartered vessels and vessels owned by other persons – Where first respondent sought arbitration by Australian Competition and Consumer Commission ("ACCC") of dispute about quantum of charge – Where ACCC and Australian Competition Tribunal on review determined first respondent could not arbitrate terms on which other persons' vessels carrying first respondent's coal were charged – Where parties agreed ACCC use "depreciated optimised replacement cost methodology" to calculate asset base component of appropriate charge – Where ACCC and Tribunal on review decided s 44X(1)(e) required it to deduct historical service user contributions to Port infrastructure from asset base in calculation of charge – Where appellant unsuccessfully appealed to Full Court of Federal Court – Whether persons with economic interest in arbitration determination or who causes access to occur are third party for purposes of Pt IIIA – Proper approach to calculation of historical user contributions in charge.

Appealed from FCA (FC): [2020] FCAFC 145; (2020) 280 FCR 194; (2020) 382 ALR 331

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Contracts

Hobart International Airport Pty Ltd v Clarence City Council & Anor; Australia Pacific Airports (Launceston) Pty Ltd v Northern Midlands Council & Anor
H2/2021; H3/2021: [2021] HCATrans 160

Date heard: 12 October 2021

Coram: Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ

Catchwords:

Contracts – Privity of contract – Declaratory relief – Where second respondent Commonwealth registered proprietor of land leased to appellants – Where first respondent Councils not party to lease – Where cl 26.2(a) of lease provides amount equivalent to council rates to be paid to first respondents in respect of leased land – Where lease contemplates that first respondents will participate in mechanism in determining amount payable – Where dispute arose between appellants and first respondents as to amounts payable – Where first respondents sought declaratory and consequential relief with respect to proper construction of cl 26.2(a) – Where primary judge held first respondents did not have standing to seek declaratory relief on basis of privity of contract – Where first respondents successfully appealed to Full Federal Court, which held doctrine of privity only prevents third parties from obtaining executory judgment to enforce terms of contract, not declaratory judgment – Whether doctrine of privity prevents third parties from seeking declaratory relief – Whether third parties have standing to seek declaratory relief in respect of contract.

Constitutional law – Judicial power of Commonwealth – Requirement for a "matter" – Jurisdiction of Federal Court – Where there is no dispute between contracting parties as to interpretation of contract – Whether first respondents have rights, duties or liabilities to be established by determination of a court – Whether there is a justiciable controversy or enforceable right, duty or liability to found a "matter".

Appealed from FCA (FC): [2020] FCAFC 134; (2020) 280 FCR 265; (2020) 382 ALR 273

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Corporations

Walton & Anor v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liquidation) & Ors
S20/2021: [2021] HCATrans 154; [2021] HCATrans 155

Date heard: 6–7 October 2021

Coram: Kiefel CJ, Gageler, Keane, Edelman and Steward JJ

Catchwords:

Corporations – Examinations relating to insolvency – Abuse of process – Where s 596A of *Corporations Act 2001* (Cth) requires court to issue examinations summons to a person about a company if "eligible applicant" applies for summons – Where "eligible applicants" include persons authorised by Australian Securities and Investments Commission ("ASIC") – Where ASIC can only authorise person if person's purpose is for benefit of corporation, its contributories or its creditors – Where appellants shareholders of respondent – Where, in 2014, respondent successfully completed capital raising for purpose of paying down debt – Where respondent entered into voluntary administration in 2016 and liquidation in 2019 – Where ASIC authorised appellants as "eligible applicants" to conduct examinations of respondent's directors and officers – Where NSW Court of Appeal found appellants' predominant purpose investigation and pursuit of shareholders' private claim against directors in relation to 2014 capital raising – Where Court of Appeal held fulfilment of that purpose would not confer benefit on corporation, creditors or contributories, and therefore offensive to purpose for which s 596A enacted and abuse of process – Whether implicit purpose of obtaining information about potential misconduct is beneficial to corporation – Whether appellants' purposes offensive or foreign to s 596A.

Appealed from NSW (CA): [2020] NSWCA 157; (2020) 383 ALR 298; (2020) 17 ABC(NS) 320

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Criminal Law

Bell v State of Tasmania

H2/2020: [2021] HCATrans 5; [2021] HCATrans 152; [2021] HCATrans 153

Date heard: 3 February, 5–6 October 2021

Coram: Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ

Catchwords:

Criminal law – Defences – Honest and reasonable mistake – Where appellant charged with one count of rape and one count of supply of controlled drug to child – Where trial judge left defence of honest and reasonable mistake as to age in relation to rape charge – Where counsel for appellant requested similar direction in respect of supply charge – Where trial judge refused to make such direction on basis that defence of honest and reasonable mistake as to age would not relieve appellant of criminal responsibility with respect to supply charge – Where jury convicted appellant of supply charge but could not reach verdict on rape or alternative charge of sexual intercourse with person under age of 17 – Where at retrial of sexual offence jury found appellant not guilty of rape but convicted on alternative charge – Where Court of Criminal Appeal upheld trial judge's decision that defence of honest and reasonable mistake as to age not available in relation to supply charge – Whether defence of honest and reasonable mistake of fact only available where its successful use would lead to defendant not being guilty of any crime.

Appealed from TASSC (CCA): [2019] TASCCA 19; (2019) 279 A Crim R 553

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Orreal v The Queen

B25/2021: [2021] HCATrans 193

Date heard: 11 November 2021

Coram: Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ

Catchwords:

Criminal law – Application of proviso – Substantial miscarriage of justice – Prejudicial evidence – Where appellant charged with sexual offending against child – Where, at trial, irrelevant, inadmissible and prejudicial medical evidence placed before jury – Where prosecution, in summing up, contended evidence could be of some use to jury – Where trial judge did not direct jury to disregard inadmissible evidence and directed jury could use evidence – Where appellant unsuccessfully appealed to Court of Appeal – Where majority of Court of Appeal held, despite reception of inadmissible and prejudicial evidence, no substantial miscarriage of justice occurred – Whether, in cases turning on issues of contested credibility, appropriate for intermediate Court of Appeal to make own assessment of admissible evidence for purpose of determining whether no substantial miscarriage of justice occurred.

Appealed from QSC (CA): [2020] QCA 95

Equity

Stubbings v Jams 2 Pty Ltd & Ors
M13/2021: [2021] HCATrans 163

Date heard: 14 October 2021

Coram: Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ

Catchwords:

Equity – Unconscionable conduct – Wilful blindness – Where appellant borrowed from respondent lenders secured only on appellant's assets – Where appellant without regular income and defaulted – Where respondents' system of asset-based lending included deliberate intention to avoid receipt of information about personal and financial circumstances of borrower or guarantor – Where certificate of independent financial advice given in respect of transaction – Where respondents brought proceedings for possession of appellant's assets – Where primary judge found respondents wilfully blind and had actual knowledge as to appellant's personal and financial circumstances – Where respondents successfully appealed to Court of Appeal, which overturned primary judge's findings as to knowledge – Whether lender's conduct unconscionable by engaging in system of asset-based lending without receipt of information about personal or financial situation of borrower, or alternatively, wilfully or recklessly failing to make such enquiries an honest and reasonable person would make – Whether Court of Appeal entitled to overturn findings of primary judge as to respondents' knowledge.

Appealed from VSC (CA): [2020] VSCA 200

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Immigration

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane
S34/2021: [2021] HCATrans 144

Date heard: 9 September 2021

Coram: Keane, Gordon, Edelman, Steward and Gleeson JJ

Catchwords:

Immigration – Judicial review – No evidence – Where respondent's visa mandatorily cancelled under s 501(3A) of *Migration Act 1958* (Cth) – Where respondent made representations pursuant to s 501CA as to why cancellation should be revoked – Where, if visa cancellation not revoked, respondent and family would be removed to Samoa or American Samoa – Where Minister decided not to revoke cancellation decision – Where respondent unsuccessfully appealed to Federal Court and successfully appealed to Full Court – Whether Minister made factual findings regarding language and availability of welfare and social services in Samoa and American Samoa without evidence – Whether Minister made factual findings based on personal or specialised knowledge about Samoa or American Samoa – If not, whether errors material and jurisdictional.

Appealed from FCA (FC): [2020] FCAFC 144; (2020) 278 FCR 386

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Industrial Law

Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd

P5/2021: [2021] HCATrans 138

Date heard: 31 August 2021

Coram: Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ

Catchwords:

Industrial law – Employee and independent contractor – Proper test for distinguishing – Labour hire agreement – Definition of "employee" –Where second appellant signed Administrative Services Agreement with respondent labour hire agency and offered work cleaning and moving materials for builder – Where contract between second appellant and respondent for work, contract between respondent and builder for labour supply, but no contract between second appellant and respondent – Where builder "controlled" second appellant – Where arrangement of casual nature included right to reject assignment – Where second appellant not integrated into respondent's business and not given uniform – Where work required personal service and second appellant not in business on own account – Where second appellant 22-year old backpacker on working holiday visa – Where express term of contract categorises relationship not employment – Where appellants allege respondent contravened various National Employment Standards and s 45 of *Fair Work Act 2009* (Cth) by not

paying second appellant in accordance with relevant award – Where Standards apply only if second appellant "employee" – Where primary judge, applying multi-factorial test, found second appellant not employee – Where Full Court preferred approach second appellant employee but for authority of intermediate appellate court in *Personnel Contracting v Construction, Forestry, Mining and Energy Union* [2004] WASCA 312 decided in similar circumstances, which Full Court held not plainly wrong – Whether second appellant "employee" of respondent – Whether, in triangular labour hire agreement, control test satisfied when second appellant controlled by builder and not respondent – Whether multi-factorial test correctly applied.

Appealed from FCA (FC): [2020] FCAFC 122; (2020) 279 FCR 631; (2020) 381 ALR 457; (2020) 297 IR 269

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NSW Commissioner of Police v Cottle & Anor

S56/2021: [2021] HCATrans 181

Date heard: 3 November 2021

Coram: Kiefel CJ, Gageler, Keane, Gordon and Steward JJ

Catchwords:

Industrial law – Jurisdiction of Industrial Relations Commission of New South Wales (IRC) – Police – Where appellant made decision under s 72A of *Police Act 1990* (NSW) to retire first respondent police officer on medical grounds – Where first respondent applied for unfair dismissal remedy in IRC under s 84 of *Industrial Relations Act 1996* (NSW) – Where *Police Act* does not expressly provide for review by IRC for medical retirement but does for other types of removal – Where appellant successfully challenged IRC's jurisdiction, following High Court's decision in *Commissioner for Police for NSW v Eaton* (2013) 252 CLR 1 – Where Full Bench overturned decision – Where appellant successfully sought judicial review of Full Bench decision by NSW Supreme Court – Where first respondent successfully appealed to Court of Appeal – Whether IRC has jurisdiction to hear and determine unfair dismissal application filed by police office retired on medical grounds – Whether Court of Appeal applied correct statutory construction principles in interpreting two overlapping statutory schemes.

Appealed from NSW (CA): [2020] NSWCA 159; (2020) 298 IR 202

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ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors
S27/2021: [2021] HCATrans 139

Date heard: 1 September 2021

Coram: Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ

Catchwords:

Industrial law – Employee and contractor – Proper test for distinguishing – Multi-factorial test – Where respondents commenced employment with appellants as truck drivers in 1980 – Where, in 1985, appellants and respondents agreed respondents would become contractors – Where respondents formed partnerships with respective wives, purchased truck from appellants and executed written contract with appellants to provide delivery services – Where respondents worked exclusively for and derived sole income from appellants for nearly forty years, and contract expressly permitted respondents to service other clients – Where respondents required to be available to work during set hours – Where impractical for respondents to work for or generate goodwill with other clients – Where respondents required to purchase truck to retain work, display company logo on truck and wear branded clothing – Where respondents responsible for upkeep, maintenance and insurance of trucks – Where respondents paid by invoice and charged GST to appellants – Where respondents conducted partnerships as one would expect of business - Where contract terminated in 2017 – Where respondents unsuccessfully claimed in Federal Court for unpaid employee entitlements under various statutory regimes and Federal Court held respondents "contractors" – Where respondents successfully appealed to Full Court, which held respondents "employees" – Whether respondents "employees" for purposes of *Fair Work Act 2009* (Cth), *Superannuation Guarantee (Administration) Act 1992* (Cth) and "workers" for purpose of *Long Service Leave Act 1955* (NSW).

Appealed from FCA (FC): [2020] FCAFC 119; (2020) 279 FCR 114; (2020) 297 IR 210

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Patents

H. Lundbeck A/S & Anor v Sandoz Pty Ltd; CNS Pharma Pty Ltd v Sandoz Pty Ltd
S22/2021; S23/2021: [2021] HCATrans 156

Date heard: 8 October 2021

Coram: Kiefel CJ, Gageler, Edelman, Steward and Gleeson JJ

Catchwords:

Patents – Patent extension – Contract construction – Where s 79 of *Patents Act 1990* (Cth) provides if patentee applies for extension of term of patent and patent expires before application determined and extension is granted, patentee has same rights to commence infringement proceedings during extension period as if extension had been granted when alleged infringement was done – Where appellants patentee and exclusive licensees of pharmaceutical compound – Where patent expired in 13 June 2009 – Where, on 25 June 2014, patent extension granted to 9 December 2012 – Where, from 15 June 2009 onwards, respondent supplied generic version of compound – Where, in 2007, patentee and respondent entered into Settlement Agreement, giving respondent licence to exploit patent prior to expiry – Where Agreement specified possible commencement dates of licence conditioned on whether extension granted, but did not specify end date – Where appellants commenced infringement proceedings in Federal Court on 26 June 2014 in respect of acts done during extension period – Where Federal Court held Agreement gave licence only for two weeks prior to original expiry date (31 May 2009) until original expiry (13 June 2009) but not extension period – Where respondent successfully appealed to Full Court, which held Agreement gave licence from 31 May 2009 to extended expiry date (9 December 2012) – Whether licence applied in relation to acts occurring after patent original expiry date and before term extended – Whether, on respondent's construction, Agreement produced commercially nonsensical result – Whether exclusive licensee may commence infringement proceeding for acts done between original date of expiry and date on which term subsequently extended.

Appealed from FCA (FC): [2020] FCAFC 133; (2020) 384 ALR 35

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Practice and Procedure

Deputy Commissioner of Taxation v Huang
S26/2021: [2021] HCATrans 162

Date heard: 13 October 2021

Coram: Gageler, Keane, Gordon, Edelman and Gleeson JJ

Catchwords:

Practice and procedure – Freezing order – Where appellant filed originating application in Federal Court seeking judgment against respondent – Where appellant obtained *ex parte* worldwide freezing order against respondent's Australian and foreign assets pursuant to r 7.32 of *Federal Court Rules 2011* (Cth) – Where respondent holds significant assets in China and Hong Kong – Where prospective judgment obtained against respondent not likely to be enforceable in China or Hong Kong – Where judgment subsequently entered against respondent – Where respondent successfully appealed to Full Court against freezing order on ground freezing order requires realistic possibility any judgment obtained by appellant can be enforced against respondent's assets in relevant foreign jurisdiction – Whether r 7.32 imposes mandatory jurisdictional precondition on appellant to prove realistic possibility of enforcement in relevant foreign jurisdiction – Whether, absent realistic possibility, disposition of respondent's foreign assets would frustrate or inhibit Federal Court processes and create danger of judgment being wholly or partly unsatisfied.

Appealed from FCA (FC): [2020] FCAFC 141; (2020) 280 FCR 160

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Taxation

Commissioner of Taxation v Carter & Ors
S62/2021: [2021] HCATrans 189

Date heard: 9 November 2021

Coram: Gageler, Gordon, Edelman, Steward and Gleeson JJ

Catchwords:

Taxation – Trust distribution – Effect of disclaimer – Where respondents default beneficiaries of trust – Where trust deed provided respondents entitled to income of trust for given tax year (ending 30 June) if trustee did not make effective determination departing from default position – Where trustee had not made effective determination as at 30 June 2014 – Where s 97(1) of *Income Tax Assessment Act 1936* (Cth) provides if beneficiary of trust is "presently entitled" to share of trust income, that share included in assessable income of beneficiary – Where, following audit, on 27 September 2015, appellant issued income tax assessments to respondents for income year ended 30 June 2014 including their share of 2014 trust income – On 30 September 2016, respondents purported to disclaim entitlement to income from trust for 2014 income year – Where Full Court of Federal Court considered themselves bound to hold general law

extinguishes entitlement to trust income ab initio and held disclaimers displaced application of s 97(1) – Whether disclaimer of gift render gift void ab initio for all purposes – Whether, if beneficiary disclaims trust distribution after end of income year, beneficiary "presently entitled" to distribution for purposes of s 97(1).

Appealed from FCA (FC): [2020] FCAFC 150; (2020) 279 FCR 83; (2020) 112 ATR 493

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Torts

Arsalan v Rixon; Nguyen v Cassim

S35/2021; S36/2021: [2021] HCATrans 143

Date heard: 8 September 2021

Coram: Kiefel CJ, Gageler, Keane, Edelman and Steward JJ

Catchwords:

Torts – Damages – Damage to chattel – Where appellants' negligence resulted in motor vehicle collision with respondents' "high-value", "prestige" vehicles – Where respondents' vehicles damaged, and respondents hired replacement vehicles of equivalent value while damaged vehicles underwent repairs – Where respondents claimed damages for cost of hiring replacement vehicles of equivalent value in NSW Local Court – Where magistrate awarded damages only for cost of hiring suitable replacement vehicle for uses vehicle will likely to be put, not necessarily of equivalent value – Where respondents' appeal to Supreme Court dismissed – Where respondents' appeal to Court of Appeal allowed – Where Court of Appeal majority held damages be awarded to put claimant in position they would have been in before wrongdoing, i.e., for replacement vehicle of equivalent value – Where each judge in Court of Appeal applied different standard – Whether respondents entitled to claim damages for cost of hiring replacement vehicles of equivalent value to damaged prestige vehicles – Whether equivalent value replacement vehicle reasonable – Correct test of quantification of damages.

Appealed from NSWSC (CA): [2020] NSWCA 115; (2020) 92 MVR 366

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Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited

S63/2021: [2021] HCATrans 190

Date heard: 10 November 2021

Coram: Kiefel CJ, Keane, Gordon, Edelman and Gleeson JJ

Catchwords:

Torts – Negligence – Breach of duty – Obvious risk – Where appellant injured in competition conducted by respondent when horse she was riding slipped and fell – Where appellant contended cause of fall was deterioration in ground surface and respondent negligent in failing to plough ground at site of event, failing to stop competition, or failing to warn competitors when ground became unsafe – Where prior to appellant's participation, there had already been 7 falls – Where trial judge held no breach of duty of care established – Where majority of Court of Appeal held appellant failed to establish cause of fall was ground surface deterioration and therefore failed to establish respondent breached duty – Where majority of Court of Appeal held even if breach established, s 5L of *Civil Liability Act 2002* (NSW) applied to exclude respondent's liability as injury suffered was manifestation of "obvious risk" – Whether Court of Appeal's approach to evidence of ground surface deterioration did not afford appellant rehearing – Proper approach to identification of "obvious risk".

Appealed from NSWSC (CA): [2020] NSWCA 263

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4: ORIGINAL JURISDICTION

The following cases are ready for hearing in the original jurisdiction of the High Court of Australia.

Constitutional Law

Delil Alexander (by his litigation guardian Berivan Alexander) v Minister for Home Affairs & Anor

S103/2021: [2021] HCATrans 159

Catchwords:

Constitutional law – Legislative power – Citizenship – Cessation of Australian citizenship – Where s 36B of *Australian Citizenship Act 2007* (Cth) provided Minister may make determination person ceases to be Australian citizen if Minister satisfied person dual citizen and person engaged in terrorist activities – Where plaintiff Australian citizen by birth and also Turkish citizen – Where, in 2013, plaintiff entered Al Raqqa Province of Syria – Where Al Raqqa province declared area for purposes of terrorism offences – Where, in 2018, plaintiff arrested and incarcerated by Syrian Government – Where plaintiff found guilty of terrorism offences against Syrian Penal Code on basis of evidence allegedly procured by torture – Where Australian Security and Intelligence Organisation advised Minister plaintiff likely engaged in foreign incursions and recruitment by remaining in declared area – Where, on 2 July 2021, Minister determined plaintiff ceased to be Australian citizen under s 36B – Where plaintiff pardoned under Syrian law, but remains in indefinite detention because no lawful right to be in Syria, cannot be removed to Turkey because citizenship under different name, and cannot be removed to Australia because of citizenship cessation – Whether s 36B within scope of aliens power in s 51(xix) of *Constitution*, defence power in s 51(vi) of *Constitution*, external affairs power in s 51(xxix) of *Constitution* or implied nationhood power – Whether implied constitutional limitation on legislative power preventing "people of Commonwealth" from being deprived of their status as such – Whether constitutionally prescribed system of representative government incompatible with s 36B, which operates to permanently disenfranchise Australian citizens – Whether s 36B impermissibly disqualifies plaintiff from eligibility to sit as member of Parliament, contrary to ss 34 and 44 of *Constitution* – Whether s 36B punitive and unlawful exercise of judicial power by Parliament – Whether s 36B within legislative competence of Commonwealth Parliament.

Special case referred to the Full Court on 26 October 2021

Farm Transparency International Ltd & Anor v State of New South Wales
S83/2021: [2021] HCATrans 151

Catchwords:

Constitutional law – Implied freedom of political communication – Where s 7 of *Surveillance Devices Act 2007* (NSW) prohibited installation, use and maintenance of listening devices to record private conversations – Where s 8 prohibited installation, use and maintenance of optical surveillance devices on premises without owner or occupier's consent – Where s 11 created offence to communicate or publish material recorded in contravention of ss 7 or 8 – Where s 12 created offence to possess material knowing it had been recorded in contravention of ss 7 or 8 – Where plaintiffs published photographs and recordings of animal agricultural practices in New South Wales in contravention of ss 11 and 12 and intends to continue to engage in such activity – Whether ss 11 and 12 impermissibly burden implied freedom of communication – If so, whether ss 11 and 12 severable in respect of operation on political communication.

Special case referred to the Full Court on 27 September 2021.

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Immigration

Plaintiff M1/2021 v Minister for Home Affairs
M1/2021: [2021] HCATrans 52

Catchwords:

Immigration – Judicial review – Non-refoulement obligations – Where plaintiff granted Refugee and Humanitarian (Class XB) Subclass 202 (Global Special Humanitarian) visa in 2006 – Where, on 19 September 2017, plaintiff convicted of unlawful assault and sentenced to 12 months' imprisonment – Where, on 27 October 2017, delegate of Minister cancelled plaintiff's visa pursuant to s 501(3A) of *Migration Act 1958* (Cth) – Where plaintiff made representations to Minister regarding possibility of refoulement if plaintiff returned to home country – Where, on 9 August 2018, delegate of Minister decided not to revoke cancellation decision pursuant to s 501CA(4) of *Migration Act* – Where, in making decision, delegate did not consider whether non-refoulement obligations owed to plaintiff because plaintiff able to apply for protection visa under *Migration Act* – Whether delegate required to

consider plaintiff's representations concerning non-refoulement obligations in making non-revocation decision pursuant to s 501CA(4) where plaintiff can apply for protection visa – If so, whether delegate failed to consider representations – If so, whether delegate failed to exercise jurisdiction under *Migration Act* or denied plaintiff procedural fairness – Whether non-revocation decision affected by jurisdictional error.

Special case referred to the Full Court on 30 March 2021.

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5: SECTION 40 REMOVAL

The following cases are ready for hearing in the original jurisdiction of the High Court of Australia.

Constitutional Law

Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor

S173/2021: [2021] HCATrans 158

Removed into the High Court under s 40 of the Judiciary Act 1903 (Cth) on 11 October 2021.

Catchwords:

Constitutional law – Aliens power – Immigration detention – Indigenous Australians – Where applicant born in and citizen of New Zealand and not Australian citizen – Where applicant's parents and ancestors not Aboriginal Australian or Torres Strait Islanders – Where applicant granted visa to live in Australia in 1997 – Where Mununjali people Indigenous society existing in Australia since prior to 1788 – Where applicant identifies as member of Mununjali people, recognised by Mununjali elders and by Mununjali traditional law and customs as such – Where, in 2018, applicant's visa cancelled – Where in 2019, applicant taken into immigration detention – Where, in *Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3, majority of High Court held Aboriginal Australian who satisfies tripartite test identified in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 beyond reach of aliens power in s 51(xix) of *Constitution* – Where applicant commenced proceedings in Federal Court of Australia, relevantly seeking declaration not alien within meaning of s 51(xix) following *Love/Thoms* – Whether decision in *Love/Thoms* be overturned – Whether applicant satisfies tripartite test despite not being biologically descended from Indigenous people – Whether applicant alien.

Removed from the Federal Court of Australia.

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Thoms v Commonwealth of Australia

B56/2021: [2021] HCATrans 157

Removed into the High Court under s 40 of the Judiciary Act 1903 (Cth) on 11 October 2021.

Catchwords:

Constitutional law – Aliens power – Immigration detention – Wrongful imprisonment – Where applicant held in immigration detention pursuant to s 189 of *Migration Act 1958* (Cth) – Where officers who detained applicant suspected he was unlawful non-citizen because not Australian citizen and did not have visa – Where, in *Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3, majority of High Court declared applicant not alien for purposes of s 51(xix) of *Constitution*, and applicant was released from immigration detention – Where applicant's claim remitted to Federal Court of Australia, where applicant sought declaration detention unlawful and not supported by s 189 of *Migration Act*, and damages for wrongful imprisonment – Where Federal Court ordered question of whether detention unlawful be determined separately – Whether within scope of aliens power for s 189 of *Migration Act* to validly authorise immigration detention of persons who are subjectively suspected to be unlawful non-citizen, even if person later found not alien – Whether applicant's detention unlawful.

Removed from the Federal Court of Australia.

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6: SPECIAL LEAVE GRANTED

The following cases have been granted special leave to appeal to the High Court of Australia.

Administrative Law

Nathanson v Minister for Home Affairs & Anor
M73/2021: [2021] HCATrans 170

Date heard: 15 October 2021 – *Special leave granted.*

Catchwords:

> Administrative law – Jurisdictional error – Procedural fairness – Materiality – Where appellant's visa cancelled by delegate on character grounds – Where, after delegate's decision but before Tribunal review, Minister issued new direction, which relevantly included as additional factor violent crimes against women or children viewed "very seriously, regardless of sentence imposed" – Where appellant not put on notice prior to Tribunal hearing that past incidents of alleged domestic violence would be taken into account, despite not having been charged or convicted of any crimes – Where appellant not given opportunity to call further evidence nor make further submissions on domestic violence issue – Where appellant applied for judicial review of Tribunal decision – Where Minister conceded Tribunal denied procedural fairness and majority of Full Federal Court dismissed application on basis appellant failed to show realistic possibility of different outcome – Whether Full Federal Court applied correct test of materiality – Whether appellant's denial of procedural fairness material and constituted jurisdictional error.

Appealed from FCA (FC): [2020] FCAFC 172; (2020) 281 FCR 23

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Constitutional Law

Citta Hobart Pty Ltd & Anor v Cawthorn
H7/2021: [2021] HCATrans 126

Date heard: 13 August 2021 – *Special leave granted on conditions*

Catchwords:

Constitutional law – Federal jurisdiction – Jurisdiction of State Tribunal – Inconsistency between Commonwealth and State laws – Discrimination – Disability Discrimination – Where respondent complained to Tasmania Anti-Discrimination Tribunal on basis appellants' building development constituted disability discrimination under *Anti-Discrimination Act 1998* (Tas) – Where appellants pleaded in defence inconsistency with *Disability Discrimination Act 1992* (Cth) pursuant to s 109 of *Constitution* – Where Tribunal dismissed complaint for lack of jurisdiction because determination of s 109 defence exercise of federal jurisdiction – Where Full Court allowed appeal on basis s 109 defence would not succeed – Whether Full Court applied correct test as to jurisdiction of State Tribunal – Whether *Anti-Discrimination Act 1998* (Tas) inconsistent with *Disability Discrimination Act 1992* (Cth).

Appealed from TASSC (FC): [2020] TASFC 15; (2020) 387 ALR 356

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Criminal Law

Bell v The Queen
A30/2021: [2021] HCATrans 132

Date heard: 13 August 2021 – *Special leave granted*

Catchwords:

Criminal law – Procedure – Stay of proceedings – Powers of Independent Commissioner Against Corruption (ICAC) – Where, in 2014, ICAC commenced investigation into appellant – Where, in 2017, ICAC forwarded matter to Director of Public Prosecutions (DPP) and provided evidentiary material gathered in course of investigation – Where DPP decided to prosecute appellant – Where ICAC officers assisted DPP to prepare for trial – Where appellant applied for permanent stay – Where District Court dismissed application and Full Court dismissed appeal – Whether *Independent Commissioner Against Corruption Act 2012* (SA) authorised ICAC to refer matter, provide evidentiary material and otherwise assist DPP in prosecution – Whether ICAC conduct abuse of process justifying permanent stay.

Appealed from SASC (FC): [2020] SASCFC 116; (2020) 286 A Crim R 501

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George v The State of Western Australia
P45/2020: [2021] HCATrans 95

Date heard: 20 May 2021 – *Application referred to Full Court for argument as on appeal*

Catchwords:

Criminal law – Jury directions – Right to silence – Where applicant charged with indecently dealing with child between ages 13 and 16 years, contrary to s 321(4) of *Criminal Code* (WA) – Where prosecution adduced evidence of investigating police officer, who gave evidence of electronic record of interview in which applicant denied offences and gave alternative account, and tendered record of interview – Where applicant did not give or adduce any evidence at trial – Where applicant submitted prosecution had not proved beyond reasonable doubt all elements of offence – Where trial judge failed to warn jury that applicant's silence could not be used as evidence against him, does not constitute admission, could not be used to fill gaps in prosecution's evidence and could not be used as a make-weight in assessing whether prosecution proved case beyond reasonable doubt (*Azzopardi* direction) – Where majority of WA Court of Appeal held absence of *Azzopardi* direction not miscarriage of justice – Whether miscarriage of justice occurred because of absence of *Azzopardi* direction.

Appealed from WASC (CA): [2020] WASCA 139

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Hoang v The Queen
S146 to S149/2021: [2021] HCATrans 148

Date heard: 10 September 2021 – *Special leave granted*

Catchwords:

Criminal law – Juror misconduct – Juror conducting own inquiries – Mandatory discharge – Where s 53A of *Jury Act 1977* (NSW) required mandatory discharge of juror if juror engaged in misconduct – Where s 68C provided juror must not make own inquiries "for purpose of obtaining information" about matters relevant to trial – Where appellant charged with 12 offences – Where jury commenced deliberations and, on 5 November 2015, jury sent note to trial judge stating agreement reached on 8 counts – Where, on evening of 5 November, juror conducted internet search for personal reasons only on matter related to trial – Where jury continued deliberating on 6 November until jury foreperson notified trial judge of juror's actions – Where trial judge took verdicts on 10 counts before discharging juror pursuant to s 53A –

Where remaining jurors continued deliberating and gave verdict on remaining 2 counts – Where appellant appealed on basis trial judge failed to discharge juror prior to taking of first 10 counts – Where Court of Criminal Appeal held no juror misconduct and dismissed appeal – Whether inquiries made "for purpose of obtaining information" in s 68C includes juror making inquiries for solely personal reasons – If so, whether juror should have been discharged prior to taking of first 10 counts – If so, whether verdicts on any counts valid.

Appealed from NSWSC (CCA): [2018] NSWCCA 166; (2018) 98 NSWLR 406; (2020) 273 A Crim R 501

Family Law

Fairbairn v Radecki

S179/2021: [2021] HCATrans 166

Date heard: 15 October 2021 – *Special leave granted on conditions*

Catchwords:

Family law – De-facto relationship – Breakdown – Proper test for determination of breakdown of de-facto relationship – Where s 90SM of *Family Law Act 1975* (Cth) provided, in property settlement proceedings after breakdown of de-facto relationship, court may make order altering interest of parties to de-facto relationship in property – Where, in 2005 or 2006, appellant and respondent entered into de-facto relationship – Where basis of relationship living together on domestic basis with clear understanding as to separation of each other's financial affairs and property interests – Where, in 2015, appellant began to suffer from rapid cognitive decline – Where appellant incapable of managing own affairs and, in 2018, New South Wales Trustee & Guardian appointed to act for appellant – Where Public Guardian placed appellant into aged care facility – Where respondent did not provide financial support for appellant, continued to reside in appellant's property and prevented Trustee from selling appellant's property – Where Trustee commenced proceedings against respondent in Federal Circuit Court seeking order for property settlement pursuant to s 90SM, claiming appellant and respondent's de-facto relationship had broken down – Where primary judge declared de-facto relationship had broken down no later than 25 May 2018 – Where respondent successfully appealed to Full Family Court – Whether basis of appellant and respondent's de-facto relationship no longer existed – Whether de-facto relationship had broken down.

Appealed from FamCA (FC): [2020] FamCAFC 307

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Industrial Law

Australian Building and Construction Commissioner v Pattinson & Anor

M34/2021: [2021] HCATrans 90

Date determined: 20 May 2021 – *Special leave granted on limited grounds*

Catchwords:

> Industrial law – Civil penalties – Determination of appropriate penalty – Where s 349(1) of *Fair Work Act 2009* (Cth) provided unlawful for person to knowingly or recklessly make false or misleading representation about another person's obligation to engage in industrial activity – Where second respondent union had "no ticket no start" policy and respondents carried out policy by representing to two workers they could not work unless joined union – Where respondents admitted liability for two contraventions of s 349(1) – Where second respondent well-resourced and, since 2000, had breached pecuniary penalty provisions on more than 150 occasions, including at least 15 occasions involving "no ticket no start" policy and 7 previous contraventions of s 349(1) – Where primary judge considered statutory maximum penalty required to sufficiently deter respondents in light of previous contraventions and imposed maximum – Where respondents appealed to Full Federal Court, which held maximum penalty must only be imposed for most serious and grave contravening conduct and imposed lower penalty – Whether statutory maximum penalty must only be imposed for most serious and grave contravening conduct – Whether statutory maximum penalty can be imposed if necessary to deter contravening conduct.

Appealed from FCA (FC): [2020] FCAFC 177; (2020) 384 ALR 75; (2020) 299 IR 404

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Superannuation

Hill v Zuda Pty Ltd as Trustee for The Holly Superannuation Fund & Ors

P17/2021: [2021] HCATrans 199

Date heard: 12 November 2021– *Special leave granted*

Catchwords:

Superannuation – Self-managed superannuation fund ("SMSF") – Binding death benefit nomination – Where reg 6.17A(4), (6) and (7) of *Superannuation Industry (Supervision) Regulations 1994* (Cth), provided for requirements for validity of binding death benefit requirement in respect of superannuation funds – Where reg 6.17A authorised by multiple provisions, relevantly, ss 31, 55A and 59 of *Superannuation Industry (Supervision) Act 1993* (Cth) – Where applicant child and dependant of deceased person – Where deceased person established SMSF with deceased person's partner as sole members – Where cl 5 and 6 of SMSF trust deed made binding death benefit nomination, requiring trustee to distribute whole of deceased member's balance to surviving member – Where applicant argued cl 5 and 6 of deed did not constitute valid binding death benefit notification due to non-compliance with reg 6.17A(6) and (7) of Regulations and claimed portion of deceased person's account – Where claim dismissed and appeal to WA Court of Appeal dismissed – Whether reg 6.17A(4), (6) and (7) of Regulations apply to SMSF.

Courts – Comity – Intermediate appellate courts – Where WA Court of Appeal held principle of comity required it to follow decision of SA Full Court in *Cantor Management Services Pty Ltd v Booth* [2017] SASCFC 122 – Where SA Full Court held reg 6.17A did not apply to SMSF because s 59 of Act did not apply to SMSF but did not consider ss 33 or 55A – Whether intermediate appellate court bound to follow decision of other intermediate appellate court where no consideration of relevant aspect of legislation.

Appealed from WASC (CA): [2021] WASCA 59

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Torts

Kozarov v State of Victoria

M36/2021: [2021] HCATrans 101

Date heard: 21 May 2021 – *Special leave granted*

Catchwords:

Torts – Negligence – Causation – Where appellant worked in Serious Sex Offenders Unit (SSOU) of Office of Public Prosecutions (OPP) – Where work in SSOU required appellant to deal with confronting material of graphic sexual nature – Where, on 11 August 2011, appellant took sick leave for symptoms consistent

with post-traumatic stress disorder (PTSD) but was not diagnosed and returned to work on 29 August 2011 – Where, on return, appellant was involved in dispute with manager and stated she did not wish to be rotated to different unit within OPP – Where, on 9 February 2012, appellant emailed manager requesting she be rotated out of SSOU due to effect of SSOU work on her health, but request was not actioned – Where primary judge held respondent was put on notice as to risks to appellant's health in August 2011 – Where primary judge made inference that timely welfare enquiry by respondent would have revealed appellant's PTSD and, if appellant had been made aware of her condition, she would have consented to be rotated out of SSOU – Where primary judge held respondent failed to discharge duty of care in August 2011 by not making welfare enquiry and not rotating appellant out of SSOU – Where Court of Appeal overturned primary judge's inference that appellant would have consented to be rotated out and held that appellant's own actions in not consenting to be rotated out caused injury rather than respondent's actions – Where Court of Appeal did not address primary judge's finding that return to work after February 2012 caused appellant injury – Where Court of Appeal allowed respondent's appeal – Whether open to Court of Appeal to overturn primary judge's finding that if duty of care had been discharged in August 2011, appellant would have consented to be rotated out of SSOU – Whether Court of Appeal erred in failing to consider injury caused by return to work after February 2012.

Appealed from VSC (CA): [2020] VSCA 301; (2020) 301 IR 446

Appealed from VSC (CA): [2020] VSCA 316

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7: Cases Not Proceeding or Vacated

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8: SPECIAL LEAVE REFUSED

Publication of Reasons: 4 November 2021 (Canberra by video link)

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	Kareem	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S124/2021)	Federal Court of Australia [2021] FCA 1016	Application dismissed [2021] HCASL 211
2.	Kangaroo Point Developments MP Property Pty Ltd ATF Kangaroo Point Developments MP Property Unit Trust	RHG Construction Fitout and Maintenance Pty Limited & Ors (B37/2021)	Supreme Court of Queensland (Court of Appeal) [2021] QCA 117	Application dismissed with costs [2021] HCASL 212
3.	Flageul	WeDrive Pty Ltd T/A WeDrive & Ors (M48/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 102	Application dismissed with costs [2021] HCASL 213
4.	Wollongong City Council	Williams (S112/2021)	Supreme Court of New South Wales (Court of Appeal) [2021] NSWCA 140	Application dismissed with costs [2021] HCASL 214

5 November 2021: Canberra and by video link

No.	*Applicant*	*Respondent*	*Court appealed from*	*Results*
1.	Ethicon Sarl & Ors	Gill & Ors (S47/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 29	Application refused with costs [2021] HCATrans 187
2.	Return to Work Corporation of South Australia	Summerfield (A13/2021)	Supreme Court of South Australia (Court of Appeal) [2021] SASCFC 17	Application refused with costs [2021] HCATrans 183
3.	Seselja	Reardon & Anor (C4/2021)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2021] ACTCA 4	Application refused with costs [2021] HCATrans 184
4.	Key Infrastructure Australia Pty Ltd & Ors	Bensons Property Group Pty Ltd (M24/2021)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 69	Application refused with costs [2021] HCATrans 185
5.	Adaz Nominees Pty Ltd (As Trustee for the Rado No 2 Trust) & Ors	Castleway Pty Ltd (As Trustee for the Castleway Trust) & Anor (M128/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 293	Application refused with costs [2021] HCATrans 186
6.	Adaz Nominees Pty Ltd (As Trustee for the Rado No 2 Trust) & Ors	Castleway Pty Ltd (As Trustee for the Castleway Trust) & Anor (M134/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 293	Application refused with costs [2021] HCATrans 186

Publication of Reasons: 11 November 2021 (Canberra by video link)

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	Donevski	Hunter & Ors (M53/2021)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 82	Application dismissed [2021] HCASL 215
2.	Mubarak	Kelly & Anor (P25/2021)	Application for Removal	Application dismissed [2021] HCASL 216
3.	Wickenden	Smith (B48/2021)	Supreme Court of Queensland (Court of Appeal) [2021] QCA 111	Application dismissed [2021] HCASL 217
4.	NWWJ	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (S110/2021)	Full Court of the Federal Court of Australia [2020] FCAFC 176	Application dismissed [2021] HCASL 218
5.	Nash & Ors	Food and Beverage Australia Limited (A26/2021)	Supreme Court of South Australia (Court of Appeal) [2021] SASCA 59	Application dismissed with costs [2021] HCASL 219
6.	ALO19	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M49/2021)	Federal Court of Australia [2021] FCA 760	Application dismissed with costs [2021] HCASL 220
7.	BDF15	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S81/2021)	Federal Court of Australia [2021] FCA 489	Application dismissed with costs [2021] HCASL 221
8.	AJL15	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S82/2021)	Federal Court of Australia [2021] FCA 289	Application dismissed with costs [2021] HCASL 222
9.	Gallaty	The Queen (B30/2021)	Supreme Court of Queensland (Court of Appeal) [2021] QCA 80	Application dismissed [2021] HCASL 223
10.	Feldman & Anor	Tayar (M47/2021)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 185	Application dismissed with costs [2021] HCASL 224

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
11.	Mineralogy Pty Ltd	Sino Iron Pty Ltd & Ors (P23/2021)	Supreme Court of Western Australia [2021] WASCA 105	Application dismissed with costs [2021] HCASL 225
12.	Palmer	Sino Iron Pty Ltd & Ors (P24/2021)	Supreme Court of Western Australia [2021] WASCA 105	Application dismissed with costs [2021] HCASL 226
13.	McRobert Superannuation Pty Ltd & Ors	Cranston & Ors (P38/2021)	Supreme Court of Western Australia [2021] WASCA 126	Application dismissed with costs [2021] HCASL 227

12 November 2021: Canberra and by video link

No.	*Applicant*	*Respondent*	*Court appealed from*	*Results*
1.	WKMZ	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M32/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 55	Application refused with costs [2021] HCATrans 195
2.	PDWL	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S64/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 48	Application refused with costs [2021] HCATrans 197
3.	Volkswagen Aktiengesellschaft	Australian Competition and Consumer Commission (S66/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 49	Application refused with costs [2021] HCATrans 194
4.	Alameddine	The Queen (S79/2021)	Supreme Court of New South Wales (Court of Criminal Appeal) [2020] NSWCCA 232	Application refused [2021] HCATrans 198
5.	Mussalli & Ors	Commissioner of Taxation of the Commonwealth of Australia (S84/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 71	Application refused with costs [2021] HCATrans 196