



# HIGH COURT BULLETIN

Produced by the Legal Research Officer,  
High Court of Australia Library  
[2022] HCAB 5 (17 June 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>Alexander v Minister for Home Affairs</i></a>	Constitutional Law
<a href="#"><i>Thoms v Commonwealth of Australia</i></a>	Constitutional Law
<a href="#"><i>Hore v The Queen; Wichen v The Queen</i></a>	Criminal Law
<a href="#"><i>Hill v Zuda Pty Ltd</i></a>	Superannuation

### 3: Cases Reserved

Case	Title
<a href="#"><i>SDCV v Director-General of Security &amp; Anor</i></a>	Constitutional Law

<a href="#"><i>Dansie v The Queen</i></a>	Criminal Law
<a href="#"><i>Stephens v The Queen</i></a>	Criminal Law
<a href="#"><i>Aristocrat Technologies Australia Pty Ltd v Commissioner of Patents</i></a>	Intellectual Property

#### 4: Original Jurisdiction

<b>Case</b>	<b>Title</b>
<a href="#"><i>Vanderstock v State of Victoria</i></a>	Constitutional Law

#### 5: Section 40 Removal

#### 6: Special Leave Granted

<b>Case</b>	<b>Title</b>
<a href="#"><i>Vunilagi v The Queen &amp; Anor</i></a>	Constitutional Law
<a href="#"><i>Awad v The Queen; Tambakakis v The Queen</i></a>	Criminal Law
<a href="#"><i>BA v The Queen</i></a>	Criminal Law
<a href="#"><i>Rigney v The Queen; Mitchell v The Queen; Carver v The Queen</i></a>	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 June 2022 sittings.

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### Constitutional Law

*Delil Alexander (by his litigation guardian Berivan Alexander) v Minister for Home Affairs & Anor*

[S103/2021](#): [2022] HCA 19

**Judgment:** 8 June 2022

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

**Catchwords:**

Constitutional law (Cth) – Powers of Commonwealth Parliament – Power to make laws with respect to naturalisation and aliens – Cessation of Australian citizenship – Where s 36B of *Australian Citizenship Act 2007* (Cth) provided Minister for Home Affairs may make determination that person ceases to be Australian citizen if satisfied, among other matters, that person engaged in specified conduct demonstrating repudiation of allegiance to Australia – Where plaintiff Australian citizen by birth and Turkish citizen by descent – Where, after departing Australia, plaintiff entered and remained in al Raqqa Province in Syria – Where al Raqqa Province a "declared area" for purposes of terrorism related offence in *Criminal Code* (Cth) – Where Australian Security Intelligence Organisation ("ASIO") reported in June 2021 that plaintiff joined Islamic State of Iraq and the Levant ("ISIL") by August 2013 and likely engaged in foreign incursions and recruitment by entering or remaining in al Raqqa Province – Where ISIL a designated "terrorist organisation" for purposes of terrorism related offences in *Criminal Code* (Cth) – Where Minister determined pursuant to s 36B, relying in part on ASIO report, that plaintiff ceased to be Australian citizen – Whether s 36B valid exercise of legislative power under s 51(xix) of *Constitution*.

Constitutional law (Cth) – Judicial power of Commonwealth – Where plaintiff's conduct relevant to Minister's determination under s 36B of *Australian Citizenship Act 2007* (Cth) amounted to conduct element of terrorism related offence under s 119. 2 of *Criminal Code* (Cth) – Whether provision providing for cessation of citizenship on determination by Minister on terrorism related grounds penal or punitive in character – Whether s 36B contrary to Ch III of *Constitution* for conferring upon Minister exclusively judicial function of adjudging and punishing criminal guilt.

Words and phrases – "adjudging and punishing criminal guilt", "alien", "banishment", "citizen", "citizenship", "citizenship cessation", "denationalisation", "deprivation of liberty", "exercise of judicial power", "exile", "foreign incursions and recruitment", "hardship or detriment", "protective purpose", "punitive character", "reciprocal rights and obligations", "repudiation of allegiance to Australia", "retribution", "shared values of the Australian community", "terrorism", "terrorism related grounds".

*Constitution*, s 51(xix), Ch III.  
*Australian Citizenship Act 2007* (Cth), ss 36A, 36B, 36D.

*Special case referred to the Full Court on 26 October 2021.*

**Held:** Special case answered.

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*Thoms v Commonwealth of Australia*

**B56/2021:** [\[2022\] HCA 20](#)

**Judgment:** 8 June 2022

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

**Catchwords:**

Constitutional law (Cth) – Powers of Commonwealth Parliament – Power to make laws with respect to naturalisation and aliens – Detention of unlawful non citizens – Where applicant "unlawful non-citizen" within meaning of s 14(1) of *Migration Act 1958* (Cth) – Where applicant detained by officers in purported exercise of s 189(1) of *Migration Act* – Where majority of High Court of Australia determined applicant not "alien" within meaning of s 51(xix) of *Constitution* in *Love v The Commonwealth* (2020) 270 CLR 152 ("*Love*") – Where applicant released from detention after delivery of judgment in *Love* – Where detaining officers held reasonable suspicion that applicant was "unlawful non-citizen" to whom s 189(1) of *Migration Act* applied until delivery of judgment in *Love* – Whether detention lawful under s 189(1) of *Migration Act* – Whether s 51(xix) of *Constitution* supported valid application of s 189(1) of *Migration Act* to applicant during time of detention.

Words and phrases – "alien", "aliens power", "detention", "non-citizen, non alien", "partially disapply", "reasonable suspicion", "so insubstantial, tenuous or distant", "sufficient connection", "unlawful non-citizen".

*Constitution*, s 51(xix).  
*Acts Interpretation Act 1901* (Cth), s 15A.

*Migration Act 1958 (Cth), ss 3A, 189.*

*Removed from the Federal Court of Australia.*

**Held:** Question ordered to be heard and determined separately and removed pursuant to s 40 of the *Judiciary Act 1903 (Cth)* answered.

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## Criminal Law

*Hore v The Queen; Wichen v The Queen*

[A5/2022](#); [A6/2022](#): [\[2022\] HCA 22](#)

**Judgment:** 15 June 2022

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

### Catchwords:

Criminal law – Sentencing – Indefinite detention – Release on licence – Where s 57 of *Sentencing Act 2017 (SA)* ("Act") conferred upon Supreme Court of South Australia discretion to order that persons convicted of certain sexual offences be detained in custody until further order – Where s 59(1a)(a) of Act provided that person detained in custody could not be released on licence unless person satisfied Supreme Court that person capable of controlling and willing to control sexual instincts – Where "willing" not defined in Act – Where s 57(1) of Act provided that, in that section, person regarded as "unwilling" to control sexual instincts if a significant risk that person would, given opportunity to commit relevant offence, fail to exercise appropriate control of person's sexual instincts – Whether "willing" in s 59(1a)(a) meant converse of "unwilling" in s 57(1) of Act – Whether Supreme Court obliged to reach state of satisfaction required by s 59(1a)(a) by excluding from consideration likely effect of conditions of release on licence upon person's willingness to exercise appropriate control of sexual instincts.

Words and phrases – "capable", "conditions of release on licence", "exercise appropriate control of the person's sexual instincts", "ongoing capability and willingness", "release on licence", "reliable commitment to control", "significant risk", "state of mind", "unwilling", "willing".

*Sentencing Act 2017 (SA), ss 57, 58, 59.*

**Appealed from SASC (CCA):** [\[2021\] SASCA 29](#); (2021) 289 A Crim R 216

**Appealed from SASC (CCA):** [\[2021\] SASCA 30](#); (2021) 138 SASR 134

**Held:** Appeal allowed.

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## Superannuation

*Hill v Zuda Pty Ltd as Trustee for The Holly Superannuation Fund & Ors*

**P48/2021:** [\[2022\] HCA 21](#)

**Judgment:** 15 June 2022

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

### Catchwords:

Superannuation – Self managed superannuation fund – Binding death benefit nomination – Where reg 6. 17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) prescribed standards for, relevantly, regulated superannuation funds for payment of member's superannuation benefits to nominated person on or after member's death – Where trust deed for self managed superannuation fund amended to insert "binding death benefit nomination" clause directing trustee as to payment of member's benefits upon member's death – Where appellant challenged validity of binding death benefit nomination clause on basis it did not comply with requirements of reg 6. 17A – Whether reg 6. 17A applied to self managed superannuation funds.

Precedent – Intermediate appellate courts – Obiter dicta of intermediate appellate courts – Decision-making principles in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

Words and phrases – "binding death benefit nomination", "compelling reason", "intermediate appellate court", "obiter dicta", "plainly wrong", "regulated superannuation fund", "self managed superannuation fund", "seriously considered dicta", "SMSF", "superannuation".

*Superannuation Industry (Supervision) Act 1993* (Cth), ss 31(1), 32(1), 34, 55A, 59, 353.

*Superannuation Industry (Supervision) Regulations 1994* (Cth), regs 6. 17, 6. 17A, 6. 21, 6. 22.

**Appealed from WASC (CA):** [\[2021\] WASCA 59](#)

**Held:** Appeal dismissed with costs.

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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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### Administrative Law

*Nathanson v Minister for Home Affairs & Anor*

**M73/2021:** [\[2022\] HCATrans 26](#)

**Date heard:** 10 March 2022

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

**Catchwords:**

Administrative law – Jurisdictional error – Procedural fairness – Materiality – Where appellant's visa cancelled by delegate on character grounds – Where, after delegate's decision but before Tribunal review, Minister issued new direction, which relevantly included as additional factor that violent crimes against women or children viewed "very seriously, regardless of sentence imposed" – Where appellant not put on notice prior to Tribunal hearing that past incidents of alleged domestic violence would be taken into account, despite not having been charged or convicted of any crimes – Where appellant not given opportunity to call further evidence or make further submissions on domestic violence issue – Where appellant applied for judicial review of Tribunal decision – Where Minister conceded Tribunal denied procedural fairness and majority of Full Federal Court dismissed application on basis appellant failed to show realistic possibility of different outcome – Whether Full Federal Court applied correct test of materiality – Whether appellant's denial of procedural fairness material and constituted jurisdictional error.

**Appealed from FCA (FC):** [\[2020\] FCAFC 172](#); (2020) 281 FCR 23; (2020) 171 ALD 497

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*Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor*

**S135/2021:** [\[2022\] HCATrans 86](#)

**Date heard:** 10 May 2022

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

**Catchwords:**

Administrative law – Judicial review – Extension of time – Proper test – Writ of certiorari – Writ of mandamus – Where plaintiff holder of visa cancelled by Minister pursuant to s 501(3)(b) of *Migration Act 1958* (Cth) – Where plaintiff applied for extension of time, pursuant to s 477A(2) of *Migration Act*, seeking review of Minister's decision – Where application for extension of time was refused by judge of Federal Court of Australia – Whether judge erred in assessing, in respect of plaintiff's proposed second ground of review of Minister's decision, whether plaintiff's claim had reasonable prospects of success so as to justify extension of time pursuant to s 477A(2) of the *Migration Act*.

*Application for constitutional writs referred to the Full Court on 9 December 2021.*

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## Constitutional Law

*Farm Transparency International Ltd & Anor v State of New South Wales*

**S83/2021:** [\[2022\] HCATrans 5](#); [\[2022\] HCATrans 6](#)

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

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

**Catchwords:**

Constitutional law – Implied freedom of political communication – Where s 7 of *Surveillance Devices Act 2007* (NSW) prohibited installation, use and maintenance of listening devices to record private conversations – Where s 8 prohibited installation, use and maintenance of optical surveillance devices on premises without owner or occupier's consent – Where s 11 created offence to communicate or publish material recorded in contravention of ss 7 or 8 – Where s 12 created offence to possess material knowing it had been recorded in contravention of ss 7 or 8 – Where plaintiffs published photographs and recordings of animal agricultural practices in New South Wales in contravention of ss 11 and 12 and intends to continue to engage in such activity – Whether ss 11 and 12 impermissibly burden implied freedom of communication – If so, whether ss 11 and 12 severable in respect of operation on political communication.

*Special case referred to the Full Court on 27 September 2021.*

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***Garlett v The State of Western Australia & Anor***  
**P56/2021**: [\[2022\] HCATrans 27](#); [\[2022\] HCATrans 28](#)

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

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

**Catchwords:**

Constitutional law – Chapter III – Where appellant was sentenced to imprisonment after pleading guilty to two charges – Where appellant's previous offending included robbery – Where appellant referred to State Solicitor's Office to consider whether application should be made under s 35 of *High Risk Serious Offenders Act 2020* (WA) ("HRSO Act"), which provided for State to apply for restriction order in relation to "serious offender under custodial sentence who is not a serious offender under restriction" – Where application was made for restriction order under s 48 of HRSO Act – Where appellant argued parts of HRSO Act were incompatible with Chapter III of *Constitution* – Whether provisions of HRSO Act contravene any requirement of Chapter III as they apply to serious offender under custodial sentence who has been convicted of robbery, referred to in item 34 of Schedule 1 Division 1 of HRSO Act.

*Removed from the Court of Appeal of the Supreme Court of Western Australia.*

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***Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor v Montgomery***  
**S192/2021**: [\[2022\] HCATrans 51](#); [\[2022\] HCATrans 52](#)

**Date heard:** 6 and 7 April 2022

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

**Catchwords:**

Constitutional law – Aliens power – Immigration detention – Indigenous Australians – Where applicant born in and citizen of New Zealand and not Australian citizen – Where applicant's parents and

ancestors not Aboriginal Australian or Torres Strait Islanders – Where applicant granted visa to live in Australia in 1997 – Where Mununjali people Indigenous society existing in Australia since prior to 1788 – Where applicant identifies as member of Mununjali people, recognised by Mununjali elders and by Mununjali traditional law and customs as such – Where, in 2018, applicant's visa cancelled – Where in 2019, applicant taken into immigration detention – Where, in *Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3, majority of High Court held Aboriginal Australian who satisfies tripartite test identified in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 beyond reach of aliens power in s 51(xix) of *Constitution* – Where applicant commenced proceedings in Federal Court of Australia, relevantly seeking declaration not alien within meaning of s 51(xix) following *Love/Thoms* – Whether decision in *Love/Thoms* should be overturned – Whether applicant satisfies tripartite test despite not being biologically descended from Indigenous people – Whether applicant alien.

Courts – Jurisdiction – Appeal from single judge of Federal Court of Australia – Habeas corpus – Competent court – Where appellate jurisdiction of Federal Court defined by s 24(1)(a) of *Federal Court of Australia Act 1976* (Cth) – Where cause removed was appeal to Full Court of Federal Court from orders of single judge – Where single judge exercised original jurisdiction, relevantly issuing writ of habeas corpus – Whether appeal lies from order for issue of writ of habeas corpus.

*Removed from the Federal Court of Australia.*

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***SDCV v Director-General of Security & Anor***

**[S27/2022](#)**; [\[2022\] HCATrans 100](#); [\[2022\] HCATrans 102](#)

**Date heard:** 7 and 8 June 2022

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

**Catchwords:**

Constitutional law – Judicial power of Commonwealth – Ch III of *Constitution* – Validity of s 46(2) of *Administrative Appeals Tribunal Act 1975* (Cth) ("AAT Act") – Where appellant subject to adverse security assessment (ASA) by Australian Security Intelligence Office (ASIO) – Where appellant sought review of ASA by Administrative Appeal Tribunal ("AAT") – Where s 39A(8) of AAT Act provided ASIO Minister may certify evidence proposed to be adduced or submissions proposed to be made by Director-General of Security are of such nature that disclosure be contrary to public interest – Where s

39B(2)(a) of AAT Act provided ASIO Minister may certify disclosure of information in certificate, or disclosure of contents of document, would be contrary to public interest – Where ASIO Minister issued certificates under ss 39A(8) and 39B(2)(a) of AAT Act – Where AAT affirmed ASA decision – Where, when appealed to Federal Court, AAT obliged under s 46(1) of AAT Act to send documents before AAT to Court – Where, because certificates in force in respect of certain documents, Federal Court required by s 46(2) of AAT Act to do all things necessary to ensure matter not disclosed to person other than a member of Court – Where Federal Court determined s 46(2) of AAT Act valid and proceeded to determine appeal grounds adversely to appellant while having regard to submissions and evidence to which appellant did not have access by reason of s 46(2) – Whether s 46(2) of AAT Act denies appellant procedural fairness – Whether s 46(2) is invalid by reason of Ch III of Constitution in that it requires Federal Court to act in procedurally unfair manner – Whether decisions in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *Assistant Commissioner Pompano v Condon Pty Ltd* (2013) 252 CLR 38; or *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 should be qualified or overruled.

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

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## Criminal Law

*Dansie v The Queen*

**A4/2022:** [\[2022\] HCATrans 106](#)

**Date heard:** 15 June 2022

**Coram:** Gageler, Keane, Gordon, Steward and Gleeson JJ

**Catchwords:**

Criminal law – Murder – Unreasonable verdict – Verdict unsupported by evidence – Where appellant's wife drowned after her wheelchair entered pond – Where prosecution alleged intentional drowning – Where, on defence case, drowning accidental – Where s 158(1)(a) of *Criminal Procedure Act 1921* (SA) provided for appeal to be allowed where Court considers verdict should be set aside on ground that conviction unreasonable or cannot be supporting having regard to evidence – Whether Court of Criminal Appeal failed to conduct independent assessment of whole of evidence – Whether open to trial judge to exclude hypothesis of accidental drowning – Proper approach by intermediate appellate court to "unreasonable verdict" limb of common form appeal provision following judge-alone trial.

**Appealed from SASC (CCA):** [\[2020\] SASCF 103](#)

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*O'Dea v The State of Western Australia*

**P53/2021:** [\[2022\] HCATrans 79](#)

**Date heard:** 4 May 2022

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

**Catchwords:**

Criminal law – Joint liability – Acting in concert – Where appellant and co-accused stood trial on one count of doing grievous bodily harm with intent to do grievous bodily harm contrary to s 294(1) of *Criminal Code* (WA) – Where appellant and co-accused alleged jointly criminally responsible – Where trial judge gave jury handout, relevantly describing circumstances in which two accused may be criminally responsible as "joint principals" under s 7(a) of Code – Where appellant convicted but co-accused discharged with jury unable to reach verdict – Where Court of Appeal held criminal responsibility under s 7(a) of Code extended to cases where several persons "acting in concert" – Whether appellant and co-accused can be criminally liable as joint principals in circumstances where acts of co-accused not proved unlawful – Whether trial judge was required to direct jury that "acting in concert" requires two accused to have reached understanding or arrangement amounting to agreement to commit crime.

**Appealed from WASC (CA):** [\[2021\] WASCA 61](#); (2021) 288 A Crim R 451

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*Stephens v The Queen*

**S53/2022:** [\[2022\] HCATrans 108](#)

**Date heard:** 16 June 2022

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

**Catchwords:**

Criminal law – Presumption against retrospectivity – Where, on 8 June 1984, *Crimes Act 1900* (NSW) amended to repeal s 81, which proscribed indecent assault on male person, and inserted s 78K, which proscribed homosexual intercourse with male person between ages of 10 and 18 years – Where appellant prosecuted for alleged

sexual offences committed against complainant between January 1982 and December 1987 – Where complainant turned 16 years old on 6 July 1987 – Where, on 29 November 2018, appellant arraigned on indictment containing 18 counts – Where date range for alleged offences extended across 8 June 1984, with indictment drafted so that one count alleged offence against s 81, and another count, pleaded in alternative, alleged offence against s 78K, with dates commensurate with dates provisions were in force – Where, on 1 December 2018, s 80AF of *Crimes Act* came into effect – Where s 80AF applied if: (a) uncertainty as to when during period conduct alleged to have occurred; (b) victim of alleged conduct child (under age of 16 years) for whole of period; (c) no time during that period that alleged conduct, if proven, would not have constituted sexual offence; and (d) because of change in law or change in age of child during that period, alleged conduct, if proven, would have constituted more than one sexual offence during that period – Where s 80AF provided that prosecution could rely on offence carrying lesser maximum penalty for entirety of charged period – Where indictment amended on 5 February 2019 to take benefit of s 80AF, with s 81 carrying lesser maximum penalty – Whether s 80AF of *Crimes Act*, which came into effect on 1 December 2018, had retrospective application to appellant's trial, which commenced no later than 29 November 2018 upon arraignment – Whether principles against retrospectivity infringed – Whether s 80AF procedural or substantive.

**Appealed from NSWSC (CCA):** [\[2021\] NSWCCA 152](#); (2021) 290 A Crim R 303

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## Defamation

*Google LLC v Defteros*

**M86/2021:** [\[2022\] HCATrans 77](#)

**Date heard:** 3 May 2022

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

**Catchwords:**

Defamation – Publication – Qualified privilege defence – Common law qualified privilege – Statutory qualified privilege – Where respondent alleged certain webpages published by appellant and defamatory – Where two webpages consisted of set of search results displayed on website [www.google.com.au](http://www.google.com.au) in response to search of respondent's name and hyperlinked article, included in search results, entitled "Underworld loses valued friend at court" (Web Matter) – Where

appellant alleged it was for "common convenience and welfare of society" for appellant to return search results that hyperlinked articles published by reputable sources – Where appellant claimed material was matter of considerable public interest such that recipients had necessary interest in material for purposes of s 30(1) of *Defamation Act 2005* (Vic) – Whether appellant published Web Matter – Whether common law qualified privilege defence applies – Whether statutory qualified privilege defence in s 30(1) applies.

**Appealed from VSC (CA):** [\[2021\] VSCA 167](#)

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## Intellectual Property

*Aristocrat Technologies Australia Pty Ltd v Commissioner of Patents*

**S40/2022:** [\[2022\] HCATrans 103](#); [\[2022\] HCATrans 104](#)

**Date heard:** 9 and 10 June 2022

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

**Catchwords:**

Intellectual property – Patents – Manner of manufacture – Electronic gaming machine ("EGM") – Where ss 18(1)(a) and 18(1A)(a) of *Patents Act 1990* (Cth) provide invention will be patentable if "manner of manufacture" within meaning of s 6 of *Statute of Monopolies* (21 Jac 1 c 3) – Where question before Federal Court whether invention disclosed by Claim 1 to Patent 967 constituted patentable subject matter – Where Claim 1 described EGM with particular feature game – Where primary judge approached question of patentability by asking: first, whether Claim 1 for mere business scheme; and secondly, if for mere business scheme, one implemented in computer, did invention lie in manner of implementation into computer – Where majority of Full Court adopted alternative approach whereby computer-implemented inventions would be patentable where invention claimed could broadly be described as "advance in computer technology" – Where majority concluded invention disclosed in Claim 1 computer-implemented invention and did not advance computer technology – Whether general principles of patentability apply to computer-implemented inventions – Whether computer-implemented inventions must be advance in computer technology to be patentable – Proper test of patentability for computer-implemented inventions.

**Appealed from FCA (FC):** [\[2021\] FCAFC 202](#); (2021) 286 FCR 572; (2021) 396 ALR 380; (2021) 163 IPR 231

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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

*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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### 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) 396 ALR 422

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*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 89](#); [\[2022\] HCATrans 90](#)

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

**Catchwords:**

Constitutional law – Judicial review – Non-statutory executive action – Sections 61 and 64 of *Constitution* – Where s 351(1) of the *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](#)

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*Vunilagi v The Queen & Anor*  
**C23/2021:** [\[2022\] 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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## Copyright

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

[S57/2022; S58/2022](#): [\[2022\] HCATrans 64](#)

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

**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 42](#)

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

**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 Manufacturers Pty Limited v Gavin Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd (in Liquidation) & Anor*  
**B19/2022:** [\[2022\] HCATrans 88](#)

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

**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) 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*  
**M74/2021; M75/2021:** [\[2022\] HCATrans 115](#)

**Date heard:** 17 June 2022 – *Special leave granted on limited grounds*

**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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*BA v The Queen*  
**S156/2021:** [\[2022\] 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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*Rigney v The Queen; Mitchell v The Queen; Carver v The Queen*  
**A38/2021; A39/2021; A42/2021:** [\[2022\] HCATrans 112](#)

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

**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) 290 A Crim R 384

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## Equity

*Bosanac v Commissioner of Taxation & Anor*  
**P9/2022:** [\[2022\] HCATrans 63](#)

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

### Catchwords:

Equity – Presumption of advancement – Beneficial ownership – Matrimonial home – Where Mr and Ms Bosanac ("Bosanacs") married in 1998 – Where Ms Bosanac offered to purchase matrimonial home for \$4.5 million ("Property") – Where Bosanacs applied for two joint loans to purchase Property – Where Property transferred into sole name of Ms Bosanac – Where Commissioner applied for declaration that Ms Bosanac held 50% of her interest in Property on trust for Mr Bosanac – Where primary judge held presumption of advancement not rebutted – Where Full Court relied on fact Mr Bosanac borrowed money with Ms Bosanac to purchase Property to found rebuttal of presumption of advancement – Where Full Court relied on statement in *The Trustees of the Property of Cummins (a bankrupt) v Cummins* (2006) 227 CLR 278 at [71] that where husband and wife purchase matrimonial home, each contributing to purchase price and title is taken by one spouse, it be inferred each spouse intended to have one-half interest, regardless of amounts contributed – Whether rebuttal of presumption of advancement, applying to purchase by spouses of matrimonial home, can be founded on same facts giving rise to presumption of advancement – Whether, in considering whether presumption of advancement rebutted, court should consider spouses' intentions or any joint intention – Proper approach to rebuttal of presumption of advancement.

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

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

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## Evidence

*TL v The Queen*

[S61/2022](#): [\[2022\] HCATrans 69](#)

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

**Catchwords:**

Evidence – Tendency evidence – Proof of identity – Where appellant convicted of murder of partner's child – Where blunt force trauma to abdomen cause of death – Where, 10 days prior, child had suffered burns after appellant placed child in hot water – Where evidence of burns was admitted as tendency evidence pursuant to s 97 of *Evidence Act 1995* (NSW) to prove appellant's tendency to "deliberately inflict physical harm on child" – Where appellant convicted and appealed against conviction on grounds including that tendency evidence should not have been admitted – Where appellant relied on statement in *Hughes v The Queen* (2017) 263 CLR 388 concerning requirement for "close similarity" between tendency alleged and offence charged – Where Court of Criminal Appeal held requirement for "close similarity" should arise when tendency evidence is only or predominant evidence that goes to identity – Whether, where tendency evidence is adduced to prove identity of offender for known offence, probative value of tendency evidence will depend upon close similarity between conduct evidencing tendency and offence – Proper approach to principle articulated in *Hughes*.

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

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## Insurance

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

[S42/2022](#): [\[2022\] HCATrans 35](#)

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

**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) 396 ALR 27; (2021) 153 ACSR 522

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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 94](#)

**Date heard:** 13 May 2022 – *Special leave granted*

### 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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## 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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## Representative Proceedings

*BHP Group Limited v Impiombato & Anor*

**[M12/2022](#)**: [\[2022\] HCATrans 13](#)

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

**Catchwords:**

Representative proceedings – Shareholder class action – Non-resident shareholders – Pt IVA of *Federal Court of Australia Act 1976* (Cth) ("FCA Act") – Presumption against extraterritoriality – Dual listed company structure – Where claims brought on behalf of non-resident shareholders of BHP Group Limited (Australian company) and BHP Group Plc (United Kingdom company) – Where claims brought in Federal Court of Australia under Pt IVA concerning representative proceedings – Whether Pt IVA of FCA Act applies to claims brought on behalf of non-resident group members – Whether presumption against extraterritorial operation of legislation applies to Pt IVA of FCA Act – Whether Part IVA of FCA Act confers on Federal Court jurisdiction or power to determine claims of group members outside territory.

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

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## Statutory Interpretation

*Page v Sydney Seaplanes Pty Ltd trading as Sydney Seaplanes*

**[S60/2022](#)**: [\[2022\] HCATrans 70](#)

**Date heard:** 13 April 2022 – *Special leave granted*

**Catchwords:**

Statutory interpretation – Jurisdiction – Limitation of actions – Inconsistency – Where s 11(2) of *Federal Courts (State Jurisdiction) Act 1999* (NSW) ("NSW Jurisdiction Act") enabled party to proceeding in which "relevant order" was made to apply to NSW Supreme Court for order that proceeding be treated as one in Supreme Court – Where appellant commenced proceedings in Federal Court of Australia seeking damages from respondent in connection with seaplane accident pursuant to provisions of *Civil Aviation (Carriers'*

*Liability) Act 1959 (Cth) ("Commonwealth Act"), incorporated by s 5 of Civil Aviation (Carriers' Liability) Act 1967 (NSW) – Where Federal Court dismissed application for want of jurisdiction because accident occurred solely in New South Wales – Where action subject to two-year limitation and extinguishment of right to damages – Where two years had passed before Federal Court decision – Where appellant sought orders in NSW Supreme Court under s 11 that Federal Court proceedings be treated as Supreme Court proceedings such that proceedings commenced within limitation period – Where Court of Appeal held "relevant order" in s 11 of NSW Jurisdiction Act refers to not to general want of jurisdiction but to general want of jurisdiction by reason of constitutionally invalid conferral of jurisdiction as considered in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 – Whether order of Federal Court dismissing Federal Court proceeding for want of jurisdiction was "relevant order" within meaning of s 11 of NSW Jurisdiction Act.*

**Appealed from NSW (CA):** [\[2021\] NSWCA 204](#); (2021) 106 NSWLR 1; (2021) 362 FLR 1; (2021) 393 ALR 485

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## Torts

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

**P5/2022:** [\[2022\] HCATrans 37](#)

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

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

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## 8: SPECIAL LEAVE REFUSED

### Publication of Reasons: 9 June 2022 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Bulow	Bulow (A8/2022)	Federal Circuit Court and Family Court of Australia (Division 1)	Application dismissed <a href="#">[2022] HCASL 105</a>
2.	Falcon	Makin & Kinsey Solicitors Pty Ltd & Anor (M20/2022)	Supreme Court of Victoria (Court of Appeal) [2022] VSCA 30	Application dismissed <a href="#">[2022] HCASL 106</a>
3.	Sebie & Anor	Pham & Ors (S30/2022)	Supreme Court of New South Wales (Court of Appeal) [2021] NSWCA 277	Application dismissed <a href="#">[2022] HCASL 107</a>
4.	Dendle	The Queen (B50/2021)	Supreme Court of Queensland [2019] QCA 194	Application dismissed <a href="#">[2022] HCASL 108</a>
5.	Conos	Director of Public Prosecutions (Vic) & Anor (M10/2022)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 367	Application dismissed <a href="#">[2022] HCASL 109</a>
6.	Tomaras	The Queen (S108/2021)	Supreme Court of New South Wales (Court of Criminal Appeal) [2021] NSWCCA 135	Application dismissed <a href="#">[2022] HCASL 110</a>

## Publication of Reasons: 16 June 2022 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Woo	Cappella & Ors (A9/2022)	Supreme Court of South Australia (Court of Appeal) [2022] SASCA 8	Application dismissed <a href="#">[2022] HCASL 111</a>
2.	Monfort	Bade (B11/2022)	Family Court of Australia	Application dismissed <a href="#">[2022] HCASL 112</a>
3.	Burton	Department of Communities and Justice (S29/2022)	Supreme Court of New South Wales (Court of Appeal) [2022] NSWCA 7	Application dismissed <a href="#">[2022] HCASL 113</a>
4.	Moore & Ors	Commonwealth of Australia (C5/2022)	Application for removal	Application dismissed with costs <a href="#">[2022] HCASL 114</a>
5.	BBY21	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S33/2022)	Federal Court of Australia [2022] FCA 68	Application dismissed <a href="#">[2022] HCASL 115</a>
6.	In the matter of an application by Vincent Francis Stanizzo (S163/2021)		Supreme Court of New South Wales (Court of Appeal) [2021] NSWCA 195	Application dismissed <a href="#">[2022] HCASL 116</a>
7.	Jasper Lewers (a pseudonym)	The Queen (M6/2022)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 351	Application dismissed <a href="#">[2022] HCASL 117</a>
8.	Jasper Lewers (a pseudonym)	The Queen (M162/2019)	Supreme Court of Victoria (Court of Appeal) [2019] VSCA 272	Application dismissed <a href="#">[2022] HCASL 117</a>
9.	Abdelkawy	ANL Container Line Pty Ltd (M7/2022)	Supreme Court of Victoria (Court of Appeal) [2021] VSCA 342	Application dismissed with costs <a href="#">[2022] HCASL 118</a>
10.	Abdallah	The Queen (S200/2021)	Supreme Court of New South Wales (Court of Criminal Appeal) [2016] NSWCCA 34	Application dismissed <a href="#">[2022] HCASL 119</a>

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<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
11.	Croft	The Queen (S180/2021)	Supreme Court of New South Wales (Court of Criminal Appeal) [2021] NSWCCA 146	Application dismissed <a href="#">[2022] HCASL 120</a>

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## 17 June 2022: Canberra and by video link

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	Lake Vermont Resources Pty Limited	Adani Abbot Point Terminal Pty Limited & Ors (B52/2021)	Supreme Court of Queensland (Court of Appeal) [2021] QCA 187	Application dismissed with costs <a href="#">[2022] HCATrans 110</a>
2.	QCoal Pty Limited & Ors	Adani Abbot Point Terminal Pty Limited & Anor (B53/2021)	Supreme Court of Queensland (Court of Appeal) [2021] QCA 187	Application dismissed with costs <a href="#">[2022] HCATrans 110</a>
3.	Irving	Pfingst & Anor (B3/2022)	Supreme Court of Queensland (Court of Appeal) [2021] QCA 280	Application dismissed with costs <a href="#">[2022] HCATrans 114</a>
4.	Pfingst & Anor	Irving (B5/2022)	Supreme Court of Queensland (Court of Appeal) [2021] QCA 280	Application dismissed with costs <a href="#">[2022] HCATrans 114</a>