

Appendix 7: Decisions of interest

ADMINISTRATIVE AND CONSTITUTIONAL LAW AND HUMAN RIGHTS NPA

Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

(2 December 2022; Kenny, Mortimer (as her Honour then was) and Lee JJ)

Santos NA Barossa Pty Ltd is the operator of and a joint venture partner in the Barossa Project (an offshore gas and condensate project located in an area of the Timor Sea north of the Tiwi Islands). Drilling operations at the Barossa project commenced on 18 July 2022. Mr Tipakalippa, an elder of the Munupi clan, sought judicial review of the decision of the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) under the *Offshore Petroleum and Greenhouse Gas (Environment) Regulations 2009* (Cth) to approve the Barossa Development Drilling and Completions Environment Plan in respect of the sinking of eight wells as part of the Project. Mr Tipakalippa contended that the Regulations required him and other members of the Munupi clan, as well as other clans on the Tiwi Islands, to be consulted because the Project is taking place in and capable of having an impact on sea country and sea country resources to which they have traditional connections, such that they have ‘interests’ that may be affected. Reg 11A of the Regulations relevantly provides that in the course of preparing an environment plan, a ‘titleholder’ (in this case, Santos) must consult each ‘relevant person’, being a person ‘whose functions, interests or activities may be affected by the activities to be carried out under the environment plan’. The primary judge held that NOPSEMA could not have been reasonably satisfied that the Plan demonstrated that the consultation required by the Regulations was carried out, and set aside NOPSEMA’s decision.

The Full Court unanimously dismissed Santos’ appeal from the decision of the primary judge. Justices Kenny and Mortimer (as her Honour then was) considered the construction of the phrase ‘functions, interests or activities’ in reg 11A of the Regulations, and found that it should be broadly construed because this approach best promotes the object of the Regulations, namely to ensure that such offshore activity is carried out consistently with the principles of ecologically sustainable development set out section 3A of the *Environment Protection and Biodiversity Conservation Act 1999*. Their

Honours found that the consultation required by reg 11A of the Regulations is designed to give effect to that object, and rejected the proposition that the connection of traditional owners with sea country cannot be an interest for the purposes of reg 11A. Their Honours observed that the material put before NOPSEMA showed that Mr Tipakalippa and the Munupi clan had a traditional connection to at least part of the sea in the environment that might be affected by the activities and to its marine resources, and that there was a potential for Santos’ proposed drilling activities to have a potentially significant adverse effect on those marine resources. Their Honours concluded that Mr Tipakalippa and the Munupi clan have interests that may be affected by the activities to be carried out by Santos under the Plan and were required by reg 11A to be consulted by Santos.

In reaching this conclusion, Justices Kenny and Mortimer rejected Santos’ contention that this construction makes reg 11A unworkable. Their Honours saw no particular difficulty with the proposition that First Nations peoples with traditional connection to sea and marine resources which may be affected by activities under the Plan are readily ascertainable.

Their Honours further considered the approach to be taken to consultation where interests are held communally, noting that the method of consultation will need reasonably to reflect the characteristics of the interests affected by the titleholder’s proposed activity. Their Honours observed that properly notified and conducted meetings may well suffice, drawing on the authorities in relation to processes (such as authorisation meetings) under the *Native Title Act 1993* (Cth).

Justices Kenny and Mortimer concluded that Santos proceeded on an incorrect understanding of the proper construction of reg 11A and the phrase ‘functions, interests or activities’, such that it could not demonstrate to NOPSEMA that it had undertaken consultation as required by reg 11A, and that NOPSEMA likewise proceeded on a misunderstanding of reg 11A.

In a separate judgment, Justice Lee agreed that the appeal should be dismissed. His Honour considered the concepts of a ‘function’ and ‘activity’ for the purposes of reg 11A, finding that ‘function’ is best seen as an existing power or duty pertaining to an office or role and ‘activity’ has its ordinary English meaning, namely a thing that a person or group does. In construing the word ‘interests’, his Honour rejected Santos’ submission that the term has a meaning directed to ‘legal interests’ and

noted that the concept must be broad enough to obtain available input into the possible risks and environmental impacts.

Justice Lee agreed with Justices Kenny and Mortimer that Mr Tipakalippa did establish that he and the traditional owners of the Tiwi Islands were relevant persons whose interests may be affected by the activities to be carried out under the Plan, because of the existence of their traditional, customary connection to at least part of the sea in the environment that might be affected by the activities and to its marine resources. His Honour held that cultural or spiritual interests of the kind described in material within the Plan were sufficiently ascertainable by Santos, given the numerous references in that material to areas of Aboriginal cultural significance and identity. His Honour rejected any suggestion that by consulting with the Tiwi Land Council, Santos discharged its obligation to consult with each of the traditional owners of the Tiwi Islands, and concluded that Mr Tipakalippa had established that it was not open to NOPSEMA to be satisfied that Santos had carried out the required consultations.

ADMINISTRATIVE AND CONSTITUTIONAL LAW AND HUMAN RIGHTS (MIGRATION) NPA

AIO21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 114

(6 July 2022; Kenny, O’Callaghan and Thawley JJ)

In 2016, while AIO21 was serving a sentence of imprisonment, the Minister determined that he did not pass the character test and mandatorily cancelled his protection visa in accordance with section 501(3A) of the *Migration Act 1958* (Cth). AIO21 applied for revocation of the cancellation decision, and a delegate of the Minister decided not to revoke the cancellation, a decision that was subsequently affirmed by the Administrative Appeals Tribunal.

AIO21 sought judicial review of the Tribunal’s decision in the Federal Court but he was unsuccessful in that application and a subsequent appeal. He then made a second application to the Federal Court, seeking an extension of time to review the same Tribunal decision, but on different grounds to his previous application. The Minister applied for summary dismissal on the basis that a further judicial review application was precluded by reason of *res judicata*, *Anshun* estoppel and as an abuse of process. While AIO21 was granted an extension of time to bring his application, it was

ultimately dismissed by the primary judge, as was the Minister’s application for summary dismissal, a decision that became the subject of this appeal and cross-appeal to the Full Court.

The Full Court considered whether the primary judge had erred in concluding that the Tribunal did not fail to comply with a Ministerial Direction that requires international non-refoulement obligations to be taken into account in deciding whether to revoke the cancellation of a visa. A non-refoulement obligation is a duty not to forcibly return a person to a place where they will be at risk of a specific type of harm.

AIO21 submitted that the Tribunal did not consider for itself, afresh, whether non-refoulement obligations were owed but had simply adopted ‘wholesale’ the findings of an International Treaties Obligations Assessment (ITOA) report concerning him. He contended that the Tribunal failed to consider whether the circumstances in his home country which gave rise to him being recognised as a refugee had fundamentally or durably altered such that the cessation clause in Article 1C of the *Convention Relating to the Status of Refugees* was engaged. Under Article 1C, the Convention will cease to apply if the circumstances giving rise to a person’s refugee status cease to exist.

The Full Court agreed with the primary Judge that the Tribunal had not erred. The Full Court found that while the Tribunal had taken the ITOA into account, it had not done so at the exclusion of AIO21’s evidence or its own consideration of the requirements of the Ministerial Direction. The Full Court concluded that the weight to be given to the ITOA was a matter for the Tribunal. The Full Court further found that the Tribunal was not required to take international non-refoulement obligations unenacted in Australia into account as a mandatory consideration when considering if there was another reason to revoke a cancellation.

As the Full Court had found the Tribunal did not err in its decision, it did not find it strictly necessary to address the cross-appeal. Nevertheless, the Full Court agreed with the primary judge’s conclusion that AIO21 was not barred by the *res judicata* doctrine from making a second judicial review application on different grounds, as different grounds of jurisdictional error can be seen as separate causes of action or claims arising out of the one decision. The Full Court also found no error in the primary judge’s reasoning that the appellant’s circumstances, including his age, medical conditions, family connections and time spent in Australia, justified that his application not be barred by the *Anshun* principle. The Full Court agreed with

the primary judge's view that in light of the above findings, the application could not be considered an abuse of process.

Both the appeal and the cross-appeal were dismissed with costs. The High Court has refused a special leave application.

***Minister for Immigration, Citizenship and Multicultural Affairs v Lieu, by her Litigation Representative Nguyen* [2023] FCAFC 57**

(13 April 2023; Mortimer CJ, Anderson and Hespe JJ)

The issue in this appeal was whether Mr Lieu was the parent of Ms Lieu for the purposes of recognising her citizenship by birth.

In 2017 Ms Nguyen applied to the Department of Home Affairs for evidence that her daughter Ms Lieu was an Australian citizen by birth, on the basis that her father Mr Lieu is an Australian citizen. A delegate of the Minister for Immigration, Citizenship and Multicultural Affairs requested Ms Nguyen provide further material evidencing that Mr Lieu was the father of her daughter, including an invitation to submit a DNA test. Ms Nguyen supplied a number of materials, including photographs, statutory declarations, copies of her daughter's Medicare card, her birth certificate and a newborn child Centrelink declaration made by Mr Lieu, but explained to the delegate that she was unable to provide a DNA test, as she had since lost contact with Mr Lieu.

The delegate refused the application on the grounds that they did not have sufficient evidence to be satisfied that Mr Lieu was the father of Ms Lieu. After an internal review, Ms Nguyen applied to the Federal Court, where the primary judge made orders setting aside the decision of the delegate. This appeal was then made on behalf of the Minister for Immigration, Citizenship and Multicultural Affairs.

At the commencement of the hearing of the appeal, the Full Court alerted the parties to a previous citizenship case that considered the meaning of the word parent as not just a matter of biology but of social and legal factors too, including acknowledging a child as one's own and treating him or her as one's own. The Minister accepted that the same construction of parentage applied to this matter and a genetic link was not required for a person to be a parent.

Before the primary judge, Ms Lieu contended that the delegate had misunderstood the statutes governing the issue of Birth Certificates, Medicare cards and child support payments and how these documents relate to the assessment of parentage. The delegate had stated that such documents

were 'self-declared' making the evidence of less probative value. Before the Full Court, the Minister contended that the delegate was not bound by such statutes, but the reasoning of the delegate showed consideration of the documents, including whether they provided independent evidence of parentage. The Minister submitted that the amount of weight afforded to the documents was a matter for the delegate and his decision was not legally unreasonable.

Mortimer CJ agreed with the primary judge that the delegate misunderstood, or failed to appreciate, the significance of the documents supplied, as the documents were products of government processes dependent on the existence of a relationship of parent and child. Mortimer CJ considered that if a person declares to various government authorities or agencies that they are a parent, this self-declaration is capable of independently tending to prove the person assumed the role of a parent.

Mortimer CJ observed that it was evident from the delegate's reasoning that he had formed an adverse view of Ms Nguyen's honesty and had erred by inappropriately focusing upon whether there was the biological link between father and daughter and whether there was a genuine relationship between Ms Nguyen and Mr Lieu. Though acknowledging the stringent threshold of legal unreasonableness, Mortimer CJ agreed with the primary judge that the decision of the delegate was legally unreasonable. In particular, Mortimer CJ concluded that without significantly probative evidence of dishonesty, and thorough reasoning, it is irrational to assume that Ms Nguyen would have been party to fraudulent conduct at the time she was giving birth, as she inferred the delegate had done.

In a separate judgment, Anderson and Hespe JJ agreed with Mortimer CJ's conclusion. They found that the delegate did not understand and apply previous case law that held that parentage is not just a matter of biology, resulting in a misunderstanding of the significance of the 'self-declared' documents and whether the relationship between Ms Nguyen and Mr Lieu was 'genuine and continuing' at the time of birth. The 'self-declared' documents were of probative value precisely because they were 'self-declared'. Anderson and Hespe JJ found that the delegate's reasoning so departed from the underlying premise of the statutory task that he was required to perform that it constituted legal unreasonableness and this was sufficient to determine the appeal.

The Full Court upheld the decision of the primary judge and dismissed the appeal made by the Minister.

ADMIRALTY AND MARITIME NPA

Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG (The BCC Nile) [2022] FCAFC 171

(12 October 2022; Rares, Sarah C Derrington and Stewart JJ)

In these proceedings, the Full Court, exercising original jurisdiction, determined two interrelated interlocutory applications dealing with Australia's marine cargo liability regime. This occasioned for the first time judicial consideration of the construction of section 11(2) of the *Carriage of Goods by Sea Act 1991* (Cth) (COGSA).

In the first application, the plaintiff, Carmichael Rail Network Pty Ltd (Carmichael Rail) sought an anti-suit injunction against the first defendant, BBC Chartering Carriers (BBC), in circumstances where BBC had commenced arbitral proceedings in London against Carmichael Rail under a bill of lading (BOL) in relation to damage done to goods whilst on board the *BBC Nile*. In the second application, BBC sought a stay of the whole of Carmichael Rail's claim against it in favour of arbitration in London.

Under the terms of the BOL issued by BBC to Carmichael Rail (as consignee) disputes were to be determined in London by arbitration on LMAA terms.

The Full Court considered, first, whether the choice of law and jurisdiction clause in the BOL were rendered void by virtue of section 10(1)(b)(ii) of COGSA read with art 3(8) of the modified Hague-Visby Rules in Schedule 1A of COGSA (Australian Rules). The Full Court did not accept Carmichael Rail's submission that the choice of law and arbitration clauses in the BOL were void by reason of art 3(8).

The Full Court held that, as both parties agreed that the Australian Rules apply to the BOL, it was appropriate for the Court to make a declaration that the Australian Rules apply to the BOL, regardless of where or under what law the dispute is ultimately determined.

To further ensure that BBC will not be able to lessen its liability in the London arbitration from that which it would be under the Australian Rules, the Full Court required an undertaking by BBC as to the applicability in the London arbitration of the Australian Rules as applied under Australian law as a condition of the stay of the domestic proceeding.

The Full Court then considered whether section 11(2) of COGSA invalidated the foreign choice of law and jurisdiction clause in respect of inter-State carriage.

The Full Court considered the legislative history and purpose of sections 10 and 11 of COGSA and held

that there was no doubt that inter-State contracts for carriage of goods by sea were not caught by the invalidating provisions in COGSA in relation to choice of law and jurisdiction. While there was no evident rationale as to why the reference to 'bill of lading' in section 11 excluded inter-State carriage, the Full Court did not consider it possible to discern legislative intention to expand the reference to 'bill of lading' to include inter-State carriage and declined to read additional words into section 11 to fill the apparent gap.

Accordingly, the Full Court refused Carmichael Rail's application for an anti-suit injunction against BBC and granted BBC's application for a stay in favour of arbitration in London.

The High Court has granted leave to appeal on limited grounds.

COMMERCIAL AND CORPORATIONS (COMMERCIAL CONTRACTS, BANKING, FINANCE AND INSURANCE) NPA

MetLife Insurance Limited v Australian Financial Complaints Authority Limited [2022] FCAFC 173

(27 October 2022; Middleton, Jackson and Halley JJ)

In this appeal, the Full Court considered the proper construction of section 1053(1) of the *Corporations Act 2001* (Cth), and the scope of the authority of the Australian Financial Complaints Authority Limited (AFCA), an external dispute resolution body, to determine complaints relating to superannuation.

By way of background, in 2018, Mr Edgecombe complained to AFCA (Complaint) in respect of an adverse decision of MetLife Insurance Limited concerning a total and permanent disability claim made under an insurance policy issued by MetLife to the trustee of Mr Edgecombe's superannuation fund. After initially accepting an objection from MetLife on the basis that the Complaint was out of time under AFCA's Complaint Resolution Scheme Rules, AFCA exercised its discretion to accept the Complaint and proceeded to determine it adversely to MetLife.

MetLife commenced proceedings in the Court, seeking a declaration that AFCA's determination was not binding on MetLife because AFCA lacked authority to determine the Complaint. MetLife submitted that the Complaint was a 'complaint relating to superannuation' within the meaning section 1053 of the Act, but it did not satisfy any of sub-ss 1053(1)(a)–(j). Section 1053(1) of the Act provides that a person may make a complaint relating to superannuation under the AFCA scheme only if the complaint is a complaint about certain matters as set out in sub-ss (a)–(j). Rather than reading the phrase 'only if' as defining an exclusive class of

superannuation disputes that could be brought under the AFCA Scheme, the primary judge found that section 1053(1) of the Act should be read as providing that a person may make a complaint *as a complaint* relating to superannuation under the AFCA Scheme only if the complaint is a complaint of the kind listed. Accordingly, the primary judge found that AFCA did have the necessary authority to determine the Complaint.

The Full Court unanimously allowed the appeal, finding that the grammatical and ordinary sense of the words in the chapeau to section 1053(1) of the Act is that a complaint that relates to superannuation can only be made to AFCA if it falls within the types of complaints specified in sub-ss 1053(1)(a)–(j). The Full Court held that, textually, there is no room for a construction that a complaint ‘relating to superannuation’ that falls outside sub-ss 1053(1)(a)–(j) may be made under AFCA’s general jurisdiction. The Full Court also rejected AFCA’s contention that the construction advanced by MetLife would have the result that complaints that could previously be dealt with under the former external dispute resolution schemes could no longer be dealt with under the AFCA Scheme. The Full Court found that the Complaint could have been made under the AFCA Scheme pursuant to subs 1053(1)(a) as a complaint against a superannuation trustee that had made a decision that is alleged to be unfair or unreasonable, namely a decision not to pursue MetLife for indemnity. The view of the Full Court was reinforced by the extrinsic materials, including the revised Explanatory Memorandum, which evidenced a legislative intention to implement a discrete procedure to deal with complaints relating to superannuation.

Finally, the Full Court dealt with grounds 1 and 2 of AFCA’s amended notice of contention, to the effect that the primary judge should have accepted its alternative argument that the Complaint was not a complaint relating to superannuation. The Full Court rejected AFCA’s submission, and agreed with the primary judge that Mr Edgecombe’s claim arose solely from his status as a member of the superannuation fund and could only be based upon that status. The Full Court also rejected the remaining grounds of AFCA’s notice of contention.

COMMERCIAL AND CORPORATIONS (ECONOMIC REGULATOR, COMPETITION AND ACCESS) NPA

Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd [2023] FCAFC 16

(23 February 2023; Allsop CJ, Yates and Beach JJ)

These proceedings stem from events in 2013 in which the State of New South Wales engaged in

privatisation of various NSW ports and entered into port commitment deeds with the NSW Ports Consortium.

In these two appeals, heard together, the Full Court considered whether NSW Ports was entitled to derivative Crown immunity and whether compensation provisions in the deeds were anti-competitive in contravention of section 45 of the *Competition and Consumer Act 2010* (Cth) (CCA). In three judgments, the Full Court unanimously ruled that the appeals failed.

Considering the appeal on Crown immunity, the Chief Justice held, in agreement with the conclusions of the primary judge, that the impugned conduct was not in the course of the ‘carrying on of a business’ by the Crown such as to engage section 2B of the CCA. Rather, it was related to effecting the State of NSW’s privatisation decision to the maximum value.

The Chief Justice further considered whether the application of section 45 of the CCA to NSW Ports would have the result of excluding the operation of Crown immunity. The Chief Justice held that section 2B and its application when the conduct of the State is not engaged in the course of a business means that the immunity of the State extends to prevent section 45 applying to NSW Ports, if for section 45 so to apply, legal or other rights of the State would be divested.

Considering the appeal on purpose, the Chief Justice noted that it is the subjective purpose(s) of the State and NSW Ports that is relevant and, in considering those matters, the distinction between purpose and effects is significant and entail separate inquiries.

The Chief Justice held that the primary judge was correct to find that the State’s purpose was to ensure that bidders did not discount their bids because of the risk of a future change of Government policy. The impugned provisions did not evince any intention or assumption of less competitive behaviour by NSW Ports.

Considering the appeal grounds in relation to the likely effects, the Chief Justice held that the primary judge’s construction of the relevant clauses and her conclusion that they did not have an anti-competitive effect were correct.

Justice Yates agreed with the reasons of the Chief Justice.

Justice Beach took a different view to the other members of the Full Court on the question of derivative Crown immunity, however, reached similar conclusions on the competition appeal grounds.

In his Honour's view, the ACCC succeeded in establishing that derivative Crown immunity was not relevantly engaged and accordingly section 45 applied. This was because the State, by reason of section 45(2), never had an unconstrained right to contract with the NSW Ports consortium where to do so placed the consortium in breach of section 45 and where the State had not otherwise sought to invoke section 51.

COMMERCIAL AND CORPORATIONS (REGULATOR AND CONSUMER PROTECTION) NPA

Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission [2022] FCAFC 170

(10 October 2022; Jagot, O'Bryan and Cheeseman JJ)

In this case, the Full Court considered an appeal from orders made by the primary judge consequential on liability and penalty judgments handed down in 2021 concerning findings of misleading and deceptive conduct by the Mayfair parties in the promotion of investment products.

The Mayfair parties, defendants in the proceedings below, did not appear at the liability hearing. The Full Court found that this was a deliberate decision, made by the director of the Mayfair companies, to not appear before the primary judge for perceived forensic advantage.

The Full Court dismissed the appeal grounds relating to evidentiary issues, holding that the primary judge did not err in admitting evidence to which no objection had been taken, and did not err in making factual findings based on the evidence where no argument was made that the finding should not be made. The Full Court noted that the need for adherence to the principle of finality is acute in respect of evidentiary appeal grounds. The appellants were and are bound by their conduct below and the consequences which flowed. It was not apparent, the Full Court observed, how the primary judge could be said to have committed error in relation to contestable evidentiary issues which could and should have been tested below.

The Full Court rejected the appeal grounds in relation to the primary judge's findings in the liability judgment that the various representations were made and were misleading. The Full Court found that the appellant's contentions were without merit and that the primary judge's findings were supported by the evidence.

In respect of the appeal grounds in relation to the penalty judgment, the Full Court considered the construction and effect of the applicable penalty provisions. The Full Court held that the primary judge was correct in his findings of contraventions and assessment of witnesses. Noting that each penalty case turns on its own facts, the Full Court held that while the primary judge's discretionary assessment of penalty was higher than that suggested by ASIC, it was open to his Honour and not manifestly excessive.

The Full Court accepted one limited ground and set aside an injunction made by the primary judge. The injunction was held by the Full Court to be too broad with insufficient nexus between the specific words which the appellants were restrained from using and contravening conduct.

The Full Court otherwise dismissed the appeal. The High Court has refused a special leave application.

Toyota Motor Corporation Australia Limited v Williams [2023] FCAFC 50

(27 March 2023; Moshinsky, Colvin and Stewart JJ)

Between 2015 and 2020, Toyota supplied to customers in Australia motor vehicles in the Prado, Fortuner and HiLux ranges which were fitted with a particular model of diesel combustion engine together with a diesel exhaust after-treatment system (DPF system). The DPF system was defective because it was not designed to function effectively during all reasonably expected conditions of normal operation and use of the vehicles.

In the representative proceeding arising from the supply of vehicles with this defect, the primary judge found that there was failure by Toyota to comply with the consumer guarantee of acceptable quality in section 54 of the ACL in respect of all the relevant vehicles, even those in which the defect had not manifested, and determined section 54 liability on a common basis. On the basis that reduction in value was to be assessed by reference to the time at which the vehicle was supplied and without reference to subsequent events, and as such that reduction in value damages could be assessed for all group members of the relevant cohort on a common basis, the primary judge held that failure to comply with the acceptable quality guarantee resulted in a reduction in value of all relevant vehicles of 17.5 per cent.

On appeal, Toyota challenged the primary judge's findings on liability, the primary judge's construction of the relevant provisions and conceptual approach to reduction in value damages, and the primary judge's approach to the quantification of those damages.

The Full Court dismissed the appeal grounds relating to liability. The Full Court held that the primary judge did not err in determining section 54 liability on a common basis and his Honour had applied the correct – objective – statutory test. The primary judge was also correct to find that a defect in the DPF system is properly regarded as a defect in the vehicles which rendered the vehicles to be of unacceptable quality.

The Full Court upheld the appeal grounds in relation to the primary judge's approach to the assessment, and quantification, of reduction in value damages. Although the Full Court agreed that, as a general proposition, the point in time for assessing damages for any reduction in the value of goods pursuant to section 272(1)(a) of the ACL is the time of supply, the Full Court held that departure from the general proposition may be warranted in the particular circumstances of a case because of the statutory focus on compensation for loss or damage actually suffered. The overarching consideration demanded by the statute is that the amount of compensation for any reduction in value be appropriate.

In this case, there was a possibility of repair of the defect at no cost and the nature of the defect was such that the vehicle could be used despite the defect. Those factors meant that considerable utility was afforded to consumers of the affected vehicles notwithstanding the defect, the appreciation of which is reinforced by the fact that from 2020, a complete fix was available and the expert evidence was that there was no ongoing reduction in value. In view of those circumstances, it was an error to assess the value of the affected vehicles without regard to the availability of the fix. If the fix is not taken into account, the possibility of over-compensation and unfairness is real.

In relation to the appeal grounds challenging the primary judge's quantitative assessment of the reduction in value of the relevant vehicles, the Full Court found that the primary judge erred in placing reliance on certain expert evidence such that the 17.5 per cent assessment cannot stand, but otherwise dismissed the appellant's contentions.

The Full Court set aside orders made below and the matter was remitted to the primary judge for re-assessment of reduction in value damages.

FEDERAL CRIME AND RELATED PROCEEDINGS NPA

DTO21 v Australian Crime Commission [2022] FCAFC 190

(30 November 2022; Wigney, Bromwich and Abraham JJ)

In this case, the appellant was serving an indeterminate prison sentence that had been imposed by the primary judge for contempt of the respondent. After the appellant had served some four months of his sentence, he exercised his liberty to apply, and the proceeding was re-listed before the primary judge to hear the application.

The appellant appealed from the primary judge's second decision, which effectively replaced the indeterminate prison sentence that his Honour had imposed with a fixed term sentence of 12 months, effectively backdated to when the appellant was first taken into custody.

In the first ground of appeal, the appellant contended that the primary judge erred in finding that there was a continued prospect of the appellant purging his contempt.

Bromwich and Abraham JJ considered authorities on contempt sentencing relied upon by the appellant and observed that one of the tasks of a sentencing judge in a case of this kind is making a prediction as to the future likelihood of the purging of contempt. Their Honours noted in relation to this prediction that there is no evidentiary requirement for proof of that future likelihood being realised as an ascertainable fact.

In their Honours' view, where a contemnor has received an indeterminate sentence and asserts they will not purge their contempt, the task of the sentencing judge as to the element of coercion is to ascertain whether the provision of information, or other conduct sought, is still required and if so, whether the previously made prediction remains sound. The primary judge was without error in approaching his Honour's task.

Wigney J agreed generally with Bromwich and Abraham JJ's reasons, however, was inclined to a different view on coercion as a relevant consideration. In his Honour's view, there is a real issue, not resolved by the authorities, as to the extent to which coercion is a relevant consideration in fixing a determinate sentence to punish a contemnor in respect of their contempt. His Honour was inclined to the view that except in two minor respects, coercion is not a relevant consideration in

such cases. His Honour was not satisfied, however, that the primary judge had impermissibly taken coercion into account in imposing the 12-month fixed term sentence.

The Full Court rejected the appellant's second ground which contended that the primary judge erred in failing to consider a suspended sentence to be an option. Their Honours found that the primary judge did have regard to this option but rejected it.

The Full Court rejected the appellant's final ground which contended that the fixed sentence was manifestly excessive. Their Honours held that the comparative sentences in cases relied upon by the appellant were distinguishable and in any event the sentence imposed by the primary judge was not outside the range produced by those cases and did not manifest error.

The Full Court was unanimous in the view that the appeal should be dismissed.

EMPLOYMENT AND INDUSTRIAL RELATIONS NPA

D&D Traffic Management Pty Ltd v The Australian Workers' Union [2022] FCAFC 113

(8 July 2022; Katzmann, Thawley and Goodman JJ)

In these proceedings, the Full Court considered an application for judicial review of decisions made by the Fair Work Commission (FWC) not to approve the *D&D Traffic Management & Other Work Enterprise Agreement 2020* (Agreement). In doing so, the Full Court considered the definition of 'shiftwork' and whether particular clauses of the *Building and Construction General On-Site Award 2010* (Award) apply to casual employees.

D&D Traffic Management Pty Ltd (D&D) is a traffic management company that employs 'traffic controllers', predominantly on a casual basis, and provides services to the civil construction industry. An application to have the Agreement approved by the FWC pursuant to s 186 of the *Fair Work Act 2009* (Cth) was dismissed because the FWC was not satisfied that the Agreement passed the 'better off overall test' under s 193(1) of the Act when compared to the Award. The FWC concluded that, where employees were not shiftworkers within the 'shiftwork' definition in cl 34.2(a) of the Award, the Award provided for the payment of overtime which would exceed the amount payable in respect of night shift work pursuant to cl 8(c) of the Agreement. A Full Bench of the FWC subsequently refused D&D permission to appeal.

D&D sought judicial review on the basis that the FWC misconceived the statutory task or failed to carry out the statutory task required by sections 186 and 193 of the Act, and breached an implied condition to exercise the power in sections 186 and 193 reasonably. In particular, D&D claimed that the Commission misconstrued certain provisions of the Award, including the 'spread of hours' clause (cl 33.1) and the definition of 'shiftwork' (cl 34.2(a)).

The Full Court considered the statutory function of the FWC in approving enterprise agreements as outlined in Division 4 of Part 2–4 of the Act and noted that the 'basic rule' established by section 186 of the Act is that the FWC must approve an agreement where the requirements set out in sections 186 and 187 are met, provided the FWC is *satisfied* that the agreement passes the better off overall test as defined in section 193. The Full Court held that states of satisfaction are judicially reviewable and that, while misconstruction of the Award is capable of giving rise to jurisdictional error, whether misconstruction does in fact have that result depends on the particular circumstances.

In this case, the Full Court found that the FWC had not misconstrued its statutory function or the task required, or materially misconstrued the Award. It rejected D&D's contention that cl 33.1 of the Award (which provides for ordinary working hours of 38 per week between 7am and 6pm Monday to Friday) does not apply to casual employees, finding that cl 33.4 (which requires that the daily ordinary hours of a casual employee not exceed 8) does not apply to the exclusion of cl 33.1.

The Full Court then considered the definition of 'shiftwork' (in cl 34.2(a) of the Award) as 'any system of work in which operations are being continued by the employment of a group of employees upon work on which another group had been engaged previously'. The Full Court rejected D&D's contention (not put to the FWC) that, even if an employee is not performing 'shiftwork' within that definition, the employee is nonetheless a shiftworker if they work a period of time being a 'day shift', 'afternoon shift' or 'night shift'. The Full Court concluded that D&D had failed to identify any error in the FWC's construction of shiftwork, and that the definition does not include a situation where employees carry out work at location A and other workers then carry out work at location B, as such work is not carried out 'upon work' on which another group had previously been engaged.

In dismissing the application, the Full Court noted that even if error had been established, the fact that the case put to the Court was in almost all respects

not put to the FWC would militate against relief being granted, observing that a judicial review proceeding is not the occasion to advance a new case.

The Full Court also noted that D&D did not seek judicial review of the Full Bench decision refusing permission to appeal. The Full Court observed that such refusal was amenable to judicial review and that it was generally not in the interests of the administration of justice for the Court to permit an applicant to circumvent the limits on appeals imposed by the Act by quashing first instance decisions of the FWC in a manner inconsistent with conclusions reached by the Full Bench.

***Airservices Australia v Civil Air Operations Officers' Association of Australia* [2022] FCAFC 172**

(19 October 2022; Bromberg, O'Callaghan and Snaden JJ)

Airservices Australia, an Australian Government statutory authority, and the Civil Air Operations Officers' Association of Australia entered into the *Airservices Australia (Air Traffic Control and Supporting Air Services) Enterprise Agreement 2017 – 2020* (the EA) in 2007. A dispute subsequently arose in 2018 when Airservices made a decision to withdraw from use a set of guidelines, contemplated by cl 19.18 of the EA, which regulate the use of 'grey-day' rosters in the rostering of air-traffic control employees. The 'grey-day' rosters allowed for employees to be rostered on stand-by for a grey-day shift with the expectation that they were required to be available to attend work if they were called to do so, but were otherwise paid their ordinary rate of pay for the nominal shift regardless of whether or not the employee was required to attend for duty. Civil Air notified the Fair Work Commission (FWC) of the dispute and, at arbitration, the FWC decided that Airservices had failed to comply with an obligation to consult with certain of its employees prior to withdrawing the guidelines and failed to maintain the status quo after being notified of the dispute. Civil Air commenced proceedings in this Court seeking declarations in relation to the failure to consult and maintain the status quo and pecuniary penalties. The primary judge rejected Airservices' submission that the Court lacked jurisdiction to decide the proceeding because there was no subsisting justiciable controversy between the parties by reason of the FWC's decision, and found that the decisions of Airservices were in contravention of section 50 of the *Fair Work Act* (FW Act). The primary judge made declarations and ordered that Airservices pay pecuniary penalties of \$72,450.

In the proceedings before it, the Full Court considered whether there was a 'matter arising under' the FW Act such as to give the Court jurisdiction under section 562, and whether the primary judge erred by making the declarations and imposing penalties, whether in the imposed amounts or at all. On the question of jurisdiction, O'Callaghan J, with whom Bromberg and Snaden JJ agreed on this point, concluded that the Court did have jurisdiction to determine the matter. In doing so, his Honour found that while the FWC may exercise arbitral powers in limited circumstances, a dispute about whether a party is liable for a contravention of section 50 of the FW Act is not a dispute that is capable of being referred to arbitration by the FWC and the FWC does not have the power to make orders in relation to contraventions of the civil remedy provisions of the FW Act. The Full Court was also unanimous in the view that the primary judge did not err in granting declaratory relief.

On the issue of penalties, O'Callaghan J and Snaden J, by way of a concurring judgment, found that the penalties imposed by the primary judge were manifestly excessive because the penalties were wholly outside the range of sentencing options available and because the penalties imposed were not necessary to provide a deterrent effect. Justice O'Callaghan found that it was appropriate for the Full Court to re-exercise the discretion to impose a pecuniary penalty and reset the penalty at 20 per cent of the maximum amount for each of the contraventions; that is \$12,600 for each penalty totalling \$25,200, being a just and proportionate amount to the contravening conduct when the surrounding circumstances are taken into account.

Justice Bromberg respectfully disagreed with the reasons of O'Callaghan J and the concurring judgment of Snaden J on the question of penalties. His Honour concluded that mid-range penalties were appropriately imposed by the primary judge in recognition that the relevant breaches of the EA were serious and occurred in circumstances where prior similar offending had occurred and Airservices continued to display a failure to appreciate the seriousness of its conduct.

***CFMMEU v OS MCAP Pty Ltd* [2023] FCAFC 51**

(28 March 2023; Collier, Thomas and Raper JJ)

In these proceedings, the Full Court considered the meaning of a 'request' to work on a public holiday within the meaning of sections 114(2) of the *Fair Work Act 2009*.

OS MCAP Pty Ltd (OS) engages employees to provide production and maintenance services to mining companies, including at the Daunia Mine site located in central Queensland, on a roster that provides services on a continuous basis. Approximately 85 OS employees worked a standard 12.5 hour shift at the Mine on Christmas Day and Boxing Day 2019, without any additional remuneration. At a number of meetings between OS management and employees in August and September 2019, OS told the employees that it could only accommodate six employees for each roster panel being absent on Christmas Day and Boxing Day. The employees who would be permitted to take leave were subsequently randomly selected.

The Construction, Forestry, Maritime, Mining and Energy Union commenced proceedings against OS, contending that it had breached the National Employment Standards, specifically section 114 of the Act, by *requiring* employees to work on public holidays, and thereby contravened section 44 of the Act. Section 114(1) affords employees protection not to be required to work on a public holiday, section 114(2) permits an employee to request an employee to work on a public holiday and section 114(3) provides that such a request can be refused if it is not reasonable or the refusal is reasonable. The primary judge concluded that section 114(2) was not intended to apply only to a request in the sense of a question leaving the employee with a choice whether to work, but was also intended to apply to a *requirement* by an employer.

On appeal, the Full Court considered the bounds of the protection afforded and what constitutes a *request* under the Act. The Full Court reiterated that the intention of s 114(1) is that an employee is entitled to be absent from their employment for either part or a whole day that is a public holiday unless the exceptions under section 114(2) to (3) apply. In light of this, the Full Court found that the ordinary meaning of the word *request*, in the context of section 114, envisages a situation where an employer can ask an employee to work on a public holiday, in circumstances where such a request is reasonable, and a discussion or negotiation may then take place. The Full Court considered what a request must constitute under the Act and determined that a request must be made in the form of a question leaving the employee with a choice to either accept or refuse the request.

As OS MCAP had not requested that the employees work on the public holiday but imposed a requirement that could not be refused by an employee, the Full Court found that OS had

contravened section 44 of the Act in respect of each of the employees that OS required to work at the Mine on 25 and 26 December 2019, by its contravention of section 114 of the Act requiring those employees to work on those dates, which were public holidays. In doing so, the Full Court sought to reinforce the purpose underlying section 114 of the Act, to provide an employee with recourse to correct a power imbalance that may exist between an employer and employee.

In reaching its decision, the Full Court observed that in situations where a request is refused by an employee and that refusal is unreasonable, an employer may require an employee to work on a public holiday, and that ‘reasonableness’ should be determined on a case-by-case basis with reference to the criteria set out in section 114(4) of the Act.

An Application for Special Leave to the High Court of Australia was filed on 26 April 2023.

INTELLECTUAL PROPERTY (TRADE MARKS) NPA

Energy Beverages LLC v Cantarella Bros Pty Ltd [2023] FCAFC 44

(22 March 2023; Yates, Stewart and Rofe JJ)

The Full Court determined two matters where leave to appeal was sought in respect of appeals from decisions of delegates of the Registrar of Trade Marks in opposition proceedings.

First, the delegate found that Energy Beverages (EB) had not used the MOTHERLAND mark (registered in class 32) and directed that it be removed. EB was unsuccessful in its appeal and then sought leave to appeal to the Full Court.

The Full Court was not persuaded that clear prima facie error on the part of the primary judge, in his conclusion that MOTHERLAND had not been used as a trade mark, had been established. Their Honours found EB only used MOTHER as a trade mark in respect of energy drinks. MOTHERLAND was only used as the name of a fictional theme park and was not used as a trade mark to indicate the trade source of the drink. Leave to appeal was refused.

Second, the delegate found EB to be unsuccessful in its opposition against Cantarella’s MOTHERSKY application in class 30 (coffee, coffee beans and chocolate) and 41 (coffee roasting and coffee grinding) before the delegate. The delegate directed the MOTHERSKY mark proceed to registration. EB was then unsuccessful in its appeal before a single judge.

On appeal, the Full Court upheld EB's contentions that:

1. the goods of the MOTHERSKY application are 'similar goods' to the goods covered by the 'blocking' MOTHER mark (which at its broadest claimed non-alcoholic beverages in class 32), and
2. MOTHERSKY is deceptively similar to MOTHER when used in respect of the goods for which the registration of MOTHERSKY is sought.

As the case below and on appeal advanced by the parties was that the MOTHERSKY application was not limited to pure coffee products but extended to coffee as a beverage, the Full Court found the primary judge did not give due recognition to the full scope of goods as 'coffee'. Cantarella's contention that effectively coffee beverages are class 30 goods only, not class 32 goods, was not accepted by the Full Court. The Court noted the goods were classified in classes for administrative convenience, and the nomination of a class is not decisive as to the scope of the mark's registration. The parties' evidence supported the notion that 'coffee' as a beverage fell within the scope of 'non-alcoholic beverages'. In this way, the MOTHERSKY application and the earlier MOTHER registration claimed goods of the same description.

Although recognising the deceptive similarity analysis was one on which reasonable minds may differ, the Full Court found there were two matters which led to the conclusion that the primary judge's assessment was affected by appealable error. The comparison was made against the background that the MOTHERSKY goods were not the same goods or not goods of the same description as the MOTHER mark, which the Full Court found was in error. The Full Court, relying on the High Court's reasoning in *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* [2023] HCA 8, then identified that the analysis should have also considered the ways in which, notionally, the competing marks could be used within the scope of the proposed registration of the MOTHERSKY mark and the scope of the actual registration of the MOTHER mark.

As the primary judge's analysis of deceptive similarity was found to be affected by error, the Full Court undertook the trade mark comparison task afresh. On the Full Court's comparison, their Honours were persuaded that MOTHERSKY is deceptively similar to MOTHER when used in respect of 'coffee' beverages. The Full Court noted MOTHER was inherently distinctive when used in respect of non-alcoholic beverages and that distinctiveness was not lost through the addition of the suffix 'sky' when used in

respect of coffee beverages, and that the primary judge erred in reaching the opposite conclusion. Special leave applications have been filed in the High Court.

INTELLECTUAL PROPERTY (COPYRIGHT AND INDUSTRIAL DESIGN) NPA

Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd [2022] FCAFC 112

(6 July 2022; Greenwood, Cheeseman and McElwaine JJ)

Campaigntrack Pty Ltd provides online marketing services to the real estate industry through the software system known as Campaigntrack. Biggin & Scott Corporate Pty Ltd is the franchisor of a group of real estate agencies in Victoria that used the DreamDesk platform, an alternative cloud based marketing system developed by Mr David Semmens. In July 2016, Campaigntrack acquired ownership of the copyright in DreamDesk, with the intention of shutting it down so that clients could be persuaded to use Campaigntrack. Mr Semmens then developed another real estate marketing software system known as Real Estate Toolbox, with the support of Biggin & Scott, and in October 2016, Biggin & Scott began to use Toolbox in place of DreamDesk.

Campaigntrack commenced proceedings against parties including Biggin & Scott, two of its directors and Mr Semmens for infringement of its copyright rights, misuse of confidential information and breaches of contract. Campaigntrack claimed that Toolbox was developed by copying substantial parts of the source code of DreamDesk.

The primary judge dismissed the proceedings against each respondent other than Mr Semmens, essentially on the basis that the respondents lacked actual or constructive knowledge and did not authorise the infringing acts within the meaning of section 36(1)–(1A) of the *Copyright Act 1968* (Cth). On appeal, the Full Court considered whether the claims against the other respondents (other than the misuse of confidential information claims, which were abandoned during the course of argument) should have been upheld.

A majority of the Full Court allowed the appeal in part. Justice Greenwood generally agreed with the reasons of McElwaine J, and in a separate judgment, noted the significance of a letter sent by Campaigntrack's solicitors to one of the respondents on 29 September 2016 in which concerns were raised about improper use of the DreamDesk source code. His Honour held that the primary

judge's conclusion that on and from 29 September 2016, the respondents had no reason to suspect that Toolbox embodied substantial parts of the DreamDesk source code could not stand in the face of the evidence. His Honour emphasised that it was no answer for the respondents to say that they trusted Mr Semmens, and that from 29 September 2016, it was not open to them to deny the conduct put to them without proper investigation. By reason of their indifference to the complaints put to them, the respondents authorised the infringement of the DreamDesk works.

Similarly, McElwaine J held that liability could attach to the respondents if it is open to infer that from an identifiable point in time, they knew or should reasonably have known that an infringing act was or was likely to be done by Mr Semmens and then failed to take reasonable steps to avoid the doing of the act. In this context, the letter of 29 September 2016 was important. His Honour held that the letter, which came to the attention of Biggin & Scott, unambiguously expressed Campaigntrack's concern that there had been improper access and duplication of the DreamDesk source code. Justice McElwaine found that this letter, and the course of correspondence that followed, put the respondents on notice of a potential claim of copyright infringement and reasonably should have caused them to make specific inquiries of Mr Semmens in order to be satisfied that he had not copied and was not intending to copy the DreamDesk source code. Steps taken by the respondents, including the appointment of an independent forensic IT expert in November 2016, were taken too late and displayed indifference to the rights of Campaigntrack.

Justice Cheeseman dissented on the issue of authorisation, finding that the primary judge did not fail to draw the correct inference from the primary facts that he found. Her Honour observed that the primary judge made multiple unchallenged trust findings – that is, findings that there was a subsisting relationship of trust between the respondents and Mr Semmens – in the context of an assessment of the whole of the evidence. Her Honour found that the primary judge was aware of and considered the 29 September 2016 letter, and inferred that the absence of an express finding in relation to that letter is because the primary judge considered it to be immaterial when viewed in the context of, amongst other things, the continuing relationship of trust and the commercial history between the parties.

The Full Court dismissed other grounds of appeal, including those in respect of Campaigntrack's breach of contract claims. The matter was remitted to the primary judge for an inquiry as to damages or profits.

The High Court granted special leave to appeal on 17 February 2023, and the appeal is set for 1 August 2023.

NATIVE TITLE NPA

Pitta Pitta Aboriginal Corporation RNTBC v Melville on behalf of the Pitta Pitta People [2022] FCAFC 154

(9 August 2022; Jagot, Rangiah and Charlesworth JJ)

This Full Federal Court judgment relates to an application for leave to appeal from the orders of Justice Mortimer (as Her Honour then was) in *Melville on behalf of the Pitta Pitta People v State of Queensland* [2022] FCA 387. Justice Mortimer dismissed the application by the Pitta Pitta Aboriginal Corporation RNTBC that sought to summarily dismiss or strike out the compensation application purportedly brought on behalf of the Pitta Pitta People. The basis of the interlocutory application was that the compensation claim had not been properly authorised under section 251B of the *Native Title Act 1993* (Cth) and/or the Pitta Pitta People did not have standing under section 61 of the Act to make the compensation application. Justice Mortimer dismissed the application on the basis that such issues were unsuitable for summary determination on a strike out application.

The Full Court dismissed the application for leave on the basis that there was no error of principle apparent in the reasoning of the primary judge capable of vitiating the discretionary decision not to summarily dismiss the compensation application. The Full Court further determined that the primary judge rightly recognised that, in this case, the construction issues relevant to standing and authorisation involved disputed or not fully resolved (or resolvable at the summary dismissal stage) issues of fact.

***Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75**

(22 May 2023; Mortimer CJ, Moshinsky and Banks-Smith JJ)

This decision by the Full Federal Court is in relation to a compensation claim made by Yunupingu on behalf of the Gumatj Clan or Estate Group under section 61 of the *Native Title Act 1993* (Cth). The claim seeks payment of compensation for the alleged effects on native title of certain acts done after the Northern Territory became a territory of the Commonwealth in 1911, but prior to the coming into force of the *Northern Territory Self-Government Act 1978* (Cth). The claim area is located in the Gove Peninsula, in north-eastern Arnhem Land in the Northern Territory.

Following a lengthy process, the parties ultimately agreed that some of the central issues in the compensation application should be dealt with separately through a demurrer process, whereby the applicant would file a statement of claim in the compensation proceeding (as well as in the native title claim that was brought at the same time). In response, it was agreed that the Commonwealth would file an interlocutory application in the compensation proceeding, seeking orders to facilitate a hearing of a demurrer against the applicant's claims for compensation.

Due to the significance of the issues raised, the former Chief Justice made a direction under section 20(1A) of the *Federal Court of Australia Act 1976* (Cth) in respect of the hearing of the demurrer by a Full Court.

The Full Court answered four separate questions in the compensation proceeding. It answered all questions in the applicant's favour. Two questions are of particular note as they raise important constitutional issues. In relation to the first of these, the Commonwealth submitted that its legislative power in relation to territories in section 122 of the Constitution is not limited by the 'just terms' requirement in section 51(xxxi). The Commonwealth relied on *Teori Tau v Commonwealth* [1969] HCA 62; 119 CLR 564 in support of its argument and submitted that the later case of *Wurridjal v Commonwealth* [2009] HCA 2; 237 CLR 309 did not overrule *Teori Tau*. In relation to the second, the Commonwealth submitted that, because native title is always liable to be extinguished by the grant of inconsistent property rights, it is 'inherently defeasible' and so not property that is protected by the 'just terms' requirement in the Constitution. The

Commonwealth focused in particular on the reasons of Gummow J in *Newcrest Mining (WA) Limited v Commonwealth* [1997] HCA 38; 190 CLR 513 at 613.

The Full Court rejected the Commonwealth's arguments. In relation to the first issue, it held that *Wurridjal* did in fact overrule *Teori Tau* and therefore that the Commonwealth's legislative power over territories is subject to section 51(xxxi). In regard to the second issue, the Full Court concluded that native title rights are proprietary in nature, they constitute property for the purposes of section 51(xxxi) and an act that extinguishes such rights is capable of amounting to an acquisition of property. The Court also decided an important extinguishment issue about the effect of the grant of a lease in 1938 to the Methodist Missionary Society of Australia, which covered all of the claim area. The Court held, in the applicant's favour, that the grant of the lease had not extinguished the non-exclusive native title contended to exist over the claim area.

On 20 June 2023, the Commonwealth filed an application for special leave in the High Court.

TAXATION NPA

***Philip Morris Ltd v Comptroller-General of Customs* [2022] FCAFC 185**

(24 November 2022; Logan, Thawley and Hespe JJ)

From 1 July 2019, import duty became payable on all tobacco products imported into Australia by Philip Morris. A drawback of import duty could be claimed for tobacco products that were destined for export to third countries. Previously, such products were held in bonded warehouses and no import duty was payable.

The Comptroller-General of Customs rejected ten claims for drawback of import duty made by Philip Morris on tobacco products exported from Australia from July to September 2019.

The Tribunal found the claims were properly rejected because Philip Morris did not give the Australian Border Force notice in writing a reasonable time before the relevant exports of its intention to claim drawback on those exports. The Tribunal found there was no discretion to pay drawbacks where the notice requirement was not complied with.

Philip Morris claimed the Tribunal erred in finding that it did not give the requisite notice of its intention to claim drawbacks, including because export declaration notices submitted by Philip Morris understood against all of the circumstances including the history of dealings between the parties and the purposes of the legislative scheme, would

reasonably be understood as giving notice in writing of an intention to claim drawbacks.

The Full Court noted that export declaration notices could be given for goods produced in or imported into Australia and did not expressly state that Philip Morris intended to claim drawback on the exportation. The Full Court found the Tribunal did not err in reaching its conclusion that the export declaration notices did not convey an intention to claim drawback on the exportation and that no such notice had been given.

The Full Court explained that one of the principal purposes of the notice requirement was to alert the Comptroller-General of Customs of the existence of an intention to claim drawback, so that before goods were exported, any verification measures or inquiries could be undertaken. The Full Court found Philip Morris had not demonstrated any irrational or legally unreasonable finding of fact or conclusion in the Tribunal's reasons.

The Full Court also found that the Tribunal did not err in law by holding that there was no power or discretion to pay drawback of import duty notwithstanding failure to comply with the notice requirement. On the proper construction, there was no residual discretion to pay drawbacks, if there was a failure to comply with the notice requirement.

The Full Court unanimously dismissed the application by Philip Morris.

OTHER FEDERAL JURISDICTION NPA

Carnival plc v Karpik (The Ruby Princess) [2022] FCAFC 149

(2 September 2022; Allsop CJ, Rares and Derrington JJ)

Class action proceedings were brought against Carnival plc, as time charterer and operator of the *Ruby Princess*, and its subsidiary, Princess Cruise Lines Ltd, as owner of cruise ship *Ruby Princess*, in respect of loss or damage allegedly suffered by passengers and relatives of passengers onboard the vessel in March 2020. During the vessel's voyage from Sydney to Sydney via New Zealand, an outbreak of COVID-19 occurred, as a result of which a number of passengers allegedly contracted the disease and fell ill or died, or sustained distress or psychiatric injury.

The primary judge determined certain separate questions relating to the terms of the contract under which Mr Patrick Ho undertook the voyage. A contract issue was whether what became known as the 'US Terms and Conditions' formed part of Mr Ho's passage contract. The US Terms and Conditions

contained an exclusive jurisdiction clause in favour of the United States District Courts in California and a class action waiver clause, raising the issue whether Mr Ho's claim (and those of other passengers who contracted on the same terms) should be stayed as an abuse of process. The primary judge found that the US Terms and Conditions were not incorporated into Mr Ho's passage contract, but on the assumption that the US Terms and Conditions did apply, his Honour found that the class action waiver clause was unenforceable because it was an 'unfair term' contrary to the *Australian Consumer Law* (ACL). The primary judge found that the exclusive jurisdiction clause was not an unfair term, but would have exercised the discretion to refuse to enforce it.

A majority of the Full Court allowed the appeal. All three judges agreed that the US Terms and Conditions were incorporated into Mr Ho's passage contract and that the primary judge erred in finding to the contrary. However, the Full Court diverged on the enforceability of the class action waiver clause.

Chief Justice Allsop and Derrington J held that the class action waiver clause was enforceable. Chief Justice Allsop agreed with the reasons of Derrington J, but emphasised that the question whether the class action waiver clause was unfair, for the purposes of sections 23 and 24 of the ACL, must be considered by reference to the whole of the contract, including the enforceable foreign exclusive jurisdiction clause. His Honour found that when the whole contract is considered, the parties agreed for the United States courts to have exclusive jurisdiction and for there to be a waiver of class action participation. His Honour concluded that the loss of the procedural advantage to Mr Ho of the Australian class action is what he freely bargained for under the proper law of the contract by the exclusive jurisdiction clause. Chief Justice Allsop also agreed with Derrington J that there is no defeat of any statutory purpose of Part IVA of the *Federal Court of Australia Act 1976* (FCA Act) by permitting parties, in the free exercise of the right to contract, to agree not to participate in class actions.

Justice Derrington found that the class action waiver clause was not an 'unfair term'. His Honour concluded that:

- the class action waiver clause merely limits the manner in which Mr Ho might pursue his claim and did not result in a significant imbalance in the parties' rights and obligations

- Princess had a legitimate interest in avoiding the burden of class actions being brought against it, and in dealing with claims made against it in the forum with which it was familiar, and
- even if Mr Ho does suffer detriment from being required to enforce his claim individually, it was not possible to give weight to that detriment, and Princess did everything reasonably necessary to bring the class action waiver to his attention such that it was 'transparent' within the meaning of section 24(2) of the ACL.

Justice Derrington found that there is no basis on which it could be concluded that the class action waiver clause was 'unfair' within the meaning of sections 23 and 24 of the ACL. His Honour also considered and rejected the submission that the class action waiver clause was contrary to the operation of Part IVA of the FCA Act, finding that there is no public policy in Part IVA which is inconsistent with a person's right to agree not to pursue a claim as a member of a class action.

In his dissenting judgment, Rares J held that Part IVA of the FCA Act does not enable persons to contract out of being group members before the commencement of a representative proceeding. His Honour observed that the Parliament chose an opt out, rather than opt in, model for representative proceedings under Part IVA of the FCA Act, and held that to allow persons to contract out of Part IVA would undermine that legislative choice. His Honour found that a representative proceeding would not achieve the intended efficiency or equity if it could be stymied by a pre-commencement agreement to opt out, concluding that the class action waiver clause is unenforceable. Similarly, his Honour held that because a person cannot contract prospectively out of being a group member in a representative proceeding, enforcement of the exclusive jurisdiction clause would also be contrary to the public policy of the FCA Act, and that clause is also unenforceable.

The Full Court ordered that the proceedings in respect of Mr Ho's claims against Carnival/Princess be stayed, with the matter remitted to the primary judge for determination of the extent to which the Full Court's reasons for decision affect the claims of other members.

The High Court granted special leave to appeal on 17 March 2023, and the appeal is set for 3–4 August 2023.

Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41) [2023] FCA 555

(2 June 2023, Besanko J)

Mr Ben Roberts-Smith VC MG, a former member of the Special Air Service Regiment (SASR), undertook six tours of Afghanistan in the period between 2003 and 2013 and received numerous awards and medals. Mr Roberts-Smith commenced three defamation proceedings against Fairfax Media Publications Pty Ltd, The Age Company Pty Limited, The Federal Capital Press of Australia Pty Limited and three journalists employed by Fairfax (respondents) in respect of three groups of articles published in June and August 2018 in various newspapers and on various websites. The articles contained allegations about the conduct of SASR soldiers in Afghanistan, and some of the articles referred to Mr Roberts-Smith by name and contained allegations concerning his conduct as a soldier in Afghanistan and an allegation of domestic violence. By the conclusion of the trial, there was no dispute that the articles, even those that did not refer to him by name, identified Mr Roberts-Smith. The three proceedings were heard together. Orders were made pursuant to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) with the effect that evidence was given in both open and closed Court, and certain matters were dealt with in closed reasons.

Justice Besanko considered what imputations were conveyed by the articles, and whether the defences of substantial truth and contextual truth pursuant to sections 25 and 26 of the *Defamation Act 2005* (NSW) were available to the respondents. In respect of the disputed imputations, his Honour found that certain of the articles, known as the 'Group 2 articles', conveyed imputations that Mr Roberts-Smith committed murder by pressing an inexperienced SASR soldier to execute an elderly, unarmed Afghan in order to 'blood the rookie' and by machine-gunning a man with a prosthetic leg. His Honour found that a further group of articles, the 'Group 3 articles', conveyed imputations that Mr Roberts-Smith was guilty of the criminal or other misconduct alleged, including that Mr Roberts-Smith authorised the execution of an unarmed Afghan and engaged in an act of domestic violence.

In respect of the defence of substantial truth, which required the respondents to establish that every material part of the relevant imputations is true, Justice Besanko made extensive findings of fact concerning events in Afghanistan and the allegations of domestic violence. His Honour found, amongst other things, that:

- during a mission to a compound known as Whiskey 108, a man known as EKIA 56 was executed by Person 4 in a tunnel courtyard at the direction of Mr Roberts-Smith and that a man known as EKIA 57 was executed by Mr Roberts-Smith
- during a mission to a village named Darwan, Mr Roberts-Smith kicked a man known as Ali Jan off a small cliff, agreed with Person 11 that Ali Jan would be shot, and was party to an agreement with Person 11 to murder Ali Jan, and
- during a mission to the District of Chinartu, Mr Roberts-Smith ordered Person 12 to shoot an Afghan male under detention, and was complicit in and responsible for murder.

On that basis, Besanko J found that the respondents had established the substantial truth of a number of the imputations conveyed by the articles. While Besanko J found that the respondents' case was not established in respect of some other imputations (including because his Honour was not satisfied that the alleged domestic violence assault occurred), his Honour found that those imputations do no further harm to Mr Roberts-Smith's reputation, and that the imputations found to be substantially true are so serious that Mr Roberts-Smith has no reputation capable of being further harmed. Accordingly, his Honour dismissed the proceedings.

Mr Roberts-Smith has filed Notices of Appeal in each of the three proceedings.