



HIGH COURT BULLETIN

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High Court of Australia Library
[2022] HCAB 10 (16 December 2022)

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	1
2: Cases Handed Down	3
3: Cases Reserved	6
4: Original Jurisdiction	15
5: Section 40 Removal	18
6: Special Leave Granted	19
7: Cases Not Proceeding or Vacated	33
8: Special Leave Refused	34

1: SUMMARY OF NEW ENTRIES

2: Cases Handed Down

Case	Title
<i>Realestate.com.au Pty Ltd v Hardingham & Ors; RP Data Pty Limited v Hardingham & Ors</i>	Contract
<i>Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788</i>	Insurance
<i>Electricity Networks Corporation Trading as Western Power v Herridge Parties & Ors</i>	Negligence

3: Cases Reserved

Case	Title
<i>Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited atf The Parras Family Trust & Ors</i>	Contracts

<u><i>QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor</i></u>	Courts and Judges
<u><i>Mitchell v The King; Rigney v The King; Carver v The King; Tenhoopen v The King</i></u>	Criminal Law
<u><i>Self Care IP Holdings Pty Ltd & Anor v Allergan Australia Pty Ltd & Anor; Self Care IP Holdings Pty Ltd & Anor v Allergan Australia Pty Ltd & Anor</i></u>	Intellectual Property

[4: Original Jurisdiction](#)

[5: Section 40 Removal](#)

[6: Special Leave Granted](#)

Case	Title
<u><i>Crime and Corruption Commission v Carne</i></u>	Constitutional Law
<u><i>Harvey & Ors v Minister for Primary Industry and Resources & Ors</i></u>	Statutes

[7: Cases Not Proceeding or Vacated](#)

[8: Special Leave Refused](#)

2: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the December 2022 sittings.

Contract

Realestate.com.au Pty Ltd v Hardingham & Ors; RP Data Pty Limited v Hardingham & Ors

[S57/2022; S58/2022](#): [\[2022\] HCA 39](#)

Judgment: 14 December 2022

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

Catchwords:

Contract – Informal agreements – Implied term – Inferred term – Copyright – Where real estate agencies informally commissioned professional photographer and his company to take photographs and prepare floor plans of properties for use on platforms concerning marketing of properties for sale or lease – Where photographs and floor plans provided to each agency were uploaded to platform operated by Realestate.com.au Pty Ltd ("REA") – Where REA's terms and conditions provided that agency granted licence to REA to use and sub-license copyright in photographs and floor plans – Where REA sub-licensed copyright in photographs and floor plans to RP Data Pty Ltd ("RP Data") – Where RP Data kept photographs and floor plans from historical sales on subscription website – Whether agencies' licence and right to grant sub-licence limited to period of marketing campaign for sale or lease of property.

Words and phrases – "all the circumstances", "business efficacy", "copyright", "implied term", "inferred term", "informal contract", "intention", "licence", "mutual understanding", "objective theory of contract", "reasonable person", "words and conduct".

Appealed from FCA (FC): [\[2021\] FCAFC 148](#); (2021) 395 ALR 644; (2021) 162 IPR 1

Held (S57/2022): Appeal allowed in part; first and second respondents pay the appellant's costs.

Held (S58/2022): Appeal allowed; first and second respondents pay the appellant's costs.

[Return to Top](#)

Insurance

Allianz Australia Insurance Limited v Delor Vue Apartments CTS
39788

S42/2022: [\[2022\] HCA 38](#)

Judgment: 14 December 2022

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

Catchwords:

Insurance – Contract of insurance – Where insured body corporate knew that apartment buildings had serious non-structural defects which it did not disclose to insurer – Where cyclone caused substantial damage to apartment buildings and exposed defects – Where insurer advised insured that it would provide indemnity despite non disclosure – Where extent of indemnity ambiguous – Where dispute arose as to sequence of repair works and distribution of costs – Where insurer proposed settlement on particular terms and advised that, if insured did not accept, it would rely on s 28(3) of *Insurance Contracts Act 1984* (Cth) and reduce liability based on non disclosure – Whether insurer bound by representation of indemnity due to waiver, election or estoppel – Whether insurer failed to act with utmost good faith.

Words and phrases – "completed exercise of a legal power", "detriment", "duty of utmost good faith", "election", "election by affirmation", "estoppel", "extinguishment of rights", "full satisfaction of alternative rights", "inconsistent sets of rights", "indemnity", "irrevocable waiver", "non disclosure", "policy of insurance", "revocation", "waiver".

Insurance Contracts Act 1984 (Cth), ss 13, 14, 28(3).

Appealed from FCA (FC): [\[2021\] FCAFC 121](#); (2021) 287 FCR 388; (2021) 396 ALR 27; (2021) 153 ACSR 522

Held: Appeal allowed with costs.

[Return to Top](#)

Negligence

Electricity Networks Corporation Trading as Western Power v Herridge Parties & Ors

P5/2022: [\[2022\] HCA 37](#)

Judgment: 7 December 2022

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

Catchwords:

Negligence – Duty of care – Where appellant statutory corporation ("Western Power") undertook, operated, managed and maintained electricity distribution system under interconnected statutory framework – Where distribution system delivered electricity to consumers' premises – Where pursuant to statutory powers in performing statutory functions Western Power attached electrical cable and other apparatus to point of attachment pole ("PA pole") owned by and on land of fourth respondent ("Mrs Campbell") and energised her premises – Where Western Power contracted fifth respondent ("Thiess") to undertake works in vicinity of Mrs Campbell's property – Where works included removing and replacing electrical cable attached to PA pole – Where employee of Thiess did not adequately undertake inspection of PA pole to identify signs of deterioration in accordance with industry standards – Where PA pole fell to ground causing bushfire – Whether Western Power owed to persons in vicinity of distribution system duty to take reasonable care to avoid or minimise risk of injury to those persons, and loss or damage to their property, from ignition and spread of fire in connection with delivery of electricity through distribution system.

Words and phrases – "assumption of responsibility", "class of persons", "control", "duty of care", "electricity distribution system", "enter into the field", "exercise of statutory powers", "existence and content of the duty", "inconsistent or incompatible", "intervene in a field of activity", "manner of exercise of the power", "negligence", "reasonable care", "reasonable precautions", "risk of harm", "statutory authority", "statutory functions", "statutory powers".

Electricity Act 1945 (WA), ss 5, 25.

Electricity Corporations Act 2005 (WA), ss 3, 4, 41, 42, 43, 54, 56, 58, 59, 61, 63.

Electricity Industry Act 2004 (WA), ss 3, 4, 5, 6, 7, 31, 57, 58, 103.

Energy Operators (Powers) Act 1979 (WA), ss 4, 28, 43, 46, 48, 49, 54, 57, 58.

Electricity Industry (Obligation to Connect) Regulations 2005 (WA), regs 2, 4, 7.

Electricity Regulations 1947 (WA), regs 241, 242, 265.

Appealed from WASC (CA): [\[2021\] WASCA 111](#); (2021) 15 ARLR 1

Held: Appeal dismissed; appellant pay the costs of the first, second, fourth and fifth respondents.

[Return to Top](#)

3: CASES RESERVED

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

Administrative Law

Stanley v Director of Public Prosecutions (NSW) & Anor
S126/2022: [\[2022\] HCATrans 202](#)

Date heard: 15 November 2022

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

Catchwords:

Administrative law – Judicial review – Jurisdictional error – Where District Court's exercise of sentencing discretion governed by *Crimes (Sentencing Procedure) Act 1999* (NSW) ("CSP") – Where s 7 of CSP provides court that sentenced offender to imprisonment may make intensive correction order ("ICO") – Where, when considering making ICO, Part 5 of CSP applies, including s 66 which provides "[c]ommunity safety must be paramount consideration" when sentencing court is deciding whether to make ICO – Where s 66(2) requires sentencing court to assess whether making order or serving sentence more likely to address offender's risk of reoffending – Whether failure to comply with s 66(2) of CSP constitutes jurisdictional error – Whether statutory requirement that matter be considered is jurisdictional/mandatory if power being exercised is part of sentencing process undertaken by court – Whether statutory requirement that matter be considered is not jurisdictional if failure to comply cannot be characterised as fundamentally misconceiving sentencing function – Whether "complex" consequences of finding criminal sentence invalid weigh significantly against finding statutory requirement intended to be jurisdictional/mandatory.

Appealed from NSWSC (CA): [\[2021\] NSWCA 337](#); (2021) 107 NSWLR 1; (2021) 398 ALR 355; (2021) 294 A Crim R 305

Appeal allowed. Reasons to be published at a later date.

[Return to Top](#)

Constitutional Law

Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Ors; DCM20 v Secretary of Department of Home Affairs & Anor

[M32/2022](#); [S81/2022](#): [\[2022\] HCATrans 179](#); [\[2022\] HCATrans 181](#)

Date heard: 19 and 20 October 2022

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

Catchwords:

Constitutional law – Judicial review – Non-statutory executive action – Sections 61 and 64 of *Constitution* – Where s 351(1) of *Migration Act 1958* (Cth) ("Act") provided if Minister thinks it in public interest, Minister may substitute decision of Administrative Appeals Tribunal under s 349 of Act for decision more favourable to applicant – Where s 351(3) and s 351(7) provided power under s 351(1) be exercised by Minister personally and Minister under no duty to consider whether to exercise power – Where Minister issued guidelines in relation to power conferred by s 351 setting out circumstances in which Department of Home Affairs should refer requests – Where Departmental officers concluded requests for intervention failed to satisfy criteria for referral in guidelines – Whether decision of Departmental officer not to refer to request for Minister to exercise power conferred by s 351(1) amenable to judicial review – Whether decision of Departmental officer affected by legal unreasonableness – Whether remedies available.

Appealed from FCA (FC): [\[2021\] FCAFC 213](#); (2021) 288 FCR 23

[Return to Top](#)

Attorney-General (Cth) v Huynh & Ors

[S78/2022](#): [\[2022\] HCATrans 190](#); [\[2022\] HCATrans 191](#)

Date heard: 8 and 9 November 2022

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

Catchwords:

Constitutional law – Judicial power – Post-appeal application for inquiry into conviction – State courts – Supervisory jurisdiction – Where s 68(1) of *Judiciary Act 1903* (Cth) provided State laws with respect to procedures apply to persons charged with Commonwealth offences where jurisdiction conferred on courts of that State – Where s 68(2) conferred jurisdiction on State courts with respect to criminal proceedings – Where, following conviction for offences against laws

of Commonwealth and unsuccessful appeal, appellant applied to NSW Supreme Court under Pt 7, Div 3 of *Crimes (Appeal and Review) Act 2001* (NSW) ("Appeal and Review Act") for review of conviction and sentence – Whether post-appeal inquiry and review procedures in Pt 7, Div 3 of Appeal and Review Act available in relation to conviction or sentence for Commonwealth offence heard in NSW court – Whether power exercised by judge under s 79 of Pt 7, Div 3 of Appeal and Review Act, to consider applications for inquiry into conviction made under s 78, judicial or administrative in nature – Whether ss 78-79 of Appeal and Review Act apply as federal law pursuant to s 68(1) of *Judiciary Act* in relation to conviction.

Appealed from NSWSC (CA): [\[2021\] NSWCA 297](#); (2021) 107 NSWLR 75; (2021) 396 ALR 422; (2021) 293 A Crim R 392

[Return to Top](#)

Unions NSW & Ors v State of New South Wales

S98/2022: [\[2022\] HCATrans 203](#); [\[2022\] HCATrans 204](#)

Date heard: 16 and 17 November 2022

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

Catchwords:

Constitutional law – Implied freedom of communication on governmental and political matters – Elections – Electoral funding – Where s 29(11) of *Electoral Funding Act 2018* (NSW) ("EF Act") provides cap of \$20,000 on electoral expenditure by third-party campaigner for State by-election – Where, pursuant to s 33(1) of EF Act, unlawful for third-party campaigner to incur electoral expenditure for State election campaign during capped State expenditure period for election if exceeds cap on electoral expenditure – Where, pursuant to s 35(1) of EF Act, unlawful for third-party to act in concert with another person or persons to incur electoral expenditure in relation to election campaign during capped expenditure period for election that exceeds cap for third-party campaigner for election – Where plaintiffs assert intention to register as "third-party campaigner", to incur "electoral expenditure", and to coordinate electoral campaigns with other entities – Where plaintiffs assert to be detrimentally affected by EF Act insofar as EF Act regulates those activities – Whether s 29(11) read with s 33(1) and/or s 35 invalid because impermissibly burdens implied freedom of political communication.

Special case referred to the Full Court on 28 September 2022.

Contracts

Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited atf The Parras Family Trust & Ors

S125/2022: [\[2022\] HCATrans 216](#)

Date heard: 9 December 2022

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

Catchwords:

Contracts – Construction – Interpretation – Termination – Frustration – Supervening illegality – Covid-19 – Public Health Order – Where settlement of goodwill, plant and equipment under contract for sale of hotel and associated business agreed to take place on 30 March 2020 – Where cl 50.1 of contract required vendor to carry on business in usual and ordinary course as regards its nature, scope and manner and repair and maintain assets in same manner as at date of contract and use reasonable endeavours to ensure all items on inventory in good repair and in proper working order – Where *Public Health (Covid-19 Places of Social Gathering) Order 2020* (NSW), made pursuant to *Public Health Act 2010* (NSW), came into effect on 23 March 2020 and prohibited opening of pubs except for sale of food and beverages to be consumed off premises – Where purchasers asserted contract had been frustrated – Whether supervening illegality pursuant to Public Health Order suspended parties' obligations to seek completion of contract – Whether Public Health Order amounted to doctrine of temporary suspension of obligations inconsistent with approach to resolving questions of supervening illegality.

Appealed from NSWSC (CA): [\[2021\] NSWCA 332](#); (2021) 396 ALR 340; (2021) 20 BPR 41,819

[Return to Top](#)

Corporations Law

Bryant & Ors as Liquidators of Gunns Limited and Auspine Limited v Badenoch Integrated Logging Pty Ltd

A10/2022: [\[2022\] HCATrans 177](#)

Date heard: 18 October 2022

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

Catchwords:

Corporations law – Voidable transactions – Unfair preferences – "Peak indebtedness" rule – Interpretation of s 588FA of *Corporations Act 2001* (Cth) – Where, pursuant to s 588FA(1), transaction an unfair preference given by company to creditor if company and creditor are parties to transaction and, as a result of transaction, creditor receives more than creditor would have were creditor to prove for debt in winding up – Where s 588FA(3)(c) provided s 588FA(1) applies to all transactions forming part of relationship as if single transaction where, relevantly, transaction an integral part of a continuing business relationship – Where Full Court set aside primary judge's finding that liquidators entitled to choose point of peak indebtedness during statutory period in endeavouring to show, from that point, preferential payment under s 588FA(1) – Whether, by enacting s 588FA(3)(c), Parliament intended to abrogate liquidator's right to choose any point during statutory period, including point of peak indebtedness, to show point from which preferential payment under s 588FA(1) – Proper point for single transaction under s 588FA(3)(c) – Whether continuing business relationship will cease if operative and mutual purpose of inducing further support is subordinated to predominant purpose of recovering past indebtedness.

Appealed from FCA (FC): [\[2021\] FCAFC 64](#); (2021) 284 FCR 590; (2021) 152 ACSR 361

Appealed from FCA (FC): [\[2021\] FCAFC 111](#)

[Return to Top](#)

Metal Manufactures Pty Limited v Gavin Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd (in Liquidation) & Anor
B19/2022: [\[2022\] HCATrans 166](#)

Date heard: 12 October 2022

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

Catchwords:

Corporations law – Insolvency – Liquidators – Set-off – Unfair preferences – Mutuality – Where s 533C(1) of *Corporations Act 2001* (Cth) provided, relevantly, where mutual credits, mutual debts or other mutual dealings between insolvent company being wound up and person who wants debt or claim admitted against company: (a) account to be taken of what due in respect of mutual dealings; and (b) sum due from one party to be set off against any sum due from other party; and (c) only balance of account admissible to proof

against company – Where ss 588FA, 588FE and 588FF of *Corporations Act* provide for recovery of unfair preferences – Where creditor received payments during relation back period of \$190,000 – Where quantum of creditor's alleged set-off admitted to be \$194,727.23 – Whether statutory set-off under s 553C(1) of *Corporations Act* available to creditor against liquidator in answer to claim for recovery of unfair preference under ss 588FA, 588FE and 588FF of *Corporations Act* – Proper approach to mutuality in s 533C.

Appealed from FCA (FC): [\[2021\] FCAFC 228](#); (2021) 289 FCR 556; (2021) 402 ALR 387; (2021) 159 ACSR 115; (2021) 18 ABC(NS) 257

Appealed from FCA (FC): [\[2022\] FCAFC 1](#)

[Return to Top](#)

Courts and Judges

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

M53/2022: [\[2022\] HCATrans 217](#)

Date heard: 13 December 2022

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

Catchwords:

Courts and judges – Bias – Reasonable apprehension of bias – Disqualification – Where, prior to appointment, judge as Commonwealth Director of Public Prosecutions: (a) instituted and carried on successful prosecution of QYFM on indictment, and (b) appeared to successfully oppose appeal by QYFM against conviction – Where QYFM brought challenge to Minister's decision not to revoke cancellation of QYFM's visa – Where application for disqualification brought against judge on basis of apprehended bias – Where judge heard application alone, refused to disqualify himself and sat on Full Court appeal challenging primary judge's decision dismissing application for judicial review of Administrative Appeals Tribunal's decision to affirm cancellation of QYFM's visa – Whether application for disqualification of single member of Full Court on basis of apprehended bias should be decided by single judge alone or by Full Court – Whether judgment of Full Court liable to be set aside if single judge affected by apprehended bias.

Constitutional Law – Chapter III – Judicature of Commonwealth – Impartiality of judiciary – Bias – Reasonable apprehension of bias –

Proper application of test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

Appealed from FCA (FC): [\[2021\] FCAFC 166](#); (2021) 287 FCR 328

[Return to Top](#)

Criminal Law

Mitchell v The King; Rigney v The King; Carver v The King; Tenhoopen v The King
[A14/2022; A15/2022; A16/2022, A17/2022](#): [\[2022\] HCATrans 212](#)

Date heard: 6 December 2022

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

Catchwords:

Criminal law – Ancillary liability – Extended joint criminal enterprise – Statutory charges – Where appellants and others entered into agreement to steal amount of cannabis from grow-house and, in furtherance of agreement, one or more of group members inflicted one or more blows to head of person guarding grow-house who died of injuries – Where appellants charged for contravening s 12A *Criminal Law Consolidation Act 1935* (SA) ("CCA") and convicted of murder – Where s 12A of CCA provided person who commits intentional act of violence while acting in course or furtherance of major indictable offence punishable by imprisonment for 10 years or more, and thus causes death of another, guilty of murder – Whether principles of joint criminal enterprise apply to statutory charge under s 12A of CCA – Whether, for secondary participant to be guilty of common law murder according to principles of extended joint criminal enterprise, secondary participant must contemplate that co-participant might do act that might cause death of person – Whether, for secondary participant to be guilty of offence against s 12A of CCA, secondary participant must contemplate that co-participant might commit intentional act of violence causing death of person – Whether, for secondary participant to be guilty of offence against s 12A of CCA, sufficient that secondary participant contemplates any act of violence rather than contemplates possibility of death caused by violence.

Appealed from SASC (CCA): [\[2021\] SASCA 74](#); (2021) 139 SASR 305; (2021) 290 A Crim R 384

[Return to Top](#)

Intellectual Property

Self Care IP Holdings Pty Ltd & Anor v Allergan Australia Pty Ltd & Anor; Self Care IP Holdings Pty Ltd & Anor v Allergan Australia Pty Ltd & Anor

[S79/2022](#); [S80/2022](#): [\[2022\] HCATrans 167](#); [\[2022\] HCATrans 221](#)

Date heard: 13 October and 14 December 2022

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

Catchwords:

Intellectual property – Trade marks – Infringement claim – Section 120 of *Trade Marks Act 1995* (Cth) – Where respondents authorised user and owner of registered trade mark for word "BOTOX" – Where respondents claimed appellants used brand name "PROTOX" as trade mark and "PROTOX" deceptively similar to BOTOX trade mark, constituting infringement under s 120(1) of *Trade Marks Act* – Where respondents claimed appellants used phrase "instant Botox® alternative" as trade mark, which constituted infringement of BOTOX trade mark – Whether appellant infringed BOTOX trade mark by using "instant Botox® alternative" or "PROTOX" – Whether phrase "instant Botox® alternative" deceptively similar to "BOTOX" within meaning of s 120(1) of *Trade Marks Act* – Whether appellants' use of phrase "instant Botox® alternative" attracts defences under s 122(1)(b)(i) and (d) of *Trade Marks Act* regarding use in good faith and use not infringing exclusive right of registered owner.

Consumer law – Misleading or deceptive conduct – Where respondent claimed appellants' statement "instant Botox® alternative" constituted representation appellants' Inhibox product would give same results as BOTOX products in contravention of s 18 or s 29(1)(a) of *Australian Consumer Law* ("ACL"), being Schedule 2 to *Competition and Consumer Act 2010* (Cth), or Inhibox would achieve or had same performance characteristics, uses and/or benefits as Botox in contravention of s 18 or 29(1)(g) of ACL – Whether appellants' made misleading or false representations contrary to ss 18, 29(1)(a) and 29(1)(g) of ACL.

Appealed from FCA (FC): [\[2021\] FCAFC 163](#); (2021) 286 FCR 259; (2021) 393 ALR 595; (2021) 162 IPR 52

Appealed from FCA (FC): [\[2021\] FCAFC 180](#)

[Return to Top](#)

Private International Law

Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. & Anor

S43/2022: [\[2022\] HCATrans 192](#); [\[2022\] HCATrans 195](#)

Date heard: 9 and 10 November 2022

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

Catchwords:

Private international law – Foreign state immunity – Interaction between s 9 of *Foreign States Immunities Act 1985* (Cth) ("Immunities Act") and *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* ("ICSID Convention") – Where proceedings commenced in Federal Court for recognition of award of International Centre for Settlement of Investment Disputes ("ICSID") under s 35(4) of *International Arbitration Act 1974* (Cth) ("Arbitration Act") – Where Kingdom of Spain asserted sovereign immunity – Where s 9 of Immunities Act provided that foreign state immune from jurisdiction of courts of Australia in proceeding – Where s 10 of Immunities Act provided foreign state not immune in proceeding in which it submitted to jurisdiction whether by agreement or otherwise – Where Art 54(1) provided each Contracting State shall recognize award rendered pursuant to ICSID Convention as binding – Where Art 54(2) of ICSID Convention referred to recognition or enforcement of award – Whether, by Art 54 of ICSID Convention, Kingdom of Spain agreed to submit itself to jurisdiction within meaning of s 10 of Immunities Act – Whether ICSID Convention excludes claims for foreign state immunity in proceedings for recognition and enforcement of an award – Proper meaning of "recognition" and "enforcement" in Art 54.

Appealed from FCA (FC): [\[2021\] FCAFC 112](#); (2021) 392 ALR 443; (2021) 153 ACSR 59

[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

ENT19 v Minister for Home Affairs & Anor
[S102/2022](#)

Date heard: 8 December 2022 – *adjourned to a date to be fixed*

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

Catchwords:

Constitutional law – Review of administrative decisions – Application for constitutional writs – Where plaintiff pleaded guilty to people smuggling and sentenced to imprisonment – Where, during sentencing, sentencing judge considered issue of general deterrence – Where plaintiff applied for Safe Haven Enterprise Visa ("SHEV") – Where Minister refused application for SHEV pursuant to s 65 of *Migration Act 1958* (Cth), not being satisfied grant of visa in "national interest", being criterion set out in cl 790.227 of Sch 2 of *Migration Regulations 1994* (Cth) ("Decision") – Whether Decision made for punitive purpose or inflicts punishment – Whether acting in "national interest" permits Executive to act for punitive purpose or in way amounting to punishment.

Administrative law – Jurisdictional error – Procedural fairness – Where Minister took account of media coverage of plaintiff's conviction as part of reason why grant of SHEV not in national interest – Whether Minister failed to consider relevant consideration – Whether Minister proceeded on incorrect understanding of law.

Application for constitutional or other writ referred to the Full Court on 5 September 2022.

Hornsby Shire Council v Commonwealth of Australia & Anor
[S202/2021](#)

Catchwords:

Constitutional law – Taxation – Section 55 of *Constitution* – Laws imposing taxation only to deal with imposition of taxation – Where Commonwealth makes grants of financial assistance for local

government purposes to States under s 9 of *Local Government (Financial Assistance) Act 1995* (Cth) – Where grants made on conditions specified in s 15 of *Local Government (Financial Assistance) Act* – Where conditions in s 15 amended by items 16, 17 and 18 of Sch 1 to *Local Government (Financial Assistance) Amendment Act 2000* (Cth) to include conditions that, if local government failed to pay Commonwealth GST payments, then: (1) State required to withhold amount allocated to local government and pay amount to Commonwealth (s 15(aa)); and, if Commonwealth Minister tells State Treasurer that Commonwealth Minister satisfied State failed to withhold and pay amount, State to repay Commonwealth amount determined by Commonwealth Minister (s 15(c)) – Whether items 16, 17 or 18 of Sch 1 to *Local Government (Financial Assistance) Amendment Act* contrary to s 55 of *Constitution*.

Constitutional law – Taxation – Sections 114 of *Constitution* – Prohibition on Commonwealth taxes imposed on property of State – Where Commonwealth provides grants of financial assistance to States under *Federal Finance Relations Act 2009* (Cth), including revenue assistance by way of goods and services tax ("GST") – Where Commonwealth provides grants of financial assistance for local government purposes to States under *Local Government (Financial Assistance) Act* – Where *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) introduced to give effect to agreement between Commonwealth and States regarding GST whereby Commonwealth paid States GST revenue and States assumed responsibility for payment of financial assistance to local governments – Where plaintiff purchased vehicle, with purchase amount including GST, and subsequently sold vehicle through auction with GST deducted – Where plaintiff, under protest, reported amount of notional GST relating to sale of vehicle in Business Activity Statement, being form for GST returns lodged with Australian Taxation Officer – Whether provisions of *Local Government (Financial Assistance) Act*, *Federal Financial Relations Act* and of *Intergovernmental Agreement Implementation (GST) Act* impose tax on property belonging to plaintiff, contrary to s 114 of *Constitution* – Proper approach to relief.

Special case referred to the Full Court on 5 September 2022.

Vanderstock & Anor v State of Victoria
[M61/2021](#)

Catchwords:

Constitutional law – Duties of excise – Section 90 of *Constitution* – Exclusive power of Commonwealth Parliament – Where *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) ("ZLEV Act") defines "ZLEV" to mean any of following not excluded vehicles: (a)

electric vehicle; (b) hydrogen vehicle; and (c) plug-in hybrid electric vehicle – Where s 7(1) of ZLEV Act requires registered operator of ZLEV to pay charge for use of ZLEV on specified roads – Whether s 7(1) of ZLEV Act invalid as imposing duty of excise within meaning of s 90 of *Constitution*.

Special case referred to the Full Court on 2 June 2022.

[Return to Top](#)

5: SECTION 40 REMOVAL

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

Civil Procedure

GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore

[S150/2022](#): [\[2022\] HCATrans 206](#)

Date heard: 18 November 2022 – *Special leave granted*

Catchwords:

Civil procedure – Stay of proceedings – Fair trial – *Civil Procedure Act 2005* (NSW), s 67 Abuse of process – Where appellant claims to have been sexually assaulted by priest of Roman Catholic Diocese of Lismore – Where appellant instituted proceedings on 31 January 2020 against respondent, a statutory corporation, on bases of negligence and vicarious liability – Where priest died in 1996 – Where primary judge satisfied material showed that there likely to be evidence available allowing fair trial between parties – Where respondent sought permanent stay of proceedings – Where primary judge refused stay, but decision reversed by Court of Appeal – Where Court of Appeal considered fair trial could not be had in circumstances where priest unavailable to give factual instructions and respondent had not been notified of claims before priest's death – Whether proceedings ought to be stayed on basis that fair trial could no longer be had such that proceedings an abuse of process.

Appealed from NSWSC (CA): [\[2022\] NSWCA 78](#)

[Return to Top](#)

Zurich Insurance PLC & Anor v Koper & Anor

[S147/2022](#): [\[2022\] HCATrans 194](#)

Date determined: 10 November 2022 – *Special leave granted*

Catchwords:

Civil procedure – Jurisdiction – Exercise of non-federal jurisdiction by State court – Service outside Australia – Service under *Trans-Tasman Pacific Act 2010* (Cth) ("TTPA") – Where first respondent domiciled in New Zealand and registered proprietor of residential apartments designed and constructed by BMX NZ, entity incorporated in New

Zealand, and without any assets or presence in Australia – Where BMX NZ insured by appellants under program of professional indemnity insurance – Where registered proprietors of apartments, commenced proceedings in High Court of New Zealand against BMX NZ and its principal, KNZ International Co Limited ("KNZ"), seeking damages in respect of various defects – Where damages awarded against BMX NZ and KNZ – Where, by summons filed on 1 April 2021 in Supreme Court of New South Wales, first respondent sought leave, pursuant to s 5 of *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ("*Claims Act*"), to bring representative proceedings under s 4 against first appellant – Where s 4 provides if insured person has insured liability to person, that person ("claimant") may recover amount of insured liability from insurer in proceedings before court of New South Wales – Where primary judge granted leave, holding *Claims Act* could not apply where claimant's claim against insured person could not properly have been brought in court of New South Wales, but, even though first respondent's claim against BMX NZ was claim against New Zealand company, without Australian assets, arising out of tort committed in New Zealand, first respondent could bring claim in reliance on Pt 2 of TTPA – Where Pt 2 of TTPA applies to "civil proceeding commenced in Australian court" – Where, pursuant to s 9 of TTPA, initiating document issued by Australian court that relates to civil proceeding may be served in New Zealand under Pt 2 – Whether ss 9 and 10 of TTPA can validly operate to authorise, or to deem as effective, service of process of State court outside territory of Commonwealth except in matters that engage federal jurisdiction – Whether first respondent could properly have brought claim against BMX NZ in connection with design or construction of apartments in court of New South Wales.

Constitutional law – Legislative power – Heads of power – External affairs – Service and execution of process throughout Commonwealth – Whether, having regard to terms of s 51(xxiv) and Ch III of *Constitution*, s 51(xxix) empowers Commonwealth Parliament to make laws with respect to service, outside Commonwealth, of process of State courts in matters that would not engage federal jurisdiction.

Appealed from NSWSC (CCA): [\[2022\] NSWCA 128](#); (2022) 368 FLR 420

[Return to Top](#)

Constitutional Law

Vunilagi v The Queen & Anor
C13/2022: [\[2022\] HCATrans 113](#)

Date heard: 17 June 2022 – *Special leave granted*

Catchwords:

Constitutional law – Powers of courts – Powers of Legislative Assembly of Australian Capital Territory – Trial by jury – Where appellant arrested and committed to trial – Where, following COVID-19 outbreak, *Supreme Court Act 1933* (ACT) amended by *COVID-19 Emergency Response Act 2020* (ACT) to include s 68BA which provided, relevantly, Court may order trial by judge alone – Where appellant advised Chief Justice proposed making order pursuant to s 68BA – Where appellant and first respondent opposed making of order – Where s 68BA repealed, but continued to apply to appellant by operation of s 116 and 117 of *Supreme Court Act* – Where Chief Justice ordered appellant's trial to proceed by judge alone – Where appellant found guilty – Whether s 68BA contravened limitation deriving from *Kable v Director of Public Prosecutions* (NSW) (1996) 198 CLR 511 – Whether s 68BA inconsistent with requirement in s 80 of *Constitution* that trial on indictment of any offence against law of Commonwealth be by jury.

Appealed from ACTSC (CA): [\[2021\] ACTCA 12](#); (2021) 17 ACTLR 72; (2021) 362 FLR 385; (2021) 295 A Crim R 168

Crime and Corruption Commission v Carne
B37/2022: [\[2022\] HCATrans 225](#)

Date heard: 15 December 2022 – *Special leave granted*

Catchwords:

Constitutional law – Legislature – Privileges – Privilege of parliamentary debate and proceedings – Where Crime and Corruption Commission ("Commission") received complaint as to allegations of corrupt conduct against respondent, former Public Trustee of Queensland – Where, following investigation, Commission prepared draft report, which did not make any finding of corrupt conduct – Where Commission submitted copy of Report to Chair of Parliamentary Crime and Corruption Committee ("PCCC") and requested, pursuant to s 69(1)(b) of *Crime and Corruption Act 2001* (Qld) ("CC Act"), that it be given to Speaker – Where respondent filed originating application seeking declaration that report was not "report" for purposes of s 69(1) of CC Act – Where Chair of PCCC issued evidentiary certificate under s 55 of *Parliament of Queensland Act 2001* (Qld) ("POQ Act") certifying report as: document prepared for purpose of, or incidental to, transacting business of PCCC under s 9(2)(c) of CC Act; and document present or submitted to PCCC – Where s 8(1) of POQ Act provides proceedings in Assembly cannot be impeached or questioned in any court – Whether parliamentary privilege protects reports prepared for and provided to parliamentary committees under POQ Act.

Statutes – Acts of Parliament – Interpretation – Where s 33 of CC Act provides for Commission's corruption functions – Where s 64 of CC Act provides Commission may report in performing its functions – Where s 69(1) provides report may be tabled in Parliament when report is made on a public hearing or report is directed to be given to Speaker – Where respondent contended that because report did not make finding of "corrupt conduct" and did not relate to public hearing, it was not report for purposes of s 69 of CC Act – Whether Commission only able to report about corruption investigation under CC Act where positive finding of "corrupt conduct".

Appealed from QLD (CA): [\[2022\] QCA 141](#); (2022) 405 ALR 166

Criminal Law

BA v The Queen

S101/2022: [\[2022\] HCATrans 111](#)

Date heard: 17 June 2022 – *Special leave granted*

Catchwords:

Criminal law – Breaking and entering – Legal right to enter – Meaning of "breaks" – Where s 112 of *Crimes Act 1900* (NSW) provides person who breaks and enters any dwelling-house or other building and commits any serious indictable offence guilty of offence – Where appellant and complainant resided together in apartment occupied pursuant to residential tenancy where both named as lessees – Where relationship broke down and appellant moved out taking most of possessions – Where, when appellant remained co-tenant, appellant entered apartment by breaking down locked door and assaulted complainant – Where appellant charged with offence against s 112 of *Crimes Act* – Whether person with legal right to enter building capable of being guilty of breaking and entering building for purposes of s 112 of *Crimes Act* – Whether co-tenant can revoke second co-tenant's permission to enter leased dwelling-house with result that, despite enjoying right of entry under lease, second co-tenant may be guilty of breaking and entering – Whether permission of occupant without legal entitlement to occupy be determinative of whether person with legal right of immediate possession breaks into building for purposes of s 112 of *Crimes Act*.

Appealed from NSWSC (CCA): [\[2021\] NSWCCA 191](#); (2021) 105 NSWLR 307; (2021) 291 A Crim R 514

[Return to Top](#)

BDO v The Queen

B52/2022: [\[2022\] HCATrans 184](#)

Date heard: 21 October 2022 – *Special leave granted*

Catchwords:

Criminal law – Criminal liability and capacity – *Doli incapax* – Where High Court in *RP v The Queen* (2016) 259 CLR 641 identified "knowledge of moral wrongness" as focus of *doli incapax* inquiry – Where s 29 of *Criminal Code* (Qld) provides age of maturity – Whether statement of principles on *doli incapax* at common law articulated in *RP v The Queen* apply to s 29 of *Criminal Code* (Qld).

Criminal practice – Appeal – Miscarriage of justice – Application of proviso that no substantial miscarriage of justice actually occurred – *Criminal Code* (Qld), s 668E(1) – Where, at trial, trial judge proceeded on mistaken view that during entire period reflected on indictment, s 349(3) of *Criminal Code* deemed child under age of 12 unable to consent – Where s 349(3) did not come into force until mid-way through charge period – Where Court of Appeal held trial judge's direction erroneous insofar as any of appellant's acts took place prior to commencement of s 349(3) – Where Court of Appeal held no substantial miscarriage of justice occurred – Whether proviso applies where, by judicial error, Crown relieved of proving contested element of offence.

Appealed from QLDSC (CA): [\[2021\] QCA 220](#)

[Return to Top](#)

Bromley v The King

A40/2021: [\[2022\] HCATrans 158](#)

Date heard: 16 September 2022 – *Special leave referred to Full Court for consideration as on appeal on limited grounds*

Catchwords:

Criminal law – Second or subsequent appeal – Further evidence – Where applicant and co-accused convicted of murder – Where, at trial, prosecution led evidence from eyewitness who suffered from schizoaffective disorder – Where applicant and co-accused appealed against convictions, including on ground that eyewitness's evidence unsafe, but appeals dismissed and subsequent petitions for mercy refused – Where applicant sought to appeal pursuant to s 353A of *Criminal Law Consolidation Act 1935* (SA) – Where s 353A empowers Full Court to hear second or subsequent appeal against conviction by person convicted on information if Court satisfied there "fresh and compelling evidence" that should, in "interests of justice", be

considered on appeal – Where applicant adduced expert evidence concerning reliability of eyewitness in light of mental illness – Where Court of Appeal refused application, holding new evidence not "fresh" or "compelling", and not in "interests of justice" to consider new evidence – Whether new evidence "compelling" – Whether in "interests of justice" to consider applicant's evidence.

Appealed from SASC (FC): [\[2018\] SASCF 41](#)

[Return to Top](#)

Lang v The Queen

B57/2022: [\[2022\] HCATrans 201](#)

Date heard: 11 November 2022 – *Special leave granted*

Catchwords:

Criminal law – Unreasonable verdict – Appeal against murder conviction – Where deceased died from knife wound to abdomen – Where hypothesis raised that deceased had committed suicide – Where pathologist expressed opinion that deceased's wound more likely to have been caused by second person than to have been self-inflicted – Whether guilty verdict unreasonable as, on whole of evidence, there reasonable possibility deceased committed suicide – Whether pathologist's opinion inadmissible because not an opinion based on expert knowledge – Lies – Consciousness of guilt – Whether alleged lie capable of overcoming improbabilities in Crown case.

Appealed from QLDSC (CA): [\[2022\] QCA 29](#)

[Return to Top](#)

The King v Jacobs Group (Australia) Pty Ltd formerly known as Sinclair Knight Merz

S148/2022: [\[2022\] HCATrans 193](#)

Date determined: 10 November 2022 – *Special leave granted*

Catchwords:

Criminal law – Sentencing – Penalty – Bribery of foreign official – Meaning of "benefit" – Where respondent pleaded guilty to offence of conspiring to cause offer of provision benefits to be made to other persons not legitimately due to those persons, with intention of influencing foreign public officials in order to obtain or retain business, contrary to ss 11.5 and 70.2 of *Criminal Code* – Where maximum penalty determined by s 70.2(5) and provides: offence punishable by fine not more than greatest of: (1) 100,000 penalty

units; (2) where court can determine value of benefit body corporate obtained and that is reasonably attributable to conduct constituting offence—3 times value that benefit; and (3) where court cannot determine value of benefit—10% of annual turnover of body corporate – Where "benefit" obtained by respondent certain project contracts – Whether maximum penalty under second limb of s 70.2(5) calculated on basis that value of benefit of contract is: (1) contract price; or (2) contract price less (untainted) costs to offender of performing it.

Appealed from NSWSC (CCA): [\[2022\] NSWCCA 152](#); (2022) 367 FLR 365

[Return to Top](#)

Criminal Practice

HCF v The Queen

B50/2022: [\[2022\] HCATrans 171](#)

Date heard: 14 October 2022 – *Special leave granted on limited grounds*

Catchwords:

Criminal practice – Miscarriage of justice – Application of proviso that no substantial miscarriage of justice actually occurred – *Criminal Code* (Qld), s 668E(1) – Juror misconduct – Independent research – Where juror disobeyed trial judge's directions that: (1) prohibited independent research; and (2) required discovery by other jurors of any such misconduct – Where sheriff investigated juror misconduct pursuant to s 70(7) of *Jury At 1995* (Qld) and produced report provided to parties before appeal heard – Whether substantial miscarriage of justice occasioned by proven disobedience by jurors of trial judge's direction – Whether verdicts of guilty were true for whole jury in circumstances where only five of twelve jurors responded to sheriff's investigation – Whether proviso applies where jury fails to obey judicial directions.

Appealed from QLDSC (CA): [\[2021\] QCA 189](#)

[Return to Top](#)

Evidence

McNamara v The King

S143/2022: [\[2022\] HCATrans 185](#)

Date heard: 21 October 2022 – *Special leave granted on limited grounds*

Catchwords:

Evidence – Unfair prejudice – Meaning of "party" – Joint trial – Co-accused – Where appellant and co-accused arraigned upon joint indictment that alleged one count of murder and one count of supply of commercial quantity of prohibited drug – Where Crown alleged that, pursuant to joint criminal enterprise, appellant and co-accused murdered deceased and dispossessed deceased of drugs – Where appellant sought to introduce evidence relevant to defence of duress and existence of joint criminal enterprise, namely evidence co-accused said to appellant "I did [deceased]" and evidence co-accused told appellant of other serious crimes co-accused committed – Where evidence excluded on basis that, though relevant under s 55 of *Evidence Act 1994* (NSW), probative value of evidence substantially outweighed by danger evidence might be "unfairly prejudicial to party" under s 135(a) of *Evidence Act*, namely to co-accused – Whether word "party" in s 135(a) of *Evidence Act 1994* (NSW) extends to and includes co-accused in joint trial.

Appealed from NSWSC (CCA): [\[2021\] NSWCCA 160](#); (2021) 290 A Crim R 239

[Return to Top](#)

Family Law

Barnett v Secretary, Department of Communities and Justice
S142/2022: [\[2022\] HCATrans 187](#)

Date heard: 21 October 2022 – *Special leave granted*

Catchwords:

Family law – Child abduction – Issue estoppel – Where child, born in Ireland, removed from Ireland by mother without father's knowledge – Where father initiated proceedings in District Court of Dublin Metropolitan District seeking interim order for appointment as child's guardian and for custody pursuant to *Guardianship of Infants Act 1964* (IR) ("Guardianship Act") – Where District Court made interim order and subsequent declaration under Guardianship Act declaring father as guardian – Where father filed application for return of child in accordance with *Hague Convention on the Civil Aspects of International Child Abduction* – Where application filed in Family Court of Australia seeking return of child to Ireland – Where primary judge found District Court order sufficed to fulfil requirement of "rights of custody" for purposes of reg 4 of *Family Law (Child Abduction Convention) Regulations 1986* (Cth) and decision of

District Court gave rise to issue estoppel, preventing Court from re-determining any factual issues – Whether order of District Court created issue estoppel that prevented Family Court from determining whether, under Irish law, father of applicant's child had rights of custody as defined by reg 4 of *Regulations* – Whether issue estoppel can be drawn from text of foreign order in absence of reasons for judgment and transcript.

Appealed from FedCFamC (1A): [\[2022\] FedCFamC1A 20](#)

[Return to Top](#)

Immigration

AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor

[M84/2022; M85/2022](#): [\[2022\] HCATrans 196](#)

Date heard: 11 November 2022 – *Special leave granted*

Catchwords:

Immigration – Detention – Regional processing – Where appellant in immigration detention since 15 July 2013 – Where appellant required to be taken to regional processing country as soon as reasonably practicable under s 198AD of *Migration Act 1958* (Cth) – Where primary judge found it reasonably practicable to take appellant to regional processing country no later than end of September 2013 and, consequently, there had been "extensive" and "unwarranted delay" in removing appellant – Where primary judge made order compelling end of appellant's detention by causing appellant to be taken from Australia under s 196 of *Migration Act* ("mandamus order") – Where primary judge ordered appellant be detained in home only for so long as it took for appellant to be taken to regional processing country in accordance with mandamus order ("order 3") – Where order 3 suspended, coming into effect only if, after 14 days, respondents failed to take appellant to regional processing country – Where, hours before order 3 due to come into effect, only available regional processing country rejected appellant and Minister exercised personal, non-compellable power under s 198AE of *Migration Act* to disapply s 198AD to appellant – Where appellant remains in detention centre – Where Full Court granted leave to appeal from orders 3-5 of primary judge's orders – Whether order 3 satisfies temporal and/or purposive element of para (a) of definition of "immigration detention" in s 5 of *Migration Act*, whereby immigration detention means being in company of, and restrained by, an officer or another prescribed person.

Constitutional law – Chapter III – Courts and judges – Appeal from interlocutory order – Where s 24(1A) of *Federal Court of Australia Act 1976* (Cth) requires leave to appeal from interlocutory judgment – Where ss 22 and 23 respectively confer power on Court to grant all remedies to which any party appears entitled and power to issue writs of such kinds as Court considers appropriate – Whether there "matter" within meaning of Chapter III of *Constitution* – Whether Full Court erred in granting leave to appeal from order 3 – Whether, in circumstances order 3 not come into execution, Full Court erred in granting leave without considering "substantial injustice" test.

Appealed from FCA (FC): [\[2022\] FCAFC 52](#); (2022) 290 FCR 149

[Return to Top](#)

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

B42/2022: [\[2022\] HCATrans 160](#)

Date heard: 16 September 2022 – *Special leave granted on condition*

Catchwords:

Immigration – Visa cancellation decision under s 501(3A) of *Migration Act 1958* (Cth) – Substantial criminal record – Where respondent's visa mandatorily cancelled following conviction for assaults occasioning bodily harm and for other offences, for which respondent sentenced to concurrent periods of imprisonment – Where respondent sought revocation of cancellation decision – Where Minister, in considering whether "another reason" why cancellation decision be revoked (s 501CA(4)(b)(ii)), took into account respondent's criminal history, including convictions which Queensland Court ordered that there be "no conviction" – Where s 184(2) of *Youth Justice Act 1992* (QLD) ("YJA") provides, in relation to recording of convictions against child, finding of guilt without recording conviction *not* taken to be conviction for any purpose – Where s 85ZR(2) of *Crimes Act 1914* (Cth) ("CA") provides where, under State law person to be taken to never been convicted of offence under law of State, person shall be taken in corresponding circumstances or for corresponding purpose, by any Commonwealth authority, never to have been convicted of offence – Whether, on proper construction of s 184(2) of YJA, s 85ZR(2) of CA engaged – Whether Minister took into account irrelevant consideration.

Administrative law – Judicial review – Jurisdictional error – Irrelevant consideration – Materiality – Whether consideration of irrelevant consideration material.

Appealed from FCA (FC): [\[2022\] FCAFC 23](#); (2022) 288 FCR 10

[Return to Top](#)

Industrial Law

Qantas Airways Limited & Anor v Transport Workers Union of Australia

S153/2022: [\[2022\] HCATrans 205](#)

Date heard: 18 November 2022 – *Special leave granted*

Catchwords:

Industrial law – Adverse action – Workplace right – Whether prohibition s 340(1)(b) only prohibits adverse action taken to prevent exercise of presently existing "workplace right" – Where first appellant made decision to outsource ground operations at 10 airports to third party providers – Where primary judge found outsourcing decision contravened s 340(1)(b) of *Fair Work Act 2009* (Cth) – Where, at time of outsourcing decision, one relevant enterprise agreement had not yet reached its nominal expiry date and no process of bargaining for replacement had been initiated, and another enterprise agreement had reached nominal expiry date and process of bargaining had commenced, but no process for protected industrial action been initiated – Where primary judge held first appellant contravened s 340(1)(b), finding first appellant had not discharged reverse onus under s 360(1) of establishing first appellant had not made outsourcing decision to prevent affected employees from exercising workplace rights to organise and engage in protected industrial action.

Appealed from FCA (FC): [\[2022\] FCAFC 71](#); (2022) 402 ALR 1; (2022) 315 IR 1

[Return to Top](#)

Leases and Tenancies

Young & Anor v Chief Executive Officer (Housing)

D5/2022: [\[2022\] HCATrans 159](#)

Date heard: 16 September 2022 – *Special leave granted*

Catchwords:

Leases and tenancies – Residential tenancies – Damages for distress and disappointment – Where Ms Young leased home from respondent – Where home without front door in doorframe for 68 months – Where

appellants commenced proceedings in Northern Territory Civil and Administrative Tribunal ("Tribunal") seeking compensation under s 122(1) of *Residential Tenancies Act 1999* (NT) ("RTA") for breach of landlord's obligations to repair premises (s 57 of RTA), to provide reasonably secure home (s 49 RTA) or, alternatively, to ensure premises "habitable" (s 48 of RTA) – Where Tribunal found landlord failed to comply with obligation of repair (s 57) and awarded \$100 compensation – Where Supreme Court set aside Tribunal's decision, holding failure to install door fundamental breach of respondent's obligation to provide reasonably secure premises, and awarded \$10,200 compensation for resulting disappointment and distress for period of 68 months – Where Court of Appeal allowed appeal, determining only compensation for disappointment and distress resulting from physical inconvenience recoverable – Whether to recover damages for emotional disturbance or "mental distress" claim brought under s 122 of RTA it necessary to apply principles of remoteness and foreseeability – Whether claim for compensation for emotional disturbance of "mental distress" able to be founded on breach of s 49.

Appealed from NT (CA): [\[2022\] NTCA 1](#)

[Return to Top](#)

Practice and Procedure

Facebook Inc v Australian Information Commissioner & Anor
S137/2022: [\[2022\] HCATrans 157](#)

Date heard: 16 September 2022 – *Special leave granted*

Catchwords:

Practice and procedure – Service out of jurisdiction – Rule 10.43 of *Federal Court Rules 2011* (Cth) – Where Australian Information Commissioner commenced proceedings against appellant alleging events surrounding installation of application known as "This Is Your Digital Life" and Facebook-Cambridge Analytica scandal involved contraventions of *Privacy Act 1998* (Cth) – Where Commissioner successful in establishing *prima facie* case on application to serve appellant out of jurisdiction – Where appellant conditionally appeared and sought to set aside service – Where primary judge and Full Court refused to set aside service – Whether *prima facie* case appellant "carr[ie]d] on business in Australia" within meaning of 5B(3)(b) of *Privacy Act* – Whether *prima facie* case appellant "collected... personal information in Australia" within meaning of s 5B(3)(c) of *Privacy Act*.

Appealed from FCA (FC): [\[2022\] FCAFC 9](#); (2022) 289 FCR 217; (2022) 402 ALR 445

Statutes

Disorganized Developments Pty Ltd & Ors v State of South Australia
A22/2022: [\[2022\] HCATrans 149](#)

Date heard: 9 September 2022 – *Special leave granted*

Catchwords:

Statutes – Interpretation – Invalidity – Where s 83GD(1) in Pt 3B, Div 2 of *Criminal Law Consolidation Act 1935* (SA) ("CLCA") provides person who participant in criminal organisation and enters, or attempts to enter, "prescribed place" commits offence – Where s 83GA(1) defines "prescribed place" as place declared by regulation, but s 83GA(2) requires regulation under subsection (1) to "only relate to ... 1 place" – Where appellants became registered proprietors of land ("Cowirra Land") – Where Pt 3B, Div2 of CLCA inserted by *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA) ("Amending Act") – Where s 13 of Amending Act provided *Criminal Law Consolidation (Criminal Organisations) Regulations 2015* ("CLCR") (set out in Sch 1) be regulations under CLCA – Where cl 3 of Sch 1 of Amending Act declared places to be prescribed places, but not Cowirra Land – Where Governor in Council subsequently made *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) Variation Regulations 2020* ("Cowirra (No.1) Regulations") and *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) (No 2) Variation Regulations 2020* ("Cowirra (No.2) Regulations") – Where Cowirra (No.1) Regulations and Cowirra (No.2) Regulations sought to vary r 3 of CLCR to add Cowirra Land as prescribed place – Whether r 3 of CLCR beyond power conferred by s 83GA(2) of CLCA – Whether Cowirra (No.1) Regulations and Cowirra (No.2) Regulations invalid because of absence of procedural fairness accorded – Whether, if Cowirra (No.1) Regulations and Cowirra (No.2) Regulations valid, s 83GD of CLCA applies to owner of land declared to be "prescribed place", director of corporation which is owner of land or any person authorised to access land.

Appealed from SASC (CA): [\[2022\] SASCA 6](#); (2022) 295 A Crim R 351

Harvey & Ors v Minister for Primary Industry and Resources & Ors
D4/2022: [\[2022\] HCATrans 229](#)

Date heard: 16 December 2022 – *Special leave granted*

Catchwords:

Statutes – Interpretation – *Native Title Act 1993* (Cth), s 24MD(6B)(b) – Meaning of "right to mine" – Meaning of "infrastructure facility" – Where first respondent intended to grant mineral lease (ML 29881) to third respondent under s 40(1)(b)(ii) of *Mineral Titles Act 2010* (NT) – Where land subject to proposed lease would be used for construction of "dredge spoil emplacement area" to deposit dredged material from loading facility located on adjacent land subject to mineral lease already held by third respondent – Whether proposed grant of ML 29881 is future act within s 24MD(6B)(b) of *Native Title Act*, being creation of right to mine for sole purpose of construction of infrastructure facility associated with mining.

Appealed from FCA (FC): [\[2022\] FCAFC 66](#); (2022) 401 ALR 578

Torts

CCIG Investments Pty Ltd v Schokman

B43/2022: [\[2022\] HCATrans 156](#)

Date heard: 16 September 2022 – *Special leave granted on limited grounds*

Catchwords:

Torts – Vicarious liability – Scope of employment – Opportunity or occasion for commission of tort – Where respondent asleep in appellant's staff accommodation when another employee urinated on face – Where trial judge concluded event exacerbated respondent's pre-existing conditions of narcolepsy and cataplexy, and suffered post-traumatic stress and adjustment disorder as result – Where respondent sued employer, alleging, relevantly, employee committed tort for which appellant, as employer, vicariously liable – Where primary judge found employee's act tortious, but concluded tort not committed in course of employee's employment – Where Court of Appeal applied *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, holding employee occupying room as employee pursuant to obligations of employment contract and therefore requisite connection between employment and employee's actions – Whether event giving rise to respondent's injury within "course or scope of employment" – Proper approach to scope of vicarious liability discussed in *Prince Alfred College Inc v ADC*.

Appealed from QLDSC (CA): [\[2022\] QCA 38](#)

[Return to Top](#)

7: CASES NOT PROCEEDING OR VACATED

[Return to Top](#)

8: SPECIAL LEAVE REFUSED

Publication of Reasons: 8 December 2022 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Kleeman	The Star Entertainment Group Limited ABN 85 149 629 023 & Anor (B38/2022)	Supreme Court of Queensland (Court of Appeal) [2022] QCA 119	Application dismissed [2022] HCASL 204
2.	Yu	ACT Education Directorate (C18/2022)	Federal Court of Australia (Full Court) [2022] FCAFC 110	Application dismissed [2022] HCASL 205
3.	Krebs	Vitasovic & Anor (P29/2022)	Supreme Court of Western Australia (Court of Appeal) CACV 36 of 2022	Application dismissed [2022] HCASL 206
4.	Van Gorp	Davy & Anor (S120/2022)	Supreme Court of New South Wales (Court of Appeal) [2022] NSWCA 117	Application dismissed [2022] HCASL 207
5.	Carson	Colt (B36/2022)	Federal Circuit and Family Court of Australia (Division 1)	Application dismissed with costs [2022] HCASL 208
6.	In the matter of an application by Mark Alfred Clarkson for leave to appeal (B49/2022)		High Court of Australia	Application dismissed [2022] HCASL 209
7.	Taylor	Minister for Immigration Citizenship Migrant Services and Multicultural Affairs & Anor (M55/2022)	Federal Court of Australia (Full Court) [2022] FCAFC 144	Application dismissed [2022] HCASL 210
8.	HRZN	Minister for Immigration Citizenship Migrant Services and Multicultural Affairs & Anor (M57/2022)	Federal Court of Australia (Full Court) [2022] FCAFC 133	Application dismissed [2022] HCASL 211
9.	Chen	A Judge of the Federal Court of Australia & Ors (M66/2022)	High Court of Australia	Application dismissed [2022] HCASL 212
10.	Mullett	Nixon & Ors (M60/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 174	Application dismissed with costs [2022] HCASL 213

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
11.	Mitchell & Anor	Transport for NSW (S129/2022)	Supreme Court of New South Wales (Court of Appeal) [2022] NSWCA 141	Application dismissed with costs [2022] HCASL 214

Publication of Reasons: 15 December 2022 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Bakshi	Mahanta (A21/2022)	Federal Circuit and Family Court of Australia (Division 1)	Application dismissed [2022] HCASL 215
2.	McCabe	The King (M51/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 139	Application dismissed [2022] HCASL 216
3.	Young	Director of Public Prosecutions & Anor (S124/2022)	Supreme Court of New South Wales (Court of Appeal) [2022] NSWCA 133	Application dismissed [2022] HCASL 217
4.	JE	Central Coast Local Health District & Ors (S132/2022)	Supreme Court of New South Wales (Court of Appeal) [2022] NSWCA 125	Application dismissed [2022] HCASL 218
5.	EEE16	Minister for Immigration Citizenship Migrant Services and Multicultural Affairs & Anor (S136/2022)	Federal Court of Australia [2022] FCA 629	Application dismissed [2022] HCASL 219
6.	Vicinity Funds Re Ltd & Ors	Commissioner of State Revenue (M59/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 176	Application dismissed with costs [2022] HCASL 220

15 December 2022: Canberra and by video link

No.	Applicant	Respondent	Court appealed from	Result
1.	Beattie	The King (S44/2022)	Supreme Court of New South Wales (Court of Criminal Appeal) [2021] NSWCCA 291	Application refused [2022] HCATrans 222
2.	Monday (a pseudonym)	The Queen (C11/2022)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2022] ACTCA 25	Application refused [2022] HCATrans 226
3.	EXT20	Minister for Home Affairs (M35/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 72	Application refused with costs [2022] HCATrans 223
4.	ACP Properties (Townsville) Pty Ltd & Ors	11 Oonoonba Road Pty Ltd & Anor (B25/2022)	Supreme Court of Queensland (Court of Appeal) [2022] QCA 87	Application refused with costs [2022] HCATrans 227
5.	Harlech Enterprises Pty Ltd as trustee for Harlech Family Trust	Beno Excavations Pty Ltd trading as Benex Pipelines & Anor (C19/2022)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2022] ACTCA 42	Application refused with costs [2022] HCATrans 228
6.	Cigno Pty Ltd	Australian Securities & Investments Commission & Anor (S105/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 108	Application refused with costs [2022] HCATrans 224
7.	BHF Solutions Pty Ltd	Australian Securities & Investments Commission & Anor (S106/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 108	Application refused with costs [2022] HCATrans 224

16 December 2022: Canberra and by video link

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	BDF	The Queen (B21/2022)	Supreme Court of Queensland (Court of Appeal) [2022] QCA 61	Application refused [2022] HCATrans 231
2.	ABR (a pseudonym)	The King (S46/2022)	Supreme Court of New South Wales (Court of Criminal Appeal) [2020] NSWCCA 33	Application refused [2022] HCATrans 235
3.	Horne	The Queen (B24/2022)	Supreme Court of Queensland (Court of Appeal) [2022] QCA 90	Application refused [2022] HCATrans 232
4.	The King	DB (S82/2022)	Supreme Court of New South Wales (Court of Criminal Appeal) [2022] NSWCCA 87	Application refused [2022] HCATrans 230
5.	Smith	The Queen (B34/2022)	Supreme Court of Queensland (Court of Appeal) [2022] QCA 89	Application refused [2022] HCATrans 233
6.	Buckley	The King (M50/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 138	Application refused [2022] HCATrans 234