# HIGH COURT BULLETIN

Produced by the Legal Research Officer,
High Court of Australia Library
[2021] HCAB 3 (16 April 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



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# 2: Cases Handed Down

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

## Courts

### *Victoria International Container Terminal Limited v Lunt & Ors*
**M96/2020**: [2021] HCA 11

**Judgment delivered:** 7 April 2021

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

**Catchwords:**

> Courts – Abuse of process – Where Fair Work Commission approved enterprise agreement – Where approval of enterprise agreement supported by union – Where first respondent was longstanding member of union – Where first respondent brought proceedings seeking to quash approval of enterprise agreement – Where appellant sought summary dismissal of proceedings on basis they were abuse of process – Where proceedings funded by union – Where union unwilling to bring proceedings in own name because of risk of discretionary refusal of relief – Whether deployment of first respondent as "front man" for union amounted to abuse of process by bringing administration of justice into disrepute – Whether choice of first respondent as plaintiff prevented scrutiny of union's acquiescence in approval of enterprise agreement – Whether power to stay or summarily dismiss proceedings informed by considerations of deterrence or punishment.
>
> Words and phrases – "abuse of process", "administration of justice", "bring the administration of justice into disrepute", "deterrence", "discretionary grounds for the refusal of relief", "enterprise agreement", "forensic or juridical advantage", "front man", "illegitimate or improper purpose", "integrity of the court's own processes", "lack of candour", "motive", "punishment", "stay of proceedings", "summary dismissal", "trade union", "true moving party".

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

**Held:** Appeal dismissed.

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# Criminal Law

## *Namoa v The Queen*
**S188/2020**: [2021] HCA 13

**Judgment delivered:** 14 April 2021

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

**Catchwords:**

> Criminal law (Cth) – Conspiracy – Where s 11. 5(1) of *Criminal Code* (Cth) established offence of conspiracy – Where appellant charged with conspiring to do acts in preparation for terrorist act contrary to ss 11. 5(1) and 101. 6(1) of *Criminal Code* – Whether s 11. 5 applies to spouses who agree between themselves, and no other person, to commit offence against Commonwealth law – Whether interpretation of s 11. 5 of *Criminal Code* affected by any common law rule that spouses alone cannot conspire – Whether references in s 11. 5 of *Criminal Code* to "person" and "another person" include two spouses – Whether meaning of "conspires" and "conspiracy" in s 11. 5 of *Criminal Code* incorporates any common law rule that spouses alone cannot conspire.
>
> Words and phrases – "another person", "common law rule", "conspiracy", "conspires", "doctrine of unity", "person", "single legal personality of spouses".
>
> *Criminal Code* (Cth) – s 11. 5.

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

**Held:** Appeal dismissed.

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# Immigration

## *DQU16 & Ors v Minister for Home Affairs & Anor*
**S169/2020**: [2021] HCA 10

**Judgment delivered:** 7 April 2021

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

**Catchwords:**

Immigration – Visas – Application for protection visa – Where s 36(2) of *Migration Act 1958* (Cth) provides two criteria for grant of protection visa – Where s 36(2)(a) provides refugee criterion – Where s 36(2)(aa) provides complementary protection criterion – Where Court in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 ("*Appellant S395*") held asylum seeker cannot be expected to hide or change behaviour manifesting protected characteristic under Refugees Convention for purposes of assessing claim under s 36(2)(a) – Where s 36(2)(aa) requires assessment of whether "significant harm" a "necessary and foreseeable consequence" of applicant's return to receiving country – Where first appellant applied for protection visa under both ss 36(2)(a) and 36(2)(aa) – Where Immigration Assessment Authority found first appellant would modify behaviour on return to Iraq – Whether failure to consider principle in Appellant S395 under s 36(2)(aa) constituted jurisdictional error.

Words and phrases – "absolute and non-derogable", "complementary protection", "Convention Against Torture", "cruel, inhuman or degrading treatment or punishment", "innate or immutable characteristics", "International Covenant on Civil and Political Rights", "manifestation of a Convention characteristic", "membership of a particular social group", "modification of behaviour", "necessary and foreseeable consequence", "non-refoulement obligations", "real chance", "real risk", "refugee", "Refugees Convention", "sale of alcohol", "significant harm", "well-founded fear of persecution".

*Migration Act 1958* (Cth) – ss 5H, 5J, 36(2)(a), 36(2)(aa).

**Appealed from FCA:** [2020] FCA 518

**Held:** Appeal dismissed with costs.

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## *DVO16 v Minister for Immigration and Border Protection & Anor*; *BNB17 v Minister for Immigration and Border Protection & Anor*

**S66/2020; M109/2020:** [2021] HCA 12

**Judgment delivered:** 14 April 2021

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

**Catchwords:**

Immigration – Refugees – Application for protection visa – Where appellants each applied for protection visas – Where each appellant interviewed by delegate of Minister – Where each appellant assisted by interpreter in interview – Where interviews affected by translation errors in questions asked and responses given – Where

Immigration Assessment Authority ("Authority") conducted review under Pt 7AA of *Migration Act 1958* (Cth) – Where in case of DVO16, Authority not aware of translation errors – Where in case of BNB17, Authority aware of three translation errors – Where in each case Authority did not exercise powers to get new information under Pt 7AA – Where in each case Authority affirmed delegate's decision to refuse visa – Whether Authority's exercise of powers unreasonable – Whether Authority failed to comply with statutory duty to "review" decision under Pt 7AA.

Words and phrases – "automatic merits review", "claims to protection in fact made", "de novo assessment of the merits", "failing to consider substance of claim", "fast track reviewable decision", "Immigration Assessment Authority", "interpretation", "interpretation error", "interpreter", "jurisdictional error", "mistranslation", "new information", "overriding duty", "reasonableness condition", "translation", "translation error".

*Migration Act 1958* (Cth) – ss 51A(1), 54, 55, 56, 65, Pt 7AA.

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

**Appealed from FCA:** [2020] FCA 304

**Held:** Appeals 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.

## Constitutional Law

*Commonwealth of Australia v AJL20*
**C16/2020; C17/2020**: [2021] HCATrans 68

**Date heard:** 13 April 2021

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

**Catchwords:**

> Constitutional law – Chapter III – Immigration detention – Where 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 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 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 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 respondent be released from detention – Whether respondent's removal from Australia "reasonably practicable" – Whether respondent's detention for purpose of removal from Australia – Whether 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 respondent falsely imprisoned.

*Removed from Full Court of the Federal Court of Australia under s 40 of the Judiciary Act 1903 (Cth).*

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## *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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## *Zhang v Commissioner of Police & Ors*
**S129/2020:** [2021] HCATrans 57; [2021] HCATrans 59

**Date heard:** 7-8 April 2021

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

**Catchwords:**

Constitutional law – Implied freedom of political communication – 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 they misstate substance of s 92.3(2) of *Criminal Code*, fail to state offences to which they relate with sufficient precision, or that either or both of sub-ss 92.3(1), (2) invalid – If some or all of warrants wholly or partly invalid, whether one or both of s 3LA orders invalid.

*Special case referred for consideration by Full Court on 12 November 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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# Evidence

## *Deputy Commissioner of Taxation v Shi*

**S211/2020:** [2021] HCATrans 69

**Date heard:** 14 April 2021

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

**Catchwords:**

Evidence – Exceptions to privilege against self-incrimination – *Evidence Act 1995* (Cth) s 128A – Where appellant commenced proceedings against respondent and two others seeking satisfaction of tax liabilities – Where appellant 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 worldwide assets – Where respondent filed two affidavits, one which was served on appellant, 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 appellant in sum of $42,297,437.65 – Where primary judge accepted 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 appellant did not get access to second affidavit – Where majority of Full Court of Federal Court held primary judge erred in certain respects, but dismissed appeal – Whether availability of mechanism to compulsorily examine respondent as judgment debtor relevant to determining whether in interests of justice to grant s 128A certificate – Whether risk of derivative use of privileged information in event that s 128A certificate granted should have been taken into account when determining whether in interests of justice to grant certificate.

**Appealed from FCA (FC):** [2020] FCAFC 100; (2020) 277 FCR 1; (2020) 380 ALR 226

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# Immigration

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

**B66/2020:** [2021] HCATrans 70

**Date heard:** 15 April 2021

**Coram:** Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ

**Catchwords:**

Immigration – Removal and deportation – Where s 5(1) of *Migration Act 1958* (Cth) 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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## *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:**

Immigration – 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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# 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.

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## Constitutional Law

### *Palmer v The State of Western Australia*; *Mineralogy Pty Ltd & Anor v The State of Western Australia*

**B52/2020; B54/2020**: [2021] HCATrans 56

**Catchwords:**

Constitutional law – State legislative power – Federalism – Chapter III of *Constitution* – Where, on 5 December 2001, plaintiffs and defendant entered into Agreement in relation to development of certain projects in Western Australia – Where Agreement ratified by *Iron Ore Processing (Minerology Pty Ltd) Agreement Act 2002* (WA) – Where Agreement subsequently varied in 2008 and ratified by *Iron Ore Processing (Minerology Pty Ltd) Agreement Amendment Act 2008* (WA) – Where various disputes arose in relation to development proposal and plaintiff claimed defendant breached terms of Agreement – Where disputes referred to arbitrator in Queensland – Where *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) enacted in 2020 – Where effect of 2020 Amendment Act to exclude defendant's liability, and prohibit any enforcement or payment of any liability, arising in respect of disputes and arbitrations – Whether 2020 Amendment Act contravenes s 118 of *Constitution* by failure to give full faith and credit and effect to *Commercial Arbitration Act 2013* (Qld) and equivalent legislation in each State and Territory – Whether 2020 Amendment Act contravenes s 6 of *Australia Act 1986* (Cth) because not enacted pursuant to manner and form specified in Agreement - Whether 2020 Amendment Act purports to direct federal courts and courts exercising federal jurisdiction as to manner of exercise of federal jurisdiction, withdraws or limits federal jurisdiction, impermissibly interferes with federal court proceedings, or confers powers and duties repugnant to exercise of federal judicial power – Whether 2020 Amendment Act beyond state legislative power because violates rule of law – Whether 2020 Amendment Act incompatible with institutional integrity of courts – Whether 2020 Amendment Act impermissibly exercises state judicial power without possibility of review by courts – Whether 2020 Amendment Act invalid because alters consequences of actions and conduct of Commonwealth Government – Whether 2020 Amendment Act invalid under s 109 of *Constitution* – Whether 2020 Amending Act invalid for specifically targeting Mr Palmer and depriving him of personal rights and property rights – Whether

2020 Amendment Act involves abdication of State legislative power – Whether 2020 Amendment Act contravenes s 117 of Constitution by discriminating against Mr Palmer as resident of Queensland – Whether 2020 Amendment Act invalid in entirety or in part.

*Special case referred to the Full Court on 6 April 2021*.

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# Immigration

## *Plaintiff M1/2021 v Minister for Home Affairs*

**M1/2021**: [2021] HCATrans 52

**Catchwords:**

Immigration – Judicial review – Non-refoulement obligations – Where plaintiff granted Refugee and Humanitarian (Class XB) Subclass 202 (Global Special Humanitarian) visa in 2006 – Where, on 19 September 2017, plaintiff convicted of unlawful assault and sentenced to 12 months' imprisonment – Where, on 27 October 2017, delegate of Minister cancelled plaintiff's visa pursuant to s 501(3A) of *Migration Act 1958* (Cth) – Where plaintiff made representations to Minister regarding possibility of refoulement if plaintiff returned to home country – Where, on 9 August 2018, delegate of Minister decided not to revoke cancellation decision pursuant to s 501CA(4) of *Migration Act* – Where, in making decision, delegate did not consider whether non-refoulement obligations owed to plaintiff because plaintiff able to apply for protection visa under *Migration Act* – Whether delegate required to consider plaintiff's representations concerning non-refoulement obligations in making non-revocation decision pursuant to s 501CA(4) where plaintiff can apply for protection visa – If so, whether delegate failed to consider representations – If so, whether delegate failed to exercise jurisdiction under *Migration Act* or denied plaintiff procedural fairness – Whether non-revocation decision affected by jurisdictional error.

*Special case referred to the Full Court on 30 March 2021.*

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# 5: SECTION 40 REMOVAL

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

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# 6: Special Leave Granted

The following cases have been granted special leave to appeal to the High Court of Australia.

## Administrative Law

*Sunland Group Limited & Anor v Gold Coast City Council*
**B64/2020:** [2021] HCATrans 61

**Date heard:** 9 April 2021

**Coram:** Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ

**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

*Hearing adjourned.*

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## Aviation

*Wells Fargo Trust Company, National Association (As Owner Trustee) & Anor v VB Leaseco Pty Ltd (Administrators Appointed) & Ors*
**S200/2020:** [2021] HCATrans 63

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

**Catchwords:**

Aviation – Construction of art XI *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (Protocol) – Where *International Interest in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) gives domestic effect to *Convention on International Interests in Mobile Equipment* (Cape Town Convention) – Where art XI(2) of Protocol provides upon occurrence of insolvency-related event, insolvency administrator or debtor shall "give possession of the aircraft object" to creditor – Where applicants owners of aircraft engines leased to first respondent and subleased to second and fourth respondents – Where third respondent appointed administrator of other respondents following insolvency-related event – Where lease imposes on lessees return obligations in respect of aircraft – Where applicants sought compliance with respondents' Art XI(2) obligations to "give possession" – Where third respondent, instead of physically redelivering engines, issued a notice under s 443B(3) of *Corporations Act 2001* (Cth) disclaiming leased engines and leaving engines still attached to aircraft operated by lessees and owned by third parties – Where primary judge held respondents failed to "give possession" of engines – Where respondents successfully appealed to Full Court Federal Court – Whether "give possession" means physical delivery of aircraft objects or merely enables creditor to exercise self-help remedy – Whether respondents failed to "give possession".

**Appealed from FCA (FC):** [2020] FCAFC 168; (2020) 394 ALR 378

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# Competition Law

## *Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd & Ors*

**S33/2021:** [2021] HCATrans 42

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

**Catchwords:**

Competition law – Arbitration determination – Third party access – Calculation of user contributions – Where appellant 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 appellant 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):** [2020] 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; (2020) 95 ALJR 1

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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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## *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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## *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*

**S37/2021:** [2021] HCATrans 44

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

**Catchwords:**

Criminal law – Criminal procedure – Conduct of cross-examination – Where appellant charged with 11 counts of having sexual intercourse without consent – Where two complainants testified as prosecution witnesses – Where appellant gave evidence – Where, during cross-examination, prosecutor asked appellant 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 appellant 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 appellant 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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## *Orreal v The Queen*
**B58/2020:** [2021] HCATrans 71

**Date heard:** 16 April 2021 – *Special leave granted*

**Catchwords:**

Criminal law – Application of proviso – Substantial miscarriage of justice – Prejudicial evidence – Where applicant charged with sexual offending against child – Where, at trial, irrelevant, inadmissible and prejudicial medical evidence placed before jury – Where prosecution, in summing up, contended evidence could be of some use to jury – Where trial judge did not direct jury to disregard inadmissible evidence and directed jury could use evidence – Where applicant unsuccessfully appealed to Court of Appeal – Where majority of Court of Appeal held, despite reception of inadmissible and prejudicial evidence, no substantial miscarriage of justice occurred – Whether, in cases turning on issues of contested credibility, appropriate for intermediate Court of Appeal to make own assessment of admissible evidence for purpose of determining whether no substantial miscarriage of justice occurred.

**Appealed from QSC (CA):** [2020] QCA 95

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## *Park v The Queen*
**S180/2020:** [2021] HCATrans 75

**Date heard:** 16 April 2021 – *Special leave granted*

**Catchwords:**

Criminal law – Sentencing – Guilty plea reduction - Where s 22(1) of *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that, in passing sentence on offender who has pleaded guilty to offence, court may impose lesser penalty "than it would otherwise have imposed" – Where applicant pleaded guilty to offence – Where offence has 5 year maximum penalty but jurisdictional limit of 2 years applies when dealt with summarily by District Court – Where primary judge would have imposed sentence of 2 years 8 months for offence and applied 25 per cent reduction to sentence pursuant to s 22(1) – Where applicant sentenced to 2 years imprisonment – Where applicant appealed to Court of Criminal Appeal on basis

reduction should have been applied to 2 years (jurisdictional limit applied to appropriate sentence) instead of 2 years 8 months (appropriate sentence before jurisdictional limit applied) - Where Court of Criminal Appeal dismissed appeal and held "would otherwise have imposed" refers to appropriate sentence despite jurisdictional limit, and jurisdictional limit only relevant if sentence post-reduction exceeds jurisdictional limit – Correct construction of "would otherwise have imposed" – Whether reduction of sentence applies to sentence appropriate to judicial officer but beyond jurisdictional limit or to sentence court would actually have imposed if no guilty plea.

**Appealed from NSW (CCA):** [2020] NSWCCA 90; (2020) 282 A Crim R 551

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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

## *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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# Immigration

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

**S34/2021:** [2021] HCATrans 46

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

**Catchwords:**

Immigration – 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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# 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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## *NSW Commissioner of Police v Cottle & Anor*

**S149/2020:** [2021] HCATrans 62

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

**Catchwords:**

Industrial law – Jurisdiction of Industrial Relations Commission of New South Wales (IRC) – Police – Where applicant made decision under s 72A of *Police Act 1990* (NSW) to retire first respondent police officer on medical grounds – Where first respondent applied for unfair dismissal remedy in IRC under s 84 of *Industrial Relations Act 1996* (NSW) – Where *Police Act* does not expressly provide for review by IRC for medical retirement but does for other types of removal – Where applicant successfully challenged IRC's jurisdiction, following High Court's decision in *Commissioner for*

*Police for NSW v Eaton* (2013) 252 CLR 1 – Where Full Bench overturned decision – Where applicant successfully sought judicial review of Full Bench decision by NSW Supreme Court – Where first respondent successfully appealed to Court of Appeal – Whether IRC has jurisdiction to hear and determine unfair dismissal application filed by police office retired on medical grounds – Whether Court of Appeal applied correct statutory construction principles in interpreting two overlapping statutory schemes.

**Appealed from NSW (CA):** [2020] NSWCA 159; (2020) 298 IR 202

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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 heard:** 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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# 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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## *Commissioner of Taxation v Carter & Ors*
**S181/2020:** [2021] HCATrans 72

**Date heard:** 16 April 2021 – *Special leave granted*

**Catchwords:**

Taxation – Trust distribution – Effect of disclaimer – Where respondents default beneficiaries of trust – Where trust deed provided respondents entitled to income of trust for given tax year (ending 30 June) if trustee did not make effective determination departing from default position – Where trustee had not made effective determination as at 30 June 2014 – Where s 97(1) of *Income Tax Assessment Act 1936* (Cth) provides if beneficiary of trust is "presently entitled" to share of trust income, that share included in assessable income of beneficiary – Where, following audit, on 27 September 2015, applicant issued income tax assessments to respondents for income year ended 30 June 2014 including their share of 2014 trust income – On 30 September 2016, respondents purported to disclaim entitlement to income from trust for 2014 income year – Where Full Court of Federal Court considered themselves bound to hold general law extinguishes entitlement to trust income ab initio and held disclaimers displaced application of s 97(1) – Whether disclaimer of gift render gift void ab initio for all purposes – Whether, if beneficiary disclaims trust distribution after end of income year,

beneficiary "presently entitled" to distribution for purposes of s 97(1).

**Appealed from FCA (FC):** [2020] FCAFC 150

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# Torts

## *Arsalan v Rixon; Nguyen v Cassim*

**S35/2021; S36/2021:** [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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## *Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited*

**S208/2020:** [2021] HCATrans 74

**Date heard:** 16 April 2021 – *Special leave granted on limited grounds*

**Catchwords:**

Torts – Negligence – Breach of duty – Obvious risk – Where applicant injured in competition conducted by respondent when horse she was riding slipped and fell – Where applicant contended cause of fall was deterioration in ground surface and respondent negligent in failing to plough ground at site of event, failing to stop competition, or failing to warn competitors when ground became unsafe – Where prior to applicant's participation, there had already been 7 falls – Where trial judge held no breach of duty of care established – Where majority of Court of Appeal held applicant failed to establish cause of fall was ground surface deterioration and therefore failed to establish respondent breached duty – Where majority of Court of Appeal held even if breach established, s 5L of *Civil Liability Act 2002* (NSW) applied to exclude respondent's liability as injury suffered was manifestation of "obvious risk" – Whether Court of Appeal's approach to evidence of ground surface deterioration did not afford applicant rehearing – Proper approach to identification of "obvious risk".

**Appealed from NSWSC (CA):** [2020] NSWCA 263

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# 7: Cases Not Proceeding or Vacated

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# 8: SPECIAL LEAVE REFUSED

## Publication of Reasons: 8 April 2021 (Canberra)

| *No.* | *Applicant* | *Respondent* | *Court appealed from* | *Result* |
|---|---|---|---|---|
| 1. | BJB17 & Ors | Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M132/2020) | Federal Court of Australia [2020] FCA 1683 | Application dismissed [2021] HCASL 54 |
| 2. | Simmonds | Kent J & Ors (P49/2020) | High Court of Australia [2020] HCASL 246 | Application dismissed [2021] HCASL 55 |
| 3. | Simmonds | Strickland J & Ors (P50/2020) | High Court of Australia [2020] HCASL 244 | Application dismissed [2021] HCASL 56 |
| 4. | In the matter of an application by Simon Golding for leave to appeal (S13/2021) | | High Court of Australia | Application dismissed [2021] HCASL 57 |
| 5. | Choi | University of Technology Sydney (S16/2021) | Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 342 | Application dismissed [2021] HCASL 58 |
| 6. | Hunt | Longhurst & Anor (S214/2020) | Supreme Court of New South Wales (Court of Appeal) [2004] NSWCA 91 | Application dismissed [2021] HCASL 59 |
| 7. | Construction, Forestry, Maritime, Mining and Energy Union & Ors | Australian Building and Construction Commissioner & Anor (B79/2020) | Full Court of the Federal Court of Australia [2020] FCAFC 203 | Application dismissed with costs [2021] HCASL 60 |
| 8. | Khadem | Penk (M93/2020) | Full Court of the Family Court of Australia | Application dismissed with costs [2021] HCASL 61 |
| 9. | Choice Pharmacy Vincentia Pty Ltd | Vincentia MC Pharmacy Pty Ltd & Ors (S190/2020) | Full Court of the Federal Court of Australia [2020] FCAFC 163 | Application dismissed with costs [2021] HCASL 62 |
| 10. | Khedrlarian | Bauer Media Pty Ltd t/as Network Services Company & Anor (S232/2020) | Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 288 | Application dismissed with costs [2021] HCASL 65 |
| 11. | Findex Group Limited & Ors | McKay & Anor (S215/2020) | Full Court of the Federal Court of Australia [2020] FCAFC 182 | Application dismissed with costs [2021] HCASL 63 |

| *No.* | *Applicant* | *Respondent* | *Court appealed from* | *Result* |
|---|---|---|---|---|
| 12. | Commissioner of Taxation | ACN 154 520 199 Pty Ltd (in liquidation) (S219/2020) | Federal Court of Australia | Application dismissed with costs [2021] HCASL 64 |
| 13. | Healius | Commissioner of Taxation (S201-205/2020) | Full Court of the Federal Court of Australia [2020] FCAFC 173 | Application dismissed [2021] HCASL 66 |

## 12 April 2021: Canberra and by video link

| *No.* | *Applicant* | *Respondent* | *Court appealed from* | *Results* |
|---|---|---|---|---|
| 1. | Anderson & Anor | Stonnington City Council (M102/2020) | Supreme Court of Victoria (Court of Appeal) [2020] VSCA 229 | Refused with costs [2021] HCATrans 65 |
| 2. | Liberty Mutual Insurance Company ARBN 086 083 605 trading as Liberty International Underwriters | Swashplate Pty Ltd (S161/2020) | Full Court of the Federal Court of Australia [2020] FCAFC 137 | Refused with costs [2021] HCATrans 64 |
| 3. | Curran | The Queen (S186/2020) | Supreme Court of New South Wales (Court of Criminal Appeal) [2020] NSWCCA 171 | Refused [2021] HCATrans 66 |
| 4. | Chief Commissioner of State Revenue | Benidorm Pty Ltd (S221/2020) | Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 285 | Refused with costs [2021] HCATrans 67 |

# Publication of Reasons: 15 April 2021 (Canberra)

| *No.* | *Applicant* | *Respondent* | *Court appealed from* | *Result* |
|---|---|---|---|---|
| 1. | Herriot | Howes<br>(B3/2021) | Full Court of the Family Court of Australia | Application dismissed<br>[2021] HCASL 67 |
| 2. | FEY17 | Minister for Home Affairs<br>& Anor<br>(B9/2021) | Federal Court of Australia<br>[2020] FCA 1014 | Application dismissed<br>[2021] HCASL 68 |
| 3. | Bakare | The Queen<br>(B77/2020) | Supreme Court of Queensland (Court of Appeal)<br>[No MNC] | Application dismissed<br>[2021] HCASL 69 |
| 4. | Giurina | Director of Public Prosecutions (On behalf of the Informant Detective Acting Sergeant Anna Louise McIlroy)<br>& Anor<br>(M2/2021) | Supreme Court of Victoria (Court of Appeal)<br>[2020] VSCA 54 | Application dismissed<br>[2021] HCASL 70 |
| 5. | In the matter of an application by Maria Fokas for leave to appeal<br>(S14/2021) | | High Court of Australia | Application dismissed<br>[2021] HCASL 71 |
| 6. | Marino | Bello &<br>Anor<br>(S17/2021<br>) | Full Court of the Family Court of Australia | Application dismissed<br>[2021] HCASL 72 |
| 7. | Craig & Ors | Johnson & Ors<br>(S234/2020) | Supreme Court of New South Wales (Court of Appeal)<br>[2020] NSWCA 278 | Application dismissed<br>[2021] HCASL 73 |
| 8. | Alskeini | Queensland University of Technology<br>(B8/2021) | Supreme Court of Queensland (Court of Appeal)<br>[2020] QCA 285 | Application dismissed<br>[2021] HCASL 74 |
| 9. | Zekry | Zekry<br>(M5/2021) | Supreme Court of Victoria (Court of Appeal)<br>[2020] VSCA 336 | Application dismissed<br>[2021] HCASL 75 |
| 10. | YKSB | Minister for Home Affairs<br>& Anor<br>(M8/2021) | Full Court of the Federal Court of Australia<br>[2020] FCAFC 22 | Application dismissed<br>[2021] HCASL 76 |
| 11. | AJE18 | Minister for Home Affairs<br>& Anor<br>(M113/2020) | Federal Court of Australia<br>[2020] FCA 1387 | Application dismissed<br>[2021] HCASL 77 |

| *No.* | *Applicant* | *Respondent* | *Court appealed from* | *Result* |
|---|---|---|---|---|
| 12. | ASD17 | Minister for Immigration and Border Protection & Anor<br>(S5/2021) | Federal Court of Australia<br>[2020] FCA 1653 | Application dismissed<br>[2021] HCASL 78 |
| 13. | DOQ17 | Australian Financial Security Authority & Ors<br>(S220/2020) | Full Court of the Federal Court of Australia<br>[2020] FCAFC 219 | Application dismissed<br>[2021] HCASL 79 |
| 14. | Queensland Taxi Licence Holders | State of Queensland<br>(B4/2021) | Supreme Court of Queensland (Court of Appeal)<br>[2020] QCA 282 | Application dismissed with costs<br>[2021] HCASL 80 |
| 15. | Kaur & Ors | Minister for Immigration, Citizenship, Migrant Services ad Multicultural Affairs & Anor<br>(M125/2020) | Federal Court of Australia<br>[2020] FCA 1677 | Application dismissed with costs<br>[2021] HCASL 81 |
| 16. | Telstra Corporation Limited | Brisbane City Council & Ors<br>(M126/2020) | Full Court of the Federal Court of Australia<br>[2020] FCAFC 200 | Application dismissed with costs<br>[2021] HCASL 82 |
| 17. | Telstra Corporation Limited | Melbourne City Council & Ors<br>(M127/2020) | Full Court of the Federal Court of Australia<br>[2020] FCAFC 200 | Application dismissed with costs<br>[2021] HCASL 82 |
| 18. | Raibevu | Minister for Home Affairs<br>(S170/2020) | Full Court of the Federal Court of Australia<br>[2020] FCAFC 35 | Application dismissed with costs<br>[2021] HCASL 83 |
| 19. | Maradaca Pty Limited<br>& Anor | Wormald & Ors<br>(S227/2020) | Supreme Court of New South Wales (Court of Appeal)<br>[2020] NSWCA 289 | Application dismissed with costs<br>[2021] HCASL 84 |
| 20. | Fuge & Anor | Commonwealth Bank of Australia<br>(S244/2020) | Full Court of the Federal Court of Australia<br>[2020] FCAFC 217 | Application dismissed with costs<br>[2021] HCASL 85 |
| 21. | FDQ18 | Minister for Immigration, Citizenship, Migrant services and Multicultural Affairs & Anor<br>(C18/2020) | Federal Court of Australia<br>[2020] FCA 1735 | Application dismissed with costs<br>[2021] HCASL 86 |
| 22. | Dughetti | The Queen<br>(M118/2020) | Supreme Court of Victoria<br>(Court of Appeal)<br>[2019] VSCA 217 | Application dismissed<br>[2021] HCASL 87 |

| *No.* | *Applicant* | *Respondent* | *Court appealed from* | *Result* |
|---|---|---|---|---|
| 23. | Mandie & Ors | Memart Nominees Pty Ltd (M123/2020) | Supreme Court of Victoria (Court of Appeal) [2020] VSCA 281 | Application dismissed with costs [2021] HCASL 88 |
| 24. | Arcidiacono & Anor | The Owners - Strata Plan No. 17719 (S212/2020) | Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 269 | Application dismissed with costs [2021] HCASL 89 |
| 25. | Arcidiacono & Anor | The Owners - Strata Plan No. 61233 (S213/2020) | Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 269 | Application dismissed with costs [2021] HCASL 89 |

# 16 April 2021: Canberra and by video link

| *No.* | *Applicant* | *Respondent* | *Court appealed from* | *Result* |
|---|---|---|---|---|
| 1. | Wagner Investments Pty Ltd & Anor | Toowoomba Regional Council (B60/2020) | Supreme Court of Queensland (Court of Appeal) [2020] QCA 191 | Refused with costs [2021] HCATrans 73 |
| 2. | Mendieta-Blanco | The Queen (M116/2020) | Supreme Court of Victoria (Court of Appeal) [2020] VSCA 265 | Refused [2021] HCATrans 76 |