Appendix 7

Decisions of interest

Administrative and Constitutional Law and Human Rights NPA

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment **[2021] FCA 560**

(27 May 2021, BROMBERG J)

The applicants commenced this proceeding on behalf of themselves, and as a representative proceeding on behalf of other children who ordinarily reside in Australia. The applicants' claim, premised on the law of negligence, was that the first respondent, the Minister responsible for administering the *Environment Protection and Biodiversity Conservation Act 1999* (the Act), owes a novel duty to the applicants to take reasonable care to not cause the applicants harm in the course of exercising her powers, including in the course of administering the Act.

The applicants claimed that if the Minister exercised her powers to approve the second respondent's proposal to extend its coal mining operations that it was reasonably foreseeable that they would be exposed to harm as a result of global warming contributed to by the combustion of coal extracted by the second respondent's mining operations. The applicants sought a declaration as to the existence of the duty of care, and injunctive relief restraining the Minister from making a decision under the Act that would breach the said duty of care.

Applying a multi-factorial approach involving the weighing of considerations relevant to whether a legal duty will be found to exist, Justice Bromberg found that the Minister owed the applicants a novel duty of care in exercising her powers pursuant to sections 130 and 133 of the Act (Relevant Provisions) to approve, or not to approve, the extension of the second respondent's coal mining operations. In the course of weighing relevant considerations, Justice Bromberg emphasised the importance of considering 'control', which was supplemented by consideration of 'knowledge', in assessing whether a duty of care is owed by a statutory authority, and found that in the circumstances of the case, the Minister's control over potential harm to the applicants by the making of a decision under the Relevant Provisions favoured the recognition of a novel duty of care.

In considering the coherence of the postulated duty of care with the exercise of power under the Relevant Provisions, Justice Bromberg found that the duty of care was limited to avoiding personal injury, and did not extend to avoiding damage to property, or pure economic loss. Justice Bromberg found that the duty of care would be incoherent with the Relevant Provisions if the scope of the duty extended to avoiding damage to property, or pure economic loss. Further concluding on his Honour's consideration of coherence of the postulated duty with the Relevant Provisions, Justice Bromberg stated that incoherence may arise between a postulated duty of care and administrative law principles in circumstances where the postulated duty is concerned with the making of a valid decision, but that was not the case in the circumstances in the case before the Court. Justice Bromberg concluded that the duty of care claimed to exist by the applicants was coherent with the Relevant Provisions because the subject of the postulated duty was not concerned with the validity of any decision made under the Relevant Provisions.

Justice Bromberg assessed whether a *quia timet* injunction to restrain the Minister from an apprehended breach of the duty of care ought to be granted by considering what the Minister might do in the knowledge that a duty of care was owed to the applicants, and in the knowledge of the large amounts of information giving rise to that finding. The Court considered it undesirable to pre-empt whether the Minister would or would not approve the second respondent's proposed extension to its mining operations, and refused to grant the injunctive relief sought. Justice Bromberg concluded that any assessment of whether injunctive relief should be granted would be more appropriate in circumstances where the Minister had made a decision on the second respondent's proposal to extend its mining operations.

The appeal from Justice Bromberg's decision has been listed before the Full Court on an expedited basis.

LibertyWorks Inc v Commonwealth of Australia **[2021] FCAFC 90**

(1 June 2021, KATZMANN, WIGNEY AND THAWLEY JJ)

In March 2020, the Health Minister made a determination under section 477 of the *Biosecurity Act 2015* (the Act) as a result of the COVID-19 pandemic. The determination prevents any Australian citizen, permanent resident, or operator of an outgoing aircraft or vessel from leaving Australian territory unless an exemption applies to the person, or is granted to the operator (Determination). The applicant, a private think-tank, challenged the validity of the Determination to impose restrictions on overseas travel, arguing that such a measure is *ultra vires*. The applicant claimed that section 477 of the Act empowered the Health Minister to make a determination that subjected an individual to a prescribed biosecurity measure, but that the Minister could not subject a *group* of individuals to such a biosecurity measure.

The Full Court considered the proper construction of section 477 of the Act, and found that the power conferred on the Minister was not limited to imposing restrictions on individuals. The Full Court rejected the applicant's argument that if section 477 conferred powers on the Minister to impose restrictions on individuals, then section 96 of the Act, which provides for the imposition of a human biosecurity order on individuals, was rendered nugatory. The Full Court found that Parliament's intention that the powers be sufficiently broad to impose appropriate restrictions on travellers to prevent or control the spread of communicable diseases would be frustrated in the context of an emergency if section 477 did not allow the Minister to make a determination that applied to persons to whom an order under section 96 of the Act could be made.

Administrative and Constitutional Law and Human Rights NPA | Migration

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A **[2020] FCAFC 121**

(24 June 2020, ALLSOP CJ, KENNY, BESANKO, MORTIMER AND MOSHINSKY JJ)

In two proceedings, heard together, the Full Court considered whether the power under section 501(1) *Migration Act 1958* (the Act) is available to refuse a protection visa. The first was an appeal by the Minister against a first instance decision which followed *BAL19 v Minister for Home Affairs* [2019] FCA 2189 in finding that the section 501(1) powers were not available to refuse a protection visa due to an identified inconsistency with the character criteria specific to protection visas in section 36 of the Act. The second was an application brought in the Court's original jurisdiction in which a question was reserved for consideration: 'Where an applicant for a safe haven enterprise visa satisfies the criteria in section 36 of the Act, can the grant of the visa be prevented by the exercise of the power conferred by section 501(1) to refuse to grant a visa to a person?'

Unanimously, the Full Court upheld the appeal in the first proceeding and answered the question in the second proceeding in the affirmative. In finding that the power in section 501(1) can apply to an application for a protection visa, the Full Court placed emphasis on the unqualified terms of section 501, expressed as a general provision applicable to all visas. Note 1, under section 501, provided that the definition of 'visa' includes a protection visa, and therefore strongly suggested that the section applies to protection visas. Further, the reference to section 501 in section 65(1) (which provides for the granting or refusing of visa applications generally) suggested that the power in section 501(1) was applicable to visas generally, including protection visas. Additionally, the statement in section 501H that the power in section 501(1) to refuse to grant a visa is 'in addition to' any other power under the Act to refuse to grant a visa supported the Full Court's conclusion. Finally, nothing in the text of section 36 expressly excluded the application of section 501 to protection visas.

The Full Court found that an examination of the legislative history buttressed this conclusion: the creation of what the second reading speech described as 'new, independent and self-contained statutory refugee framework' referred to an independence from *international law*, as opposed to independence from the other provisions of the Act. It was not correct to consider, as the judge in *BAL19* had, that the 2014 amendments sought to codify Australia's obligations under the *Convention Relating to the Status of Refugees*: the provisions in fact depart from the Convention in certain respects.

The Full Court went on to find that while section 501 and the protection visa character criteria in section 36 overlap, they operate in different ways and are not inconsistent. The Full Court found that if an applicant fails to satisfy the character provisions in section 36, the visa *must* be refused, whereas a visa *may* be refused if an applicant fails the character test in section 501. This formed an intelligible basis for the presence of the (narrower) character criteria in the protection visa provisions. It was not to be assumed that, simply due to failure to satisfy the Minister that the applicant passes the character test, their application would be refused under section 501(1). The Full Court held that Parliament having expressly dealt with protection visas differently from other visas in certain respects weighed against any conclusion that such visas are to be treated differently in any other, unexpressed respect.

In dismissing the Special Leave Application in KDSP [2021] HCATrans 020, an analogous case, Gordon J stated 'There is no reason to doubt the correctness of the conclusion reached by the Full Court of the Federal Court of Australia in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20*'.

Taxation NPA

***Commissioner of Taxation v Fortunatow* [2020] FCAFC 139**

(17 August 2020, McKerracher, Davies and Thawley JJ)

In the 2012 and 2013 income years, Mr Fortunatow, a business analyst, provided personal services to eight different end clients through his company. Each of the engagements was arranged by a recruiter or intermediary, like Hays. Mr Fortunatow claimed that he was not required to include the personal services income generated through his company in his assessable income because his company satisfied the 'unrelated clients test' for a personal services business. The test required the services to have been provided 'as a direct result' of the individual or personal services entity making offers or invitations (for example, by advertising), to the public at large or to a section of the public, to provide the services'. The facts found by the Tribunal were that some of the intermediaries contacted Mr Fortunatow as a result of his advertising on LinkedIn, but that none of the clients relied upon any form of advertising by Mr Fortunatow or his company.

Although the primary judge agreed with the Tribunal in relation to the causal connection required by the phrase 'as a direct result', the primary judge considered that the Tribunal applied the 'unrelated clients test' in a way which was otherwise affected by error and set aside the Tribunal's decision. The Commissioner accepted that the Tribunal erred in the way identified, but contended that the error was immaterial because, on the Tribunal's findings, Mr Fortunatow had not established that the services had been provided 'as a direct result' of offers or invitations made to the public to provide the services. The Commissioner contended the matter should therefore not have been set aside.

As to the meaning of 'as a direct result', the primary judge concluded that the phrase creates a requirement for a causal connection between the services provided and the offer or invitation to the public but did not denote the type of causal connection. The Full Court concluded that meaning had to be given to the word 'direct' in the phrase 'as a direct result' and concluded that a direct causal connection was required between a client's decision to obtain the services and the individual or personal services entity making offers or invitations to provide them. A direct causal effect might be shown where it was established that an invitation or offer was comprehended by the client, in the sense of received and digested, and that it had at least some influence on the client's decision to obtain the services. Contrary to the view of the Tribunal and the primary judge, the Full Court found that it was offers or invitations which operated directly on the client which were relevant, not those which operated on an intermediary.

On the facts as found by the Tribunal, none of the clients made their decisions to engage the services of Mr Fortunatow 'as a direct result' of any offer or invitation constituted by Mr Fortunatow's LinkedIn profile. The Full Court found that the application of the correct construction of the 'unrelated clients test' to the facts as found by the Tribunal could lead to only one conclusion, namely that the test was not met. This was the conclusion which the Tribunal reached, albeit in a way which was affected by error. The Full Court concluded that the Tribunal's error was immaterial as, on a correct application of the law, the Tribunal would necessarily have concluded that the 'unrelated clients test' was not satisfied. The Full Court allowed the appeal from the decision of the

primary judge and in lieu of the orders made by the primary judge, ordered that the appeal from the Tribunal be dismissed. The Full Court also rejected Mr Fortunatow's contention that the Commissioner's appeal was incompetent.

The High Court of Australia has refused an application for special leave to appeal.

Employment and Industrial Relations

***WorkPac Pty Ltd v Rossato* [2020] FCAFC 84**

(20 May 2020, BROMBERG, WHITE AND WHEELAHAN JJ)

This proceeding concerns whether the respondent (Mr Rossato) was employed by the applicant (WorkPac), a labour hire company, as a casual employee. The proceeding follows the decision in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, in which the Full Court had found that the respondent was not a casual employee within the meaning of section 86 of the *Fair Work Act 2009* (FW Act). The Full Court had also determined in *Skene* that employees will be found to be casuals if their employer has made no firm advance commitment to provide continuing and indefinite work according to an agreed pattern of work.

WorkPac commenced proceedings against Mr Rossato, who it had treated as a casual employee, after he had, in reliance on the decision in *Skene*, written to it claiming that he was owed outstanding paid leave entitlements because he had not been a casual employee. WorkPac sought various declarations that Mr Rossato was a casual employee at common law, and within the meaning of sections 86, 95 and 106 of the FW Act. In the alternative, WorkPac argued it was entitled to a 'set-off' of any amount owed to Mr Rossato with respect to the entitlements claimed as a result of the Mr Rossato's pay incorporating a casual loading of 25 per cent of the minimum rate of pay payable under the relevant enterprise agreement. Further, and in the alternative, WorkPac argued that it was entitled to restitution of the amount of casual loading incorporated into Mr Rossato's pay above the flat rate under the relevant enterprise agreement.

The Full Court found that Mr Rossato was not a casual employee, and therefore that he was entitled to be paid the National Employment Standards (NES) entitlements he claimed from WorkPac. In making that finding, the Full Court considered the correct approach to the assessment of whether a firm advance commitment had been made was to assess, as a whole, each of the six employment contracts entered into by the parties. WorkPac's contention that post contractual conduct of the parties is irrelevant for the purpose of such an assessment was rejected by the Full Court.

The Full Court rejected WorkPac's claim that it was entitled to restitution of the casual loading incorporated into the Mr Rossato's hourly rate, on the basis that there had been no failure of consideration or mistake which would support that claim. Further, the Full Court rejected WorkPac's claim that it was entitled to set off of amounts paid to the Mr Rossato above the flat rate of pay, because there was no close correlation between the payments made, and the entitlements claimed. The Court further held that regulations on which WorkPac relied to effect a setoff were not engaged, and alternatively, did not have the substantive effect for which WorkPac contended.

An appeal from the Full Court decision was heard by the High Court of Australia in May 2021, and judgment is currently reserved.

***Berkeley Challenge Pty Ltd v United Voice* [2020] FCAFC 113**

(1 July 2020, RARES, COLLIER AND RANGIAH JJ)

The Full Court in this proceeding determined two separate appeals together concerning the proper construction of section 119(1)(a) of the *Fair Work Act 2009* (FW Act). That provision provides an employee is entitled to redundancy pay when the employment is terminated at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour. Each of the appellants, Berkeley Challenge Pty Ltd (Berkeley) and Spotless Services Australia Pty Ltd (Spotless), employed staff who then provided services to a third party entity pursuant to a contract entered into between each appellant and the respective third party entity. For different reasons, the term of the contract between each appellant and the third parties concluded, and each appellant terminated the employment of a number of staff whom it had employed for lengthy periods of time.

Proceedings were commenced on behalf of the staff whose employment had been terminated (affected employees), claiming that each of the appellants had failed to pay those employees redundancy pay entitlements pursuant to section 119 of the FW Act. The primary judges found that each of Berkeley and Spotless had contravened section 119 of the FW Act by failing to pay the affected employees' redundancy entitlements. In the proceeding against Berkeley, the primary judge also found that Berkeley had contravened section 44 of the FW Act and that the affected employees were entitled to compensation. Berkeley and Spotless relied on broadly the same grounds of appeal, namely that each of the primary judges erred in the construction and application of the exception to the requirement to pay redundancy entitlements under section 119(1)(a) of the FW Act. Both Berkeley and Spotless asserted that the affected employees' employment was terminated as part of the ordinary and customary turnover of labour, and thus the exception under section 119 applied, the effect of which was that the affected employees were not entitled to redundancy pay.

The Full Court found that, contrary to the contentions of the appellants, for the exception in section 119(1)(a) of the FW Act to be enlivened, a causal link must be established between the termination by an employer of an employee's employment, and the termination must be due to the ordinary and customary turnover of labour. The Full Court dismissed contentions by both appellants that the primary judges in each proceeding took irrelevant considerations into account in their construction of s 119(1)(a). The Full Court found that various considerations, including the reasonable expectations of employees with respect to ongoing employment, are relevant to the Court's assessment of whether the exception in section 119 applies, and that such a consideration was also relevant in determining what constitutes the 'ordinary and customary turnover of labour'. The Full Court found that the primary judge in the Berkeley primary proceeding erred in framing the test for the application of the exception under section 119, and by failing to take a number of considerations into account in determining whether the exception applied, but that such errors did not change the conclusion that the primary judge had reached. The Full Court dismissed both appeals.

Knowles v BlueScope Steel Limited **[2021] FCAFC 32**

(12 March 2021, LOGAN, FLICK AND KERR JJ)

The applicant was employed by the first respondent, BlueScope Steel Limited (BlueScope), until his employment was terminated following an investigation into breaches of safety procedures by the applicant in relation to his operation of a crane used to move steel coils. The applicant made a successful unfair dismissal application to the Fair Work Commission (FWC). The Commissioner made orders including that the applicant be reinstated. BlueScope was granted permission by the Full Bench of the FWC to appeal the Commission's decision, and subsequently upheld the appeal. The Full Bench ordered that the unfair dismissal application be dismissed.

The applicant applied to the Federal Court seeking relief, pursuant to section 39B of the *Judiciary Act 1903*, from the Full Bench's decision. The applicant claimed that the Commissioner's decision contained no 'error of fact', or 'significant error of fact', and that the Full Bench erred by disturbing the findings made by the Commissioner. Alternatively, the applicant claimed the findings of fact made by the Full Bench were not open to it by reason of irrationality, illogicality or unreasonableness.

The Full Court majority considered the appeal rights to the Full Bench under section 604 of the *Fair Work Act 2009* (FW Act), and the jurisdiction of the Full Bench to consider appeals only if it is considered to 'be in the public interest to do so' (FW Act section 400(1)), and if permission is granted, the constraints on the Full Bench to resolve an appeal involving a significant error of fact under section 400(2) of the FWA. The Full Court majority juxtaposed what the Full Bench's task is in considering an application for permission to appeal under section 400, and the task of the Court in judicial review proceedings, confirming the requirement of the Full Bench to make a 'broad value judgment', which the Court should only disturb upon judicial review if the Court considers that the Full Bench misunderstood its role, or its jurisdiction, or failed to apply itself to the relevant question.

The Full Court majority rejected the applicant's argument that identification of a significant error of fact is a jurisdictional fact to be determined by the Court, finding that it was within the

Full Bench's jurisdiction, and open to the Full Bench, to find four significant errors of fact in the Commissioner's finding, and to thereafter re-hear the matter within the constraints of section 400(2). The Full Court majority went on to reject the applicant's contention that the Full Bench's conclusions on the re-hearing of the matter were affected by irrationality, illogicality or unreasonableness, and thus constituted a jurisdictional error. The Full Court majority emphasised that it is not the Court's task to prefer one finding of fact over another, rather the Court's task was to ensure the Full Bench had performed its task within the constraints of section 400(2).

The Full Court minority found that the Full Bench fell into jurisdictional error by failing to make a requisite finding of significant error of fact in the Commissioner's decision that would enliven the Full Bench's jurisdiction to re-hear the matter.

Intellectual Property NPA | Patents and Associated Statutes sub-area

***Mylan Health Pty Ltd v Sun Pharma ANZ Pty Ltd* [2020] FCAFC 116**

(3 July 2020, Middleton, Jagot, Yates, Beach and Moshinsky JJ)

Diabetic retinopathy is a progressive long-term complication associated with diabetes. The disease affects the retina and can cause permanent vision loss. The appellants' (Mylan) patents in this case concerned the medical use of fenofibrate (a fibrate class medication) for preventing diabetic retinopathy. Some of the patent claims were Swiss type claims, being claims directed to methods or processes of manufacture whose products were for second or later therapeutic use. Before the priority date of the claims in suit, a clinical trial protocol (the Protocol) was made publicly available which had as one of its hypotheses that 'fibrate therapy... will reduce the risk of diabetic retinopathy'. Mylan marketed and sold the only fenofibrate product on the Australian market. In 2016, the first respondent (Sun Pharma) obtained entry on the Australian Register of Therapeutic Goods of certain fenofibrate film-coated tablets which it intended to market and supply in Australia. Mylan unsuccessfully sued Sun Pharma for threatened patent infringement.

The primary judge dismissed the threatened infringement case finding that the main patent in suit was invalid on the grounds that the invention was not novel in light of the publication of the Protocol as an earlier documentary disclosure. In any event, the primary judge also found that Mylan had not established that there was a threatened infringement of the Swiss type claims. To find infringement of the Swiss type claims required proof of the manufacturer's intention that the medication be used for the prevention or treatment of diabetic retinopathy when making the medicine. The primary judge was not satisfied that Mylan had proved that Sun Pharma intended to use its products in this way.

In issue in the appeal was whether the Protocol anticipated the invention as claimed and deprived it of novelty when it advanced no more than a reasoned hypothesis for treatment, not a method of treatment as such. Mylan also appealed against the finding that the manufacturer's intention is an essential element of infringement for Swiss type claims.

The Full Court found that while the context of a documentary disclosure may inform the interpretation of a document's content, if the document nonetheless discloses what is later claimed as an invention it will anticipate the invention and deprive it of its novelty. It is not a requirement for a patentable invention that the invention, as claimed, be based on scientific proof or substantiation and so no such requirement was imposed on the earlier documentary disclosure. Because the Protocol had described the method of treatment and disclosed all the essential integers of the patent claim that was enough to deny its novelty.

Regarding the Swiss type claims, the Full Court disagreed with the primary judge's construction that the manufacturer's intention in making the medicament is an essential feature of the invention. Infringement of Swiss type claims is concerned with whether in the circumstances of the case the product of the claimed method or process is the medicament for the specified therapeutic process. Evidence of manufacturer's intention, physical characteristics of the product, reasonably foreseeable uses and suitability for use may all be relevant, but none will be determinative. In this case it was critical that Sun Pharma's product information did not state that the product was registered for indications including diabetic retinopathy.

The Full Court dismissed the appeal and the first respondent's notice of contention. An application for special leave to appeal was refused by the High Court of Australia.

Intellectual Property NPA | Trade Marks

***Hashtag Burgers Pty Ltd v In-N-Out Burgers, Inc* [2020] FCAFC 235**

(23 December 2020, NICHOLAS, YATES AND BURLEY JJ)

The respondent operates a business, founded in 1948, selling fast food, including burgers, under the name IN-N-OUT Burger. The respondent predominately trades in the United States of America, however regularly hosts pop-up restaurant events outside of the USA, including in Australia. The second and third appellant incorporated the first appellant to operate a business selling fast food, including burgers, under the name DOWN-N-OUT Burgers.

At first instance the primary judge found that the second and third appellants were jointly and severally liable for trade mark infringement, passing off, and contravening section 18 of the Australian Consumer Law (ACL). The primary judge found that from 23 June 2017, the first appellant was liable for trade mark infringement and passing off, but not the second or third appellant from that date. The second and third appellants were however found to be personally liable for the first appellant's contraventions of the ACL.

The Full Court rejected the appellants' two grounds of appeal challenging the primary judge's findings concerning trade mark infringement, and found that the primary judge's conclusion that consumers with an imperfect recollection may be caused to wonder whether the first appellant's business was associated with the respondent's business by reason of the trade marks used by the appellant to promote the business was correct. The Full Court did conclude that the primary judge's reasoning concerning whether the second and third appellant acted dishonestly in their use of the impugned trade marks to promote their business involved error, but that the error did not materially affect the primary judge's conclusions as to the impugned trade marks being deceptively similar to the respondent's registered trade marks.

The Full Court found that the primary judge correctly determined that the appellants had contravened section 18 of the ACL because a significant portion the identified class of prospective consumers would think that the first appellant's business was associated with the respondent's business. The Full Court rejected that appellants' contention that for passing off conduct to be made out the respondent needed to have a business connection in Australia.

The Full Court allowed the respondent's cross-appeal and found that the second and third appellants, who were directors of the first appellant at the relevant times, were knowingly involved in the first appellant's conduct constituting passing off and trade mark infringement, and as such were personally liable as joint tortfeasors.

Commercial and Corporations NPA | Commercial Contracts, Banking, Finance and Insurance sub-area

***Rockment Pty Ltd t/a Vanilla Lounge v AAI Limited t/a Vero Insurance* [2020] FCAFC 228**

(18 December 2020, BESANKO, DERRINGTON AND COLVIN JJ)

In this decision, the Full Court determined a separate question concerning the construction of an exclusion under a policy of insurance (Policy) held by Rockment Pty Ltd (Rockment) with AAI Limited t/a Vero Insurance (Vero). Rockment operated a café in Victoria, and the Policy relevantly insured Rockment against business interruptions resulting in loss of profit. The exclusion in question excluded claims being made under the Policy for business interruptions caused 'directly or indirectly by cleaning, repairing or checking the cafe premises, or interruptions caused by highly pathogenic Avian Influenza or any biosecurity emergency or human biosecurity emergency declared under the *Biosecurity Act 2015*... irrespective of whether discovered at the premises or the breakout is elsewhere.' Rockment made a claim under the Policy for losses caused by the requirement to close the café during a lockdown ordered by the Victorian Government as a result of the COVID-19 pandemic, and Vero denied the claim by reason of the Policy exclusion clause. Of relevance is that in January 2020, a determination was made under section 42(1) of the *Biosecurity Act 2015* (Act) in respect of COVID-19, and in March 2020, the Commonwealth Governor-General declared

that a 'human biosecurity emergency' existed in Australia, pursuant to section 475 of the Act. That declaration empowered the Federal Health Minister to impose human activity restrictions under the Act. Also in March 2020, the Victorian Government declared a state of emergency in Victoria under the *Public Health and Wellbeing Act 2008* (Vic).

As to the exclusion causation trigger, Rockment argued that the exclusion was not triggered because the declaration made by the Commonwealth Governor-General did not trigger the lockdown resulting in its loss. Rockment argued that the exclusion would be triggered if the Federal Health Minister had imposed restrictions subsequent to the making of the declaration, but the Minister had not done so. Vero on the other hand, claimed that the exclusion was triggered by the existence of the listed human disease which formed the basis of a declaration of a human biosecurity emergency under the Act. Alternatively, that the exclusion applied to a claim caused by the state of affairs upon which a human biosecurity emergency was declared under the Act.

The separate question related to the circumstances which are sufficient to exclude coverage under the Policy and, in particular, whether the loss or damage was relevantly caused by or arose from a listed human disease specified in a declaration of a human biosecurity emergency under the Act. Although the Full Court answered the question in the negative, it did not do so for the reason advanced by Rockment. The exclusion clause was not restricted to cases where the loss or damage was the consequence of closures resulting from the exercise of power by the Federal Minister for Health under the Act. At the same time, the question must be answered 'no' because it is not sufficient to exclude cover under the exclusion that the claim is somehow causally connected to the human disease specified in a declaration of a human biosecurity emergency. The required causal link must exist between the claim on the one hand and the human biosecurity emergency which has been declared under the Act on the other.

Commercial and Corporations NPA | Corporations and Corporate Insolvency sub-area

***Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52; 275 FCR 533**

(27 March 2020, Greenwood, Rares and Thawley JJ)

The appellants were the former directors of a financial services provider (Storm) which held an Australian Financial Services Licence (AFSL) enabling it to provide advice to retail investors. The former directors were found by the primary judge to have exercised 'an extraordinary degree of control' of Storm's affairs and governance including by causing Storm to give advice to 11 financially 'vulnerable investors' based on the Storm investment 'model' which utilised high levels of debt.

The primary judge found that a reasonable director in the position of the former directors, exercising the degree of care and diligence such a reasonable person would exercise in Storm's circumstances, would not have permitted the investment advice in issue to have been given to the 11 vulnerable investors. Thus, the former directors had contravened the care and diligence duty in section 180 of the *Corporations Act 2001* (Cth) (the Act). The primary judge found that any reasonable director in the position of the appellants would have known that if they did not take steps to prevent the giving of inappropriate advice, it was likely that Storm would contravene the Act with a foreseeable risk of harm to Storm due to a likely loss of its AFSL and other consequences.

The contraventions by the appellants had the effect of causing or permitting Storm to contravene sections 945A(1)(b) and (c), 912A(1)(a) and (c) of the Act.

The appellants contended that as they held *all* of the issued shares in Storm which was a solvent company when the advice was given and they owed their duties to Storm, Storm's 'interests' were coincidental with or predominantly informed by the wishes of the shareholders enabling the appellants to determine the level of risk to which Storm could properly be exposed given Storm's historical success. The majority of the Full Court, Greenwood J and Thawley J (in separate judgments), held that the primary judge did not err in finding contraventions

of section 180 by the former directors. The important aspect of the majority judgments is that liability arose directly under section 180 as a matter of conduct in contravention of the section rather than as a matter of accessorial liability for contraventions by Storm. The contravening conduct of the former directors ultimately gave rise to the contraventions by Storm. The majority judgments reject the contentions of the former directors of 'identicality of interest' with Storm as the *sole* shareholders in Storm. The majority judgments discuss the 'normative' character of section 180 of the Act and the concept and utility of the 'stepping stones' approach to liability under section 180.

In the minority judgment, Rares J, considered that, at the time Storm contravened section 945A of the Act, a reasonable director in the position of the appellants would not have perceived a risk requiring the director to act so as to prevent action being taken by the Regulator that would result in Storm's AFSL being cancelled and, as such, the appellants did not contravene their duties under section 180 of the Act.

Gageler and Keane JJ refused special leave to appeal on the papers..

***GetSwift Limited v Webb* [2021] FCAFC 26**

(5 March 2021, MIDDLETON, MCKERRACHER AND JAGOT JJ)

This appeal was from the decision of the primary judge to refuse to disqualify himself from hearing a class action proceeding in circumstances where the primary judge had heard a related proceeding commenced by the Australian Securities and Investments Commission (ASIC) which involved consideration of the same underlying facts (regulatory proceeding). In the class action proceeding it was claimed that the first appellant, Get Swift Ltd (Get Swift), and its managing director had engaged in misleading and deceptive conduct, and that Get Swift had failed to meet its continuous disclosure obligations. Relevantly: (a) the primary judge had not yet delivered judgment in the regulatory proceeding, (b) it was agreed that there were common issues in the two sets of proceedings, and (c) there was evidence in the regulatory proceeding relevant to the common issues which would not be before the primary judge in the class action proceeding.

By way of interlocutory application Get Swift moved for the primary judge to refer the class action proceeding to the registry to be reallocated to a different judge. Webb did not oppose Get Swift's application. The primary judge dismissed that application but granted leave to appeal from his decision. On appeal, ASIC intervened but sought an alternative form of relief to the effect that the primary judge should first deliver judgment in the regulatory proceeding which the parties could then consider to decide if they wished to pursue a disqualification application. The Court appointed a contradictor to assist the Court.

The appellants' grounds of appeal relevantly included that the primary judge erred in not disqualifying himself from hearing the class action proceeding by reason of the existence of a reasonable apprehension of bias. The appellants contended that in the circumstances of the two proceedings a fair-minded lay observer might reasonably apprehend that the primary judge might not bring an impartial mind to the resolution of the class action proceeding given that the primary judge had heard but not yet delivered judgment in the regulatory proceeding. It was common ground that it was highly likely that the issues in the two proceedings included common issues, and the evidence in the regulatory proceeding included evidence that would not be before the primary judge in the class action proceeding. It was contended that these circumstances gave rise to a reasonable apprehension of both the risk of pre-judgment and misuse of the additional evidence from the regulatory proceeding (referred to as the extraneous information ground).

The Full Court considered the critical question to be whether a reasonable observer might apprehend a risk that the primary judge might sub-consciously misuse the extraneous information from the regulatory proceeding in the class action proceeding. The Full Court noted there was no real dispute as to the applicable law, and restated that the test to be applied is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to determining the question before them. The Full Court made some observations on the knowledge attributable to the hypothetical observer for the purpose of the test, confirming that such knowledge includes that judges are taken to have the ability to disregard irrelevant and immaterial matters.

The Full Court had regard to the nature and extent of material to be considered by the primary judge in both proceedings, including the nature and extent of the extraneous information. The Full Court considered that this material could in no way be considered by a hypothetical observer as insignificant which the primary judge could easily put to one side or compartmentalise when hearing and determining each proceeding. The Full Court allowed the appeal, concluding that the hypothetical observer might reasonably apprehend the primary judge might be subconsciously influenced by the extraneous material from the regulatory proceeding if he were to hear and determine the class action proceeding. In so finding, the Full Court noted that the primary judge's decision not to disqualify himself was selflessly motivated by a desire to achieve case management efficiency. The Full Court considered the contradictor's submission that sufficient legal protections such as a judge's obligation to accord procedural fairness and the duty to give reasons for a decision guarded against the risk of a reasonable apprehension of bias in concurrent trials, but held that such protections were not sufficient to avoid the risk of a reasonable apprehension of bias, or the risk of parties being left with the cost and inconvenience of instituting an appeal to cure what would otherwise be an avoidable error.

The appeal was allowed by the Full Court, and an order was made that the class action proceeding be referred to the National Operations Registrar to be reallocated to a different judge.

Commercial and Corporations NPA | Economic Regulator, Competition and Access sub-area

***Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145; 382 ALR 331**

(24 August 2020 Allsop CJ, Beach and Colvin JJ)

The Port of Newcastle (the Port) is the largest coal exporting port in the world and enables yearly overall trade of 164 million tonnes of cargo worth approximately AU$26 billion. In 2014 the operation of the Port was privatised and sold to the Port of Newcastle Operation (PNO). As the only commercially viable means of exporting coal from the Hunter Valley, the shipping channels of the Port are a natural 'bottleneck' monopoly. Glencore and PNO disagreed regarding the terms and conditions of access to the shipping channels, a declared service under the *Competition and Consumer Act 2010* (the Act). The dispute was the subject of arbitration by the Australian Competition and Consumer Commission (ACCC) and of re-arbitration by the respondent (Tribunal). Both Glencore and the ACCC bought applications for review of the Tribunal's decision.

In the re-arbitration the Tribunal agreed with the submissions of PNO regarding the scope of the determination and the access price. As to the scope, the Tribunal found that the determination only applied when Glencore owned or chartered the ship that entered the Port precinct through the shipping channels and loaded Glencore coal. The Tribunal went on to calculate the access price without regard to previous user contributions (some AU$912 million) to develop the infrastructure of the Port, on the basis that such contributions could not be relevant to what an appropriate level of efficient costs would be under the methodology used. The access price for the service the Tribunal decided upon was $1.0058 per vessel gross tonnage, while the ACCC had set $0.6075 per gross tonnage.

In particular, the Tribunal was obliged to take into account the present value to PNO of extensions being borne by others by reason of past user contributions (s 44X(1)(e)). In circumstances where some costs were being borne by others, the user contributions were not irrelevant in meeting the concept of efficient costs (s 44ZZCA(a)(i)). Further, the Tribunal was required to determine an appropriate return on investment after evaluating the relevant risks, which included consideration of the concept of economic efficiency (s 44ZZCA(a)(ii)).

The applications for review raised two issues concerning the re-arbitration. The first issue concerned the scope of the declaration and the extent to which Glencore was a party seeking access to the service. The second issue concerned the manner in which the Tribunal had calculated the price to be paid by Glencore for the service, and the relevance of past contributions by users of the Port facilities in reaching the price terms within the determination. The Full Court also considered whether the ACCC's application should be entertained and what the appropriate relief was if an error of law was demonstrated.

The Full Court found that the proper construction of the terms of the determination of the service was wider than simply governing physical access or use by the control and navigation of a vessel in the shipping channels of the Port. The specific contractual arrangements of who controlled the vessel while in the shipping lanes did not affect the conclusion that an exporter, by its sales agreement, relevantly caused a vessel to enter the Port. The Full Court found that Tribunal was in legal error when it confined the terms of the determination to instances where Glencore was the party in control of the ship. That finding was set aside and remitted to the Tribunal, which the Full Court noted was responsible for fashioning the scope of the terms.

The Full Court also found that the Tribunal erred in law by failing to have regard to the user contributions on the basis that such contributions could not be relevant to the determination of an appropriate level of efficient costs. Past user contributions should have been deducted from the asset base upon which the relevant charge for the service was calculated. This was required under various provisions of the Act and so not doing so was an error of law by the Tribunal.

As to the involvement of the ACCC in separate proceedings, the Full Court found that it was inconsistent with the statutory scheme for the ACCC to be arguing for the correctness of its own view in its own proceeding against the Tribunal. Accordingly, its application was dismissed.

The Full Court allowed Glencore's application and the matter was remitted to the Tribunal to determine the questions of scope, user contribution and any consequences for the access price arising from a determination of the user contribution issue.

An appeal is currently pending in the High Court of Australia, special leave having been granted on 12 March 2021.

Commercial and Corporations NPA | Regulator and Consumer Protection sub-area

Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission **[2021] FCAFC 49**

(9 April 2021, Wigney, Beach, and O'Bryan JJ)

The Full Court found that the record AU$125 million penalty set by the primary judge against the appellant (Volkswagen) for having made false or misleading representations on multiple occasions with regard to the compliance of their vehicles with Australian diesel emissions standards was not manifestly excessive.

Volkswagen admitted that over the period of 2011–2015 it had engaged in a course of conduct involving deliberate and dishonest deception regarding the exhaust emissions of certain Volkswagen-branded motor vehicles. Volkswagen had developed software known as 'two mode software' which allowed their vehicles to operate in a mode which minimised nitrogen oxide emissions during a standard test and in a second mode which was activated any other time the vehicles were driven and resulted in higher nitrogen oxide emissions. Volkswagen submitted documents to obtain approvals to import or supply over 57,000 vehicles as well as for their vehicles to be published on a 'Green Vehicle Guide' website on the basis of these false test results. In 2015, the two mode software was discovered by the Environmental Protection Agency in the United States of America resulting in a worldwide scandal for Volkswagen.

The Australian Competition and Consumer Commission (ACCC) brought the primary proceeding in 2016, following five representative proceedings having been commenced against Volkswagen and its subsidiaries. A joint first stage hearing of separate questions relevant to the ACCC proceeding and the representative proceedings was heard by the primary judge over 13 days in 2018. Two weeks before the longer second stage hearing was scheduled to begin, the ACCC and Volkswagen came to a settlement, and jointly submitted to the primary judge that a penalty of AU$75 million was appropriate. The primary judge found that the penalty proposed was 'manifestly inadequate' and imposed the

AU$125 million penalty, which was almost five times higher than any penalty previously imposed for a contravention of the Australian Consumer Law (ACL). The potential maximum aggregate penalty in the case was at least AU$500 million. The primary judge reasoned that the contraventions were an example of particularly egregious consumer fraud and that the agreed penalty reflected an 'overly pragmatic approach' on the behalf of the ACCC. Volkswagen appealed on seven grounds against the primary judge's decision, with support from the ACCC although not as to all of the contentions raised. An amicus curiae was appointed by the Full Court as a contradictor.

The Full Court dismissed all of the grounds of appeal. The Full Court agreed with Volkswagen that the primary judge had erred in not considering whether Volkswagen's absence of prior contraventions under the ACL was capable of constituting a mitigating factor. The primary judge only had regard to that fact in the limited sense of it amounting to the absence of an aggravating feature, where neither party had submitted that the absence of prior contraventions was a mitigating circumstance. However, the Full Court found that the absence of prior contraventions was not a material consideration in all the circumstances in any event and so did not warrant appellate intervention. Otherwise, the Full Court found that the primary judge was not shown to have acted upon any wrong principle, or to have taken into account any extraneous or irrelevant matters, or to have failed to take into account any material matters. The penalty imposed was not shown to be manifestly excessive, the Full Court not being persuaded that any penalty below that imposed by the primary judge would have been appropriate in the circumstances.

An application for special leave to appeal is currently pending in the High Court of Australia.

Commercial and Corporations NPA | General and Personal Insolvency sub-area

***Dimitriou v Pineview Property Holdings Pty Ltd* [2020] FCAFC 218**

(8 December 2020, MARKOVIC, ANASTASSIOU AND STEWART JJ)

The appellant in this matter, Mr Dimitriou, and the respondent, Pineview Property Holdings Pty Ltd (Pineview), were both defendants in proceedings commenced in the Equity Division of the New South Wales Supreme Court (NSWSC proceedings). The NSWSC proceedings were commenced by two individuals against Mr Dimitriou, Pineview and a number of other defendants, relevantly including the Australia and New Zealand Bank (ANZ), and concerned a property refinancing arrangement administered by Mr Dimitriou.

The plaintiffs, the ANZ, and another party entered into an agreement to settle the NSWSC proceedings prior to trial, and the trial judge in those proceedings ultimately upheld cross claims by Pineview and its director against Mr Dimitriou, making findings adverse to Mr Dimitriou, inter alia, that his conduct was unconscionable and fraudulent. Judgment was entered for Pineview and its director against Mr Dimitriou, and various orders were made concerning Mr Dimitrio's liability to indemnify Pineview and its director, and that Mr Dimitriou pay to Pineview and its director over $1.8 million in costs and damages plus interest. Mr Dimitriou failed to pay the judgment debt. After the judgment on liability was entered in the NSWSC proceedings, all parties to those proceedings, except Mr Dimitriou, entered into a deed of release (DOR) to settle those proceedings.

Mr Dimitriou failed to comply with a bankruptcy notice issued to him by Pineview in April 2018, and in July 2018 Pineview filed a creditor's petition in the Federal Court seeking a sequestration order. At first instance an issue arose concerning production by the respondent of the DOR, which Mr Dimitriou sought to rely upon in his claim that indemnities given by him were rendered inoperative because the primary liability to the ANZ was extinguished when the DOR was executed.

Before the primary judge, counsel for Pineview gave an assurance that the DOR did not exist, resulting in Mr Dimitriou abandoning attempts to obtain a copy of the DOR. Mr Dimitriou was successful in obtaining an unexecuted copy of the DOR from one of the plaintiffs in the NSWSC proceedings, and successfully applied for leave to reopen the first instance proceedings. Mr Dimitriou obtained an executed copy of the DOR after judgment had been reserved in the primary proceedings. In the primary proceedings judgment was entered in favour of Pineview, and a sequestration order was made against the estate of Mr Dimitriou.

On appeal Mr Dimitriou relied on two grounds of appeal (seeking leave to rely on a third) to the effect that he owed no debt to Pineview for the purpose of section 52 of the *Bankruptcy Act 1966* because the judgment debt was a contingent liability to indemnify Pineview for its indebtedness to the ANZ, and upon execution of the DOR such liabilities between the NSWSC proceedings plaintiffs, the ANZ and Pineview had resolved. The Full Court rejected this contention on the basis that the debt was not contingent upon any obligation to indemnify Pineview against its liability to the ANZ. Rather, the judgment debt, being damages payable to Pineview, was the subject of a separate and distinct order to that of the declaration that Mr Dimitriou indemnify Pineview.

Mr Dimitriou's contention that the primary judge should have been satisfied that there was some 'other sufficient cause' for a sequestration order not to be made was rejected by the Full Court on the basis that the DOR had no bearing on Mr Dimitriou's indebtedness, and by extension, the DOR would have no bearing on Pineview calling for payment of that debt, thus the Full Court could not be satisfied the DOR constituted a sufficient reason for a sequestration order not to be made.

The Full Court dismissed the appeal, but concluded that the DOR ought to have been produced by Pineview in the primary proceedings, despite it being of no relevance to whether Mr Dimitriou owed a debt to Pineview. The Full Court noted that considerable time had been spent, both in the primary and appeal proceedings, contesting the existence of the DOR and its admissibility, with Pineview ultimately making a concession in the appeal proceedings that leave to tender the document was no longer opposed. The Full Court remarked that Pineview's conduct in relation to the DOR was inconsistent with a party's duty to conduct the proceedings upon the real issues in contest, and on that basis Pineview was to bear its own costs in the appeal proceedings.

Native Title NPA

***Roberts on behalf of the Widjabul Wia-Bal People v Attorney-General of New South Wales* [2020] FCAFC 103**

(17 June 2020, REEVES, MURPHY AND GRIFFITHS JJ)

This matter concerns section 47B of the *Native Title Act 1993* (the Act), which provides exceptions to the principle that extinguishment of native title rights and interests is permanent. The appellants filed a native title determination application on 24 June 2013 claiming native title rights and interests over an area of land located in northern New South Wales, east of Casino. Within the claim area existed five identifiable areas of land. Four of the five areas of land were the subject of an appeal considered by the Full Court. Those areas are identified as Areas 572, 115, 460 and 624. Area 572 is covered by a reservation from sale, and 115 is covered by a reservation from sale and lease, both reservations being for public purposes. Areas 460 and 624 are each covered by a reservation and a permissive occupancy licence for grazing. Separate questions in relation to the Ares of land were determined by the primary judge, namely whether section 47B of the Act is excluded in relation to those Areas by reason of section 47B(1)(b)(ii) of the Act. The primary judge determined the separate questions in favour of the respondents.

On appeal the appellants contended that the primary judge erred in the construction of section 47B(1)(b)(ii) of the Act, arguing that the phrase 'is to be used' should be construed as 'is *required* to be used'. The effect of the appellants' contention being that no such 'reservation, proclamation, dedication, condition, permission or authority' existed that attracted the operation of section 47B(1)(b)(ii).

The Full Court questioned whether the use of the separate question procedure to determine the issues in dispute between the parties was appropriate, or whether the parties were instead seeking advisory opinions from the Court. Subsequent to judgment being reserved, the Full Court requested the parties provide further submissions concerning factual issues that remained uncertain giving rise to the concern about the use of the separate question procedure. The Full Court requested that the parties address a number of factual issues around the extinguishment of native title rights in the land Areas, creation of prior interests bringing about any extinguishment of native title rights, and the occupation of members of the native title claim group with respect to the Areas. The parties submitted a joint note in response to the Full Court's request (Joint Note), which contained a number of additional agreed facts and other matters, which relevantly included that instruments concerning the Areas had extinguished exclusive native title rights, and created a prior interest in those Areas, but reserving each parties' position in relation to non-exclusive native title rights to be determined at a future trial.

The Full Court found that, whilst stating a 'prior interest' had been created in each of the Areas, the parties had failed to identify or explain what that 'prior interest' was that would extinguish native title rights by reference to the relevant applicable statutory provisions upon which the purportedly extinguishing acts were occasioned. The Full Court considered the legislative provisions pursuant to which the instruments said to extinguish native title rights were executed, and stated that because of the general terms in which the provisions were expressed, and because the provisions appeared to have no immediate effect, it was not clear that any native title rights had in fact been extinguished. The Full Court considered it was unlikely native title was extinguished in relation to two of the four Areas, and that no factual foundation existed upon which the Court could confidently say that native title rights had been extinguished in relation to the other two Areas of land.

The Full Court considered that the separate question procedure was inappropriate to be used in the circumstances because a consideration of the exception under s 47B(1)(b)(ii) was hypothetical if no extinguishment of native title in any of the four Areas had occurred, meaning that there would be no extinguishment to be disregarded under s 47B(2). Further, the Full Court found that even if a factual basis existed upon which the dispute concerning the proper construction of section 47B(1)(b)(ii) could be properly considered, such a dispute was minor in comparison to the extensive issues concerning the holding of native title rights, full or partial extinguishment of any rights, and connection, remaining unresolved in the proceeding.

The Full Court considered the authorities relied upon in support of the parties' contention that the separate question procedure was appropriate, and found that none of those cases supported the parties' contention as to the appropriate use of the procedure. The Full Court emphasised that the separate question procedure in native title litigation does have utility, however the procedure is most appropriately employed at a point in the proceeding when issues of whether native title exists in a claim area, and the nature of those rights, are settled, prior to any issues of extinguishment being heard and determined.

The Full Court dismissed the appeal, and set aside the primary judge's answers to the separate questions.

Other Federal Jurisdiction NPA | Defamation

Leyonhjelm v Hanson-Young **[2021] FCAFC 22**

(3 March 2021, RARES, WIGNEY and ABRAHAM JJ)

The appellant is a former senator, and the respondent is a current senator in the Australian Parliament. In the course of a debate, in June 2018 the appellant said to the respondent 'you should stop shagging men, Sarah'. The appellant claimed that he made that comment in response to comments made by the respondent that were 'tantamount to a claim that all men are responsible for sexual assault or that all men are rapists'. The respondent commenced proceedings against the appellant claiming that he had made or published four statements

subsequent to the debate in Parliament in June that were defamatory of the respondent. The primary judge found that the statements or publications did convey imputations defamatory of the respondent, rejected the appellant's defences of justification and qualified privilege, and awarded the respondent damages for non-economic loss.

The appellant challenged the primary judge's decision on seven grounds, which broadly fell into two categories, namely the application of section 16(3) of the *Parliamentary Privileges Act 1987* (the PP Act), and the defence of qualified privilege.

The first two grounds of appeal concerned parliamentary privilege. Under section 16(3) of the PP Act, no evidence can be 'tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament' in a court or tribunal for the purposes identified in that provision. The appellant's grounds of appeal claiming that the primary judge erred by receiving evidence in the primary proceeding relating to what the respondent purportedly said during the Parliamentary debate were rejected by all the members of the Full Court on the basis that the appellant could not identify any evidence or submissions which were used in the primary proceeding for any purpose prohibited under section 16(3) of the PP Act.

The Full Court majority dismissed the grounds advanced by the appellant challenging the primary judge's consideration and findings in relation the appellant's qualified privilege defence. The appellant's contention that it was not open to the primary judge to make a finding that the appellant acted unreasonably in publishing the impugned statements concerning the respondent was rejected by the Full Court. The Full Court majority concluded that the primary judge's finding that the appellant was actuated by malice in publishing the statements was open on the evidence at first instance, and that the appellant's qualified privilege claims failed because the preconditions to raising that defence required under section 30(3) of the *Defamation Act 1974* (the Act) were not satisfied.

The Full Court majority found that none of the appellant's grounds of appeal were made out, and the appeal was dismissed.

The Full Court minority found that the appellant's grounds of appeal concerning qualified privilege were made out under section 30(1) of the Act. The Full Court minority found that the appellant's conduct in not making further inquiries as to the correctness of his honest belief about the respondent's comments made in Parliament was not unreasonable, and that his comments were published on an occasion of qualified privilege. The Full Court minority further found that the appellant's qualified privilege claim was made out because the appellant was not actuated by malice in publishing the statements.

An application for special leave to appeal to the High Court of Australia was dismissed.

Federal Crime and Related Proceedings NPA

***Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Ltd* [2021] FCA 511**

(14 May 2021, White J)

Following an investigation by the Australian Competition and Consumer Commission (ACCC), the prosecutor (CDPP) charged ANZ, Deutsche Bank and Citigroup along with six individual employees of one or another of these entities (the accused) with having participated in criminal cartel conduct. The alleged conduct arose from an institutional share placement undertaken by ANZ for which JPMorgan, Deutsche Bank and Citigroup were the joint lead managers and underwriters. It is alleged that an understanding to limit the supply of the ANZ shares received as underwriters and to control the price of those shares was reached. As part of an internal investigation regarding the share placement JPMorgan's legal representatives prepared notes of interviews with employees and outlines of evidence. Subsequently JPMorgan self-reported the share placement transactions to the ACCC. On the basis of this reporting JPMorgan was granted conditional and derivative immunity from civil and criminal prosecution, subject to it agreeing to continue to provide full, frank and truthful disclosure and cooperation to the ACCC. During later meetings between the CDPP and JPMorgan's legal representatives, parts of the witnesses' outlines of evidence were read out to address concerns regarding the consistency of evidence which had been provided. JPMorgan

submitted that it had been effectively compelled to disclose these parts of the evidence by the CDPP's insistence, so as not to jeopardise the conditional immunity.

The CDPP served subpoenas on JPMorgan requiring production of the notes of interviews and outlines of evidence from the internal investigation. JPMorgan objected to the production of all but 13 (of which portions were redacted) of the 147 documents answering the subpoena on the basis of legal professional privilege.

The principle issues to be determined by the Court were whether the documents had been prepared for a privileged purpose and whether the subsequent conduct of JPMorgan had waived any privilege which existed.

Justice White accepted the evidence of a JPMorgan employee that the documents were prepared for the purpose of obtaining legal advice. On the waiver point Justice White disagreed that JPMorgan had been compelled to make the partial disclosures, finding it did so voluntarily in pursuit of its commercial and strategic interests. Further JPMorgan was aware that the CDPP would not be maintaining the confidentiality of the partial disclosures. Justice White found that the subject matter of the partial disclosures was similar to the undisclosed matters and that, without full disclosure of the documents, the perceptions of the disclosed material were likely to be incomplete and inaccurate. In those circumstances there was an inconsistency in the conduct of JPMorgan making the partial disclosures and the maintenance of legal professional privilege.

Accordingly the main category of objection underlying most redacted portions of the subpoenaed documents was overruled and the CDPP and accused were granted leave to inspect those portions of the documents.

The matter is listed for a trial by jury before Justice Wigney from April – September 2022.