



# HIGH COURT BULLETIN

Produced by the Legal Research Officer,  
High Court of Australia Library  
[2022] HCAB 8 (21 October 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

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## 1: SUMMARY OF NEW ENTRIES

### [2: Cases Handed Down](#)

Case	Title
<a href="#"><i>SDCV v Director-General of Security &amp; Anor</i></a>	Constitutional Law
<a href="#"><i>TL v The King</i></a>	Evidence
<a href="#"><i>BHP Group Limited v Impiombato &amp; Anor</i></a>	Statutes
<a href="#"><i>Bosanac v Commissioner of Taxation &amp; Anor</i></a>	Trusts

### [3: Cases Reserved](#)

Case	Title
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<a href="#"><i>Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs &amp; Ors; DCM20 v Secretary of Department of Home Affairs &amp; Anor</i></a>	Constitutional Law
<a href="#"><i>Realestate.com.au Pty Ltd v Hardingham &amp; Ors; RP Data Pty Limited v Hardingham &amp; Ors</i></a>	Copyright
<a href="#"><i>Bryant &amp; Ors as Liquidators of Gunns Limited and Auspine Limited v Badenoch Integrated Logging Pty Ltd</i></a>	Corporations Law
<a href="#"><i>Metal Manufactures Pty Limited v Gavin Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd (in Liquidation) &amp; Anor</i></a>	Corporations Law

#### 4: Original Jurisdiction

<b>Case</b>	<b>Title</b>
<a href="#"><i>Unions NSW &amp; Ors v State of New South Wales</i></a>	Constitutional Law

#### 5: Section 40 Removal

#### 6: Special Leave Granted

<b>Case</b>	<b>Title</b>
<a href="#"><i>BDO v The Queen</i></a>	Criminal Law
<a href="#"><i>HCF v The Queen</i></a>	Criminal Practice
<a href="#"><i>McNamara v The Queen</i></a>	Evidence
<a href="#"><i>Barnett v Secretary, Department of Communities and Justice</i></a>	Family Law

#### 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 October 2022 sittings.

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### Constitutional Law

*SDCV v Director-General of Security & Anor*

**S27/2022:** [\[2022\] HCA 32](#)

**Judgment:** 12 October 2022

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

**Catchwords:**

Constitutional law (Cth) – Judicial power of Commonwealth – Where adverse security assessment of appellant, accompanied by statement of grounds, certified by Director General of Security on behalf of Australian Security Intelligence Organisation ("ASA decision") – Where appellant's visa cancelled on character grounds in consequence of ASA decision – Where appellant applied to Administrative Appeals Tribunal for merits review of ASA decision – Where Minister administering *Australian Security Intelligence Organisation Act 1979* (Cth) issued certificates under s 39B(2)(a) of *Administrative Appeals Tribunal Act 1975* (Cth) ("AAT Act") stating that disclosure of some of contents of documents relating to ASA decision would be contrary to public interest because disclosure would prejudice security of Australia ("certificated matter") – Where Tribunal provided with certificated matter but certificated matter not disclosed to appellant or appellant's legal representatives – Where Tribunal affirmed ASA decision – Where appellant appealed to Federal Court of Australia pursuant to s 44 of AAT Act – Where s 46(1) of AAT Act allowed Federal Court to have regard to certificated matter in determining appeal – Where s 46(2) of AAT Act provided that Federal Court shall do all things necessary to ensure that certificated matter not disclosed to any person other than member of court as constituted for purposes of proceeding – Where certificated matter not disclosed to appellant or appellant's legal representatives in Federal Court – Whether s 46(2) of AAT Act invalid on basis that Ch III of *Constitution* precludes making of law that denied party to proceedings in court of federal judicature fair opportunity to respond to evidence on which order of court which finally altered or determined right or legally protected interest of party might be based – Whether s 46(2) of AAT Act invalid on basis that it required or authorised Federal Court to act in manner inconsistent with essential character of court or with nature of judicial power.

Words and phrases – "adverse security assessment", "all things necessary to ensure", "balancing exercise", "denial of disclosure", "essential characteristics of a court", "fair opportunity to respond", "forensic advantage", "gist", "judicial power of the Commonwealth", "national security", "officer of the court", "practical injustice", "procedural fairness", "public interest", "public interest immunity", "special advocate".

*Constitution*, Ch III.

*Administrative Appeals Tribunal Act 1975* (Cth), ss 39A, 39B, 43AAA, 44, 46.

*Australian Security Intelligence Organisation Act 1979* (Cth), s 54.

**Appealed from FCA (FC):** [\[2021\] FCAFC 51](#); (2021) 284 FCR 357; (2021) 389 ALR 372; (2021) 173 ALD 450

**Held:** Appeal dismissed with costs.

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## Evidence

*TL v The King*

**S61/2022:** [\[2022\] HCA 35](#)

**Judgment:** 19 October 2022

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

### Catchwords:

Evidence – Criminal trial – Admissibility – Tendency evidence – *Evidence Act 1995* (NSW), s 97(1)(b) – Where tendency evidence adduced to prove identity of offender – Where narrow class of possible perpetrators – Where other evidence identifying appellant as offender and tending to exclude other possible perpetrators – Whether Court of Criminal Appeal misapplied principles in *Hughes v The Queen* (2017) 263 CLR 338 – Whether tendency evidence required to bear close similarity to offence – Whether tendency evidence had "significant probative value".

Words and phrases – "close similarity", "identity of the offender", "probative value", "serious physical harm", "significant probative value", "tendency evidence".

*Evidence Act 1995* (NSW), s 97(1)(b).

**Appealed from NSW (CCA):** [\[2020\] NSWCCA 265](#)

**Held:** Appeal dismissed.

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## Statutes

*BHP Group Limited v Impiombato & Anor*

**M12/2022:** [\[2022\] HCA 33](#)

**Judgment:** 12 October 2022

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

**Catchwords:**

Statutes – Interpretation – Territorial operation – Presumption against extraterritoriality – *Acts Interpretation Act 1901* (Cth), s 21(1)(b) – Where Pt IVA of the *Federal Court of Australia Act 1976* (Cth) permitted a person to commence a representative proceeding in the Federal Court of Australia on behalf of other persons ("group members") where certain statutory criteria were met – Where Pt IVA did not contain any express geographic or territorial restriction on the identity of persons who could be group members – Whether Pt IVA allowed claims to be brought on behalf of group members not resident in Australia.

Words and phrases – "central focus", "claims", "class action", "federal jurisdiction", "hinge", "in and of the Commonwealth", "matter", "object of legislative concern", "personal jurisdiction", "presumption", "presumption against extraterritoriality", "representative proceedings", "statutory construction", "statutory interpretation", "statutory presumption", "subject matter jurisdiction", "territorial connection", "territorial jurisdiction", "territorial restriction".

*Constitution*, s 77(i).

*Acts Interpretation Act 1901* (Cth), s 21(1)(b).

*Federal Court of Australia Act 1976* (Cth), Pt IVA; ss 19, 33A, 33C, 33D, 33ZB.

**Appealed from FCA (FC):** [\[2021\] FCAFC 93](#); (2021) 286 FCR 625; (2021) 151 ACSR 634

**Held:** Appeal dismissed with costs.

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## Trusts

*Bosanac v Commissioner of Taxation & Anor*

**P9/2022:** [\[2022\] HCA 34](#)

**Judgment:** 12 October 2022

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

**Catchwords:**

Trusts – Resulting trust – Presumption of resulting trust – Presumption of advancement – Where wife purchased property – Where purchase price paid from joint loans taken in names of wife and husband – Where security for joint loans from separately owned properties – Where title registered in name of wife only – Where husband never claimed interest in property – Where property matrimonial home – Where history of separate ownership of assets – Where presumption of advancement precludes presumption of resulting trust from arising – Whether presumption of resulting trust over one half of property in favour of husband – Whether objective intention of wife and husband for husband to have beneficial interest in property – Whether presumption of advancement remains part of general law of Australia.

Words and phrases – "beneficial interest in property", "benefit of another", "circumstance of fact", "circumstance of evidence", "inference", "intention", "objective intention to create a trust", "presumption of advancement", "presumption of fact", "presumption of law", "presumption of resulting trust", "proof of intention", "purchase money resulting trust", "relationship of husband and wife", "spouses", "strength of the presumptions".

**Appealed from FCA (FC):** [\[2021\] FCAFC 158](#)

**Appealed from FCA (FC):** [\[2022\] FCAFC 5](#)

**Held:** Leave to amend the Notice of Contention refused; appeal allowed; orders of the Full Court of the Federal Court set aside.

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## 3: CASES RESERVED

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

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### 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

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### Copyright

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

**[S57/2022](#); [S58/2022](#): [\[2022\] HCATrans 165](#)**

**Date heard:** 11 October 2022

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

**Catchwords:**

Copyright – Informal oral agreements – Inferred term – Implied term – Where Hardingham professional photographer and sole director of Real Estate Marketing Australia Pty Ltd ("REMA") – Where REMA commissioned by agencies to take photographs and prepare floor plans of properties for use on platforms concerning marketing of properties for sale or lease – Where retainer of Hardingham and REMA by agencies oral, informal and said nothing of copyright in photographs and floorplans – Where Hardingham entered into "deed of licence" with REMA by which Hardingham granted REMA exclusive licence of copyright subsisting in works originated by him – Where photographs and floor plans provided to each agency were uploaded to appellant's platform – Where appellant's terms and conditions provided that agency granted licence to appellant to use and adapt content provided by agency – Where s 15 of *Copyright Act 1968* (Cth) provided "act shall be deemed to have been done with licence of copyright owner if doing of act was authorized by a licence binding copyright owner" – Whether, in informal agreement under which owner of copyright in works intends to grant another person licence to use works, including right to grant sub-licence to third party, it is necessary for licensor and licensee to know precise terms of grant by sub-licence – Whether, for purposes of engaging s 15 of *Copyright Act*, it is necessary to show what licence binding on owner allowed, and whether infringer acted consistently with licence.

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

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## 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](#)

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*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) 402 ALR 387; (2021) 159 ACSR 115; (2021) 18 ABC(NS) 257

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

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## Criminal Law

*Awad v The Queen; Tambakakis v The Queen*  
**M44/2022; M45/2022:** [\[2022\] HCATrans 153](#)

**Date heard:** 13 September 2022

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

**Catchwords:**

Criminal law – Jury directions – *Jury Directions Act 2015* (Vic) – Where s 44J(b) of *Jury Directions Act* prohibited trial judge from directing jury that accused gave evidence because: (i) guilty person who gives evidence more likely to be believed; and (ii) innocent person can do nothing more than give evidence – Where appellants arraigned before jury panel, both pleading not guilty to one charge alleging commission of offence of attempt to possess commercial quantity of unlawfully imported border controlled drug – Where Crown's case was appellants in joint possession of drugs for period – Where Tambakakis gave sworn evidence – Where trial judge gave jury direction regarding Tambakakis' evidence that Court of Appeal held contrary to s 44J of *Jury Directions Act* – Where Court of Appeal held, despite direction contrary to s 44J of *Jury Directions Act*, direction did not result in substantial miscarriage of justice for either appellant – Whether, given impugned direction prohibited by s 44J of *Jury Directions Act*, substantial miscarriage of justice occurred.

**Appealed from VSC (CA):** [\[2021\] VSCA 285](#); (2021) 291 A Crim R 303

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## Insurance

*Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788*

**S42/2022:** [\[2022\] HCATrans 126](#); [\[2022\] HCATrans 127](#)

**Date heard:** 10 and 11 August 2022

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

**Catchwords:**

Insurance – Insurance contracts – Indemnity – Election – Estoppel – Waiver – Duty of utmost good faith – Where s 28(3) of *Insurance Contracts Act 1984* (Cth) enables insurer to reduce liability in respect of claim where, relevantly, insured breached duty of disclosure – Where insured notified claim under insurance policy following cyclone damage – Where insurer agreed to indemnify despite non-disclosure of prior defects – Where insurer took steps consistent with providing indemnity – Where insurer emailed insured stating, despite non-disclosure, claim would be honoured – Where insurer subsequently sought to disclaim liability on basis of non-disclosure – Where majority of Full Court of Federal Court of Australia dismissed appeal, holding insurer had elected not to raise defence under s 28(3) – Whether insurer elected not to raise defence under s 28(3) – Whether, if doctrine of election did not apply, insurer waived entitlement to raise defence under s 28(3) – Whether insurer estopped from raising defence under s 28(3) – Whether insured suffered detriment – Whether insurer breached duty of utmost good faith and, if so, whether insured suffered loss justifying relief.

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

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## Torts

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

**P5/2022:** [\[2022\] HCATrans 145](#); [\[2022\] HCATrans 147](#); [\[2022\] HCATrans 148](#)

**Date heard:** 6-8 September 2022

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

**Catchwords:**

Torts – Negligence – Duty of care – Breach of duty – Statutory authority – Where Western Power ("WP") statutory authority

established under *Electricity Corporations Act 2005* (WA) with functions including management, provision and improvement of electricity transmission and distribution services in South West Interconnected System ("SWIS") – Where service cable owned by WP ran from WP's termination pole into mains connection box secured adjacent to top of point of attachment pole ("PA pole") on Mrs Campbell's property – Where PA pole owned by Mrs Campbell – Where electricity passed from wires of WP's service cable to wires of Mrs Campbell's consumer mains cable – Where WP had systems for regular inspection of WP's network assets, but did not regularly inspect or maintain consumer-owned PA poles – Where WP engaged Thiess to replace WP's network poles in Parkerville area, including termination pole, but inspection did not comply with industry standards or Thiess' contractual obligations – Where PA pole fell causing electrical arcing, igniting dry vegetation around base of pole – Where resulting fire spread, becoming Parkerville bushfire, and causing property damage – Where primary judge found WP owed duty to take reasonable care to inspect PA pole to ascertain whether safe and fit condition for supply of electricity before and when undertaking works on pole, but duty discharged by engaging Thiess – Where trial judge apportioned liability for losses 70% as to Thiess and 30% as to Mrs Campbell, and dismissed claims against WP – Where Court of Appeal formulated duty as one owed to persons in vicinity of SWIS to take reasonable care to avoid or minimise risk of injury, and loss to property, from ignition and spread of fire in connection with delivery of electricity through distribution system – Where Court of Appeal held WP had breached duty by failing to have system in place to respond to risk of harm and apportioned liability for losses 50% as to WP, 35% as to Thiess and 15% as to Mrs Campbell – Whether WP, as statutory authority with defined duties, owes common law duty to take reasonable care to avoid fire, discharge of which would oblige WP to exercise discretionary statutory powers in relation to property not owned or controlled by WP – Whether duty of care asserted inconsistent with statute – Proper test for inconsistency between common law duty and statutory scheme which regulates statutory authority.

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

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## 4: ORIGINAL JURISDICTION

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

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### Constitutional law

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

**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.*

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*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.*

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***Unions NSW & Ors v State of New South Wales***

**[S98/2022](#): [\[2022\] HCATrans 161](#)**

**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.*

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***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.*

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## 5: SECTION 40 REMOVAL

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

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## 6: SPECIAL LEAVE GRANTED

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

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### Administrative Law

*Stanley v Director of Public Prosecutions (NSW) Anor*  
**S126/2022:** [\[2022\] HCATrans 139](#)

**Date heard:** 19 August 2022 – *Special leave granted*

**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 NSW (CA):** [\[2021\] NSWCA 337](#); (2021) 107 NSWLR 1; (2021) 398 ALR 355

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### Constitutional Law

*Attorney-General (Cth) v Huynh & Ors*  
**S78/2022:** [\[2022\] HCATrans 91](#)

**Date determined:** 12 May 2022 – *Special leave granted*

**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, Mr Huynh 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 – Where NSW Supreme Court judge dismissed application and Mr Huynh sought judicial review of decision – 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 NSW (CA):** [\[2021\] NSWCA 297](#); (2021) 107 NSWLR 75; (2021) 396 ALR 422

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*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

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## Contracts

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

**S125/2022:** [\[2022\] HCATrans 136](#)

**Date heard:** 19 August 2022 – *Special leave granted*

### 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 NSW (CA):** [\[2021\] NSWCA 332](#); (2021) 396 ALR 340

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## Courts and Judges

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

**M53/2022:** [\[2022\] HCATrans 130](#)

**Date heard:** 12 August 2022 – *Special leave granted*

**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

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

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*BDO v The Queen*

**B8/2022:** [\[2022\] 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](#)

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*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](#)

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*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 112](#)

**Date heard:** 17 June 2022 (A14/2022; A15/2022; A16/2022) – *Special leave granted*

**Date determined:** 18 August 2022 (A17/2022) – *Special leave application referred to the Full Court*

**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

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## 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](#)

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## Evidence

*McNamara v The King*  
**S203/2021:** [\[2022\] 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

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## Family Law

*Barnett v Secretary, Department of Communities and Justice*  
**S34/2022:** [\[2022\] 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 the 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](#)

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## Immigration

*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

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## 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](#)

**Date heard:** 13 October 2022 – *adjourned to a date to be fixed*

**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](#)

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## 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](#)

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## 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[ied] 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) 402 ALR 445

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## Private International Law

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

**S43/2022:** [\[2022\] HCATrans 39](#)

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

### 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

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## 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](#)

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# 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](#)

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## **7: CASES NOT PROCEEDING OR VACATED**

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## 8: SPECIAL LEAVE REFUSED

### Publication of Reasons: 13 October 2022 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	AFB20	Minister for Immigration Citizenship Migrant Services and Multicultural Affairs & Anor (M38/2022)	Federal Court of Australia [2022] FCA 299	Application dismissed <a href="#">[2022] HCASL 169</a>
2.	AVI17	Minister for Immigration Citizenship Migrant Services and Multicultural Affairs & Anor (S118/2022)	Federal Court of Australia [2022] FCA 800	Application dismissed <a href="#">[2022] HCASL 170</a>
3.	Nash	The Queen (B29/2022)	Supreme Court of Queensland (Court of Appeal) [2022] QCA 84	Application dismissed <a href="#">[2022] HCASL 171</a>
4.	The King	Keith Clarke - a pseudonym (M39/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 89	Application dismissed <a href="#">[2022] HCASL 172</a>
5.	AFG20	Minister for Immigration Citizenship Migrant Services and Multicultural Affairs & Anor (M42/2022)	Federal Court of Australia [2022] FCA 585	Application dismissed with costs <a href="#">[2022] HCASL 173</a>
6.	Collector of Customs	Hurley (P15/2022)	Federal Court of Australia (Full Court) [2022] FCAFC 92	Application dismissed with costs <a href="#">[2022] HCASL 174</a>
7.	Environment Protection Authority	Eastern Creek Operations Pty Limited (S89/2022)	Supreme Court of New South Wales (Court of Criminal Appeal) [2022] NSWCCA 97	Application dismissed <a href="#">[2022] HCASL 175</a>
8.	Environment Protection Authority	Eastern Creek Operations Pty Limited (S90/2022)	Supreme Court of New South Wales (Court of Criminal Appeal) [2022] NSWCCA 97	Application dismissed <a href="#">[2022] HCASL 175</a>
9.	Kupang Resources Limited	Commonwealth of Australia (S97/2022)	Supreme Court of New South Wales (Court of Appeal) [2022] NSWCA 77	Application dismissed with costs <a href="#">[2022] HCASL 176</a>



## Publication of Reasons: 13 October 2022 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	In the matter of an application by Gaye Luck for leave to Appeal (M80/2020)		High Court of Australia	Application dismissed <a href="#">[2022] HCASL 177</a>
2.	Luck	Federal Court of Australia & Ors (M82/2020)	High Court of Australia	Application dismissed <a href="#">[2022] HCASL 178</a>
3.	Luck	Nell (M62/2021)	Application for Removal	Application dismissed <a href="#">[2022] HCASL 179</a>
4.	Luck	Nell (M83/2021)	High Court of Australia	Application dismissed <a href="#">[2022] HCASL 180</a>
5.	CHB17	Minister for Immigration Citizenship Migrant Services and Multicultural Affairs & Anor (P19/2022)	Federal Court of Australia [2022] FCA 635	Application dismissed with costs <a href="#">[2022] HCASL 181</a>
6.	CMP19	Minister for Immigration Citizenship Migrant Services and Multicultural Affairs & Anor (S94/2022)	Federal Court of Australia [2022] FCA 634	Application dismissed with costs <a href="#">[2022] HCASL 182</a>

## 14 October 2022: Canberra and by video link

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	The Star Entertainment Group Limited & Ors	Chubb Insurance Australia Ltd & Ors (S35/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 16	Application refused with costs <a href="#">[2022] HCATrans 173</a>
2.	Insurance Australia Limited	Meridian Travel (Vic) Pty Ltd (S36/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 17	Application refused <a href="#">[2022] HCATrans 172</a>
3.	The Taphouse Townsville Pty Ltd	Insurance Australia Limited (S37/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 17	Application refused <a href="#">[2022] HCATrans 172</a>
4.	LCA Marrickville Pty Limited	Swiss Re International SE (S38/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 17	Application refused <a href="#">[2022] HCATrans 172</a>
5.	Anthony John Warner in his Capacity as Trustee in Bankruptcy of the Estate of Brian McMillan	McMillan (S39/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 20	Application refused with costs <a href="#">[2022] HCATrans 170</a>
6.	Sakieh	The King (S170/2021)	Supreme Court of New South Wales (Court of Criminal Appeal) [2021] NSWCCA 130	Application refused <a href="#">[2022] HCATrans 174</a>
7.	Minogue	Thompson (in his capacity as Governor of Barwon Prison) (M4/2022)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 358	Application refused with costs <a href="#">[2022] HCATrans 175</a>
8.	Minogue	Falkingham (in her capacity as Secretary to the Department of Justice and Community Safety) & Anor (M8/2022)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 358	Application refused with costs <a href="#">[2022] HCATrans 175</a>

## Publication of Reasons: 20 October 2022 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	AVL15 & Anor	Minister for Immigration Citizenship Migrant Services and Multicultural Affairs & Anor (M37/2022)	Federal Court of Australia [2022] FCA 452	Application dismissed <a href="#">[2022] HCASL 183</a>
2.	Mensink	Registrar of the Federal Court of Australia (B30/2022)	Federal Court of Australia (Full Court) [2022] FCAFC 102	Application dismissed with costs <a href="#">[2022] HCASL 184</a>
3.	Mensink	Registrar of the Federal Court of Australia (B31/2022)	Federal Court of Australia (Full Court) [2022] FCAFC 102	Application dismissed with costs <a href="#">[2022] HCASL 184</a>
4.	Zakhour	The King (M43/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 63	Application dismissed <a href="#">[2022] HCASL 185</a>
5.	Break Fast Investments Pty Ltd	Rigby Cooke Lawyers (a Firm) (M47/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 118	Application dismissed with costs <a href="#">[2022] HCASL 186</a>
6.	Yadu	Orjit (P16/2022)	Federal Circuit and Family Court of Australia (Division 1)	Application dismissed with costs <a href="#">[2022] HCASL 187</a>
7.	Toscana (WA) Ravenswood Estate Pty Ltd & Ors	Murray Riverside Pty Ltd & Anor (P22/2022)	Supreme Court of Western Australia (Court of Appeal) [2022] WASCA 67	Application dismissed with costs <a href="#">[2022] HCASL 188</a>
8.	BQX17 & Ors	Minister for Immigration Citizenship Migrant Services and Multicultural Affairs & Anor (S92/2022)	Federal Court of Australia [2022] FCA 595	Application dismissed with costs <a href="#">[2022] HCASL 189</a>
9.	Gall	The King (S93/2022)	Supreme Court of New South Wales (Court of Criminal Appeal) [2015] NSWCCA 69	Application dismissed <a href="#">[2022] HCASL 190</a>

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<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Campbell	Northern Territory of Australia & Anor (D3/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 37	Application dismissed with costs <a href="#">[2022] HCATrans 188</a>
2.	Worley Limited	Crowley (S47/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 33	Application dismissed with costs <a href="#">[2022] HCATrans 182</a>
3.	KTC	David & Ors (S70/2022)	Full Court of the Federal Court of Australia [2022] FCAFC 60	Application dismissed with costs <a href="#">[2022] HCATrans 183</a>
4.	Fister & Anor	King & Anor (B17/2022)	Supreme Court of Queensland (Court of Appeal) [2022] QCA 47	Application dismissed with costs <a href="#">[2022] HCATrans 186</a>