



HIGH COURT BULLETIN

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[2021] HCAB 7 (10 September 2021)

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

1: Summary of New Entries	1
2: Cases Handed Down	3
3: Cases Reserved	5
4: Original Jurisdiction	17
5: Section 40 Removal	18
6: Special Leave Granted.....	19
7: Cases Not Proceeding or Vacated.....	32
8: Special Leave Refused.....	33

1: SUMMARY OF NEW ENTRIES

2: Cases Handed Down

Case	Title
<i>Director of Public Prosecutions Reference No 1 of 2019</i>	Criminal Law
<i>Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller</i>	Defamation

3: Cases Reserved

Case	Title
<i>Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd & Ors</i>	Competition Law
<i>Park v The Queen</i>	Criminal Law
<i>Charisteas v Charisteas & Ors</i>	Family Law

<i>Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane</i>	Immigration
<i>Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd</i>	Industrial Law
<i>ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors</i>	Industrial Law
<i>Arsalan v Rixon; Nguyen v Cassim</i>	Torts

[4: Original Jurisdiction](#)

[5: Section 40 Removal](#)

[6: Special Leave Granted](#)

Case	Title
<i>Hoang v The Queen</i>	Criminal Law
<i>The Queen v Rolfe</i>	Criminal 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 September 2021 sittings.

Criminal Law

Director of Public Prosecutions Reference No 1 of 2019

M131/2020: [\[2021\] HCA 26](#)

Judgment delivered: 1 September 2021

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

Catchwords:

Criminal law – Recklessness – Where s 17 of *Crimes Act 1958* (Vic) provides that person who, without lawful excuse, recklessly causes serious injury is guilty of indictable offence – Where Court of Appeal of Supreme Court of Victoria in *R v Campbell* [1997] 2 VR 585 held that recklessness means person foresaw that serious injury probably will result from act or omission – Where *Crimes Act* amended following *Campbell* with significant, substantive and direct effect on s 17 – Where High Court cast doubt on correctness of *Campbell* in *Aubrey v The Queen* (2017) 260 CLR 305 – Where accused charged with recklessly causing serious injury under s 17 of *Crimes Act* – Where trial judge directed jury in relation to recklessness consistently with *Campbell* – Where accused acquitted – Where Director of Public Prosecutions (Vic) referred correctness of *Campbell* as point of law to Court of Appeal – Whether Parliament left meaning of recklessness in s 17 of *Crimes Act* to courts – Whether recklessness in s 17 of *Crimes Act* has meaning stated in *Campbell*.

Words and phrases – "culpability and criminality", "elements of the existing offences", "expert review of the law", "extensive consultation with key stakeholders", "foresight of possibility", "foresight of probability", "gross violence offences", "injury", "maximum penalty", "offences against the person other than murder", "recklessness", "re-enactment presumption", "serious injury", "specialised and politically sensitive fields", "temporal proximity".

Crimes Act 1958 (Vic) – s 17.

Appealed from VSC (CA): [\[2020\] VSCA 181](#); (2020) 284 A Crim R 19

Held: Appeal dismissed with costs.

[Return to Top](#)

Defamation

Fairfax Media Publications Pty Ltd v Voller; Nationwide News Pty Limited v Voller; Australian News Channel Pty Ltd v Voller
[S236/2020; S237/2020; S238/2020](#): [\[2021\] HCA 27](#)

Judgment delivered: 8 September 2021

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

Catchwords:

Defamation – Publication – Where appellants were media companies – Where each appellant created, operated and maintained public Facebook page – Where each appellant created posts on Facebook page hyperlinking to news stories referring to respondent – Where third-party Facebook users left "comments" on appellants' posts – Where comments alleged to be defamatory of respondent – Whether appellants "publishers" of comments – Whether intention to communicate defamatory matter necessary for appellants to be publishers.

Words and phrases – "communication of defamatory matter to a third party", "defamation", "digital newspaper or broadcast", "encouraged and facilitated", "Facebook comments", "Facebook page", "innocent dissemination", "intention to publish defamatory matter", "internet platform providers", "participation", "participation in the process", "publication", "publisher", "rebuttable presumption of publication", "strict liability", "third party".

Defamation Act 2005 (NSW) – s 7(2).

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

Held: Appeals dismissed with costs.

[Return to Top](#)

3: CASES RESERVED

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

Competition Law

Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd & Ors

[S33/2021](#): [\[2021\] HCATrans 142](#)

Date heard: 7 September 2021

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

Catchwords:

Competition law – Arbitration determination – Third party access – Calculation of user contributions – Where appellant operator of Port of Newcastle – Where provision of access and use of Port shipping channels declared service pursuant to Pt IIIA of *Competition and Consumer Act 2010* (Cth) – Where appellant levies certain charges payable by vessel owner or charterer in respect of use of Port infrastructure – Where first respondent coal mining company exported coal through Port via both own chartered vessels and vessels owned by other persons – Where first respondent sought arbitration by Australian Competition and Consumer Commission (“ACCC”) of dispute about quantum of charge – Where ACCC and Australian Competition Tribunal on review determined first respondent could not arbitrate terms on which other persons’ vessels carrying first respondent’s coal were charged – Where parties agreed ACCC use “depreciated optimised replacement cost methodology” to calculate asset base component of appropriate charge – Where ACCC and Tribunal on review decided s 44X(1)(e) required it to deduct historical service user contributions to Port infrastructure from asset base in calculation of charge – Where appellant unsuccessfully appealed to Full Court of Federal Court – Whether persons with economic interest in arbitration determination or who causes access to occur are third party for purposes of Pt IIIA – Proper approach to calculation of historical user contributions in charge.

Appealed from FCA (FC): [\[2020\] FCAFC 145](#); (2020) 280 FCR 194; (2020) 382 ALR 331

[Return to Top](#)

Constitutional Law

Palmer v The State of Western Australia; Mineralogy Pty Ltd & Anor v State of Western Australia

[B52/2020](#); [B54/2020](#); [\[2021\] HCATrans 104](#); [\[2021\] HCATrans 106](#); [\[2021\] HCATrans 107](#); [\[2021\] HCATrans 108](#)

Dates heard: 15-18 June 2021

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

Catchwords:

Constitutional law – State legislative power – Federalism – Chapter III of *Constitution* – Where, on 5 December 2001, plaintiffs and defendant entered into Agreement in relation to development of certain projects in Western Australia – Where Agreement ratified by *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) – Where Agreement subsequently varied in 2008 and ratified by *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2008* (WA) – Where various disputes arose in relation to development proposal and plaintiff claimed defendant breached terms of Agreement – Where disputes referred to arbitrator in Queensland – Where *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) enacted in 2020 – Where effect of 2020 Amendment Act to exclude defendant’s liability, and prohibit any enforcement or payment of any liability, arising in respect of disputes and arbitrations – Whether 2020 Amendment Act contravenes s 118 of *Constitution* by failure to give full faith and credit and effect to *Commercial Arbitration Act 2013* (Qld) and equivalent legislation in each State and Territory – Whether 2020 Amendment Act contravenes s 6 of *Australia Act 1986* (Cth) because not enacted pursuant to manner and form specified in Agreement - Whether 2020 Amendment Act purports to direct federal courts and courts exercising federal jurisdiction as to manner of exercise of federal jurisdiction, withdraws or limits federal jurisdiction, impermissibly interferes with federal court proceedings, or confers powers and duties repugnant to exercise of federal judicial power – Whether 2020 Amendment Act beyond state legislative power because violates rule of law – Whether 2020 Amendment Act incompatible with institutional integrity of courts – Whether 2020 Amendment Act impermissibly exercises state judicial power without possibility of review by courts – Whether 2020 Amendment Act invalid because alters consequences of actions and conduct of Commonwealth Government – Whether 2020 Amendment Act invalid under s 109 of *Constitution* – Whether 2020 Amending Act invalid for specifically targeting Mr Palmer and depriving him of personal rights and property rights – Whether 2020 Amendment Act involves abdication of State legislative power

– Whether 2020 Amendment Act contravenes s 117 of Constitution by discriminating against Mr Palmer as resident of Queensland – Whether 2020 Amendment Act invalid in entirety or in part.

Special case referred to the Full Court on 6 April 2021.

[Return to Top](#)

Criminal Law

Edwards v The Queen

S235/2020: [\[2021\] HCATrans 89](#)

Date heard: 19 May 2021

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

Catchwords:

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

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

[Return to Top](#)

Hofer v The Queen

S37/2021: [\[2021\] HCATrans 125](#)

Date heard: 12 August 2021

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

Catchwords:

Criminal law – Criminal procedure – Conduct of cross-examination – Where appellant charged with 11 counts of having sexual intercourse without consent – Where two complainants testified as prosecution witnesses – Where appellant gave evidence – Where, during cross-examination, prosecutor asked appellant about aspects of his evidence arising from defence counsel’s failure to comply with *Browne v Dunn* rule in respect of those matters in cross-examination of complainants – Where prosecutor suggested appellant lying in evidence about those matters because defence counsel had not put those matters to complainants – Where defence counsel did not object to prosecutor’s questions – Where appellant convicted and unsuccessfully appealed to NSW Court of Criminal Appeal – Whether prosecutor able to cross-examine accused with regard to defence counsel’s non-compliance with rule in *Browne v Dunn* – Whether prosecutor engaged in impermissible questioning – Whether defence counsel at trial incompetent – Whether trial miscarried.

Appealed from NSWSC (CCA): [\[2019\] NSWCCA 244](#)

[Return to Top](#)

Park v The Queen

S61/2021: [\[2021\] HCATrans 140](#)

Date heard: 2 September 2021

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

Catchwords:

Criminal law – Sentencing – Guilty plea reduction - Where s 22(1) of *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that, in passing sentence on offender who has pleaded guilty to offence, court may impose lesser penalty “than it would otherwise have imposed” – Where appellant pleaded guilty to offence – Where offence has 5 year maximum penalty but jurisdictional limit of 2 years applies when dealt with summarily by District Court – Where primary judge would have imposed sentence of 2 years 8 months for offence and applied 25 per cent reduction to sentence pursuant to s 22(1) – Where appellant sentenced to 2 years imprisonment – Where appellant appealed to Court of Criminal Appeal on basis reduction should have been applied to 2 years (jurisdictional limit applied to appropriate sentence) instead of 2 years 8 months (appropriate sentence before jurisdictional limit applied) - Where Court of Criminal Appeal dismissed appeal and held “would otherwise have imposed” refers to appropriate sentence despite jurisdictional limit, and jurisdictional limit only relevant if sentence post-reduction exceeds jurisdictional limit – Correct construction of

“would otherwise have imposed” – Whether reduction of sentence applies to sentence appropriate to judicial officer but beyond jurisdictional limit or to sentence court would actually have imposed if no guilty plea.

Appealed from NSW (CCA): [\[2020\] NSWCCA 90](#); (2020) 282 A Crim R 551

[Return to Top](#)

Evidence

Hamilton (a pseudonym) v The Queen
[S24/2021](#): [\[2021\] HCATrans 109](#)

Date heard: 22 June 2021

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

Catchwords:

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

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

[Return to Top](#)

Family Law

Charisteas v Charisteas & Ors
[P6/2021](#): [\[2021\] HCATrans 141](#)

Date heard: 3 September 2021

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

Catchwords:

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

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

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

[Return to Top](#)

Immigration

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

S34/2021: [\[2021\] HCATrans 144](#)

Date heard: 9 September 2021

Coram: Keane, Gordon, Edelman, Steward and Gleeson JJ

Catchwords:

Immigration – Judicial review – No evidence – Where respondent’s visa mandatorily cancelled under s 501(3A) of *Migration Act 1958* (Cth) – Where respondent made representations pursuant to s 501CA as to why cancellation should be revoked – Where, if visa cancellation not revoked, respondent and family would be removed to Samoa or American Samoa – Where Minister decided not to revoke cancellation decision – Where respondent unsuccessfully appealed to Federal Court and successfully appealed to Full Court – Whether Minister made factual findings regarding language and availability of welfare and social services in Samoa and American Samoa without evidence – Whether Minister made factual findings based on personal or specialised knowledge about Samoa or American Samoa – If not, whether errors material and jurisdictional.

Appealed from FCA (FC): [\[2020\] FCAFC 144](#); (2020) 278 FCR 386

[Return to Top](#)

Industrial Law

Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd
P5/2021: [\[2021\] HCATrans 138](#)

Date heard: 31 August 2021

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

Catchwords:

Industrial law – Employee and independent contractor – Proper test for distinguishing – Labour hire agreement – Definition of “employee” – Where second appellant signed Administrative Services Agreement with respondent labour hire agency and offered work cleaning and moving materials for builder – Where contract between second appellant and respondent for work, contract between respondent and builder for labour supply, but no contract between second appellant and respondent – Where builder “controlled” second appellant – Where arrangement of casual nature included right to reject assignment – Where second

appellant not integrated into respondent's business and not given uniform – Where work required personal service and second appellant not in business on own account – Where second appellant 22-year old backpacker on working holiday visa – Where express term of contract categorises relationship not employment – Where appellants allege respondent contravened various National Employment Standards and s 45 of *Fair Work Act 2009* (Cth) by not paying second appellant in accordance with relevant award – Where Standards apply only if second appellant "employee" – Where primary judge, applying multi-factorial test, found second appellant not employee – Where Full Court preferred approach second appellant employee but for authority of intermediate appellate court in *Personnel Contracting v Construction, Forestry, Mining and Energy Union* [2004] WASCA 312 decided in similar circumstances, which Full Court held not plainly wrong – Whether second appellant "employee" of respondent – Whether, in triangular labour hire agreement, control test satisfied when second appellant controlled by builder and not respondent – Whether multi-factorial test correctly applied.

Appealed from FCA (FC): [\[2020\] FCAFC 122](#); (2020) 279 FCR 631; (2020) 381 ALR 457; (2020) 297 IR 269

[Return to Top](#)

Ridd v James Cook University
[B12/2021](#): [\[2021\] HCATrans 110](#)

Date heard: 23 June 2021

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

Catchwords:

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

13 and Code should be read together – If so, whether cl 13 qualifies cl 14 or vice versa.

Appealed from FCA (FC): [\[2020\] FCAFC 123](#); (2020) 278 FCR 566; (2020) 382 ALR 8; (2020) 298 IR 50

Appealed from FCA (FC): [\[2020\] FCAFC 132](#)

[Return to Top](#)

ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors

S27/2021: [\[2021\] HCATrans 139](#)

Date heard: 1 September 2021

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

Catchwords:

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

Appealed from FCA (FC): [\[2020\] FCAFC 119](#); (2020) 279 FCR 114; (2020) 297 IR 210

[Return to Top](#)

Planning and Environment

Sunland Group Limited & Anor v Gold Coast City Council

B64/2020: [\[2021\] HCATrans 61](#); [\[2021\] HCATrans 124](#)

Date heard: 9 April and 5 August 2021

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

Catchwords:

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

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

[Return to Top](#)

Taxation

Addy v Commissioner of Taxation

S25/2021: [\[2021\] HCATrans 111](#)

Date heard: 24 June 2021

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

Catchwords:

Taxation – Double taxation treaty – Non-discrimination clause – Where Art 25 of Australia and United Kingdom Double Taxation Treaty provides foreign nationals shall not be subjected to more burdensome tax treatment compared to hypothetical Australian

national in same circumstances – Where appellant citizen of United Kingdom and holder of working holiday visa – Where working holiday visa-holders subject to special working holiday tax rate in Pt III of Sch 7 of *Income Tax Rates Act 1986* (Cth) – Where appellant taxed \$3,986 compared to \$1,591.44 by Australian national on same income – Where appellant selected as test case by respondent Commissioner – Where Federal Court held appellant entitled to benefit of Art 25 – Where respondent successfully appealed to Full Court – Whether appellant subject to more burdensome taxation by reason of nationality – If so, whether appellant Australian resident for tax purposes.

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

[Return to Top](#)

Torts

Arsalan v Rixon; Nguyen v Cassim

[S35/2021](#); [S36/2021](#): [\[2021\] HCATrans 143](#)

Date heard: 8 September 2021

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

Catchwords:

Torts – Damages – Damage to chattel – Where appellants' negligence resulted in motor vehicle collision with respondents' "high-value", "prestige" vehicles – Where respondents' vehicles damaged, and respondents hired replacement vehicles of equivalent value while damaged vehicles underwent repairs – Where respondents claimed damages for cost of hiring replacement vehicles of equivalent value in NSW Local Court – Where magistrate awarded damages only for cost of hiring suitable replacement vehicle for uses vehicle will likely to be put, not necessarily of equivalent value – Where respondents' appeal to Supreme Court dismissed – Where respondents' appeal to Court of Appeal allowed – Where Court of Appeal majority held damages be awarded to put claimant in position they would have been in before wrongdoing, i.e., for replacement vehicle of equivalent value – Where each judge in Court of Appeal applied different standard – Whether respondents entitled to claim damages for cost of hiring replacement vehicles of equivalent value to damaged prestige vehicles – Whether equivalent value replacement vehicle reasonable – Correct test of quantification of damages.

Appealed from NSWSC (CA): [\[2020\] NSWCA 115](#); (2020) 92 MVR 366

[Return to Top](#)

4: ORIGINAL JURISDICTION

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

Immigration

Plaintiff M1/2021 v Minister for Home Affairs

M1/2021: [\[2021\] HCATrans 52](#)

Catchwords:

Immigration – Judicial review – Non-refoulement obligations – Where plaintiff granted Refugee and Humanitarian (Class XB) Subclass 202 (Global Special Humanitarian) visa in 2006 – Where, on 19 September 2017, plaintiff convicted of unlawful assault and sentenced to 12 months' imprisonment – Where, on 27 October 2017, delegate of Minister cancelled plaintiff's visa pursuant to s 501(3A) of *Migration Act 1958* (Cth) – Where plaintiff made representations to Minister regarding possibility of refoulement if plaintiff returned to home country – Where, on 9 August 2018, delegate of Minister decided not to revoke cancellation decision pursuant to s 501CA(4) of *Migration Act* – Where, in making decision, delegate did not consider whether non-refoulement obligations owed to plaintiff because plaintiff able to apply for protection visa under *Migration Act* – Whether delegate required to consider plaintiff's representations concerning non-refoulement obligations in making non-revocation decision pursuant to s 501CA(4) where plaintiff can apply for protection visa – If so, whether delegate failed to consider representations – If so, whether delegate failed to exercise jurisdiction under *Migration Act* or denied plaintiff procedural fairness – Whether non-revocation decision affected by jurisdictional error.

Special case referred to the Full Court on 30 March 2021.

[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.

Aviation

Wells Fargo Trust Company, National Association (As Owner Trustee) & Anor v VB Leaseco Pty Ltd (Administrators Appointed) & Ors

[S60/2021: \[2021\] HCATrans 63](#)

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

Catchwords:

Aviation – Construction of art XI *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (Protocol) – Where *International Interest in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) gives domestic effect to *Convention on International Interests in Mobile Equipment (Cape Town Convention)* – Where art XI(2) of Protocol provides upon occurrence of insolvency-related event, insolvency administrator or debtor shall “give possession of the aircraft object” to creditor – Where appellants owners of aircraft engines leased to first respondent and subleased to second and fourth respondents – Where third respondent appointed administrator of other respondents following insolvency-related event – Where lease imposes on lessees return obligations in respect of aircraft – Where appellants sought compliance with respondents’ Art XI(2) obligations to “give possession” – Where third respondent, instead of physically redelivering engines, issued a notice under s 443B(3) of *Corporations Act 2001* (Cth) disclaiming leased engines and leaving engines still attached to aircraft operated by lessees and owned by third parties – Where primary judge held respondents failed to “give possession” of engines – Where respondents successfully appealed to Full Court Federal Court – Whether “give possession” means physical delivery of aircraft objects or merely enables creditor to exercise self-help remedy – Whether respondents failed to “give possession”.

Appealed from FCA (FC): [\[2020\] FCAFC 168](#); (2020) 279 FCR 518; (2020) 384 ALR 378

[Return to Top](#)

Constitutional Law

Citta Hobart Pty Ltd & Anor v Cawthorn

[H7/2021](#); [\[2021\] HCATrans 126](#)

Date heard: 13 August 2021 – *Special leave granted on conditions*

Catchwords:

Constitutional law – Federal jurisdiction – Jurisdiction of State Tribunal – Inconsistency between Commonwealth and State laws – Discrimination – Disability Discrimination – Where respondent complained to Tasmania Anti-Discrimination Tribunal on basis applicants’ building development constituted disability discrimination under *Anti-Discrimination Act 1998* (Tas) – Where applicants pleaded in defence inconsistency with *Disability Discrimination Act 1992* (Cth) pursuant to s 109 of *Constitution* – Where Tribunal dismissed complaint for lack of jurisdiction because determination of s 109 defence exercise of federal jurisdiction – Where Full Court allowed appeal on basis s 109 defence would not succeed – Whether Full Court applied correct test as to jurisdiction of State Tribunal – Whether *Anti-Discrimination Act 1998* (Tas) inconsistent with *Disability Discrimination Act 1992* (Cth).

Appealed from TASSC (FC): [\[2020\] TASFC 15](#); (2020) 387 ALR 356

[Return to Top](#)

Contracts

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

[H2/2021](#); [H3/2021](#): [\[2021\] HCATrans 26](#)

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

Catchwords:

Contracts – Privity of contract – Declaratory relief – Where second respondent Commonwealth registered proprietor of land leased to appellants – Where first respondent Councils not party to lease – Where cl 26.2(a) of lease provides amount equivalent to council rates to be paid to first respondents in respect of leased land – Where lease contemplates that first respondents will participate in mechanism in determining amount payable – Where dispute arose between appellants and first respondents as to amounts payable – Where first respondents sought declaratory and consequential relief

with respect to proper construction of cl 26.2(a) – Where primary judge held first respondents did not have standing to seek declaratory relief on basis of privity of contract – Where first respondents successfully appealed to Full Federal Court, which held doctrine of privity only prevents third parties from obtaining executory judgment to enforce terms of contract, not declaratory judgment – Whether doctrine of privity prevents third parties from seeking declaratory relief – Whether third parties have standing to seek declaratory relief in respect of contract.

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

Appealed from FCA (FC): [\[2020\] FCAFC 134](#); (2020) 280 FCR 265; (2020) 382 ALR 273

[Return to Top](#)

Corporations

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

S20/2021: [\[2021\] HCATrans 18](#)

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

Catchwords:

Corporations – Examinations relating to insolvency – Abuse of process – Where s 596A of *Corporations Act 2001* (Cth) requires court to issue examinations summons to a person about a company if “eligible applicant” applies for summons – Where “eligible applicants” include persons authorised by Australian Securities and Investments Commission (“ASIC”) – Where ASIC can only authorise person if person’s purpose is for benefit of corporation, its contributories or its creditors – Where appellants shareholders of respondent – Where, in 2014, respondent successfully completed capital raising for purpose of paying down debt – Where respondent entered into voluntary administration in 2016 and liquidation in 2019 – Where ASIC authorised appellants as “eligible applicants” to conduct examinations of respondent’s directors and officers – Where NSW Court of Appeal found appellants’ predominant purpose investigation and pursuit of shareholders’ private claim against directors in relation to 2014 capital raising – Where Court of Appeal

held fulfilment of that purpose would not confer benefit on corporation, creditors or contributories, and therefore offensive to purpose for which s 596A enacted and abuse of process – Whether implicit purpose of obtaining information about potential misconduct is beneficial to corporation – Whether appellants' purposes offensive or foreign to s 596A.

Appealed from NSW (CA): [\[2020\] NSWCA 157](#); (2020) 383 ALR 298; (2020) 17 ABC(NS) 320

[Return to Top](#)

Criminal Law

Bell v State of Tasmania

H2/2020: [\[2021\] HCATrans 5](#)

Date heard: 3 February 2021

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

Catchwords:

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

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

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

[Return to Top](#)

Bell v The Queen

A30/2021: [\[2021\] HCATrans 132](#)

Date heard: 13 August 2021 – *Special leave granted*

Catchwords:

Criminal law – Procedure – Stay of proceedings – Powers of Independent Commissioner Against Corruption (ICAC) – Where, in 2014, ICAC commenced investigation into applicant – Where, in 2017, ICAC forwarded matter to Director of Public Prosecutions (DPP) and provided evidentiary material gathered in course of investigation – Where DPP decided to prosecute applicant – Where ICAC officers assisted DPP to prepare for trial – Where applicant applied for permanent stay – Where District Court dismissed application and Full Court dismissed appeal – Whether *Independent Commissioner Against Corruption Act 2012* (SA) authorised ICAC to refer matter, provide evidentiary material and otherwise assist DPP in prosecution – Whether ICAC conduct abuse of process justifying permanent stay.

Appealed from SASC (FC): [\[2020\] SASCF 116](#); (2020) 286 A Crim R 501

[Return to Top](#)

George v The State of Western Australia

P45/2020: [\[2021\] HCATrans 95](#)

Date heard: 20 May 2021 – *Application referred to Full Court for argument as on appeal*

Catchwords:

Criminal law – Jury directions – Right to silence – Where applicant charged with indecently dealing with child between ages 13 and 16 years, contrary to s 321(4) of *Criminal Code* (WA) – Where prosecution adduced evidence of investigating police officer, who gave evidence of electronic record of interview in which applicant denied offences and gave alternative account, and tendered record of interview – Where applicant did not give or adduce any evidence at trial – Where applicant submitted prosecution had not proved beyond reasonable doubt all elements of offence – Where trial judge failed to warn jury that applicant's silence could not be used as evidence against him, does not constitute admission, could not be used to fill gaps in prosecution's evidence and could not be used as a make-weight in assessing whether prosecution proved case beyond reasonable doubt (*Azzopardi* direction) – Where majority of

WA Court of Appeal held absence of *Azzopardi* direction not miscarriage of justice – Whether miscarriage of justice occurred because of absence of *Azzopardi* direction.

Appealed from WASC (CA): [\[2020\] WASCA 139](#)

[Return to Top](#)

Hoang v The Queen

S6; S7; S8; S9/2021: [\[2021\] HCATrans 148](#)

Date heard: 10 September 2021 – *Special leave granted*

Catchwords:

Criminal law – Juror misconduct – Juror conducting own inquiries – Mandatory discharge – Where s 53A of *Jury Act 1977* (NSW) required mandatory discharge of juror if juror engaged in misconduct – Where s 68C provided juror must not make own inquiries “for purpose of obtaining information” about matters relevant to trial – Where applicant charged with 12 offences – Where jury commenced deliberations and, on 5 November 2015, jury sent note to trial judge stating agreement reached on 8 counts – Where, on evening of 5 November, juror conducted internet search for personal reasons only on matter related to trial – Where jury continued deliberating on 6 November until jury foreperson notified trial judge of juror’s actions – Where trial judge took verdicts on 10 counts before discharging juror pursuant to s 53A – Where remaining jurors continued deliberating and gave verdict on remaining 2 counts – Where applicant appealed on basis trial judge failed to discharge juror prior to taking of first 10 counts – Where Court of Criminal Appeal held no juror misconduct and dismissed appeal – Whether inquiries made “for purpose of obtaining information” in s 68C includes juror making inquiries for solely personal reasons – If so, whether juror should have been discharged prior to taking of first 10 counts – If so, whether verdicts on any counts valid.

Appealed from NSWSC (CCA): [\[2018\] NSWCCA 166](#); (2018) 98 NSWLR 406; (2020) 273 A Crim R 501

Orreal v The Queen

B25/2021: [\[2021\] HCATrans 71](#)

Date heard: 16 April 2021 – *Special leave granted*

Catchwords:

Criminal law – Application of proviso – Substantial miscarriage of justice – Prejudicial evidence – Where appellant charged with sexual offending against child – Where, at trial, irrelevant, inadmissible and prejudicial medical evidence placed before jury – Where prosecution, in summing up, contended evidence could be of some use to jury – Where trial judge did not direct jury to disregard inadmissible evidence and directed jury could use evidence – Where appellant unsuccessfully appealed to Court of Appeal – Where majority of Court of Appeal held, despite reception of inadmissible and prejudicial evidence, no substantial miscarriage of justice occurred – Whether, in cases turning on issues of contested credibility, appropriate for intermediate Court of Appeal to make own assessment of admissible evidence for purpose of determining whether no substantial miscarriage of justice occurred.

Appealed from QSC (CA): [\[2020\] QCA 95](#)

The Queen v Rolfe

D2/2021: [\[2021\] HCATrans 145](#)

Date heard: 10 September 2021 – *Application referred to Full Court for argument as on appeal*

Catchwords:

Criminal law – Police – Use of lethal force by police officer – Protection from criminal liability – Where respondent police officer shot person violently resisting arrest three times, resulting in death – Where respondent charged with murder and, in alternative, manslaughter – Where respondent sought to rely on defence in s 148B of *Police Administration Act 1978* (NT) – Where s 148B provided protection from criminal liability for act done by person in good faith in exercise of power or function under Act – Where s 5 of Act provided “core functions” of NT Police Force includes protection of life and prevention of criminal offences – Where availability of s 148B immunity referred to NT Full Court, which held respondent may rely on s 148B immunity – Whether “performance of function by person” in s 148B includes “core functions of Police Force” in s 5 – Whether respondent may rely on s 148B immunity.

Appealed from NTSC (FC): [\[2021\] NTSCFC 6](#)

[Return to Top](#)

Equity

Stubbings v Jams 2 Pty Ltd & Ors

M13/2021: [\[2021\] HCATrans 23](#)

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

Catchwords:

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

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

[Return to Top](#)

Industrial Law

Australian Building and Construction Commissioner v Pattinson & Anor

M34/2021: [\[2021\] HCATrans 90](#)

Date determined: 20 May 2021 – *Special leave granted on limited grounds*

Catchwords:

Industrial law – Civil penalties – Determination of appropriate penalty – Where s 349(1) of *Fair Work Act 2009* (Cth) provided unlawful for person to knowingly or recklessly make false or misleading representation about another person's obligation to engage in industrial activity – Where second respondent union had "no ticket no start" policy and respondents carried out policy by representing to two workers they could not work unless joined union – Where respondents admitted liability for two contraventions of s 349(1) – Where second respondent well-resourced and, since

2000, had breached pecuniary penalty provisions on more than 150 occasions, including at least 15 occasions involving “no ticket no start” policy and 7 previous contraventions of s 349(1) – Where primary judge considered statutory maximum penalty required to sufficiently deter respondents in light of previous contraventions and imposed maximum – Where respondents appealed to Full Federal Court, which held maximum penalty must only be imposed for most serious and grave contravening conduct and imposed lower penalty – Whether statutory maximum penalty must only be imposed for most serious and grave contravening conduct – Whether statutory maximum penalty can be imposed if necessary to deter contravening conduct.

Appealed from FCA (FC): [\[2020\] FCAFC 177](#); (2020) 384 ALR 75; (2020) 299 IR 404

[Return to Top](#)

NSW Commissioner of Police v Cottle & Anor
S56/2021: [\[2021\] HCATrans 62](#)

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

Catchwords:

Industrial law – Jurisdiction of Industrial Relations Commission of New South Wales (IRC) – Police – Where appellant made decision under s 72A of *Police Act 1990* (NSW) to retire first respondent police officer on medical grounds – Where first respondent applied for unfair dismissal remedy in IRC under s 84 of *Industrial Relations Act 1996* (NSW) – Where *Police Act* does not expressly provide for review by IRC for medical retirement but does for other types of removal – Where appellant successfully challenged IRC’s jurisdiction, following High Court’s decision in *Commissioner for Police for NSW v Eaton* (2013) 252 CLR 1 – Where Full Bench overturned decision – Where appellant successfully sought judicial review of Full Bench decision by NSW Supreme Court – Where first respondent successfully appealed to Court of Appeal – Whether IRC has jurisdiction to hear and determine unfair dismissal application filed by police officer retired on medical grounds – Whether Court of Appeal applied correct statutory construction principles in interpreting two overlapping statutory schemes.

Appealed from NSW (CA): [\[2020\] NSWCA 159](#); (2020) 298 IR 202

[Return to Top](#)

Patents

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

[S22/2021](#); [S23/2021](#): [\[2021\] HCATrans 13](#)

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

Catchwords:

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

Appealed from FCA (FC): [\[2020\] FCAFC 133](#); (2020) 384 ALR 35

[Return to Top](#)

Practice and Procedure

Deputy Commissioner of Taxation v Huang

[S26/2021](#): [\[2021\] HCATrans 21](#)

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

Catchwords:

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

Appealed from FCA (FC): [\[2020\] FCAFC 141](#); (2020) 280 FCR 160

[Return to Top](#)

Taxation

Commissioner of Taxation v Carter & Ors

S62/2021: [\[2021\] HCATrans 72](#)

Date heard: 16 April 2021 – *Special leave granted*

Catchwords:

Taxation – Trust distribution – Effect of disclaimer – Where respondents default beneficiaries of trust – Where trust deed provided respondents entitled to income of trust for given tax year (ending 30 June) if trustee did not make effective determination departing from default position – Where trustee had not made effective determination as at 30 June 2014 – Where s 97(1) of *Income Tax Assessment Act 1936* (Cth) provides if beneficiary of trust is “presently entitled” to share of trust income, that share included in assessable income of beneficiary – Where, following audit, on 27 September 2015, appellant issued income tax assessments to respondents for income year ended 30 June 2014 including their share of 2014 trust income – On 30 September 2016, respondents purported to disclaim entitlement to income

from trust for 2014 income year – Where Full Court of Federal Court considered themselves bound to hold general law extinguishes entitlement to trust income ab initio and held disclaimers displaced application of s 97(1) – Whether disclaimer of gift render gift void ab initio for all purposes – Whether, if beneficiary disclaims trust distribution after end of income year, beneficiary “presently entitled” to distribution for purposes of s 97(1).

Appealed from FCA (FC): [\[2020\] FCAFC 150](#); (2020) 279 FCR 83; (2020) 112 ATR 493

[Return to Top](#)

Torts

Kozarov v State of Victoria

M36/2021: [\[2021\] HCATrans 101](#)

Date heard: 21 May 2021 – *Special leave granted*

Catchwords:

Torts – Negligence – Causation – Where appellant worked in Serious Sex Offenders Unit (SSOU) of Office of Public Prosecutions (OPP) – Where work in SSOU required appellant to deal with confronting material of graphic sexual nature – Where, on 11 August 2011, appellant took sick leave for symptoms consistent with post-traumatic stress disorder (PTSD) but was not diagnosed and returned to work on 29 August 2011 – Where, on return, appellant was involved in dispute with manager and stated she did not wish to be rotated to different unit within OPP – Where, on 9 February 2012, appellant emailed manager requesting she be rotated out of SSOU due to effect of SSOU work on her health, but request was not actioned – Where primary judge held respondent was put on notice as to risks to appellant’s health in August 2011 – Where primary judge made inference that timely welfare enquiry by respondent would have revealed appellant’s PTSD and, if appellant had been made aware of her condition, she would have consented to be rotated out of SSOU – Where primary judge held respondent failed to discharge duty of care in August 2011 by not making welfare enquiry and not rotating appellant out of SSOU – Where Court of Appeal overturned primary judge’s inference that appellant would have consented to be rotated out and held that appellant’s own actions in not consenting to be rotated out caused injury rather than respondent’s actions – Where Court of Appeal did not address primary judge’s finding that return to work after February 2012 caused appellant injury – Where Court of Appeal allowed respondent’s appeal – Whether open to Court of Appeal to overturn

primary judge's finding that if duty of care had been discharged in August 2011, appellant would have consented to be rotated out of SSOU – Whether Court of Appeal erred in failing to consider injury caused by return to work after February 2012.

Appealed from VSC (CA): [\[2020\] VSCA 301](#); (2020) 301 IR 446

Appealed from VSC (CA): [\[2020\] VSCA 316](#)

[Return to Top](#)

Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited

S63/2021: [\[2021\] HCATrans 74](#)

Date heard: 16 April 2021 – *Special leave granted on limited grounds*

Catchwords:

Torts – Negligence – Breach of duty – Obvious risk – Where appellant injured in competition conducted by respondent when horse she was riding slipped and fell – Where appellant contended cause of fall was deterioration in ground surface and respondent negligent in failing to plough ground at site of event, failing to stop competition, or failing to warn competitors when ground became unsafe – Where prior to appellant's participation, there had already been 7 falls – Where trial judge held no breach of duty of care established – Where majority of Court of Appeal held appellant failed to establish cause of fall was ground surface deterioration and therefore failed to establish respondent breached duty – Where majority of Court of Appeal held even if breach established, s 5L of *Civil Liability Act 2002* (NSW) applied to exclude respondent's liability as injury suffered was manifestation of "obvious risk" – Whether Court of Appeal's approach to evidence of ground surface deterioration did not afford appellant rehearing – Proper approach to identification of "obvious risk".

Appealed from NSWSC (CA): [\[2020\] NSWCA 263](#)

[Return to Top](#)

7: CASES NOT PROCEEDING OR VACATED

[Return to Top](#)

8: SPECIAL LEAVE REFUSED

Publication of Reasons: 2 September 2021 (Canberra by video link)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Atkins	District Council of Coober Pedy (A17/2021)	Supreme Court of South Australia (Court of Appeal) [2021] SASCA 6	Application dismissed [2021] HCASL 159
2.	Day	Woolworths Group Limited & Ors (B18/2021)	Supreme Court of Queensland (Court of Appeal) [2021] QCA 42	Application dismissed [2021] HCASL 160
3.	Day & Anor	Woolworths Group Limited & Ors (B19/2021)	Supreme Court of Queensland (Court of Appeal) [2021] QCA 42	Application dismissed [2021] HCASL 160
4.	Day	Woolworths Group Limited & Ors (B20/2021)	Supreme Court of Queensland (Court of Appeal) [2021] QCA 42	Application dismissed [2021] HCASL 160
5.	Day	Woolworths Group Limited & Ors (B21/2021)	Supreme Court of Queensland (Court of Appeal) [2021] QCA 42	Application dismissed [2021] HCASL 160
6.	Steven Dural (a pseudonym)	The Queen (M27/2021)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 82	Application dismissed [2021] HCASL 161
7.	DSL16	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S99/2021)	Federal Court of Australia [2020] FCA 1141	Application dismissed [2021] HCASL 162
8.	Coal of Queensland Pty Ltd	Innovation and Science Australia (B29/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 54	Application dismissed with costs [2021] HCASL 163
9.	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs	CQZ15 & Anor (M21/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 24	Application dismissed with costs [2021] HCASL 164

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
10.	Dring	Telstra Corporation Limited (M30/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 50	Application dismissed with costs [2021] HCASL 165
11.	Kennedy	The Queen (S18/2021)	Supreme Court of New South Wales (Court of Criminal Appeal) [2019] NSWCCA 242	Application dismissed [2021] HCASL 166
12.	Vagg	The Queen (S69/2021)	Supreme Court of New South Wales (Court of Criminal Appeal) [2020] NSWCCA 134	Application dismissed [2021] HCASL 167
13.	Kola	The Queen (A22/2020)	Supreme Court of South Australia (Court of Criminal Appeal) [2019] SASCFC 87	Application dismissed [2021] HCASL 168

Publication of Reasons: 9 September 2021 (Canberra by video link)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Draoui	Le & Ors (A24/2021)	Supreme Court of South Australia (Court of Appeal) [2021] SASCA 33	Application dismissed [2021] HCASL 169
2.	PAU	The Queen (B31/2021)	Supreme Court of Queensland (Court of Appeal) [2016] QCA 197	Application dismissed [2021] HCASL 170
3.	Darley	Darley & Anor (B38/2021)	Full Court of the Family Court of Australia	Application dismissed [2021] HCASL 171
4.	Darley	Darley & Anor (B39/2021)	Full Court of the Family Court of Australia	Application dismissed [2021] HCASL 172
5.	Darley	Darley & Anor (B40/2021)	Full Court of the Family Court of Australia	Application dismissed [2021] HCASL 173
6.	CPQ16	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M29/2021)	Federal Court of Australia [2021] FCA 329	Application dismissed [2021] HCASL 174
7.	WKS	The State of Western Australia (P18/2021)	Supreme Court of Western Australia (Court of Appeal) [2020] WASCA 178	Application dismissed [2021] HCASL 175
8.	Mubarak	Kelly & Anor (P20/2021)	Supreme Court of Western Australia (Court of Appeal) [2021] WASCA 75	Application dismissed [2021] HCASL 176
9.	Royce	State of Queensland (B36/2021)	Supreme Court of Queensland (Court of Appeal) [2021] QCA 90	Application dismissed [2021] HCASL 177
10.	Ambrose	Commonwealth of Australia (C9/2021)	Full Court of the Federal Court of Australia [2021] FCAFC 88	Application dismissed [2021] HCASL 178
11.	Covington	Covington & Anor (M25/2021)	Full Court of the Family Court of Australia	Application dismissed [2021] HCASL 179

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
12.	Taylor	The Queen (M35/2021)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 131	Application dismissed [2021] HCASL 180
13.	Chan	Eastern Blue Pty Ltd (ACN 620 756 694) & Ors (M38/2021)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 121	Application dismissed [2021] HCASL 181
14.	EAI16	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S80/2021)	Federal Court of Australia [2021] FCA 506	Application dismissed [2021] HCASL 182
15.	DLB19	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S88/2021)	Federal Court of Australia [2021] FCA 504	Application dismissed [2021] HCASL 183
16.	Mahommed	Unicomb & Anor (S94/2021)	Supreme Court of New South Wales (Court of Appeal) [2021] NSWCA 108	Application dismissed [2021] HCASL 184
17.	Viscariello	Legal Profession Conduct Commissioner (A25/2021)	Full Court of the Supreme Court of South Australia [2021] SASCF 24	Application dismissed with costs [2021] HCASL 185
18.	CCP	The Queen (B33/2021)	Supreme Court of Queensland (Court of Appeal) [2020] QCA 292	Application dismissed [2021] HCASL 186
19.	Mackenzie & Anor	Head, Transport for Victoria & Ors (M33/2021)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 100	Application dismissed with costs [2021] HCASL 187
20.	ASSK investments Pty Ltd	AMA Group Limited (S54/2021)	Supreme Court of New South Wales (Court of Appeal) [2021] NSWCA 45	Application dismissed with costs [2021] HCASL 188
21.	Saipani	The Queen (C6/2021)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2021] ACTCA 58	Application dismissed [2021] HCASL 189
22.	BJEK Pty Ltd (ACN 105 399 675) as Trustee for the EL & SL Fogarty Family Trust	Henbury Cattle Co Pty Ltd (ACN 169 887 629) (D1/2021)	Supreme Court of the Northern Territory (Court of Appeal) [2021] NTCA 1	Application dismissed with costs [2021] HCASL 190

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
23.	Higgs	The Queen (M31/2021)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 90	Application dismissed [2021] HCASL 191

10 September 2021: Canberra and by video link

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Amaca Pty Limited	Werfel & Anor (A4/2021)	Full Court of the Supreme Court of South Australia [2020] SASCF 125	Application refused with costs [2021] HCATrans 146
2.	Stone	Guli (B5/2021)	Supreme Court of Queensland (Court of Appeal) [2020] QCA 288	Application refused with costs [2021] HCATrans 147
3.	Stone	Smith (B6/2021)	Supreme Court of Queensland (Court of Appeal) [2020] QCA 288	Application refused with costs [2021] HCATrans 147
4.	Stone	Mount Isa Mines Limited & Anor (B7/2021)	Supreme Court of Queensland (Court of Appeal) [2020] QCA 288	Application refused with costs [2021] HCATrans 147
5.	BBE15	Federal Circuit Court of Australia & Anor (S15/2021)	Full Court of the Federal Court of Australia [2020] FCAFC 230	Application refused with costs [2021] HCATrans 149
6.	Parker	The Queen (S230/2020)	Supreme Court of New South Wales (Court of Criminal Appeal) [2020] NSWCCA 206	Application refused [2021] HCATrans 150