HIGH COURT BULLETIN

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[2021] HCAB 1 (12 February 2021)

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

1: SUMMARY OF NEW ENTRIES

2: Cases Handed Down

Case	Title
Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors	Administrative Law
Minister for Home Affairs v Benbrika	Constitutional Law
Westpac Securities Administration Ltd & Anor v Australian Securities and Investments Commission	Corporations
Minister for Immigration and Border Protection v Makasa	Immigration

3: Cases Reserved

Case	Title

BNB17 v Minister for Immigration and Border Protection & Anor	Migration Law
Victoria International Container Terminal Limited v Lunt & Ors	Practice and Procedure
DQU16 & Ors v Minister for Home Affairs & Anor	Migration Law
DVO16 v Minister for Immigration and Border Protection & Anor	Migration Law

4: Original Jurisdiction

5: Section 40 Removal

6: Special Leave Granted

Case	**Title**
Hobart International Airport Pty Ltd v Clarence City Council & Anor; Australia Pacific Airports (Launceston) Pty Ltd v Northern Midlands Council & Anor	Contracts
Walton & Anor v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liquidation) & Ors	Corporations
Stubbings v Jams 2 Pty Ltd & Ors	Equity
Hamilton (a pseudonym) v the Queen	Evidence
Charisteas v Charisteas & Ors	Family Law
Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd	Industrial Law
Ridd v James Cook University	Industrial Law

ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors	Industrial Law
H. Lundbeck A-S & Anor v Sandoz Pty Ltd; CNS Pharma Pty Ltd v Sandoz Pty Ltd	Patents
Deputy Commissioner of Taxation v Huang	Practice and Procedure
Addy v Commissioner of Taxation	Taxation

7: Cases Not Proceeding or Vacated

Case	**Title**
Davidson v The Queen	Evidence
Mackellar Mining Equipment Pty Ltd and Dramatic Investments Pty Ltd t/as Partnership 818 & Anor v Thornton & Ors	Private International Law

8: Special Leave Refused

2: Cases Handed Down

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

Administrative Law

Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors
B34/2020: [2021] HCA 2

Judgment delivered: 3 February 2021

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

Catchwords:

Administrative law – Apprehended bias – Relief – Jurisdiction of inferior courts – Where first respondent applied for additional mining leases and amendment to existing environmental authority ("applications") – Where appellant and others lodged objections to applications – Where first decision of Land Court of Queensland ("Land Court") recommended that both applications be rejected – Where Supreme Court of Queensland rejected arguments by first respondent that recommendations made by Land Court affected by apprehended bias, but held recommendations involved errors of law and remitted certain matters to Land Court for reconsideration – Where second decision of Land Court constituted by different Member recommended applications be approved subject to conditions – Where amendment to environmental authority granted by delegate of second respondent – Where Court of Appeal allowed cross-appeal by first respondent and held that recommendations in Land Court's first decision affected by apprehended bias – Whether open to Court of Appeal, after finding that recommendations in Land Court's first decision affected by apprehended bias, not to refer matters to which recommendations related back to Land Court for full reconsideration, and instead to make consequential orders limited to declaration that procedural fairness not observed – Whether matters to which recommendations related should not be referred back to Land Court on basis of discretion to refuse relief.

Words and phrases – "administrative decision", "administrative function", "apprehended bias", "binding", "declaration", "discretion to refuse relief", "environmental authority", "error of law", "inferior court", "jurisdictional error", "lacking in legal force", "Land Court", "mining lease", "nullity", "procedural fairness", "qualified order for referral back", "setting aside", "spent", "statutory precondition", "valid".

Environmental Protection Act 1994 (Qld) – Ch 5.

Judicial Review Act 1991 (Qld) – s 30.

Land Court Act 2000 (Qld).

Mineral Resources Act 1989 (Qld) – Ch 6.

Appealed from QSC (CA): [2019] QCA 184; (2019) 2 QR 271; (2019) 242 LGERA 309

Held: Appeal allowed.

Return to Top

Constitutional Law

Minister for Home Affairs v Benbrika
M112/2020: [2021] HCA 4

Judgment delivered: 10 February 2021

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

Catchwords:

Constitutional law (Cth) – Judicial power of Commonwealth – Jurisdiction vested in State courts – Where Div 105A of *Criminal Code* (Cth) empowered Supreme Court of State or Territory, on application of Minister for Home Affairs, to order that person convicted of terrorist offence be detained in prison for further period after expiration of sentence of imprisonment pursuant to continuing detention order ("CDO") – Whether all or any part of Div 105A of *Criminal Code* invalid because power to make CDO not within judicial power of Commonwealth having been conferred, inter alia, on Supreme Court of Victoria contrary to Ch III of *Constitution* – Whether scheme for preventative detention of terrorist offender capable of falling within exception to principle articulated in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 that involuntary detention of citizen in custody by the State is penal or punitive in character and exists only as incident of exclusively judicial function of adjudging and punishing criminal guilt – Whether Div 105A of *Criminal Code* directed to ensuring safety and protection of community from risk of harm posed by threat of terrorism.

Words and phrases – "analogy", "apprehended conduct", "Ch III court", "continuing detention order", "exception to the Lim principle", "involuntary detention", "judicial function of adjudging and punishing criminal guilt", "judicial power of the Commonwealth", "less restrictive measure", "non-punitive

purpose", "orthodox judicial process", "preventative detention", "protection of the community from harm", "protective punishment", "protective purpose", "punitive purpose", "restriction on liberty", "separation of powers", "serious Part 5. 3 offence", "Supreme Court of a State or Territory", "terrorism", "terrorist act", "terrorist offence", "terrorist organisation", "unacceptable risk".

Constitution – Ch III.

Criminal Code (Cth) – Div 105A.

Removed from Supreme Court of Victoria; *question reserved.*

Held: Questions answered.

Return to Top

Corporations

Westpac Securities Administration Ltd & Anor v Australian Securities and Investments Commission

S69/2020: [2021] HCA 3

Judgment delivered: 2 February 2021

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

Catchwords:

Corporations – Financial services – Where appellants had contacted members of superannuation funds of which they are trustees, advising each to accept offer to roll over their external superannuation accounts into their account with appellants – Where s 766B(3)(b) of *Corporations Act 2001* (Cth) defines "personal advice" to include "financial product advice" given or directed to person in circumstances where a reasonable person might expect provider to have considered one or more of that person's objectives, financial situation and needs – Whether financial product advice given by appellants to members personal advice within meaning of s 766B(3)(b).

Words and phrases – "consideration", "considered", "financial adviser", "financial product advice", "general advice", "one or more of the person's objectives, financial situation and needs", "personal advice", "social proofing", "superannuation", "superannuation fund".

Corporations Act 2001 (Cth) – ss 766B(3), 766B(4), 949A(2)(a).

Appealed from FCA (FC): [2019] FCAFC 187; (2019) 272 FCR 170; (2019) 373 ALR 455; (2019) 141 ACSR 1

Held: Appeal dismissed with costs.

Return to Top

Immigration

Minister for Immigration and Border Protection v Makasa
S103/2020: [2021] HCA 1

Pronouncement of orders: 12 November 2020

Reasons published: 3 February 2021

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

Catchwords:

> Immigration – Visas – Visa cancellation – Character test – Substantial criminal record – Where delegate of Minister for Immigration and Border Protection ("Minister") cancelled respondent's visa on character grounds under s 501(2) of *Migration Act 1958* (Cth) – Where Administrative Appeals Tribunal ("AAT") made decision under s 43(1)(c)(i) of *Administrative Appeals Tribunal Act 1975* (Cth) to set aside delegate's decision and substitute a decision not to cancel visa – Where Minister purported to re-exercise discretion to cancel visa – Whether Minister can re-exercise discretion on same factual basis in circumstances where AAT earlier decided not to cancel visa.
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> Words and phrases – "Administrative Appeals Tribunal", "character test", "different factual basis", "finality to the administrative decision-making process", "from time to time as occasion requires", "general power", "ministerial override", "nature of merits review", "powers of AAT", "reasonable suspicion", "re-exercise of a power", "special power", "substantial criminal record", "visa cancellation".
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> *Acts Interpretation Act 1901* (Cth) – ss 2, 33(1).
>
> *Administrative Appeals Tribunal Act 1975* (Cth) – s 43.
>
> *Migration Act 1958* (Cth) – ss 501, 501A.

Appealed from FCA (FC): [2020] FCAFC 22; (2020) 376 ALR 191'

Held: Appeal dismissed with costs.

Return to Top

3: Cases Reserved

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

Administrative Law

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17 & Anor
P23/2020: [2020] HCATrans 210

Date heard: 3 December 2020

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

Catchwords:

> Administrative law – Procedural fairness – Where first respondent unsuccessfully applied for protection visa and where Administrative Appeals Tribunal affirmed refusal decision – Where first respondent sought judicial review of Tribunal's decision in Federal Circuit Court ("FCC") – Where first respondent appeared in person before FCC with assistance of translator – Where at conclusion of hearing FCC made orders dismissing application and gave ex tempore reasons – Where reasons for judgment published two months later after first respondent had instituted appeal to Federal Court – Where Federal Court allowed appeal on basis that first respondent denied procedural fairness by FCC and that there had therefore been no real exercise of judicial power in the circumstances – Where Federal Court considered that FCC's review of Tribunal's decision otherwise unaffected by error warranting appellate attention – Whether requirement of procedural fairness, either generally or in relation to courts, includes duty to provide reasons – If yes, whether such requirement extends to requiring reasons to be provided in particular manner and/or time – What is appropriate form of order for court conducting appeal by way of rehearing to make in circumstances where appellate court finds court below denied appellant procedural fairness and also considers decision under appeal correct.

Appealed from FCA: [2019] FCA 1951

Return to Top

Constitutional Law

Palmer & Anor v The State of Western Australia & Anor
B26/2020: [2020] HCATrans 178; [2020] HCATrans 179; [2020] HCATrans 180

Dates heard: 3-4 November 2020

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

Catchwords:

> Constitutional law – Section 92 – *Quarantine (Closing the Border) Directions* (WA) ("Directions") – *Emergency Management Act 2005* (WA) ("Act") – Where on 15 March 2020, pursuant to s 56 of Act, WA Minister for Emergency Services declared state of emergency over whole State of WA to address pandemic caused by COVID-19 – Where state of emergency continued and extended – Where on 5 April 2020, State Emergency Coordinator (second defendant) issued Directions, purportedly pursuant to ss 61, 67, 70 and 72A of Act – Where Directions prohibited entry to WA with limited exceptions for "exempt travellers" – Where Directions subsequently amended, but no change made to broad aim of implementing "hard border" policy – Where first plaintiff Chairman and Managing Director of second plaintiff – Where second plaintiff corporation holds interests in mining projects in WA, and has offices and staff in Brisbane and Perth – Where first plaintiff ordinarily resides in Queensland, but travels to WA often for business, social, charitable, and political purposes – Where first plaintiff unsuccessfully applied for "exempt traveller" status – Whether Directions and/or Act wholly or partly invalid on basis that they impermissibly infringe s 92 *Constitution* (Cth).

Orders made on 6 November 2020 answering questions in special case. Written reasons of the Court to be published at a future date.

Return to Top

Migration Law

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

Date heard: 10 February 2021

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

Catchwords:

> Migration law – Fast track review process – *Migration Act 1958* (Cth) Pt 7AA – Where appellant applied for Safe Haven Enterprise

Visa on basis he feared serious or significant harm due to imputed support for Liberation Tigers of Tamil Eelam – Where Minister's delegate refused application – Where appellant contended interview conducted by delegate affected by material translation errors – Where, on review, Immigration Assessment Authority ("IAA") affirmed delegate's decision – Where Federal Circuit Court dismissed application for judicial review – Where appeal to Federal Court dismissed – Whether alleged translation errors in initial interview had consequence IAA could not perform function of considering "review material" – Whether, when on notice of alleged translation errors, legally unreasonable for IAA to fail to mould its procedures to cure effect of alleged errors by using power in s 473DC to get new information or taking any other step – Whether, when on notice of alleged translation errors, legally unreasonable for IAA to make adverse credibility findings relying on aspects of appellant's evidence allegedly affected by errors.

Appealed from FCA: [2020] FCA 304

Return to Top

DQU16 & Ors v Minister for Home Affairs & Anor

S169/2020: [2021] HCATrans 6

Date heard: 4 February 2021

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

Catchwords:

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

Appealed from FCA: [2020] FCA 518

Return to Top

DVO16 v Minister for Immigration and Border Protection & Anor
S66/2020: [2021] HCATrans 11

Date heard: 10 February 2021

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

Catchwords:

Migration law – Fast track review process – *Migration Act 1958* (Cth) Pt 7AA – Where appellant applied for temporary protection visa – Where Minister's delegate conducted interview with appellant – Where translation errors and omissions occurred in interview – Where Minister's delegate refused application – Where, relying on material obtained in interview, Immigration Assessment Authority ("IAA") reviewed delegate's decision – Where IAA affirmed delegate's decision – Whether, in circumstances where material translation error occurred in delegate's interview and IAA relies on material obtained in interview in reviewing delegate's decision under Pt 7AA, IAA needs to have actual or constructive knowledge of translation error for jurisdictional error to arise.

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

Return to Top

Minister for Immigration and Border Protection v EFX17
B43/2020: [2020] HCATrans 211

Date heard: 4 December 2020

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

Catchwords:

Migration law – Visa cancellation – Character test – *Migration Act 1958* (Cth) ss 496, 501, 501CA – Notice of cancellation – Where Minister's delegate made decision under s 501(3A) to cancel respondent's protection visa while respondent serving sentence of imprisonment – Where pursuant to duties in s 501CA(3) Minister caused to be given to respondent written notice containing notification of cancellation decision, relevant information as to reason for decision, and invitation to make representations about revocation of cancellation decision – Where notice given to respondent by officer of Queensland Corrective Services – Where respondent commenced proceedings in Federal Circuit Court challenging validity of notice – Where Circuit Court dismissed challenge – Where appeal to Full Court of Federal Court allowed by majority – Whether Minister, in performing duties under s 501CA(3), must have regard to matters relating to former visa

holder's capacity, including literacy, capacity to understand English, mental capacity and health, and facilities available to them in custody – Whether fulfilment of duties in s 501CA(3) dependent on former visa holder's ability to comprehend notice, particulars, and invitation to make representations – Whether valid performance of duties in s 501CA(3) conditional on person performing them holding delegated authority under s 496(1) or whether s 497 applicable.

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

Return to Top

Practice and Procedure

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

Date heard: 9 February 2021

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

Catchwords:

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

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

Return to Top

Wigmans v AMP Limited & Ors
S67/2020: [2020] HCATrans 182

Date heard: 10 November 2020

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

Catchwords:

Practice and procedure – Representative proceedings – Where multiple representative proceedings on foot against respondent in single forum – Where each plaintiff sought stay of proceedings commenced by other plaintiffs – Where primary judge applied multifactorial analysis to determine which proceeding should progress – Where NSW Court of Appeal dismissed appeal from primary judge's decision – Whether Pt 10 of *Civil Procedure Act 2005* (NSW) authorised approach taken by primary judge – Whether permissible for court faced with multiple open class actions conducted on basis of different funding models and with different incentives, disincentives and risk profiles to assume, without findings in evidence, that different proceedings equally likely to achieve possible settlement or judgment outcome within range of possible outcomes.

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

Return to Top

Taxation

The Commissioner of Taxation for the Commonwealth of Australia v Travelex Limited
S116/2020: [2020] HCATrans 209

Date heard: 2 December 2020

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

Catchwords:

Taxation – Overpayments – Interest – Where supplies which were GST-free wrongly included in Business Activity Statement – Where on 28 June 2012 Commissioner allocated credit of $149,020 to respondent's Running Balance Account ("RBA") and recorded "effective date" of allocation as 16 December 2009 – Whether Commissioner's actions on 28 June 2012, even if made in error and unreflective of any entitlement under a taxation law on part of respondent, created obligation on part of Commissioner to refund "RBA surplus" within meaning of Pt IIB of *Taxation Administration*

Act 1953 (Cth) and entitlement on part of respondent to interest under *Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth).

Appealed from FCA (FC): [2020] FCAFC 10; (2019) 275 FCR 239

Return to Top

4: ORIGINAL JURISDICTION

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

Constitutional Law

LibertyWorks Inc v Commonwealth of Australia
S10/2020: [2020] HCATrans 116

Catchwords:

Constitutional law – Validity of legislation – *Foreign Influence Transparency Scheme Act 2018* (Cth) ("*FITS Act*") – Where plaintiff is a not-for-profit think-tank incorporated in Queensland – Where in August 2019, plaintiff organised and held Conservative Political Action Conference in Sydney – Where US corporation, American Conservative Union ("ACU"), runs conference with same name in US, where ACU board members spoke at Sydney conference, and where ACU was advertised as "Think Tank Host Partners" for Sydney conference – Where plaintiff not registered under *FITS Act* – Where in October 2019, notice under s 45 of *FITS Act* issued to President of plaintiff, requiring plaintiff to provide certain information within specified period – Where s 59 of *FITS Act* provides for offence of failing to comply with s 45 notice within time – Where in November 2019, President of plaintiff replied to notice, refusing to provide requested information and disputing validity of notice – Whether terms, operation, or effect of *FITS Act* impermissibly burden implied freedom of political communication – Whether *FITS Act* contravenes s 92 of *Constitution* (Cth) by impermissibly burdening freedom of intercourse – Whether *FITS Act* supported by head of power in s 51 *Constitution*.

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

Return to Top

Zhang v Commissioner of Police & Ors
S129/2020

Catchwords:

Constitutional law – Validity of legislation – Validity of warrants – Where plaintiff under investigation for alleged foreign interference offences, contrary to *Criminal Code* (Cth) sub-ss 92.3(1), (2) – Where plaintiff formerly employed part-time in office of member of New South Wales Parliament – Where magistrate, purporting to

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

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

Return to Top

5: SECTION 40 REMOVAL

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

Commonwealth of Australia v AJL20

C16/2020; C17/2020: [2020] HCATrans 244

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

Catchwords:

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

Torts – False imprisonment – Whether second respondent falsely imprisoned.

Removed from Full Court of the Federal Court of Australia.

Return to Top

6: SPECIAL LEAVE GRANTED

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

Administrative Law

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

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

Catchwords:

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

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

Return to Top

Constitutional Law

Chetcuti v Commonwealth of Australia
M122/2020

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

Catchwords:

> Constitutional law – Legislative power – Naturalisation and aliens – Where appellant entered Australia in 1948 – Where appellant was

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

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

Return to Top

Contracts

Matthew Ward Price as Executor of the Estate of Alan Leslie Price (Deceased) & Ors v Christine Claire Spoor as Trustee & Ors

B55/2020: [2020] HCATrans 142

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

Catchwords:

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

could sound in any remedy other than claim for damages for breach of warranty.

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

Return to Top

Hobart International Airport Pty Ltd v Clarence City Council & Anor; Australia Pacific Airports (Launceston) Pty Ltd v Northern Midlands Council & Anor

H4/2020; H5/2020: [2021] HCATrans 26

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

Catchwords:

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

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

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

Return to Top

Corporations

Walton & Anor v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liquidation) & Ors

S151/2020: [2021] HCATrans 18

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

Catchwords:

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

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

Return to Top

Criminal Law

Bell v State of Tasmania

H2/2020: [2021] HCATrans 5

Date heard: 3 February 2021.

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

Catchwords:

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

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

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

Return to Top

Edwards v The Queen

S235/2020: [2020] HCATrans 216

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

Catchwords:

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

remained reasonable doubt as to existence of opportunity for offending to have occurred.

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

Return to Top

Namoa v The Queen

S188/2020: [2020] HCATrans 163

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

Catchwords:

Criminal law – Conspiracy between married persons – Relationship between common law and Schedule ("*Criminal Code*") to *Criminal Code Act 1995* (Cth) – Where applicant tried jointly with another on one count of conspiring to do acts in preparation for terrorist act or acts, contrary to ss 11.5 and 101.6 of *Criminal Code* – Where prior to trial, trial judge rejected application for permanent stay on basis that applicant and co-accused were married – Where applicant and co-accused convicted – Where NSW Court of Criminal Appeal ("CCA") dismissed appeal against conviction – Whether immediately prior to enactment of *Criminal Code*, it was part of common law of Australia that married persons could not commit criminal conspiracy – If so, whether that principle remains part of common law – Whether CCA entitled to depart from Privy Council decisions on principles of common law which preceded passage of *Australia Acts* in 1986 – Whether *Criminal Code* expressly or impliedly ousts common law rule as to conspiracy between married persons.

Appealed from NSWSC (CCA): [2020] NSWCCA 62; (2020) 351 FLR 266

Return to Top

Director of Public Prosecutions Reference No 1 of 2019

M131/2020: [2020] HCATrans 221

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

Catchwords:

Criminal law – Mental element – Recklessness – Where Victorian Court of Appeal in *R v Campbell* [1997] 2 VR 585 held that "recklessness" requires foresight of probability of consequence – Where High Court in *Aubrey v The Queen* (2017) 260 CLR 305 held that "recklessness" for offences other than murder requires

foresight of possibility of consequence – Where reference arose from trial in which accused acquitted of recklessly causing serious injury, contrary to s 17 of *Crimes Act 1958* (Vic) – Where Court of Appeal concluded nothing in *Aubrey* compelled reconsideration of *Campbell* – Where Court of Appeal held correct interpretation of "recklessness" requires foresight of "probability" of serious injury – Whether, in Victoria, correct interpretation of "recklessness" for offences not resulting in death is foresight of the "possibility" of serious injury – Whether principle in *Campbell* should be followed.

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

Return to Top

Defamation

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

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

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

Catchwords:

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

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

Return to Top

Equity

Stubbings v Jams 2 Pty Ltd & Ors

M81/2020: [2021] HCATrans 23

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

Catchwords:

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

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

Return to Top

Evidence

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

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

Catchwords:

Evidence – Exceptions to privilege against self-incrimination – *Evidence Act 1995* (Cth) s 128A – Where applicant commenced proceedings against respondent and two others seeking satisfaction of tax liabilities – Where applicant sought freezing orders with respect to respondent's assets – Where Federal Court made *ex parte* freezing orders in relation to respondent's worldwide assets – Where respondent also ordered to file and serve affidavit disclosing his worldwide assets – Where respondent filed two affidavits, one which was served on applicant, and one which was delivered to Federal Court in sealed envelope – Where respondent claimed privilege against self-incrimination in respect of second affidavit, invoking s 128A – Where prior to hearing of privilege claim, judgment entered for applicant in sum of $42,297,437.65 – Where primary judge accepted there were reasonable grounds for respondent's claim for privilege against self-incrimination, but

considered not in interests of justice that certificate be granted pursuant to s 128A(7), with consequence that applicant did not get access to second affidavit – Where majority of Full Court of Federal Court held that primary judge had erred in certain respects, but dismissed appeal – Whether availability of mechanism to compulsorily examine respondent as judgment debtor relevant to determining whether it was in interests of justice to grant s 128A certificate – Whether risk of derivative use of privileged information in event that s 128A certificate was granted should have been taken into account when determining whether it was in interests of justice to grant certificate.

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

Return to Top

Hamilton (a pseudonym) v the Queen
S146/2020: [2021] HCATrans 19

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

Catchwords:

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

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

Return to Top

Family Law

Charisteas v Charisteas & Ors
P38/2020: [2021] HCATrans 28

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

Catchwords:

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

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

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

Return to Top

Industrial Law

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

P40/2020: [2021] HCATrans 30

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

Catchwords:

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

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

Return to Top

Ridd v James Cook University

B47/2020: [2020] HCATrans 15

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

Catchwords:

Industrial law – Enterprise agreement – Where applicant employed as professor by respondent under James Cook University Enterprise Agreement ("EA") – Where EA cl 14 protected right to intellectual freedom and specified limits – Where respondent has Code of Conduct and in cl 13, parties to EA expressed commitment to Code – Where cl 54 provided disciplinary action could only be taken for "misconduct" or "serious misconduct" – Where "serious misconduct" included breach of Code – Where respondent took disciplinary action against applicant on basis applicant breached Code by failure to act in collegial manner and to uphold integrity and good reputation of respondent – Where applicant successfully brought proceedings in Federal Circuit Court alleging respondent contravened EA because he could not be disciplined for conduct protected under cl 14 – Where respondent successfully appealed to Full Court of the Federal Court – Whether applicant's conduct protected by cl 14 – Whether, on proper construction of EA, cl 14, 13 and Code should be read together – If so, whether cl 13 qualifies cl 14 or vice versa.

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

Return to Top

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

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

Catchwords:

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

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

Return to Top

ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors

S139/2020: [2021] HCATrans 27

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

Catchwords:

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

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

Return to Top

Migration Law

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

B66/2020: [2020] HCATrans 166

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

Catchwords:

Migration law – Removal and deportation – Where s 5(1) of *Migration Act 1958* (Cth) relevantly provided that person who had "been removed or deported from Australia or removed or deported from another country" was "behaviour concern non-citizen" – Where respondent held special category visa – Where that visa purportedly cancelled, and respondent detained and removed from Australia to New Zealand – Where, by consent, Federal Circuit Court quashed cancellation decision – Where respondent returned to Australia and was interviewed by Minister's delegate at airport on arrival – Where delegate asked whether she had ever been removed, deported, or excluded from any country, including Australia – Where respondent answered yes, and explained circumstances of earlier removal – Where delegate refused to grant respondent special category visa, not being satisfied that the respondent had not been "removed … from Australia" within meaning of definition of "behaviour concern non-citizen" – Where Federal Circuit Court dismissed respondent's application for judicial review of delegate's decision – Where Federal Court allowed appeal from Circuit Court's decision – Whether "removed or deported from" means taken out of some country by or on behalf of government of that country in fact, or whether it means being taken out of some country validly or lawfully, or whether it bears different meanings in same section, namely, valid or lawful removal or deportation in case of ejection from Australia, and removal or deportation in fact in case of other countries.

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

Return to Top

MZAPC v Minister for Immigration and Border Protection & Anor

M77/2020: [2020] HCATrans 113

Date heard: 14 August 2020 – *Special leave granted*.

Catchwords:

Migration law – Procedural fairness – Materiality – Where appellant applied for protection visa – Where appellant's criminal record and related material provided to Administrative Appeals Tribunal ("AAT") by first respondent without appellant's knowledge – Where certificate under s 438 of *Migration Act 1958* (Cth) issued in relation

to criminal record and related material and appellant not notified of certificate – Where criminal record disclosed history of serious traffic offences – Where AAT affirmed delegate's decision to refuse visa application – Where appeal to Federal Circuit Court dismissed – Where appeal to Federal Court dismissed – Where common ground that failure to notify appellant of certificate constituted denial of procedural fairness – Whether, when considering materiality of denial of procedural fairness occasioned by failure to notify appellant of s 438 certificate, appellant bore onus of rebutting presumption that AAT did not rely on documents subject to certificate and had to prove that documents had been taken into account by AAT – Whether Federal Court erred in finding that denial of procedural fairness immaterial on basis that offences disclosed in criminal record not rationally capable of impacting appellant's credibility before AAT.

Appealed from FCA: [2019] FCA 2024

Return to Top

Patents

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

S154/2020; S155/2020: [2021] HCATrans 13

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

Catchwords:

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

2009) but not extension period – Where respondent successfully appealed to Full Court, which held Agreement gave licence from 31 May 2009 to extended expiry date (9 December 2012) – Whether licence applied in relation to acts occurring after patent original expiry date and before term extended – Whether, on respondent's construction, Agreement produced commercially nonsensical result – Whether exclusive licensee may commence infringement proceeding for acts done between original date of expiry and date on which term subsequently extended.

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

Return to Top

Practice and Procedure

Deputy Commissioner of Taxation v Huang
S179/2020: [2021] HCATrans 21

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

Catchwords:

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

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

Return to Top

Taxation

Addy v Commissioner of Taxation
B49/2020: [2021] HCATrans 17

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

Catchwords:

Taxation – Double taxation treaty – Non-discrimination clause – Where Art 25 of Australia and United Kingdom Double Taxation Treaty provides foreign nationals shall not be subjected to more burdensome tax treatment compared to hypothetical Australian national in same circumstances – Where applicant citizen of United Kingdom and holder of working holiday visa – Where working holiday visa-holders subject to special working holiday tax rate in Pt III of Sch 7 of *Income Tax Rates Act 1986* (Cth) – Where applicant taxed $3,986 compared to $1,591.44 by Australian national on same income – Where applicant selected as test case by respondent Commissioner – Where Federal Court held applicant entitled to benefit of Art 25 – Where respondent successfully appealed to Full Court – Whether applicant subject to more burdensome taxation by reason of nationality – If so, whether applicant Australian resident for tax purposes.

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

Return to Top

Torts

Talacko v Talacko & Ors
M111/2020: [2020] HCATrans 169; [2020] HCATrans 175

Dates determined: 16, 22 October 2020 – *Special leave granted*.

Catchwords:

Torts – Unlawful means conspiracy – Loss of chance – Where, in context of long dispute over properties in Prague, Slovakia, and Dresden, some of the respondents commenced proceedings in Supreme Court of Victoria alleging that applicant and members of her immediate family engaged in unlawful means conspiracy by executing donation agreements which purported to put certain interests in properties beyond reach of respondents – Where Supreme Court held that three of four elements of unlawful means conspiracy made out, but that pecuniary loss not established –

Where Court of Appeal allowed appeal against that decision – Whether reduction in chance to recover judgment debt, where that debt may yet be recovered, can constitute pecuniary loss sufficient to complete cause of action – Whether expenses incurred by one party in foreign proceedings can constitute pecuniary loss sufficient to complete cause of action in circumstances where foreign proceedings ongoing and where foreign court may order that party to bear its own expenses.

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

Return to Top

7: Cases Not Proceeding or Vacated

Evidence

Davidson v The Queen
B6/2020: [2021] HCATrans 4

Date heard: 2 February 2021

Catchwords:

Evidence – Similar fact evidence – Common law approach – Where applicant was massage therapist – Where applicant charged with counts of sexual assault and rape committed against ten complainant clients – Where prosecution sought to lead similar fact evidence – Where applicant unsuccessfully sought to have separate trials ordered on rape counts on basis that evidence relied upon as similar fact evidence not cross-admissible on other counts – Where following jury trial, applicant convicted of 18 counts of sexual assault and one count of rape – Whether joint trial of sexual assault and rape counts occasioned miscarriage of justice – Whether majority of Court of Appeal effectively lowered threshold for admission of similar fact evidence at common law.

Appealed from QSC (CA): [2019] QCA 120

Application for extension of time to file application for special leave refused.

Return to Top

Private International Law

Mackellar Mining Equipment Pty Ltd and Dramatic Investments Pty Ltd t/as Partnership 818 & Anor v Thornton & Ors
B56/2019: [2021] HCATrans 10

Hearing vacated: 10 February 2021

Catchwords:

Private international law – Restraint of foreign proceedings – Where plane crash in Queensland killed two pilots and 13 passengers –

Where respondents, relatives of deceased, commenced proceedings against appellants in Missouri in May 2008 – Where appellants brought application in March 2017 in Queensland Supreme Court for permanent anti-suit injunction in respect of Missouri proceedings – Whether complete relief was available in Queensland proceedings and nothing additional could be gained in Missouri proceedings – Whether continuation of Missouri proceeding, after all foreign parties removed, was vexatious or oppressive or otherwise unconscionable within *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

Appealed from QSC (CA): [2019] QCA 77; (2019) 367 ALR 171

Hearing vacated and pronouncement of orders by consent on 10 February 2021.

Return to Top

8: SPECIAL LEAVE REFUSED

Publication of Reasons: 4 February 2021 (Canberra)

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	AJH19	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S177/2020)	Federal Court of Australia [2020] FCA 821	Application dismissed [2021] HCASL 1
2.	Kingston	Field (S185/2020)	Full Court of the Family Court of Australia [2020] FamCAFC 235	Application dismissed [2021] HCASL 2
3.	Daley	Child Support Registrar (S187/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 161	Application dismissed [2021] HCASL 3
4.	Mao	AMP Superannuation Limited & Ors (S194/2020)	Supreme Court of New South Wales (Court of Appeal) [2018] NSWCA 72	Application dismissed [2021] HCASL 4
5.	CKG17	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S198/2020)	Federal Court of Australia [2020] FCA 478	Application dismissed [2021] HCASL 5
6.	BSL17	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (B24/2020)	Federal Court of Australia [2020] FCA 480	Application dismissed with costs [2021] HCASL 6
7.	ATU19	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (B44/2020)	Federal Court of Australia [2020] FCA 1165	Application dismissed with costs [2021] HCASL 7
8.	Reading	TTB SMS Pty Ltd (M84/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 203	Application dismissed with costs [2021] HCASL 8

Publication of Reasons: 10 February 2021 (Canberra)

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	Zeqaj	Deputy Commissioner of Taxation (M100/2020)	Federal Court of Australia [2020] FCA 1270	Application dismissed [2021] HCASL 9
2.	La Mela	Franklexis Pty Ltd & Anor (P30/2020)	Supreme Court of Western Australia (Court of Appeal) [2020] WASCA 83	Application dismissed [2021] HCASL 10
3.	La Mela	Franklexis Pty Ltd & Anor (P31/2020)	Supreme Court of Western Australia (Court of Appeal) [2020] WASCA 83	Application dismissed [2021] HCASL 10
4.	Okoli	The Queen (P44/2020)	Supreme Court of Western Australia (Court of Appeal) [2019] WASCA 91	Application dismissed [2021] HCASL 11
5.	Karlsson	Griffith University (S178/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 176	Application dismissed [2021] HCASL 12
6.	Mohareb	Saratoga Marine Pty Ltd & Ors (S189/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 235	Application dismissed [2021] HCASL 13
7.	AAQ18	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S193/2020)	Federal Court of Australia [2020] FCA 232	Application dismissed [2021] HCASL 14

Publication of Reasons: 11 February 2021 (Canberra)

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	Craven	Commercial & Process Services Australia Pty Ltd & Anor (B56/2020)	Supreme Court of Queensland (Court of Appeal) [2020] QCA 177	Application dismissed [2021] HCASL 15
2.	Ezekiel-Hart	Australian Capital Territory (C12/2020)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2020] ACTCA 32	Application dismissed [2021] HCASL 16
3.	Krysiak	Housing Authority (P47/2020)	Supreme Court of Western Australia (Court of Appeal) [2020] WASCA 119	Application dismissed [2021] HCASL 17
4.	In the matter of an application by Martin Waterhouse for leave to appeal (S182/2020)		High Court of Australia (unreported)	Application dismissed [2021] HCASL 18
5.	DOF16	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S197/2020)	Federal Court of Australia [2020] FCA 1358	Application dismissed [2021] HCASL 19
6.	Holzinger	Attorney-General for the State of Queensland & Anor [2020] QCA 165	Supreme Court of Queensland (Court of Appeal) [2020] QCA 165	Application dismissed with costs [2021] HCASL 20
7.	NY	The Queen (B59/2020)	Supreme Court of Queensland (Court of Appeal) [2020] QCA 170	Application dismissed [2021] HCASL 21
8.	Jesse Deacon (a pseudonym)	The Queen (M74/2020)	Supreme Court of Victoria (Court of Appeal) [2018] VSCA 257	Application dismissed [2021] HCASL 22
9.	Leigh Milner (a pseudonym)	The Queen (M89/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 207	Application dismissed [2021] HCASL 23
10.	Provan's Timber Pty Ltd & Ors	Secretary to the Department of Transport (M91/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 210	Application dismissed with costs [2021] HCASL 24
11.	Field	The Queen (S141/2020)	Supreme Court of Queensland (Court of Criminal Appeal) [2020] NSWCCA 105	Application dismissed [2021] HCASL 25

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
12.	BOX16	Minister for Immigration and Border Protection & Anor (S126/2020)	Federal Court of Australia [2020] FCA 801	Application dismissed with costs [2021] HCASL 26
13.	Loder	Bolton (S132/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 45	Application dismissed with costs [2021] HCASL 27
14.	Fortunatow	Commissioner of Taxation & Anor (S165/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 139	Application dismissed with costs [2021] HCASL 28

11 February 2021: Canberra and by video link

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	Dental Corporation Pty Ltd	Moffet (S137/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 118	Refused with costs [2021] HCATrans 16
2.	KDSP	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (M65/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 108	Refused with costs [2021] HCATrans 20
3.	KDSP	Minister for Immigration, Citizenship, Migrant Services and multicultural Affairs (M95/2020)	Application for Constitutional Writ	Vacated
4.	Chief Commissioner of State Revenue	Downer EDI Engineering Pty Limited (S134/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 126	Refused with costs [2021] HCATrans 14
5.	Hari Singh by his next friend Ambu Kanwar	Lynch (S147/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 152	Refused with costs [2021] HCATrans 12

12 February 2021: Canberra and by video link

No.	*Applicant*	*Respondent*	*Court appealed from*	*Results*
1.	Schmidt & Anor	Ahrkalimpa Pty Ltd (Receivers and Managers Appointed) & Anor (M78/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 193	Refused with costs [2021] HCATrans 24
2.	Morton	The Queen (D3/2020)	Supreme Court of Northern Territory (Court of Criminal Appeal) [2020] NTCCA 2	Refused [2021] HCATrans 25
3.	Brown	The Queen (M69/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 20	Refused [2021] HCATrans 29
4.	PQSM	Minister for Home Affairs (P41/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 125	Refused with costs [2021] HCATrans 31