HIGH COURT BULLETIN

[2024] HCAB 7 (25 September 2024)

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

1: SUMMARY OF NEW ENTRIES

2: Cases Handed Down

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Morgan & Ors v McMillan Investment Holdings Pty Ltd & Anor	Companies
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Case	Title

Fuller & Anor v Lawrence	Administrative law
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La Perouse Local Aboriginal Council ABN 89136607167 & Anor v Quarry Street Pty Ltd CAN 616184117 & Anor	Land law

7: Cases Not Proceeding or Vacated

2: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the September 2024 sittings.

Companies

Morgan & Ors v McMillan Investment Holdings Pty Ltd & Anor
S119/2023: **[2024] HCA 33**

Judgment delivered: 11 September 2024

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

Catchwords:

Companies – Winding up – Insolvency – Appeal against making of pooling order under s 579E(1) of *Corporations Act 2001* (Cth) – Whether gateway requirement in s 579E(1)(b)(iv) for making of pooling order satisfied – Whether alleged chose in action owned jointly and severally by two companies is particular property used, or for use, in connection with joint business, scheme or undertaking – Whether alleged chose in action is used or available for use by two or more companies – Whether alleged chose in action concerning sale agreement for disposal of joint business has sufficient connection to undertaking or carrying out of joint business – Whether alleged chose in action arose upon entry into sale agreement – Where company reinstated after deregistration – Whether s 601AH(5) of *Corporations Act* deems company to have undertaken activities during period of deregistration.

Words and phrases – "carrying on of the joint business, scheme or undertaking", "chose in action", "deregistration", "gateway requirement", "group of 2 or more companies", "joint ownership or operation of property", "just and equitable", "material disadvantage to any eligible unsecured creditor", "money had and received", "necessary connection", "ownership or operation of any asset jointly or for joint benefit", "particular property", "pooling order", "reinstatement", "sufficient connection".

Corporations Act 2001 (Cth), ss 579E(1), 579E(1)(b)(iii), 579E(1)(b)(iv), 579E(2), 601AD(1), 601AD(2), 601AH, 601AH(5).

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

Held: Appeal dismissed with costs

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Criminal Practice

Director of Public Prosecutions v Smith
M16/2024: [2024] HCA 32

Judgment delivered: 11 September 2024

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

Catchwords:

Criminal practice – Questions of law arising before trial – Questions of law referred to Court of Appeal – Case stated – Where accused charged with sexual offences against child under 16 years – Where judge and counsel for both prosecution and accused met with complainant before complainant gave evidence at "special hearing" – Where complainant was a minor – Where s 389E(1) of *Criminal Procedure Act 2009* (Vic) provides that "[a]t a ground rules hearing, the court may make or vary any direction for the fair and efficient conduct of the proceeding" – Where accused not present at meeting and meeting not recorded – Where meeting occurred consequent to recommendation of intermediary appointed under s 389J(1) of *Criminal Procedure Act 2009* (Vic) – Whether meeting authorised by s 389E(1) – Whether meeting inconsistent with principle of open justice – Whether meeting a fundamental irregularity – Whether as a result of meeting fair-minded lay observer might reasonably apprehend that judge might not bring impartial mind to resolution of any issue required to be decided in proceeding.

Words and phrases – "apprehension of bias", "exercise of judicial power", "fair and efficient conduct of the proceeding", "fair-minded lay observer", "fundamental irregularity", "ground rules hearing", "hearing", "impartiality", "intermediary", "introductory meeting", "minor", "principle of open justice", "proper administration of justice", "special hearing", "substantial miscarriage of justice".

Charter of Human Rights and Responsibilities (Vic), ss 24, 28, 32.
Criminal Procedure Act 2009 (Vic), Pts 5.7, 8.2, 8.2A; ss 246, 276, 330, 389B, 389E, 389I, 389J.
Open Courts Act 2013 (Vic), ss 28, 30.

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

Held: Appeal allowed.

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Practice and Procedure

Chief Commissioner of Police v Crupi
M83/2024: [2024] HCA 34

Judgment delivered: 11 September 2024

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

Catchwords:

Practice and procedure – Adequacy of reasons – Public interest immunity – Where s 130 of *Evidence Act 2008* (Vic) required weighing of competing public interests for and against disclosure of information or documents – Where first respondent charged with murder – Where applicant resisted disclosure of documents concerning an informer – Where disclosure likely to lead to identification of informer and seriously risk informer's safety – Where primary judge found some documents likely to be of substantial assistance to first respondent's defence – Where primary judge's reasons consisted of five paragraphs – Whether primary judge complied with obligation to give adequate reasons by not disclosing process required by s 130(1).

Words and phrases – "adequate reasons", "balancing exercise", "disclosure", "document", "forensic significance", "informer", "public interest", "public interest immunity", "weighing process".

Evidence Act 2008 (Vic), ss 130, 131A.

Appealed from VSCA: [2023] VSCA 245

Held: Appeal allowed.

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Statutes

Attorney-General for the State of Tasmania v Casimaty & Anor
[2024] HCA 31

Judgment delivered: 11 September 2024

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

Catchwords:

Statutes – Construction – Statutory consequence of non-compliance with statutory condition of exercise of power – Where s 16(1) of *Public Works Committee Act 1914* (Tas) ("Act") stipulates conditions precedent to commencement of public work proposed to be undertaken by Tasmanian Government department or State authority – Conditions precedent that public work referred to and reported upon by Parliamentary Standing Committee on Public Works ("Committee") – Where Tasmanian Government Department of State Growth proposed new interchange be constructed – Where proposal referred to and reported upon by Committee – Where person with claimed interest in adjacent land brought proceeding against construction company in Supreme Court of Tasmania alleging commencement of road work contravened s 16(1) of Act as different from proposal referred to and reported upon by Committee – Where Attorney-General for Tasmania joined as defendant to proceeding – Where Attorney-General sought order that statement of claim be struck out or proceeding be dismissed because statement of claim failed to disclose cause of action in that no justiciable issue before Court or because adjudication by Court would contravene privilege of Tasmanian Parliament – Whether observance of conditions precedent to commencement of public work stipulated by s 16(1) of Act an obligation enforceable by a court.

Words and phrases – "conditions precedent", "duty", "exclusive cognisance of Parliament", "impeached or questioned", "intra-mural", "justiciable controversy", "non-compliance", "non-justiciable", "parliamentary privilege", "political accountability", "public obligation", "public work", "public works committee", "referred to and reported upon by", "responsible government".

Bill of Rights 1688 (1 W & M sess 2 c 2), Art 9.
Public Works Committee Act 1914 (Tas), ss 15, 16, 17.

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

Held: Appeal allowed with costs.

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3: CASES RESERVED

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

Administrative Law

Fuller & Anor v Lawrence
B24/2024; [2024] HCATrans 62

Date heard: 10 September 2024

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

Catchwords:

Administrative law – Judicial review – Reviewable decisions and conduct – Meaning of "decision... made under an enactment" – Where respondent is prisoner released under supervision order pursuant to *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) – Where Corrective Services Officer gave direction to respondent approving phone contact with particular person including video calls, but denying respondent's request to have in-person contact with that person – Where respondent requested reasons for direction in so far as it denied in-person contact – Where appellants' response was respondent not entitled to statement of reasons under *Judicial Review Act 1991* (Qld) ("JRA") – Where primary judge found direction was decision under enactment within meaning of JRA and therefore respondent entitled to statement of reasons under s 33 of JRA – Where Court of Appeal dismissed appeal – Whether Court of Appeal erred in concluding direction "itself" affects rights in sense necessary to qualify as "decision … made under an enactment" within meaning of JRA.

Appealed from QLDSC (CA): [2023] QCA 257

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Civil Procedure

RC v The Salvation Army (Western Australia) Property Trust
P7/2023: [2024] HCATrans 32; [2024] HCATrans 33

Date heard: 7 and 8 May 2024

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

Catchwords:

Civil procedure – Permanent stay of proceedings – Prejudice – Where appellant claimed damages with respect to loss and damage suffered as result of sexual abuse by Salvation Army Officer between August 1959 and April 1960, when appellant aged 12 and 13 years old, while in care of respondent – Where Salvation Army Officer died in 2006, eight years before respondent first became aware appellant alleged sexual abuse – Where another key witness died in 1968 – Where respondent applied for permanent stay of proceedings – Where primary judge granted permanent stay – Where appellant unsuccessfully appealed to Court of Appeal – Whether Court of Appeal erred in concluding open to primary judge to grant permanent stay of appellant's action against respondent – Whether Court of Appeal erred in upholding finding of prejudice.

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

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Willmot v The State of Queensland
B65/2023: [2024] HCATrans 31

Date heard: 7 May 2024

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

Catchwords:

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

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

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Constitutional Law

Commonwealth of Australia v Mr Stradford (a pseudonym) & Ors; His Honour Judge Salvatore Paul Vasta v Mr Stradford (a pseudonym) & Ors
C3/2024; C4/2024: [2024] HCA Trans 52; [2024] HCA Trans 53

Date heard: 14 and 15 August 2024

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

Catchwords:

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

Removed from Full Court of the Federal Court of Australia.

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Commonwealth of Australia v Yunupingu (on behalf of the Gumatj Clan or Estate Group) & Ors
D5/2023: [2024] HCA Trans 48; [2024] HCA Trans 49; [2024] HCA Trans 50

Date heard: 7 – 9 August 2024

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

Catchwords:

Constitutional law – *Constitution,* s 51(xxxi) – Acquisition of property on just terms – Extinguishment of native title – Where principal proceeding is application for compensation under *Native Title Act 1993* (Cth) for alleged effects of grants or legislative acts on native title in period after Northern Territory became territory of Commonwealth in 1911 and before enactment of *Northern Territory Self-Government Act 1978* (Cth) – Whether Full Court erred by failing to find that just terms requirement contained in s 51(xxxi) of *Constitution* does not apply to laws enacted pursuant to s 122 of *Constitution*, including *Northern Territory (Administration) Act 1910* (Cth) and Ordinances made thereunder – Whether *Wurridjal v Commonwealth* (2009) 237 CLR 309 should be re-opened – Whether Full Court erred in failing to find that, on facts set out in appellant's statement of claim, neither vesting of property in all minerals on or below surface of land in claim area in Crown, nor grants of special mineral leases capable of amounting to acquisitions of property under s 51(xxxi) of *Constitution* because native title inherently susceptible to valid exercise of Crown's sovereign power to grant interests in land and to appropriate to itself unalienated land for Crown purposes.

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

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

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

S27/2024: [2024] HCA Trans 47

Date heard: 6 August 2024

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

Catchwords:

Constitutional law – Judicial power of Commonwealth – Monitoring and curfew powers – Where plaintiff sentenced to aggregate term of imprisonment of 18 months and his permanent refugee visa cancelled – Where after release from prison, plaintiff detained under s 189 of *Migration Act 1958* (Cth) – Where plaintiff released from detention and granted various visas, each with curfew condition and electronic monitoring condition imposed – Whether curfew and monitoring powers under cl 070.612A(1) of Sch 2 of *Migration Regulations 1994* (Cth), together or alone, "punitive" and therefore contrary to Ch III of *Constitution*

Special case referred to the Full Court on 22 May 2024.

Courts

HBSY Pty Ltd ACN 151 894 049 v Lewis & Anor

S106/2023: [2024] HCATrans 34

Date heard: 9 May 2024

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

Catchwords:

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

determine substantive appeal – Whether Full Court has jurisdiction to hear appeal – Proper construction of s 7(5) of *Cross-Vesting Act*.

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

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Damages

Commonwealth of Australia v Sanofi (formerly Sanofi-Aventis) & Ors
S169/2023; [2024] HCATrans 58; [2024] HCA Trans 59

Date heard: 4 and 5 September 2024

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

Catchwords:

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

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

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Equity

Kramer & Anor v Stone
S53/2024: [2024] HCA Trans 63

Date heard: 11 September 2023

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

Catchwords:

Equity – Proprietary estoppel – Estoppel by encouragement – Knowledge of detriment – Where in 1975, respondent commenced share-farming 100-acre property situated on Colo River ("Property") under oral contract described as share-farming agreement – Where shortly after death of then-joint proprietor, his wife ("deceased") told respondent about agreement to pass Property and sum of money to respondent upon deceased's death – Where under her final will, deceased left Property to one of couple's two daughters, first appellant – Where primary judge held respondent established entitlement to equitable relief on basis of proprietary estoppel and characterised case as based upon estoppel by encouragement –Where primary judge found respondent acted to his detriment on faith of deceased's assurance by continuing share farming operation on Property for about 23 years in belief that he would inherit Property under deceased's will – Where primary judge found in absence of such belief, respondent would have terminated share-farming agreement and pursued more remunerative occupation – Where Court of Appeal dismissed appeal – Whether Court of Appeal erred concluding in cases of proprietary estoppel by encouragement elements of encouragement coupled with reasonable and detrimental reliance are sufficient, without more, to establish unconscionable conduct.

Appealed from NSWSC (CA): [2023] NSWCA 270; (2023) 112 NSWLR 564

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Immigration

BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs
M44/2024: [2024] HCA Trans 57

Date heard: 3 September 2024

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

Catchwords:

Immigration – Visas – Cancellation – Notice of cancellation decision – Legal incapacity from acting on notice – Where delegate of Minister cancelled

appellant's visa under s 501 (3A) of *Migration Act 1958* (Cth) – Where s 501CA(3) provided after making decision, Minister must give person written notice that sets out original decision and invite person to make representations to Minister – Where written notice for purposes of s 501CA(3) handed to appellant, who at relevant time in psychiatric unit of Correctional Centre – Where subsequent to notification, Victorian Civil and Administrative Tribunal made order under s 30 of *Guardianship and Administration Act 2019* (Vic) appointing Public Advocate as guardian of appellant – Where appellant commenced proceeding in Federal Circuit Court seeking judicial review of Minister's decision to give 501CA(3) notice – Where primary judge and Full Court dismissed application and appeal – Whether Full Court erred failing to find not "practicable" within meaning of s 501CA(3) for Minister's delegate to give appellant notice in circumstances where appellant lacked decision-making capacity – Whether, alternatively, Full Court erred failing to find further notice could be issued to appellant, after guardian appointed for him under *Guardianship and Administration Act 2019* (Vic) – Whether legally unreasonable for Minister not to give further notice in circumstances where appellant now able to make representations about revocation of cancellation of his visa by his guardian.

Appealed from FCA (FC): [2023] FCAFC 201; (2023) 301 FCR 229

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Statutes

SkyCity Adelaide Pty Ltd v Treasurer of South Australia & Anor
A10/2024: [2024] HCA Trans 64

Date heard: 12 September 2024

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

Catchwords:

Statutes – Interpretation – Principles – Taking into account ordinary meaning of defined term in construing definition – Where appellant and respondent entered casino duty agreement ("CDA)" under s 17 of *Casino Act 1997* (SA) whereby appellant liable to pay duty on net gambling revenue according to schedule to CDA – Where dispute arose regarding correct interpretation of CDA and duty payable in accordance with it – Where master ordered questions of law be reserved for determination by Court of Appeal – Where question one of case stated whether "Converted Credits", being electronic gaming credits arising from conversion of loyalty points by appellant's customers, when played by customers, constitutes "amount received by the Licensee during the period for or in respect of consideration for gambling in the Casino premises" within

meaning of "gross gambling revenue" within definition in clause 1.1 of operative terms of CDA – Where Court of Appeal answered "Yes" to question one – Whether Court of Appeal erred in answering "Yes" to question one of case stated, on basis concepts of "gross gambling revenue" and "net gambling revenue" in CDA included value of credits wagered on electronic gambling which had their source in loyalty points given to customers by appellant – Whether ordinary meaning of expression being defined, or part of expression, provides part of context that is properly capable of informing interpretation of words used in definition.

Taxation – Miscellaneous taxation – Casino duty – Casino duty agreement.

Appealed from SASC (CA): [2024] SASCA 14

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Taxation

Automotive Invest Pty Limited v Commissioner of Taxation
S170/2023: [2024] HCATrans 44

Date heard: 13 June 2024

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

Catchwords:

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

Appealed from FCA (FC): [2023] FCAFC 129; (2023) 299 FCR 288; (2023) 117 ATR 151

Torts

Bird v DP (a pseudonym)
M82/2023: [2024] HCATrans 16

Date heard: 14 March 2024

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

Catchwords:

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

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

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State of Queensland v Mr Stradford (a pseudonym) & Ors
S24/2024: [2024] HCA Trans 52; [2024] HCA Trans 53

Date heard: 14 & 15 August 2024

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

Catchwords:

Torts – False imprisonment – Contempt order – Where second respondent incorrectly found first respondent in contempt and sentenced him to 12 months' imprisonment – Where first respondent detained for six days – Where officers of appellant took and held first respondent in custody – Where Full Court

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

Special case referred to Full Court on 7 March 2024

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Trade Practices

Capic v Ford Motor Company of Australia Pty Ltd ACN 004 116 223
S25/2024: [2024] HCATrans 23; [2024] HCATrans 24

Date heard: 11 and 12 April 2024

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

Catchwords:

Trade Practices – Consumer law – Measure of damages for failure to comply with guarantee of acceptable quality – Where appellant brought representative proceedings under Part IVA of *Federal Court of Australia Act 1976* (Cth) in respect of Ford-badged motor vehicles fitted with DPS6 dual-clutch transmission system ("affected vehicles") – Where primary judge found affected vehicles supplied in breach of guarantee of acceptable quality under s 25 of *Australian Consumer Law* – Where primary judge held damages under s 272(1) requires assessment of reduction in value only at time of supply – Where Full Court found in order to avoid overcompensation under s 272(1)(a), it may be necessary to depart from date of supply as reference state for statutory reduction in value damages – Where Full Court held post-supply information may be relevant – Whether Full Court erred in construing s 272(1)(a) as subject to qualification that assessment of damages may require departure from assessment at time of supply or adjustment to avoid over-compensation –

Whether s 272(1)(a) permits, and for what purpose, evidence of post-supply events to be used when assessing statutory compensation under the provision.

Appealed from FCA (FC): [2023] FCAFC 179; (2023) 300 FCR 1

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Williams & Anor v Toyota Motor Corporation Australia Limited (ACN 009 686 097); Toyota Motor Corporation Australia Limited (ACN 009 686 097) v *Williams & Anor*
S157/2023; S155/2023: [2024] HCATrans 21; [2024] HCATrans 22

Date heard: 10 and 11 April 2024

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

Catchwords:

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

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

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4: ORIGINAL JURISDICTION

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

Constitutional Law

MJZP v Director-General of Security & Anor
S142/2023

Catchwords:

Constitutional law – Judicial power of Commonwealth – Procedural fairness – Where plaintiff company is carriage service provider within meaning of *Telecommunications Act 1997* (Cth) – Where in June 2021 Australian Security Intelligence Organisation ("ASIO") furnished to Minister for Home Affairs adverse security assessment in respect of plaintiff in connection with s 315A of *Telecommunications Act* – Where plaintiff applied to Administrative Appeals Tribunal ("Tribunal") for review of adverse security assessment – Where Minister made various certifications under *Administrative Appeals Tribunal Act 1975* (Cth) ("AAT Act") that disclosure of certain documents and evidence contrary to public interest – Where Tribunal provided open reasons to plaintiff and first defendant, and closed reasons only to first defendant – Where plaintiff appealed to Federal Court of Australia – Where s 46(1) of AAT Act requires Tribunal to send to Federal Court all documents before Tribunal in connexion with proceeding, including documents subject to certificates issued by Minister – Where s 46(2) of AAT Act requires Federal Court to ensure matter subject to certificates not disclosed to any person other than member of Federal Court for purposes of appeal – Whether s 46(2) substantially impairs institutional integrity of Federal Court – Whether s 46(2) requires Federal Court to exercise Commonwealth judicial power in manner inconsistent with nature of that power – Whether s 46(2) invalid on basis it infringes Ch III of *Constitution*.

Special case referred to the Full Court on 4 June 2024.

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Pearson v Commonwealth of Australia & Ors
S126/2023: [2023] HCATrans 178

Catchwords:

Constitutional law – Judicial power of Commonwealth – Usurpation or interference with Commonwealth judicial power – Where plaintiff New Zealand national – Where plaintiff convicted of offences including supply of prohibited drug and sentenced to aggregate term of imprisonment of four years and three

months – Where plaintiff's Australian visa cancelled on basis she failed character test in s 501 of *Migration Act 1958* (Cth) and upheld on appeal – Where plaintiff commenced fresh proceeding in original jurisdiction of Federal Court seeking judicial review – Where Full Court held aggregate sentence not "a term of imprisonment" within meaning of s 501(7)(c) and plaintiff released from immigration detention – Where plaintiff re-detained following commencement of *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) ("Amending Act") – Whether Amending Act invalid usurpation of, or interference with, judicial power of Commonwealth – Whether Amending Act does not operate to validate decision of third defendant because decision not "a thing" done under *Migration Act*, but "a thing" done under s 43 of *Administrative Appeals Tribunal Act 1975* (Cth).

Constitutional law – Powers of Commonwealth Parliament – Acquisition of property on just terms – Whether Amending Act invalid acquisition by Commonwealth of plaintiff's right to sue Commonwealth for false imprisonment other than on just terms, contrary to s 51(xxxi) of *Constitution*.

Application for constitutional or other writ referred to the Full Court on 7 March 2024.

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5: SECTION 40 REMOVAL

The following cases have been removed into the High Court of Australia under s 40 of the *Judiciary Act 1903* (Cth).

Constitutional Law

Attorney-General for the State of Queensland v G Global 120E T2 Pty Ltd as trustee for the G Global 120E AUT & Anor

Attorney-General for the State of Queensland v G Global 180Q Pty Ltd as trustee for the G Global 180Q AUT & Anor

Attorney-General for the State of Queensland v G Global 180Q Pty Ltd as trustee for the G Global 180Q AUT & Anor

B48/2024
B49/2024
B50/2024

Removed into the High Court under s 40 of the Judiciary Act 1903 (Cth) on 26 August 2024.

Catchwords:

Constitutional law – state taxation - validity of *Treasury Laws Amendment (Foreign Investment) Act 2024 (Cth)* which inserted s 5(3) into *International Tax Agreements Act 1953* (Cth) which provides that operation of a provision of a bilateral tax agreement provided for in s 5(1) "is subject to anything inconsistent with the provision contained in a law of the Commonwealth, or of a State or Territory, that imposed a tax other than an Australian tax, unless expressly provided otherwise in that law – where s 5(3) expressed to operate with retrospective effect – whether s 5(3) supported by head of Commonwealth legislative power insofar as it purports to apply to taxes imposed by State laws – whether, if so, at 24(4) of Agreement between Australian and Federal Republic of Germany for elimination of double taxing with respect to taxes on income and capital and prevention of fiscal evasion and avoidance – where first respondent imposed foreign land tax surcharge under s 32(1)(b)(ii) of *Land Tax Act 2010* (Qld) on basis that first respondent a foreign company or trustee of foreign trust – where first respondent contended this had effect of imposing more burdensome taxation on enterprise carried on by resident of Australia the capital of which partly owned by resident(s) of Germany than on other similar enterprises carried on by Australian resident contrary to art 24(4) of German Agreement.

Removed from Supreme Court of Queensland.

CZA19 v Commonwealth of Australia & Anor

M66/2024: [2024] HCA Trans 46

Removed into the High Court under s 40 of the Judiciary Act 1903 (Cth) on 31 July 2024.

Catchwords:

Constitutional law – immigration detention – whether limit on constitutionally permissible duration of immigration detention identified in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 applies to non-citizen detained under ss 189(1) and 196(1) of *Migration Act 1958* (Cth) for purpose of considering whether to grant the person a visa where no real prospect of removal if person not granted a visa – where first respondent taken into immigration detention in December 2018 – where first respondent applied for protection visa and was refused by delegate – where AAT set aside delegate's decision and remitted to delegate with direction that substantial grounds for believing first respondent would suffer significant harm if removed to Poland – where following decision in *NZYQ* first respondent sought habeas corpus and mandamus in Federal Court seeking consideration of visa and declaratory relief regarding lawfulness of detention – where separate question referred for determination in Federal Court – where visa refused by applicant released on bridging visa – whether detention unlawful between November 2022 and release.

Removed from Federal Court of Australia.

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DBD24 v Minister for Immigration, Citizenship & Multicultural Affairs & Anor

P29/2024: [2024] HCA Trans 46

Removed into the High Court under s 40 of the Judiciary Act 1903 (Cth) on 31 July 2024

Catchwords:

Constitutional law – immigration detention – whether limit on constitutionally permissible duration of immigration detention identified in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 applies to non-citizen detained under ss 189(1) and 196(1) of *Migration Act 1958* (Cth) for purpose of considering whether to grant the person a visa where no real

prospect of removal if person not granted a visa – where first respondent refused safe haven enterprise visa and placed in immigration detention in June 2023 – where in December 2023 AAT set aside delegate's decision and remitted visa application with direction that first respondent satisfied s 36(2)(aa) *Migration Act 1958* (Cth) – where visa decision not yet made and first respondent remains in immigration detention - where following decision in *NZYQ* first respondent sought habeas corpus and mandamus in Federal Court seeking consideration of visa – lawfulness of ongoing detention of first respondent.

Removed from Federal Court of Australia.

Practice and Procedure

Bogan & Anor v The Estate of Peter John Smedley (Deceased) & Ors
M21/2024: [2024] HCASL 55

Removed into the High Court under s 40 of the Judiciary Act 1903 (Cth) on 7 March 2024.

Catchwords:

Practice and Procedure – Transfer of proceedings – Group costs order – Where Victoria legislated to permit costs orders calculated as percentage of judgment or settlement in representative proceedings – Where provision unique to Victoria – Where appellants commenced representative proceedings in Supreme Court of Victoria against respondents – Where fifth respondent applied to transfer proceedings to Supreme Court of NSW under s 1337H of *Corporations Act 2001* (Cth) – Where appellants applied for group costs order ("GCO") under s 33ZDA of *Supreme Court Act 1986* (Vic) – Where Supreme Court directed GCO application be determined before transfer application, and later made GCO – Where fifth respondent's first removal application to High Court dismissed – Where fifth respondent referred transfer application to Victorian Court of Appeal for provision of reasons without final orders – Where Court of Appeal held proceedings should not be transferred to Supreme Court of NSW – Where fifth respondent successfully made second removal application to High Court – Whether GCO made under s 33ZDA of *Supreme Court Act* relevant in deciding whether to transfer proceedings to another court under s 1337H(2) of *Corporations Act* – Whether GCO will remain in force if proceedings are transferred to Supreme Court of NSW – Whether Supreme Court of NSW would have power to vary or revoke GCO if proceedings transferred – Whether proceedings should be transferred to Supreme Court of NSW.

Removed from Victorian Court of Appeal.

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6: SPECIAL LEAVE GRANTED

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

Civil Procedure

DZY (a pseudonym) v Trustees of the Christian Brothers
M81/2024: [2024] HCASL 245

Date determined: 5 September 2024 – *Special leave granted on limited grounds*

Catchwords:

Civil procedure – limitation of actions – application to set aside deeds of settlement under s 27QE of *Limitation of Actions Act 1958* (Vic) – where appellant entered into two deeds of settlement relating to sexual abuse alleged against Christian Brothers in school run by respondent – where appellant later commenced proceedings seeking damages from respondent for economic loss caused by abuse – where respondent claimed settlements should not be set aside because it would have pleaded limitation defence and *"Ellis"* defence that unincorporated association not solvent legal entity capable of being sued (*Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565) – where primary judge allowed claim to proceed – where Court of Appeal set aside primary judge's decision – whether majority of Court of Appeal erred in finding power in s 27QE *Limitation of Actions Act* not enlivened unless claimant establishes that limitation or *Ellis* defence had material impact on or was leading factor in decision to settle – whether Court of Appeal misapplied correctness standard of appellate review in *Warren v Coombs* (1979) 142 CLR 531.

Appealed from VSCA: [2024] VSCA 73

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Forestry Corporation of New South Wales v South East Rescue Incorporated
S120/2024: [2024] HCASL 230

Date determined: 5 September 2024 – *Special leave granted*

Catchwords:

Civil procedure – standing – where respondent environmental organisation brought civil enforcement proceedings seeking injunctive and declaratory relief against respondent in relation to certain forestry operations on basis of impact on three species of glider – where primary judge found respondent lacked standing because of no "special interest" in subject matter – where Court of Appeal set aside decision on basis that clear language required to abrogate or curtail fundamental rights – whether Court of Appeal erred in concluding that on proper construction of *Forestry Act 2012* (NSW), ss 69SB and 69ZA and *Biodiversity Conservation Act 2016* (NSW), ss 13, 14 and 13.14A private entities have standing to bring civil enforcement proceedings for alleged breach of integrated forestry operations agreement – whether there is presumption of standing to bring proceedings for alleged breach by third party where private person or entity has "special interest" unless abrogated by statute.

Appealed from NSWCA: [2024] NSWCA 113

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Lendlease Corporation Limited ACN 000 226 228 & Anor v David William Pallas and Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund & Anor
S108/2024: [2024] HCASL 191

Date determined: 8 August 2024 – *Special leave granted on conditions*

Catchwords:

Civil procedure – representative proceedings – notices to group members - where appellant is defendant in shareholder class action brought by respondent plaintiffs alleging misleading and deceptive conduct and breach of continuous disclosure obligations – where separate question stated for determination in New South Wales Court of Appeal – whether Court of Appeal erred in holding that Supreme Court of New South Wales does not have power in representative proceeding too approve notice to group members containing notation to effect that upon any settlement, parties or defendant will seek order that group members neither registering nor opting-out shall not be permitted without leave to seek any benefit under settlement – where Court of Appeal authority conflict with Full Federal Court authority on the question.

Appealed from NSWCA: [2024] NSWCA 83

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Competition Law

Australian Competition and Consumer Commission v J Hutchison Pty Ltd (ACN 009 778 330) & Anor

Australian Competition and Consumer Commission v Construction, Forestry and Maritime Employees Union & Anor
B41/2024; B42/2024: [2024] HCASL 182

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

Catchwords:

Competition law – giving effect to arrangement or arriving at understanding containing provision preventing or hindering acquisition of services from a subcontractor – *Competition and Consumer Act 2010* (Cth) s 45E(3) – where Hutchison construction company and head contractor on large construction project – where CFMEU a trade union for purposes of *Fair Work (Registered Organisations) Act 2009* (Cth) – where appellant alleged contravention of s 45E(3) and 45E of *Competition and Consumer Act* by first respondent making and giving effect to understanding with second respondent that it would terminate its sub-contract or cease acquiring services from third party on project – where second respondent alleged to have been knowingly concerned in or party to contravention by threatening industrial action if first respondent did not cease using third party – where primary judge found evidence established respondents entered into arrangement of understanding – where Full Federal Court allowed appeal – whether Full Court found that merely succumbing to threat of industrial action insufficient to give rise to arrangement or understanding – whether making or arriving at arrangement or understanding within meaning of s 45E(3) requires communication of assent that precedes and is distinct from conduct that gives effect or arrangement or understanding.

Appealed from FCAFC: [2024] FCAFC 18; (2024) 302 FCR 79

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Costs

Birketu Pty Ltd ACN 003 831 392 & Anor v Atanaskovic & Ors
S52/2024: [2024] HCASL 117

Date determined: 11 April 2024 – *Special leave granted*

Catchwords:

Costs – General rule that self-represented litigants cannot recover costs for own time – Whether partners of unincorporated law firm entitled to recover costs for work done by employed solicitors of that firm in proceedings brought by or against partners of firm – Whether Court of Appeal erred finding first and second respondents able to recover costs of employed solicitors in proceedings in which they were self-represented solicitor litigants by their unincorporated law firm – Whether Court of Appeal erred finding s 98(1) of *Civil Procedure Act 2005* (NSW) ("CPA") and definition of costs in s 3(1) authorised recovery of

costs – Whether Court of Appeal erred in finding employed solicitor rule operated to authorise recovery of costs – Whether Court of Appeal erred in declining to follow *United Petroleum v Herbert Smith Freehills* [2020] VSCA 15 in applying CPA to recovery of costs by employed solicitors of self-represented solicitor litigants.

Appealed from NSWSC (CA): [2023] NSWCA 312; (2023) 113 NSWLR 305

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Constitutional Law

JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor
B15/2024: [2024] HCASL 42

Date determined: 7 March 2024 – *Special leave granted*

Catchwords:

Constitutional law – Judicial power of Commonwealth – Direction principle – Where appellant born in Somalia and granted refugee status in New Zealand – Where appellant convicted of intentionally causing injury and making threats to kill and sentenced to aggregate term of 15 months imprisonment – Where appellant's Australian visa cancelled on basis he failed character test in s 501 of *Migration Act 1958* (Cth) – Where Administrative Appeals Tribunal ("Tribunal") affirmed non-revocation decision and concluded appellant did not pass character test – Where appellant lodged originating motion in Federal Court seeking judicial review – Where appellant released from immigration detention following *Pearson v Minister for Home Affairs* (2022) 295 FCR 177 ("*Pearson*") – Where Full Federal Court in *Pearson* held aggregate sentence does not fall within s 501(7)(c) – Where appellant amended originating application raising *Pearson* ground – Where *Migration Amendment (Aggregate Sentences) Act 2023 (Cth)* ("Amending Act") amended *Migration Act* with retrospective effect to treat aggregate sentence as equivalent to sentence for single offence for purposes of s 501(7)(c) – Where appellant re-detained under Amending Act – Where Full Court held Tribunal's decision and Amending Act valid – Whether Amending Act beyond legislative power of Commonwealth Parliament by directing courts as to conclusions they should reach in exercise of their jurisdiction – Whether Amending Act denies court exercising jurisdiction under, or derived from, s 75(v) of *Constitution*, ability to enforce limits which Parliament has expressly or impliedly set on decision-making power.

Immigration – Visas – Cancellation – Application for judicial review – Whether decision made by Tribunal under s 43 of *Administrative Appeals Tribunal Act 1975* (Cth) capable of meeting Amending Act's description of decision made "under" *Migration Act* – Whether appellant's aggregate sentence of 15 months'

imprisonment is "term of imprisonment of 12 months or more" within meaning of s 501(7)(c) of *Migration Act 1958*.

Appealed from FCA (FC): [2023] FCAFC 168; (2023) 300 FCR 370; (2023) 413 ALR 620

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State of New South Wales v Wojciechowska & Ors

S39/2024: [2024] HCASL 63

Date determined: 7 March 2024 – *Special leave granted with undertakings*

Catchwords:

Constitutional law – Judicial Power of Commonwealth – Where first respondent resided in Tasmania – Where first respondent commenced various proceedings in New South Wales Civil and Administrative Tribunal ("Tribunal") against third and fourth respondents, emanations of State of New South Wales – Where first respondent sought review of various decisions and conduct under *Government Information (Public Access) Act 2009* (NSW) ("GIPA Act") and *Privacy and Personal Information Protection Act 1998* (NSW) ("PPIP Act") – Where claim included claim for damages under s 52(2)(a) PPIP Act – Where first respondent challenged jurisdiction of Tribunal on basis functions performed by Tribunal when determining administrative review applications under GIPA Act and PPIP Act involved exercise of judicial power – Where Court of Appeal held determining administrative review under GIPA Act did not involve exercise of judicial power – Where Court of Appeal held determination of application for damages under s 55(2)(a) of PPIP Act brought by out-of-state resident would involve Tribunal exercising judicial power of Commonwealth – Whether *Burns v Corbett* (2018) 265 CLR 304 applies to exercise of non-judicial power – Whether Court of Appeal erred in holding Tribunal, when performing at instance of out-of-State resident claiming damages review of public sector agency conduct under Pt 5 of PPIP Act and *Administrative Decisions Review Act 1997* (NSW) exercises Commonwealth judicial power.

Courts – State tribunals – Jurisdiction.

Appealed from NSWSC (CA): [2023] NSWCA 191; (2023) 379 FLR 256

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Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs

P10/2024: [2024] HCASL 43

Date determined: 7 March 2024 – *Special leave granted*

Catchwords:

Constitutional law – Judicial power of Commonwealth – Usurpation or interference with Commonwealth judicial power – Where appellant New Zealand national – Where appellant's Australian visa purportedly cancelled under s 501(3A) of *Migration Act 1958* (Cth) – Where appellant sentenced to 12 months' imprisonment imposed in September 2020 – Where delegate considered appellant had "been sentenced to a term of imprisonment of 12 months or more" within meaning of s 501(7)(c) – Where appellant unsuccessfully sought revocation of cancellation – Where Administrative Appeals Tribunal ("Tribunal") affirmed non-revocation decision – Where appellant released from immigration detention following decision in *Pearson v Minister for Home Affairs* (2022) 295 FCR 177 ("*Pearson*") – Where appellant succeeded in Full Federal Court on appeal and in original jurisdiction, declaring Tribunal's decision and cancellation decision invalid – Where following *Pearson*, *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) ("Amending Act") enacted – Where appellant taken back into immigration detention after commencement of Amending Act – Where appellant commenced proceedings in original jurisdiction of Federal Court for declaration items 4(3), 4(4) and 4(5)(b)(i) of Amending Act invalid, and writ of *habeas corpus* – Where Full Court dismissed application – Whether Full Court erred in not finding relevant items of Amending Act invalid usurpation or interference with judicial power of Commonwealth by reversing or dissolving effect of orders made by Chapter III court.

Constitutional law – Powers of Commonwealth Parliament – Acquisition of property on just terms – Whether Full Court erred in not finding relevant item of Amending Act effectuated acquisition of property other than on just terms contrary to s 51(xxxi) of *Constitution* by extinguishing cause of action for false imprisonment.

Appealed from FCA (FC): [2023] FCAFC 167; (2023) 300 FCR 354; (2023) 413 ALR 605

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Criminal Law

The King v ZT
S38/2024: [2024] HCASL 49

Date determined: 7 March 2024 – *Special leave granted*

Catchwords:

Criminal law – Appeal against conviction – Unreasonable verdict – Joint criminal enterprise – Where respondent found guilty at trial of party to murder – Where case against him founded upon series of admissions made as to

involvement in killing – Where respondent's accounts numerous and inconsistent – Where respondent successfully appealed conviction to Court of Criminal Appeal on ground jury's verdict unreasonable – Where Court of Criminal Appeal majority found admissions not sufficiently reliable to establish guilt beyond reasonable doubt – Whether Court of Criminal Appeal majority erred in concluding jury enjoyed no relevant or significant advantage over appellate court – Whether Court of Criminal Appeal majority erred in its application of test in *M v The Queen* (1994) 181 CLR 487.

Appealed from NSWSC (CCA): [2023] NSWCCA 241

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Criminal Practice

Brawn v The King
A20/2024: [2024] HCASL 250

Date determined: 5 September 2024 – *Special leave granted*

Catchwords:

Criminal practice – appeal – miscarriage of justice – prosecution duty of disclosure – where appellant found guilty of one count of maintaining sexual relationship with child – where defence case was that complainant lied about identity of abuser – where, after trial, prosecution disclosed that appellant's father had been charged with six counts of unlawful sexual intercourse with different child – whether Court or Appeal erred in finding that breach of duty of disclosure did not lead to miscarriage of justice for purpose of s 158(1)(c) *Criminal Procedure Act 1921* (SA) because appellant would not have conducted trial differently – whether Court of Appeal erred in finding appellant conceded that non-disclosure did deprive him of opportunity to adduce evidence relating to father – proper approach to 'miscarriage of justice' for purposes of s 158(1)(c) *Criminal Procedure Act*.

Appealed from SASCA: [2022] SASCA 96; (2022) 141 SASR 465

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Damages

Elisha v Vision Australia Limited
M22/2024: [2024] HCASL 60

Date determined: 7 March 2024 – *Special leave granted*

Catchwords:

Damages – Contract – Breach – Psychiatric injury – Where appellant entered employment contract with respondent – Where during hotel stay while performing his work duties, appellant involved in incident with hotel proprietor – Where appellant's employment terminated for alleged "serious misconduct" – Where appellant developed major depressive disorder, which trial judge found caused by dismissal – Where appellant sued for damages, claiming alleged breaches of due process provision contained in clause 47.5 of Vision Australia Unified Enterprise Agreement 2013 and respondent's "disciplinary procedure" – Where appellant claimed respondent's duty of care extended to discipline and termination procedures – Where at trial, appellant succeeded in contract and failed in negligence – Where Court of Appeal held respondent did not owe alleged duty of care, and affirmed trial judge's finding in respect of contract claim – Whether Court of Appeal erred in concluding damages for psychiatric injury suffered by appellant not recoverable for breach of contract.

Tort – Negligence – Duty of care owed by employers – Whether Court of Appeal erred in concluding respondent did not owe duty to take reasonable care to avoid injury to appellant in its implementation of processes leading to and resulting in termination of his employment.

Appealed from VSC (CA): [2023] VSCA 265; (2023) 328 IR 299

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Equity

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

S26/2024: [2024] HCASL 21; [2024] HCASL 147

Date determined: 8 February and 9 May 2024 – *Special leave granted*

Catchwords:

Equity – Fiduciary duty – Fiduciary duty between former and successor trustees – Duties of trustees – Where first respondent successor trustee – Where second respondent sole director and shareholder of former trustee – Where former trustee appointed in June 2005 – Where in November 2006, appellant commenced proceedings against former trustee seeking damages of $2 million – Where first respondent replaced former trustee by way of deed of appointment – Where former trustee promised indemnity from first respondent as successor trustee – Where former trustee wound up because of claim for $2,500, with effect appellant's pending proceedings stayed – Where legal title to trust assets transferred to first respondent as trustee – Where on March 2014, default judgment entered in favour of appellant against former trustee –

Where judgment set aside by consent, and proceedings reheard in December 2014 – Where on 25 February 2016, primary judge made orders entering judgment for appellant against former trustee in amount of $3.4 million and declared former trustee entitled to be indemnified out of trust assets – Where in meantime, trust assets dissipated by first respondent at discretion of third respondent – Where other respondents either knowingly involved in conduct or received trust property – Where primary judge found first respondent breached fiduciary duties, and other respondents either knowingly involved in the conduct or received trust property – Where Court of Appeal majority held first respondent did not owe fiduciary obligation at any time – Whether Court of Appeal majority erred in concluding first respondent as successor trustee did not owe fiduciary duty to former trustee not to deal with trust assets so as to destroy, diminish or jeopardise former trustee's right of indemnity or exoneration from those assets.

Appealed from NSWSC (CA): [2023] NSWCA 214; (2023) 112 NSWLR 318; (2023) 21 BPR 44,317

Appealed from NSWSC (CA): [2023] NSWCA 254

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Evidence

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

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

Catchwords:

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

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

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Immigration

FEL17 v Minister for Immigration, Citizenship and Multicultural Affairs
S107/2024: [2024] HCASL 197

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

Catchwords:

Immigration – protection visas – invalid application – where appellant applied for protection visa and was refused by delegate – where AAT affirmed delegate's decision – where Assistant Minister for Immigration and Border Protection exercised power under s 417(1) *Migration Act 1958* (Cth) to substitute "another decision" for Tribunal's decision and granted appellate a three month visitor visa with no further stay condition – where appellate subsequently made second application for protection visa – where delegate found application invalid under s 48A – whether majority of Full Federal Court erred in finding application invalid and barred by s 48A.

Appealed from FCA (FC): [2023] FCAFC 153

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Minister for Immigration, Citizenship and Multicultural Affairs & Ors v MZAPC
P21/2024: [2024] HCA Trans 51

Date heard: 13 August 2024 *adjourned to a date to be fixed*

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

Catchwords:

Immigration – Duty to remove unlawful citizen as soon as reasonably practicable – Personal and non-compellable powers of Minister – Where respondent's visa cancelled in November 2015 – Where respondent in immigration detention and exhausted all rights of review and appeal in relation to his immigration status – Where primary judge made orders restraining appellants from performing duty imposed by s 198(6) of *Migration Act 1958* (Cth) to remove respondent from Australia as soon as reasonably practicable – Where primary judge concluded following this Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*

[2023] HCA 10, serious question to be tried as to whether officers of Department had, acting beyond power, made assessments of respondent's circumstances against ministerial guidelines concerning referral of cases to Minister for personal consideration under ss 195A and 417 of Act – Where Full Court majority upheld primary judge's decision – Whether Full Court erred concluding primary judge had power to grant interlocutory injunction restraining respondent's removal from Australia.

Practice and procedure – Interlocutory injunction restraining removal from Australia – Serious question to be tried.

Appealed from FCA (FC): [2024] FCAFC 34

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Industrial Law

Helensburgh Coal Pty Ltd v Bartley & Ors
S119/2024: [2024] HCASL 221

Date determined: 5 September 2024 – *Special leave granted*

Catchwords:

Industrial law – unfair dismissal – genuine redundancy – redeployment – *Fair Work Act 2009* (Cth), ss 385(b), 389(2) – where s 385(d) provides applicant for unfair dismissal remedy must demonstrate dismissal not case of genuine redundancy – where s 389(2) provides no genuine redundancy if reasonable in all the circumstances to redeploy employee within employer's enterprise – where respondent scaled back mining operations and terminated respondents' employment – whether Full Federal Court erred in construing s389(2) as authorising Fair Work Commission to inquire into whether employer could have made alternative changes to enterprise (including by terminating other operational or staffing arrangements) so as to make position available to otherwise redundant employee – whether determination of genuine redundancy discretionary decision reviewable only for *House v King* error.

Appealed from FCAFC: [2024] FCAFC 45; (2024) 302 FCR 589

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Land Law

La Perouse Local Aboriginal Council & Anor v Quarry Street Pty Ltd & Anor
S121/2024: [2024] HCASL 228

Date determined: 5 September 2024 – *Special leave granted*

Catchwords:

Land law – indigenous land rights – *Aboriginal Land Rights Act 1983* (NSW), s 36 – claimable Crown land – where second respondent Minister proved in part an Aboriginal land claim in relation to Crown Land in Paddington – where first respondent lessee of site described as "Paddington Bowling Club" but site fallen into disuse other than "oral sublease" over small portion of land – where land subject to reservation of Crown land under s 87 *Crown Lands Act* 1989 (NSW) for use as community and sporting club facilities and tourist facilities and services – where first respondent unsuccessfully sought judicial review of Minister's decision to approve claim – where Court of Appeal allowed appeal – where Court of Appeal found land being "used" for purposes of s 36(1) of *Aboriginal Land Rights Act* such that land was not "claimable Crown land" – whether Court of Appeal erred in finding Minister required to find land was "claimable Crown land" – whether concept of "use" in s 36(1)(b) requires examination of activities on claimed land as opposed to away from or in relation to claimed land – whether definition of "land" in s 4(1) has result that "use" of "any estate or interest" in respect of land either individually or cumulatively will satisfy s 36(1)(b) – whether leasing of land by Crown a "use" within s 36()(b).

Appealed from NSWCA: [2024] NSWCA 107

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Native Title

Stuart & Ors v State of South Australia & Ors
A1/2024: [2024] HCASL 10

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

Catchwords:

Native title – Extinguishment – Proper construction of "native title" in s 223(1) *Native Title Act 1993* (Cth) ("NTA") – Overlapping claims – Where appellants together comprise applicant in native title determination under s 61 of NTA made on behalf of Arabana people in March 2013 over area in vicinity of township of Oodnadatta in South Australia – Where over subsequent five years different claim group, Walka Wani people, made two claims concerning same area ("overlap area") – Where in January 1998 Arabana made claim over area abutting overlap area, resulting in consent determination in 2012 in favour of

Arabana in *Dodd v State of South Australia* [2012] FCA 519 ("*Dodd*") – Where overlap area omitted from 1998 claim area because Arabana believed different accommodation of their rights in overlap area would be made by state government – Where primary judge dismissed Arabana claim and made determination of native title in favour of Walka Wani – Where appellants unsuccessfully appealed orders dismissing Arabana Claim to Full Court – Whether Full Court majority erred by not finding trial judge failed to correctly construe and apply definition of "native title" in s 223(1) when dismissing Arabana's native title determination application – Whether Full Court erred by treating all aspects of determination in *Dodd* as being geographically specific.

Appealed from FCA (FC): [2023] FCAFC 131; (2023) 299 FCR 507; (2023) 412 ALR 407

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Tort

Pafburn Pty Limited (ACN 003 485 505) & Anor v The Owners - Strata Plan No 84674
S54/2024: [2024] HCASL 96

Date determined: 11 April 2024 – *Special leave granted*

Catchwords:

Tort – Statutory duty of care for construction work – Proportionate liability – Apportionable claims – Where second appellant retained first appellant to design and construct building – Where respondent sued appellants for damages under Pt 4 of *Design and Building Practitioners Act 2020* (NSW) ("DBPA") alleging defective works in common property – Where appellants pleaded proportionate liability defences under Pt 4 *Civil Liability Act 2002* (NSW) ("CLA") – Where respondent sought to strike out paragraphs of appellants' pleadings on basis s 5Q CLA operates so claims under Pt 4 DBPA are not apportionable – Where primary judge held proportionate liability defence could be pleaded – Where Court of Appeal held proportionate liability cannot apply as defence to respondent's claim under Pt 4 DBPA – Whether Court of Appeal erred in concluding s 5Q of CLA enlivened by cause of action brought under Pt 4 of DBPA – Whether Court of Appeal erred in concluding s 39 of DBPA implicitly excludes application of Pt 4 of CLA to claims under Pt 4 of DBPA – Whether, alternatively, if s 5Q of CLA is enlivened by cause of action under Pt 4 of DBPA, Court of Appeal erred in concluding no apportionment is to occur.

Appealed from NSWSC (CA): [2023] NSWCA 301; (2023) 113 NSWLR 105

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7: CASES NOT PROCEEDING OR VACATED

8: SPECIAL LEAVE REFUSED