



HIGH COURT BULLETIN

Produced by the Legal Research Officer,
High Court of Australia Library
[2023] HCAB 7 (15 September 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>AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Ors</i>	Immigration
<i>Qantas Airways Limited & Anor v Transport Workers Union of Australia</i>	Industrial Law
<i>Crime and Corruption Commission v Carne</i>	State Parliament

3: Cases Reserved

Case	Title
<i>Huxley v The Queen</i>	Criminal Law
<i>Ismail v Minister for Immigration, Citizenship and Multicultural Affairs</i>	Immigration

<i>Redland City Council v Kozik & Ors</i>	Restitution
<i>Harvey & Ors v Minister for Primary Industry and Resources & Ors</i>	Statutes

4: Original Jurisdiction

5: Section 40 Removal

6: Special Leave Granted

Case	Title
<i>Morgan & Ors v McMillan Investment Holdings Pty Ltd & Anor</i>	Bankruptcy
<i>Cessnock City Council ABN 60 919 148 928 v 123 259 932 Pty Ltd ACN 123 259 932</i>	Contract
<i>LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor</i>	Immigration
<i>Miller v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor</i>	Immigration
<i>Productivity Partners Pty Ltd (trading as Captain Cook College) (ACN 085 570 547) & Anor v Australian Competition and Consumer Commission & Anor</i>	Trade Practices
<i>Wills v Australian Competition and Consumer Commission & Ors</i>	Trade Practices

7: Cases Not Proceeding or Vacated

8: Special Leave Refused

2: CASES HANDED DOWN

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

Immigration

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

[M84/2022](#); [M85/2022](#): [\[2023\] HCA 26](#)

Judgment delivered: 6 September 2023

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

Catchwords:

Constitutional Law (Cth) – Judicial power of the Commonwealth – Jurisdiction – Appeals – Meaning of “matter” – Where appellant commenced proceedings in Federal Court of Australia seeking mandamus to require Secretary of Department of Home Affairs to remove him from Australia to a regional processing country under s 198AD(2) of *Migration Act 1958* (Cth) – Where Federal Court made orders declaring s 198AD(2) of Act applied to appellant, requiring Secretary to perform duty under s 198AD(2) as soon as reasonably practicable, and requiring appellant be detained in immigration detention at a residential address pending removal to a regional processing country – Where Minister for Home Affairs subsequently exercised power under s 198AE(1) of Act to determine duty under s 198AD(2) did not apply to appellant – Where respondents sought to appeal primary judge's orders to Full Court of the Federal Court of Australia – Where at time of appeals primary judge's orders did not have any operative legal effect – Whether there was a “matter” within meaning of Ch III of *Constitution* at time Full Court made orders determining appeals – Whether there was a justiciable controversy before Full Court – Whether Full Court had jurisdiction to determine appeals.

Words and phrases – “advisory opinion”, “appellate jurisdiction”, “federal jurisdiction”, “immediate right, duty or liability”, “judicial power of the Commonwealth”, “jurisdiction”, “justiciable controversy”, “matter”, “standing”.

Constitution, Ch III.

Federal Court of Australia Act 1976 (Cth), s 24.

Migration Act 1958 (Cth), ss 198, 198AD, 198AE.

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

Held: Appeal allowed with costs.

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Industrial Law

Qantas Airways Limited & Anor v Transport Workers Union of Australia

S153/2022: [\[2023\] HCA 27](#)

Judgment delivered: 13 September 2023

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

Catchwords:

Industrial law (Cth) – Prohibition of taking adverse action against person to prevent exercise of workplace right – Workplace right – Where s 340(1)(b) of *Fair Work Act 2009* (Cth) provided that person must not take adverse action against another person to prevent exercise of workplace right – Where Qantas Airways Ltd made decision to outsource ground handling operations – Where outsourcing decision was adverse action in respect of affected employees – Where at time of outsourcing decision affected employees had no presently existing workplace right to organise and engage in protected industrial action and to participate in enterprise bargaining – Whether prohibition in s 340(1)(b) of *Fair Work Act* only prohibited adverse action taken to prevent exercise of presently existing workplace right.

Words and phrases – “adverse action”, “contingent right”, “enterprise bargaining”, “presently existing right”, “prevent”, “protected industrial action”, “rebuttable presumption”, “substantial and operative reasons”, “workplace law or workplace instrument”, “workplace right”.

Fair Work Act 2009 (Cth), ss 340, 341, 361.

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

Held: Appeal dismissed.

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State Parliament

Crime and Corruption Commission v Carne

B66/2022: [\[2023\] HCA 28](#)

Judgment delivered: 13 September 2023

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

Catchwords:

State Parliament – Parliamentary privilege – Where Crime and Corruption Commission (“Commission”) conducted investigation in response to complaint alleging corrupt conduct and maladministration by Public Trustee of Queensland – Where Commission then composed Report on allegations and investigation – Where Commission sought to use Parliamentary Crime and Corruption Committee (“Committee”) to make Report public – Where Commission requested Committee direct under s 69(1)(b) of *Crime and Corruption Act 2001* (Qld) (“CC Act”) that Report be given to Speaker of Legislative Assembly to be tabled in Legislative Assembly – Where s 69(1)(b) direction not given prior to or during court proceedings – Where Committee issued certificate under s 55 of *Parliament of Queensland Act 2001* (Qld) (“POQ Act”) certifying Report was a document prepared for the purposes of, or incidental to, transacting business of the Committee under s 9(2)(c) of POQ Act – Where s 9 of POQ Act defined “proceedings in the Assembly” to include “all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee” – Where “proceedings in the Assembly” could not be impeached or questioned in any court under s 8 of POQ Act – Whether court precluded by s 8(1) of POQ Act from making declaration concerning Report because preparation and presentation of Report were “proceedings” in Legislative Assembly.

Statutes – Construction – Statutory powers – Where CC Act established Commission and its functions and powers – Where Commission conducted investigation into alleged corrupt conduct – Where only consequent actions Commission took under CC Act were referring information to Attorney-General and making recommendations to Acting Public Trustee – Where s 69 of CC Act applied to report on public hearing, research report or “other report” that Committee directs be given to Speaker of Legislative Assembly – Whether Report was “other report” for purposes of s 69(1)(b) of CC Act.

Words and phrases – “adverse comment”, “business of the Assembly or a committee”, “corrupt conduct”, “corruption functions”, “for the purposes of, or incidental to, transacting business”, “impeached or questioned in any court”, “investigations and reporting”, “parliamentary privilege”, “proceedings in the Assembly”, “reporting powers”, “tabling requirements”, “unit of public administration”.

Crime and Corruption Act 2001 (Qld), ss 49, 64, 69.

Parliament of Queensland Act 2001 (Qld), ss 8, 9, 55.

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

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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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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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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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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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): [\[2018\] SASFCFC 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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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

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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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.

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.

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

S20/2023: [\[2023\] 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

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

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

S21/2023: [\[2023\] 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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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](#); (2022) 298 A Crim R 483

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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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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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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](#)

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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](#)

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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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Sentence

Xerri v The King

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

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

Catchwords:

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

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

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Shipping and Navigation

Carmichael Rail Network Pty Ltd as Trustee for the Carmichael Rail Network Trust v BBC Chartering Carriers GmbH & Co. KG & Anor

B32/2023: [\[2023\] HCATrans 79](#)

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

Catchwords:

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

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

S46/2023: [\[2023\] 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](#)

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Wills v Australian Competition and Consumer Commission & Ors
S49/2023: [\[2023\] 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](#)

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7: CASES NOT PROCEEDING OR VACATED

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8: SPECIAL LEAVE REFUSED

Publication of Reasons: 7 September 2023 (Canberra)

No.	Applicant	Respondent	Court appealed from	Result
1.	Singh	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M31/2023)	Federal Court of Australia [2023] FCA 424	Application dismissed [2023] HCASL 120
2.	Young	Director of Public Prosecutions & Anor (S56/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 69	Application dismissed [2023] HCASL 121
3.	Hegarty	Keogh (A7/2023)	Supreme Court of South Australia (Court of Appeal) [2023] SASCA 30	Application dismissed with costs [2023] HCASL 122
4.	Acciona Infrastructure Australia Pty Ltd ABN 52 140 915 251 & Anor	Zurich Australian Insurance Limited ABN 13 000 296 640 & Ors (S39/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 47	Application dismissed with costs [2023] HCASL 123
5.	NDA	The State of Western Australia (P11/2023)	Supreme Court of Western Australia (Court of Appeal) [2023] WASCA 50	Application dismissed [2023] HCASL 124
6.	Bevan	Bingham (S60/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 86	Application dismissed with costs [2023] HCASL 125
7.	Ngakyunkwokka	The King (B28/2023)	Supreme Court of Queensland (Court of Appeal) [2023] QCA 85	Application dismissed [2023] HCASL 126
8.	CYH16	Minister for Immigration, Citizenship and Multicultural Affairs & Anor (M39/2023)	Federal Court of Australia [2023] FCA 453	Application dismissed with costs [2023] HCASL 127
9.	Edgar Case (a pseudonym)	The King (M35/2023)	Supreme Court of Victoria (Court of Appeal) [2023] VSCA 12	Application dismissed [2023] HCASL 128
10.	Stolyar & Anor	Scott in his capacity as the Trustee of the bankrupt estates of Ian Stolyar and Beth Ngoc Nguyen (S58/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 61	Application dismissed with costs [2023] HCASL 129

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
11.	In the matter of an application by Cindy Taylor for leave to appeal (M37/2023)		High Court of Australia (unreported)	Application dismissed [2023] HCASL 130
12.	BHG20	Minister for Immigration, Citizenship and Multicultural Affairs & Anor (M40/2023)	Federal Court of Australia [2023] FCA 391	Application dismissed [2023] HCASL 131
13.	Mokbel	The King (M50/2023)	Supreme Court of Victoria (Court of Appeal) [2023] VSCA 40	Application dismissed [2023] HCASL 132

Publication of Reasons: 14 September 2023 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Luck	Bunnings Group Limited & Ors (M27/2023)	High Court of Australia (unreported)	Application dismissed [2023] HCASL 133
2.	Brown & Anor	King (S59/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 36	Application dismissed [2023] HCASL 134
3.	Panagaris	The King (B22/2023)	Supreme Court of Queensland (Court of Appeal) [2022] QCA 192	Application dismissed [2023] HCASL 135
4.	Nightowl Properties Pty Ltd ACN 126 734 549	Replay Australia Pty Ltd as Trustee under Instrument 707248123 ACN 088 310 785 (B27/2023)	Supreme Court of Queensland (Court of Appeal) [2023] QCA 76	Application dismissed with costs [2023] HCASL 136
5.	DWD Project Pty Ltd (ACN 601 276 108) & Anor	Northern Territory Environment Protection Authority (D2/2023)	Supreme Court of the Northern Territory (Court of Appeal) [2023] NTCA 3	Application dismissed with costs [2023] HCASL 137
6.	Atlas Advisors Australia Pty Ltd ACN 164 576 569	Tredmore Pty Ltd as trustee for the Xue Family Trust ACN 617 491 022 & Ors (S42/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 60	Application dismissed with costs [2023] HCASL 138
7.	Ahern & Anor	Aon Risk Services Australia Limited & Ors (S64/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 91	Application dismissed with costs [2023] HCASL 139
8.	V'landys	Australian Broadcasting Corporation & Anor (S71/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 80	Application dismissed with costs [2023] HCASL 140

15 September 2023: Canberra and by video link

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	RC	The Salvation Army (Western Australia) Property Trust (P7/2023)	Supreme Court of Western Australia (Court of Appeal) [2023] WASCA 29	Stood over
2.	Cantarella Bros Pty Ltd (ACN 000 095 607)	Energy Beverages LLC (S34/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 44	Application refused with costs [2023] HCATrans 123
3.	Energy Beverages LLC	Cantarella Bros Pty Ltd (ACN 000 095 607) (S35/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 44	Application refused with costs [2023] HCATrans 124