



# HIGH COURT BULLETIN

Produced by the Legal Research Officer,  
High Court of Australia Library  
[2023] HCAB 8 (20 October 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
<a href="#"><i>Vanderstock &amp; Anor v The State of Victoria</i></a>	Constitutional Law
<a href="#"><i>Lang v The Queen</i></a>	Criminal Law

### 3: Cases Reserved

Case	Title
<a href="#"><i>Potts v National Australia Bank Limited (ABN 12 004 044 937)</i></a>	Corporations Law
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#### [4: Original Jurisdiction](#)

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<b>Case</b>	<b>Title</b>
<a href="#"><u><i>Attorney-General for the State of Tasmania v Casimaty &amp; Anor</i></u></a>	Constitutional Law
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<a href="#"><u><i>Obian v The King</i></u></a>	Criminal Law
<a href="#"><u><i>Greylag Goose Leasing 1410 Designated Activity Company &amp; Anor v P.T. Garuda Indonesia Ltd</i></u></a>	Private International Law
<a href="#"><u><i>Godolphin Australia Pty Ltd ACN 093921021 v Chief Commissioner of State Revenue</i></u></a>	Taxation
<a href="#"><u><i>Bird v DP (a pseudonym)</i></u></a>	Torts
<a href="#"><u><i>Mallonland Pty Ltd ACN 051 136 291 &amp; Anor v Advanta Seeds Pty Ltd ACN 010 933 061</i></u></a>	Torts

#### [7: Cases Not Proceeding or Vacated](#)

#### [8: Special Leave Refused](#)

## 2: CASES HANDED DOWN

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

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### Constitutional Law

*Vanderstock & Anor v The State of Victoria*

**M61/2021:** [\[2023\] HCA 30](#)

**Judgment delivered:** 18 October 2023

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

**Catchwords:**

Constitutional law (Cth) – Duties of excise – Exclusive power of Commonwealth Parliament – Scope and operation of s 90 of *Constitution* – Where s 7(1) of *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) ("ZLEV Charge Act") purported to oblige registered operator of zero or low emissions vehicle ("ZLEV") to pay charge for use of ZLEV on "specified roads" ("ZLEV charge") – Where "specified roads" defined to include all roads in Victoria and elsewhere in Australia over which public has right of way – Where ZLEV charge a debt due by registered operator to Victoria – Where question of law stated for opinion of Full Court as to whether s 7(1) of ZLEV Charge Act invalid for imposing duty of excise within meaning of s 90 of *Constitution* – Whether ZLEV charge properly characterised as tax on goods – Whether definition of duty of excise stated in *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 and *Ha v New South Wales* (1997) 189 CLR 465 as tax on production, manufacture, sale or distribution of goods exhaustive or descriptive – Where application for leave to reopen *Capital Duplicators [No 2]* and *Ha* refused – Whether inland tax on goods imposed at stage of consumption answers description of duty of excise – Whether *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 should be reopened and overruled.

Words and phrases – "affect goods as articles of commerce", "articles of commerce", "close relation to goods", "commodities", "constitutional fact", "consumer", "consumption", "consumption tax", "criterion of liability", "dealing in goods", "direct tax", "distance-based charge", "distribution", "duty of customs", "duty of excise", "electric vehicle", "excise", "exclusive power", "imposts on goods", "incidence of tax", "indirect tax", "inland tax on goods", "manufacture", "markets in goods", "natural tendency", "point of consumption", "point of receipt by the consumer", "price of goods", "production", "sales tax", "stage of consumption", "stream of

production and distribution", "tax on commodities", "tax on consumption", "tax on distribution", "tax on goods", "tax on manufacture", "tax on production", "tax on sale of goods", "tendency to depress demand for goods", "trading tax", "zero or low emissions vehicle".

*Constitution*, ss 51(ii), 51(iii), 53, 55, 86, 87, 88, 90, 92, 93, 109.  
*Road Safety Act 1986* (Vic), s 3.

*Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic), ss 3, 6, 7, 8, 9, 10, 11, 15, 18, 19.

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

**Held:** Special case answered.

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## Criminal Law

*Lang v The Queen*

**B57/2022:** [\[2023\] HCA 29](#)

**Judgment delivered:** 11 October 2023

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

**Catchwords:**

Criminal Practice – Appeal – Unreasonable verdict – Independent assessment of evidence – Where appellant charged with and convicted of murder – Where appellant appealed conviction on ground that verdict unreasonable or could not be supported having regard to whole of evidence – Where deceased's injuries were either self-inflicted or caused by appellant – Where only hypothesis consistent with appellant's innocence was deceased's injuries were self-inflicted – Whether reasonable possibility upon whole of evidence that deceased died by suicide.

Evidence – Criminal trial – Admissibility – Expert opinion evidence – Where opinion evidence adduced from forensic pathologist that injuries occasioning death more likely inflicted by another person than self-inflicted – Whether opinion based on expert knowledge – Whether wrong decision of question of law to admit evidence.

Words and phrases – "admissibility", "body of knowledge or experience", "expert evidence", "inadmissible", "independent assessment of the evidence", "miscarriage of justice", "opinion", "specialised knowledge", "training, study or experience", "unreasonable verdict", "wholly or substantially"

*Criminal Code (Qld), ss 590AA, 668E.*

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

**Held:** Appeal dismissed.

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## 3: CASES RESERVED

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

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### Civil Procedure

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

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

**Date heard:** 8 June 2023

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

**Catchwords:**

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

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

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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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***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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## Contract

*Karpik v Carnival PLC ARBN 107 998 443 & Anor*  
**S25/2023**: [\[2023\] HCATrans 99](#); [\[2023\] HCATrans 100](#)

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

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

### Catchwords:

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

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

Private international law – Enforcement – Exclusive jurisdiction clause – Where US terms and conditions contained exclusive



jurisdiction clause in favour of US courts – Whether Mr Ho’s claim ought to be stayed pursuant to exclusive jurisdiction clause.

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

**Appealed from FCA (FC):** [\[2022\] FCAFC 149](#); (2022) 294 FCR 524; (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*  
**S16/2023:** [\[2023\] HCATrans 96](#)

**Date heard:** 1 August 2023

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

**Catchwords:**

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

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

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

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## Corporations Law

*Potts v National Australia Bank Limited (ABN 12 004 044 937)*  
**[S47/2023](#); [S48/2023](#): [\[2023\] HCATrans 130](#); [\[2023\] HCATrans 131](#)**

**Date heard:** 10 October 2023

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

**Catchwords:**

Corporations law – Proportionate liability – Where appellant Chief Financial Officer and director of Dick Smith Holdings Ltd (“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

*Orders made by consent on 10 October 2023 dismissing the appeal Potts & Anor v DSHE Holdings Ltd ACN 166 237 841 (receivers and managers appointed) (in liquidation) & Ors (S47/2023).*

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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):** [\[2018\] SASCF 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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*Huxley v The Queen*

**B19/2023:** [\[2023\] HCATrans 113](#)

**Date heard:** 7 September 2023

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

**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 132](#)

**Date heard:** 12 October 2023

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

**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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## 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

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

**M20/2023:** [\[2023\] HCATrans 111](#)

**Date heard:** 6 September 2023

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

**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 acts of family violence under 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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## 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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## Restitution

*Redland City Council v Kozik & Ors*

**[B17/2023](#)**: [\[2023\] HCATrans 116](#); [\[2023\] HCATrans 121](#)

**Date heard:** 13 and 14 September 2023

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

**Catchwords:**

Restitution – Unjust enrichment – Payment of public impost – Mistake of law – Restitutionary defence in public law – Where respondents

plaintiffs in representative action against appellant seeking recovery of monies paid as ratepayers for charges wrongly levied by appellant – Where appellant accepts charges wrongly levied, but refuses to repay amount of charges expended for particular benefit of group of ratepayers – Where primary judge held appellant unable to raise restitutionary defences in circumstances where plaintiffs' claims brought as cause of action in debt and no contractual relationship arose – Where Court of Appeal majority found restitution claims available in circumstances where monies paid under invalid laws, but that ratepayers could not be considered to be unjustly enriched by repayment of monies – Whether defence of unjust enrichment available where payment of public impost made under mistake of law – Whether defence of unjust enrichment available where, though wrongly levied, charges expended to special benefit of group – Whether defence of unjust enrichment to be framed by reference to contractual principles of failure of consideration or by reference to material benefit derived.

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

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## Sentence

*Xerri v The King*

**S76/2023:** [\[2023\] HCATrans 142](#)

**Date heard:** 18 October 2023

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

### 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*  
**B32/2023:** [\[2023\] HCATrans 141](#)

**Date heard:** 17 October 2023

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

### 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 connection 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 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) 295 FCR 81; (2022) 406 ALR 431

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## Statutes

*Harvey & Ors v Minister for Primary Industry and Resources & Ors*  
**D9/2022:** [\[2023\] HCATrans 110](#)

**Date heard:** 5 September 2023

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

### 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 97](#)

**Date heard:** 2 August 2023

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

**Catchwords:**

Trade practices – Misleading or deceptive conduct – Where fuel consumption label affixed to new vehicle offered for sale – Where affixing of label required by *Motor Vehicle Standards Act 1989* (Cth) and *Vehicle Standard (Australian Design Rule 81/02 – Fuel Consumption Labelling for Light Vehicles) 2008* (“Standard”) – Where label displayed fuel consumption figures derived from standard testing of vehicle type – Where purchased vehicle unable to substantially achieve label figures under standard test – Where Court of Appeal held found label conveyed particular representation that fuel consumption figures substantially replicable in purchased vehicle (“testing replicability representation”) – Where Court of Appeal found affixing of fuel consumption label to respondent’s vehicle, and presenting and offering vehicle for sale with label affixed, appellants engaged in misleading or deceptive conduct in contravention of s 18 of *Australian Consumer Law* – Whether fuel consumption label made testing replicability representation – Whether conduct required by Standard can give rise to contravention of s 18 of *Australian Consumer Law*.

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

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## 4: ORIGINAL JURISDICTION

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

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### Constitutional law

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

[S28/2023](#)

**Catchwords:**

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

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

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

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

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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

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

[S12/2023](#)

### Catchwords:

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

plaintiff's sentences between 1996 and 1998 as criminal convictions  
– Whether defendant took into account irrelevant consideration by  
having regard to plaintiff's offences between 1996 and 1998 and  
treating such conduct as criminal offending.

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

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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.

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### Arbitration

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

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

**Catchwords:**

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

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

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### Administrative Law



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

**M63/2023**: [\[2023\] HCATrans 103](#)

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

**Catchwords:**

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

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

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## Bankruptcy

*Morgan & Ors v McMillan Investment Holdings Pty Ltd & Anor*

**S119/2023**: [\[2023\] HCATrans 122](#)

**Date heard:** 15 September 2023 – *Special leave granted*

**Catchwords:**

Bankruptcy – Pooling order – *Corporations Act 2001* (Cth), s 579E – Meaning of “particular property” – Where first applicant is liquidator of second and third applicants – Where first applicant sought order

before primary judge that, inter alia, Australian Securities and Investments Commission ("ASIC") reinstate registration of third applicant, and Court make pooling order pursuant to s 579E of *Corporations Act* in respect of second and third applicants – Where primary judge made orders that ASIC reinstate registration of third applicant, and that second and third applicants be pooled group for purpose of s 579E of *Corporations Act* – Where first respondent appealed to Full Court on question of whether pooling order should be set aside – Where Full Court found precondition in s 570E(1)(b)(iv) of *Corporations Act* not satisfied – Whether Full Court majority erred in finding precondition in s 579E(1)(b)(iv) of *Corporations Act* not satisfied in circumstances where second and third applicants jointly and severally owned "particular property", being chose in action, at time of making pooling order, being immediately following reinstatement of third applicant – Whether Full Court majority impermissibly departed from clear and unambiguous language of s 601AH(5) of *Corporations Act*.

**Appealed from FCA (FC):** [\[2023\] FCAFC 9](#); (2023) 295 FCR 543; (2023) 407 ALR 328; (2023) 164 ACSR 129

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## Constitutional Law

*Attorney-General for the State of Tasmania v Casimaty & Anor*  
**H3/2023:** [\[2023\] HCATrans 139](#)

**Date heard:** 13 October 2023 – *Special leave granted*

### Catchwords:

Constitutional law – Legislature – Privileges – Privilege of parliamentary debate and proceedings – Admissibility of report of parliamentary committee – Where proceedings concern road works at intersection – Where first respondent claims to hold interest in land at intersection – Where proposal by Department of State Growth to upgrade intersection considered and reported upon by Parliamentary Standing Committee on Public Works ("Committee") in 2017 – Where second respondent engaged to construct new interchange – Where first respondent claims that works that second respondent was to perform not same as public works considered and reported upon by Committee – Where Attorney-General joined as second defendant and applied to, inter alia, strike out parts of statement of claim as offending parliamentary privilege – Where primary judge found cause of action could not proceed without court adjudicating upon 2017 report of Committee, which would contravene Article 9 of Bill of Rights – Where Full Court dismissed Attorney-General's interlocutory application – Whether Full Court

erred in construing s 15 and s 16 of *Public Works Committee Act 1914* (Tas) ("PWC Act") as creating public obligation which falls outside parliamentary process and hence ambit of parliamentary privilege – Whether it would infringe parliamentary privilege for court to determine whether road works complied with s 16(1) of PWC Act by adjudicating upon whether road works that second respondent were engaged to undertake were different from road works reported on by Committee.

**Appealed from TASSC (FC):** [\[2023\] TASFC 2](#)

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*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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*Commonwealth of Australia v Yunupingu (on behalf of the Gumatj Clan or Estate Group) & Ors*

**D4/2023:** [\[2023\] HCATrans 143](#)

**Date determined:** 19 October 2023 – *Special leave granted*

**Catchwords:**

Constitutional law – *Constitution*, s 51(xxxi) – Acquisition of property on just terms – Extinguishment of native title – Where principal proceeding is application for compensation under *Native Title Act 1993* (Cth) for alleged effects of grants or legislative acts on native title in period after Northern Territory became territory of Commonwealth in 1911 and before enactment of *Northern Territory Self-Government Act 1978* (Cth) – Whether Full Court erred by failing to find that just terms requirement contained in s 51(xxxi) of *Constitution* does not apply to laws enacted pursuant to s 122 of *Constitution*, including *Northern Territory (Administration) Act 1910* (Cth) and Ordinances made thereunder – Whether *Wurridjal v Commonwealth* (2009) 237 CLR 309 should be re-opened – Whether Full Court erred in failing to find that, on facts set out in appellant’s statement of claim, neither vesting of property in all minerals on or below surface of land in claim area in Crown, nor grants of special mineral leases capable of amounting to acquisitions of property under s 51(xxxi) of *Constitution* because native title inherently susceptible to valid exercise of Crown’s sovereign power to grant interests in land and to appropriate to itself unalienated land for Crown purposes.

Native title – Extinguishment – Reservations of minerals – Whether Full Court erred in failing to find that reservation of “all minerals” from grant of pastoral lease “had the consequence of creating rights of ownership” in respect of minerals in Crown, such that Crown henceforth had right of exclusive possession of minerals and could bring an action for intrusion.

**Appealed from FCA (FC):** [\[2023\] FCAFC 75](#); (2023) 410 ALR 231

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## Contract

*Cessnock City Council (ABN 60 919 148 928) v 123 259 932 Pty Ltd (ACN 123 259 932)*

**S115/2023:** [\[2023\] HCATrans 125](#)

**Date heard:** 15 September 2023 – *Special leave granted*

**Catchwords:**

Contract – Breach of contract – Remedies – Damages – Reliance damages – Recoupment presumption – Where dispute arose from plan to develop airport at Cessnock – Where applicant operated as

both commercial party and relevant planning authority – Where applicant lodged development application for consolidation of airport land into lots 1 and 2 – Where respondent was company that hoped to build hanger on lot 2 – Where on 26 July 2007, applicant executed agreement whereby it promised to grant respondent lease of part of airport – Where respondent spent around \$3.7 million constructing hangar – Where on 29 June 2011, applicant told respondent that it would not be proceeding with subdivision of airport as it could not afford to connect proposed lots to sewerage system – Where primary judge held applicant breached parties’ agreement by not committing funds to connect proposed lots to sewerage, but only awarded nominal damages – Where primary judge distinguished case from *Amann Aviation and McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, such that recoupment presumption did not arise, and even if such presumption had arisen, applicant had rebutted it – Where Court of Appeal held recoupment presumption was engaged, and presumption had not been rebutted – Whether Court of Appeal erred in concluding presumption arose that respondent would have at least recouped its wasted expenditure if contract had been performed – Whether presumption arises where contract has inherent contingency that no net profit would be made.

**Appealed from NSWSC (CA):** [\[2023\] NSWCA 21](#)

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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](#); (2022) 298 A Crim R 483

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*Obian v The King*

**M29/2023:** [\[2023\] HCATrans 135](#)

**Date heard:** 13 October 2023 – *Special leave granted*

**Catchwords:**

Criminal law – Reopening of prosecution case – Substantial miscarriage of justice – Proper test for re-opening under s 233(2) *Criminal Procedure Act 2009* (Vic) – Where appellant charged with three counts of trafficking in not less than commercial quantity of 1,4-butanediol (“1,4-BD”), which is drug of dependence except when possessed or used “for a lawful industrial purpose and not for human consumption” – Where defence case was that appellant imported and used 1,4-BD in course of his cleaning business – Where prosecution case was appellant imported and possessed 1,4-BD for purposes of sale for human consumption – Where after close of prosecution case, appellant gave evidence, which included admitting hiring HiAce van but did so on behalf of another person – Where part-way through appellant’s cross-examination, prosecution granted leave to re-open its case to call evidence from surveillance operatives to rebut aspects of appellant’s evidence about his hiring of van – Where majority of Court of Appeal refused appellant’s application for leave to appeal against conviction – Whether trial judge erred in permitting prosecution to reopen prosecution case under s 233(2) of *Criminal Procedure Act* and that substantial miscarriage of justice occurred as result.

**Appealed from VSC (CA):** [\[2023\] VSCA 18](#)

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*The King v Anna Rowan – A Pseudonym*

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

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

**Catchwords:**

Criminal law – Defence of duress – Duress of circumstances – Where respondent charged with indecent act with children under 16, and

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

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

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## Immigration

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

**M32/2023:** [\[2023\] HCATrans 117](#)

**Date determined:** 14 September 2023 – *Special leave granted*

### Catchwords:

Immigration – Visas – Cancellation – Direction 90 – Materiality – Where applicant convicted of criminal offences and sentenced to term of imprisonment – Where applicant’s visa cancelled under s 501(3A) of *Migration Act 1958* (Cth) – Where applicant applied under s 501CA(4) to have cancellation revoked – Where Minister required Tribunal under s 499(1) of *Migration Act* to comply with certain directions as to how evaluative discretionary power should be exercised – Where Direction 90 requires Tribunal to consider “seriousness” of conduct – Where delegate decided not to revoke cancellation under s 501CA of *Migration Act* – Where Administrative Appeals Tribunal and primary judge affirmed delegate’s decision – Where Full Court found Tribunal erred in purporting to consider certain matters set out in cl 8.1.1 of Direction 90 – Where Full Court found each error immaterial – Whether Full Court erred in concluding each of second respondent’s multiple failures to comply as required by s 499(2A) of *Migration Act* with Direction 90 were not material to Tribunal’s decision – Whether Full Court erred in failing to conclude that, cumulatively, Tribunal’s multiple non-compliances with Direction 90 were material – Proper approach to materiality of jurisdictional error.

**Appealed from FCA (FC):** [\[2023\] FCAFC 64](#); (2023) 297 FCR 1

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

**S157/2022:** [\[2023\] HCATrans 126](#)

**Date heard:** 15 September 2023 – *Special leave granted*

**Catchwords:**

Immigration – Visas – Cancellation – Invalid applications – Application for review of decision of Administrative Appeals Tribunal (“Tribunal”) – Requirements under s 29(1) of *Administrative Appeals Tribunal Act 1975* (Cth) for application for review of migration decision – Where applicant filed document in Tribunal seeking review of delegate’s decision not to revoke cancellation of his visa under s 501CA(4) of *Migration Act 1958* (Cth) – Where in courts below, Minister accepted application complied with all requirements in s 29(1) of *Administrative Appeals Tribunal Act* other than requirement in s 29(1)(c) to “contain a statement of reasons for the application” – Where at directions hearing on 1 April 2021, Tribunal requested applicant provide by 9 April 2021 email stating reasons for application – Where on that day, applicant’s migration agent emailed reasons – Where primary judge and Full Court held that statement required by s 29(1)(c) essential to validity of application and thus Tribunal’s jurisdiction – Where Full Court held that 9 April 2021 email stating reasons sent outside nine-day period specified by s 500(6B) of *Migration Act 1958* (Cth) “perfected” application out of time – Whether Full Court erred in concluding second respondent did not have jurisdiction to determine applicant’s application filed on 24 March 2021.

**Appealed from FCA (FC):** [\[2022\] FCAFC 183](#); (2022) 295 FCR 254

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

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

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

**Catchwords:**

Immigration – Visas – Mandatory cancellation – Representations to Minister to revoke cancellation – Relying on Departmental summary



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

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

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## Private International Law

*Greylag Goose Leasing 1410 Designated Activity Company & Anor v P.T. Garuda Indonesia Ltd*

**S83/2023:** [\[2023\] HCATrans 144](#)

**Date determined:** 19 October 2023 – *Special leave granted*

### Catchwords:

Private international law – Jurisdiction – Immunities – *Foreign State Immunities Act 1985* (Cth) (“FSIA”) – Where s 9 of FSIA provides immunity for foreign States from proceedings in Australian courts, except as provided by FSIA – Where s 14(3)(a) of FSIA provides exception for proceedings concerning “bankruptcy, insolvency or the winding up of a body corporate” – Where appellants instituted proceedings to wind up respondent – Where respondent is separate entity of foreign State under FSIA – Where primary judge and Court of Appeal held s 14(3)(a) did not apply, because it applied only to insolvency or winding up of body corporate other than separate entity of foreign State – Whether Court of Appeal erred in construing s 14(3)(a) as not applying to proceedings in so far as they concern winding up, including in insolvency, of body corporate that is separate entity of foreign State.

**Appealed from NSWSC (CA):** [\[2023\] NSWCA 134](#); (2023) 410 ALR 371

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## Taxation

*Godolphin Australia Pty Ltd ACN 093921021 v Chief Commissioner of State Revenue*

**S130/2023:** [\[2023\] HCATrans 136](#)

**Date heard:** 13 October 2023 – *Special leave granted*

### Catchwords:

Taxation – Land tax – Assessments – Exemption for land used for primary production – Where appellant runs thoroughbred stud operation – Where appellant also engages in associated agricultural activities such as raising cattle and growing lucerne – Where no dispute that appellant’s broad use or activities on land involved maintenance of horses and that use dominated over any other use of land – Where s10AA(1) of *Land Tax Management Act 1956* (NSW) provides exemption for “land that is rural land from taxation if it is land used for primary production” – Where s10AA(3)(b) provides that “land used for primary production” means land the dominant purpose of which is for “the maintenance of animals (including birds), whether wild or domesticated, for the purpose of selling them or their natural increase or bodily produce” – Where Court of Appeal found appellant failed to establish exempt purpose was dominant including that non-exempt purpose was not merely incidental and subservient to exempt purpose – Whether Court of Appeal erred in concluding that requirement of dominance in s 10AA(3)(b) applies to both use and purpose – Whether Court of Appeal should have concluded that where dominant use of land involves same physical activity for two or more complementary or overlapping purposes, one of which satisfies s 10AA(3)(b) and does not prevail over other purpose, it is unnecessary to demonstrate separately that exempt purpose is dominant purpose – Whether Court of Appeal should have concluded that appellant’s use of land for maintenance of animals was for purpose of selling animals, their progeny and bodily produce.

**Appealed from NSWSC (CA):** [\[2023\] NSWCA 44](#); (2023) 115 ATR 490

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## Torts

*Bird v DP (a pseudonym)*

**M26/2023:** [\[2023\] HCATrans 145](#)

**Date heard:** 20 October 2023 – *Special leave granted*

### Catchwords:

Torts – Personal Injury – Sexual assault – Vicarious liability – Where trial concerned allegations of sexual assaults against respondent by Catholic Priest in 1971, when respondent was five years of age – Where respondent sued Diocese of Ballarat through current Bishop, who was nominated defendant – Where respondent’s negligence case failed, but appellant, representing Diocese, found to be vicariously liable for Priest’s sexual assaults – Whether Court of Appeal erred in holding that appellant could be vicariously liable for tortfeasor’s wrong where express finding that tortfeasor not in employment relationship with appellant and was no finding that tortious conduct occurred as part of any agency relationship between tortfeasor and appellant – Where in circumstances Court finds relationship between appellant and tortfeasor gives rise to relationship of vicarious liability, whether Court of Appeal erred in concluding, based on general and non-specific evidence accepted, that conduct of tortfeasor was conduct for which appellant ought be liable as having provided both opportunity and occasion for its occurrence.

**Appealed from VSC (CA):** [\[2023\] VSCA 66](#); (2023) 323 IR 174

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*Mallonland Pty Ltd ACN 051 136 291 & Anor v Advanta Seeds Pty Ltd ACN 010 933 061*

**B18/2023:** [\[2023\] HCATrans 138](#)

**Date heard:** 13 October 2023 – *Special leave granted*

**Catchwords:**

Torts – Negligence – Pure economic loss – Duty of care – Where appellants and other group members commercial sorghum growers who between 2010 and 2014 conducted business of planting and commercial cultivation and sale of sorghum – Where they purchased, via distributors and resellers, “MR43 Elite” sorghum seeds manufactured by respondent, which were contaminated – Where MR43 sold in bags with “Conditions of Sale and Use” printed, including generic disclaimer – Where trial judge and Court of Appeal found that respondent did not owe duty of care to appellants – Whether Court of Appeal erred in failing to find respondent owed duty of care to appellants as end users of respondent’s product, to take reasonable care to avoid risk that such end users who used product as intended would sustain economic losses by reason of hidden defects in those goods – Whether Court of Appeal erred in finding that presence of disclaimer of liability on product packaging negated any assumption of responsibility by respondent so as to preclude duty of care on part of manufacturer arising, and thereby overwhelming consideration of all other salient features – Whether Court of Appeal erred by proceeding on basis that potential for farmers to avail themselves of contractual and statutory protection

in dealings with distributors, and absence of statutory protection of farmers as consumers in Commonwealth consumer protection legislation, were matters which supported not expanding protection available to persons in position of applicants by recognising duty of care.

**Appealed from QLDSC (CA):** [\[2023\] QCA 24](#)

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## Trade Practices

*Productivity Partners Pty Ltd (trading as Captain Cook College) (ACN 085 570 547) & Anor v Australian Competition and Consumer Commission & Anor*

**S118/2023:** [\[2023\] HCATrans 118](#)

**Date determined:** 14 September 2023 – *Special leave granted*

### **Catchwords:**

Trade Practices – Consumer law – Unconscionable conduct – Statutory unconscionability under s 21 of *Australian Consumer Law* (“ACL”) – Where first applicant carried on business providing vocational education and training courses to students – Where second applicant is parent company of first applicant – Where students enrolled in courses by first applicant were eligible for funding support under Commonwealth government scheme (VET-FEE HELP) – Where first applicant engaged agents to market to or recruit potential students – Where changes made to VET-FEE HELP scheme by Commonwealth to protect students from risk of misconduct by agents and providers – Where prior to 7 September 2015, first applicant had several controls in enrolment system which it implemented to ameliorate risk of unethical or careless conduct of agents with respect to enrolments – Where first applicant removed those controls after suffering declining enrolments – Where primary judge and Full Court held first applicant engaged in unconscionable conduct in contravention of s 21 of ACL – Whether Full Court ought to have held that primary judge erred in holding first applicant engaged in unconscionable conduct within meaning of s 21 of ACL, which claim was framed, and considered by trial judge, without reference to factors prescribed by s 22 of ACL – Whether Full Court erred in holding first applicant’s conduct of removing two system controls and operating enrolment system without those controls, in absence of intention that risks ameliorated by those controls eventuate, constituted unconscionable conduct in contravention of s 21 – Whether Full Court erred in holding second applicant knowingly concerned or party to first applicant’s contravention of s 21.

**Appealed from FCA (FC):** [\[2023\] FCAFC 54](#); (2023) 297 FCR 180

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*Wills v Australian Competition and Consumer Commission & Ors*  
**S116/2023:** [\[2023\] HCATrans 119](#)

**Date determined:** 14 September 2023 – *Special leave granted*

**Catchwords:**

Trade Practices – Consumer law – Unconscionable conduct – Statutory unconscionability under s 21 of *Australian Consumer Law* (“ACL”) – Knowing concern in unconscionable conduct – Accessorial liability – Where second respondent carried on business providing vocational education and training courses to students – Where third respondent parent company of second respondent – Where applicant was Chief Operating Officer of third respondent, and for period Chief Executive Officer of second respondent – Where students enrolled in courses by second respondent were eligible for funding support under Commonwealth government scheme (VET-FEE HELP) – Where second respondent engaged agents to market to or recruit potential students – Where changes made to VET-FEE HELP scheme by Commonwealth to protect students from risk of misconduct by agents and providers – Where prior to 7 September 2015, second respondent had several controls in enrolment system which it implemented to ameliorate risk of unethical or careless conduct of agents with respect to enrolments – Where second respondent removed those controls after suffering declining enrolments – Where primary judge and Full Court held second respondent engaged in unconscionable conduct in contravention of s 21 of ACL – Where primary judge held applicant was knowingly concerned in contravention of prohibition second respondent’s unconscionable conduct – Where Full Court majority allowed one of applicant’s grounds of appeal in part, that applicant did not know all of matters essential to contravention until he was acting CEO – Whether Full Court majority erred in finding that applicant had requisite knowledge to be liable as accessory to contravention of s 21, notwithstanding applicant did not have knowledge that conduct involved taking advantage of consumers or was otherwise against conscience – Whether Full Court majority erred in finding that applicant satisfied participation element for accessorial liability by (i) applicant’s conduct before he had knowledge of essential matters which make up contravention; together with (ii) applicant’s continued holding of position of authority, but no identified positive acts after applicant had requisite knowledge.

**Appealed from FCA (FC):** [\[2023\] FCAFC 54](#); (2023) 297 FCR 180

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

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## 8: SPECIAL LEAVE REFUSED

### Publication of Reasons: 12 October 2023 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Motufuoki	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M52/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 74	Application dismissed <a href="#">[2023] HCASL 141</a>
2.	Ejueyitsi	Western Sydney University & Ors (S81/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 126	Application dismissed <a href="#">[2023] HCASL 143</a>
3.	Cuthbert	Abbott & Ors (B42/2023)	Supreme Court of Queensland (Court of Appeal) [2023] QCA 139	Application dismissed <a href="#">[2023] HCASL 144</a>
4.	Cockman	Gorman & Ors (P8/2023)	Supreme Court of Western Australia (Court of Appeal) [2023] WASCA 44	Application dismissed with costs <a href="#">[2023] HCASL 145</a>
5.	Henley Constructions Pty Ltd (ACN 123 122 038) & Anor	Henley Arch Pty Ltd (ACN 007 316 930) (M36/2023)	Full Court of the Federal Court of Australia [2022] FCAFC 62	Application dismissed with costs <a href="#">[2023] HCASL 146</a>
6.	Wilio	The King (M49/2023)	Supreme Court of Victoria (Court of Appeal) [2023] VSCA 88	Application dismissed <a href="#">[2023] HCASL 147</a>
7.	Greenway Health Centre Pty Ltd trading as Greenway Plaza Pharmacy ACN 620 125 019	Bronger & Anor (S68/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 104	Application dismissed with costs <a href="#">[2023] HCASL 148</a>
8.	Govindasamy	Marktlend Pty Ltd (ACN 602 720 856) (S70/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 90	Application dismissed with costs <a href="#">[2023] HCASL 149</a>
9.	SZRWS	Minister for Immigration, Citizenship and Multicultural Affairs & Ors (S74/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 83	Application dismissed with costs <a href="#">[2023] HCASL 150</a>
10.	Khattar	Khattar & Ors (S86/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 133	Application dismissed with costs <a href="#">[2023] HCASL 151</a>



<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
11.	Bay	Australian Health Practitioner Regulation Agency & Ors (B37/2023)	High Court of Australia [2023] HCASL 86	Application dismissed <a href="#">[2023] HCASL 152</a>
12.	Mehajer	The King (S77/2023)	Supreme Court of New South Wales (Court of Criminal Appeal) [2022] NSWCCA 240	Application dismissed <a href="#">[2023] HCASL 153</a>
13.	Al-Dmoor & Anor	Minister for Immigration, Citizenship and Multicultural Affairs & Anor (S84/2023)	Federal Court of Australia [2023] FCA 663	Application dismissed <a href="#">[2023] HCASL 154</a>
14.	Commissioner of Taxation	JMC Pty Ltd ACN 003 572 012 (S69/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 76	Application dismissed <a href="#">[2023] HCASL 155</a>

## Publication of Reasons: 19 October 2023 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Schafer	Bacon (B35/2023)	Supreme Court of Queensland (Court of Appeal) [2023] QCA 55	Application dismissed <a href="#">[2023] HCASL 156</a>
2.	Burt	The State of Western Australia (P15/2023)	Supreme Court of Western Australia (Court of Appeal) [2022] WASCA 150	Application dismissed <a href="#">[2023] HCASL 157</a>
3.	CCY	The King (B30/2023)	Supreme Court of Queensland (Court of Appeal) [2023] QCA 49	Application dismissed <a href="#">[2023] HCASL 158</a>
4.	DMQ20	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (B36/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 84	Application dismissed with costs <a href="#">[2023] HCASL 159</a>
5.	WA Glass Pty Ltd	Auto Control Systems Pty Ltd (P14/2023)	Supreme Court of Western Australia (Court of Appeal) [2023] WASCA 85	Application dismissed with costs <a href="#">[2023] HCASL 160</a>

## 20 October 2023: Canberra and by video link

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Gavanas	The King (M12/2023)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 271	Application refused <a href="#">[2023] HCATrans 148</a>
2.	Toyne	Stokes (S43/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 59	Application refused with costs <a href="#">[2023] HCATrans 147</a>
3.	183 Eastwood Pty Ltd ACN 614508600	Dragon Property Development & Investment Pty Ltd ACN 616387485 (S51/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 72	Application refused with costs <a href="#">[2023] HCATrans 146</a>