



HIGH COURT BULLETIN

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High Court of Australia Library
[2023] HCAB 1 (17 February 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

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1: SUMMARY OF NEW ENTRIES

2: Cases Handed Down

Case	Title
<i>Stanley v Director of Public Prosecutions (NSW) & Anor</i>	Administrative Law
<i>Unions NSW & Ors v State of New South Wales</i>	Constitutional Law
<i>Bryant & Ors as Liquidators of Gunns Limited and Auspine Limited v Badenoch Integrated Logging Pty Ltd</i>	Corporations
<i>Metal Manufactures Pty Limited v Gavin Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd (in Liquidation) & Anor</i>	Corporations

3: Cases Reserved

Case	Title
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<i>Vanderstock & Anor v The State of Victoria</i>	Constitutional Law
<i>Vunilagi v The Queen & Anor</i>	Constitutional Law
<i>BA v The King</i>	Criminal Law

4: Original Jurisdiction

5: Section 40 Removal

6: Special Leave Granted

Case	Title
<i>Real Estate Tool Box Pty Ltd & Ors v Campaigntrack Pty Ltd & Anor</i>	Copyright
<i>Mitsubishi Motors Australia Ltd & Anor v Begovic</i>	Trade Practices

7: Cases Not Proceeding or Vacated

Case	Title
<i>Barnett v Secretary, Department of Communities and Justice</i>	Family Law

8: Special Leave Refused

2: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the February 2023 sittings.

Administrative Law

Stanley v Director of Public Prosecutions (NSW) & Anor
S126/2022: [\[2023\] HCA 3](#)

Publication of reasons: 15 February 2023

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

Catchwords:

Administrative law – Judicial review – Jurisdictional error – Sentencing powers of inferior court – Where s 7 of *Crimes (Sentencing Procedure) Act 1999* (NSW) ("Sentencing Procedure Act") empowered sentencing court to make intensive correction order ("ICO") directing that a sentence of imprisonment be served by way of intensive correction in community – Where power to make ICO was a discrete function arising after sentence of imprisonment imposed – Where s 66(1) of Sentencing Procedure Act provided community safety was paramount consideration in exercising discretion to make ICO – Where s 66(2) of Sentencing Procedure Act required sentencing court, when considering community safety, to assess whether making ICO or serving sentence by way of full-time detention more likely to address offender's risk of reoffending – Whether failure to comply with s 66(2) amounted to jurisdictional error – Consideration of categories of jurisdictional error in *Craig v South Australia* (1995) 184 CLR 163 and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

Sentence – Sentence imposed by State court – Discretion to make ICO – Where community safety was paramount consideration in exercising discretion to order ICO – Where sentencing judge declined to make ICO and ordered sentence of imprisonment be served by way of full-time detention – Whether sentencing judge undertook assessment of community safety in accordance with s 66 of Sentencing Procedure Act.

Words and phrases – "community safety", "error of law", "error of law by an inferior court", "full-time detention", "intensive correction order", "jurisdictional error", "misconception of function", "paramount consideration", "risk of reoffending", "sentencing process".

Crimes (Appeal and Review) Act 2001 (NSW), ss 11, 17.
Crimes (Sentencing Procedure) Act 1999 (NSW), ss 3A, 5, 7, 66, Pt 2 Div 2, Pt 5.
Supreme Court Act 1970 (NSW), s 69B.

Appealed from NSWSC (CA): [\[2021\] NSWCA 337](#); (2021) 107 NSWLR 1; (2021) 398 ALR 355; (2021) 294 A Crim R 305

Held: Appeal allowed.

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Constitutional Law

Unions NSW & Ors v State of New South Wales
S98/2022: [\[2023\] HCA 4](#)

Judgment: 15 February 2023

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

Catchwords:

Constitutional law (Cth) – Implied freedom of communication on governmental and political matters – Where s 29(11) of the *Electoral Funding Act 2018* (NSW) ("EF Act") capped electoral expenditure by third-party campaigners in "capped State expenditure period" before State by-election for Legislative Assembly – Where third-party campaigners subject to lower cap than candidates – Where s 29(11) restricted capacity of third-party campaigners to engage in political debate and imposed burden on political communication – Where State no longer sought to justify burden – Where State conceded Court should hold s 29(11) invalid – Whether Court should make declaration of invalidity.

Constitutional law (Cth) – Judicial power of the Commonwealth – High Court – Original jurisdiction – Meaning of "matter" – Standing – Offence under s 35 of the EF Act for third party campaigner to act in concert with other persons to incur electoral expenditure that exceeded applicable cap for third-party campaigner – Where Court had jurisdiction to determine validity of s 35 when plaintiffs commenced proceeding – Where s 35 was repealed before hearing – Whether Court had jurisdiction to determine validity of s 35 – Whether plaintiffs had standing to seek declaration of invalidity.

Words and phrases – "declaration", "electoral expenditure", "federal jurisdiction", "foreseeable consequences", "implied freedom of communication on governmental and political matters", "judicial power of the Commonwealth", "justiciable controversy", "justified",

"matter", "special interest", "standing", "sufficient interest", "third-party campaigner".

Constitution, ss 7, 24; Ch III.

Electoral Funding Act 2018 (NSW), ss 29(11), 33(1), 35.

Held: Special case answered.

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Corporations

Bryant & Ors as Liquidators of Gunns Limited and Auspine Limited v Badenoch Integrated Logging Pty Ltd

A10/2022: [\[2023\] HCA 2](#)

Judgment: 8 February 2023

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

Catchwords:

Corporations – Winding up – Insolvency – Voidable transactions – Unfair preferences – Construction of s 588FA(3) of *Corporations Act 2001* (Cth) – Where appellants liquidators of debtor company – Where respondent entered into agreement to supply services to debtor company for harvesting and hauling timber – Where respondent continued to provide services to debtor company despite debtor company's increasing indebtedness – Where liquidators applied to have series of payments made by debtor company to respondent within six month period ending on relation back day set aside as unfair preferences – Where liquidators contended that, if "continuing business relationship" existed so as to engage s 588FA(3), liquidators entitled by "peak indebtedness rule" to choose starting date of "single transaction" within relation back period to prove existence of unfair preference – Whether "peak indebtedness rule" part of or excluded by s 588FA(3) – Proper approach to construction of element of s 588FA(3)(a) that "transaction is, for commercial purposes, an integral part of a continuing business relationship" – Whether payments engaged s 588FA(3)(a).

Words and phrases – "business character of the transaction", "continuing business relationship", "peak indebtedness rule", "running account principle", "unfair preference", "voidable transactions", "winding up".

Corporations Act 2001 (Cth), Pt 5. 7B, ss 588FA, 588FC, 588FE, 588FF, 588FG.

Appealed from FCA (FC): [\[2021\] FCAFC 64](#); (2021) 284 FCR 590; (2021) 152 ACSR 361

Appealed from FCA (FC): [\[2021\] FCAFC 111](#)

Held: Appeal dismissed; special leave to cross-appeal granted; cross-appeal dismissed; appellants pay the respondent's costs of the appeal and respondent pay the appellants' costs of the cross-appeal.

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Metal Manufactures Pty Limited v Gavin Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd (in Liquidation) & Anor
B19/2022: [\[2023\] HCA 1](#)

Judgment: 8 February 2023

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

Catchwords:

Corporations – Winding up – Insolvency – Set-off – Unfair preferences – Where appellant received payments from company within six-month period prior to winding up – Where liquidator of company sought to recover payments from appellant under s 588FF(1)(a) of *Corporations Act 2001* (Cth) ("Act") as unfair preferences under s 588FA of Act – Where appellant owed separate and distinct debt by company – Whether set-off under s 553C(1) of Act available to appellant against liquidator's claim for recovery of unfair preferences.

Words and phrases – "commencement of the winding up", "contingent right", "insolvency", "insolvent transaction", "liquidation", "liquidator's duties and powers", "mutual dealing", "mutuality", "pari passu principle", "set-off", "statutory scheme of liquidation", "unfair preference", "voidable transaction", "winding up".

Corporations Act 2001 (Cth), ss 474, 477, 478, 553, 553C, 555, 556, 588FA, 588FC, 588FE, 588FF, 588FI.

Appealed from FCA (FC): [\[2021\] FCAFC 228](#); (2021) 289 FCR 556; (2021) 402 ALR 387; (2021) 159 ACSR 115; (2021) 18 ABC(NS) 257

Appealed from FCA (FC): [\[2022\] FCAFC 1](#)

Held: Appeal dismissed; costs of the appeal be costs in the cause.

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3: CASES RESERVED

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

Constitutional Law

Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Ors; DCM20 v Secretary of Department of Home Affairs & Anor

M32/2022; S81/2022: [\[2022\] HCATrans 179](#); [\[2022\] HCATrans 181](#)

Date heard: 19 and 20 October 2022

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

Catchwords:

Constitutional law – Judicial review – Non-statutory executive action – Sections 61 and 64 of *Constitution* – Where s 351(1) of *Migration Act 1958* (Cth) ("Act") provided if Minister thinks it in public interest, Minister may substitute decision of Administrative Appeals Tribunal under s 349 of Act for decision more favourable to applicant – Where s 351(3) and s 351(7) provided power under s 351(1) be exercised by Minister personally and Minister under no duty to consider whether to exercise power – Where Minister issued guidelines in relation to power conferred by s 351 setting out circumstances in which Department of Home Affairs should refer requests – Where Departmental officers concluded requests for intervention failed to satisfy criteria for referral in guidelines – Whether decision of Departmental officer not to refer to request for Minister to exercise power conferred by s 351(1) amenable to judicial review – Whether decision of Departmental officer affected by legal unreasonableness – Whether remedies available.

Appealed from FCA (FC): [\[2021\] FCAFC 213](#); (2021) 288 FCR 23

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Attorney-General (Cth) v Huynh & Ors

S78/2022: [\[2022\] HCATrans 190](#); [\[2022\] HCATrans 191](#)

Date heard: 8 and 9 November 2022

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

Catchwords:

Constitutional law – Judicial power – Post-appeal application for inquiry into conviction – State courts – Supervisory jurisdiction – Where s 68(1) of *Judiciary Act 1903* (Cth) provided State laws with respect to procedures apply to persons charged with Commonwealth offences where jurisdiction conferred on courts of that State – Where s 68(2) conferred jurisdiction on State courts with respect to criminal proceedings – Where, following conviction for offences against laws of Commonwealth and unsuccessful appeal, appellant applied to NSW Supreme Court under Pt 7, Div 3 of *Crimes (Appeal and Review) Act 2001* (NSW) ("Appeal and Review Act") for review of conviction and sentence – Whether post-appeal inquiry and review procedures in Pt 7, Div 3 of Appeal and Review Act available in relation to conviction or sentence for Commonwealth offence heard in NSW court – Whether power exercised by judge under s 79 of Pt 7, Div 3 of Appeal and Review Act, to consider applications for inquiry into conviction made under s 78, judicial or administrative in nature – Whether ss 78-79 of Appeal and Review Act apply as federal law pursuant to s 68(1) of *Judiciary Act* in relation to conviction.

Appealed from NSWSC (CA): [\[2021\] NSWCA 297](#); (2021) 107 NSWLR 75; (2021) 396 ALR 422; (2021) 293 A Crim R 392

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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.

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Vunilagi v The Queen & Anor

C13/2022: [\[2023\] HCATrans 3](#); [\[2023\] HCATrans 4](#)

Date heard: 8 and 9 February 2023

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

Catchwords:

Constitutional law – Powers of courts – Powers of Legislative Assembly of Australian Capital Territory – Trial by jury – Where appellant arrested and committed to trial – Where, following COVID-19 outbreak, *Supreme Court Act 1933* (ACT) amended by *COVID-19 Emergency Response Act 2020* (ACT) to include s 68BA which provided, relevantly, Court may order trial by judge alone – Where appellant advised Chief Justice proposed making order pursuant to s 68BA – Where appellant and first respondent opposed making of order – Where s 68BA repealed, but continued to apply to appellant by operation of s 116 and 117 of *Supreme Court Act* – Where Chief Justice ordered appellant's trial to proceed by judge alone – Where appellant found guilty – Whether s 68BA contravened limitation deriving from *Kable v Director of Public Prosecutions* (NSW) (1996) 198 CLR 511 – Whether s 68BA inconsistent with requirement in s 80 of *Constitution* that trial on indictment of any offence against law of Commonwealth be by jury.

Appealed from ACTSC (CA): [\[2021\] ACTCA 12](#); (2021) 17 ACTLR 72; (2021) 362 FLR 385; (2021) 295 A Crim R 168

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Contracts

Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited atf The Parras Family Trust & Ors

S125/2022: [\[2022\] HCATrans 216](#)

Date heard: 9 December 2022

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

Catchwords:

Contracts – Construction – Interpretation – Termination – Frustration – Supervening illegality – Covid-19 – Public Health Order – Where settlement of goodwill, plant and equipment under contract for sale of hotel and associated business agreed to take place on 30 March 2020 – Where cl 50.1 of contract required vendor to carry on business in usual and ordinary course as regards its nature, scope and manner and repair and maintain assets in same manner as at date of contract and use reasonable endeavours to ensure all items on inventory in good repair and in proper working order – Where *Public Health (Covid-19 Places of Social Gathering) Order 2020* (NSW), made pursuant to *Public Health Act 2010* (NSW), came into effect on 23 March 2020 and prohibited opening of pubs except for sale of food and beverages to be consumed off premises – Where purchasers asserted contract had been frustrated – Whether supervening illegality pursuant to Public Health Order suspended parties' obligations to seek completion of contract – Whether Public Health Order amounted to doctrine of temporary suspension of obligations inconsistent with approach to resolving questions of supervening illegality.

Appealed from NSWSC (CA): [\[2021\] NSWCA 332](#); (2021) 396 ALR 340; (2021) 20 BPR 41,819

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Courts and Judges

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

M53/2022: [\[2022\] HCATrans 217](#)

Date heard: 13 December 2022

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

Catchwords:

Courts and judges – Bias – Reasonable apprehension of bias – Disqualification – Where, prior to appointment, judge as Commonwealth Director of Public Prosecutions: (a) instituted and carried on successful prosecution of QYFM on indictment, and (b) appeared to successfully oppose appeal by QYFM against conviction – Where QYFM brought challenge to Minister's decision not to revoke cancellation of QYFM's visa – Where application for disqualification brought against judge on basis of apprehended bias – Where judge heard application alone, refused to disqualify himself and sat on Full Court appeal challenging primary judge's decision dismissing application for judicial review of Administrative Appeals Tribunal's

decision to affirm cancellation of QYFM's visa – Whether application for disqualification of single member of Full Court on basis of apprehended bias should be decided by single judge alone or by Full Court – Whether judgment of Full Court liable to be set aside if single judge affected by apprehended bias.

Constitutional Law – Chapter III – Judicature of Commonwealth – Impartiality of judiciary – Bias – Reasonable apprehension of bias – Proper application of test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

Appealed from FCA (FC): [\[2021\] FCAFC 166](#); (2021) 287 FCR 328

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Criminal Law

BA v The King

S101/2022: [\[2023\] HCATrans 2](#)

Date heard: 7 February 2023

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

Catchwords:

Criminal law – Breaking and entering – Legal right to enter – Meaning of "breaks" – Where s 112 of *Crimes Act 1900* (NSW) provides person who breaks and enters any dwelling-house or other building and commits any serious indictable offence guilty of offence – Where appellant and complainant resided together in apartment occupied pursuant to residential tenancy where both named as lessees – Where relationship broke down and appellant moved out taking most of possessions – Where, when appellant remained co-tenant, appellant entered apartment by breaking down locked door and assaulted complainant – Where appellant charged with offence against s 112 of *Crimes Act* – Whether person with legal right to enter building capable of being guilty of breaking and entering building for purposes of s 112 of *Crimes Act* – Whether co-tenant can revoke second co-tenant's permission to enter leased dwelling-house with result that, despite enjoying right of entry under lease, second co-tenant may be guilty of breaking and entering – Whether permission of occupant without legal entitlement to occupy be determinative of whether person with legal right of immediate possession breaks into building for purposes of s 112 of *Crimes Act*.

Appealed from NSWSC (CCA): [\[2021\] NSWCCA 191](#); (2021) 105 NSWLR 307; (2021) 291 A Crim R 514

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Mitchell v The King; Rigney v The King; Carver v The King; Tenhoopen v The King

[A14/2022; A15/2022; A16/2022, A17/2022](#): [\[2022\] HCATrans 212](#)

Date heard: 6 December 2022

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

Catchwords:

Criminal law – Ancillary liability – Extended joint criminal enterprise – Statutory charges – Where appellants and others entered into agreement to steal amount of cannabis from grow-house and, in furtherance of agreement, one or more of group members inflicted one or more blows to head of person guarding grow-house who died of injuries – Where appellants charged for contravening s 12A *Criminal Law Consolidation Act 1935* (SA) ("CCA") and convicted of murder – Where s 12A of CCA provided person who commits intentional act of violence while acting in course or furtherance of major indictable offence punishable by imprisonment for 10 years or more, and thus causes death of another, guilty of murder – Whether principles of joint criminal enterprise apply to statutory charge under s 12A of CCA – Whether, for secondary participant to be guilty of common law murder according to principles of extended joint criminal enterprise, secondary participant must contemplate that co-participant might do act that might cause death of person – Whether, for secondary participant to be guilty of offence against s 12A of CCA, secondary participant must contemplate that co-participant might commit intentional act of violence causing death of person – Whether, for secondary participant to be guilty of offence against s 12A of CCA, sufficient that secondary participant contemplates any act of violence rather than contemplates possibility of death caused by violence.

Appealed from SASC (CCA): [\[2021\] SASCA 74](#); (2021) 139 SASR 305; (2021) 290 A Crim R 384

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Intellectual Property

Self Care IP Holdings Pty Ltd & Anor v Allergan Australia Pty Ltd & Anor; Self Care IP Holdings Pty Ltd & Anor v Allergan Australia Pty Ltd & Anor

[S79/2022](#); [S80/2022](#): [\[2022\] HCATrans 167](#); [\[2022\] HCATrans 221](#)

Date heard: 13 October and 14 December 2022

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

Catchwords:

Intellectual property – Trade marks – Infringement claim – Section 120 of *Trade Marks Act 1995* (Cth) – Where respondents authorised user and owner of registered trade mark for word "BOTOX" – Where respondents claimed appellants used brand name "PROTOX" as trade mark and "PROTOX" deceptively similar to BOTOX trade mark, constituting infringement under s 120(1) of *Trade Marks Act* – Where respondents claimed appellants used phrase "instant Botox® alternative" as trade mark, which constituted infringement of BOTOX trade mark – Whether appellant infringed BOTOX trade mark by using "instant Botox® alternative" or "PROTOX" – Whether phrase "instant Botox® alternative" deceptively similar to "BOTOX" within meaning of s 120(1) of *Trade Marks Act* – Whether appellants' use of phrase "instant Botox® alternative" attracts defences under s 122(1)(b)(i) and (d) of *Trade Marks Act* regarding use in good faith and use not infringing exclusive right of registered owner.

Consumer law – Misleading or deceptive conduct – Where respondent claimed appellants' statement "instant Botox® alternative" constituted representation appellants' Inhibox product would give same results as BOTOX products in contravention of s 18 or s 29(1)(a) of *Australian Consumer Law* ("ACL"), being Schedule 2 to *Competition and Consumer Act 2010* (Cth), or Inhibox would achieve or had same performance characteristics, uses and/or benefits as Botox in contravention of s 18 or 29(1)(g) of ACL – Whether appellants' made misleading or false representations contrary to ss 18, 29(1)(a) and 29(1)(g) of ACL.

Appealed from FCA (FC): [\[2021\] FCAFC 163](#); (2021) 286 FCR 259; (2021) 393 ALR 595; (2021) 162 IPR 52

Appealed from FCA (FC): [\[2021\] FCAFC 180](#)

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Private International Law

Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. & Anor

S43/2022: [\[2022\] HCATrans 192](#); [\[2022\] HCATrans 195](#)

Date heard: 9 and 10 November 2022

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

Catchwords:

Private international law – Foreign state immunity – Interaction between s 9 of *Foreign States Immunities Act 1985* (Cth) ("Immunities Act") and *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* ("ICSID Convention") – Where proceedings commenced in Federal Court for recognition of award of International Centre for Settlement of Investment Disputes ("ICSID") under s 35(4) of *International Arbitration Act 1974* (Cth) ("Arbitration Act") – Where Kingdom of Spain asserted sovereign immunity – Where s 9 of Immunities Act provided that foreign state immune from jurisdiction of courts of Australia in proceeding – Where s 10 of Immunities Act provided foreign state not immune in proceeding in which it submitted to jurisdiction whether by agreement or otherwise – Where Art 54(1) provided each Contracting State shall recognize award rendered pursuant to ICSID Convention as binding – Where Art 54(2) of ICSID Convention referred to recognition or enforcement of award – Whether, by Art 54 of ICSID Convention, Kingdom of Spain agreed to submit itself to jurisdiction within meaning of s 10 of Immunities Act – Whether ICSID Convention excludes claims for foreign state immunity in proceedings for recognition and enforcement of an award – Proper meaning of "recognition" and "enforcement" in Art 54.

Appealed from FCA (FC): [\[2021\] FCAFC 112](#); (2021) 392 ALR 443; (2021) 153 ACSR 59

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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

ENT19 v Minister for Home Affairs & Anor

[S102/2022](#): [\[2022\] HCATrans 214](#)

Date heard: 8 December 2022 – *adjourned to a date to be fixed*

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

Catchwords:

Constitutional law – Review of administrative decisions – Application for constitutional writs – Where plaintiff pleaded guilty to people smuggling and sentenced to imprisonment – Where, during sentencing, sentencing judge considered issue of general deterrence – Where plaintiff applied for Safe Haven Enterprise Visa ("SHEV") – Where Minister refused application for SHEV pursuant to s 65 of *Migration Act 1958* (Cth), not being satisfied grant of visa in "national interest", being criterion set out in cl 790.227 of Sch 2 of *Migration Regulations 1994* (Cth) ("Decision") – Whether Decision made for punitive purpose or inflicts punishment – Whether acting in "national interest" permits Executive to act for punitive purpose or in way amounting to punishment.

Administrative law – Jurisdictional error – Procedural fairness – Where Minister took account of media coverage of plaintiff's conviction as part of reason why grant of SHEV not in national interest – Whether Minister failed to consider relevant consideration – Whether Minister proceeded on incorrect understanding of law.

Application for constitutional or other writ referred to the Full Court on 5 September 2022.

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Hornsby Shire Council v Commonwealth of Australia & Anor

[S202/2021](#)

Catchwords:

Constitutional law – Taxation – Section 55 of *Constitution* – Laws imposing taxation only to deal with imposition of taxation – Where Commonwealth makes grants of financial assistance for local government purposes to States under s 9 of *Local Government (Financial Assistance) Act 1995* (Cth) – Where grants made on conditions specified in s 15 of *Local Government (Financial Assistance) Act* – Where conditions in s 15 amended by items 16, 17 and 18 of Sch 1 to *Local Government (Financial Assistance) Amendment Act 2000* (Cth) to include conditions that, if local government failed to pay Commonwealth GST payments, then: (1) State required to withhold amount allocated to local government and pay amount to Commonwealth (s 15(aa)); and, if Commonwealth Minister tells State Treasurer that Commonwealth Minister satisfied State failed to withhold and pay amount, State to repay Commonwealth amount determined by Commonwealth Minister (s 15(c)) – Whether items 16, 17 or 18 of Sch 1 to *Local Government (Financial Assistance) Amendment Act* contrary to s 55 of *Constitution*.

Constitutional law – Taxation – Sections 114 of *Constitution* – Prohibition on Commonwealth taxes imposed on property of State – Where Commonwealth provides grants of financial assistance to States under *Federal Finance Relations Act 2009* (Cth), including revenue assistance by way of goods and services tax ("GST") – Where Commonwealth provides grants of financial assistance for local government purposes to States under *Local Government (Financial Assistance) Act* – Where *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) introduced to give effect to agreement between Commonwealth and States regarding GST whereby Commonwealth paid States GST revenue and States assumed responsibility for payment of financial assistance to local governments – Where plaintiff purchased vehicle, with purchase amount including GST, and subsequently sold vehicle through auction with GST deducted – Where plaintiff, under protest, reported amount of notional GST relating to sale of vehicle in Business Activity Statement, being form for GST returns lodged with Australian Taxation Officer – Whether provisions of *Local Government (Financial Assistance) Act*, *Federal Financial Relations Act* and of *Intergovernmental Agreement Implementation (GST) Act* impose tax on property belonging to plaintiff, contrary to s 114 of *Constitution* – Proper approach to relief.

Special case referred to the Full Court on 5 September 2022.

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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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6: SPECIAL LEAVE GRANTED

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

Civil Procedure

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

[S150/2022](#): [\[2022\] HCATrans 206](#)

Date heard: 18 November 2022 – *Special leave granted*

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](#)

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Zurich Insurance PLC & Anor v Koper & Anor

[S147/2022](#): [\[2022\] HCATrans 194](#)

Date determined: 10 November 2022 – *Special leave granted*

Catchwords:

Civil procedure – Jurisdiction – Exercise of non-federal jurisdiction by State court – Service outside Australia – Service under *Trans-Tasman Pacific Act 2010* (Cth) ("TTPA") – Where first respondent domiciled in New Zealand and registered proprietor of residential apartments designed and constructed by BMX NZ, entity incorporated in New

Zealand, and without any assets or presence in Australia – Where BMX NZ insured by appellants under program of professional indemnity insurance – Where registered proprietors of apartments, commenced proceedings in High Court of New Zealand against BMX NZ and its principal, KNZ International Co Limited ("KNZ"), seeking damages in respect of various defects – Where damages awarded against BMX NZ and KNZ – Where, by summons filed on 1 April 2021 in Supreme Court of New South Wales, first respondent sought leave, pursuant to s 5 of *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ("*Claims Act*"), to bring representative proceedings under s 4 against first appellant – Where s 4 provides if insured person has insured liability to person, that person ("claimant") may recover amount of insured liability from insurer in proceedings before court of New South Wales – Where primary judge granted leave, holding *Claims Act* could not apply where claimant's claim against insured person could not properly have been brought in court of New South Wales, but, even though first respondent's claim against BMX NZ was claim against New Zealand company, without Australian assets, arising out of tort committed in New Zealand, first respondent could bring claim in reliance on Pt 2 of TTPA – Where Pt 2 of TTPA applies to "civil proceeding commenced in Australian court" – Where, pursuant to s 9 of TTPA, initiating document issued by Australian court that relates to civil proceeding may be served in New Zealand under Pt 2 – Whether ss 9 and 10 of TTPA can validly operate to authorise, or to deem as effective, service of process of State court outside territory of Commonwealth except in matters that engage federal jurisdiction – Whether first respondent could properly have brought claim against BMX NZ in connection with design or construction of apartments in court of New South Wales.

Constitutional law – Legislative power – Heads of power – External affairs – Service and execution of process throughout Commonwealth – Whether, having regard to terms of s 51(xxiv) and Ch III of *Constitution*, s 51(xxix) empowers Commonwealth Parliament to make laws with respect to service, outside Commonwealth, of process of State courts in matters that would not engage federal jurisdiction.

Appealed from NSWSC (CCA): [\[2022\] NSWCA 128](#); (2022) 368 FLR 420

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Constitutional Law

Crime and Corruption Commission v Carne
B66/2022: [\[2022\] HCATrans 225](#)

Date heard: 15 December 2022 – *Special leave granted*

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.

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 QLD (CA): [\[2022\] QCA 141](#); (2022) 405 ALR 166

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Copyright

Real Estate Tool Box Pty Ltd & Ors v Campaigntrack Pty Ltd & Anor
S110/2022: [\[2022\] HCATrans 13](#)

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

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) 402 ALR 576; (2022) 167 IPR 411

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

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Criminal Law

BDO v The Queen

B52/2022: [\[2022\] HCATrans 184](#)

Date heard: 21 October 2022 – *Special leave granted*

Catchwords:

Criminal law – Criminal liability and capacity – *Doli incapax* – Where High Court in *RP v The Queen* (2016) 259 CLR 641 identified "knowledge of moral wrongness" as focus of *doli incapax* inquiry – Where s 29 of *Criminal Code* (Qld) provides age of maturity – Whether statement of principles on *doli incapax* at common law articulated in *RP v The Queen* apply to s 29 of *Criminal Code* (Qld).

Criminal practice – Appeal – Miscarriage of justice – Application of proviso that no substantial miscarriage of justice actually occurred – *Criminal Code* (Qld), s 668E(1) – Where, at trial, trial judge proceeded on mistaken view that during entire period reflected on indictment, s 349(3) of *Criminal Code* deemed child under age of 12 unable to consent – Where s 349(3) did not come into force until mid-way through charge period – Where Court of Appeal held trial judge's direction erroneous insofar as any of appellant's acts took place prior to commencement of s 349(3) – Where Court of Appeal

held no substantial miscarriage of justice occurred – Whether proviso applies where, by judicial error, Crown relieved of proving contested element of offence.

Appealed from QLDSC (CA): [\[2021\] QCA 220](#)

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Bromley v The King

A40/2021: [\[2022\] HCATrans 158](#)

Date heard: 16 September 2022 – *Special leave referred to Full Court for consideration as on appeal on limited grounds*

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): [\[2018\] SASCF 41](#)

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Lang v The Queen

B57/2022: [\[2022\] HCATrans 201](#)

Date heard: 11 November 2022 – *Special leave granted*

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](#)

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

S148/2022: [\[2022\] HCATrans 193](#)

Date determined: 10 November 2022 – *Special leave granted*

Catchwords:

Criminal law – Sentencing – Penalty – Bribery of foreign official – Meaning of "benefit" – Where respondent pleaded guilty to offence of conspiring to cause offer of provision benefits to be made to other persons not legitimately due to those persons, with intention of influencing foreign public officials in order to obtain or retain business, contrary to ss 11.5 and 70.2 of *Criminal Code* – Where maximum penalty determined by s 70.2(5) and provides: offence punishable by fine not more than greatest of: (1) 100,000 penalty units; (2) where court can determine value of benefit body corporate obtained and that is reasonably attributable to conduct constituting offence—3 times value that benefit; and (3) where court cannot determine value of benefit—10% of annual turnover of body corporate – Where "benefit" obtained by respondent certain project contracts – Whether maximum penalty under second limb of s 70.2(5) calculated on basis that value of benefit of contract is: (1) contract price; or (2) contract price less (untainted) costs to offender of performing it.

Appealed from NSWSC (CCA): [\[2022\] NSWCCA 152](#); (2022) 367 FLR 365

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Criminal Practice

HCF v The Queen

B50/2022: [\[2022\] HCATrans 171](#)

Date heard: 14 October 2022 – *Special leave granted on limited grounds*

Catchwords:

Criminal practice – Miscarriage of justice – Application of proviso that no substantial miscarriage of justice actually occurred – *Criminal Code* (Qld), s 668E(1) – Juror misconduct – Independent research – 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 At 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](#)

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Evidence

McNamara v The King

S143/2022: [\[2022\] HCATrans 185](#)

Date heard: 21 October 2022 – *Special leave granted on limited grounds*

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

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Immigration

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

[M84/2022; M85/2022](#): [\[2022\] HCATrans 196](#)

Date heard: 11 November 2022 – *Special leave granted*

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

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Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton

B42/2022: [\[2022\] HCATrans 160](#)

Date heard: 16 September 2022 – *Special leave granted on condition*

Catchwords:

Immigration – Visa cancellation decision under s 501(3A) of *Migration Act 1958* (Cth) – Substantial criminal record – Where respondent's visa mandatorily cancelled following conviction for assaults occasioning bodily harm and for other offences, for which respondent sentenced to concurrent periods of imprisonment – Where respondent sought revocation of cancellation decision – Where Minister, in considering whether "another reason" why cancellation decision be revoked (s 501CA(4)(b)(ii)), took into account respondent's criminal history, including convictions which Queensland Court ordered that there be "no conviction" – Where s 184(2) of *Youth Justice Act 1992* (QLD) ("YJA") provides, in relation to recording of convictions against child, finding of guilt without recording conviction *not* taken to be conviction for any purpose – Where s 85ZR(2) of *Crimes Act 1914* (Cth) ("CA") provides where, under State law person to be taken to never been convicted of offence under law of State, person shall be taken in corresponding circumstances or for corresponding purpose, by any Commonwealth authority, never to have been convicted of offence – Whether, on proper construction of s 184(2) of YJA, s 85ZR(2) of CA engaged – Whether Minister took into account irrelevant consideration.

Administrative law – Judicial review – Jurisdictional error – Irrelevant consideration – Materiality – Whether consideration of irrelevant consideration material.

Appealed from FCA (FC): [\[2022\] FCAFC 23](#); (2022) 288 FCR 10; (2022) 295 A Crim R 398

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Industrial Law

Qantas Airways Limited & Anor v Transport Workers Union of Australia

S153/2022: [\[2022\] HCATrans 205](#)

Date heard: 18 November 2022 – *Special leave granted*

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) 402 ALR 1; (2022) 315 IR 1

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Leases and Tenancies

Young & Anor v Chief Executive Officer (Housing)

D5/2022: [\[2022\] HCATrans 159](#)

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

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](#)

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Practice and Procedure

Facebook Inc v Australian Information Commissioner & Anor
S137/2022: [\[2022\] HCATrans 157](#)

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

Catchwords:

Practice and procedure – Service out of jurisdiction – Rule 10.43 of *Federal Court Rules 2011* (Cth) – Where Australian Information Commissioner commenced proceedings against appellant alleging events surrounding installation of application known as "This Is Your Digital Life" and Facebook-Cambridge Analytica scandal involved contraventions of *Privacy Act 1998* (Cth) – Where Commissioner successful in establishing *prima facie* case on application to serve appellant out of jurisdiction – Where appellant conditionally appeared and sought to set aside service – Where primary judge and Full Court refused to set aside service – Whether *prima facie* case appellant "carr[ied] on business in Australia" within meaning of 5B(3)(b) of *Privacy Act* – Whether *prima facie* case appellant "collected... personal information in Australia" within meaning of s 5B(3)(c) of *Privacy Act*.

Appealed from FCA (FC): [\[2022\] FCAFC 9](#); (2022) 289 FCR 217; (2022) 402 ALR 445

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Statutes

Disorganized Developments Pty Ltd & Ors v State of South Australia
A22/2022: [\[2022\] HCATrans 149](#)

Date heard: 9 September 2022 – *Special leave granted*

Catchwords:

Statutes – Interpretation – Invalidity – Where s 83GD(1) in Pt 3B, Div 2 of *Criminal Law Consolidation Act 1935* (SA) ("CLCA") provides person who participant in criminal organisation and enters, or attempts to enter, "prescribed place" commits offence – Where s 83GA(1) defines "prescribed place" as place declared by regulation, but s 83GA(2) requires regulation under subsection (1) to "only relate to ... 1 place" – Where appellants became registered proprietors of land ("Cowirra Land") – Where Pt 3B, Div2 of CLCA inserted by *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA) ("Amending Act") – Where s 13 of Amending Act provided *Criminal Law Consolidation (Criminal Organisations) Regulations 2015* ("CLCR") (set out in Sch 1) be regulations under CLCA – Where cl 3 of Sch 1 of Amending Act declared places to be prescribed places, but not Cowirra Land – Where Governor in Council subsequently made *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) Variation Regulations 2020* ("Cowirra (No.1) Regulations") and *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) (No 2) Variation Regulations 2020* ("Cowirra (No.2) Regulations") – Where Cowirra (No.1) Regulations and Cowirra (No.2) Regulations sought to vary r 3 of CLCR to add Cowirra Land as prescribed place – Whether r 3 of CLCR beyond power conferred by s 83GA(2) of CLCA – Whether Cowirra (No.1) Regulations and Cowirra (No.2) Regulations invalid because of absence of procedural fairness accorded – Whether, if Cowirra (No.1) Regulations and Cowirra (No.2) Regulations valid, s 83GD of CLCA applies to owner of land declared to be "prescribed place", director of corporation which is owner of land or any person authorised to access land.

Appealed from SASC (CA): [\[2022\] SASCA 6](#); (2022) 295 A Crim R 351

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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

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Torts

CCIG Investments Pty Ltd v Schokman

B43/2022: [\[2022\] HCATrans 156](#)

Date heard: 16 September 2022 – *Special leave granted on limited grounds*

Catchwords:

Torts – Vicarious liability – Scope of employment – Opportunity or occasion for commission of tort – Where respondent asleep in appellant's staff accommodation when another employee urinated on face – Where trial judge concluded event exacerbated respondent's pre-existing conditions of narcolepsy and cataplexy, and suffered post-traumatic stress and adjustment disorder as result – Where respondent sued employer, alleging, relevantly, employee committed tort for which appellant, as employer, vicariously liable – Where primary judge found employee's act tortious, but concluded tort not committed in course of employee's employment – Where Court of Appeal applied *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, holding employee occupying room as employee pursuant to obligations of employment contract and therefore requisite connection between employment and employee's actions – Whether event giving rise to respondent's injury within "course or scope of employment" – Proper approach to scope of vicarious liability discussed in *Prince Alfred College Inc v ADC*.

Appealed from QLDSC (CA): [\[2022\] QCA 38](#)

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Trade Practices

Mitsubishi Motors Australia Ltd & Anor v Begovic
M56/2022: [\[2023\] HCATrans 15](#)

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

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 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 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

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7: CASES NOT PROCEEDING OR VACATED

Family Law

Barnett v Secretary, Department of Communities and Justice

S142/2022: [\[2023\] HCATrans 5](#)

Date heard: 10 February 2023 – *Special leave revoked; reasons to be published*

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

Catchwords:

Family law – Child abduction – Issue estoppel – Where child, born in Ireland, removed from Ireland by mother without father's knowledge – Where father initiated proceedings in District Court of Dublin Metropolitan District seeking interim order for appointment as child's guardian and for custody pursuant to *Guardianship of Infants Act 1964* (IR) ("Guardianship Act") – Where District Court made interim order and subsequent declaration under Guardianship Act declaring father as guardian – Where father filed application for return of child in accordance with *Hague Convention on the Civil Aspects of International Child Abduction* – Where application filed in Family Court of Australia seeking return of child to Ireland – Where primary judge found District Court order sufficed to fulfil requirement of "rights of custody" for purposes of reg 4 of *Family Law (Child Abduction Convention) Regulations 1986* (Cth) and decision of District Court gave rise to issue estoppel, preventing Court from re-determining any factual issues – Whether order of District Court created issue estoppel that prevented Family Court from determining whether, under Irish law, father of applicant's child had rights of custody as defined by reg 4 of *Regulations* – Whether issue estoppel can be drawn from text of foreign order in absence of reasons for judgment and transcript.

Appealed from FedCFamC (1A): [\[2022\] FedCFamC1A 20](#)

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8: SPECIAL LEAVE REFUSED

Publication of Reasons: 9 February 2023 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Ryan	Cain & Anor (C20/2022)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2022] ACTCA 29	Application dismissed [2023] HCASL 1
2.	Ryan	O'Halloran & Anor (C21/2022)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2022] ACTCA 29	Application dismissed [2023] HCASL 1
3.	Ryan	Bhagria & Anor (C22/2022)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2022] ACTCA 29	Application dismissed [2023] HCASL 1
4.	Ryan	Bunnings Group Limited (C23/2022)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2022] ACTCA 29	Application dismissed [2023] HCASL 1
5.	Ryan	Eastlake Football Club Limited (C24/2022)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2022] ACTCA 29	Application dismissed [2023] HCASL 1
6.	Thomas	The Queen (B45/2022)	Supreme Court of Queensland (Court of Appeal) [2020] QCA 236	Application dismissed [2023] HCASL 3
7.	Lawson	Workcover Queensland (B53/2022)	Supreme Court of Queensland (Court of Appeal) [2022] QCA 178	Application dismissed [2023] HCASL 4
8.	Clarke	The State of Western Australia (P25/2022)	Supreme Court of Western Australia (Court of Appeal) [2022] WASCA 6	Application dismissed [2023] HCASL 2
9.	Biba	The King (M58/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 168	Application dismissed [2023] HCASL 5
10.	Creusot	The State of Western Australia (M64/2022)	Supreme Court of Western Australia (Court of Appeal) [2022] WASCA 117	Application dismissed [2023] HCASL 6

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
11.	Howell	The State of Western Australia (M65/2022)	Supreme Court of Western Australia (Court of Appeal) [2022] WASCA 117	Application dismissed [2023] HCASL 6
12.	El Zain	Vitrafy Life Sciences Ltd (ACN 622 720 254) (M67/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 195	Application dismissed with costs [2023] HCASL 7
13.	Aziz (a pseudonym)	The King (S128/2022)	Supreme Court of New South Wales (Court of Criminal Appeal) [2022] NSWCCA 76	Application dismissed [2023] HCASL 8

Publication of Reasons: 15 February 2023 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Parry	University of South Australia (A25/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 168	Application dismissed [2023] HCASL 9
2.	Lim	Zong & Anor (B48/2022)	Federal Circuit and Family Court of Australia (Division 1)	Application dismissed [2023] HCASL 10
3.	Tan Yeong – (a pseudonym)	The Director of Public Prosecutions (M61/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 179	Application dismissed [2023] HCASL 11
4.	Al-Anwiya	The King (M62/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 181	Application dismissed [2023] HCASL 12

17 February 2023: Canberra and by video link

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	AIO21	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M49/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 114	Application refused with costs [2023] HCATrans 17
2.	DBO19	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M72/2021)	Federal Court of Australia [2021] FCA 1218	Application refused with costs [2023] HCATrans 18
3.	Olde English Tiles Australia Pty Ltd	Transport for New South Wales (S107/2022)	Supreme Court of New South Wales (Court of Appeal) [2022] NSWCA 108	Application refused with costs [2023] HCATrans 12
4.	HarperCollins Publishers Australia Pty Ltd & Anor	Gill & Ors (S108/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 68	Application refused with costs [2023] HCATrans 14
5.	Yang & Ors	Nashco Pty Ltd (S127/2022)	Supreme Court of New South Wales (Court of Appeal) [2022] NSWCA 137	Application refused with costs [2023] HCATrans 16