HIGH COURT BULLETIN

Produced by the Legal Research Officer,
High Court of Australia Library
[2024] HCAB 1 (16 February 2024)

A record of recent High Court of Australia cases: decided, reserved for judgment, awaiting hearing in the Court's original jurisdiction, granted special leave to appeal, refused special leave to appeal and not proceeding or vacated

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Director of Public Prosecutions v Smith	Criminal Practice

Naaman v Jaken Properties Australia Pty Limited ACN 123 423 432 & Ors	Equity
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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 December 2023 sittings.

Criminal Law

The King v Rohan (a pseudonym)
M33/2023: [2024] HCA 3

Judgment delivered: 14 February 2024

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

Catchwords:

Criminal law – Appeal against conviction – Criminal liability – Statutory complicity – Where s 324(1) of *Crimes Act 1958* (Vic) provided, "if an offence ... is committed, a person who is involved in the commission of the offence is taken to have committed the offence" – Where s 323(1)(c) of *Crimes Act* provided person is "involved in the commission of an offence" if person "enters into an agreement, arrangement or understanding with another person to commit the offence" – Where respondent convicted of offences of supplying drug of dependence to a child and sexual penetration of a child under 12 on basis of ss 323(1)(c) and 324(1) – Where prosecution relevantly alleged respondent and two co-accused entered into agreement, arrangement or understanding to supply cannabis to two complainants (aged 11 and 12), and then sexually penetrate complainant (aged 11) – Where element of supply offence that child in fact be under 18 years of age – Where element of sexual penetration offence that child in fact be under 12 years of age – Where knowledge of age not an element of either offence – Whether prosecution required to prove that accused knew, at time of entering agreement, ages of complainants or that complainants were under specified age – Whether substantial miscarriage of justice resulted from failure to direct jury to be satisfied beyond reasonable doubt that parties to agreement knew ages of complainants – Whether fault element in *Giorgianni v The Queen* (1985) 156 CLR 473 applicable to s 323(1)(c) – Whether prosecution required to prove that accused knew or believed, at time of entering into agreement, essential facts that made conduct an offence, where knowledge or belief not an element of the offence itself.

Words and phrases – "accessorial liability", "agreement", "agreement, arrangement or understanding", "agreement to commit an offence", "complicity", "derivative liability", "essential facts", "group activity", "involved in the commission of an offence", "joint criminal enterprise", "primary liability", "statutory complicity".

Crimes Act 1958 (Vic), s 49A, Subdiv 1 of Div 1 of Pt II.
Drugs, Poisons and Controlled Substances Act 1981 (Vic), s 71B.

Appealed from VSC (CA): [2022] VSCA 215

Held: Appeal allowed.

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Immigration

Ismail v Minister for Immigration, Citizenship and Multicultural Affairs
M20/2023: [2024] HCA 2

Judgment delivered: 7 February 2024

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

Catchwords:

Immigration – Visas – Application for visa – Where delegate of Minister refused to grant visa under s 501 of *Migration Act 1958* (Cth) as plaintiff did not pass character test and considerations favouring non-refusal outweighed by considerations favouring refusal – Where delegate was required to comply with *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ("Direction 90") in determining whether to refuse to grant visa – Where Direction 90 required decision-maker to take into account considerations, including protection of Australian community (para 8.1), any engagement in family violence by non-citizens (para 8.2), best interests of minor children affected by decision (para 8.3), and expectations of Australian community (para 8.4) – Whether delegate failed to comply with para 8.3(1) of Direction 90 or failed to inquire about status of minor child in circumstances where it was legally unreasonable not to do so – Whether para 8.2 of Direction 90 permitted delegate to give weight to family violence considerations in circumstances where delegate had given weight to considerations under other paragraphs – Whether para 8.2 invalid – Whether delegate misapplied para 8.4 of Direction 90.

Words and phrases – "direction", "double counting", "failure to consider", "failure to inquire", "illegitimate purpose", "irrational, illogical, or legally unreasonable", "legally unreasonable", "primary consideration", "relevant considerations", "relevant, legitimate, and non-punitive", "repetitious weighing".

Migration Act 1958 (Cth), ss 499, 501, 501CA.

Application for constitutional or other writ referred to the Full Court on 5 June 2023.

Held: Application dismissed with costs.

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Native Title

Harvey & Ors v Minister for Primary Industry and Resources & Ors
D9/2022: [2024] HCA 1

Judgment delivered: 7 February 2024

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

Catchwords:

Native title – Native title rights – Mining – Mineral leases – Where s 24MD(6B) of *Native Title Act 1993* (Cth) entitles native title holders to certain procedural rights in relation to future acts that, relevantly, involve "the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility ... associated with mining" – Where Mount Isa Mines Limited carries on mining enterprise in Northern Territory – Where Mount Isa Mines Limited applied for mineral lease ("ML 29881") under *Mineral Titles Act 2010* (NT) to construct Dredge Spoil Emplacement Area ("DSEA") on pastoral lease – Where first and second appellants native title holders in respect of land comprising pastoral lease – Where third appellant relevant prescribed body corporate for the purposes of *Native Title Act* – Whether appellants entitled to procedural rights in s 24MD(6B) of *Native Title Act* – Whether proposed grant of ML 29881 constitutes creation of right to mine for sole purpose of construction of infrastructure facility associated with mining pursuant to s 24MD(6B)(b) of *Native Title Act* – Whether definition of "infrastructure facility" in s 253 of *Native Title Act* exhaustive – Whether DSEA infrastructure facility.

Words and phrases – "associated with mining", "definition", "dredging", "exhaustive", "explanatory memorandum", "extrinsic materials", "future act", "includes any of the following", "infrastructure facility", "mine", "mineral lease", "mining", "mining lease", "mining operations", "mining tenement", "native title holders", "ordinary meaning", "right to mine", "right to negotiate", "sole purpose", "statutory interpretation".

Acts Interpretation Act 1901 (Cth), s 15AB.
Mineral Resources (Sustainable Development) Act 1990 (Vic), ss 4(1), 14(1).

Mineral Resources Act 1989 (Qld), ss 234(1)(b), 316(2).
Mineral Resources Development Act 1995 (Tas), ss 3, 84(1)(a), 106(1).
Mineral Titles Act 2010 (NT), ss 11(1), 12(1), 40, 44, 74(2), 86, 148.
Mining Act 1971 (SA), ss 6(1), 48(1).
Mining Act 1978 (WA), ss 85(1)(d), 87(1).
Mining Act 1992 (NSW), s 73(1)(c).
Native Title Act 1993 (Cth), ss 24MD(6A), 24MD(6B), 26(1)(c)(i), 26(2), 226, 253.

Appealed from FCA (FC): [2022] FCAFC 66; (2022) 291 FCR 263; (2022) 401 ALR 578

Held: Appeal allowed.

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Shipping and Navigation

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

B32/2023: [2024] HCA 4

Judgment delivered: 14 February 2024

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

Catchwords:

Statutes – Construction – Where Sch 1A of *Carriage of Goods by Sea Act 1991* (Cth) contained amended Hague-Visby Rules (the "Australian Hague Rules") – Where Art 3(8) of Australian Hague Rules provided that any clause in contract for carriage of goods by sea relieving or lessening carrier's liability for loss or damage to goods otherwise than as provided for in Australian Hague Rules shall be void – Where arbitration clause in bill of lading provided for resolution of disputes between carrier and shipper by arbitration in London under English law – Where arbitration commenced – Where shipper commenced proceedings in Federal Court of Australia and sought to restrain arbitration – Where carrier sought stay of Federal Court proceedings in favour of arbitration – Where carrier undertook to admit in London arbitration that Australian Hague Rules as applied under Australian law were to apply in arbitration – Where Federal Court made declaration by consent to similar effect – Whether arbitration clause in bill of lading rendered inoperative by Art 3(8) – Whether conduct of arbitration would relieve or lessen carrier's liability – Whether carrier's undertaking and Federal Court's declaration should be taken into account – Proper approach to standard of proof under Art 3(8).

Words and phrases – "arbitration", "arbitration clause", "Australian Hague Rules", "balance of probabilities", "burden of proof", "carrier's liability", "contract of carriage of goods by sea", "declaration", "declaration by consent", "foreign arbitration", "lessen the carrier's liability", "liability would be relieved or lessened", "ordinary civil standard of proof", "standard of proof", "undertaking".

Carriage of Goods by Sea Act 1991 (Cth), ss 4, 7, 8, 9, Schs 1, 1A, Art 3(8).
International Arbitration Act 1974 (Cth), ss 7, 39.

Appealed from FCA (FC): [2022] FCAFC 171; (2022) 295 FCR 81; (2022) 406 ALR 431

Held: Appeal dismissed with costs.

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3: CASES RESERVED

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

Administrative Law

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

M63/2023: [2023] HCATrans 180

Date heard: 7 December 2023

Coram: Gageler CJ, Gordon, Edelman[1], Steward, Gleeson, Jagot and Beech-Jones JJ

Catchwords:

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

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

[1] The parties consented to Justice Edelman participating in the hearing by reading the transcript.

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Arbitration

Tesseract International Pty Ltd v Pascale Construction Pty Ltd
A9/2023: [2023] HCATrans 160

Date heard: 15 November 2023

Coram: Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ

Catchwords:

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

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

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Constitutional Law

Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks (ABN 13 051 694 963) & Anor
D3/2023: [2023] HCATrans 181; [2023] HCATrans 182

Date heard: 12 and 13 December 2023

Coram: Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ

Catchwords:

Constitutional law – Territories – Territory crown – Crown immunity – Where s 34(1) of *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ("Sacred Sites Act") prescribes offence and penalty for carrying out work on sacred site – Where Director of National Parks arranged for contractor to perform work on walking track at Gunlom Falls, in Kakadu National Park in Northern Territory – Where track works in area amounting to "sacred site" – Where Director a corporation with perpetual succession established by s 15 of *National Parks and Wildlife Conservation Act 1975* (Cth) and continued in existence as body corporate by s 514A of *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – Whether s 34(1) of Sacred Sites Act applies to Director.

Statutory interpretation – Statutory presumption – Presumption against imposition of criminal liability on executive – Where presumption considered in *Cain v Doyle* (1946) 72 CLR 409 – Proper approach to scope of presumption in *Cain v Doyle* – Whether presumption in *Cain v Doyle* applies to statutory corporations – Whether Sacred Sites Act expresses intention to apply to persons or bodies corporate associated with Commonwealth.

Appealed from NTSC (FC): [2022] NTSCFC 1

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Contract

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

S115/2023: [2024] HCATrans 8

Date heard: 13 February 2024

Coram: Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ

Catchwords:

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

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

Appealed from NSWSC (CA): [2023] NSWCA 21; (2023) 110 NSWLR 464

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Criminal Law

Director of Public Prosecutions (Cth) v Kola

A21/2023: [2024] HCATrans 10

Date heard: 15 February 2024

Coram: Gageler CJ, Steward, Gleeson, Jagot and Beech-Jones JJ

Catchwords:

Criminal law – Drug offences – Scope of conspiracy – Misdirection and non-direction – Where respondent charged with conspiring to import commercial quantity of border controlled drug contrary to ss 1.5(1) and 307.1(1) of *Criminal Code* (Cth) – Where Crown case respondent agreed with others to conduct being engaged in, which if successful, would result in commercial quantity of cocaine being imported from Panama to Australia – Where no direct evidence of quantity of cocaine agreed to import – Where Crown relied on inferences to support case amount of cocaine to be imported 2kg or more – Where trial judge directed jury elements to be proven beyond reasonable doubt included substance imported pursuant to agreement commercial quantity – Where approach to directing juries

about elements of conspiracy offence differs in Victoria, New South Wales and present South Australian case – Whether Court of Appeal erred in concluding element of offence of conspiracy to import commercial quantity that conspirators agree to conduct which, if executed would have resulted in importation of commercial quantity where conspirators knew or intended agreement would result in importation of product of that weight.

Appealed from SASC (CA): [2023] SASCA 50; (2023) 377 FLR 253

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Hurt v The King; Delzotto v The King
C7/2023; C8/2023; S44/2023: [2023] HCATrans 156

Date heard: 9 November 2023

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

Catchwords:

Criminal law – Sentencing – Mandatory minimum sentences – Sentencing discretion – Where s 16AAB of *Crimes Act 1914* (Cth) imposes minimum sentences for certain offences – Whether minimum sentence to be regarded as base of range of appropriate sentence or minimum permissible sentence – Proper approach to minimum sentences – Whether proper approach involves sentencing judge having regard to minimum from outset as prescribing bottom of range of appropriate sentence, consistent with *Bahar v The Queen* (2011) 45 WAR 100 – Whether proper approach involves sentencing judge exercising sentencing discretion in usual way and only if proposed sentence falls below minimum penalty that minimum penalty has effect, consistent with approach in *R v Pot, Wetangky and Lande* (Supreme Court (NT), 18 January 2011, unrep).

Appealed from ACTSC (CA) (C25/2022; C26/2022): [2022] ACTCA 49; (2022) 18 ACTLR 272; (2022) 372 FLR 312

Appealed from NSWSC (CCA): [2022] NSWCCA 117; (2022) 298 A Crim R 483

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The King v Anna Rowan – A Pseudonym
M47/2023: [2023] HCATrans 159

Date heard: 14 November 2023

Coram: Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ

Catchwords:

Criminal law – Defence of duress – Duress of circumstances – Where respondent convicted of multiple sexual offences against daughters – Where respondent, at time of offending, residing with partner ("JR"), father of complainants, also convicted of sexual offences against complainants – Where respondent sought to raise defence of duress, relying on report recording JR's controlling behaviour towards, and physical and sexual abuse of, respondent – Where, during periods covered by alleged offences, defence of duress covered by common law and then s 322O of *Crimes Act 1958* (Vic) – Where trial judge held not sufficient factual basis for duress to be left to jury – Where Court of Appeal found continuing or ever present threat could constitute duress and ordered re-trial – Whether law of duress applies in case of duress of circumstances, namely where accused has not been in receipt of specific threat enjoining them to engage in criminal act or suffer consequences, but accused still reasonably fears if they do not commit criminal act they will suffer such consequences.

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

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Immigration

Lesianawai v Minister for Immigration, Citizenship and Multicultural Affairs

S12/2023: [2023] HCATrans 161

Date heard: 16 November 2023

Coram: Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ

Catchwords:

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

Services and Multicultural Affairs v Thornton [2023] HCA 17 – Whether defendant acted on misunderstanding of law by treating plaintiff's sentences between 1996 and 1998 as criminal convictions – Whether defendant took into account irrelevant consideration by having regard to plaintiff's offences between 1996 and 1998 and treating such conduct as criminal offending.

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

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

M70/2023: [2024] HCATrans 2

Date heard: 6 February 2024

Coram: Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ

Catchwords:

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

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

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

S120/2023: [2024] HCATrans 9

Date heard: 14 February 2024

Coram: Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ

Catchwords:

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

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

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Minister for Immigration, Citizenship and Multicultural Affairs v McQueen

P2/2023: [2023] HCATrans 183

Date heard: 14 December 2023

Coram: Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ

Catchwords:

Immigration – Visas – Mandatory cancellation – Representations to Minister to revoke cancellation – Relying on Departmental summary or synthesis of documents – Where respondent's visa mandatorily

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

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

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Restitution

Redland City Council v Kozik & Ors

B17/2023: [2023] HCATrans 116; [2023] HCATrans 121

Date heard: 13 and 14 September 2023

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

Catchwords:

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

contractual principles of failure of consideration or by reference to material benefit derived.

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

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Sentence

Xerri v The King
S76/2023: [2023] HCATrans 142

Date heard: 18 October 2023

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

Catchwords:

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

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

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Trade Practices

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

S118/2023: [2024] HCATrans 5

Date heard: 7 February 2024

Coram: Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ

Catchwords:

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

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

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Wills v Australian Competition and Consumer Commission & Ors

S116/2023: [2024] HCATrans 5; [2024] HCATrans 6

Date heard: 7 and 8 February 2024

Coram: Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ

Catchwords:

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

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

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4: ORIGINAL JURISDICTION

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

Courts

HBSY Pty Ltd ACN 151 894 049 v Lewis & Anor
S106/2023

Catchwords:

Courts – Jurisdiction – Cross-vesting – State court invested with federal jurisdiction – *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) ss 7(3), 7(5) – Where dispute arose in respect of first defendant's late aunt's estate – Where first defendant's brother director of Lewis Securities Ltd – Where estate's largest asset money owing to it by Sir Moses Montefiore Jewish Home ("Montefiore sum") – Where brother deposited Montefiore Sum with Lewis Securities – Where Lewis Securities entered liquidation and Montefiore sum lost – Where brother liable to estate and declared bankrupt – Where plaintiff purchased various assets from trustee in bankruptcy including interest in residue of estate – Where brother discharged from bankruptcy – Where plaintiff sought orders in Supreme Court revoking letters of administration granted to first defendant, or alternatively order that he be replaced as trustee – Where first defendant cross-claimed seeking declarations that plaintiff not entitled to be paid brother's share of estate – Where plaintiff unsuccessful at first-instance – Where on 27 July 2022, plaintiff filed and served notice of intention to appeal to New South Wales Court of Appeal – Where on 31 August 2022, plaintiff's legal advisers came to view appeal would concern matter arising under *Bankruptcy Act 1966* (Cth) and would therefore have to be brought in Full Federal Court – Where plaintiff sought extension of time to appeal from judgment of Supreme Court of New South Wales to Full Court of Federal Court of Australia – Where Full Court held s 7(5) of *Cross-Vesting Act* did not apply and suggested plaintiff may wish to revive process it had commenced in Court of Appeal – Where plaintiff seeks writ of mandamus requiring Full Court to determine substantive appeal – Whether Full Court has jurisdiction to hear appeal – Proper construction of s 7(5) of *Cross-Vesting Act*.

Application for constitutional or other writ referred to the Full Court on 22 November 2023.

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5: SECTION 40 REMOVAL

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

Constitutional Law

Attorney-General of the Commonwealth v ASF17 & Anor
P5/2024

Removed into the High Court under s 40 of the Judiciary Act 1903 (Cth) on 16 February 2024.

Catchwords:

> Constitutional law – Judicial power of Commonwealth – Immigration detention – Where first respondent Iranian citizen currently detained under ss 189(1) and 196(1) of *Migration Act 1958* (Cth) ("Act") as unlawful non-citizen – Where first respondent arrived in Australia on 13 July 2013 and in immigration detention since 10 February 2014 – Where following this Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 ("NZYQ"), first respondent filed application in Federal Court for habeas corpus and declaratory relief to effect his ongoing detention has been and is unlawful – Where second respondent argued first respondent could be removed to Iran with their cooperation – Where first respondent argued they had good reasons for fearing harm in Iran and thus for not cooperating – Where primary judge did not accept first respondent's claimed bases for fearing harm if returned to Iran – Where primary judge held constitutional limit in *NZYQ* should be determined on hypothetical basis first respondent is cooperating – Where primary judge's finding inconsistent with aspects of reasoning in *AZC20 v Secretary Department of Home Affairs (No 2)* [2023] FCA 1497 – Whether first respondent's ongoing detention lawful – Whether limit on constitutionally permissible duration of immigration detention identified in *NZYQ* applies in relation to unlawful non-citizens detained under ss 189(1) and 196(1), who are not cooperative with efforts to remove them and, in doing so, prevent their own removal pursuant to s 198.

Removed from Full Court of the Federal Court of Australia.

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Commonwealth of Australia v Mr Stradford (a pseudonym) & Ors; His Honour Judge Salvatore Paul Vasta v Mr Stradford (a pseudonym) & Ors
C3/2024; C4/2024: [2024] HCASL 24; [2024] HCASL 25

Removed into the High Court under s 40 of the Judiciary Act 1903 (Cth) on 8 February 2024.

Catchwords:

Constitutional law – Chapter III Court – Judicial Immunity – Contempt order – Where Judge of Federal Circuit Court ("Judge"), incorrectly found Mr Stradford ("Mr S") in contempt and sentenced him to 12 months' imprisonment – Where Mr S detained for six days – Where Full Court allowed Mr S' appeal and set aside contempt declaration and imprisonment order – Where Mr S commenced proceeding in Federal Court alleging false imprisonment by Judge – Where Federal Court held Judge liable for false imprisonment – Where Federal Court found Commonwealth and State of Queensland ("Queensland") vicariously liable – Where Mr S, Commonwealth and Queensland each appealed to Full Court of the Federal Court – Whether Judge liable to Mr S for tort of false imprisonment – Whether Federal Circuit Court of Australia had power to punish for contempt despite its designation as inferior court – Whether order for contempt by inferior court affected by jurisdictional error *void ab initio* – Whether Judge had same immunity as superior court judge with respect to making of contempt orders – Whether Federal Court erred in concluding Commonwealth and Queensland not afforded protection at common law from civil liability in circumstances where their respective officers executed imprisonment order and warrant issued by Circuit Court which appeared valid on their face – Whether Federal Court erred in concluding Circuit Court's constitutionally derived power to punish contempts and its power under s 17 of *Federal Circuit Court of Australia Act 1999* (Cth) ousted or limited by Pts XIIIA and XIIIB of *Family Law Act 1975* (Cth) – Whether Federal Court erred in finding errors Judge made "outside" or "in excess of" jurisdiction and he had pre-judged outcome of hearing in relation to contempt orders.

Removed from Full Court of the Federal Court of Australia.

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Torts

State of Queensland v Mr Stradford (a pseudonym) & Ors
S24/2024: [2024] HCASL 23

Removed into the High Court under s 40 of the Judiciary Act 1903 (Cth) on 8 February 2024.

Catchwords:

Torts – False imprisonment – Contempt order – Where second respondent incorrectly found first respondent in contempt and sentenced him to 12 months' imprisonment – Where first respondent detained for six days – Where officers of appellant took and held first respondent in custody – Where Full Court allowed first respondent's appeal and set aside contempt declaration and imprisonment order – Where first respondent commenced proceeding in Federal Court alleging false imprisonment by second respondent – Where Federal Court held second respondent liable for false imprisonment – Where Federal Court found third respondent and appellant vicariously liable – Where third respondent, second respondent and appellant each appealed to Full Court of the Federal Court – Whether appellant liable to first respondent for tort of false imprisonment – Whether Federal Court erred in concluding third respondent and appellant not afforded protection at common law from civil liability in circumstances where their respective officers executed imprisonment order and warrant issued by Circuit Court which appeared valid on their face – Whether Federal Court erred in concluding s 249 of *Criminal Code* (Qld) did not apply to warrant issued by Federal Circuit Court, and Court ought to have held ss 247, 249 and 250, which together relevantly provide for limited immunity for persons executing sentences passed and warrants issued without authority, applied to Queensland's officers executing warrant and imprisonment order.

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.

Arbitration

CBI Constructors Pty Ltd & Anor v *Chevron Australia Pty Ltd*
P22/2023: [2023] HCATrans 166

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

Catchwords:

Arbitration – Bifurcation of proceedings – Admissibility/jurisdiction dichotomy – *Functus officio* – Standard of supervisory court review – Where arbitration proceedings arose from contract under which appellants required to provide staff to carry out work at construction sites and respondent required to reimburse appellants for costs of providing staff – Where arbitral tribunal bifurcated proceedings principally on basis that first hearing would deal with liability and second hearing would deal with quantum – Where following first interim award appellants included additional pleading in repleaded case as to staff costs calculation ("Contract Criteria Case") – Where respondent objected to Contract Criteria Case on basis of *res judicata*, issue estoppel, *Anshun* estoppel and Tribunal *functus officio* in respect of liability – Where Tribunal in second interim award declared appellants not prevented from advancing Contract Criteria Case by any estoppels and Tribunal not *functus officio* in respect of Contract Criteria Case – Where respondent applied to set aside second interim award pursuant to s 34(2)(a)(iii) of *Commercial Arbitration Act 2012* (WA) on ground beyond scope of parties' submission to arbitration – Where Court of Appeal dismissed appeal – Whether Court of Appeal erred finding arbitral tribunal *functus officio* with respect to Contract Criteria Case for purpose of s 34(2)(a)(iii) – Whether Court erred finding standard of supervisory court's review of scope of parties' submission to arbitration in application to set aside arbitral award under s 34(2)(a)(iii) is de novo review in which supervisory court applies "correctness" standard of intervention.

Appealed from WASC (CA): [2023] WASCA 1

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Bankruptcy

Morgan & Ors v McMillan Investment Holdings Pty Ltd & Anor
S119/2023: [2023] HCATrans 122

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

Catchwords:

Bankruptcy – Pooling order – *Corporations Act 2001* (Cth), s 579E – Meaning of "particular property" – Where first applicant is liquidator of second and third applicants – Where first applicant sought order before primary judge that, inter alia, Australian Securities and Investments Commission ("ASIC") reinstate registration of third applicant, and Court make pooling order pursuant to s 579E of *Corporations Act* in respect of second and third applicants – Where primary judge made orders that ASIC reinstate registration of third applicant, and that second and third applicants be pooled group for purpose of s 579E of *Corporations Act* – Where first respondent appealed to Full Court on question of whether pooling order should be set aside – Where Full Court found precondition in s 570E(1)(b)(iv) of *Corporations Act* not satisfied – Whether Full Court majority erred in finding precondition in s 579E(1)(b)(iv) of *Corporations Act* not satisfied in circumstances where second and third applicants jointly and severally owned "particular property", being chose in action, at time of making pooling order, being immediately following reinstatement of third applicant – Whether Full Court majority impermissibly departed from clear and unambiguous language of s 601AH(5) of *Corporations Act*.

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

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Civil Procedure

RC v The Salvation Army (Western Australia) Property Trust
P7/2023: [2024] HCASL 12

Date determined: 8 February 2024 – *Application for special leave to appeal referred to Full Court as if on appeal*

Catchwords:

Civil procedure – Permanent stay of proceedings – Prejudice – Where appellant claimed damages with respect to loss and damage suffered as result of sexual abuse by Salvation Army Officer between August

1959 and April 1960, when appellant aged 12 and 13 years old, while in care of respondent – Where Salvation Army Officer died in 2006, eight years before respondent first became aware appellant alleged sexual abuse – Where another key witness died in 1968 – Where respondent applied for permanent stay of proceedings – Where primary judge granted permanent stay – Where appellant unsuccessfully appealed to Court of Appeal – Whether Court of Appeal erred in concluding open to primary judge to grant permanent stay of appellant's action against respondent – Whether Court of Appeal erred in upholding finding of prejudice.

Appealed from WASC (CA): [2023] WASCA 29

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Willmot v The State of Queensland
B65/2023: [2023] HCATrans 155

Date determined: 9 November 2023 – *Special leave granted*

Catchwords:

Civil procedure – Stay of proceedings – Where appellant claimed damages as result of physical and sexual abuse which she claimed she suffered whilst State Child pursuant to *State Children Act 1911* (Qld) and under control of respondent by virtue of *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) – Where alleged perpetrators either deceased or in case of NW, 78 year old man who was 16 at time of alleged conduct – Where trial judge held case in exceptional category where permanent stay warranted – Where Court of Appeal upheld trial judge's decision – Whether Court of Appeal erred in determining trial judge did not err in exercise of discretion to grant permanent stay of applicant's proceeding.

Appealed from QLDSC (CA): [2023] QCA 102

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Constitutional Law

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

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

Catchwords:

Constitutional law – Legislature – Privileges – Privilege of parliamentary debate and proceedings – Admissibility of report of parliamentary committee – Where proceedings concern road works at intersection – Where first respondent claims to hold interest in land at intersection – Where proposal by Department of State Growth to upgrade intersection considered and reported upon by Parliamentary Standing Committee on Public Works ("Committee") in 2017 – Where second respondent engaged to construct new interchange – Where first respondent claims that works that second respondent was to perform not same as public works considered and reported upon by Committee – Where Attorney-General joined as second defendant and applied to, inter alia, strike out parts of statement of claim as offending parliamentary privilege – Where primary judge found cause of action could not proceed without court adjudicating upon 2017 report of Committee, which would contravene Article 9 of Bill of Rights – Where Full Court dismissed Attorney-General's interlocutory application – Whether Full Court erred in construing s 15 and s 16 of *Public Works Committee Act 1914* (Tas) ("PWC Act") as creating public obligation which falls outside parliamentary process and hence ambit of parliamentary privilege – Whether it would infringe parliamentary privilege for court to determine whether road works complied with s 16(1) of PWC Act by adjudicating upon whether road works that second respondent were engaged to undertake were different from road works reported on by Committee.

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

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

D5/2023: [2023] HCATrans 143

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

Catchwords:

Constitutional law – *Constitution,* s 51(xxxi) – Acquisition of property on just terms – Extinguishment of native title – Where principal proceeding is application for compensation under *Native Title Act 1993* (Cth) for alleged effects of grants or legislative acts on native title in period after Northern Territory became territory of Commonwealth in 1911 and before enactment of *Northern Territory Self-Government Act 1978* (Cth) – Whether Full Court erred by failing to find that just terms requirement contained in s 51(xxxi) of *Constitution* does not apply to laws enacted pursuant to s 122 of *Constitution*, including *Northern Territory (Administration) Act 1910* (Cth) and Ordinances made thereunder – Whether *Wurridjal v Commonwealth* (2009) 237 CLR 309 should be re-opened – Whether

Full Court erred in failing to find that, on facts set out in appellant's statement of claim, neither vesting of property in all minerals on or below surface of land in claim area in Crown, nor grants of special mineral leases capable of amounting to acquisitions of property under s 51(xxxi) of *Constitution* because native title inherently susceptible to valid exercise of Crown's sovereign power to grant interests in land and to appropriate to itself unalienated land for Crown purposes.

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

Appealed from FCA (FC): [2023] FCAFC 75; (2023) 298 FCR 160; (2023) 410 ALR 231

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Criminal Law

Dayney v The King
B69/2023: [2023] HCATrans 174

Date heard: 21 November 2023 – *Special leave granted*

Catchwords:

Criminal law – Appeal against conviction – Self-defence against provoked assault – *Criminal Code* (Qld), s 272 – Where appellant involved in violent altercation resulting in death of another individual – Where appellant convicted of murder – Where appellant successfully appealed conviction – Where s 272 of *Criminal Code* (Qld) affords defence of self-defence against provoked assault – Where majority in first appeal held final clause of s 272(2) ousts protection afforded by s 271(1) only where force used in self-defence results in death or grievous bodily harm – Where minority held final clause of s 272(2) applies to modify effect of first two clauses in s 272(2) – Where jury in retrial directed in accordance with majority's interpretation of s 272 and appellant convicted of murder – Where appellant appeals second time on ground minority's interpretation of s 272(2) in first appeal is correct and decision of majority plainly wrong – Whether Court of Appeal erred in holding final clause of s 272(2) constitutes standalone exception to protection afforded by self-defence against provoked assault – Proper meaning of "before such necessity arose".

Appealed from QLDSC (CA): [2023] QCA 62

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Obian v The King
M77/2023: [2023] HCATrans 135

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

Catchwords:

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

Appealed from VSC (CA): [2023] VSCA 18; (2023) 69 VR 553

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Criminal Practice

Director of Public Prosecutions v Smith
M100/2023: [2024] HCASL 26

Date determined: 8 February 2024 – *Special leave granted*

Catchwords:

Criminal practice – Open justice – Where respondent faces trial in County Court of Victoria on indictment charging them with four child sexual offences – Where child complainant gave evidence at special hearing conducted pursuant to s 370 of *Criminal Procedure Act 2009*

(Vic) ("CPA") – Where day prior to special hearing, presiding judge met with complainant in presence of both prosecutor and defence counsel at offices of Child Witness Service – Where respondent's counsel did not object to introductory meeting and judge made directions for fair and efficient conduct of proceeding pursuant to s 389E of CPA, having regard to recommendations made by intermediary – Where introductory meeting not recorded and accused not present – Whether Court of Appeal erred in finding introductory meeting between child complainant, presiding judge, prosecutor and defence counsel prior to special hearing at which complainant gave evidence, not authorised by s 389E of CPA – Whether Court of Appeal erred in finding introductory meeting inconsistent with principle of open justice – Whether Court of Appeal erred in finding introductory meeting fundamental irregularity in respondent's trial that could not be waived.

Appealed from VSC (CA): [2023] VSCA 293

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Damages

Commonwealth of Australia v Sanofi (formerly Sanofi-Aventis) & Ors

S169/2023: [2023] HCATrans 184

Date heard: 18 December 2023 – *Special leave granted*

Catchwords:

Damages – Patent litigation – Compensation for loss flowing from interlocutory injunction – Where respondent held patent for clopidogrel – Where interlocutory injunction obtained restraining generic supplier from entering market – Where generic supplier undertook not to seek Pharmaceutical Benefits Scheme ("PBS") listing – Where respondent undertook to compensate persons adversely affected by injunction – Where respondent's patent subsequently found invalid – Where Commonwealth sought recovery of additional subsidies provided to respondent due to non-listing of generic clopidogrel – Where primary judge dismissed Commonwealth's application, and Full Court dismissed appeal by Commonwealth – Whether Full Court erred in failing to hold Commonwealth's evidential burden was to establish *prima facie* case that its loss flowed directly from interlocutory injunction with evidential burden shifted to respondents to establish that generic supplier would not have sought listing on PBS even if not enjoined – Whether Full Court erred in failing to hold Commonwealth discharged its evidential burden but respondents did not – Whether Full Court erred in failing to find, by inference from evidence, that in absence

of interlocutory injunction, it was likely that Dr Sherman would have reconfirmed plan to seek PBS listing.

Appealed from FCA (FC): [2023] FCAFC 97; (2023) 411 ALR 315; (2023) 174 IPR 66

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Equity

Naaman v Jaken Properties Australia Pty Limited ACN 123 423 432 & Ors

S123/2023: [2024] HCASL 21

Date determined: 8 February 2024 – *Special leave granted*

Catchwords:

Equity – Fiduciary duty – Fiduciary duty between former and successor trustees – Duties of trustees – Where first respondent successor trustee – Where second respondent sole director and shareholder of former trustee – Where former trustee appointed in June 2005 – Where in November 2006, appellant commenced proceedings against former trustee seeking damages of $2 million – Where first respondent replaced former trustee by way of deed of appointment – Where former trustee promised indemnity from first respondent as successor trustee – Where former trustee wound up because of claim for $2,500, with effect appellant's pending proceedings stayed – Where legal title to trust assets transferred to first respondent as trustee – Where on March 2014, default judgment entered in favour of appellant against former trustee – Where judgment set aside by consent, and proceedings reheard in December 2014 – Where on 25 February 2016, primary judge made orders entering judgment for appellant against former trustee in amount of $3.4 million and declared former trustee entitled to be indemnified out of trust assets – Where in meantime, trust assets dissipated by first respondent at discretion of third respondent – Where other respondents either knowingly involved in conduct or received trust property – Where primary judge found first respondent breached fiduciary duties, and other respondents either knowingly involved in the conduct or received trust property – Where Court of Appeal majority held first respondent did not owe fiduciary obligation at any time – Whether Court of Appeal majority erred in concluding first respondent as successor trustee did not owe fiduciary duty to former trustee not to deal with trust assets so as to destroy, diminish or jeopardise former trustee's right of indemnity or exoneration from those assets.

Appealed from NSWSC (CA): [2023] NSWCA 214

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Evidence

BQ v The King
S173/2023: [2023] HCASL 214

Date determined: 7 December 2023 – *Special leave granted on limited grounds*

Catchwords:

Evidence – Admissibility of expert evidence – Where complainants two sisters and nieces of appellant – Where appellant convicted at second trial of child sexual assault offending – Where Crown sought to rely on evidence from Associate Professor Shackel with respect to (a) how victims of child sexual assault respond to and disclose their victimisation and (b) matters relevant to complainants' conduct during and after alleged assaults and whether such conduct consistent with research – Where trial judge ruled evidence in respect of (a) admissible but refused to admit evidence in respect of (b) – Whether Court of Criminal Appeal erred in holding expert evidence concerning behaviour of perpetrators of child sexual assault offences, risk factors for sexual abuse and when abuse commonly takes place admissible as expert opinion evidence and occasioned no miscarriage of justice in trial – Whether Court erred in holding that trial judge's directions to jury in respect of expert evidence adequate and did not occasion miscarriage of justice.

Appealed from NSW (CCA): [2023] NSWCCA 34

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Cook (A Pseudonym) v The King
S158/2023: [2023] HCATrans 169

Date heard: 21 November 2023 – *Special leave granted*

Catchwords:

Evidence – Admissibility of evidence about complainant's sexual experience or activity – Temporal limitations – Where appellant convicted of sexual offences against child – Where issue arose prior to trial regarding admissibility of evidence relating to complainant's complaint of sexual assault by another member of her family – Where common ground evidence of other offences probative and appellant sought to adduce the evidence in their defence – Where s 293 of

Criminal Procedure Act 1986 (NSW) provides evidence of sexual experience inadmissible subject to exceptions – Where trial judge ruled evidence of other offences inadmissible in appellant's trial – Whether Court of Criminal Appeal erred in constructing s 293(4) – Whether Court erred in holding permissible to mislead jury by cross-examination in order to attempt to counteract unfairness occasioned by exclusion of s 293 evidence – Whether Court erred in ordering appellant be retried – Whether Court erred in refusing to stay proceedings.

Appealed from NSW (CCA): [2022] NSWCCA 282

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MDP v The King
B72/2023: [2023] HCASL 215

Date determined: 7 December 2023 – *Special leave granted*

Catchwords:

Evidence – Propensity evidence – Miscarriage of justice – Where appellant convicted of various child sexual assault and domestic violence offences against former partner's daughter – Where evidence included evidence from complainant's sister that appellant smacked complainant on bottom – Where trial judge directed jury if they accepted bottom slapping evidence was true, and that it displayed sexual interest of appellant in complainant beyond reasonable doubt, they could use it to reason that it was more likely that offences occurred – Where Court of Appeal found bottom slapping evidence did not meet test for admissibility of propensity evidence – Where Court of appeal found evidence admissible under s 132B of *Evidence Act 1977* (Qld) ("evidence of domestic violence") – Whether Court of Appeal erred holding that no miscarriage of justice occurred when evidence inadmissible as propensity evidence was nonetheless left to jury to be used as propensity evidence.

Appealed from QLDSC (CA): [2023] QCA 134

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The Director of Public Prosecutions v Benjamin Roder (a pseudonym)
M85/2023: [2023] HCATrans 179

Date heard: 7 December 2023 – *Special leave referred to Full Court for consideration as on appeal*

Catchwords:

Evidence – Tendency evidence – Standard of proof – Where respondent is to be tried in County Court of Victoria on indictment charging him with 27 sexual offences against two sons of his former domestic partner – Where prosecution gave notice of intention to adduce tendency evidence that respondent had tendency to have improper sexual interest in stepchildren and tendency to act in particular ways towards them – Where trial judge ruled jury should be directed that "the charged acts must be proved beyond reasonable doubt" before they could be used as tendency evidence – Where Court of Appeal refused leave to appeal from trial judge's decision – Whether Court of Appeal erred in upholding interlocutory decision of County Court of Victoria on basis that where charged act relied upon as evidence to prove tendency, jury should be directed that charged act must be proved beyond reasonable doubt before it can be so used – Whether such direction prohibited by s 61 of *Jury Directions Act 2015* (Vic).

Appealed from VSC (CA): [2023] VSCA 262

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Native Title

Stuart & Ors v State of South Australia & Ors
A17/2023: [2024] HCASL 10

Date determined: 8 February 2024 – *Special leave granted*

Catchwords:

Native title – Extinguishment – Proper construction of "native title" in s 223(1) *Native Title Act 1993* (Cth) ("NTA") – Overlapping claims – Where appellants together comprise applicant in native title determination under s 61 of NTA made on behalf of Arabana people in March 2013 over area in vicinity of township of Oodnadatta in South Australia – Where over subsequent five years different claim group, Walka Wani people, made two claims concerning same area ("overlap area") – Where in January 1998 Arabana made claim over area abutting overlap area, resulting in consent determination in 2012 in favour of Arabana in *Dodd v State of South Australia* [2012] FCA 519 ("*Dodd*") – Where overlap area omitted from 1998 claim area because Arabana believed different accommodation of their rights in overlap area would be made by state government – Where primary judge dismissed Arabana claim and made determination of native title in favour of Walka Wani – Where appellants unsuccessfully appealed orders dismissing Arabana Claim to Full Court – Whether Full Court majority erred by not finding trial judge failed to correctly construe and apply definition of "native title" in s

223(1) when dismissing Arabana's native title determination application – Whether Full Court erred by treating all aspects of determination in *Dodd* as being geographically specific.

Appealed from FCA (FC): [2023] FCAFC 131; (2023) 412 ALR 407

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Private International Law

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

S135/2023: [2023] HCATrans 144

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

Catchwords:

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

Appealed from NSWSC (CA): [2023] NSWCA 134; (2023) 111 NSWLR 550; (2023) 378 FLR 101; (2023) 410 ALR 371

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Taxation

Automotive Invest Pty Limited v Commissioner of Taxation

S170/2023: [2023] HCASL 200

Date determined: 7 December 2023 – *Special leave granted*

Catchwords:

Taxation – Luxury car tax – Goods and services tax – *A New Tax System (Luxury Car Tax) Act 1999* (Cth) ("LCT Act") – Where appellant operated business called "Gosford Classic Car Museum" – Where museum displayed motor vehicles – Where displayed motor vehicles also generally available for sale and were trading stock – Where LCT Act is single stage tax imposed on supply or importation of "luxury cars" where value exceeds "luxury car tax threshold" – Proper test for non-application of LCT Act – Whether LCT Act to be read and construed by reference to underlying legislative policy – Whether whole of s 9-5(1) determinative of whether appellant subject to increasing adjustment under charging provisions in ss 15-30(3)(c) and 15-35(3)(c) – Whether Full Court majority erred in concluding because LCT Act does not define "retail" sale there was no basis for importing into s 9-5(1)(a) "the idea of taking only a 'retail sale'".

Appealed from FCA (FC): [2023] FCAFC 129

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

S130/2023: [2023] HCATrans 136

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

Catchwords:

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

dominant purpose – Whether Court of Appeal should have concluded that appellant's use of land for maintenance of animals was for purpose of selling animals, their progeny and bodily produce.

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

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Torts

Bird v DP (a pseudonym)
M82/2023: [2023] HCATrans 145

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

Catchwords:

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

Appealed from VSC (CA): [2023] VSCA 66; (2023) 69 VR 408; (2023) 323 IR 174

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Mallonland Pty Ltd ACN 051 136 291 & Anor v Advanta Seeds Pty Ltd ACN 010 933 061
B60/2023: [2023] HCATrans 138

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

Catchwords:

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

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

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Trade Practices

Capic v Ford Motor Company of Australia Pty Ltd ACN 004 116 223

S11/2024: [2024] HCASL 27

Date determined: 13 February 2024 – *Special leave granted*

Catchwords:

Trade Practices – Consumer law – Measure of damages for failure to comply with guarantee of acceptable quality – Where appellant brought representative proceedings under Part IVA of *Federal Court of Australia Act 1976* (Cth) in respect of Ford-badged motor vehicles fitted with DPS6 dual-clutch transmission system ("affected vehicles") – Where primary judge found affected vehicles supplied in breach of guarantee of acceptable quality under s 25 of *Australian Consumer Law* – Where primary judge held damages under s 272(1) requires assessment of reduction in value only at time of supply – Where Full Court found in order to avoid overcompensation under s

272(1)(a), it may be necessary to depart from date of supply as reference state for statutory reduction in value damages – Where Full Court held post-supply information may be relevant – Whether Full Court erred in construing s 272(1)(a) as subject to qualification that assessment of damages may require departure from assessment at time of supply or adjustment to avoid over-compensation – Whether s 272(1)(a) permits, and for what purpose, evidence of post-supply events to be used when assessing statutory compensation under the provision.

Appealed from FCA (FC): [2023] FCAFC 179

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Toyota Motor Corporation Australia Limited (ACN 009 686 097) v *Williams & Anor; Williams & Anor v Toyota Motor Corporation Australia Limited (ACN 009 686 097)*

S155/2023; S157/2023: [2023] HCATrans 162

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

Catchwords:

Trade Practices – Consumer law – Measure of damages for failure to comply with guarantee of acceptable quality – Where representative proceedings concerned 264,170 Toyota motor vehicles with diesel engines sold to Australian consumers – Where vehicles supplied with defective diesel particulate filter system – Where appellant introduced effective solution known as "2020 field fix" – Where 2020 field fix effective in remedying defect and its consequences in all relevant vehicles – Where primary judge found on "common sense approach" breach of s 54 *Australian Consumer* Law ("*ACL*") resulted in reduction in value of all vehicles by 17.5% – Where primary judge ordered reduction in damages under s 272(1)(a) of *ACL* be awarded to all group members who had not opted out, had not received 2020 field fix and first consumer had not sold it during relevant period – Where Full Court set aside order awarding reduction in value damages and reassessed reduction in value to be 10% before taking into account availability of 2020 field fix – Whether Full Court erred in finding damages for reduction in value recoverable when no ongoing reduction in value due to availability of free repair - Whether Full Court erred in failing to find damages for breach of guarantee of acceptable quality always to be assessed by reference to true value of goods at time of supply - Whether assessment of damages imports discretion exercisable under standard of appropriateness to assess reduction in value of goods at some later time or make adjustment downwards to reflect future event unknown at date of supply.

Appealed from FCA (FC): [2023] FCAFC 50; (2023) 296 FCR 514; (2023) 408 ALR 582

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7: Cases Not Proceeding or Vacated

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8: SPECIAL LEAVE REFUSED

Publication of Reasons: 8 February 2024 (Canberra)

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	Raghoobar	Legal Services Commissioner (B57/2023)	Supreme Court of Queensland (Court of Appeal) [2023] QCA 191	Special leave refused [2024] HCASL 1
2.	BOY17	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S117/2023)	Federal Court of Australia [2023] FCA 1040	Special leave refused [2024] HCASL 2
3.	Picos	Council of New South Wales Bar Association (S125/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 218	Special leave refused [2024] HCASL 3
4.	AML (a pseudonym)	Longden Super Custodian Pty Ltd (M68/2023)	Supreme Court of Victoria (Court of Appeal) [2023] VSCA 170	Special leave refused [2024] HCASL 4
5.	Reynolds	National Australia Bank Limited (P17/2023)	Supreme Court of Western Australia (Unreported)	Special leave refused [2024] HCASL 5
6.	Truong	Director of Public Prosecutions & Anor (S134/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 64	Special leave refused [2024] HCASL 6
7.	Jemmott	Krejci & Ors (S102/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 187	Special leave refused [2024] HCASL 7
8.	Watson	Greenwoods & Herbert Smith Freehills Pty Ltd & Anor (S122/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 132	Special leave refused [2024] HCASL 8
9.	Norkin	The University of New England ABN 75792454315 & Anor (S124/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 194	Special leave refused [2024] HCASL 9
10.	Fulton	Chief of Defence Force (B51/2023)	Full Court of the Federal Court of Australia [2023] FCAFC 134	Special leave refused with costs [2024] HCASL 11

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
11.	Holmes	The State of Western Australia (P19/2023)	Supreme Court of Western Australia (Court of Appeal) [2023] WASCA 26	Special leave refused [2024] HCASL 13
12.	ABI	The King (B52/2023)	Supreme Court of Queensland (Court of Appeal) [2023] QCA 166	Special leave refused [2024] HCASL 14
13.	The Catholic Archdiocese of Melbourne	RWQ (a pseudonym) & Anor (M69/2023)	Supreme Court of Victoria (Court of Appeal) [2023] VSCA 197	Special leave refused with costs [2024] HCASL 15
14.	Keay	Metro Trains Melbourne Pty Ltd (M73/2023)	Supreme Court of Victoria (Court of Appeal) [2023] VSCA 223	Special leave refused with costs [2024] HCASL 16
15.	EQU19	Minister for Immigration, Citizenship and Multicultural Affairs & Anor (M79/2023)	Federal Court of Australia [2023] FCA 1182	Special leave refused with costs [2024] HCASL 17
16.	Ames	Director of Public Prosecutions for the State of South Australia (A19/2023)	Supreme Court of South Australia (Court of Appeal) [2023] SASCA 85	Special leave refused [2024] HCASL 18
17.	PPK Mining Equipment Pty Ltd ACN 167705606 & Anor	Flynn & Anor (S114/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 201	Special leave refused with costs [2024] HCASL 19
18.	Dwyer	Volkswagen Group Australia Pty Ltd trading as Volkswagen Australia ABN 14093117876 (S121/2023)	Supreme Court of New South Wales (Court of Appeal) [2023] NSWCA 211	Special leave refused with costs [2024] HCASL 20
19.	Galuak	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M13/2023)	Application for removal	Application refused with costs [2024] HCASL 22