

SHORT PARTICULARS OF CASES
APPEALS

DECEMBER 2024

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MDP v THE KING (B72/2023)

Court appealed from: Supreme Court of Queensland Court of Appeal
[2023] QCA 134

Date of judgment: 27 June 2023

Special leave granted: 7 December 2023

The appellant (“MDP”) was convicted by a jury after a trial in the District Court of Queensland on all sixteen counts of an indictment charging four counts of rape, six counts of indecent treatment of a child under 12 under care, one count of maintaining a sexual relationship with a child, and five counts of indecent treatment of a child under 16 under care. The offences were charged as having occurred between 2014 and 2019 when the complainant was aged from 7 to 12 years old. She complained to the police in 2019. MDP was the complainant’s mother’s partner and lived with the family for substantial periods during that time. The complainant gave evidence by the playing of a recorded interview with the police and then pre-recorded evidence (mainly cross-examination). The complainant’s mother gave evidence about the family’s living and sleeping arrangements and of ‘preliminary complaint’. The complainant’s younger sister (“the sister”) also gave evidence. She was 11 when she spoke to the police in 2019. She gave ‘preliminary complaint’ evidence of what the complainant had told her about the offences. She was then asked by police if anything else happened and in response she referred to MDP “bottom slapping” the complainant, but not as discipline. The sister was not asked about this bottom slapping evidence during her pre-recorded evidence by the prosecutor or defence counsel. The complainant gave no evidence of bottom slapping and was not asked about it by police or in her pre-recorded evidence. The bottom slapping was not included in the particulars of the counts charged. MDP gave evidence, denying all sexual offending against the complainant. MDP said he would smack all the children, including the complainant, on the bottom in a disciplinary way or to move them out of the way.

At trial, the respondent (“the Crown”) asked for a “sexual interest” direction about the bottom slapping evidence on the basis that the evidence showed a sexual interest and could be used to reason it was more likely that MDP committed the offences (propensity reasoning). Defence counsel at trial acquiesced to the direction being given on the basis he wished to use it tactically in his address by using it to show the apparent desperation of the Crown case. The Crown submitted to the jury that the sister’s evidence was unchallenged and that it provided independent proof of the offences. The trial judge directed the jury in relation to the bottom slapping evidence by giving a conventional propensity direction.

MDP appealed his conviction to the Court of Appeal on a number of grounds. One ground was that there had been a miscarriage of justice because the trial judge had directed that the occasions when MDP slapped the complainant on the bottom could be used as evidence of sexual interest. MDP submitted that the evidence was not admissible for the purpose potentially allowed by the direction, namely its use as evidence of propensity, but that it was not admissible for that purpose because it did not meet the test of admissibility in *Pfennig v The Queen* (1995) 182 CLR 461.

Henry J, delivering the judgment of the Court of Appeal (Mullins P, Morrison JA & Henry J) dismissed this ground because it was not obvious it was led as evidence of sexual interest as opposed to familiarity of the domestic relationship. He agreed the bottom slapping evidence probably did not meet the test identified in *Pfennig* for the admissibility of propensity evidence. However, MDP had agreed to its admission and the evidence was so weak and the jury would not likely have used it as propensity evidence. His Honour concluded that neither the use of the bottom slapping evidence, nor the giving of the propensity direction gave rise to a miscarriage of justice.

This appeal was listed for hearing before the High Court comprised of five Justices sitting in Canberra on 4 June 2024. The sole ground of appeal at that time was that:

- The Court of Appeal erred in law by holding that no miscarriage of justice occurred when evidence inadmissible as propensity evidence was nonetheless left to the jury to be used as propensity evidence.

Upon review of the written submissions, it became apparent to the Court that the scope of the issues potentially in play had expanded considerably from those which had been identified at the time of the grant of the special leave to appeal, making the appeal more appropriate to be heard before all seven Justices. The Court adjourned the hearing to allow MDP to file an amended notice of appeal, the Crown to file any notice of contention, and for the parties and interveners to file additional submissions.

The Director of Public Prosecutions (Cth) (to make submissions only on the general principles concerning “a miscarriage of justice”) and the Director of Public Prosecutions for NSW (in support of the Crown) have been granted leave to intervene in the appeal.

By an amended notice of appeal, MDP seeks a further grant of special leave to appeal on three additional grounds as follows:

- The trial judge made a wrong decision on a question of law when his Honour decided to direct the jury that they could employ propensity reasoning in relation to evidence inadmissible as propensity evidence.
- The admission at trial of inadmissible evidence of uncharged sexual conduct of the appellant resulted in a miscarriage of justice.
- The trial judge made a wrong decision on a question of law when his Honour permitted the prosecution to lead inadmissible evidence of uncharged sexual conduct of the appellant.

BRAWN v THE KING (A20/2024)

Court appealed from: Supreme Court of South Australia Court of Appeal
[2022] SASCA 96

Date of judgment: 15 September 2022

Special leave granted: 5 September 2024

The appellant was convicted by a jury in the Supreme Court of South Australia of one count of maintaining an unlawful sexual relationship with a child contrary to section 50(1) of the *Criminal Law Consolidation Act 1935* (SA).

The prosecution alleged that the appellant, who turned eighteen on 1 April 2016, had exploited the close relationship between his family and the victim's family and committed eight unlawful sexual acts against the victim when she was between the ages of five and eight years old, in the period of 1 April 2016 to 1 January 2019.

The victim first disclosed that she was being abused by her 'uncle' but later identified her abuser as the appellant, who was not her uncle but instead her 'cousin'. The terms 'uncle' and 'cousin' in the Sudanese community (of which both the victim and appellant belong to) describe close relationships rather than any familial relationship. At trial, the appellant's defence was that while the victim had probably been sexually abused by another Sudanese male, the appellant was not her abuser and that she was lying for some unknown reason by accusing the appellant of committing the abuse. The defence submitted that the victim was not a reliable witness due to inconsistencies in her account of what happened and because aspects of her account were inherently unlikely.

After the trial, the appellant's lawyers were told for the first time that the appellant's father had previously been charged with six counts of unlawful sexual intercourse with a different child, however those charges were withdrawn about a year before the appellant's trial. The appellant himself was aware of this, however, did not understand the relevance or significance of this information insofar as it related to his trial and instructions.

The appellant appealed against his conviction to the Court of Appeal ("the CCA") on the ground that the prosecution's failure to make proper disclosure of the charges against his father denied him a fair trial, and that there was a miscarriage of justice within the scope of s 158(1)(c) of the *Criminal Procedure Act 1921* (SA), as he had been denied the opportunity to conduct his case differently.

The CCA found that the prosecution did fail to make proper disclosure of material which might have materially assisted the conduct of the appellant's defence, as it may have assisted the appellant's cross-examination of various witnesses on the topic of the identity of the abuser. However, the CCA dismissed the appeal, holding that the appellant had conceded that, notwithstanding the non-disclosure, he was not denied the opportunity to adduce admissible evidence. The CCA concluded that the disclosure would not have altered the forensic contest at trial and that there was no miscarriage of justice as the appellant did not demonstrate that the trial would have been conducted differently if full disclosure was made.

The Director of Public Prosecutions (Cth) is seeking leave to intervene or to be heard as amicus curiae in this appeal, to make submissions only on the general principles concerning “a miscarriage of justice”. The Director of Public Prosecutions for NSW is also seeking leave to intervene in support of the respondent.

The grounds of appeal are:

- The Court of Appeal erred in finding that the prosecution’s failure to comply with its duty of disclosure did not result in a miscarriage of justice for the purposes of s 158(1)(c) of the *Criminal Procedure Act 1921 (SA)*.
- The Court of Appeal erred in relying on a supposed concession by the appellant that the prosecution’s non-disclosure had not deprived him of any opportunity to adduce admissible evidence that his father had engaged in unlawful sexual intercourse with another female child, when that concession was not made.

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v J HUTCHINSON PTY LTD (ACN 009 778 330) & ANOR (B41/2024); AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION & ANOR (B42/2024)

Court appealed from: Full Court of the Federal Court of Australia
[2024] FCAFC 18

Date of judgment: 29 February 2024

Special leave granted: 8 August 2024

J Hutchinson Pty Ltd (“Hutchinson”), a construction company, entered into a contract with Waterproofing Industries Qld Pty Ltd (“WPI”) in March 2016 for WPI to perform waterproofing works on a construction project known as Southpoint A (“Southpoint project”).

Hutchinson had entered into an enterprise bargaining agreement (“EBA”) in 2012 and 2015, with the Construction, Forestry and Maritime Employees Union (“CFMEU”) representing employees working on the Southpoint project. The 2015 EBA required Hutchinson to consult with the CFMEU about the appointment of subcontractors and provided that subcontractors’ employees must receive terms no less favourable than those provided to employees under the 2015 EBA performing the same work.

WPI, which did not have an EBA with the CFMEU, performed some waterproofing work at the Southpoint project site in May and June 2016. Upon learning of the subcontract with WPI, the CFMEU raised some concerns with Hutchinson regarding the subcontract; including safety issues, the lack of consultation with the CFMEU prior to entering the subcontract, and the fact that WPI did not have an EBA.

On 11 June 2016, a delegate of the CFMEU informed Hutchinson’s project manager that the CFMEU would engage in industrial action if WPI came onto the Southpoint project site. No further work was performed by WPI after this conversation and from mid-July 2016 a different subcontractor commenced waterproofing works on the Southpoint project. On 26 July 2016, Hutchinson terminated its subcontract with WPI.

The Australian Competition and Consumer Commission (“ACCC”) commenced proceedings against Hutchinson and the CFMEU, claiming that Hutchinson had engaged in anticompetitive conduct in contravention of sections 45E(3) and 45AE of the *Competition and Consumer Act 2010* (Cth) (“the CCA”) by making, and giving effect to, an arrangement or arriving at an understanding with the CFMEU or one of its officers, that it would terminate its subcontract, or otherwise cease to acquire services from WPI. The ACCC also alleged that the CFMEU had accessorial liability with respect to, and induced, Hutchinson’s contraventions.

On 14 February 2022, Downes J held that the evidence established, on the balance of probabilities, that a consensus was reached pursuant to which Hutchinson and the CFMEU committed to a particular course of action, namely that they arrived at an arrangement or understanding containing a provision to the effect that Hutchinson would no longer acquire WPI’s services and further, that WPI’s subcontract would be terminated. Declarations were made that Hutchinson had

contravened ss 45E(3) and 45EA of the CCA, and that the CFMEU was an accessory to, and induced, Hutchinson's contraventions by threatening or implying that there would be conflict with or industrial action if Hutchinson did not cease using WPI.

Hutchinson and the CFMEU successfully appealed to the Full Court of the Federal Court (Wigney J, Bromwich & Anderson JJ). On 29 February 2024, the Full Court set aside the declarations made and found that while Hutchinson had succumbed to the CFMEU's threat, there was no arrangement or understanding between them for the purposes of s 45E(3)(a) of the CCA. This was because the evidence did not establish that they had arrived at the requisite "meeting of minds", and that for an arrangement or understanding to be formed, assent must be communicated prior to it being given effect. The Full Court found that the facts as found by Downes J could equally support an inference that Hutchinson had unilaterally succumbed to the CFMEU's threat of industrial action, which alone is insufficient to give rise to an arrangement or understanding.

The ACCC's ground of appeal is:

- The Full Court erred in finding that an "arrangement or understanding" for the purposes of s 45E(3) of the CCA requires communication of assent to an arrangement or understanding that precedes and is distinct from conduct giving effect to the arrangement or understanding, so that the first respondent "succumbing to a threat" by the second respondent and responding by doing what was demanded under sanction of the threat of industrial action was insufficient to give rise to an "arrangement or understanding".

FEL17 v MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS (S107/2024)

Court appealed from: Full Court of the Federal Court of Australia
[2023] FCAFC 153

Date of judgment: 12 September 2023

Special leave granted: 8 August 2024

The appellant is an Egyptian national and a Coptic Christian. He applied for a protection visa soon after his arrival in Australia in 2013. That application was refused in 2014 by a delegate of the Respondent (“the Refusal Decision”). In 2015, the Administrative Appeals Tribunal (“AAT”) affirmed the Refusal Decision (“the AAT Decision”).

In September 2017, the Assistant Minister for Immigration and Border Protection exercised power under section 417(1) of the *Migration Act 1958* (Cth) (“the Migration Act”) to substitute a more favourable decision for the AAT Decision, being the grant of a three-month visitor visa to the appellant (“the Assistant Minister’s Decision”).

In October 2017, the appellant lodged a fresh application for a protection visa. That application was assessed by a delegate of the Respondent as being invalid (“the Invalidity Decision”) on account of s 48A of the Migration Act, which provided that a non-citizen in Australia who had previously been refused a protection visa could not make a further application for a protection visa.

An application by the appellant for judicial review of the Invalidity Decision was dismissed by the Federal Circuit and Family Court in January 2023. Judge Laing observed that the visa granted was of a very different kind from that which was the subject of the Refusal Decision, and that the Assistant Minister’s Decision was not directed to the Refusal Decision. Her Honour held that the applicability of s 48A was unchanged by the AAT Decision and by the Assistant Minister’s Decision, and that the Invalidity Decision therefore was correct.

An appeal by the appellant was dismissed by the Full Court of the Federal Court (Abraham and Halley JJ; Snaden J dissenting). The majority noted that the AAT Decision did not amount to a decision to refuse to grant the visa sought, and their Honours considered that the substitution power under s 417 of the Migration Act was to be contrasted with the AAT’s powers under s 415, which expressly included the power to set aside a delegate’s decision and substitute a new decision. Their Honours held that the Refusal Decision had legal effect prior to the AAT Decision, and that the latter merely gave the former continuing force. Although the Assistant Minister’s Decision was substituted under s 417 for the AAT Decision, the Assistant Minister’s Decision said nothing about the Delegate’s Decision. The substitution effected was simply the giving of a visa of a different kind. Their Honours therefore held that s 48A applied, with the consequence that the appellant’s second visa application was invalid.

Snaden J however would have allowed the appeal. His Honour held that the AAT Decision under s 415 of the Migration Act became the sole source of legal effect for the Refusal Decision. When a new decision by the Assistant Minister was then “substituted” under s 417 for the AAT Decision, the legal effectiveness of the

Refusal Decision was brought to an end. From the time of that substitution, there was no operative refusal of a protection visa application that could attract the operation of s 48A, and consequently the Invalidity Decision involved an error of jurisdiction.

The sole ground of appeal is:

- The Full Court of the Federal Court erred in finding that the appellant's application for a protection visa was invalid as it was barred by s 48A of the Migration Act.

RAVBAR & ANOR v COMMONWEALTH OF AUSTRALIA & ORS **(S113/2024)**

Date writ of summons filed: 3 September 2024

Date special case referred to Full Court: 18 October 2024

The first and second plaintiffs are former Queensland branch officials of the Construction and General Division (“C&G Division”) of the Construction, Forestry and Maritime Employees Union (“CFMEU”). The first and second defendants are the Commonwealth of Australia and the Attorney-General of the Commonwealth (“the Commonwealth parties”). The third defendant is the barrister who was appointed as administrator in the Federal Court of Australia proceeding initiated by Fair Work Australia, and has filed a submitting appearance. This proceeding concerns the impact of the *Fair Work (Registered Organisations) Amendment (Administration) Act 2024* (Cth) (“the Amendment Act”), which was introduced after serious allegations about the C&G Division had been published by the media, on the *Fair Work Act 2009* (Cth) (“the FW Act”) and the *Fair Work (Registered Organisations) Act 2009* (Cth) (“the FWRO Act”). This matter specifically raises the question of the validity of the amendments made to the FWRO Act by the Amendment Act.

The CFMEU is a trade union representing approximately 120,000 workers across Australia, and consists of three independently operating Divisions, being the C&G Division, the Manufacturing Division, and the Maritime Union of Australia Division. In July 2024, media reports were published alleging misconduct by officers and members of the C&G Division. None of the allegations have yet led to convictions for offences or resulted in adverse findings by a court. On 2 August 2024, the General Manager of the Fair Work Commission applied to the Federal Court of Australia under section 323 of the FWRO Act seeking declarations and orders, including for the approval of a scheme of administration and the appointment of the third defendant as Administrator in relation to the C&G Division.

On 23 August 2024, after the Amendment Act commenced, the Attorney-General exercised the statutory rights of the Minister for Employment and Workplace Relations under s 323B(1) of the FWRO Act to determine a scheme of administration, and under s 323C to appoint an Administrator, which together had the effect of placing the entire C&G Division under administration.

The plaintiffs contend that the provisions allowing the administration of the C&G Division are invalid and unconstitutional, which raises four issues: a) whether the Amendment Act is supported by a head of Commonwealth legislative power; b) whether the Amendment Act and the scheme of administration infringe the implied freedom of political communication; c) whether s 323B of the FWRO Act involves the exercise of judicial power by the Minister or Parliament, because it imposes punishment on the C&G Division other than by a Chapter III Court; and d) whether the impugned provisions effect an acquisition of property other than on just terms, both generally in the vesting of control of property in the Administrator, and by reason of the requirement that he be remunerated from the funds of the C&G Division.

The Commonwealth parties reject the plaintiffs' submission and say that there has been a history of contravention by the CFMEU and its officers, and even the Federal Court has found that the CFMEU's "abuse of industrial power" occurs so regularly that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU to engage in disruptive, threatening and abusive behaviour. The purpose of the Amendment Act must be ascertained recalling that "the principal act is to be construed as a whole in the form in which it stands following the amendment", which is to enhance relations within workplaces and reduce adverse effects of industrial disputation. The position of the Commonwealth parties is that there is no constitutional difficulty arising from the Amendment Act and its impact on the FWRO Act.

The plaintiffs and the Commonwealth parties have each filed a notice of a constitutional matter. The Attorney-Generals for the States of Tasmania, South Australia and Queensland have intervened in support of the Commonwealth parties. Mr Michael Hiscox, a branch official of the ACT Divisional Branch of the C&G Division, seeks leave to intervene in support of the Plaintiffs. The ACT Divisional Branch is also under administration as a result of the appointment of the third defendant, but Mr Hiscox has not been removed from office, unlike the plaintiffs.

The then Acting Chief Justice Gordon ordered that the following questions of law in the form of a Special Case be referred for consideration by a Full Court:

- Are Part 2A of the FWRO Act, s 177A of the FW Act and/or the Amendment Act invalid because they are not laws with respect to any head of power in ss 51 or 122 of the Constitution?
- Are Part 2A of the FWRO Act, s 177A of the FW Act and/or the Amendment Act 2024 (Cth) invalid because they impermissibly burden the implied freedom of political communication?
- Is the *Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024* (Cth) invalid because it is not authorised by Part 2A of the FWRO Act by reason of the implied freedom of political communication?
- Are Part 2A of the FWRO Act, s 177A of the FW Act and/or the Amendment Act invalid because they infringe Chapter III of the Constitution?
- Are Part 2A of the FWRO Act, s 177A of the FW Act and/or the Amendment Act invalid because they are laws authorising the acquisition of property otherwise than on just terms within the meaning of s 51 (xxxii) of the Constitution?
- Is s 323M of the FWRO Act invalid because it authorises the acquisition of property otherwise than on just terms within the meaning of s 51(xxxii) of the Constitution?
- Who should bear the costs of the special case (having regard, if appropriate, to s 329 of the FWRO Act)?

The plaintiffs submit that the questions reserved should be answered: (1) to (6): yes; and (7) no order as to costs. The Commonwealth parties submit that the questions reserved should be answered as follows: (1) to (6): no; and (7) no order as to costs.

MJZP v DIRECTOR-GENERAL OF SECURITY & ANOR
(S142/2023)

Date writ of summons filed: 15 November 2023

Date special case referred to Full Court: 4 June 2024

The plaintiff is a carriage service provider within the meaning of the *Telecommunications Act 1997* (“the TA”). The first defendant (“the Director-General”) has filed a submitting appearance and the second defendant is the Commonwealth of Australia (“the Commonwealth”). This proceeding concerns the validity of section 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (“the AAT Act”) and whether it infringes on Chapter III of the Constitution (the Judicature). Section 46(2) of the AAT Act relevantly applies to appeals instituted in the Federal Court of Australia (“FCA”) where a certificate under s 39B(2) of AAT Act has been issued such that the FCA “shall... do all things necessary to ensure that the matter is not disclosed to any person other than a member of the court as constituted for the purpose of the proceeding”.

In 2019, the Department of Home Affairs requested that the Australian Security Intelligence Organisation (“ASIO”) assess and produce a security assessment in respect of the plaintiff in connection with s 315A of the TA. ASIO furnished an adverse security assessment (“ASA”) which was accompanied by a “statement of grounds” for the assessment. If the ASA stands, it will affect the plaintiff’s commercial interests. The plaintiff sought a merits review before the AAT.

The AAT Act contains provisions designed to allow information which would generally be excluded from court proceedings, as it would attract public interest immunity from production, in the AAT. Under ss 39A and 39B(2), the Minister for Home Affairs may certify that evidence or submissions proposed to be adduced or made is of such a nature that disclosure would be contrary to the public interest because it would prejudice security or the defence of Australia. The Minister issued three certificates under ss 39A and 39B(2), certifying that the disclosure of certain information in the statement of grounds would be contrary to the public interest. The AAT affirmed the decision to issue the ASA and provided “open” reasons to the plaintiff and the Director-General, while also providing “closed” reasons to the Director-General. The plaintiff has appealed the AAT decision to the FCA on questions of law. Under the AAT Act, the AAT is required to send to the FCA all documents that were before the AAT that are in connection with the proceeding to which the appeal relates. This will include information that is the subject of the Minister’s certificates and to which the plaintiff has no access.

The plaintiff submits that s 46(2) infringes on the Constitution on the basis that it requires the FCA to depart from the “general rule” of procedural fairness to an extent that is more reasonably necessary to protect a compelling and legitimate public interest. The plaintiff contends that s 46(2) substantially impairs the institutional integrity of the FCA and requires the FCA to exercise the judicial power of the Commonwealth in a manner inconsistent with the nature of that power. The plaintiff seeks leave to argue that the High Court decision in

SDCV v Director-General of Security (2022) 277 CLR 241¹ (where this Court found that s 46(2) did not infringe on Chapter III of the Constitution) be reopened and overruled as there is no *ratio decidendi* that can be extracted from the reasoning in that case, and the decision provided no binding statement on the proper construction on s 46(2). The plaintiff seeks to raise an argument which it says was not put in *SDCV* regarding proportionality. The plaintiff disagrees with the interveners' submissions that *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 and *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 also stand as authority against the plaintiff's position, but in the alternative seek leave to re-open and overrule those decisions to the extent necessary. The plaintiff submits that as s 46(2) is invalid, the FCA should not follow the result in *SDCV* when determining the pending appeal in the FCA brought by the plaintiff upon the AAT's decision to affirm the ASA. The plaintiff contends that the reasoning of any dissenting judges (Gageler J as His Honour then was, Gordon and Edelman JJ) in *SDCV* is to be disregarded and only the reasons of the plurality (Kiefel CJ, Keane and Gleeson JJ) are relevant for consideration.

The Commonwealth submits that s 46(2) is not invalid, does not infringe on Chapter III of the Constitution, and the decision in *SDCV* where a majority of the Court upheld the validity of s 46(2) provides a complete answer to the plaintiff's case and should not be reopened. However, if the Court decides to reopen *SDCV*, the plaintiff's challenge to s 46(2) should be rejected as s 46(2) does not give rise to any practical injustice having regard to the statutory scheme as a whole, or alternatively, to the extent s 46(2) requires the FCA to depart from the general rule that a party should know the case put against it, that is reasonably necessary for the achievement of a legitimate purpose.

This case raises the question of whether the Court should re-visit the *SDCV* decision to resolve any uncertainty arising from the reasons given as to the constitutional validity of s 46(2) of the AAT Act. Although the AAT Act has now been repealed, s 46(2) of the AAT Act will continue to govern the plaintiff's case under the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (Cth).

The plaintiff has filed a notice of a constitutional matter. The Attorney-Generals for the States of Queensland, Western Australia, New South Wales and Tasmania are intervening in support of the Commonwealth.

Chief Justice Gageler has ordered that the following questions of law in the form of a Special Case be referred for consideration by a Full Court:

- Is s 46(2) of the AAT Act invalid on the basis that it infringes Chapter III of the Constitution?
- Who should pay the costs of the Special Case and of the proceeding?

¹ This case concerned the cancellation of a visa on character grounds pursuant to s 501(3) of the *Migration Act 1958* (Cth) in consequence of an ASA certified by the Director-General on behalf of ASIO.