SHORT PARTICULARS OF CASES
APPEALS

OCTOBER 2025

****

THE KING v MCGREGOR (S45/2025)

Court appealed from: Court of Criminal Appeal of the Supreme Court of New South Wales
[2024] NSWCCA 200

Date of judgment: 1 November 2024

Special leave granted: 3 April 2025

The respondent pleaded guilty to four federal child sexual abuse offences and admitted his guilt of an additional federal child sexual abuse offence to be taken into account in sentencing. The primary judge, Herbert DCJ, sentenced the respondent to an aggregate term of imprisonment of eleven years and six months, with a non-parole period of eight years. Count One relates to the offence of engaging in persistent sexual abuse of a child outside of Australia and carries a mandatory minimum sentence of seven years under section 16AAA of the *Crimes Act 1914* (Cth) ('the Crimes Act').

The respondent sought leave to appeal the aggregate sentence imposed on him by Herbert DCJ on the basis that the wrong formula was used when applying the discount for the respondent's guilty plea, and his assistance to authorities. The appellant conceded the error in this regard, and the Court of Criminal Appeal allowed the appeal and quashed the sentence imposed by Herbert DCJ. In the context of re-sentencing, the appellant raised issues with the permissible structure of the respondent's sentence, specifically:

1. That an aggregate sentence cannot be imposed in respect of offences that include an offence to which a mandatory minimum sentence applies; and

2. In any event, aggregate sentencing under s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the NSW Act') is not applicable to sentences for federal offenders due to the unique drafting of that provision.

The Court of Criminal Appeal rejected the appellant's arguments and proceeded to impose a lesser single aggregate sentence of ten years and nine months for all the offences. The appellant appeals to this Court raising the following questions of law:

1. Where s 16AAA of the Crimes Act sets a mandatory minimum sentence for a particular offence, should a sentencing court impose a separate sentence for that offence, or is it permissible to impose an aggregate sentence in respect of that offence and any other federal offence for which the offender is before the court to be sentenced by applying a State or Territory aggregate sentencing regime; and

2. Is s 53A of the NSW Act picked up by s 68(1) of the *Judiciary Act 1903* (Cth) and therefore applicable to the sentencing of federal offenders in New South Wales?

The parties agree that this case largely turns on the construction and proper operation of s 16AAA of the Crimes Act, and whether it requires the imposition of a sentence of imprisonment exclusively for a listed offence.

The appellant submits that the treatment of guilty pleas illustrates the inconsistency between the Crimes Act and the NSW Act for a federal offender when applying discounts (whether discretionary or mandatory) to determine sentencing. The appellant contends that the Court of Criminal Appeal's position invites significant uncertainty in sentencing formulas which are not workable. The respondent submits that the unanimous decision of the Court of Criminal Appeal, constituted by a bench of five judges, was correct in relation to the issues it determined and does not require re-agitation.

The grounds of appeal are:

1. The Court of Criminal Appeal erred in imposing an aggregate sentence under s 53A of the NSW Act in respect of Count One, to which a mandatory minimum sentence under s 16AAA of the Crimes Act applied.

2. Further or in the alternative to ground one, the Court of Criminal Appeal erred in imposing an aggregate sentence under s 53A of the NSW Act in respect of the respondent's four Commonwealth offences.

CULLEN v STATE OF NEW SOUTH WALES (S47/2025)

Court appealed from: Court of Appeal of the Supreme Court of New South Wales
[2024] NSWCA 310

Date of judgment: 20 December 2024

Special leave granted: 3 April 2025

At an 'Invasion Day' rally in Sydney on 26 January 2017, the appellant was injured when she fell and her head hit the ground, during an incident involving New South Wales police officers from the Operational Services Group ('OSG officers').

In the lead-up to the incident, a police inspector directed a police sergeant to extinguish any fire if the burning of a flag was attempted and there would be a risk to public safety. When a protester bent down and squirted liquid on an Australian flag while another protester held out a lighter near the flag, OSG officers rapidly entered the crowd (without prior announcement) and discharged at least one fire extinguisher. Approximately fifteen metres away from the attempted flag burning, a police officer video-recording the incident had the camera she was holding slapped from her hand by a protester, Mx Williams. Leading Senior Constable Livermore pursued Williams to effect an arrest for assault. Livermore grabbed Williams and the two fell down, knocking over the appellant in the process.

The appellant sued the respondent, her claims including that her injuries had been caused by the negligence of OSG officers. In its defence, the respondent raised section 43A of the *Civil Liability Act 2002* (NSW) ('the CLA'), which relevantly provides that a public authority cannot be liable where it exercised a statutory power, of a kind that persons generally are not authorised to exercise without specific statutory authority (defined in s 43A(2) as a 'special statutory power'), unless such exercise of the power was unreasonable.

The primary judge, Elkaim AJ, gave judgment for the appellant and awarded damages in the sum (agreed by the parties) of $800,000. His Honour found that the appellant's injuries were caused by the OSG officers' breach of a duty of care that they owed to the appellant and other members of the public present at the Invasion Day rally. Upon applying the general principles prescribed in s 5B of the CLA, Elkaim AJ found that there was a plain risk of harm consequent upon multiple OSG officers rushing unannounced into the crowd carrying fire extinguishers. His Honour held that s 43A of the CLA applied, but found that the OSG officers had acted recklessly, such that their actions amounted to an unreasonable exercise of power within the meaning of s 43A(3).

An appeal by the respondent was allowed by the Court of Appeal (Gleeson and Kirk JJA; White JA dissenting). The majority held that the OSG officers owed a duty of care, being a duty to take reasonable care to avoid the risk of their actions inflicting physical injury on persons in the immediate vicinity of the OSG officers' operational response during the protest march. Their Honours held that the finding of breach of a duty of care must be set aside, as the primary judge had failed to have regard to the obligations of the OSG officers to take action, including in crowded situations, to prevent breaches of the peace. It was impractical for the OSG officers to have made an announcement, or for only one of them to have walked through the crowd carrying a fire extinguisher to where the flag seemed

about to be burned. Gleeson and Kirk JJA also found that even if breach of a duty of care had occurred, on the application of the principles of causation prescribed in s 5D of the CLA, the OSG officers' actions had not caused the harm suffered by the appellant. The independent choice and actions of Mx Williams had led to the difficult arrest, which caused the appellant to be injured. Mx Williams' decision and actions did not occur in the ordinary course of things that might flow from the OSG officers' actions some distance away.

White JA, however, would have dismissed the appeal, finding that breach and causation had been made out. His Honour found that the OSG officers' actions had inflamed the situation, increasing the risk of harm to bystanders and causing the melee that led to the appellant's injury. The voluntary actions of Mx Williams, and the ensuing forceful arrest, were a reasonably foreseeable consequence of the OSG officers' actions.

In relation to s 43A of the CLA, the Court of Appeal unanimously held that the provision was inapplicable, as the OSG officers were not exercising a 'special statutory power'. This was because any member of the public was entitled to act, without statutory authorisation, to prevent or put out a fire (as a response to a breach of the peace) or to apprehend Mx Williams after witnessing the assault committed.

The grounds of appeal are:

1. The majority of the Court of Appeal erred in determining whether the respondent breached the duty of care owed to the appellant because:

    a. the scope of the duty of care was unjustifiably confined with the result that the risk of harm was not correctly identified; and

    b. consequent to the risk of harm not being correctly identified, the majority erred in its determination of whether the duty of care owed was breached.

2. The majority of the Court of Appeal erred in determining that the conduct of the OSG officers was not causative of the harm suffered by the appellant due to it being beyond the scope of the respondent's legal liability under s 5D(1)(b) of the CLA because:

    a. the harm suffered was of the very kind likely to happen as a result of the respondent's negligence; and

    b. there are sound policy reasons for the harm caused being held to be within the scope of the respondent's liability.

By notice of contention, the respondent seeks to raise the following grounds:

1. The Court of Appeal erred in deciding that s 43A of the CLA did not apply in relation to the determination of breach of any duty of care owed by the OSG officers to the appellant.

2. The Court of Appeal erred in determining that the appellant had established factual causation in accordance with s 5D(1)(a) of the CLA.

COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v BENDEL & ANOR (M47/2025)

Court appealed from: Full Court of the Federal Court of Australia [2025] FCAFC 15

Date of judgment: 19 February 2025

Special leave granted: 12 June 2025

The first respondent is the sole director and secretary of, and the beneficial owner of the shares in, both the second respondent, Gleewin Investments Pty Ltd, and Gleewin Pty Ltd ('Gleewin'). Gleewin is the trustee of a trust ('the Trust'), of which the first and second respondents are discretionary beneficiaries.

The trust deed of the Trust provided that Gleewin had a discretion to set aside any part of the Trust's income for one or more of the beneficiaries, each such amount to be held by the trustee 'on a separate trust' for the beneficiary, with the trustee having power to invest the amount in any of certain authorised investments, which included the lending of money with or without interest.

In each of the income years ended 30 June 2014 to 30 June 2017, Gleewin passed a resolution that resulted in the first and second respondents each becoming presently entitled to a share of the Trust's net income. Gleewin recorded the amounts as credits in a current account in the name of each of the respondents, but did not recognise in its accounts any separation of assets reflecting the amounts set aside. The second respondent recorded in its balance sheet the cumulative total of its unpaid entitlements from the Trust.

The appellant assessed each of the respondents for tax on the basis that:

(a) the second respondent had unpaid present entitlements to prior year trust income, which entitlements comprised loans, within the meaning of section 109D(3) of the *Income Tax Assessment Act 1936* (Cth) ('the 1936 Act'), made by the second respondent to Gleewin;

(b) the loans were deemed to be dividends under s 109D(1) of the 1936 Act;

(c) the dividends were deemed to be paid out of profits under s 109Z of the 1936 Act;

(d) the dividends deemed to be paid out of profits were assessable income pursuant to s 44(1) of the 1936 Act and included in Gleewin's net income; and

(e) the beneficiaries entitled to Gleewin's income were liable to assessment under s 97 of the 1936 Act on their proportionate shares of the deemed dividends.

After objections by the respondents were disallowed by the appellant, the respondents commenced review proceedings in the Administrative Appeals Tribunal ('the Tribunal'). The Tribunal found that no separate trust in fact arose by Gleewin's setting aside of amounts pursuant to its resolutions, but that the balance of a corporate beneficiary's unpaid present entitlement to trust income could not be a loan to the trustee within the meaning of s 109D(3) of the 1936 Act.

The Tribunal then set aside the objection decisions and remitted the respondents' objections to the appellant for reconsideration.

In an appeal by the appellant to the Federal Court, the respondents accepted that a debtor-creditor relationship existed between Gleewin and the second respondent. However, the appellant's appeal was unanimously dismissed by the Full Court (Logan, Hespe and Neskovcin JJ). Their Honours held that a 'loan' for the purpose of s 109D(3) of the 1936 Act required a transaction or a financial accommodation that in substance created an obligation to repay an identifiable sum. The Full Court found that the necessary anterior transfer of a sum, in this case by or at the direction of the second respondent, was not present; it was not constituted by the second respondent's deciding to refrain from calling for the payment of amounts to which it was entitled.

The sole ground of appeal is:

- The Full Court ought to have found that the second respondent made 'loans' (as defined in s 109D(3) of the 1936 Act) to Gleewin as trustee for the Trust in the income years ended 30 June 2014 to 2017 when it agreed or acquiesced to Gleewin retaining and using, for the purposes of the Trust, amounts to which it was presently entitled.

By notice of contention, the respondents seek to raise the following ground:

- The Court below failed to decide that, if the amounts of income of the Trust for the years ended 30 June 2013 to 2016 ('original years') to which the second respondent was presently entitled but had not been paid were 'loans' (as defined in s 109D(3) of the 1936 Act), then s 6-25(1) of the *Income Tax Assessment Act 1997* (Cth) prevented each of those amounts being included in the assessable income of the Trust for the year after the relevant original year to the extent the same amount was included in the assessable income of the Trust for the relevant original year.

EGH19 v COMMONWEALTH OF AUSTRALIA (S55/2025)

Date special case referred to Full Court: 19 August 2025

The plaintiff, who is a citizen of Papua New Guinea, first arrived in Australia in June 2000 at the age of eleven as a dependent on his father's temporary visa. In November 2006, the plaintiff, while still a minor, was convicted of murder and after an appeal was resentenced to 17.5 years imprisonment, with a non-parole period of 12.5 years.

While the plaintiff was in prison, his parents and siblings applied for protection visas, which were granted in 2014. In 2017, the plaintiff applied for a protection visa while still in prison. There followed a number of decisions and reconsiderations. In October 2022, the plaintiff was granted a protection visa and released from immigration detention. In 2023, the plaintiff committed domestic violence offences against his partner and her father. He was imprisoned for three months commencing in February 2024 in relation to offences against his partner's father. In May 2024, his protection visa was cancelled pursuant to section 501(3A) of the *Migration Act 1958* (Cth) ('the Migration Act'), just before his sentence expired. The plaintiff sought to have that decision revoked. He was subsequently imprisoned in relation to offences against his partner, with a non-parole period ending in December 2024. Upon his release on parole, he was taken into immigration detention. On 1 April 2025, a delegate decided not to revoke the decision to cancel the plaintiff's protection visa. The delegate then granted the plaintiff a Bridging Visa subject to conditions, including conditions 8620 (curfew conditions) and 8621 (electronic monitoring conditions by the use of a monitoring device to be worn at all times). Those conditions are said to be authorised by clause 070.612A(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) ('the Migration Regulations'). The plaintiff was released from immigration detention, but remains subject to his parole conditions. At issue in these proceedings is the constitutional validity of those conditions.

In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 ('*NZYQ*'), the constitutional limit ('the limit') was explained by this Court as '*a law enacted by the Commonwealth Parliament which authorises the detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the Constitution unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose*' because such detention is '*penal or punitive unless justified as otherwise*'.

Clause 070.612A was originally enacted as part of the legislative response to this Court's decision in *NZYQ*. After it was found to be invalid by this Court in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, cl 070.612A(1) was amended. However, the plaintiff submits that its operation to impose conditions 8620 and 8621 retains the same features and so remains punitive. The plaintiff submits that when s 504(1) of the Migration Act is read consistently with the limit, it is incapable of authorising cl 070.612A(1) of Sch 2 to the Migration Regulations, to the extent that that clause purports to authorise the imposition of conditions 8620 and 8621. Clause 070.612A(1) is to that extent, and conditions 8620 and 8621 are, therefore *ultra vires* s 504(1) and invalid.

The defendant submits that cl 070.612A(1) is valid insofar as it authorises the Minister to impose the curfew and monitoring conditions. Although the defendant accepts that the power to impose the curfew and monitoring conditions is *prima facie* punitive, that power is not properly characterised as punitive because:

- it has a legitimate and non-punitive purpose — namely, to protect the Australian community, or any part thereof, from serious harm of the kind caused by the commission of serious offences; and

- having regard to the significant limitations on the power to impose the conditions, the power is reasonably capable of being seen as necessary for that purpose.

The questions of law stated for the opinion of the Full Court in the special case are:

1. To the extent cl 070.612A(1) of Sch 2 to the Migration Regulations authorises the imposition of condition 8620 on a Bridging R (Subclass 070) visa, is that clause invalid because it exceeds the power conferred by s 504 of the Migration Act when that power is construed subject to Ch III of the *Constitution*?

2. To the extent cl 070.612A(1) of Sch 2 to the Migration Regulations authorises the imposition of condition 8621 on a Bridging R (Subclass 070) visa, is that clause invalid because it exceeds the power conferred by s 504 of the Migration Act when that power is construed subject to Ch III of the *Constitution*?

3. Who should pay the costs of the Special Case?

SUNSHINELOANS PTY LTD (ACN 092 821 960) v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (B23/2025)

Court appealed from: Full Court of the Federal Court of Australia [2025] FCAFC 32

Date of judgment: 24 March 2025

Special leave granted: 7 August 2025

This appeal concerns the principles which govern the circumstances in which a judge will be disqualified from the hearing of a civil penalty case on the grounds of apprehended bias. The appellant is a credit provider and is regulated by the *National Consumer Credit Protection Act 2009* (Cth) ('the Credit Act'), including the National Credit Code as contained in Schedule 1 to the Credit Act. The respondent brought proceedings against the appellant alleging contraventions of the Credit Act and the National Credit Code, and sought relief under sections 166, 167 and 177 of the Credit Act, as well as s 21 of the *Federal Court of Australia Act 1976* (Cth) for declarations, injunctions and the payment of pecuniary penalties arising out of the alleged contraventions.

The original hearing was divided into two stages: 1) the liability hearing; and 2) the penalty hearing. The primary judge (Derrington J) made adverse credibility findings about the appellant's director as a witness in the liability decision. The appellant intended to rely on further evidence of the director in the penalty hearing, and filed an interlocutory application for the primary judge to recuse himself from the further hearing of the case on the assertion that adverse findings made in the liability decision meant that the primary judge's determination of the penalty would be affected by apprehended bias. While this assertion was rejected by Derrington J (and upheld by the Full Court), the primary judge independently identified a different possible basis for recusal, namely that he would be required to make a second assessment of a witness's credibility. The primary judge therefore recused himself on this basis and the matter was re-allocated to another judge of the Federal Court to preside over the penalty hearing.

The respondent obtained leave to appeal to the Full Court of the Federal Court and a majority (Bromwich and Colvin JJ, Perram J dissenting) overturned the primary judge's decision to recuse himself and remitted the penalty hearing back to the primary judge. The appellant now appeals to this Court on the basis that the Full Court incorrectly applied the *Ebner* principles.

The test of apprehended bias as set out in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 ('*Ebner*') is whether a fair-minded lay observer might reasonably apprehend the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

The appellant submits that the apprehension of bias principle embraces all variants of the absence of impartiality and independence as per the *Ebner* principles. The appellant contends that the majority of the Full Court incorrectly considered this case to fall within a category in which 'the judge is permitted or required to have regard to, and apply, findings made at an earlier stage of the proceedings'. A logical connection between findings made at the earlier stage of the proceedings (the liability hearing) and the feared impartiality at the later stage cannot be

established merely on the basis that the judge has determined facts in dispute or had regard to evidence not led at the penalty hearing.

The respondent contends that two aspects of the *Ebner* test are important to this appeal:

- The reasonableness of any suggested apprehension is to be considered in the context of ordinary judicial practice; and

- Just as litigants do not choose their judges, judges do not choose their cases and they are not at liberty to decline to hear cases without good cause.

The respondent submits that the decision of the Full Court involved no error, and while each of the judges on the Full Court accepted that the primary judge failed to apply the *Ebner* test to the particular circumstances before him, they then proceed to apply the *Ebner* test afresh, with the majority judges identifying the correct test and applicable principles regarding the witness's credibility in relation to further evidence at the penalty hearing, in circumstances where adverse findings as to credibility had already been made in the liability decision.

The grounds of appeal are:

1. The majority erred in failing to find that the primary judge, having in his determination that the appellant had contravened s 24(1A) of the National Credit Code, found the evidence of the appellant (including that of its director) not to be credible, had correctly recused himself from hearing the respondent's pecuniary penalty application.

2. The majority ought properly to have held that the primary judge's decision to recuse himself from hearing the respondent's pecuniary penalty application was in accordance with the *Ebner* principles, and satisfied the double might test.

3. The majority erred in finding that in cases where 'the judge is permitted or required, or at least entitled to have regard to, and apply, findings made at an earlier stage of the proceedings', 'a logical connection between findings made at the earlier stage of the proceedings and the feared [lack of] impartiality at the later stage cannot be established merely on the basis that the judge has determined facts in dispute or had regard to evidence that is not led at the penalty hearing'.

4. The majority ought to have found that even in two stage proceedings, reference must be had to the totality of the proceeding's own circumstances, and that the test being one of possibility, not probability, the primary judge's conclusion that the evidence of the appellant was not credible, might cause the lay observer to apprehend that the judge 'might be unable completely to discard a mind-set … unfavourable to the appellant to a degree incompatible with the degree of neutrality required dispassionately to resolve' the appropriate amount of the pecuniary penalty to be paid.

THE KING v TSALKOS (M64/2025)

Court appealed from: Supreme Court of Victoria Court of Appeal [2024] VSCA 324

Date of judgment: 19 December 2024

Special leave granted: 7 August 2025

On 31 August 2022, the respondent was found guilty by a jury of two charges of kidnapping, two charges of rape with aggravating circumstances, and four charges of gross indecency with a person under 16 for offences committed on 7 May 1987 against two female complainants, AB and JJ. AB and JJ, who were 16 and 15 years of age at the time, had recently begun soliciting for sex work and were doing so on the night that the offending occurred. They reported to the police shortly after the offending but concocted a story that they were hitchhiking and were picked up by the man who had raped them because they did not want to tell anyone they had been engaged in sex work. The respondent was identified as a person of interest based on DNA evidence and charged in 2020.

At the trial, evidence was led that AB and JJ were taken to hospital on the day of the offending. At the time, AB's mother did not know that she was engaging in sex work. AB's mother gave evidence that when she visited her daughter at the hospital, AB was 'very, very distressed', 'very, very upset' and 'very emotional' ('the distress evidence'). The respondent denied the offending occurred and gave evidence that he had engaged in consensual sexual activity with AB and JJ on the night in question.

The prosecution referred to the distress evidence as independent evidence that supported AB's version of events. The trial judge directed the jury that they could use the distress evidence as indirect or circumstantial evidence that supported the case that AB did not consent to the sexual activity, or alternatively, they could accept the respondent's argument that there may have been other reasons she was upset, for example that her mother might have found out that she was engaged in sex work.

The respondent sought leave to appeal against his convictions and sentence. He argued that a substantial miscarriage of justice had occurred because the jury was invited to use the distress evidence as independent support for AB's account. The Court of Appeal (Emerton P, Priest, McLeish and Boyce JJA; Niall JA dissenting) allowed the appeal on this ground, set aside the respondent's convictions, and ordered a re-trial. The majority (Emerton P, Priest, McLeish and Boyce JJA) held that the distress evidence was admissible as context but was not capable of being used by the jury as independent, indirect, or circumstantial evidence of the events alleged. In this case they found that the distress evidence could not be used as independent support for AB's account as there were other possible causes for her distress. The majority held that for distress to be used as independent evidence, there must be a direct connection between the distress and the alleged events, and the relevant factors to be considered are the same as those required to be used for corroboration evidence at common law, as set out in *R v Flannery* [1969] VR 586. In dissent, Niall JA (as his Honour then was) held that the trial judge's directions read as a whole did not invite the jury to treat the distress evidence as independent corroboration of AB's account, and that while there were

other possible causes, it was open to the jury to use the distress evidence as evidence that AB had been sexually assaulted.

In this Court, the appellant submits that the Court of Appeal erred in concluding that the distress evidence was incapable of providing indirect support of the occurrence of the alleged offending. The respondent counters that the Court of Appeal correctly assessed the capacity of the distress evidence to bear on the occurrence of the alleged offending, and there was no rational basis for the jury to infer that the distress evidence was causally connected to the charged acts or to exclude the reasonable possibility that the distress was caused by things other than the occurrence of the alleged offending.

The sole ground of appeal is:

- The Court below erred in finding that the trial judge erred in directing the jury that it could use evidence of the complainant's distress when making a complaint of being raped as indirect evidence that supported the prosecution case that the complainant did not consent to sexual penetration with the respondent.