



# HIGH COURT BULLETIN

Produced by the Legal Research Officer,  
High Court of Australia Library  
[2023] HCAB 6 (11 August 2023)

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 .....	1
2: Cases Handed Down .....	3
3: Cases Reserved .....	9
4: Original Jurisdiction .....	21
5: Section 40 Removal .....	24
6: Special Leave Granted .....	25
7: Cases Not Proceeding or Vacated .....	35
8: Special Leave Refused .....	36

## 1: SUMMARY OF NEW ENTRIES

### 2: Cases Handed Down

Case	Title
<a href="#"><i>Vunilagi v The Queen &amp; Anor</i></a>	Constitutional Law
<a href="#"><i>The King v Jacobs Group (Australia) Pty Ltd formerly known as Sinclair Knight Merz</i></a>	Criminal Law
<a href="#"><i>Zurich Insurance Company Ltd &amp; Anor v Koper &amp; Anor</i></a>	Practice and Procedure
<a href="#"><i>Disorganized Developments Pty Ltd &amp; Ors v State of South Australia</i></a>	Statutes
<a href="#"><i>CCIG Investments Pty Ltd v Schokman</i></a>	Torts

### 3: Cases Reserved

Case	Title
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<a href="#"><i>Karpik v Carnival PLC ARBN 107 998 443 &amp; Anor</i></a>	Contract
<a href="#"><i>Real Estate Tool Box Pty Ltd &amp; Ors v Campaigntrack Pty Ltd &amp; Anor</i></a>	Copyright
<a href="#"><i>Mitsubishi Motors Australia Ltd &amp; Anor v Begovic</i></a>	Trade Practices

#### 4: Original Jurisdiction

<b>Case</b>	<b>Title</b>
<a href="#"><i>Lesianawai v Minister for Immigration, Citizenship and Multicultural Affairs</i></a>	Immigration

#### 5: Section 40 Removal

#### 6: Special Leave Granted

<b>Case</b>	<b>Title</b>
<a href="#"><i>AB (a pseudonym) &amp; Anor v Independent Broad-based Anti-corruption Commission</i></a>	Administrative Law
<a href="#"><i>Minister for Immigration, Citizenship and Multicultural Affairs v McQueen</i></a>	Immigration

#### 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 August 2023 sittings.

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### Constitutional Law

*Vunilagi v The Queen & Anor*

**C13/2022:** [\[2023\] HCA 24](#)

**Judgment delivered:** 8 August 2023

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

**Catchwords:**

Constitutional law (Cth) – Judicial power of Commonwealth – Jurisdiction vested in Territory courts – Institutional integrity of Territory courts – Where s 68BA inserted into *Supreme Court Act 1933* (ACT) in response to COVID-19 pandemic – Where s 68BA(3) allowed Supreme Court of Australian Capital Territory (“ACT”) to make order for trial by judge alone for previously excluded indictable offences if satisfied order would ensure orderly and expeditious discharge of Court business and in interests of justice – Where s 68BA(4) required judge to provide written notice of proposed order under s 68BA(3) – Where no requirement for election or consent by accused – Where Justice of Supreme Court proposed to and did order trial by judge alone despite appellant’s submissions opposing order – Where appellant tried and convicted under ss 54 and 60 of *Crimes Act 1900* (ACT) – Whether s 68BA(4) substantially impaired institutional integrity of Territory courts as function conferred incompatible with position of Territory court as repository of federal jurisdiction.

Constitutional law (Cth) – Trial by jury – Where prior to self-government *Crimes Act 1900* (NSW) picked up and applied in ACT as surrogate federal law – Where following self-government Commonwealth law provided *Crimes Act 1900* (NSW) shall be taken to be enacted by ACT Legislative Assembly and may be amended and repealed – Where subsequent ACT law provided *Crimes Act 1900* (NSW) to be treated as an Act passed by ACT Legislative Assembly – Where ss 54 and 60 of *Crimes Act 1900* (ACT) were indictable offences – Whether ss 54 and 60 were laws of the Commonwealth within meaning of s 80 of *Constitution* – Whether “any law of the Commonwealth” within meaning of s 80 of *Constitution* includes laws of ACT Legislative Assembly as “subordinate legislature” – Whether miscarriage of justice as trial on indictment was not by jury contrary

to s 80 of *Constitution* – Whether *R v Bernasconi* (1915) 19 CLR 629 should be re-opened or overruled.

Words and phrases – “amend or repeal”, “case management”, “Ch III court”, “COVID-19 emergency period”, “gatekeeping function”, “independent body politic”, “institutional integrity”, “interests of justice”, “judge alone trial”, “*Kable* principle”, “law of the Commonwealth”, “overruling constitutional precedent”, “peace, order and good government of the Territory”, “picked up and applied”, “plenary power”, “proposed order”, “prudential approach”, “self-government”, “statutory fiction”, “subordinate legislature”, “taken to be an enactment”, “trial on indictment”.

*Constitution*, Ch III, ss 80, 111, 122.

*ACT Self-Government (Consequential Provisions) Act 1988* (Cth), s 12.

*Australian Capital Territory (Self-Government) Act 1988* (Cth), ss 7, 8, 22, 34.

*Crimes Act 1900* (ACT), ss 54, 60.

*Crimes Legislation (Status and Citation) Act 1992* (ACT), s 3.

*Supreme Court Act 1933* (ACT), ss 68A, 68B, 68BA, 116.

**Held:** Appeal dismissed.

[Return to Top](#)

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## Criminal Law

*The King v Jacobs Group (Australia) Pty Ltd formerly known as Sinclair Knight Merz*

**S148/2022:** [\[2023\] HCA 23](#)

**Judgment date:** 2 August 2023

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

**Catchwords:**

Statutes – Construction – Where respondent pleaded guilty to offences of conspiracy to cause offer of provision of bribe to foreign public official contrary to ss 11.5 and 70.2(1) of *Criminal Code* (Cth) – Where s 70.2(5) of *Criminal Code* (Cth) relevantly prescribed maximum monetary penalty for offence as not more than greatest of: (a) 100,000 penalty units; or (b) if court can determine value of benefit that body corporate obtained that is reasonably attributable to conduct constituting offence, three times value of that benefit – Where parties agreed “benefit” obtained was securing contracts for carrying out construction projects – Where parties also agreed “benefit” obtained was money received for performing contracts –

Whether s 70.2(5)(b) required value of benefit obtained by respondent to be determined as sum of amounts respondent in fact received under contracts secured by bribery – Whether deduction could properly be made for any costs incurred in performing contracts.

Words and phrases – “any advantage”, “benefit”, “bribery”, “effective, proportionate, and dissuasive”, “fine”, “foreign public official”, “gross amount”, “international obligations”, “maximum penalty”, “monetary penalty”, “net benefit”, “obtained directly or indirectly”, “OECD Convention”, “reasonably attributable”, “sentence”, “value of the benefit”.

*Criminal Code (Cth), s 70.2.*

**Held:** Appeal allowed.

[Return to Top](#)

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## Practice and Procedure

*Zurich Insurance Company Ltd & Anor v Koper & Anor*  
**S147/2022:** [\[2023\] HCA 25](#)

**Judgment delivered:** 8 August 2023

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

### **Catchwords:**

Practice and procedure – Jurisdiction – Service outside Australia – Where first respondent sought leave under *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) (“Claims Act”) to bring proceedings against appellant insurers in Supreme Court of New South Wales (“NSWSC”) – Where ability of first respondent to bring proceedings under Claims Act against appellant insurers in NSWSC assumed to depend on whether notional proceedings in NSWSC could be brought against insured resident of New Zealand – Whether service of process on insured in New Zealand would have been effective by reason of ss 9 and 10 of *Trans-Tasman Proceedings Act 2010* (Cth) (“TTPA”) – Whether ss 9 and 10 of TTPA have valid application to initiating document issued by State court relating to civil proceeding in State jurisdiction.

Constitutional law (Cth) – Powers of Commonwealth Parliament – Implications from *Constitution* – Power with respect to service and execution throughout the Commonwealth of civil and criminal process – Where ss 9 and 10 of TTPA accepted to be within legislative power of Commonwealth Parliament under s 51(xxix) of *Constitution*

– Whether ss 9 and 10 of TPA invalid in application to initiating document issued by State court in relation to civil proceeding in State jurisdiction – Whether capacity of Commonwealth Parliament to alter scope and reach of State judicial power subject to implied limitation derived from ss 51(xxiv), 77(ii) and 77(iii) of *Constitution* – Whether power of Commonwealth Parliament under s 51(xxiv) of *Constitution* to make laws for service of process of State courts throughout geographical area of Commonwealth inconsistent with purported implied limitation.

Words and phrases – “authority to adjudicate”, “constitutional implications”, “constitutional limitation”, “federal jurisdiction”, “initiating document”, “initiating process”, “judicial power”, “judicial power of the Commonwealth”, “jurisdiction”, “legislative power”, “personal jurisdiction”, “service of process”, “State judicial power”, “State jurisdiction”, “subject-matter jurisdiction”, “territorial jurisdiction”, “text and structure of the *Constitution*”.

*Constitution*, ss 51, 71, 75, 76, 77.

*Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW), ss 4, 5.

*Trans-Tasman Proceedings Act 2010* (Cth), ss 3, 9, 10.

**Held:** Appeal dismissed with costs.

[Return to Top](#)

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## Statutes

*Disorganized Developments Pty Ltd & Ors v State of South Australia*  
**A22/2022:** [\[2023\] HCA 22](#)

**Judgment date:** 2 August 2023

**Coram:** Kiefel CJ, Gageler, Steward, Gleeson and Jagot JJ

### Catchwords:

Statutes – Interpretation – Efficacy of regulations – Where s 83GD(1) of *Criminal Law Consolidation Act 1935* (SA) (“1935 Act”) established offence for participant in criminal organisation to enter or attempt to enter “prescribed place” – Where “prescribed place” meant place declared by regulation – Where s 370 of 1935 Act empowered Governor in Council to make regulations – Where *Criminal Law Consolidation (Criminal Organisations) Regulations 2015* (SA) (“2015 Regulations”) declared list of places to be “prescribed places” – Where Governor made two Regulations (“Cowirra Regulations”) purporting to vary 2015 Regulations to include blocks of land at Cowirra, South Australia (“Cowirra land”) – Where appellants owners and occupiers of Cowirra land – Where, if Cowirra Regulations valid,

second and third appellants would commit criminal offence if they entered Cowirra land – Where Cowirra Regulations did not in terms “declare” Cowirra land to be “prescribed places” – Whether Cowirra Regulations valid exercise of regulation-making power in s 370 of 1935 Act.

Statutes – Interpretation – Presumption of duty to afford procedural fairness – Whether power to make regulations prescribing places under 1935 Act conditioned by duty to afford procedural fairness to owners and occupiers of land – Whether presumption displaced by statute.

Words and phrases – “declaration power”, “displace”, “duty”, “Governor in Council”, “owners and occupiers”, “participant in a criminal organisation”, “prescribed place”, “presumption”, “procedural fairness”, “regulation-making power”, “statutory interpretation”.

*Criminal Law Consolidation Act 1935 (SA), Pt 3B, Div 2.*

*Statutes Amendment (Serious and Organised Crime) Act 2015 (SA), Pt 5, Sch 1.*

*Criminal Law Consolidation (Criminal Organisations) (Prescribed Place— Cowirra) Variation Regulations 2020 (SA).*

*Criminal Law Consolidation (Criminal Organisations) (Prescribed Place— Cowirra) (No 2) Variation Regulations 2020 (SA).*

*Criminal Law Consolidation (Criminal Organisations) Regulations 2015 (SA).*

**Held:** Appeal allowed with costs.

[Return to Top](#)

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## Torts

*CCIG Investments Pty Ltd v Schokman*

**B43/2022:** [\[2023\] HCA 21](#)

**Judgment date:** 2 August 2023

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

**Catchwords:**

Torts – Negligence – Vicarious liability – Where appellant employer of respondent – Where appellant required respondent to live in shared accommodation with another employee under terms of employment contract – Where other employee negligently urinated on respondent while he was sleeping causing cataplectic attack – Whether other employee’s wrongful act in course or scope of

employment – Whether appellant vicariously liable for negligent act of other employee.

Words and phrases – “agency”, “course or scope of employment”, “employee”, “employer”, “frolic”, “modes of doing authorised acts”, “negligent act”, “nondelegable duty”, “occasion”, “opportunity”, “sufficiently or closely connected”, “sufficiently strong connection”, “tort”, “unauthorised act”, “vicarious liability”, “wrongful act”.

**Held:** Appeal allowed with costs.

[Return to Top](#)

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## 3: CASES RESERVED

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

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### Civil Procedure

*GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore*

**[S150/2022](#)**: [\[2023\] HCATrans 76](#)

**Date heard:** 8 June 2023

**Coram:** Kiefel CJ, Gageler, Steward, Gleeson and Jagot JJ

**Catchwords:**

Civil procedure – Stay of proceedings – Fair trial – *Civil Procedure Act 2005* (NSW), s 67 – Abuse of process – Where appellant claims to have been sexually assaulted by priest of Roman Catholic Diocese of Lismore – Where appellant instituted proceedings on 31 January 2020 against respondent, a statutory corporation, on bases of negligence and vicarious liability – Where priest died in 1996 – Where primary judge satisfied material showed that there likely to be evidence available allowing fair trial between parties – Where respondent sought permanent stay of proceedings – Where primary judge refused stay, but decision reversed by Court of Appeal – Where Court of Appeal considered fair trial could not be had in circumstances where priest unavailable to give factual instructions and respondent had not been notified of claims before priest’s death – Whether proceedings ought to be stayed on basis that fair trial could no longer be had such that proceedings an abuse of process.

**Appealed from NSWSC (CA):** [\[2022\] NSWCA 78](#)

[Return to Top](#)

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### Constitutional Law

*Benbrika v Minister for Home Affairs & Anor*

**[M90/2022](#)**: [\[2023\] HCATrans 83](#)

**Date heard:** 14 June 2023

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

**Catchwords:**

Constitutional law – Judicial power of Commonwealth – Cessation of Australian citizenship – Where s 36D of *Australian Citizenship Act 2007* (Cth) provided Minister for Home Affairs may make determination that person ceases to be Australian citizen if satisfied, among other matters, that person convicted of specified offences in s 36D(5) and that it contrary to public interest for person to remain Australian citizen – Where applicant citizen of Algeria and Australia – Where applicant convicted of offences under ss 102.3(1) (intentionally being member of terrorist organisation), 102.2(1) (intentionally directing activities of terrorist organisation) and 101.4(1) (possession of thing connected with preparation for terrorist act) of *Criminal Code* (Cth) – Where provisions s 36D(5) that enlivened power to make determination under s 36D included offences against ss 102.3(1), 102.2(1) and 101.4(1) of *Criminal Code* – Where Minister determined, pursuant to s 36D(1), that applicant ceased to be Australian citizen – Whether s 36D contrary to Ch III of *Constitution* – Whether s 36D invalid for conferring upon Minister exclusively judicial function of adjudging and punishing criminal guilt.

*Special case referred to the Full Court on 23 February 2023.*

[Return to Top](#)

***Crime and Corruption Commission v Carne***

**[B66/2022](#)**; [\[2023\] HCATrans 74](#); [\[2023\] HCATrans 75](#)

**Date heard:** 6 and 7 June 2023

**Coram:** Kiefel CJ, Gageler, Gordon, Edelman and Jagot JJ

**Catchwords:**

Constitutional law – Legislature – Privileges – Privilege of parliamentary debate and proceedings – Where Crime and Corruption Commission (“Commission”) received complaint as to allegations of corrupt conduct against respondent, former Public Trustee of Queensland – Where, following investigation, Commission prepared draft report, which did not make any finding of corrupt conduct – Where Commission submitted copy of Report to Chair of Parliamentary Crime and Corruption Committee (“PCCC”) and requested, pursuant to s 69(1)(b) of *Crime and Corruption Act 2001* (Qld) (“CC Act”), that it be given to Speaker – Where respondent filed originating application seeking declaration that report was not “report” for purposes of s 69(1) of CC Act – Where Chair of PCCC issued evidentiary certificate under s 55 of *Parliament of Queensland Act 2001* (Qld) (“POQ Act”) certifying report as: document prepared for purpose of, or incidental to, transacting business of PCCC under

s 9(2)(c) of CC Act; and document present or submitted to PCCC – Where s 8(1) of POQ Act provides proceedings in Assembly cannot be impeached or questioned in any court – Whether parliamentary privilege protects reports prepared for and provided to parliamentary committees under POQ Act – Whether, where Parliament asserts privilege, court can enquire beyond that.

Statutes – Acts of Parliament – Interpretation – Where s 33 of CC Act provides for Commission’s corruption functions – Where s 64 of CC Act provides Commission may report in performing its functions – Where s 69(1) provides report may be tabled in Parliament when report is made on a public hearing or report is directed to be given to Speaker – Where respondent contended that because report did not make finding of “corrupt conduct” and did not relate to public hearing, it was not report for purposes of s 69 of CC Act – Whether Commission only able to report about corruption investigation under CC Act where positive finding of “corrupt conduct”.

**Appealed from QLDSC (CA):** [\[2022\] QCA 141](#); (2022) QR 334; (2022) 405 ALR 166

[Return to Top](#)

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*Jones v Commonwealth of Australia & Ors*

**B47/2022:** [\[2023\] HCATrans 85](#)

**Date heard:** 15 June 2023

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

**Catchwords:**

Constitutional law – Powers of Commonwealth Parliament – Power to make laws with respect to naturalisation and aliens – Cessation of Australian citizenship – Where s 34(2) of *Australian Citizenship Act 2007* (Cth) (“2007 Citizenship Act”) provides Minister for Home Affairs may revoke person’s Australian citizenship where, relevantly, person has, after making application to become Australian citizen, been convicted of serious offence (s 34(2)(b)(ii)), and Minister satisfied that it contrary to public interest for person to remain Australian citizen – Where, by operation of transitional provisions, s 34(2)(b)(ii) applies as if it also referred to person’s conviction, at any time after person made application for certificate Australian citizenship under *Australian Citizenship Act 1948* (Cth), of offence that person committed at any time before grant of certificate – Where plaintiff citizen of United Kingdom by birth and became Australian citizen in December 1988 – Where plaintiff convicted of offences contrary to Queensland laws – Where Minister revoked plaintiff’s

citizenship, relying on s 34(2)(b)(ii) of 2007 Citizenship Act – Whether s 34(2)(b)(ii) supported by s 51(xix) of *Constitution*.

Constitutional law (Cth) – Judicial power of Commonwealth – Whether s 34(2)(b)(ii) contrary to Ch III of *Constitution* – Whether s 34(2)(b)(ii) invalid for conferring upon Minister exclusively judicial function of adjudging and punishing criminal guilt.

*Special case referred to the Full Court on 3 April 2023.*

[Return to Top](#)

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### *Vanderstock & Anor v The State of Victoria*

**M61/2021:** [\[2023\] HCATrans 7](#); [\[2023\] HCATrans 10](#); [\[2023\] HCATrans 11](#)

**Date heard:** 14, 15 and 16 February 2023

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

#### **Catchwords:**

Constitutional law – Duties of excise – Section 90 of *Constitution* – Exclusive power of Commonwealth Parliament – Where *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) (“ZLEV Act”) defines “ZLEV” to mean any of following not excluded vehicles: (a) electric vehicle; (b) hydrogen vehicle; and (c) plug-in hybrid electric vehicle – Where s 7(1) of ZLEV Act requires registered operator of ZLEV to pay charge for use of ZLEV on specified roads – Whether s 7(1) of ZLEV Act invalid as imposing duty of excise within meaning of s 90 of *Constitution* – Whether ZLEV a tax on consumption of goods – Whether inland tax on consumption of goods a duty of excise within meaning of s 90 of *Constitution*.

*Special case referred to the Full Court on 2 June 2022.*

[Return to Top](#)

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## Contract

*Karpik v Carnival PLC ARBN 107 998 443 & Anor*

**S25/2023:** [\[2023\] HCATrans 99](#); [\[2023\] HCATrans 100](#)

**Date heard:** 3 and 4 August 2023

**Coram:** Gageler, Gordon, Edelman, Gleeson and Jagot JJ

**Catchwords:**

Contract – Construction – Class action waiver clause – Exclusive jurisdiction clause – Where representative proceedings brought under Pt IVA of *Federal Court of Australia Act 1976* (Cth) (“FCA Act”) against owner of cruise ship, *Ruby Princess* – Where class consisted of parties to either Australian terms and conditions, US terms and conditions or UK terms and conditions – Where US terms and conditions contained class action waiver clause, exclusive jurisdiction clause, and choice of law clause – Where Federal Court asked to determine whether US terms and conditions incorporated into Mr Ho’s contract and whether claim should in effect be stayed – Proper approach to construction of clauses.

Trade practices – Consumer law – Unfair terms – *Australian Consumer Law* (“ACL”), s 23 – Where primary judge held s 5(1)(g) of *Competition and Consumer Act 2010* (Cth) extends operation of s 23 of ACL to “engaging in conduct outside Australia... by bodies corporate... carrying on business in Australia” – Whether extraterritorial scope of s 23 of ACL applied to Mr Ho’s contract with second respondent – Whether class action waiver clause in Mr Ho’s contract void or unenforceable under s 23 of ACL.

Private international law – Enforcement – Exclusive jurisdiction clause – Where US terms and conditions contained exclusive jurisdiction clause in favour of US courts – Whether Mr Ho’s claim ought to be stayed pursuant to exclusive jurisdiction clause.

Representative proceedings – Class action – Waiver clause – Enforceability – Where primary judge and majority of Full Court held, because Pt IVA permissive, as group members can opt out under s 33J of FCA Act, parties are free to contractually waive right to participate in representative proceeding – Whether class action waiver clause in Mr Ho’s contract void or unenforceable for being contrary to Pt IVA of FCA Act.

**Appealed from FCA (FC):** [\[2022\] FCAFC 149](#); (2022) 404 ALR 386; (2022) 163 ACSR 119

[Return to Top](#)

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## Copyright

*Real Estate Tool Box Pty Ltd & Ors v Campaigntrack Pty Ltd & Anor*  
**S16/2023:** [\[2023\] HCATrans 96](#)

**Date heard:** 1 August 2023

**Coram:** Gageler, Gordon, Edelman, Steward and Jagot JJ

**Catchwords:**

Copyright – Infringement – Authorisation – Where s 36(1) of *Copyright Act 1968* (Cth) provides copyright infringed by person who, not being owner of copyright, and without licence of owner, does in Australia, or “authorizes” doing in Australia of, any act comprised in copyright – Where s 36(1A) of *Copyright Act* sets out matters that must be taken into account in determining s 36(1) – Where Full Court found first, second, fifth and sixth applicants infringed copyright in works by authorising infringements of second respondent and other developers in developing system, and by authorising infringements of users in using system – Where Full Court found third and fourth respondents infringed copyright in works by authorising infringements of second respondent – Proper approach to construction of “authorizes” in s 36(1) of *Copyright Act* – Whether finding of authorisation of infringement of copyright under s 36(1) of *Copyright Act* requires mental element – Whether authorisation under s 36(1) of *Copyright Act* may be imposed on persons by imputing to them indifference on account of failure to inquire about supposed infringement.

**Appealed from FCA (FC):** [\[2022\] FCAFC 112](#); (2022) 292 FCR 512; (2022) 402 ALR 576; (2022) 167 IPR 411

**Appealed from FCA (FC):** [\[2022\] FCAFC 121](#)

[Return to Top](#)

## Criminal Law

*Bromley v The King*

**A40/2021:** [\[2023\] HCATrans 62](#); [\[2023\] HCATrans 64](#)

**Date heard:** 17 and 18 May 2023

**Coram:** Gageler ACJ, Edelman, Steward, Gleeson and Jagot JJ

**Catchwords:**

Criminal law – Second or subsequent appeal – Further evidence – Where applicant and co-accused convicted of murder – Where, at trial, prosecution led evidence from eyewitness who suffered from schizoaffective disorder – Where applicant and co-accused appealed against convictions, including on ground that eyewitness’s evidence unsafe, but appeals dismissed and subsequent petitions for mercy refused – Where applicant sought to appeal pursuant to s 353A of *Criminal Law Consolidation Act 1935* (SA) – Where s 353A empowers Full Court to hear second or subsequent appeal against conviction by

person convicted on information if Court satisfied there “fresh and compelling evidence” that should, in “interests of justice”, be considered on appeal – Where applicant adduced expert evidence concerning reliability of eyewitness in light of mental illness – Where Court of Appeal refused application, holding new evidence not “fresh” or “compelling”, and not in “interests of justice” to consider new evidence – Whether new evidence “compelling” – Whether in “interests of justice” to consider applicant’s evidence.

**Appealed from SASC (FC):** [\[2018\] SASFC 41](#)

[Return to Top](#)

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*HCF v The Queen*

**B50/2022:** [\[2023\] HCATrans 43](#)

**Date heard:** 14 April 2023

**Coram:** Gageler, Edelman, Steward, Gleeson and Jagot JJ

**Catchwords:**

Criminal law – Miscarriage of justice – Juror misconduct – Application of proviso that no substantial miscarriage of justice actually occurred – *Criminal Code* (Qld), s 668E(1) – Where juror disobeyed trial judge’s directions that: (1) prohibited independent research; and (2) required discovery by other jurors of any such misconduct – Where sheriff investigated juror misconduct pursuant to s 70(7) of *Jury Act 1995* (Qld) and produced report provided to parties before appeal heard – Whether substantial miscarriage of justice occasioned by proven disobedience by jurors of trial judge’s direction – Whether verdicts of guilty were true for whole jury in circumstances where only five of twelve jurors responded to sheriff’s investigation – Whether proviso applies where jury fails to obey judicial directions.

**Appealed from QLDSC (CA):** [\[2021\] QCA 189](#)

[Return to Top](#)

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*Lang v The Queen*

**B57/2022:** [\[2023\] HCATrans 60](#)

**Date heard:** 12 May 2023

**Coram:** Kiefel CJ, Gageler, Gordon, Edelman and Jagot JJ

**Catchwords:**

Criminal law – Unreasonable verdict – Appeal against murder conviction – Where deceased died from knife wound to abdomen – Where hypothesis raised that deceased had committed suicide – Where pathologist expressed opinion that deceased's wound more likely to have been caused by second person than to have been self-inflicted – Whether guilty verdict unreasonable as, on whole of evidence, there reasonable possibility deceased committed suicide – Whether pathologist's opinion inadmissible because not an opinion based on expert knowledge – Lies – Consciousness of guilt – Whether alleged lie capable of overcoming improbabilities in Crown case.

**Appealed from QLDSC (CA):** [\[2022\] QCA 29](#)

[Return to Top](#)

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## Evidence

*McNamara v The King*

**S143/2022:** [\[2023\] HCATrans 61](#)

**Date heard:** 16 May 2023

**Coram:** Gageler ACJ, Gordon, Steward, Gleeson, Jagot JJ

**Catchwords:**

Evidence – Unfair prejudice – Meaning of “party” – Joint trial – Co-accused – Where appellant and co-accused arraigned upon joint indictment that alleged one count of murder and one count of supply of commercial quantity of prohibited drug – Where Crown alleged that, pursuant to joint criminal enterprise, appellant and co-accused murdered deceased and dispossessed deceased of drugs – Where appellant sought to introduce evidence relevant to defence of duress and existence of joint criminal enterprise, namely evidence co-accused said to appellant “I did [deceased]” and evidence co-accused told appellant of other serious crimes co-accused committed – Where evidence excluded on basis that, though relevant under s 55 of *Evidence Act 1994* (NSW), probative value of evidence substantially outweighed by danger evidence might be “unfairly prejudicial to party” under s 135(a) of *Evidence Act*, namely to co-accused – Whether word “party” in s 135(a) of *Evidence Act 1994* (NSW) extends to and includes co-accused in joint trial.

**Appealed from NSWSC (CCA):** [\[2021\] NSWCCA 160](#); (2021) 290 A Crim R 239

[Return to Top](#)

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# Immigration

*AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Ors*

**[M84/2022; M85/2022](#); [2023] HCATrans 59**

**Date heard:** 11 May 2023

**Coram:** Kiefel CJ, Gordon, Edelman, Steward and Gleeson JJ

**Catchwords:**

Immigration – Detention – Regional processing – Where appellant in immigration detention since 15 July 2013 – Where appellant required to be taken to regional processing country as soon as reasonably practicable under s 198AD of *Migration Act 1958* (Cth) – Where primary judge found it reasonably practicable to take appellant to regional processing country no later than end of September 2013 and, consequently, there had been “extensive” and “unwarranted delay” in removing appellant – Where primary judge made order compelling end of appellant’s detention by causing appellant to be taken from Australia under s 196 of *Migration Act* (“mandamus order”) – Where primary judge ordered appellant be detained in home only for so long as it took for appellant to be taken to regional processing country in accordance with mandamus order (“order 3”) – Where order 3 suspended, coming into effect only if, after 14 days, respondents failed to take appellant to regional processing country – Where, hours before order 3 due to come into effect, only available regional processing country rejected appellant and Minister exercised personal, non-compellable power under s 198AE of *Migration Act* to disapply s 198AD to appellant – Where appellant remains in detention centre – Where Full Court granted leave to appeal from orders 3-5 of primary judge’s orders – Whether order 3 satisfies temporal and/or purposive element of para (a) of definition of “immigration detention” in s 5 of *Migration Act*, whereby immigration detention means being in company of, and restrained by, an officer or another prescribed person.

Constitutional law – Chapter III – Courts and judges – Appeal from interlocutory order – Where s 24(1A) of *Federal Court of Australia Act 1976* (Cth) requires leave to appeal from interlocutory judgment – Where ss 22 and 23 respectively confer power on Court to grant all remedies to which any party appears entitled and power to issue writs of such kinds as Court considers appropriate – Whether there “matter” within meaning of Chapter III of *Constitution* – Whether Full Court erred in granting leave to appeal from order 3 – Whether, in circumstances order 3 not come into execution, Full Court erred in granting leave without considering “substantial injustice” test.

**Appealed from FCA (FC):** [\[2022\] FCAFC 52](#); (2022) 290 FCR 149

[Return to Top](#)

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## Industrial Law

*Qantas Airways Limited & Anor v Transport Workers Union of Australia*

**S153/2022:** [\[2023\] HCATrans 54](#); [\[2023\] HCATrans 56](#)

**Date heard:** 9 and 10 May 2023

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

**Catchwords:**

Industrial law – Adverse action – Workplace right – Whether prohibition s 340(1)(b) only prohibits adverse action taken to prevent exercise of presently existing “workplace right” – Where first appellant made decision to outsource ground operations at 10 airports to third party providers – Where primary judge found outsourcing decision contravened s 340(1)(b) of *Fair Work Act 2009* (Cth) – Where, at time of outsourcing decision, one relevant enterprise agreement had not yet reached its nominal expiry date and no process of bargaining for replacement had been initiated, and another enterprise agreement had reached nominal expiry date and process of bargaining had commenced, but no process for protected industrial action been initiated – Where primary judge held first appellant contravened s 340(1)(b), finding first appellant had not discharged reverse onus under s 360(1) of establishing first appellant had not made outsourcing decision to prevent affected employees from exercising workplace rights to organise and engage in protected industrial action.

**Appealed from FCA (FC):** [\[2022\] FCAFC 71](#); (2022) 292 FCR 34; (2022) 402 ALR 1; (2022) 315 IR 1

[Return to Top](#)

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## Leases and Tenancies

*Young & Anor v Chief Executive Officer (Housing)*

**D5/2022:** [\[2023\] HCATrans 30](#)

**Date heard:** 16 March 2023

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

**Catchwords:**

Leases and tenancies – Residential tenancies – Damages for distress and disappointment – Where Ms Young leased home from respondent – Where home without front door in doorframe for 68 months – Where appellants commenced proceedings in Northern Territory Civil and Administrative Tribunal (“Tribunal”) seeking compensation under s 122(1) of *Residential Tenancies Act 1999* (NT) (“RTA”) for breach of landlord’s obligations to repair premises (s 57 of RTA), to provide reasonably secure home (s 49 RTA) or, alternatively, to ensure premises “habitable” (s 48 of RTA) – Where Tribunal found landlord failed to comply with obligation of repair (s 57) and awarded \$100 compensation – Where Supreme Court set aside Tribunal’s decision, holding failure to install door fundamental breach of respondent’s obligation to provide reasonably secure premises, and awarded \$10,200 compensation for resulting disappointment and distress for period of 68 months – Where Court of Appeal allowed appeal, determining only compensation for disappointment and distress resulting from physical inconvenience recoverable – Whether to recover damages for emotional disturbance or “mental distress” claim brought under s 122 of RTA it necessary to apply principles of remoteness and foreseeability – Whether claim for compensation for emotional disturbance of “mental distress” able to be founded on breach of s 49.

**Appealed from NT (CA):** [\[2022\] NTCA 1](#)

[Return to Top](#)

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## Trade Practices

*Mitsubishi Motors Australia Ltd & Anor v Begovic*

**M17/2023:** [\[2023\] HCATrans 97](#)

**Date heard:** 2 August 2023

**Coram:** Gageler, Gordon, Steward, Gleeson and Jagot JJ

**Catchwords:**

Trade practices – Misleading or deceptive conduct – Where fuel consumption label affixed to new vehicle offered for sale – Where affixing of label required by *Motor Vehicle Standards Act 1989* (Cth) and *Vehicle Standard (Australian Design Rule 81/02 – Fuel Consumption Labelling for Light Vehicles) 2008* (“Standard”) – Where label displayed fuel consumption figures derived from standard testing of vehicle type – Where purchased vehicle unable to substantially achieve label figures under standard test – Where Court

of Appeal held found label conveyed particular representation that fuel consumption figures substantially replicable in purchased vehicle (“testing replicability representation”) – Where Court of Appeal found affixing of fuel consumption label to respondent’s vehicle, and presenting and offering vehicle for sale with label affixed, appellants engaged in misleading or deceptive conduct in contravention of s 18 of *Australian Consumer Law* – Whether fuel consumption label made testing replicability representation – Whether conduct required by Standard can give rise to contravention of s 18 of *Australian Consumer Law*.

**Appealed from VSC (CA):** [\[2022\] VSCA 155](#); (2022) 403 ALR 558; (2022) 101 MVR 95

[Return to Top](#)

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## 4: ORIGINAL JURISDICTION

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

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### Constitutional law

*NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*

[S28/2023](#)

**Catchwords:**

Constitutional law (Cth) – Judicial power of the Commonwealth – Unlawful non-citizen in immigration detention – No real prospect of removal from Australia in reasonably foreseeable future – Whether provision for indefinite detention without judicial order infringes Chapter III of the *Constitution* – Whether detention involves an exercise of judicial power of the Commonwealth by the Executive – Whether detention is for a non-punitive purpose – Whether Court should overrule or distinguish *Al-Kateb v Godwin* (2004) 219 CLR 562.

Immigration – Unlawful non-citizens – Detention pending removal from Australia – No real prospect of removal from Australia in reasonably foreseeable future – Whether detention lawful under *Migration Act 1958* (Cth) – Whether detention is temporally limited by purpose of removal – Whether requirement to remove as soon as reasonably practicable implies time limit on detention – Whether position considered in *Al-Kateb* altered since decision in *Commonwealth v AJL20* (2021) 273 CLR 43 because of introduction of s 197C(3) of *Migration Act*.

Statutes – Acts of Parliament – Construction and interpretation – Presumption of legislative intention not to invade personal common law rights.

*Special case referred to the Full Court on 6 June 2023.*

[Return to Top](#)

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*Rehmat & Mehar Pty Ltd & Anor v Hortle*

[M16/2023](#)

**Catchwords:**

Constitutional law – Powers of Commonwealth Parliament – States – Inconsistency between Commonwealth and State laws – Where first plaintiff operated restaurant in Victoria – Where Victorian Parliament passed *Fair Work (Commonwealth Powers) Act 2009* (Vic) (“Referral Act”), referring matters to Commonwealth Parliament for purposes of s 51(xxxvii) of *Constitution* – Where Commonwealth Parliament passed *Fair Work Act 2009* (Cth) – Where matters referred under Referral Act included administration of, inspection of, and enforcement of terms and conditions of employment for national system employers, covered under *Fair Work Act* – Where Restaurant Industry Award made under *Fair Work Act* and first plaintiff’s employees subject to Award – Where Victorian Parliament passed *Wage Theft Act 2020* (Vic) – Where defendant Commissioner of Wage Inspectorate Victoria, appointed under *Wage Theft Act* – Where defendant, following investigation, filed charges against first plaintiff alleging contravention of *Wage Theft Act* for non-payment of entitlements allegedly payable under Award – Whether *Fair Work Act* intended to be exhaustive statement of law applicable to national system employers – Whether there exists alteration, impairment, detraction and/or collision between *Wage Theft Act* and *Fair Work Act* – Whether *Wage Theft Act* invalid by operation of s 109 of *Constitution* to extent of inconsistency.

*Demurrer referred to the Full Court on 22 May 2023.*

[Return to Top](#)

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## Immigration

*Ismail v Minister for Immigration, Citizenship and Multicultural Affairs*

**[M20/2023](#)**

### **Catchwords:**

Immigration – Application for Return (Residence) (Class BB) (Subclass 155) visa (“Return visa”) – Character test – Family violence – Where delegate of Minister refused application for Return visa, finding plaintiff did not pass character test on basis of his substantial criminal record, which included domestic violence offences – Where, having regard to *Direction No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (“Direction 90”), delegate decided not to exercise power to grant plaintiff visa – Where plaintiff seeks orders for certiorari and mandamus, and consequential declarations – Whether delegate made jurisdictional error: (1) by failing to make inquiry as to critical fact, and/or failing to comply with para 8.3 of Direction 90, requiring decision-maker to make determination as to best interests of minor children; (2) in interpreting and/or applying

para 8.2 of Direction 90 by giving weight to acts of family violence committed by plaintiff where weight also given to consideration other paras of Direction 90; (3) by interpreting and/or applying para 8.2 of Direction 90 as if it permitted weight to be given to family violence unconnected to protection and/or expectations of Australian community – Whether para 8.2 valid exercise of power under s 499(1) of *Migration Act 1958* (Cth).

Administrative law – Judicial review – Jurisdictional error – Direction 90 made under s 499 of *Migration Act*.

*Application for constitutional or other writ referred to the Full Court on 5 June 2023.*

[Return to Top](#)

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### ***Lesianawai v Minister for Immigration, Citizenship and Multicultural Affairs***

**[S12/2023](#)**

#### **Catchwords:**

Immigration – Cancellation of Class BF 154 Transitional (Permanent) visa (“visa”) – Character test – Plaintiff charged with offences before Children’s Court – Misunderstanding of law – Irrelevant considerations – Where between 1996 and 1998, plaintiff found guilty by Children’s Court of New South Wales of various offences – Where in 2010 plaintiff sentenced to terms of imprisonment for armed robbery offences – Where on 9 October 2013 delegate of defendant cancelled plaintiff’s visa under s 501(2) of *Migration Act 1958* (Cth) – Where there has been no merits review because plaintiff did not lodge application with Administrative Appeals Tribunal within prescribed time limits – Where proceedings were held in abeyance pending judgment in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 – Whether defendant acted on misunderstanding of law by treating plaintiff’s sentences between 1996 and 1998 as criminal convictions – Whether defendant took into account irrelevant consideration by having regard to plaintiff’s offences between 1996 and 1998 and treating such conduct as criminal offending.

*Application for constitutional or other writ referred to the Full Court on 14 July 2023.*

[Return to Top](#)

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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.

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[Return to Top](#)

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## 6: SPECIAL LEAVE GRANTED

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

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### Arbitration

*Tesseract International Pty Ltd v Pascale Construction Pty Ltd*  
**A9/2023:** [\[2023\] HCATrans 65](#)

**Date heard:** 19 May 2023 – *Special leave granted*

**Catchwords:**

Arbitration – Arbitral proceedings – Powers and duties of arbitrator – Where respondent subcontracted with applicant – Where applicant agreed to provide engineering consultancy services to respondent in relation to design and construction of warehouse – Where, under contract, if dispute between applicant and respondent arose, dispute could be submitted to arbitration – Where dispute arose where respondent alleged applicant breached various terms of contract, breached duty of care in negligence and involved in misleading or deceptive conduct in contravention of s 18 of *Australian Consumer Law* – Where applicant denied allegations, but pleaded in alternative that any damages payable should be reduced by reason of proportionate liability provisions under Part 3 of *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and Part VIA of *Competition and Consumer Act 2010* (Cth) (collectively “proportionate liability regimes”) – Whether proportionate liability regimes amenable to arbitration – Whether s 28 of *Commercial Arbitration Act 2011* (SA) empowers arbitrator to apply proportionate liability regimes, or whether terms of legislation preclude arbitrator from doing so – Whether implied power conferred on arbitrator to determine parties’ dispute empowers arbitrator to apply proportionate liability regimes, or whether terms of legislation preclude arbitrator from doing so.

**Appealed from SASC (CA):** [\[2022\] SASCA 107](#); (2022) 140 SASR 395; (2022) 406 ALR 293

[Return to Top](#)

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### Administrative Law

*AB (a pseudonym) & Anor v Independent Broad-based Anti-corruption Commission*

**M7/2023:** [\[2023\] HCATrans 103](#)

**Date heard:** 11 August 2023 – *Special leave granted on limited grounds*

**Catchwords:**

Administrative law – Natural justice – Procedural fairness – Meaning of “adverse material” – Reasonable opportunity to respond to “adverse material” – Where first appellant senior officer of second appellant, a non-governmental body – Where between 2019 and 2021, respondent, Independent Broad-based Anti-corruption Commission (“IBAC”), conducted investigation – Where AB gave evidence in private examination conducted by IBAC – Where IBAC prepared draft special report containing adverse comments and opinions relating to appellants – Where IBAC provided redacted draft reports to appellants seeking response – Where IBAC agreed to provide transcripts of AB’s examination but not transcript of other witnesses – Where *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) contains procedural fairness protections in ss 162(2)-(4) regarding adverse findings about public bodies – Where AB commenced proceeding in Trial Division of Supreme Court of Victoria seeking judicial review remedies in relation to draft report on basis of infringement of natural justice – Where CD added to AB’s proceedings against IBAC seeking same relief – Where appellants were unsuccessful at trial, and on appeal in Victorian Court of Appeal – Whether Court of Appeal erred in concluding that “adverse material” in s 162(3) of *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) refers only to comments or opinions contained in draft report that are adverse to person, and not evidentiary material on which such comments or opinions are based.

**Appealed from VSC (CA):** [\[2022\] VSCA 283](#)

[Return to Top](#)

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## Constitutional Law

*Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks (ABN 13 051 694 963) & Anor*

**D3/2023:** [\[2023\] HCATrans 68](#)

**Date heard:** 19 May 2023 – *Special leave granted*

**Catchwords:**

Constitutional law – Territories – Territory crown – Crown immunity – Where s 34(1) of *Northern Territory Aboriginal Sacred Sites Act*

1989 (NT) ("Sacred Sites Act") prescribes offence and penalty for carrying out work on sacred site – Where Director of National Parks arranged for contractor to perform work on walking track at Gunlom Falls, in Kakadu National Park in Northern Territory – Where track works in area amounting to "sacred site" – Where Director is corporation sole with perpetual succession established by s 15 of *National Parks and Wildlife Conservation Act 1975* (Cth) and continued in existence as body corporate by s 514A of *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – Whether s 34(1) of Sacred Sites Act applies to Director.

Statutory interpretation – Statutory presumption – Presumption against imposition of criminal liability on executive – Where presumption considered in *Cain v Doyle* (1946) 72 CLR 409 – Proper approach to scope of presumption in *Cain v Doyle* – Whether presumption in *Cain v Doyle* applies to statutory corporations – Whether Sacred Sites Act expresses intention to apply to persons or bodies corporate associated with Commonwealth.

**Appealed from NTSC (FC):** [\[2022\] NTSCFC 1](#)

[Return to Top](#)

## Corporations Law

*Potts & Anor v DSHE Holdings Ltd ACN 166 237 841 (receivers and managers appointed) (in liquidation) & Ors; Potts v National Australia Bank Limited (ABN 12 004 044 937)*

**S47/2023; S48/2023:** [\[2023\] HCATrans 48](#)

**Date heard:** 21 April 2023 – *Special leave granted* (S47/2023); *Special leave granted on limited grounds* (S48/2023)

### Catchwords:

Corporations law – Compensation orders – Breach of directors' duties – Damage – Where directors found to have breached s 180 of *Corporations Act 2001* (Cth) by voting in favour of payment of dividends – Where s 254T sets out circumstances in which dividend may be paid – Where s 1317H provides Court may order person to compensate corporation if person contravened corporation civil penalty provision and "damage resulted from contravention" – Whether payment by Dick Smith Holdings Ltd ("DSH") of dividend constitutes damage which resulted from contravention of s 180 within meaning of s 1317H – Whether, when assessing compensation under s 1317H for damage company suffered by contravention of s 180(1), Court must have regard to normative considerations in addition to considering "but for" causation – Whether, when assessing compensation under s 1317H for damage which company

has suffered by contravention of s 180(1), dividend paid to shareholders is "damage" suffered by company within meaning of s 1317H where no breach of s 254T.

Corporations law – Proportionate liability – Where appellant Chief Financial Officer and director of DSH – Where National Australia Bank Ltd ("NAB") became DSH's financier after entering into Syndicated Facility Agreement ("SFA") – Where SFA contained representation as to accuracy of information provided by DSH to NAB – Where NAB relied on three causes of action for misleading conduct and appellant raised proportionate liability defences under ss 87CB of *Competition and Consumer Act 2010* (Cth), 1041L of *Corporations Act 2001* (Cth), and 12GP of *Australian Securities and Investments Commission Act 2001* (Cth), claiming DSH concurrent wrongdoer – Whether DSH concurrent wrongdoer – Whether, when determining if corporation, having regard to matters within its knowledge, engaged in misleading conduct by making representations in document authorised by board, issue should be determined solely by reference to matters within knowledge of board, rather than by reference to any knowledge attributable to corporation applying orthodox principles – Whether, when determining if corporation engaged in misleading conduct by making representations in document authorised by board, appropriate to exclude from consideration matters known to a particular member of board against whom allegations of misleading conduct been made, but not established.

**Appealed from NSWSC (CA):** [\[2022\] NSWCA 165](#); (2022) 371 FLR 349; (2022) 405 ALR 70; (2022) 163 ACSR 23

[Return to Top](#)

## Criminal Law

*Hurt v The King; Delzotto v The King*  
[C7/2023](#); [C8/2023](#); [S44/2023](#): [\[2023\] HCATrans 52](#)

**Date heard:** 21 April 2023 – *Special leave granted*

### Catchwords:

Criminal law – Sentencing – Mandatory minimum sentences – Sentencing discretion – Where s 16AAB of *Crimes Act 1914* (Cth) imposes minimum sentences for certain offences – Whether minimum sentence to be regarded as base of range of appropriate sentence or minimum permissible sentence – Proper approach to minimum sentences – Whether proper approach involves sentencing judge having regard to minimum from outset as prescribing bottom of range of appropriate sentence, consistent with *Bahar v The Queen* (2011) 45 WAR 100 – Whether proper approach involves sentencing

judge exercising sentencing discretion in usual way and only if proposed sentence falls below minimum penalty that minimum penalty has effect, consistent with approach in *R v Pot, Wetangky and Lande* (Supreme Court (NT), 18 January 2011, unrep).

**Appealed from ACTSC (CA) (C25/2022; C26/2022):** [\[2022\] ACTCA 49](#); (2022) 18 ACTLR 272; (2022) 372 FLR 312

**Appealed from NSWSC (CCA):** [\[2022\] NSWCCA 117](#)

[Return to Top](#)

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*Huxley v The Queen*

**M19/2023:** [\[2023\] HCATrans 36](#)

**Date heard:** 17 March 2023 – *Special leave granted on limited grounds*

**Catchwords:**

Criminal law – Jury direction – Witness evidence – Joint trial – Where appellant convicted by jury for murder after being charged on joint indictment which charged three others – Where direction given to jury in relation to witness’ evidence – Where witness’ evidence central to co-accused’s case and relevant to appellant’s – Where direction made that jury should only act upon witness’ evidence if satisfied beyond reasonable doubt that evidence truthful, reliable and accurate – Whether jury direction, that witness’ evidence in joint trial can only be used by jury if satisfied evidence of witness truthful, reliable and accurate beyond reasonable doubt, constituted miscarriage of justice.

**Appealed from QLDSC (CA):** [\[2021\] QCA 78](#)

[Return to Top](#)

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*The King v Rohan (a pseudonym)*

**M33/2023:** [\[2023\] HCATrans 66](#)

**Date heard:** 19 May 2023 – *Special leave granted*

**Catchwords:**

Criminal law – Liability – Primary – Derivative – Where s 323(1)(c) of *Crimes Act 1958* (Vic) provides that person is involved in commission of offence if person enters into agreement, arrangement or understanding with another person to commit offence – Where respondent jointly charged with co-offenders – Where respondent and co-offenders each found guilty by jury verdict, relevantly, of two charges of supplying drug of dependence to child (charges 1 and 2)

(in relation to two complainants) and seven charges of sexual penetration of child under 12 (including charges 3, 7, 8 and 9) (in relation to one complainant) – Where Court of Appeal held respondent suffered substantial miscarriage of justice on charges 1, 2, 3, 7, 8 and 9, because jury not directed that it needed to be satisfied to criminal standard that respondent knew relevant complainants were under statutory prescribed age when respondent agreed with co-offenders that he would engage in criminal act – Whether, on proper construction, implied into s 323(1)(c) should be words “intentionally” and “knowing or believing facts that make proposed conduct offence”.

**Appealed from VSC (CA):** [\[2022\] VSCA 215](#)

[Return to Top](#)

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*The King v Anna Rowan – A Pseudonym*

**M47/2023:** [\[2023\] HCATrans 90](#)

**Date heard:** 16 June 2023 – *Special leave granted*

**Catchwords:**

Criminal law – Defence of duress – Duress of circumstances – Where respondent charged with indecent act with children under 16, and incest – Where respondent mother of two complainants – Where respondent, at time of alleged offending, residing with partner (“JR”), father of complainants, who also convicted of sexual offences against complainants – Where respondent sought to raise defence of duress, relying on report recording JR’s controlling behaviour towards, and physical and sexual abuse of, respondent – Where, during periods covered by alleged offences, defence of duress covered by common law and then s 3220 of *Crimes Act 1958* (Vic) – Whether law of duress applies in case of duress of circumstances, namely where accused has not been in receipt of specific threat enjoining them to engage in criminal act or suffer consequences, but accused still reasonably fears that if they do not commit criminal act they will suffer such consequences.

**Appealed from VSC (CA):** [\[2022\] VSCA 236](#)

[Return to Top](#)

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## Immigration

*Minister for Immigration, Citizenship and Multicultural Affairs v McQueen*

**P2/2023:** [\[2023\] HCATrans 107](#)

**Date heard:** 11 August 2023 – *Application for special leave to appeal referred to Full Court*

**Catchwords:**

Immigration – Visas – Mandatory cancellation – Representations to Minister to revoke cancellation – Relying on Departmental summary or synthesis of documents – Where respondent’s visa mandatorily cancelled pursuant to s 501(3A) of *Migration Act 1958* (Cth) – Where s 501CA requires Minister to invite person affected by mandatory cancellation to “make representations to the Minister”, and empowers Minister to revoke such cancellation if “person makes representations in accordance with the invitation” and Minister satisfied, inter alia, that there is another reason why the original decision should be revoked – Where following notification of visa cancellation respondent submitted documents and former Minister personally decided not to revoke cancellation – Where primary judge found former Minister did not consider representation by respondent – Where Full Court upheld finding, and concluded that where Minister exercises power under s 501CA(4), Minister required to read actual documents submitted, and that Minister cannot rely on Departmental synthesis or summary of those documents – Whether Minister when required by statute to consider documents may rely on Departmental synthesis or summary of those documents.

**Appealed from FCA (FC):** [\[2022\] FCAFC 199](#); (2022) 292 FCR 595

[Return to Top](#)

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## Restitution

*Redland City Council v Kozik & Ors*

**B17/2023:** [\[2023\] HCATrans 34](#)

**Date heard:** 17 March 2023 – *Special leave granted*

**Catchwords:**

Restitution – Unjust enrichment – Payment of public impost – Mistake of law – Restitutionary defence in public law – Where respondents plaintiffs in representative action against appellant seeking recovery of monies paid as ratepayers for charges wrongly levied by appellant – Where appellant accepts charges wrongly levied, but refuses to repay amount of charges expended for particular benefit of group of ratepayers – Where primary judge held appellant unable to raise restitutionary defences in circumstances where plaintiffs’ claims brought as cause of action in debt and no contractual relationship arose – Where Court of Appeal majority found restitution claims

available in circumstances where monies paid under invalid laws, but that ratepayers could not be considered to be unjustly enriched by repayment of monies – Whether defence of unjust enrichment available where payment of public impost made under mistake of law – Whether defence of unjust enrichment available where, though wrongly levied, charges expended to special benefit of group – Whether defence of unjust enrichment to be framed by reference to contractual principles of failure of consideration or by reference to material benefit derived.

**Appealed from QLDSC (CA):** [\[2022\] QCA 158](#); (2022) 11 QR 524; (2022) 252 LGERA 315

[Return to Top](#)

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## Sentence

*Xerri v The King*

**S76/2023:** [\[2023\] HCATrans 91](#)

**Date heard:** 16 June 2023 – *Special leave granted*

### Catchwords:

Sentence – Maximum penalty – Where appellant sentenced in respect of offence of persistent sexual abuse of child contrary to s 66EA(1) of *Crimes Act 1900* (NSW) – Where maximum penalty at time of sentence was life imprisonment and a discounted sentence was assessed on that basis – Where maximum penalty at time of offending was 25 years imprisonment – Where s 66EA repealed and reconstituted by *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) – Where s 19(1) of *Crimes (Sentencing Procedure) Act 1999* (NSW) provides if Act increases penalty for offence, increased penalty applies only to offences committed after commencement of provision of Act increasing penalty – Where majority of NSW Court of Criminal Appeal held it correct for appellant to be sentenced on basis that maximum penalty life imprisonment – Whether maximum penalty life imprisonment or 25 years for purposes of sentencing – Whether s 66EA of *Crimes Act*, as amended, a “new offence” or existing offence that has been reformulated, refined and improved – Whether s 19(1) of *Crimes (Sentencing Procedure) Act* precludes retrospective application of increased maximum penalty for offence without express provision in offence as to disapplication of s 19(1).

**Appealed from NSW (CCA):** [\[2021\] NSWCCA 268](#); (2021) 292 A Crim R 355

[Return to Top](#)



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## Shipping and Navigation

*Carmichael Rail Network Pty Ltd as Trustee for the Carmichael Rail Network Trust v BBC Chartering Carriers GmbH & Co. KG & Anor*  
**B32/2023**: [\[2023\] HCATrans 79](#)

**Date heard:** 9 June 2023 – *Special leave granted on limited grounds*

**Catchwords:**

Shipping and navigation – Bill of lading – Arbitration clause – Application for stay of proceedings in favour of arbitration – Anti-suit injunction – Where Art 3(8) of Hague-Visby Rules (given effect in Australia, with some modifications, in Sch 1A of *Carriage of Goods by Sea Act 1991* (Cth) (“Australian Hague Rules”)) relevantly provides any clause, covenant, or agreement in contract of carriage relieving carrier or ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in duties and obligations or lessening such liability otherwise than as provided in Rules, shall be null and void and of no effect – Where applicant consignee of domestic shipment of hardened steel rails from Whyalla to Mackay, under bill of lading drafted and issued by first respondent – Where applicant also entered into contracts with second respondent to supply rails, and to load them onto second respondent’s ship – Where, on arrival at Mackay, members of first respondent’s crew observed collapse had occurred, and steel rails damaged and unfit for use – Where bill of lading provided that any dispute arising thereunder shall be referred to arbitration in London – Where first respondent gave notice that it commenced arbitral proceedings seeking declaration it not liable for damage suffered by applicant, and inviting applicant to nominate arbitrator – Where applicant applied for anti-suit injunction restraining first respondent from taking further steps in purported arbitration – Where Full Court Full Court held arbitration clause contained in clause 4 of bill of lading valid – Proper test to apply to anti-suit injunction based on putatively invalid arbitration clause under Article 3(8) of the Australian Hague Rules – Whether for foreign jurisdiction clause to be held void as contrary to Art 3(8) of the Australian Hague Rules, shipper must prove conduct of foreign proceeding would be such as to lessen liability of carrier.

**Appealed from FCA (FC):** [\[2022\] FCAFC 171](#); (2022) 406 ALR 431

[Return to Top](#)

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## Statutes

*Harvey & Ors v Minister for Primary Industry and Resources & Ors*  
**D9/2022:** [\[2022\] HCATrans 229](#)

**Date heard:** 16 December 2022 – *Special leave granted*

### Catchwords:

Statutes – Interpretation – *Native Title Act 1993* (Cth), s 24MD(6B)(b) – Meaning of “right to mine” – Meaning of “infrastructure facility” – Where first respondent intended to grant mineral lease (ML 29881) to third respondent under s 40(1)(b)(ii) of *Mineral Titles Act 2010* (NT) – Where land subject to proposed lease would be used for construction of “dredge spoil emplacement area” to deposit dredged material from loading facility located on adjacent land subject to mineral lease already held by third respondent – Whether proposed grant of ML 29881 is future act within s 24MD(6B)(b) of *Native Title Act*, being creation of right to mine for sole purpose of construction of infrastructure facility associated with mining.

**Appealed from FCA (FC):** [\[2022\] FCAFC 66](#); (2022) 291 FCR 263; (2022) 401 ALR 578

[Return to Top](#)

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## **7: CASES NOT PROCEEDING OR VACATED**

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[Return to Top](#)

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## 8: SPECIAL LEAVE REFUSED

### Publication of Reasons: 3 August 2023 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	NL	Chief Executive of the Department for Child Protection & Ors (A5/2023)	Supreme Court of South Australia (Court of Appeal) [2023] SASCA 20	Application dismissed <a href="#">[2023] HCASL 98</a>
2.	Hyder & Ors	Commissioner of Taxation (B20/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 29	Application dismissed with costs <a href="#">[2023] HCASL 99</a>
3.	Ali	Director of Public Prosecutions (Cth) (M24/2023)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 330	Application dismissed <a href="#">[2023] HCASL 100</a>
4.	Stokey	Dye & Anor (P12/2023)	Federal Circuit and Family Court of Australia (Division 1)	Application dismissed <a href="#">[2023] HCASL 102</a>
5.	Soulis	R & A Henry Auto Repairs Pty Ltd (S36/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 50	Application dismissed <a href="#">[2023] HCASL 103</a>
6.	Volkov	The King (B23/2023)	Supreme Court of Queensland (Court of Appeal) [2022] QCA 57	Application dismissed <a href="#">[2023] HCASL 104</a>
7.	Alexander (a pseudonym)	The King (S23/2023)	Supreme Court of New South Wales (Court of Criminal Appeal) [2019] NSWCCA 79	Application dismissed <a href="#">[2023] HCASL 105</a>
8.	TAV	The King (B16/2023)	Supreme Court of Queensland (Court of Appeal) [2022] QCA 271	Application dismissed <a href="#">[2023] HCASL 106</a>
9.	Peter James (a pseudonym)	The King (M22/2023)	Supreme Court of Victoria (Court of Appeal) [2023] VSCA 34	Application dismissed <a href="#">[2023] HCASL 107</a>
10.	Chalmers	The King (B12/2023)	Application for Removal	Application dismissed <a href="#">[2023] HCASL 108</a>
11.	Kuperman	Permanent Trustee Australia Limited (B25/2023)	Supreme Court of Queensland (Court of Appeal) [2023] QCA 54	Application dismissed <a href="#">[2023] HCASL 109</a>
12.	Frigger & Anor	Trenfield (P10/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 49	Application dismissed <a href="#">[2023] HCASL 110</a>

## Publication of Reasons: 10 August 2023 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Dearden	Ryan & Ors (B15/2023)	Supreme Court of Queensland (Court of Appeal) [2023] QCA 20	Application dismissed with costs <a href="#">[2023] HCASL 111</a>
2.	Goldsmith	Stinson (B21/2023)	Federal Circuit and Family Court of Australia (Division 1)	Application dismissed with costs <a href="#">[2023] HCASL 112</a>
3.	Bektasovski	The King (S19/2023)	Supreme Court of New South Wales (Court of Criminal Appeal) [2022] NSWCCA 246	Application dismissed <a href="#">[2023] HCASL 113</a>
4.	Lee & Ors	Deputy Commissioner of Taxation & Anor (S24/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 22	Application dismissed with costs <a href="#">[2023] HCASL 114</a>
5.	Peterson	B Davis & Ors (S30/2023)	Federal Circuit and Family Court of Australia (Division 1)	Application dismissed with costs <a href="#">[2023] HCASL 115</a>
6.	Van Gorp	James Ashleigh Davy (as executor of the estate of the Late Kate Louise Davy) & Anor (S32/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 43	Application dismissed <a href="#">[2023] HCASL 116</a>
7.	GWRV	Minister for Immigration, Citizenship and Multicultural Affairs & Anor (P9/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 39	Application dismissed <a href="#">[2023] HCASL 117</a>
8.	Flowers	Finlayson (A3/2023)	Supreme Court of South Australia (Court of Appeal) [2023] SASCA 12	Application dismissed <a href="#">[2023] HCASL 118</a>
9.	Flowers	Finlayson (A4/2023)	Supreme Court of South Australia (Court of Appeal) [2023] SASCA 9	Application dismissed <a href="#">[2023] HCASL 119</a>

## 11 August 2023: Canberra and by video link

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Bara	Blackwell (D1/2023)	Court of Appeal of the Northern Territory [2022] NTCCA 17	Application refused <a href="#">[2023] HCATrans 104</a>
2.	Nuon	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (M4/2023)	Full Court of the Federal Court of Australia [2022] FCAFC 197	Application refused with costs <a href="#">[2023] HCATrans 106</a>
3.	City Garden Australia Pty Ltd	Yisheng Construction Pty Ltd & Anor (S10/2023)	Supreme Court of New South Wales (Court of Appeal) [2022] NSWCA 269	Application refused with costs <a href="#">[2023] HCATrans 102</a>
4.	Minister for Home Affairs & Anor	Pearson & Anor (S14/2023)	Full Court of the Federal Court of Australia [2022] FCAFC 203	Application refused with costs <a href="#">[2023] HCATrans 105</a>