



HIGH COURT BULLETIN

Produced by the Legal Research Officer,
High Court of Australia Library
[2023] HCAB 5 (16 June 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>ENT19 v Minister for Home Affairs & Anor</i>	Constitutional Law
<i>Hornsby Shire Council v Commonwealth of Australia & Anor</i>	Constitutional Law
<i>Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton</i>	Immigration

3: Cases Reserved

Case	Title
<i>GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore</i>	Civil Procedure
<i>Benbrika v Minister for Home Affairs & Anor</i>	Constitutional Law

<i>Crime and Corruption Commission v Carne</i>	Constitutional Law
<i>Jones v Commonwealth of Australia & Ors</i>	Constitutional Law

4: Original Jurisdiction

Case	Title
<i>NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor</i>	Constitutional Law
<i>Ismail v Minister for Immigration, Citizenship and Multicultural Affairs</i>	Immigration

5: Section 40 Removal

6: Special Leave Granted

Case	Title
<i>The King v Anna Rowan – A Pseudonym</i>	Criminal Law
<i>Xerri v The King</i>	Sentence
<i>Carmichael Rail Network Pty Ltd as Trustee for the Carmichael Rail Network Trust v BBC Chartering Carriers GmbH & Co. KG & Anor</i>	Shipping and Navigation

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 June 2023 sittings.

Constitutional Law

ENT19 v Minister for Home Affairs & Anor

S102/2022: [\[2023\] HCA 18](#)

Judgment date: 14 June 2023

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

Catchwords:

Immigration – Refugees – Application for protection visa – Power of Minister under s 65 of *Migration Act 1958* (Cth) to grant or refuse to grant visa – Where visa criterion in Sch 2, cl 790.227 of *Migration Regulations 1994* (Cth) required Minister to be satisfied grant of visa in national interest – Where plaintiff convicted of aggravated offence of people smuggling – Where Minister personally refused to grant plaintiff protection visa – Where sole basis for decision that cl 790.227 not satisfied – Where Minister conceded all other criteria for grant of visa met – Where Minister did not exercise power to refuse visa under s 501 of Act – Whether cl 790.227 permitted Minister to refuse to grant visa solely on ground that not in national interest to grant visa to person convicted of people smuggling – Proper construction of cl 790.227 – Whether Minister's decision authorised by cl 790.227.

Statutes – Interpretation – Context – Construction of visa criterion in Regulations – Where Act of Parliament inserted criterion into existing Regulations made by Governor General.

Administrative law – Judicial review – Certiorari and mandamus.

Words and phrases – "character test", "mandamus", "national interest", "people smuggling", "personally", "protection visa", "refugee", "unauthorised maritime arrival", "visa refusal".

Migration Act 1958 (Cth), ss 47, 65, 233C, 501.

Migration Regulations 1994 (Cth), Sch 2, cl 790.227; Sch 4, Pt 1, cl 4001.

Held: A writ of certiorari issue quashing the decision of the first defendant; a writ of mandamus issue commanding the first defendant to determine the

plaintiff's visa application according to law; the defendants pay the plaintiff's costs.

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Hornsby Shire Council v Commonwealth of Australia & Anor
[S202/2021: \[2023\] HCA 19](#)

Judgment date: 14 June 2023

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

Catchwords:

Constitutional law (Cth) – Taxation – Where Commonwealth makes grants to States for local government purposes under *Local Government (Financial Assistance) Act 1995* (Cth) ("Local Government Assistance Act") – Where States agreed that local government would make "notional GST" payments notwithstanding prohibition in s 114 of *Constitution* against Commonwealth imposing tax on State property – Where s 15(aa) of Local Government Assistance Act provided as a condition on grants of financial assistance that States withhold from local governing bodies amounts representing notional GST payments that should have, but have not, been paid by those bodies – Where s 15(c) of Local Government Assistance Act provided that where State failed to comply with s 15(aa), State must repay to Commonwealth amount not more than amount which State failed to pay – Where plaintiff, a local government body, paid notional GST arising from sale of vehicle under protest – Whether notional GST was tax on State property contrary to s 114 of *Constitution*.

Words and phrases – "Business Activity Statement", "circuitous device", "compulsory exaction", "condition", "financial assistance", "forced benevolence", "goods and services tax", "grants", "GST legislation", "GST revenue", "Intergovernmental Agreement", "legal compulsion", "liability", "local government", "notional GST", "practical compulsion", "tax", "taxable supply", "voluntary act".

Constitution, ss 96, 114.

A New Tax System (Commonwealth-State Financial Arrangements) Act 1999 (Cth), s 10.

A New Tax System (Goods and Services Tax) Act 1999 (Cth), s 177-3.

Federal Financial Relations Act 2009 (Cth), ss 5, 6(3)(a)(ii), 6(3)(c), 17.

Intergovernmental Agreement Implementation (GST) Act 2000 (NSW), ss 4, 5.

Local Government (Financial Assistance) Act 1995 (Cth), ss 6(8), 9, 11, 14(3), 15(a)(i), 15(aa), 15(c).

Held: Special case answered.

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Immigration

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

B42/2022: [\[2023\] HCA 17](#)

Judgment date: 14 June 2023

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

Catchwords:

Immigration – Visas – Cancellation of visa – Where respondent's visa subject to mandatory cancellation under s 501(3A) of *Migration Act 1958* (Cth) – Where Minister decided not to revoke visa cancellation on basis that respondent represented unacceptable risk of harm to Australian community – Where Minister took into account respondent's offending as a child for which no conviction recorded – Where s 184(2) of *Youth Justice Act 1992* (Qld) provided that finding of guilt without recording of conviction not taken to be conviction for any purpose – Where s 85ZR(2)(b) of *Crimes Act 1914* (Cth) provided that where, under State law, a person is, in particular circumstances or for particular purpose, taken never to have been convicted of offence under law of that State, the person shall be taken, in any State, in corresponding circumstances or for corresponding purpose, by any Commonwealth authority in that State, never to have been convicted of that offence – Whether s 184(2) of *Youth Justice Act* a State law which provided that person to be taken never to have been convicted of offence under law of that State – Whether Minister took into account irrelevant consideration – Whether Minister's decision vitiated by jurisdictional error.

Words and phrases – "another reason", "conviction", "criminal history", "finding of guilt", "for a particular purpose", "for any purpose", "in particular circumstances", "irrelevant consideration", "jurisdictional error", "pardon", "recording of a conviction", "unacceptable risk", "visa cancellation".

Crimes Act 1914 (Cth), ss 85ZM, 85ZR, 85ZS.

Migration Act 1958 (Cth), ss 501, 501CA.

Youth Justice Act 1992 (Qld), ss 148, 154, 183, 184.

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

Held: Appeal dismissed with costs.

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3: CASES RESERVED

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

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](#)

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Zurich Insurance Company Ltd & Anor v Koper & Anor

[S147/2022](#): [\[2023\] HCATrans 42](#)

Date heard: 13 April 2023

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

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 BMZ 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

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.

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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) 405 ALR 166

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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.

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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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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](#)

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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](#)

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

S148/2022: [\[2023\] HCATrans 41](#)

Date heard: 12 April 2023

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

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 relevantly 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 – 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) 108 NSWLR 377; (2022) 367 FLR 365

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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](#)

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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

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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

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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

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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](#)

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Statutes

Disorganized Developments Pty Ltd & Ors v State of South Australia
A22/2022: [\[2023\] HCATrans 25](#)

Date heard: 10 March 2023

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

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, Div 2 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) 140 SASR 206; (2022) 295 A Crim R 351

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Torts

CCIG Investments Pty Ltd v Schokman

B43/2022: [\[2023\] HCATrans 24](#)

Date heard: 9 March 2023

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

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](#); (2022) 10 QR 310

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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

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.

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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.

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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.

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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.

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

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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](#)

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Contract

Karpik v Carnival PLC ARBN 107 998 443 & Anor

S25/2023: [\[2023\] HCATrans 33](#)

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

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

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Copyright

Real Estate Tool Box Pty Ltd & Ors v Campaigntrack Pty Ltd & Anor
S137/2023: [\[2022\] 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) 292 FCR 512; (2022) 402 ALR 576; (2022) 167 IPR 411

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

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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

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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](#)

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Huxley v The Queen

B19/2023: [\[2023\] 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](#)

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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](#)

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The King v Anna Rowan – A Pseudonym

M83/2022: [\[2023\] 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](#)

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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 – Restitutory 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) 252 LGERA 315

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Sentence

Xerri v The King

S169/2022: [\[2023\] 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

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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
B54/2022: [\[2023\] 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

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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

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Trade Practices

Mitsubishi Motors Australia Ltd & Anor v Begovic
M17/2023: [\[2023\] 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 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

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7: CASES NOT PROCEEDING OR VACATED

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8: SPECIAL LEAVE REFUSED

Publication of Reasons: 2 June 2023 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Clark	The King (A8/2023)	Supreme Court of South Australia (Court of Appeal) [2023] SASCA 15	Application dismissed [2023] HCASL 93

Publication of Reasons: 7 June 2023 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Bay	Australian Health Practitioner Regulation Agency & Ors (B13/2023)	Application for Removal	Application dismissed with costs [2023] HCASL 86
2.	In the matter of an application by Mark Stephen Flowers for leave to appeal (S26/2023)		High Court of Australia	Application dismissed [2023] HCASL 87

Publication of Reasons: 8 June 2023 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Hesham Galam by his litigation guardian Alzbeta Tichonova	Shahin (A6/2023)	Supreme Court of South Australia (Court of Appeal) [2023] SASCA 27	Application dismissed [2023] HCASL 88
2.	BUB18 & Anor	Minister for Immigration, Citizenship and Multicultural Affairs & Anor (S27/2023)	Federal Court of Australia [2023] FCA 212	Application dismissed [2023] HCASL 89
3.	Rubino	Ziaee (C6/2023)	Supreme Court of The Australian Capital Territory (Court of Appeal) [2023] ACTCA 7	Application dismissed with costs [2023] HCASL 90
4.	Evans	The King (S13/2023)	Supreme Court of New South Wales (Court of Criminal Appeal) [2023] NSWCCA 11	Application dismissed [2023] HCASL 91
5.	Tseng	Brisbane City Council (B61/2022)	Supreme Court of Queensland (Court of Appeal) [2022] QCA 222	Application dismissed [2023] HCASL 92

9 June 2023: Canberra and by video link

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Palliyaguruge	The King (M71/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 159	Application refused [2023] HCATrans 81
2.	Voitin	GP Building Holdings Pty Ltd (ACN 145 944 163) & Anor (M75/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 210	Application refused with costs [2023] HCATrans 82
3.	Stone	The King (M79/2022)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 186	Application refused [2023] HCATrans 80
4.	Melbourne Water Corporation	Vaughan Constructions Pty Ltd (ACN 004 334 543) & Ors (M89/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 241	Application refused with costs [2023] HCATrans 78
5.	Hughes as liquidator of Westgem Investments Pty Ltd (Receivers & Managers appointed) (in liq)	Commonwealth Bank of Australia Ltd (ACN 123 123 124) & Ors (P32/2022)	Supreme Court of Western Australia (Court of Appeal) [2022] WASCA 132	Application refused with costs [2023] HCATrans 77

Publication of Reasons: 15 June 2023 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Ezekiel-Hart	Council of the Law Society of the Act & Anor (C5/2023)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2023] ACTCA 5	Application dismissed [2023] HCASL 94
2.	Frugniet	Australian Securities and Investments Commission & Anor (M18/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 14	Application dismissed [2023] HCASL 95
3.	Zhong	The King (M19/2023)	Supreme Court of Victoria (Court of Appeal) [2023] VSCA 35	Application dismissed [2023] HCASL 96
4.	Garray	The Queen (C4/2023)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2023] ACTCA 2	Application dismissed [2023] HCASL 97

16 June 2023: Canberra and by video link

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Optus Fixed Infrastructure Pty Limited (ACN 092 450 783)	State of Queensland & Anor (B51/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 158	Application refused with costs [2023] HCATrans 86
2.	Dean	Pope (S6/2023)	Supreme Court of New South Wales (Court of Appeal) [2022] NSWCA 260	Application refused with costs [2023] HCATrans 88
3.	Landrey	Director of Public Prosecutions (NSW) & Ors (S145/2022)	Supreme Court of New South Wales (Court of Appeal) [2022] NSWCA 211	Application refused [2023] HCATrans 89
4.	Nyunt	First Property Holdings Pte Ltd (S170/2022)	Supreme Court of New South Wales (Court of Appeal) [2022] NSWCA 249	Application refused with costs [2023] HCATrans 87