HIGH COURT BULLETIN

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[2021] HCAB 8 (15 October 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

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1: SUMMARY OF NEW ENTRIES

2: Cases Handed Down

Case	Title
Palmer v The State of Western Australia	Constitutional Law
Mineralogy Pty Ltd & Anor v State of Western Australia	Constitutional Law
Edwards v The Queen	Criminal Law
Charisteas v Charisteas & Ors	Family Law
Ridd v James Cook University	Industrial Law

3: Cases Reserved

Case	Title

Hobart International Airport Pty Ltd v Clarence City Council & Anor; Australia Pacific Airports (Launceston) Pty Ltd v Northern Midlands Council & Anor	Contracts
Walton & Anor v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liquidation) & Ors	Corporations
Bell v State of Tasmania	Criminal Law
Stubbings v Jams 2 Pty Ltd & Ors	Equity
H. Lundbeck A/S & Anor v Sandoz Pty Ltd; CNS Pharma Pty Ltd v Sandoz Pty Ltd	Patents
Deputy Commissioner of Taxation v Huang	Practice and Procedure

4: Original Jurisdiction

Case	**Title**
Farm Transparency International Ltd & Anor v State of New South Wales	Constitutional Law

5: Section 40 Removal

Case	**Title**
Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor	Constitutional Law
Thoms v Commonwealth of Australia	Constitutional Law

6: Special Leave Granted

Case	**Title**
Nathanson v Minister for Home Affairs & Anor	Administrative Law
Fairbairn v Radecki	Family Law

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 October 2021 sittings.

Constitutional Law

Palmer v The State of Western Australia

B52/2020: [2021] HCA 31

Judgment delivered: 13 October 2021

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

Catchwords:

> Constitutional law – State Parliament – Legislative power – Where State of Western Australia entered into agreement concerning mining projects in Pilbara region with Mineralogy Pty Ltd and other parties ("co-proponents") including International Minerals Pty Ltd – Where plaintiff controller and beneficial owner of Mineralogy Pty Ltd and director of both Mineralogy Pty Ltd and International Minerals Pty Ltd – Where agreement and 2008 variation set out in schedules to, and thereby formed part of, *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ("State Act") – Where agreement provided that Mineralogy Pty Ltd, alone or with co-proponent, could submit proposals to relevant Minister regarding projects – Where Mineralogy Pty Ltd and International Minerals Pty Ltd submitted proposals to Minister in 2012 and 2013 – Where disputes in relation to 2012 proposal referred to arbitration, resulting in arbitral awards in favour of Mineralogy Pty Ltd and International Minerals Pty Ltd in 2014 and 2019 – Where in August 2020 Parliament of Western Australia passed *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ("Amending Act") – Where Amending Act purported to insert new Pt 3 into State Act, including provisions which would deprive 2012 and 2013 proposals of legal effect (s 9) and deprive 2014 and 2019 arbitral awards of legal effect (s 10) – Where plaintiff named in Pt 3 – Where plaintiff commenced proceedings in High Court's original jurisdiction seeking declarations that Amending Act wholly or partly invalid – Whether Amending Act singled out plaintiff for "disability" or "discrimination" in manner forbidden by s 117 of *Constitution* – Whether ss 9(1), 9(2) and 10(4)-(7) of State Act invalid on basis they amounted to exercise of adjudicative authority regarding controversy within scope of s 75(iv) of *Constitution* – Whether ss 9(1), 9(2) and 10(4)-(7) of State Act invalid on basis they constituted bill of pains and penalties – Whether Amending Act exceeded limitation on legislative power of Parliament of Western Australia arising from

rule of law.

Words and phrases – "adjudicative authority", "bill of pains and penalties", "disability", "discrimination", "exercise of judicial power", "legislative power", "rule of law", "text and structure of the Constitution".

Constitution – Ch III, s 117.

Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA).

Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA).

Special case referred to the Full Court on 6 April 2021.

Held: Questions answered.

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Mineralogy Pty Ltd & Anor v State of Western Australia

B54/2020: [2021] HCA 30

Judgment delivered: 13 October 2021

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

Catchwords:

Constitutional law – State Parliament – Legislative power – Where State of Western Australia entered into agreement concerning mining projects in Pilbara region with Mineralogy Pty Ltd and other parties ("co-proponents") including International Minerals Pty Ltd – Where agreement and 2008 variation set out in schedules to, and thereby formed part of, *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ("State Act") – Where agreement provided that Mineralogy Pty Ltd, alone or with co-proponent, could submit proposals to relevant Minister regarding projects – Where two plaintiff companies submitted proposals to Minister in 2012 and 2013 – Where disputes in relation to 2012 proposal referred to arbitration, resulting in arbitral awards in favour of plaintiffs in 2014 and 2019 – Where in August 2020 Parliament of Western Australia passed *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ("Amending Act") – Where Amending Act purported to insert new Pt 3 into State Act, including provisions which would deprive 2012 and 2013 proposals of legal effect (s 9) and deprive 2014 and 2019 arbitral awards of legal effect (s 10) – Where plaintiffs commenced proceedings in High Court's original jurisdiction seeking declarations that Amending Act wholly or partly

invalid – Whether manner of enactment of Amending Act contravened s 6 of *Australia Act 1986* (Cth) – Whether Amending Act exceeded limitation on legislative power of Parliament of Western Australia arising from rule of law or deeply rooted common law rights – Whether ss 9(1), 9(2) and 10(4)-(7) of State Act incompatible with Ch III of *Constitution* – Whether ss 9(1), 9(2) and 10(4)-(7) of State Act incompatible with s 118 of *Constitution*.

High Court – Practice – Special case – Where parties agreed to state questions of law for opinion of Full Court – Where special case stated facts and identified documents said to be necessary to enable Court to answer questions of law – Whether facts stated and documents identified sufficient to satisfy Court of necessity of answering questions of law stated in special case for determination of immediate right, duty or liability in controversy between parties.

Words and phrases – "adjudicative function", "advisory", "arbitral awards", "conflict between State laws", "deeply rooted common law rights", "exercise of judicial power", "full faith and credit", "government agreement", "institutional integrity", "interference with judicial power", "legislative power", "limitations on the scope of the legislative power", "manner and form", "necessity of answering the questions stated by the parties", "original jurisdiction", "prudential approach to resolving questions of constitutional validity", "rule of law", "severance", "special case".

Constitution – Ch III, ss 107, 118.

Colonial Laws Validity Act 1865 (Imp) – s 5.

Australia Act 1986 (Cth) – s 6.

Judiciary Act 1903 (Cth) – s 18.

High Court Rules 2004 (Cth) – rr 27. 07, 27. 08.

Commercial Arbitration Act 2013 (Qld) – ss 35, 36.

Government Agreements Act 1979 (WA).

Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA) – Pts 2, 3, Schs 1, 2.

Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA).

Special case referred to the Full Court on 6 April 2021.

Held: Questions answered.

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Criminal Law

Edwards v The Queen

S235/2020: [2021] HCA 28

Judgment delivered: 6 October 2021

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

Catchwords:

> Criminal practice – Appeal – Miscarriage of justice – Prosecution's duty of disclosure in ss 141 and 142 of *Criminal Procedure Act 1986* (NSW) – Where appellant's mobile phone seized by police upon arrest – Where police made copy of data on mobile phone ("Cellebrite Download") – Where prosecution informed appellant's lawyers of existence of Cellebrite Download prior to trial but did not serve copy – Whether prosecution failed to give full and proper pre-trial disclosure required by s 142 – Whether Cellebrite Download contained material falling within s 142(1)(i) or s 142(1)(k) – Whether forensic value of contents of Cellebrite Download for appellant's case rose above level of speculation – Whether non-provision of Cellebrite Download to appellant caused miscarriage of justice.
>
> Words and phrases – "cellebrite", "cellebrite download", "disclosure", "good prosecutorial practice", "miscarriage of justice", "pre-trial disclosure", "prosecutorial duty of disclosure", "relevant to the reliability of a prosecution witness", "s 142 notice", "would reasonably be regarded as relevant".
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> *Criminal Procedure Act 1986* (NSW) – ss 141, 142.

Appealed from NSWSC (CCA): [2020] NSWCCA 57

Held: Appeal dismissed.

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Family Law

Charisteas v Charisteas & Ors

P6/2021: [2021] HCA 29

Judgment delivered: 6 October 2021

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

Catchwords:

Family law – Property settlements – Apprehended bias – Where husband and wife separated – Where husband commenced proceedings in Family Court of Western Australia seeking orders for settlement of property – Where Family Court made orders for settlement of property – Where orders provided for early vesting of trust and distribution of trust fund and income – Where early vesting orders set aside on appeal but not remitted for redetermination – Where different judge of Family Court ("trial judge") made new and inconsistent orders for settlement of property – Where wife's barrister engaged in private communication with trial judge, including while case underway and while judgment reserved, without previous knowledge and consent of other parties – Where wife's barrister said communications did not concern substance of case – Whether fair-minded lay observer might reasonably apprehend that trial judge might not bring impartial mind to decision – Whether Family Court retained power to make orders for settlement of property subject of early vesting orders.

Words and phrases – "apprehended bias", "bias", "disclosure", "fair-minded lay observer", "final orders", "hypothetical observer", "independence and impartiality", "informed consent", "judicial practice", "private communications", "professional conduct", "property settlement", "public confidence in the judicial system", "reasonable apprehension of bias".

Family Law Act 1975 (Cth) – ss 79, 79A.

Appealed from FamCA (FC): [2020] FamCAFC 162; (2020) 354 FLR 167; (2020) 60 Fam LR 483

Held: Appeal allowed with costs.

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Industrial Law

Ridd v James Cook University

B12/2021: [2021] HCA 32

Judgment delivered: 13 October 2021

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

Catchwords:

> Industrial law (Cth) – Industrial agreement – Interpretation of Enterprise Agreement – Where Enterprise Agreement and Code of Conduct each applied to all employees of respondent – Where intellectual freedom protected by Enterprise Agreement – Where

Enterprise Agreement imposed confidentiality requirements concerning disciplinary processes – Where disciplinary action taken and employment terminated for misconduct and serious misconduct including for breaches of Code of Conduct – Whether disciplinary action taken for breaches of Code of Conduct contravened Enterprise Agreement – Whether exercise of intellectual freedom subject to constraints in Code of Conduct – Whether exercise of intellectual freedom subject to confidentiality obligations in Enterprise Agreement.

Words and phrases – "academic freedom", "censure", "Code of Conduct", "confidentiality", "critical and open debate and inquiry", "disciplinary processes", "Enterprise Agreement", "freedom of expression", "intellectual freedom", "lawful and reasonable direction", "obligations of confidentiality", "responsibility to respect the rights of others", "right to express unpopular or controversial views", "termination", "tone or manner of expression", "treat fellow staff members, students and members of the public with honesty, respect and courtesy".

Fair Work Act 2009 (Cth) – s 50.

Appealed from FCA (FC): [2020] FCAFC 123; (2020) 278 FCR 566; (2020) 382 ALR 8; (2020) 298 IR 50

Appealed from FCA (FC): [2020] FCAFC 132

Held: Appeal dismissed.

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3: Cases Reserved

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

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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Hofer v The Queen
S37/2021: [2021] HCATrans 125

Date heard: 12 August 2021

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

Catchwords:

> Criminal law – Criminal procedure – Conduct of cross-examination – Where appellant charged with 11 counts of having sexual intercourse without consent – Where two complainants testified as prosecution witnesses – Where appellant gave evidence – Where, during cross-examination, prosecutor asked appellant about aspects of his evidence arising from defence counsel's failure to comply with *Browne v Dunn* rule in respect of those matters in cross-examination of complainants – Where prosecutor suggested appellant lying in evidence about those matters because defence counsel had not put those matters to complainants – Where defence counsel did not object to prosecutor's questions – Where appellant convicted and unsuccessfully appealed to NSW Court of Criminal Appeal – Whether prosecutor able to cross-examine accused with regard to defence counsel's non-compliance with rule in *Browne v Dunn* – Whether prosecutor engaged in impermissible

questioning – Whether defence counsel at trial incompetent – Whether trial miscarried.

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

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Park v The Queen
S61/2021: [2021] HCATrans 140

Date heard: 2 September 2021

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

Catchwords:

Criminal law – Sentencing – Guilty plea reduction - Where s 22(1) of *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that, in passing sentence on offender who has pleaded guilty to offence, court may impose lesser penalty "than it would otherwise have imposed" – Where appellant pleaded guilty to offence – Where offence has 5 year maximum penalty but jurisdictional limit of 2 years applies when dealt with summarily by District Court – Where primary judge would have imposed sentence of 2 years 8 months for offence and applied 25 per cent reduction to sentence pursuant to s 22(1) – Where appellant sentenced to 2 years imprisonment – Where appellant appealed to Court of Criminal Appeal on basis reduction should have been applied to 2 years (jurisdictional limit applied to appropriate sentence) instead of 2 years 8 months (appropriate sentence before jurisdictional limit applied) - Where Court of Criminal Appeal dismissed appeal and held "would otherwise have imposed" refers to appropriate sentence despite jurisdictional limit, and jurisdictional limit only relevant if sentence post-reduction exceeds jurisdictional limit – Correct construction of "would otherwise have imposed" – Whether reduction of sentence applies to sentence appropriate to judicial officer but beyond jurisdictional limit or to sentence court would actually have imposed if no guilty plea.

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

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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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Evidence

Hamilton (a pseudonym) v The Queen
S24/2021: [2021] HCATrans 109

Date heard: 22 June 2021

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

Catchwords:

> Evidence – Tendency evidence – Jury directions – Where appellant charged with ten counts of aggravated indecent assault against three separate complainants – Where trial judge ruled evidence from complainants admissible but not cross-admissible for tendency purposes – Where anti-tendency direction not given – Where Court of Criminal Appeal held anti-tendency direction not necessary as appellant had not established risk of jury engaging in tendency

> reasoning – Where Court of Criminal Appeal found defence counsel made deliberate decision not to request anti-tendency direction to obtain forensic advantage – Whether anti-tendency direction generally be given in multi-complainant trial – Whether miscarriage of justice occasioned by failure to direct jury it was prohibited from using evidence led in support of each count as tendency evidence in support of other counts.

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

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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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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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Planning and Environment

Sunland Group Limited & Anor v Gold Coast City Council

B64/2020: [2021] HCATrans 61; [2021] HCATrans 124

Date heard: 9 April and 5 August 2021

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

Catchwords:

> Planning and environment – Development approvals – Where in 2015 second appellant bought parcel of undeveloped land which carried with it benefit of preliminary development approval granted

in 2007 – Where preliminary approval approved multi-stage residential development subject to 56 conditions – Where some conditions provided for payment of infrastructure contributions to respondent – Where preliminary approval made under *Integrated Planning Act 1997* (Qld) – Where *Integrated Planning Act* replaced by other legislation – Whether conditions concerning infrastructure contributions, properly construed, should be read as binding on appellant or landowner, or merely as statements as to scope of future possible conditions – Whether, in construction of conditions, *contra proferentem* rule applies so that ambiguities are to be resolved against approving authority.

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

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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

Addy v Commissioner of Taxation

S25/2021: [2021] HCATrans 111

Date heard: 24 June 2021

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

Catchwords:

> Taxation – Double taxation treaty – Non-discrimination clause – Where Art 25 of Australia and United Kingdom Double Taxation Treaty provides foreign nationals shall not be subjected to more burdensome tax treatment compared to hypothetical Australian national in same circumstances – Where appellant citizen of United Kingdom and holder of working holiday visa – Where working holiday visa-holders subject to special working holiday tax rate in Pt III of Sch 7 of *Income Tax Rates Act 1986* (Cth) – Where appellant taxed $3,986 compared to $1,591.44 by Australian national on same income – Where appellant selected as test case by respondent Commissioner – Where Federal Court held appellant entitled to benefit of Art 25 – Where respondent successfully appealed to Full Court – Whether appellant subject to more burdensome taxation by reason of nationality – If so, whether appellant Australian resident for tax purposes.

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

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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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4: ORIGINAL JURISDICTION

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

Constitutional Law

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

M115/2020: [2021] HCATrans 170

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

Catchwords:

> Administrative law – Jurisdictional error – Procedural fairness – Materiality – Where applicant'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 applicant 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 applicant not given opportunity to call further evidence nor make further submissions on domestic violence issue – Where applicant applied for judicial review of Tribunal decision – Where Minister conceded Tribunal denied procedural fairness and majority of Full Federal Court dismissed application on basis applicant failed to show realistic possibility of different outcome – Whether Full Federal Court applied correct test of materiality – Whether applicant'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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Aviation

Wells Fargo Trust Company, National Association (As Owner Trustee) & Anor v VB Leaseco Pty Ltd (Administrators Appointed) & Ors

S60/2021: [2021] HCATrans 63

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

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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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 applicants' building development constituted disability discrimination under *Anti-Discrimination Act 1998* (Tas) – Where applicants 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 applicant – 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 applicant – Where ICAC officers assisted DPP to prepare for trial – Where applicant 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 applicant 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 applicant 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

Orreal v The Queen

B25/2021: [2021] HCATrans 71

Date heard: 16 April 2021 – *Special leave granted*

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

The Queen v Rolfe

D2/2021: [2021] HCATrans 145

Date heard: 10 September 2021 – *Application referred to Full Court for argument as on appeal*

Catchwords:

Criminal law – Police – Use of lethal force by police officer – Protection from criminal liability – Where respondent police officer shot person violently resisting arrest three times, resulting in death – Where respondent charged with murder and, in alternative, manslaughter – Where respondent sought to rely on defence in s 148B of *Police Administration Act 1978* (NT) – Where s 148B provided protection from criminal liability for act done by person in good faith in exercise of power or function under Act – Where s 5 of Act provided "core functions" of NT Police Force includes protection of life and prevention of criminal offences – Where availability of s 148B immunity referred to NT Full Court, which held respondent

may rely on s 148B immunity – Whether "performance of function by person" in s 148B includes "core functions of Police Force" in s 5 – Whether respondent may rely on s 148B immunity.

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

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Family Law

Fairbairn v Radecki
S2/2021: [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, applicant 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, applicant began to suffer from rapid cognitive decline – Where applicant incapable of managing own affairs and, in 2018, New South Wales Trustee & Guardian appointed to act for applicant – Where Public Guardian placed applicant into aged care facility – Where respondent did not provide financial support for applicant, continued to reside in applicant's property and prevented Trustee from selling applicant's property – Where Trustee commenced proceedings against respondent in Federal Circuit Court seeking order for property settlement pursuant to s 90SM, claiming applicant 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 applicant 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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NSW Commissioner of Police v Cottle & Anor

S56/2021: [2021] HCATrans 62

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

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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Taxation

Commissioner of Taxation v Carter & Ors

S62/2021: [2021] HCATrans 72

Date heard: 16 April 2021 – *Special leave granted*

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

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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Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited

S63/2021: [2021] HCATrans 74

Date heard: 16 April 2021 – *Special leave granted on limited grounds*

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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7: Cases Not Proceeding or Vacated

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8: SPECIAL LEAVE REFUSED

Publication of Reasons: 7 October 2021 (Canberra by video link)

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	Gersbach	Gersbach (S92/2021)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 153	Application dismissed [2021] HCASL 192
2.	Kumar	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S106/2021)	Federal Court of Australia [2021] FCA 713	Application dismissed [2021] HCASL 193
3.	Munday	St Vincent's Hospital Ltd (M45/2021)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 170	Application dismissed with costs [2021] HCASL 194
4.	VP	The Queen (S77/2021)	Supreme Court of New South Wales (Court of Criminal Appeal) [2021] NSWCCA 11	Application dismissed [2021] HCASL 195
5.	Agha	Devine Real Estate Concord Pty Ltd & Ors (S87/2021)	Supreme Court of New South Wales (Court of Appeal) [2021] NSWCA 29	Application dismissed with costs [2021] HCASL 196
6.	Spirits International B.V.	Federal Treasury Enterprise (FKP) Sojuzplodoimport & Anor (S89/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 120	Application dismissed with costs [2021] HCASL 197

Publication of Reasons: 14 October 2021 (Canberra by video link)

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	In the matter of an application by David Weisinger for leave to appeal (C11/2021)		High Court of Australia (Unreported)	Application dismissed [2021] HCASL 198
2.	In the matter of an application by David Weisinger for leave to appeal (C12/2021)		High Court of Australia (Unreported)	Application dismissed [2021] HCASL 199
3.	Armet	CFC Consolidated Pty Ltd (P21/2021)	Supreme Court of Western Australia (Court of Appeal) [2021] WASCA 42	Application dismissed [2021] HCASL 200
4.	Harradine	Chief Executive of the Department for Education and Child Development (A12/2021)	Supreme Court of South Australia (Court of Appeal) (Unreported)	Application dismissed with costs [2021] HCASL 201
5.	BCT18 & Ors	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (A28/2021)	Federal Court of Australia [2021] FCA 695	Application dismissed [2021] HCASL 202
6.	DYI16	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M43/2021)	Federal Court of Australia [2021] FCA 612	Application dismissed [2021] HCASL 203
7.	Daher	Bell & Anor (M51/2021)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 192	Application dismissed [2021] HCASL 204
8.	Barranbali Pty Ltd & Ors	Pioneer Australia Pty Ltd & Anor (B42/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 100	Application dismissed with costs [2021] HCASL 205
9.	Robert Taylor (a pseudonym)	The Queen (S21/2021)	Supreme Court of New South Wales (Court of Criminal Appeal)	Application dismissed [2021] HCASL 206
10.	Kassab (a pseudonym)	The Queen (S57/2021)	Supreme Court of New South Wales (Court of Criminal Appeal)	Application dismissed [2021] HCASL 207

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
11.	MNLR	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S76/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 35	Application dismissed with costs [2021] HCASL 208
12.	Landmark Roofing Pty Ltd	SafeWork NSW (S86/2021)	Supreme Court of New South Wales (Court of Criminal Appeal) [2021] NSWCCA 95	Application dismissed with costs [2021] HCASL 209
13.	Dzik	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (B32/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 78	Application dismissed with costs [2021] HCASL 210

15 October 2021: Canberra and by video link

No.	*Applicant*	*Respondent*	*Court appealed from*	*Results*
1.	Jennings & Anor	Cheshire & Anor (A10/2021)	Full Court of the Supreme Court of South Australia [2021] SASCFC 11	Application refused with costs [2021] HCATrans 165
2.	Bucknell & Anor	Townsville City Council & Anor (B17/2021)	Supreme Court of Queensland (Court of Appeal) [2021] QCA 26	Application refused with costs [2021] HCATrans 164
3.	The State of Tasmania	MFC (H6/2021)	Full Court of the Supreme Court of Tasmania [2021] TASFC 6	Application refused with costs [2021] HCATrans 167
4.	HZCP	Minister for Immigration and Border Protection & Anor (M15/2021)	Full Court of the Federal Court of Australia [2019] FCAFC 202	Application refused with costs [2021] HCATrans 168
5.	Façade Designs International Pty Ltd	Yuanda Vic Pty Ltd (M22/2021)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 44	Application refused with costs [2021] HCATrans 169