HIGH COURT BULLETIN

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High Court of Australia Library

[2021] HCAB 2 (12 March 2021)

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

1: SUMMARY OF NEW ENTRIES

2: Cases Handed Down

Case	Title
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17 & Anor	Administrative Law
Palmer & Anor v The State of Western Australia & Anor	Constitutional Law
Minister for Immigration and Border Protection v EFX17	Immigration
Wigmans v AMP Limited & Ors	Practice and Procedure
The Commissioner of Taxation for the Commonwealth of Australia v Travelex Limited	Taxation

3: Cases Reserved

Case	Title
LibertyWorks Inc v Commonwealth of Australia	Constitutional Law
Matthew Ward Price as Executor of the Estate of Alan Leslie Price (Deceased) & Ors v Christine Claire Spoor as Trustee & Ors	Contracts
Namoa v The Queen	Criminal Law
MZAPC v Minister for Immigration and Border Protection & Anor	Migration Law
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4: Original Jurisdiction

5: Section 40 Removal

6: Special Leave Granted

Case	Title
Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd & Ors	Competition Law
Hofer v The Queen	Criminal Law
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane	Migration Law
Arsalan v Rixon; Nguyen v Cassim	Torts

7: Cases Not Proceeding or Vacated

8: Special Leave Refused

2: Cases Handed Down

The following cases were handed down by the High Court of Australia during the February 2021 sittings.

Administrative Law

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17 & Anor

P23/2020: [2021] HCA 6

Judgment delivered: 4 March 2021

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

Catchwords:

Immigration – Visas – Application for protection visa – Procedural fairness – Where delegate of Minister rejected first respondent's application for protection visa – Where Administrative Appeals Tribunal affirmed delegate's decision – Where first respondent sought judicial review of that decision in Federal Circuit Court – Where first respondent unrepresented before Circuit Court and obtained assistance of interpreter – Where Circuit Court dismissed application for judicial review and delivered ex tempore judgment – Where Circuit Court orders were translated to first respondent but ex tempore reasons were not – Where written reasons delivered by Circuit Court after first respondent filed notice of appeal in Federal Court of Australia – Where Federal Court held that failure of Circuit Court to have ex tempore reasons for judgment translated resulted in denial of procedural fairness – Whether Federal Court erred in holding that Circuit Court denied first respondent procedural fairness – Whether Federal Court erred in holding that setting aside Circuit Court's judgment necessary to provide first respondent with practical justice.

Words and phrases – "assistance of an interpreter", "ex tempore reasons", "failure to translate", "judicial function", "operative reasons", "oral reasons", "practical injustice", "practical unfairness", "procedural fairness", "written reasons".

Federal Circuit Court of Australia Act 1999 (Cth) – ss 5, 42, 57, 74, 75.

Federal Circuit Court Rules 2001 (Cth) – rr 15. 27, 16. 01, 16. 02.

Appealed from FCA: [2019] FCA 1951

Held: Appeal allowed.

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Constitutional Law

Palmer & Anor v The State of Western Australia & Anor
B26/2020: [2021] HCA 5

Pronouncement of orders: 6 November 2020

Reasons published: 24 February 2021

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

Catchwords:

Constitutional law (Cth) – Freedom of interstate trade, commerce, and intercourse – Where s 56 of *Emergency Management Act 2005* (WA) ("EM Act") empowered Minister to declare state of emergency – Where s 67 empowered authorised officer to direct or prohibit movement of persons into emergency area – Where Minister for Emergency Services declared state of emergency in Western Australia in respect of COVID-19 pandemic – Where State Emergency Coordinator issued *Quarantine (Closing the Border) Directions* (WA) ("Directions") – Where paras 4 and 5 of Directions prohibited persons from entering Western Australia unless exempt traveller – Whether EM Act or Directions impermissibly infringed constitutional limitation in s 92 of *Constitution* – Whether infringement determined by reference to authorising provisions of EM Act – Whether provisions of EM Act imposed impermissible burden on interstate trade, commerce or intercourse – Whether exercise of power to make Directions raised constitutional question.

Words and phrases – "burden", "COVID-19", "differential", "discrimination", "emergency", "emergency management", "freedom of interstate trade, commerce, and intercourse", "hazard", "intercourse", "interstate movement", "plague or epidemic", “protectionist”, "reasonable necessity", "state of emergency", "structured proportionality", "trade and commerce".

Constitution – s 92.

Emergency Management Act 2005 (WA) – ss 56, 58, 67, 72A.

Quarantine (Closing the Border) Directions (WA) – paras 4, 5, 27.

Held: Questions answered.

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Immigration

Minister for Immigration and Border Protection v EFX17

B43/2020: [2021] HCA 9

Judgment delivered: 10 March 2021

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

Catchwords:

Immigration – Cancellation of protection visa – Notice of cancellation – Where delegate of Minister cancelled respondent's visa under s 501(3A) of *Migration Act 1958* (Cth) – Where pursuant to duties in s 501CA(3) letter from delegate and enclosures sent explaining decision to cancel respondent's visa and opportunity to make representations about revoking decision – Where letter and enclosures given to respondent by corrective services officer – Where letter incorrectly stated date on which respondent taken to have received notice – Whether Minister complied with duty to "give" written notice and particulars and "invite" representations under s 501CA(3) – Whether capacity of respondent to understand written notice, particulars, and invitation relevant to whether duties in s 501CA(3) were performed – Whether Minister or delegate required personally to perform duties in s 501CA(3) – Whether Minister failed to invite representations as letter did not specify period within which to make representations in accordance with *Migration Regulations 1994* (Cth).

Words and phrases – "capacity to understand", "deliver", "give", "in the way that the Minister considers appropriate in the circumstances", "incapacity", "invite", "method of delivery", "notice", "ordinary meaning", "personally to perform", "requesting formally", "service", "substantive content", "within the period and in the manner ascertained in accordance with the regulations".

Migration Act 1958 (Cth) – ss 496, 497, 501(3A), 501CA(3).

Migration Regulations 1994 (Cth) – regs 2. 52, 2. 55.

Appealed from FCA (FC): [2019] FCAFC 230; (2019) 273 FCR 508; (2019) 374 ALR 272; (2019) 167 ALD 225

Held: Appeal dismissed.

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Practice and Procedure

Wigmans v AMP Limited & Ors
S67/2020: [2021] HCA 7

Judgment delivered: 10 March 2021

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

Catchwords:

Practice and procedure – Representative action – Stay – Where five open class representative actions commenced against same defendant in relation to same controversy – Where considerable overlap between claims made in proceedings – Where representative plaintiff in four proceedings filed notice of motion in Supreme Court of New South Wales seeking orders that each other proceeding be permanently stayed – Whether Supreme Court's power to grant stay is confined by rule or presumption that representative proceeding issued first in time is to be preferred – Whether litigation funding arrangements can be relevant consideration under s 67 of *Civil Procedure Act 2005* (NSW) – Whether Supreme Court erred in considering litigation funding arrangements.

Words and phrases – "abuse of process", "auction process", "certification and carriage motion procedures", "class actions", "competing funding proposals, costs estimates and net hypothetical return to members", "competing representative proceedings", "conflicts of interest", "contradictor", "duplicative proceedings", "equitable principles concerning test actions", "first-in-time rule or presumption", "funding model", "litigation funding arrangements", "multifactorial approach", "multiplicity", "one size fits all", "power to grant a stay", "prima facie vexatious and oppressive", "representative proceedings", "special referee".

Civil Procedure Act 2005 (NSW) – ss 56, 57, 58, 67, Pt 10.

Appealed from NSWSC (CA): [2019] NSWCA 243; (2019) 373 ALR 323

Held: Appeal dismissed with costs.

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Taxation

The Commissioner of Taxation for the Commonwealth of Australia v Travelex Limited
S116/2020: [2021] HCA 8

Judgment delivered: 10 March 2021

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

Catchwords:

Taxation – Administration – Goods and services tax – Taxable supply – Running Balance Accounts ("RBA") – Commissioner's obligation to pay interest – Where Commissioner lacked statutory authority to amend taxpayer's GST return – Where net amount in GST return calculated in error – Where Commissioner purported to amend taxpayer's GST return and credited taxpayer's RBA – Whether mistaken balance in an RBA is efficacious in law to constitute an RBA surplus within meaning of Pt IIB of *Taxation Administration Act 1953* (Cth) – Whether Commissioner obliged to pay interest under *Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth).

Words and phrases – "administration", "allocation", "amounts due to the Commonwealth under taxation laws", "erroneous balances", "goods and services tax", "interest", "RBA", "RBA deficit debt", "RBA surplus", "refund", "running balance account", "taxation administration".

A New Tax System (Goods and Services Tax) Act 1999 (Cth) – ss 17-5, 17-15, 33-5, 35-5, Pt 2-1 of Ch 2.

Taxation Administration Act 1953 (Cth) – ss 8AAZA, 8AAZC(1), 8AAZD(1), 8AAZH, 8AAZI, 8AAZL(1), 8AAZLF; Sch 1, ss 105-5, 105-20, 105-100.

Taxation (Interest on Overpayments and Early Payments) Act 1983 (Cth) – s 12AA.

Appealed from FCA (FC): [2020] FCAFC 10; (2020) 275 FCR 239; (2020) 111 ATR 248

Held: Appeal allowed; appellant pay respondent's costs.

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3: Cases Reserved

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

Constitutional Law

LibertyWorks Inc v Commonwealth of Australia
S10/2020: [2021] HCATrans 35

Date heard: 2 March 2021

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

Catchwords:

> Constitutional law – Implied freedom of political communication – Validity of legislation – *Foreign Influence Transparency Scheme Act 2018* (Cth) ("*FITS Act*") – Where plaintiff not-for-profit think-tank incorporated in Queensland – Where in August 2019, plaintiff organised and held Conservative Political Action Conference in Sydney – Where US corporation, American Conservative Union ("ACU"), runs conference with same name in US, where ACU board members spoke at Sydney conference, and where ACU advertised as "Think Tank Host Partners" for Sydney conference – Where plaintiff not registered under *FITS Act* – Where in October 2019, notice under s 45 of *FITS Act* issued to President of plaintiff, requiring plaintiff to provide certain information within specified period – Where s 59 of *FITS Act* provides for offence of failing to comply with s 45 notice within time – Where in November 2019, President of plaintiff replied to notice, refusing to provide requested information and disputing validity of notice – Whether terms, operation, or effect of *FITS Act* impermissibly burden implied freedom of political communication.

Special case referred for consideration by Full Court on 20 August 2020.

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Contracts

Matthew Ward Price as Executor of the Estate of Alan Leslie Price (Deceased) & Ors v Christine Claire Spoor as Trustee & Ors
B55/2020: [2021] HCATrans 36

Date heard: 4 March 2021

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

Catchwords:

Contracts – Statutory limitation periods – Exclusion by agreement – Where in 1998, two mortgages executed by deceased Mr A Price and second appellant, and deceased Mr J Price and third applicant in favour of Law Partners Mortgages Pty Ltd ("LPM"), securing $320,000 loan advanced by LPM to mortgagors – Where respondents trustees of pension fund successor in title as mortgagee to LPM – Where by 30 April 2001, only $50,000 of principal repaid and where no repayments made after that date – Where respondents commenced proceedings in 2017, claiming $4,014,969.22 and possession of mortgaged land – Where proceedings commenced outside of statutory bars in *Limitation of Actions Act 1974* (Qld) – Where cl 24 of mortgages provided that "[t]he Mortgagor covenants with the Mortgage[e] that the provisions of all statutes now or hereafter in force whereby or in consequence whereof any o[r] all of the powers rights and remedies of the Mortgagee and the obligations of the Mortgagor hereunder may be curtailed, suspended, postponed, defeated or extinguished shall not apply hereto and are expressly excluded insofar as this can lawfully done" – Whether agreement not to plead or to rely on provisions of *Limitation of Actions Act* made at time of entry into loan contract and before accrual of cause of action unenforceable on public policy grounds – Whether, on proper construction of cl 24, applicants entitled to plead defence under *Limitation of Actions Act* – Whether operation of s 24 of *Limitation of Actions Act* can be excluded by agreement – Whether, on proper construction, terms of cl 24 ambiguous – If cl 24 enforceable, whether breach of cl 24 could sound in any remedy other than claim for damages for breach of warranty.

Appealed from QSC (CA): [2019] QCA 297; (2019) 3 QR 176

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Criminal Law

Namoa v The Queen
S188/2020: [2021] HCATrans 40

Date heard: 11 March 2021

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

Catchwords:

Criminal law – Conspiracy between married persons – Relationship between common law and Schedule to *Criminal Code Act 1995* (Cth) ("*Criminal Code*") – Where appellant tried jointly with another on one count of conspiring to do acts in preparation for terrorist act or acts, contrary to ss 11.5 and 101.6 of *Criminal Code* – Where prior to trial, trial judge rejected application for permanent stay on basis that appellant and co-accused were married – Where appellant and co-accused convicted – Where NSW Court of Criminal Appeal dismissed appeal against conviction – Whether immediately prior to enactment of *Criminal Code*, it was part of common law of Australia that married persons could not commit criminal conspiracy – If so, whether that principle remains part of common law – Whether *Criminal Code* expressly or impliedly ousts common law rule as to conspiracy between married persons.

Appealed from NSWSC (CCA): [2020] NSWCCA 62; (2020) 351 FLR 266; (2020) 282 A Crim R 362

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Migration Law

BNB17 v Minister for Immigration and Border Protection & Anor
M109/2020: [2021] HCATrans 11

Date heard: 10 February 2021

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

Catchwords:

Migration law – Fast track review process – *Migration Act 1958* (Cth) Pt 7AA – Where appellant applied for Safe Haven Enterprise Visa on basis he feared serious or significant harm due to imputed support for Liberation Tigers of Tamil Eelam – Where Minister's delegate refused application – Where appellant contended interview conducted by delegate affected by material translation errors – Where, on review, Immigration Assessment Authority ("IAA") affirmed delegate's decision – Where Federal Circuit Court dismissed application for judicial review – Where appeal to Federal Court dismissed – Whether alleged translation errors in initial interview had consequence IAA could not perform function of considering "review material" – Whether, when on notice of alleged translation errors, legally unreasonable for IAA to fail to mould its procedures to cure effect of alleged errors by using power in s 473DC to get new information or taking any other step – Whether, when on notice of alleged translation errors, legally unreasonable

for IAA to make adverse credibility findings relying on aspects of appellant's evidence allegedly affected by errors.

Appealed from FCA: [2020] FCA 304

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DQU16 & Ors v Minister for Home Affairs & Anor

S169/2020: [2021] HCATrans 6

Date heard: 4 February 2021

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

Catchwords:

Migration law – Complementary protection – Where first appellant worked as alcohol distributor in Iraq and claimed would be targeted for doing so if returned to Iraq – Where applications for temporary protection visas refused by Minister's delegate – Where Immigration Assessment Authority ("IAA") affirmed delegate's decision finding first appellant could take reasonable step of not selling alcohol to avoid real chance of persecution in Iraq – Whether principles in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 applicable in considering complementary protection criteria in s 36(2)(aa) of *Migration Act 1958* (Cth) – Whether, in determining complementary protection claims, IAA may rely on finding made in relation to claim for refugee status as to future changes in applicant's behaviour without addressing reason for intended changed conduct.

Appealed from FCA: [2020] FCA 518

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DVO16 v Minister for Immigration and Border Protection & Anor

S66/2020: [2021] HCATrans 11

Date heard: 10 February 2021

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

Catchwords:

Migration law – Fast track review process – *Migration Act 1958* (Cth) Pt 7AA – Where appellant applied for temporary protection visa – Where Minister's delegate conducted interview with appellant – Where translation errors and omissions occurred in interview – Where Minister's delegate refused application – Where, relying on

material obtained in interview, Immigration Assessment Authority ("IAA") reviewed delegate's decision – Where IAA affirmed delegate's decision – Whether, in circumstances where material translation error occurred in delegate's interview and IAA relies on material obtained in interview in reviewing delegate's decision under Pt 7AA, IAA needs to have actual or constructive knowledge of translation error for jurisdictional error to arise.

Appealed from FCA (FC): [2019] FCAFC 157; (2019) 271 FCR 342

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MZAPC v Minister for Immigration and Border Protection & Anor

M77/2020: [2021] HCATrans 37

Date heard: 5 March 2021

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

Catchwords:

Migration law – Procedural fairness – Materiality – Where appellant applied for protection visa – Where appellant's criminal record and related material provided to Administrative Appeals Tribunal ("AAT") by first respondent without appellant's knowledge – Where certificate under s 438 of *Migration Act 1958* (Cth) issued in relation to criminal record and related material and appellant not notified of certificate – Where criminal record disclosed history of serious traffic offences – Where AAT affirmed delegate's decision to refuse visa application – Where appeal to Federal Circuit Court dismissed – Where appeal to Federal Court dismissed – Where common ground that failure to notify appellant of certificate constituted denial of procedural fairness – Whether, when considering materiality of denial of procedural fairness occasioned by failure to notify appellant of s 438 certificate, appellant bore onus of rebutting presumption that AAT did not rely on documents subject to certificate and had to prove that documents had been taken into account by AAT – Whether Federal Court erred in finding that denial of procedural fairness immaterial on basis that offences disclosed in criminal record not rationally capable of impacting appellant's credibility before AAT.

Appealed from FCA: [2019] FCA 2024

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Practice and Procedure

Victoria International Container Terminal Limited v Lunt & Ors
M96/2020: [2021] HCATrans 7

Date heard: 9 February 2021

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

Catchwords:

> Practice and procedure – Dismissal of proceedings – Abuse of process – Where Fair Work Commission approved enterprise agreement – Where first respondent sought order in nature of certiorari to quash Commission's approval – Where appellant applied for dismissal of proceeding on basis it was abuse of process – Where appellant contended that Construction, Forestry, Maritime, Mining and Energy Union ("CFMMEU") was true moving party and proceeding had been brought in first respondent's name to sidestep fact that CFMMEU's predecessor union acquiesced in enterprise agreement – Where primary judge acceded to appellant's application and dismissed proceeding, finding CFMMEU was true moving party and first respondent was "front man" – Where appeal to Full Court of Federal Court allowed, and appellant's application to have proceeding dismissed as abuse of process dismissed – Whether it would bring administration of justice into disrepute to allow CFMMEU, using "front man", to challenge Commission's approval of enterprise agreement while avoiding scrutiny of predecessor union's acquiescence in agreement.

Appealed from FCA (FC): [2020] FCAFC 40

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Torts

Talacko v Talacko & Ors
M111/2020: [2021] HCATrans 39

Dates determined: 10 March 2021

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

Catchwords:

> Torts – Unlawful means conspiracy – Loss of chance – Where, in context of long dispute over properties in Prague, Slovakia, and

Dresden, some of the respondents commenced proceedings in Supreme Court of Victoria alleging applicant and members of her immediate family engaged in unlawful means conspiracy by executing donation agreements which purported to put certain interests in properties beyond reach of respondents – Where Supreme Court held that three of four elements of unlawful means conspiracy made out, but that pecuniary loss not established – Where Court of Appeal allowed appeal against that decision – Whether reduction in chance to recover judgment debt where that debt may yet be recovered can constitute pecuniary loss sufficient to complete cause of action – Whether expenses incurred by one party in foreign proceedings can constitute pecuniary loss sufficient to complete cause of action in circumstances where foreign proceedings ongoing and where foreign court may order that party to bear own expenses.

Appealed from VSC: [2018] VSC 807
Appealed from VSC (CA): [2017] VSCA 163; [2020] VSCA 99

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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

Zhang v Commissioner of Police & Ors
S129/2020

Catchwords:

Constitutional law – Validity of legislation – Validity of warrants – Where plaintiff under investigation for alleged foreign interference offences, contrary to *Criminal Code* (Cth) sub-ss 92.3(1), (2) – Where plaintiff formerly employed part-time in office of member of New South Wales Parliament – Where magistrate, purporting to exercise power in s 3E of *Crimes Act 1914* (Cth), issued search warrant authorising AFP officers to enter and search plaintiff's residential premises – Where magistrate also purported to make order under s 3LA, requiring plaintiff to provide information or assistance to officers enabling them to access, copy, or convert data held on computers or devices found in execution of warrant – Where searches took place, and pursuant to s 3K, certain items removed for examination – Where magistrate purported to exercise s 3E power and issued warrant authorising search of warehouse premises from which plaintiff and his wife conducted business – Where searches took place, material seized pursuant to s 3F, and electronic devices removed for examination pursuant to s 3K – Where registrar purported to exercise s 3E power and issued warrant authorising AFP officers to enter and search premises within NSW Parliament House – Where searches took place, and data copied to USB thumb drives pursuant to s 3F – Where magistrate made s 3LA order requiring plaintiff to provide information and assistance to police that would allow them to access data held in or accessible from phones moved to another place for examination after search of residential premises – Whether either or both of sub-ss 92.3(1), (2) invalid for impermissibly burdening implied freedom of political communication – Whether some or all of warrants are wholly or partly invalid on basis that they misstate substance of s 92.3(2) of *Criminal Code*, that they fail to state offences to which they relate with sufficient precision, or that either or both of sub-ss 92.3(1), (2) are invalid – If some or all of warrants are wholly or partly invalid, whether one or both of s 3LA orders are invalid.

Special case referred for consideration by Full Court on 12 November 2020.

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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.

Commonwealth of Australia v AJL20

C16/2020; C17/2020: [2020] HCATrans 224

Removed into the High Court under s 40 of the Judiciary Act 1903 *(Cth) on 17 December 2020.*

Catchwords:

Constitutional law – Chapter III – Immigration detention – Where second respondent citizen of Syria and granted visa in 2005 – Where Minister for Immigration and Border Protection cancelled visa on character grounds in 2014 under s 501(2) *Migration Act 1958* (Cth) ("Act") – Where second respondent detained by officer of Commonwealth from 8 October 2014 under s 189(1) of Act – Where Minister accepted Australia has non-refoulement obligations to second respondent – Where Minister refused to grant protection visa and declined to consider granting visa under s 195A of Act on 25 July 2019 – Where detention of unlawful non-citizen lawful if for permissible purpose – Where removal from Australia permissible purpose – Where, from 26 July 2019, officer of Commonwealth obliged to remove second respondent from Australia "as soon as reasonably practicable" under s 198 of Act – Where primary judge held detention unlawful since 26 July 2019 and ordered second respondent be released from detention – Whether second respondent's removal from Australia "reasonably practicable" – Whether second respondent's detention for purpose of removal from Australia – Whether second respondent's detention lawful – Whether ss 189 and 196 require detention of unlawful non-citizen until removal from Australia despite non-compliance with duty of removal consistently with Ch III of *Constitution*.

Torts – False imprisonment – Whether second respondent falsely imprisoned.

Removed from Full Court of the Federal 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.

Administrative Law

Sunland Group Limited & Anor v Gold Coast City Council
B64/2020: [2020] HCATrans 160

Date heard: 13 October 2020 – *Special leave granted*.

Catchwords:

> Administrative law – Planning and environment – Development approvals – Where in 2015 second applicant bought parcel of undeveloped land which carried with it benefit of preliminary development approval granted in 2007 – Where preliminary approval approved multi-stage residential development subject to 56 conditions – Where some conditions provided for payment of infrastructure contributions to respondent – Where preliminary approval made under *Integrated Planning Act 1997* (Qld) – Where *Integrated Planning Act* replaced by other legislation – Whether conditions concerning infrastructure contributions, properly construed, should be read as binding on applicant or landowner, or merely as statements as to scope of future possible conditions – Whether, in construction of conditions, *contra proferentem* rule applies so that ambiguities are to be resolved against approving authority.

Appealed from QSC (CA): [2020] QCA 89

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Competition Law

Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd & Ors
S171/2020: [2021] HCATrans 42

Date heard: 12 March 2021 – *Special leave granted*.

Catchwords:

> Competition law – Arbitration determination – Third party access – Calculation of user contributions – Where applicant operator of Port

of Newcastle – Where provision of access and use of Port shipping channels declared service pursuant to Pt IIIA of *Competition and Consumer Act 2010* (Cth) – Where applicant levies certain charges payable by vessel owner or charterer in respect of use of Port infrastructure – Where first respondent coal mining company exported coal through Port via both own chartered vessels and vessels owned by other persons – Where first respondent sought arbitration by Australian Competition and Consumer Commission ("ACCC") of dispute about quantum of charge – Where ACCC and Australian Competition Tribunal on review determined first respondent could not arbitrate terms on which other persons' vessels carrying first respondent's coal were charged – Where parties agreed ACCC use "depreciated optimised replacement cost methodology" to calculate asset base component of appropriate charge – Where ACCC and Tribunal on review decided s 44X(1)(e) required it to deduct historical service user contributions to Port infrastructure from asset base in calculation of charge – Where applicant unsuccessfully appealed to Full Court of Federal Court – Whether persons with economic interest in arbitration determination or who causes access to occur are third party for purposes of Pt IIIA – Proper approach to calculation of historical user contributions in charge.

Appealed from FCA (FC): [2021] FCAFC 145; (2020) 382 ALR 331

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Constitutional Law

Chetcuti v Commonwealth of Australia
M122/2020

Notice of appeal from judgment of a single Justice exercising original jurisdiction filed on 10 December 2020.

Catchwords:

Constitutional law – Legislative power – Naturalisation and aliens – Where appellant entered Australia in 1948 – Where appellant was born in Malta and entered Australia as British subject – Where appellant became citizen of United Kingdom and Colonies in 1949 and citizen of Malta on 1961 – Whether within power of Commonwealth Parliament to treat appellant as alien within s 51(xix) of *Constitution* – Whether within power of Parliament to specify criteria for alienage – Whether appellant entered Australia as alien.

Appealed from HCA (Single Justice): [2020] HCA 42

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Contracts

Hobart International Airport Pty Ltd v Clarence City Council & Anor; Australia Pacific Airports (Launceston) Pty Ltd v Northern Midlands Council & Anor
H2/2021; H3/2021: [2021] HCATrans 26

Date heard: 12 February 2021 – *Special leave granted*.

Catchwords:

Contracts – Privity of contract – Declaratory relief – Where second respondent Commonwealth registered proprietor of land leased to applicants – Where first respondent Councils not party to lease – Where cl 26.2(a) of lease provides amount equivalent to council rates to be paid to first respondents in respect of leased land – Where lease contemplates that first respondents will participate in mechanism in determining amount payable – Where dispute arose between applicants and first respondents as to amounts payable – Where first respondents sought declaratory and consequential relief with respect to proper construction of cl 26.2(a) – Where primary judge held first respondents did not have standing to seek declaratory relief on basis of privity of contract – Where first respondents successfully appealed to Full Federal Court, which held doctrine of privity only prevents third parties from obtaining executory judgment to enforce terms of contract, not declaratory judgment – Whether doctrine of privity prevents third parties from seeking declaratory relief – Whether third parties have standing to seek declaratory relief in respect of contract.

Constitutional law – Judicial power of Commonwealth – Requirement for a "matter" – Jurisdiction of Federal Court – Where there is no dispute between contracting parties as to interpretation of contract – Whether first respondents have rights, duties or liabilities to be established by determination of a court – Whether there is a justiciable controversy or enforceable right, duty or liability to found a "matter".

Appealed from FCA (FC): [2020] FCAFC 134; (2020) 382 ALR 273

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Corporations

Walton & Anor v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liquidation) & Ors
S20/2021: [2021] HCATrans 18

Date heard: 11 February 2021 – *Special leave granted*.

Catchwords:

Corporations – Examinations relating to insolvency – Abuse of process – Where s 596A of *Corporations Act 2001* (Cth) requires court to issue examinations summons to a person about a company if "eligible applicant" applies for summons – Where "eligible applicants" include persons authorised by Australian Securities and Investments Commission ("ASIC") – Where ASIC can only authorise person if person's purpose is for benefit of corporation, its contributories or its creditors – Where applicants shareholders of respondent – Where, in 2014, respondent successfully completed capital raising for purpose of paying down debt – Where respondent entered into voluntary administration in 2016 and liquidation in 2019 – Where ASIC authorised applicants as "eligible applicants" to conduct examinations of respondent's directors and officers – Where NSW Court of Appeal found applicants' predominant purpose investigation and pursuit of shareholders' private claim against directors in relation to 2014 capital raising – Where Court of Appeal held fulfilment of that purpose would not confer benefit on corporation, creditors or contributories, and therefore offensive to purpose for which s 596A enacted and abuse of process – Whether implicit purpose of obtaining information about potential misconduct is beneficial to corporation – Whether applicants' purposes offensive or foreign to s 596A.

Appealed from NSW (CA): [2020] NSWCA 157; (2020) 383 ALR 298

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Criminal Law

Bell v State of Tasmania
H2/2020: [2021] HCATrans 5

Date heard: 3 February 2021.

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

Catchwords:

Criminal law – Defences – Honest and reasonable mistake – Where applicant charged with one count of rape and one count of supply of controlled drug to child – Where trial judge left defence of honest

and reasonable mistake as to age in relation to rape charge – Where counsel for applicant requested similar direction in respect of supply charge – Where trial judge refused to make such direction on basis that defence of honest and reasonable mistake as to age would not relieve applicant of criminal responsibility with respect to supply charge – Where jury convicted applicant of supply charge but could not reach verdict on rape or alternative charge of sexual intercourse with person under age of 17 – Where at retrial of sexual offence jury found applicant not guilty of rape but convicted on alternative charge – Where Court of Criminal Appeal upheld trial judge's decision that defence of honest and reasonable mistake as to age not available in relation to supply charge – Whether defence of honest and reasonable mistake of fact only available where its successful use would lead to defendant not being guilty of any crime.

Appealed from TASSC (CCA): [2019] TASCCA 19; (2019) 279 A Crim R 553

Hearing adjourned to a date to be fixed to notify State and Territory Attorneys-General of the appeal and allow the opportunity to intervene.

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Edwards v The Queen

S235/2020: [2020] HCATrans 216

Date heard: 8 December 2020 – *Special leave granted on limited grounds.*

Catchwords:

Criminal law – Prosecution's duty of disclosure – Where applicant charged with sexual offences against child – Where applicant's mobile phone seized and contents downloaded – Where prosecution disclosed existence of download and offered to provide applicant with copy of downloaded data – Where data not provided to applicant – Where prosecution did not disclose relevance of download data – Where prosecution case on two counts relied on evidence of complainant – Where defence case on same counts relied on documentary evidence contradicting complainant's evidence – Where NSW Court of Criminal Appeal ("CCA") dismissed appeal against conviction –Whether prosecutor breached duty of disclosure by not providing download data to applicant, contrary to s 142 of *Criminal Procedure Act 1987* (NSW) – Whether CCA erred in concluding verdicts on two counts not unreasonable as there remained reasonable doubt as to existence of opportunity for offending to have occurred.

Appealed from NSWSC (CCA): [2020] NSWCCA 57

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Hofer v The Queen
S163/2020: [2021] HCATrans 44

Date heard: 12 March 2021 – *Special leave granted*.

Catchwords:

Criminal law – Criminal procedure – Conduct of cross-examination – Where applicant charged with 11 counts of having sexual intercourse without consent – Where two complainants testified as prosecution witnesses – Where applicant gave evidence – Where, during cross-examination, prosecutor asked applicant about aspects of his evidence arising from defence counsel's failure to comply with *Browne v Dunn* rule in respect of those matters in cross-examination of complainants – Where prosecutor suggested applicant lying in evidence about those matters because defence counsel had not put those matters to complainants – Where defence counsel did not object to prosecutor's questions – Where applicant convicted and unsuccessfully appealed to NSW Court of Criminal Appeal – Whether prosecutor able to cross-examine accused with regard to defence counsel's non-compliance with rule in *Browne v Dunn* – Whether prosecutor engaged in impermissible questioning – Whether defence counsel at trial incompetent – Whether trial miscarried.

Appealed from NSWSC (CCA): [2019] NSWCCA 244

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Director of Public Prosecutions Reference No 1 of 2019
M131/2020: [2020] HCATrans 221

Date heard: 11 December 2020 – *Special leave granted*.

Catchwords:

Criminal law – Mental element – Recklessness – Where Victorian Court of Appeal in *R v Campbell* [1997] 2 VR 585 held that "recklessness" requires foresight of probability of consequence – Where High Court in *Aubrey v The Queen* (2017) 260 CLR 305 held that "recklessness" for offences other than murder requires foresight of possibility of consequence – Where reference arose from trial in which accused acquitted of recklessly causing serious injury, contrary to s 17 of *Crimes Act 1958* (Vic) – Where Court of Appeal concluded nothing in *Aubrey* compelled reconsideration of *Campbell* – Where Court of Appeal held correct interpretation of

"recklessness" requires foresight of "probability" of serious injury – Whether, in Victoria, correct interpretation of "recklessness" for offences not resulting in death is foresight of the "possibility" of serious injury – Whether principle in *Campbell* should be followed.

Appealed from VSC (CA): [2020] VSCA 181

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Defamation

Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller

S236/2020; S237/2020; S238/2020: [2020] HCATrans 214

Date heard: 8 December 2020 – *Special leave granted*.

Catchwords:

Defamation – Publication – Where applicants created and operated public Facebook pages on which Facebook users can view and comment on items posted – Where Facebook users posted comments on applicants' Facebook posts – Where respondent commenced defamation proceedings against applicants – Where primary judge determined separate question – Where NSW Court of Appeal dismissed appeal from determination – Whether intention to communicate defamatory material is necessary for person to be "publisher" – Whether operators of Facebook pages "publish" third-party comments posted on page prior to being aware of comments.

Appealed from NSWSC (CA): [2020] NSWCA 102; (2020) 380 ALR 700

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Equity

Stubbings v Jams 2 Pty Ltd & Ors

M13/2021: [2021] HCATrans 23

Date heard: 12 February 2021 – *Special leave granted*

Catchwords:

Equity – Unconscionable conduct – Wilful blindness – Where applicant borrowed from respondent lenders secured only on applicant's assets – Where applicant without regular income and defaulted – Where respondents' system of asset-based lending

included deliberate intention to avoid receipt of information about personal and financial circumstances of borrower or guarantor – Where certificate of independent financial advice given in respect of transaction – Where respondents brought proceedings for possession of applicant's assets – Where primary judge found respondents wilfully blind and had actual knowledge as to applicant's personal and financial circumstances – Where respondents successfully appealed to Court of Appeal, which overturned primary judge's findings as to knowledge – Whether lender's conduct unconscionable by engaging in system of asset-based lending without receipt of information about personal or financial situation of borrower, or alternatively, wilfully or recklessly failing to make such enquiries an honest and reasonable person would make – Whether Court of Appeal entitled to overturn findings of primary judge as to respondents' knowledge.

Appealed from VSC (CA): [2020] VSCA 200

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Evidence

Deputy Commissioner of Taxation v Shi
S211/2020: [2020] HCATrans 188

Date heard: 11 November 2020 – *Special leave granted*.

Catchwords:

Evidence – Exceptions to privilege against self-incrimination – *Evidence Act 1995* (Cth) s 128A – Where applicant commenced proceedings against respondent and two others seeking satisfaction of tax liabilities – Where applicant sought freezing orders with respect to respondent's assets – Where Federal Court made *ex parte* freezing orders in relation to respondent's worldwide assets – Where respondent also ordered to file and serve affidavit disclosing his worldwide assets – Where respondent filed two affidavits, one which was served on applicant, and one which was delivered to Federal Court in sealed envelope – Where respondent claimed privilege against self-incrimination in respect of second affidavit, invoking s 128A – Where prior to hearing of privilege claim, judgment entered for applicant in sum of $42,297,437.65 – Where primary judge accepted there were reasonable grounds for respondent's claim for privilege against self-incrimination, but considered not in interests of justice that certificate be granted pursuant to s 128A(7), with consequence that applicant did not get access to second affidavit – Where majority of Full Court of Federal Court held that primary judge had erred in certain respects, but dismissed appeal – Whether availability of mechanism to

compulsorily examine respondent as judgment debtor relevant to determining whether it was in interests of justice to grant s 128A certificate – Whether risk of derivative use of privileged information in event that s 128A certificate was granted should have been taken into account when determining whether it was in interests of justice to grant certificate.

Appealed from FCA (FC): [2020] FCAFC 100; (2020) 380 ALR 226

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Hamilton (a pseudonym) v The Queen
S24/2021: [2021] HCATrans 19

Date heard: 11 February 2021 – *Special leave granted on limited grounds.*

Catchwords:

Evidence – Tendency evidence – Jury directions – Where applicant charged with ten counts of aggravated indecent assault against three separate complainants – Where trial judge ruled evidence from complainants admissible but not cross-admissible for tendency purposes – Where anti-tendency direction not given – Where Court of Criminal Appeal held anti-tendency direction not necessary as applicant had not established risk of jury engaging in tendency reasoning – Where Court of Criminal Appeal found defence counsel made deliberate decision not to request anti-tendency direction to obtain forensic advantage – Whether anti-tendency direction generally be given in multi-complainant trial – Whether miscarriage of justice occasioned by failure to direct jury it was prohibited from using evidence led in support of each count as tendency evidence in support of other counts.

Appealed from NSWSC (CCA): [2020] NSWCCA 80

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Family Law

Charisteas v Charisteas & Ors
P6/2021: [2021] HCATrans 28

Date determined: 12 February 2021 – *Special leave granted.*

Catchwords:

Family law – Appeals – Apprehension of bias – Where parties involved in protracted proceedings since 2008, including two trials in Family Court of Western Australia where orders were set aside by Full Court of Family Court of Australia – Where primary judge in third trial engaged in undisclosed communication and personal contact with then-counsel for respondent prior to commencement of trial and after judgment reserved but before judgment delivered – Where fact but not full details of communication subsequently disclosed after applicant became aware of relationship between primary judge and respondent counsel – Where applicant unsuccessfully applied to have judge recused and unsuccessfully appealed to Full Court – Where Full Court held hypothetical observer would not have reasonable apprehension of bias because would accept judge may have mistaken views about proprietary of private communications after judgment reserved but before judgment delivered and would tolerate some amount of private communication – Whether hypothetical observer would have reasonable apprehension of bias from failure to disclose communications between primary judge and respondent counsel.

Family law – Practice and procedure – Powers under s 79 of *Family Court Act 1975* (Cth) ("Act") – Where, in 2011 trial judgment, primary judge made final orders under s 79 – Where some orders set aside without remitter by 2013 appeal to Full Court – Where primary judge in third trial made 2015 interlocutory interpretation decision that power to make orders under s 79 not exhausted – Where primary judge made orders in 2017 varying 2011 orders – Where Full Court held primary judge had power to vary or set aside 2011 orders – Whether, when orders made in exercise of statutory power and some set aside on appeal without remittal or rehearing, power under s 79 is exhausted – Whether primary judge acting in excess of jurisdiction – Whether applicant waived right to challenge exercise of power because did not appeal 2015 interpretation decision.

Appealed from FamCA (FC): [2020] FamCAFC 162; (2020) 354 FLR 167; (2020) 60 Fam LR 483

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Industrial Law

Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd

P5/2021: [2021] HCATrans 30

Date determined: 12 February 2021 – *Special leave granted.*

Catchwords:

Industrial law – Employee and independent contractor – Proper test for distinguishing – Labour hire agreement – Definition of "employee" –Where second applicant signed Administrative Services Agreement with respondent labour hire agency and offered work cleaning and moving materials for builder – Where contract between second applicant and respondent for work, contract between respondent and builder for labour supply, but no contract between second applicant and respondent – Where builder "controlled" second applicant – Where arrangement of casual nature included right to reject assignment – Where second applicant not integrated into respondent's business and not given uniform – Where work required personal service and second applicant not in business on own account – Where second applicant 22-year old backpacker on working holiday visa – Where express term of contract categorises relationship not employment – Where applicants allege respondent contravened various National Employment Standards and s 45 of *Fair Work Act 2009* (Cth) by not paying second applicant in accordance with relevant award – Where Standards apply only if second applicant "employee" – Where primary judge, applying multi-factorial test, found second applicant not employee – Where Full Court preferred approach second applicant employee but for authority of intermediate appellate court in *Personnel Contracting v Construction, Forestry, Mining and Energy Union* [2004] WASCA 312 decided in similar circumstances, which Full Court held not plainly wrong – Whether second applicant "employee" of respondent – Whether, in triangular labour hire agreement, control test satisfied when second applicant controlled by builder and not respondent – Whether multi-factorial test correctly applied.

Appealed from FCA (FC): [2020] FCAFC 122; (2020) 381 ALR 457

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Ridd v James Cook University

B12/2021: [2020] HCATrans 15

Date heard: 11 February 2021 – *Special leave granted*.

Catchwords:

Industrial law – Enterprise agreement – Where applicant employed as professor by respondent under James Cook University Enterprise Agreement ("EA") – Where EA cl 14 protected right to intellectual freedom and specified limits – Where respondent has Code of Conduct and in cl 13, parties to EA expressed commitment to Code – Where cl 54 provided disciplinary action could only be taken for "misconduct" or "serious misconduct" – Where "serious misconduct" included breach of Code – Where respondent took disciplinary

action against applicant on basis applicant breached Code by failure to act in collegial manner and to uphold integrity and good reputation of respondent – Where applicant successfully brought proceedings in Federal Circuit Court alleging respondent contravened EA because he could not be disciplined for conduct protected under cl 14 – Where respondent successfully appealed to Full Court of the Federal Court – Whether applicant's conduct protected by cl 14 – Whether, on proper construction of EA, cl 14, 13 and Code should be read together – If so, whether cl 13 qualifies cl 14 or vice versa.

Appealed from FCA (FC): [2020] FCAFC 123; (2020) 382 ALR 8; (2020) 298 IR 50
Appealed from FCA (FC): [2020] FCAFC 132

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WorkPac Pty Ltd v Rossato & Ors
B73/2020: [2020] HCATrans 200

Date determined: 26 November 2020 – *Special leave granted.*

Catchwords:

Industrial law – Characterisation as "casual employee" – Restitution – Where *Fair Work Act 2009* (Cth) contains National Employment Standards (NES) – Where NES provide that permanent employees entitled to certain leave entitlements – Where first respondent employed under contract describing him as "casual employee" – Where first respondent employed for indefinite period with regular and predictable shifts – Where first respondent's hours set far in advance and where he was not given option to elect not to work particular shifts – Where first respondent paid casual loading in lieu of leave entitlements – Where applicant sought declarations that respondent not entitled to leave – Where Full Court of Federal Court dismissed application – Whether respondent "casual employee" for the purposes of *Fair Work Act* or enterprise agreement – If not, whether applicant is entitled to apply casual loading paid to first respondent in satisfaction of his leave entitlements by way of set-off, restitution or by reg 2.03A of *Fair Work Regulations 2009* (Cth).

Appealed from FCA (FC): [2020] FCAFC 84; (2020) 296 IR 38; (2020) 378 ALR 585

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ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors
S27/2021: [2021] HCATrans 27

Date determined: 12 February 2021 – *Special leave granted on limited grounds.*

Catchwords:

Industrial law – Employee and contractor – Proper test for distinguishing – Multi-factorial test – Where respondents commenced employment with applicants as truck drivers in 1980 – Where, in 1985, applicants and respondents agreed respondents would become contractors – Where respondents formed partnerships with respective wives, purchased truck from applicants and executed written contract with applicants to provide delivery services – Where respondents worked exclusively for and derived sole income from applicants for nearly forty years, and contract expressly permitted respondents to service other clients – Where respondents required to be available to work during set hours – Where impractical for respondents to work for or generate goodwill with other clients – Where respondents required to purchase truck to retain work, display company logo on truck and wear branded clothing – Where respondents responsible for upkeep, maintenance and insurance of trucks – Where respondents paid by invoice and charged GST to applicants – Where respondents conducted partnerships as one would expect of business - Where contract terminated in 2017 – Where respondents unsuccessfully claimed in Federal Court for unpaid employee entitlements under various statutory regimes and Federal Court held respondents "contractors" – Where respondents successfully appealed to Full Court, which held respondents "employees" – Whether respondents "employees" for purposes of *Fair Work Act 2009* (Cth), *Superannuation Guarantee (Administration) Act 1992* (Cth) and "workers" for purpose of *Long Service Leave Act 1955* (NSW).

Appealed from FCA (FC): [2020] FCAFC 119; (2020) 297 IR 210

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Migration Law

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

B66/2020: [2020] HCATrans 166

Date heard: 16 October 2020 – *Special leave granted*.

Catchwords:

Migration law – Removal and deportation – Where s 5(1) of *Migration Act 1958* (Cth) relevantly provided that person who had "been removed or deported from Australia or removed or deported

from another country" was "behaviour concern non-citizen" – Where respondent held special category visa – Where that visa purportedly cancelled, and respondent detained and removed from Australia to New Zealand – Where, by consent, Federal Circuit Court quashed cancellation decision – Where respondent returned to Australia and was interviewed by Minister's delegate at airport on arrival – Where delegate asked whether she had ever been removed, deported, or excluded from any country, including Australia – Where respondent answered yes, and explained circumstances of earlier removal – Where delegate refused to grant respondent special category visa, not being satisfied that the respondent had not been "removed … from Australia" within meaning of definition of "behaviour concern non-citizen" – Where Federal Circuit Court dismissed respondent's application for judicial review of delegate's decision – Where Federal Court allowed appeal from Circuit Court's decision – Whether "removed or deported from" means taken out of some country by or on behalf of government of that country in fact, or whether it means being taken out of some country validly or lawfully, or whether it bears different meanings in same section, namely, valid or lawful removal or deportation in case of ejection from Australia, and removal or deportation in fact in case of other countries.

Appealed from FCA: [2020] FCA 382; (2020) 275 FCR 276

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

S167/2020: [2021] HCATrans 46

Date determined: 12 March 2021 – *Special leave granted on conditions.*

Catchwords:

Migration law – Judicial review – No evidence – Where respondent's visa mandatorily cancelled under s 501(3A) of *Migration Act 1958* (Cth) – Where respondent made representations pursuant to s 501CA as to why cancellation should be revoked – Where, if visa cancellation not revoked, respondent and family would be removed to Samoa or American Samoa – Where Minister decided not to revoke cancellation decision – Where respondent unsuccessfully appealed to Federal Court and successfully appealed to Full Court – Whether Minister made factual findings regarding language and availability of welfare and social services in Samoa and American Samoa without evidence – Whether Minister made factual findings based on personal or specialised knowledge about Samoa or American Samoa – If not, whether errors material and jurisdictional.

Appealed from FCA (FC): [2020] FCAFC 144

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Patents

H. Lundbeck A-S & Anor v Sandoz Pty Ltd; CNS Pharma Pty Ltd v Sandoz Pty Ltd

S22/2021; S23/2021: [2021] HCATrans 13

Date heard: 11 February 2021 – *Special leave granted*.

Catchwords:

Patents – Patent extension – Contract construction – Where s 79 of *Patents Act 1990* (Cth) provides if patentee applies for extension of term of patent and patent expires before application determined and extension is granted, patentee has same rights to commence infringement proceedings during extension period as if extension had been granted when alleged infringement was done – Where appellants patentee and exclusive licensees of pharmaceutical compound – Where patent expired in 13 June 2009 – Where, on 25 June 2014, patent extension granted to 9 December 2012 – Where, from 15 June 2009 onwards, respondent supplied generic version of compound – Where, in 2007, patentee and respondent entered into Settlement Agreement, giving respondent licence to exploit patent prior to expiry – Where Agreement specified possible commencement dates of licence conditioned on whether extension granted, but did not specify end date – Where appellants commenced infringement proceedings in Federal Court on 26 June 2014 in respect of acts done during extension period – Where Federal Court held Agreement gave licence only for two weeks prior to original expiry date (31 May 2009) until original expiry (13 June 2009) but not extension period – Where respondent successfully appealed to Full Court, which held Agreement gave licence from 31 May 2009 to extended expiry date (9 December 2012) – Whether licence applied in relation to acts occurring after patent original expiry date and before term extended – Whether, on respondent's construction, Agreement produced commercially nonsensical result – Whether exclusive licensee may commence infringement proceeding for acts done between original date of expiry and date on which term subsequently extended.

Appealed from FCA (FC): [2020] FCAFC 133

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Practice and Procedure

Deputy Commissioner of Taxation v Huang
S26/2021: [2021] HCATrans 21

Date determined: 11 February 2021 – *Special leave granted*.

Catchwords:

Practice and procedure – Freezing order – Where applicant filed originating application in Federal Court seeking judgment against respondent – Where applicant obtained *ex parte* worldwide freezing order against respondent's Australian and foreign assets pursuant to r 7.32 of *Federal Court Rules 2011* (Cth) – Where respondent holds significant assets in China and Hong Kong – Where prospective judgment obtained against respondent not likely to be enforceable in China or Hong Kong – Where judgment subsequently entered against respondent – Where respondent successfully appealed to Full Court against freezing order on ground freezing order requires realistic possibility any judgment obtained by applicant can be enforced against respondent's assets in relevant foreign jurisdiction – Whether r 7.32 imposes mandatory jurisdictional precondition on applicant to prove realistic possibility of enforcement in relevant foreign jurisdiction – Whether, absent realistic possibility, disposition of respondent's foreign assets would frustrate or inhibit Federal Court processes and create danger of judgment being wholly or partly unsatisfied.

Appealed from FCA (FC): [2020] FCAFC 141

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Taxation

Addy v Commissioner of Taxation
S25/2021: [2021] HCATrans 17

Date heard: 11 February 2021 – *Special leave granted on limited grounds*.

Catchwords:

Taxation – Double taxation treaty – Non-discrimination clause – Where Art 25 of Australia and United Kingdom Double Taxation Treaty provides foreign nationals shall not be subjected to more burdensome tax treatment compared to hypothetical Australian national in same circumstances – Where appellant citizen of United Kingdom and holder of working holiday visa – Where working

holiday visa-holders subject to special working holiday tax rate in Pt III of Sch 7 of *Income Tax Rates Act 1986* (Cth) – Where appellant taxed $3,986 compared to $1,591.44 by Australian national on same income – Where appellant selected as test case by respondent Commissioner – Where Federal Court held appellant entitled to benefit of Art 25 – Where respondent successfully appealed to Full Court – Whether appellant subject to more burdensome taxation by reason of nationality – If so, whether appellant Australian resident for tax purposes.

Appealed from FCA (FC): [2020] FCAFC 135; (2020) 382 ALR 68

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Torts

Arsalan v Rixon; Nguyen v Cassim
S159/2020; S162/2020: [2021] HCATrans 43

Date heard: 12 March 2021 – *Special leave granted*

Catchwords:

Torts – Damages – Damage to chattel – Where applicants' negligence resulted in motor vehicle collision with respondents' "high-value", "prestige" vehicles – Where respondents' vehicles damaged, and respondents hired replacement vehicles of equivalent value while damaged vehicles underwent repairs – Where respondents claimed damages for cost of hiring replacement vehicles of equivalent value in NSW Local Court – Where magistrate awarded damages only for cost of hiring suitable replacement vehicle for uses vehicle will likely to be put, not necessarily of equivalent value – Where respondents' appeal to Supreme Court dismissed – Where respondents' appeal to Court of Appeal allowed – Where Court of Appeal majority held damages be awarded to put claimant in position they would have been in before wrongdoing, i.e., for replacement vehicle of equivalent value – Where each judge in Court of Appeal applied different standard – Whether respondents entitled to claim damages for cost of hiring replacement vehicles of equivalent value to damaged prestige vehicles – Whether equivalent value replacement vehicle reasonable – Correct test of quantification of damages.

Appealed from NSWSC (CA): [2020] NSWCA 115; (2020) 92 MVR 366

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7: Cases Not Proceeding or Vacated

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8: SPECIAL LEAVE REFUSED

Publication of Reasons: 25 February 2021 (Sydney)

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	Suris	Suris & Anor (B69/2020)	Full Court of the Family Court of Australia [2020] FamCAFC 248	Application dismissed [2021] HCASL 29
2.	Scott	Munayallan & Anor (S209/2020)	Full Court of the Family Court of Australia [2019] FamCAFC 246	Application dismissed [2021] HCASL 30
3.	Matthews	Minister for Home Affairs & Anor (M97/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 146	Application dismissed with costs [2021] HCASL 31
4.	Jonval Builders Pty Limited & Ors	Commissioner for Fair Trading (S196/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 233	Application dismissed with costs [2021] HCASL 32

Publication of Reasons: 4 March 2021 (Canberra)

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	Prestige & Rich Pty Ltd	Janey Ellen McGregor of the Office of Fair Trading (B67/2020)	Supreme Court of Queensland (Court of Appeal) [2020] QCA 220	Application dismissed [2021] HCASL 33
2.	Heywood	Commissioner of Police (B70/2020)	Supreme Court of Queensland (Court of Appeal) [2020] QCA 226	Application dismissed [2021] HCASL 34
3.	Lawrence	Ciantar & Anor (S210/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 89 [2020] NSWCA 186	Application dismissed [2021] HCASL 35
4.	Makowski	Legal Profession Admission Board (S243/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 305	Application dismissed [2021] HCASL 36
5.	Milford	Coles Supply Chain Pty Ltd & Anor (B62/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 152	Application dismissed [2021] HCASL 37
6.	Whitehaven Coal Mining Ltd	Davies (S183/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 219	Application dismissed with costs [2021] HCASL 38
7.	Commissioner of Police, New South Wales Police Force	Zisopoulos & Anor (S192/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 236	Application dismissed with costs [2021] HCASL 39
8.	Chapel of Angels Pty Ltd trading as Chapel of Angels	Hennessy Building Pty Ltd trading as Hennessy Building ACN 117 587 998 in its own capacity and as Trustee for the Hennessy Family Trust & Anor (S199/2020)	Supreme Court of Queensland (Court of Appeal) [2020] QCA 219	Application dismissed with costs [2021] HCASL 40
9.	Healius Ltd	Commissioner of Taxation (S201/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 173	Application dismissed with costs [2021] HCASL 41
10.	Healius Ltd	Commissioner of Taxation (S202/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 173	Application dismissed with costs [2021] HCASL 41
11.	Healius Ltd	Commissioner of Taxation (S203/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 173	Application dismissed with costs [2021] HCASL 41

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
12.	Healius Ltd	Commissioner of Taxation (S204/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 173	Application dismissed with costs [2021] HCASL 41
13.	Healius Ltd	Commissioner of Taxation (S205/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 173	Application dismissed with costs [2021] HCASL 41
14.	Feldman	NATIONWIDE NEWS PTY LTD TRADING AS NATIONWIDE NEWS PTY LTD & ORS (S218/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 260	Application dismissed with costs [2021] HCASL 42

Publication of Reasons: 11 March 2021 (Canberra)

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	Dunstan	Higham & Ors (C14/2020)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2020] ACTCA 50	Application dismissed [2021] HCASL 43
2.	EDQ17	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M119/2020)	Federal Court of Australia [2020] FCA 1566	Application dismissed [2021] HCASL 44
3.	Donohue	The Queen (M129/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 302	Application dismissed [2021] HCASL 45
4.	El Ali	The Queen (S54/2020)	Supreme Court of New South Wales (Court of Criminal Appeal) [2019] NSWCCA 289 [2019] NSWCCA 207	Application dismissed [2021] HCASL 46
5.	Mohammed Ali	Minister for Home Affairs & Anor (S239/2020)	Full Court of the Federal Court of Australia [2020] FCA 538	Application dismissed [2021] HCASL 47
6.	Bruder Expeditions Pty Ltd	Leigh (B72/2020)	Supreme Court of Queensland (Court of Appeal) [2020] QCA 246	Application dismissed with costs [2021] HCASL 48
7.	Endresz	Commonwealth of Australia & Ors (C13/2020)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2020] ACTCA 48	Application dismissed with costs [2021] HCASL 49
8.	Flash Lighting Company Ltd	Australia Kunqian International Energy Co Pty Ltd & Ors (M110/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 239 [2020] VSCA 259	Application dismissed with costs [2021] HCASL 50
9.	BTW17	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (P48/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 159	Application dismissed with costs [2021] HCASL 51
10.	Australian Consulting Engineers Pty Ltd	Mistrina Pty Ltd (in Liquidation) & Anor (S184/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 223	Application dismissed with costs [2021] HCASL 52

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
11.	DRJ & Ors	Commissioner of Victims Rights & Anor (S195/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 242	Application dismissed with costs [2021] HCASL 53

12 March 2021: Canberra and by video link

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	Young	The Queen (B51/2020)	Supreme Court of Queensland (Court of Appeal) [2020] QCA 3	Refused [2021] HCATrans 45
2.	ZHA	The State of Western Australia (P35/2020)	Supreme Court of Western Australia (Court of Appeal) [2020] WASCA 101	Refused [2021] HCATrans 47
3.	Hancock Prospecting Pty Ltd & Ors	DFD Rhodes Pty Ltd & Ors (P42/2020)	Supreme Court of Western Australia (Court of Appeal) [2020] WASCA 77	Refused with costs [2021] HCATrans 41
4.	Rinehart & Anor	Rinehart & Ors (P43/2020)	Supreme Court of Western Australia (Court of Appeal) [2020] WASCA 77	Refused with costs [2021] HCATrans 41