Appendix 7: Decisions of interest

Administrative and Constitutional Law and Human Rights NPA

Minister for the Environment v Sharma [2022] FCAFC 35

(15 March 2022, Allsop CJ, Beach and Wheelahan JJ)

This appeal concerns the orders made by the primary judge declaring that the Commonwealth Minister for the Environment owed a duty of care at common law when considering and approving an extension of a coal mine in New South Wales. The duty required the Minister to take reasonable care to avoid causing personal injury or death to all people in Australia under 18 years of age at the time of the commencement of the proceeding arising from the emissions of carbon dioxide into the Earth's atmosphere from the combustion of the coal to be mined in the extension of the mine.

The Full Court was unanimous in the view that the duty of care should not be imposed upon the Minister. The three judgments of the Court had different emphases as to why this conclusion should be reached.

The Chief Justice found that the duty should not be imposed for a number of reasons. First, the matter was unsuitable for judicial determination given it dealt with core questions of government policy. Secondly, the imposition of the duty of care as found by the primary judge would be incoherent and inconsistent with the relevant statutory and governmental frameworks in question. Thirdly, the lack of control over the harm (as distinct from over the tiny contribution to the overall risk of damage from climate change), a lack of special vulnerability in the legal sense, the indeterminacy of liability and the lack of proportionality between the tiny increase in risk and lack of control and liability for all damage by heatwaves, bushfires and rising sea levels to all Australians under the age of 18, ongoing into the future, meant that the duty in tort should not be imposed.

Justice Beach emphasised two factors in support of the conclusion that the duty should not be imposed. First, there was not sufficient closeness and directness between the Minister's exercise of statutory power and the likely risk of harm to the respondents and the class that they represent. Secondly, to impose a duty would result in indeterminate liability. As for the other matters argued by the Minister, in his Honour's view none of them individually or collectively warranted not recognising the duty found by the primary judge.

Justice Wheelahan held the view that no duty of care arose for three main reasons. First, there is no relationship between the Minister, and the respondents and those whom they represent, that supports the recognition of a duty of care. Secondly, it would not be feasible to establish an appropriate standard of care, with the consequence that there would be incoherence between the suggested duty and the discharge of the Minister's statutory functions. Thirdly, it was not reasonably foreseeable that the approval of the extension to the coal mine would be a cause of personal injury to the respondents or those whom they represent, as the concept of causation is understood for the purposes of the common law tort of negligence.

Darnell v Stonehealth Pty Ltd [2022] FCAFC 76

(11 May 2022, Markovic, Thomas and Stewart JJ)

In this case, the Full Court considered when a supermarket business came into existence and drew a distinction between the primary business of a store and its primary activities on a particular day.

The issue arose in the context of an application for approval to supply pharmaceutical benefits scheme (PBS) medicines. In order to obtain approval, a pharmacy was required to be a certain distance away from the nearest PBS approved pharmacy and within a certain distance from a 'supermarket', defined as 'a retail store the primary business of which is the sale of a range of food, beverages, groceries and other domestic goods'.

Stonehealth leased a premises from Coles at the Flagstone Village Shopping Centre, and applied to supply PBS medicines from that premises at around midnight on 20 March 2020. Mr Darnell, the proprietor of a nearby non-PBS approved pharmacy, applied for approval on the following day. The Australian Community Pharmacy Authority dealt with the applications in the order received. It recommended that the Stonehealth

application be approved and the approval was granted by the Secretary, Department of Health. Mr Darnell appealed to the Full Court after unsuccessfully seeking judicial review of the Authority's recommendation and the Secretary's approval.

Mr Darnell claimed there was no 'supermarket', as defined, on 20 March 2020. In preparation for its advertised 'grand opening' on 21 March 2020, the Coles at the Flagstone Village Shopping Centre opened its doors for a period of two hours on the evening prior. The Full Court found that the Coles was operating a supermarket and had 'commenced trading' from 20 March 2020, even if its primary activities on that day were preparatory in nature. There was no requirement for the primary activity on a particular day to be the sale of goods. The role played by 'primary' in the definition of 'supermarket' was only to identify the primary business of the retail store in question, namely selling groceries as opposed to selling other goods or providing services.

Mr Darnell also claimed the decision of the Authority was affected by materially false or misleading information, including a letter linking the early opening of the supermarket to the COVID-19 pandemic. Mr Darnell claimed the early opening was a sham to assist Stonehealth. The Full Court did not agree that the findings of the primary judge in relation to the reasons for the early opening of the supermarket were 'glaringly improbable'. The Full Court found that Coles was prepared to assist Stonehealth by working towards an early opening, but that this did not 'cross the line'. The evidence before the primary judge established that the supermarket was open to the public and that members of the public took advantage of that, entered the store and purchased groceries.

Mr Darnell claimed that the Authority was not entitled to take into account an unsolicited letter received from Coles after the application date. The Full Court found no error in the primary judge's conclusion that the Authority was permitted to consider the letter because Coles acted at the request of Stonehealth, but not as its agent.

The Full Court dismissed Mr Darnell's appeal with costs.

Administrative and Constitutional Law and Human Rights NPA | Migration

Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20 [2021] FCAFC 76

(9 November 2021, Allsop CJ, Kenny Besanko, Kerr and Charlesworth JJ)

In these proceedings, heard together, the Full Court considered two decisions involving the cancellation or refusal of a visa on character grounds under section 501A(2) of the *Migration Act* (the Act).

In the first matter, an appeal from a single judge, the Acting Minister determined that CWY20 did not pass the character test, concluding that it was in the national interest to refuse him a bridging visa having regard to the seriousness of his criminal conduct and risk of re-offending.

The second matter comprises two grounds of an application for judicial review filed in the Court's original jurisdiction, determined as separate questions by the Full Court. After QJMV was found guilty of criminal charges, the Minister determined that he did not pass the character test and it was in the national interest to cancel his protection visa.

Both CWY20 and QJMV had previously been assessed as being owed protection obligations, and it was accepted that their removal to Afghanistan would breach Australia's non-refoulement obligations under international law. In similarly structured decisions, the Acting Minister and the Minister referred to these non-refoulement obligations as a 'countervailing consideration' outweighed by national interest considerations favouring refusal or cancellation.

The Full Court unanimously found that the Minister retained a residual discretion under section 501A(2) to refuse or cancel a visa once he was satisfied as to the criteria in section 501A(2)(c), (d) and (e) of the Act. In these decisions, the Minister and Acting Minister were found to have erred by deferring consideration of non-refoulement obligations to the final, discretionary stage of the decision making process. The Full Court determined that the Minister and Acting Minister did not give active consideration to the significance of a breach of Australia's non-refoulement obligations under international law as part of the national interest criteria under section 501A(2)(e) of the Act.

Justice Besanko (with whom Allsop CJ, Kenny, Kerr and Charlesworth JJ agreed) determined that the primary judge was correct to reject the Acting Minister's submission that it should be inferred from the statement of reasons that he turned his mind to Australia's non-refoulement obligations, but had concluded that it was not material to the assessment of 'national interest'.

Justice Besanko considered that, while not a mandatory relevant consideration in every case, a failure to consider Australia's non-refoulement obligations in relation to 'national interest' under section 501A(2)(e) could amount to jurisdictional error where the Minister may not have reached a state of satisfaction as to the 'national interest' reasonably, and where there was at least a possibility that the Minister may have given different weight to the national interest had this been taken into account.

Chief Justice Allsop also considered Australia's non-refoulement obligations in the context of international law, noting that the violation of international law is intrinsically and inherently a matter of national interest, and therefore within the subject of evaluation.

The Court dismissed the Acting Minister's appeal in CWY20, and found that the Minister's cancellation of QJMV's visa was affected by jurisdictional error.

Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 3

(16 January 2022, Allsop CJ, Besanko and O'Callaghan JJ)

Mr Djokovic is a Serbian citizen and one of the world's top ranked men's tennis players. Mr Djokovic arrived in Australia on 5 January 2022 to compete in the Australian Open Tennis Championship. His visa was cancelled upon arrival by a delegate of the Minister for Home Affairs, when it came to light that Mr Djokovic was not vaccinated against COVID-19 and had recently tested positive. Section 116 of the *Migration Act* 1958 (the Act) allows the Minister or their delegate to cancel a visa if they are satisfied that the presence of the visa holder in Australia is or may be a risk to the health, safety or good order of the Australian community or a segment of it.

Mr Djokovic immediately challenged the cancellation of his visa in the Federal Circuit and Family Court of Australia. On 10 January 2022, counsel for the Minister of Home Affairs conceded that the process adopted by her delegate denied Mr Djokovic procedural fairness (synonymous with 'natural justice' as used in the Act). The visa cancellation decision was subsequently quashed.

After the hearing, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (the Minister) indicated to Mr Djokovic's legal advisors that he would be considering whether to exercise his personal power of cancellation pursuant to section 133C(3) of the Act. Under section 133C(3), the Minister may cancel a visa if he is satisfied that a ground for cancelling the visa under section 116 exists *and* that it would be in the public interest to do so. A cancellation made by the Minister personally is not subject to the rules of procedural fairness. On 14 January 2022, the Minister cancelled Mr Djokovic's visa relying on section 133C(3).

Mr Djokovic sought a review of the Minister's decision in the Federal Circuit and Family Court of Australia. The proceedings were then transferred to the Federal Court of Australia and on 16 January 2022, the Full Court heard Mr Djokovic's application.

Mr Djokovic contended that the Minister exercised his discretion unreasonably and failed to consider whether cancelling his visa may itself foster anti-vaccination sentiment in Australia. Mr Djokovic asserted he posed a negligible COVID-19 risk to others, had a medical reason for not being vaccinated, and had entered Australia lawfully and consistently with Australian Technical Advisory Group on Immunisation (ATAGI) documents. There was no basis for the Minister to find that Mr Djokovic's presence in Australia is or may be a risk to the health or good order of the Australian community, nor was it open to the Minister to conclude that Mr Djokovic had a well-known anti-vaccination stance.

The Full Court unanimously rejected Mr Djokovic's arguments.

The Full Court assessed whether the Minister exercised his discretionary power in accordance with the concept of legal reasonableness. It ruled that the Minister's finding that Mr Djokovic posed a risk to the health, safety and good order of the

Australian community was not irrational, illogical or based on findings or inferences of fact not supported by logical grounds.

Mr Djokovic had recently ignored public health measures overseas by attending activities unmasked while COVID positive to his knowledge. There had been rallies and protests by anti-vaccination groups when Mr Djokovic's visa was cancelled. It was open to the Minister to infer that Mr Djokovic's presence in Australia may encourage (1) an attitude of breaching public health regulations; and (2) anti-vaccination sentiment; particularly amongst the young, the impressionable, and those who remain hesitant about receiving vaccinations. Both scenarios could lead to heightened community transmission and increased pressure on the Australian health system. No evidence was needed to establish Mr Djokovic's ability as a world tennis champion to influence a broad demographic: this inference could be drawn from common sense and human experience. Further, it was not necessary for the Minister to consider the consequences of Mr Djokovic's removal from or absence in Australia. Section 116 only requires the Minister to examine the risks that may arise from the presence of Mr Djokovic in Australia.

The Full Court dismissed Mr Djokovic's appeal with costs.

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

*Star Entertainment Group Limited v Chubb Insurance Australia Ltd [*2022] FCAFC 16

LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17

(21 February 2022, Moshinsky, Derrington and Colvin JJ)

The Full Court handed down judgment in six appeals that raised issues concerning business interruption insurance policies and the COVID-19 pandemic.

In the first appeal, companies in the Star Entertainment Group appealed from a decision that they were not entitled to indemnity under an insurance policy for loss from business interruption caused by COVID-19 restrictions. The Full Court dismissed the appeal. The policy in question included separate provisions dealing with disease and with catastrophes. There was an exclusion for COVID-19 in the provision dealing with disease, so the appellants relied on the provision dealing with catastrophes. The Full Court found that the scope of the more generally expressed provision dealing with catastrophes had to be read down so as to avoid inconsistency with the more specific provision dealing with disease.

The Full Court emphasised the importance of reading the policy as a whole to avoid incoherence or incongruence in the policy's operation.

The other five appeals related to ten test cases concerning the application and operation of policies of insurance for business interruption or interference in the context of the effects of COVID-19, including government actions to control its spread. The Full Court agreed with the conclusions of the primary judge that the insuring clauses did not apply in all but one of the cases under consideration (the Meridian Travel case).

Some of the specific provisions dealing with disease did not exclude COVID-19, a 'listed human disease' under the *Biosecurity Act 2015*, because they still referred to 'quarantinable diseases' under a repealed Commonwealth Act, the *Quarantine Act 1908*. The relevant insurers sought to rely on section 61A of the *Property Law Act 1958* (Vic), which provides that where an Act is repealed and re-enacted, any reference to the repealed Act is to be construed as a reference to the re-enacted Act. The Full Court agreed with the primary judge that this provision applied to Acts of the Victorian rather than the Commonwealth Parliament and that, in any event, the *Biosecurity Act 2015* was not a re-enactment with modification of the *Quarantine Act 1908*.

In relation to certain policies, the Full Court agreed with the primary judge that the policies would not apply where cover was contingent on restrictions being imposed 'as a result of' an outbreak of COVID-19 within a specified radius. This is because the relevant restrictions were imposed as a result of the threat to the health of all persons from COVID-19, not because of any particular outbreak.

The policy in the Meridian Travel case covered losses caused by an outbreak of COVID-19 within a specified radius and the insurer conceded that

there had been such an outbreak. The primary judge found, and the Full Court agreed, that Meridian Travel should have the opportunity to try to prove the proximate cause of its losses.

The Full Court came to a different view to the primary judge with respect to certain subsidiary issues and so amended the primary judge's answers to certain of the questions posed by the parties.

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

Crowley v Worley Limited [2022] FCAFC 33

(11 March 2022, Perram, Jagot and Murphy JJ)

In August 2013, Worley announced earnings of $322 million for the 2013 financial year and 'a solid foundation to deliver increased earnings' in the 2014 financial year (FY14). Mr Crowley purchased shares in Worley in October 2013. The following month, Worley's share price suffered a significant fall after Worley announced reduced earnings guidance for FY14.

Mr Crowley commenced a shareholder class action on his own behalf and on behalf of other persons who purchased Worley shares between August and November 2013, alleging that Worley engaged in misleading and deceptive conduct by representing that it expected to achieve net profit after tax in excess of $322 million in FY14 and that it had reasonable grounds to so expect. It was also claimed that Worley contravened its continuous disclosure obligations and the Australian Stock Exchange (ASX) Listing Rules by not notifying the ASX that it did not have a reasonable basis for providing the FY14 earnings guidance and/or that its FY14 earnings were likely to fall materially short of the consensus expectation.

The primary judge found that Mr Crowley's case failed. The primary judge was not satisfied that Worley's FY14 budget, which supported the FY14 earnings guidance, lacked reasonable grounds when it was approved by the board, that the position changed in September or October 2013, or that Worley knew or ought to have known that its FY14 earnings would fall materially short of any consensus expectation.

The Full Court allowed Mr Crowley's appeal and remitted the matter to a single judge for further consideration, in the context of the evidence as a whole.

Jagot and Murphy JJ, with whose reasons Perram J also agreed, found that the primary judge's process of reasoning miscarried. In relation to misleading and deceptive conduct, it was Worley's case that the FY14 budget process and FY14 budget provided it with reasonable grounds to make the FY14 earnings guidance statement. Mr Crowley contended that the FY14 budget was unrealistic and unreasonable. The primary judge erred in considering the issue of reasonable grounds by reference to the reasonableness and diligence of the board. The relevant representation was made by Worley, not by its board, so the relevant issue was whether Worley had reasonable grounds for making that representation.

It could not be safely concluded that the primary judge would have reached the same conclusions as to whether Worley, the representor, had reasonable grounds for making the representation, because that question had to be answered by reference to the knowledge properly attributable to Worley according to orthodox principles, which included at least the knowledge of the CFO, Mr Holt.

In relation to continuous disclosure and the ASX listing rules, the Full Court found that it is not only opinions actually held or possessed by the company that required disclosure. The Full Court found that a company would also be 'aware' of an opinion which it ought reasonably to have formed on the basis of information of which its officers ought reasonably to have been aware.

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

McMillan v Warner (Trustee) [2022] FCAFC 20

(23 February 2022, Logan, Farrell and Halley JJ)

A sequestration order was made against the bankrupt estate of Mr McMillan in November 2018 and Mr Warner was appointed as trustee over Mr McMillan's bankrupt estate (Trustee).

The Trustee claimed that the transfer in 2002 of Mr McMillan's interest in a property in Strathfield, New South Wales to his wife, the appellant, was void as an undervalued transaction or as a transaction to defeat creditors. The year prior, Mr McMillan had decided to operate a car dealership in addition to his existing prestige car repair business.

The primary judge found that the transfer was void as a transaction to defeat creditors. The Full Court allowed the appeal and, in lieu of the orders made by the primary judge, ordered that the Trustee's claim be dismissed.

The Full Court concluded that the primary judge erred in drawing an inference, from all the relevant circumstances, that the main purpose of Mr McMillan in making the transfer was to prevent the Strathfield property from becoming divisible among his creditors, or was to hinder or delay the process of making that property available among his creditors

The Full Court found that an inference that the main purpose of a bankrupt in making a transfer of property was to defeat his or her creditors must be a reasonable and definite inference, not merely one of a number of conflicting inferences with equal degree of probability.

As the primary judge rejected Mr McMillan's explanation for the transfer, the question of Mr McMillan's purpose for making the transfer was an objective enquiry to be determined by drawing inferences from factual findings.

The Full Court found there was insufficient foundation for the drawing of a reasonable and definite inference of Mr McMillan's main purpose. There were several reasons for the Full Court's conclusion, including that an equally compelling inference was available as to a different purpose, and that the creditor most affected by the transfer had not sought any security over the property. The Full Court did not accept that the car dealership could relevantly be characterised as a risky venture and it was not suggested by the Trustee that there was any doubt as to Mr McMillan's solvency at the time of the transfer. Noting that 16 years had elapsed between the transfer and Mr McMillan's bankruptcy, the Full Court was satisfied that the absence of any temporal connection between the liabilities of Mr McMillan as at the time of the transfer and the liabilities that ultimately led to his bankruptcy was a significant consideration that should have been given significant weight in any determination of the main purpose of the transfer. The Full Court also found that the judge erred in not taking into account dealings subsequent to the transfer that were inconsistent with a main purpose of defeating creditors.

The Full Court was not persuaded that any other grounds of appeal had been established, finding that the primary judge had not erred by departing from the pleaded case, in rejecting Mr McMillan's explanation for the transfer or in drawing negative inferences by reason of the failure to call certain witnesses.

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

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

Australian Competition and Consumer Commission v IVF Finance Pty Limited (No 2) [2021] FCA 1295

(25 October 2021, O'Bryan J)

In this case, the ACCC was successful in obtaining an interlocutory injunction under section 80(2) of the *Competition and Consumer Act 2010* (the Act) restraining IVF Finance from completing the acquisition of certain fertility clinics.

On 22 August 2021, IVF Finance and its parent company, Virtus Health, entered into a share sale agreement pursuant to which IVF Finance agreed to acquire all of the issued share capital in four companies (Adora, Darlinghurst, Greensborough and Craigie) that operated four fertility clinics and three day hospitals located in Brisbane, Sydney, Melbourne and Perth.

The share sale agreement was not conditional on formal or informal ACCC approval. Nevertheless, when the sale was announced publicly on 23 August 2021, the parties also informed the ACCC of the sale. On 30 August 2021, the parties provided the ACCC with information concerning the sale and the markets affected, but did not seek the ACCC's approval to complete the sale.

The ACCC subsequently informed the parties that it intended to conduct a public review of the sale and sought an undertaking from the parties not to complete. The parties refused to provide that undertaking and ultimately informed the ACCC that they intended to complete the sale on 15 October 2021.

The ACCC then commenced proceedings alleging that the sale would contravene s 50 of the Act by reason that the acquisition of Adora by IVF Finance would have the effect, or be likely to have the effect, of substantially lessening competition for the supply of low cost fertility services, or alternatively, fertility services, in the Brisbane metropolitan region and in the Melbourne metropolitan region. The ACCC sought an interlocutory injunction to restrain completion of the acquisition until the final determination of its originating application.

O'Bryan J heard and determined the ACCC's interlocutory application on an urgent basis.

On the question of a prima facie case, O'Bryan J was satisfied that the ACCC had shown a prima facie case that the acquisition of Adora by IVF Finance would be likely to have the effect of substantially lessening competition by reference to evidence adduced in relation to market definition, market concentration, barriers to entry, product differentiation and brand reputation.

On the question of the balance of convenience, Virtus Health and IVF Finance offered to provide 'hold separate' undertakings to the Court which would continue until the final determination of the ACCC's originating application. The undertakings were to keep the Adora business separate and independent from Virtus Health's operations, both in terms of ownership of the assets and the management of its operations. O'Bryan J considered the balance of convenience on the basis that it was likely that any interlocutory injunction would remain in effect until mid-2022. O'Bryan J found that the balance of convenience favoured the grant of an interlocutory injunction. His Honour considered that there was a very substantial public interest in preventing an acquisition that presented a real risk of substantially lessening competition. The proffered undertakings were an imperfect solution to that risk. O'Bryan J considered that the private interests of the parties to the share sale agreement weighed less than the public interest and should be further discounted in circumstances where the inconvenience and risk of loss were largely avoidable. O'Bryan J was not persuaded that the risk to the Adora business generated by the grant of an injunction was any greater than the risk generated by the proceeding more generally.

The proceeding was timetabled for an expedited trial, but discontinued after Virtus Health decided not to proceed with the Acquisition.

Commercial and Corporations NPA | International Commercial Arbitration sub-area

Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company [2021] FCAFC 110

(25 June 2021, Allsop CJ, Middleton and Stewart JJ)

In 2010, Energy City Qatar (ECQ), a company incorporated in Qatar, and Hub Street Equipment (Hub), a company incorporated in Australia, entered into a contract for Hub to supply and install street lighting equipment, street furniture and accessories in Doha, Qatar. The contract provided for disputes to be referred to arbitration in Qatar, with each party allowed to appoint one member of the arbitral committee, and a third member to be mutually chosen by the first two members.

In 2012, ECQ decided not to proceed with the contract and sought repayment of an advance that it had paid to Hub. Rather than allowing Hub to appoint a member of the arbitral committee, in June 2016 ECQ commenced proceedings in Qatar seeking orders that the Court appoint an arbitral tribunal of three arbitrators including an arbitrator nominated by ECQ.

Hub did not participate in the Qatari Court proceedings or in the subsequent arbitration. In August 2017, the arbitral tribunal issued an award obliging Hub to repay the advance and to pay compensation to ECQ and arbitration fees.

The primary judge decided that the Court should enforce the award and entered judgment for ECQ against Hub. The principal ground on which Hub contended that the award should not be enforced was that the composition of the arbitral tribunal

was not in accordance with the agreement of the parties notwithstanding that the tribunal was appointed by a Qatari Court. ECQ's principal contention in response was that the appointment, having been made by the Qatari Court, must be regarded as valid under the law of the seat and that Hub's remedy was to challenge it there rather than to resist enforcement in Australia. ECQ also contended that as a matter of discretion the Court should enforce the award.

Two days before the Full Court intended to hand down judgment, Hub (with the consent of ECQ) informed the Court that the matter had settled in principle. The Court received no response when it asked the parties to communicate to the Court their view as to whether the judgment should be handed down. Allsop CJ, with whom Middleton and Stewart JJ agreed, found that important considerations of public policy and public interest meant that the Court could and should proceed to hand down its judgment, noting that the judgment was complete at the time of notification, that the appeal raised points of law of general interest and that the judgment corrected errors of both law and fact in the judgment below.

The Full Court decided that Hub's appeal should be allowed. Stewart J, with whom Allsop CJ and Middleton J agreed, found that the award should not be enforced in Australia because the arbitral tribunal was not composed in accordance with the agreement of the parties and that was a proper basis to resist enforcement, it not being necessary for the award debtor to seek to set the award aside at the seat of the arbitration. Since a failure to compose the arbitral tribunal in accordance with the agreement of the parties was fundamental to the jurisdiction of the arbitrators, there was little if any scope to exercise the discretion to enforce and the discretion should not be so exercised.

The Full Court allowed the appeal and set aside the orders and declaration made below.

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

viagogo AG v Australian Competition and Consumer Commission [2022] FCAFC 87

(18 May 2022, Yates, Abraham and Cheeseman JJ)

Viagogo, a company incorporated in Switzerland, operated an Australian online 'marketplace' where people could resell their tickets for live events at a price of their own choosing. If a buyer was found, viagogo added certain charges, including a booking fee of about 28 per cent of the price of the ticket.

The primary judge found that viagogo engaged in misleading conduct by failing to adequately disclose that it was a reseller (Official Site Representation), all-inclusive ticket prices (Price Representations), and that references to tickets still available related only to tickets on the viagogo Australian website (Quantity Representations). The primary judge imposed pecuniary penalties in the total sum of A$7 million in addition to non-pecuniary relief.

Viagogo appealed from the primary judge's findings in relation to both liability and penalty. In relation to liability, the appeal was confined to the Official Site and Price Representations. In relation to penalty, viagogo contended that the total amount was manifestly excessive.

The Full Court found that no errors had been established in the primary judge's 'methodical and detailed' reasoning or in the conclusions that the Official Site and Price Representations were misleading. In relation to the requirement in the *Australian Consumer Law* for a single price to be specified in certain circumstances, the Full Court found that the relevant supply was a single transaction that could not be split into the supply to a consumer on the one part, of a ticket by the third party seller, and on the other part, the supply of a marketplace by viagogo, each of which attract a separate price.

The Full Court also found that viagogo had not established that an error of manifest excess was plainly apparent in the way in which the primary judge exercised the penalty discretion.

The Full Court explained that profit was merely one factor that may be relevant among many others and that reported profit may not reflect the objective seriousness of the contravention. Those engaged in trade or commerce should be deterred from conducting themselves according to the cynical cost benefit calculus where the risk of the penalty is weighed against the profits to be made from the contravention. The Full Court also rejected a contention that the primary judge placed insufficient weight on the impacts of the COVID-19 pandemic. The Full Court noted that viagogo did not lead any evidence of the impact of the pandemic on its Australian business, but that the primary judge expressly took the impact of the COVID-19 pandemic into account, taking judicial notice of the fact that the entertainment industry has been devastated by the restrictions brought about by the pandemic.

The Full Court unanimously dismissed the appeal in relation to both liability and penalty.

Employment and Industrial Relations NPA

Australian Rail, Tram and Bus Industry Union v Busways Northern Beaches Pty Ltd (No 2) [2022] FCAFC 55

(7 April 2022, Bromberg, Wheelahan and Snaden JJ)

The New South Wales government sought to privatise its state-run public transport bus services. Busways, a newly established private operator, proposed to tender for contracts covering the provision of bus services in various regions within Sydney that had previously been serviced by the State Transit Authority. The Full Court considered whether Busways was establishing, or was proposing to establish, a 'genuine new enterprise', such that the Fair Work Commission had jurisdiction to approve a greenfields agreement between Busways and the Transport Workers' Union of Australia.

The government continued to own the buses and other assets used to service each region and would maintain control over bus timetables and fares. The incoming operators were required to retain bus drivers and maintenance staff, whose jobs would be guaranteed for two years and who would transfer with all their accrued entitlements.

The applicant sought prerogative relief to have the approval of the greenfields agreement by the Fair Work Commission set aside on the basis that it did not relevantly relate to a 'genuine new enterprise'. The original jurisdiction of the Court was exercised by a Full Court.

The Court unanimously found that the greenfields agreement did not relate to a 'genuine new enterprise', such that the Fair Work Commission could not exercise the power of approval that it purported to exercise.

Bromberg J found that a 'new' enterprise had to be novel generally, rather than merely new to its proponent, and that the word 'genuine' directed attention to substance rather than form. Bromberg J found it was necessary to compare the character of any existing similar enterprise with that of the proposed enterprise by reference to their essential characteristics.

Bromberg J found that the State Transit Authority and Busways provided or proposed to provide services to Transport for New South Wales. Those services, in each case, involved the management and delivery of the same transport services to the public in the same regions, utilising largely the same plant and equipment. The existence of a profit motive did not result in the proposed enterprise bearing a substantially different character.

Wheelahan J agreed substantially with the reasons given by Bromberg J.

Snaden J found that a 'genuine new enterprise' denoted a business, activity, project or undertaking upon which an employer proposed to commence otherwise than as the successor to an existing operator. Snaden J found the analysis turned upon the proper characterisation of the enterprise of an 'old' or existing operator and an assessment as to whether it bore, in substance, the same character as the enterprise of the 'new' or 'incoming' operator. In this case, Snaden J found that the nature or character of the pre-tender bus services was, in substance, the same as the nature or character of the bus services in respect of which the Busways entities made the greenfields agreement.

King v Melbourne Vicentre Swimming Club Inc [2021] FCAFC 123

(15 July 2021, Collier, Katzmann and Jackson JJ)

Mr King was employed as a swim coach by the Club between 2006 and 2018. He claimed that the Club failed to pay him in accordance with the *Fitness Industry Award 2010* during the last six years of his employment (claim period). The Club claimed that Mr King was not covered by the Award during his employment.

Mr King coached swim squads that were, broadly, in the middle range of seniority among the squads offered by the Club. He worked full time and reported to the Head Coach at the Club, and on occasion acted in that position when the Head Coach was absent. During the claim period, Mr King held a Silver Licence swim coaching qualification.

The primary judge considered Award coverage as a separate issue and declared that Mr King was not covered by the Award during the claim period. The primary judge found that the Award covered swimming teachers, and coaches of beginner swimmers who were current Bronze Licence holders, but not those coaching at higher levels, like Mr King. The primary judge found it was too much of a strain to construe the text of the Award as bringing within its coverage coaches with higher qualifications, or coaches of squads above the level of beginner swimmers.

The Full Court considered two questions of construction of the Award. The first was whether Mr King qualified for coverage at classification level 4 because he met the general requirements as to supervision and initiative, or whether he also needed to meet the more specific conditions for swim-related roles. The Full Court found that the words 'an employee at this level may also be' conveyed that an employee's role may or may not be swim-related, not that the more specific conditions for swim-related roles were optional.

The second question was whether the more specific conditions for swim-related roles at level 4 were minimum requirements only, such that swim coaches who exceeded the specified level of work, qualifications and experience were covered by the Award. The Full Court found there was no doubt that Mr King exceeded the specified qualifications and experience. The Full Court accepted, however, that it was no strain on the language to construe the more specific conditions as only minimum requirements for a swim coach to be covered by level 4. The Full Court found there was nothing in the Award that set a 'ceiling' for level 4 in terms of qualifications and experience.

The Full Court found that Mr King's Silver Licence and duties coaching intermediate and senior swimmers did not take him outside the coverage of level 4. The Full Court found that Mr King fulfilled the minimum requirements for that level and did not fulfil the requirements for any higher level, so he was covered by the level 4 classification in the Award during the claim period. The matter was remitted to the primary judge for the trial of the balance of the issues in the proceeding.

Federal Crime and Related Proceedings NPA

Mensink v Registrar of the Federal Court of Australia [2022] FCAFC 102

(9 June 2022, Bromwich, Lee and Thawley JJ)

Mr Mensink was charged with contempt of court for failing, on two occasions, to comply with a summons to attend a public examination into the collapse of Queensland Nickel Pty Ltd, of which he was a sole director at the time it was placed into voluntary administration. Contempt proceedings were commenced by the special purpose liquidators of Queensland Nickel but subsequently taken over by the Registrar of the Federal Court pursuant to a court order made following the special purpose liquidators entering into a settlement deed with Mr Mensink and other parties. Mr Mensink's application for summary dismissal of the contempt proceeding and to discharge the warrants for his arrest was dismissed.

Mr Mensink sought an extension of time and leave to appeal from the court order that the Registrar take over the contempt proceeding and appealed against the dismissal of his summary judgment application. The Full Court dismissed both appeals.

The Full Court rejected that Mr Mensink had been denied procedural fairness, finding that that in making the order for the Registrar to take over the contempt proceeding, Mr Mensink had the opportunity to be heard.

The Full Court found Mr Mensink's challenge to the power of the Court to order the Registrar to take over the contempt proceeding was based upon a misunderstanding of the *Federal Court Rules 2011* (the Rules), the statutory context in which they are made, their terms, their ordinary operation and the freedom given to a judge to depart from them. The Full Court found the Rules did not limit the power of the primary judge to make the order appointing the Registrar to take over the contempt proceeding.

The Full Court rejected that the contempt proceeding was brought to an end upon approval of the settlement deed. While the settlement deed affected the rights and obligations of Mr Mensink and the special purpose liquidators, it did not operate to extinguish the contempt proceeding, or the underlying cause of action for contempt. The Full Court further found that there remained an important and independent public interest to be vindicated, having much wider application than the private interests of the special purpose liquidators confined to the proceeding they had brought. Mr Mensink's defiance of the Court's authority, and the ongoing public interest in maintaining practical and effective compulsion to attend examinations under the *Corporations Act 2001,* were both important considerations and bases for continuing the contempt proceeding. The Full Court concluded it was appropriate and in the interests of justice to make an order to ensure that the contempt proceeding could continue.

Intellectual Property NPA | Copyright and Industrial Designs sub-area

State of Escape Accessories Pty Limited v Schwartz [2022] FCAFC 63

(20 April 2022, Greenwood, Nicholas and Anderson JJ)

This proceeding concerns whether copyright subsisted in the appellant's perforated neoprene tote bag or carry-all bag (Escape Bag) on the basis that it was a work of artistic craftsmanship.

The primary judge rejected the appellant's claim against the respondents for copyright infringement in respect of the Escape Bag. The appellant appealed on 10 grounds against the primary judge's decision. The first six grounds challenged the primary judge's consideration of the evidence, in particular how much weight was given to the appellant's evidence and the respondent's evidence. Grounds 7 and 8 concerned alleged errors in the primary judge's findings concerning the state of the art in bag design and in the evaluation of the Escape Bag's features as a whole. Grounds 9 and 10 challenged two specific findings made by the primary judge concerning the approach to design and choice of materials used in the design.

The Full Court found that the primary judge's treatment of the appellant's evidence was not affected by error and that there was no inconsistency in the primary judge having accepted the appellant's evidence and holding that the Escape Bag was not a work of artistic craftsmanship. The Full Court also found it was open to the primary judge to give considerable weight to the respondent's expert evidence.

The Full Court agreed with the primary judge's finding that the design of the Escape Bag was substantially constrained by function. The use of perforated neoprene and sailing rope in the design was said to reflect minor variations in design detail that was consistent with the primary judge's conclusion that the use of such materials to make an everyday carry bag was, at its highest, an evolution in styling rather than an act of artistic craftsmanship.

The view of the Full Court was that the appellant's criticism of the primary judge's overall approach was unfounded. The Full Court concluded that Escape Bag was not a work of artistic craftsmanship and the appeal was dismissed.

Intellectual Property NPA | Patents and associated Statutes sub-area

Commissioner of Patents v Ono Pharmaceutical Co. Ltd [2022] FCAFC 39

Merck Sharp & Dohme Corp. v Sandoz Pty Ltd [2022] FCAFC 40

(18 March 2022, Allsop CJ, Yates and Burley JJ)

In these cases, the Full Court considered the operation of the patent term extension regime for standard patents relating to pharmaceutical substances.

In *Ono*, a competitor's pharmaceutical product that contained or consisted of a substance that

fell within the scope of the claim(s) of the patent obtained regulatory approval at an earlier date than a product sponsored by a related entity of the patentees. The primary judge found that the extension of term regime was designed to compensate a patentee of a pharmaceutical substance for the loss in time before which it could exploit its invention, and to remedy the mischief caused by delays in obtaining regulatory approval. The primary judge preferred a liberal rather than a literal construction, finding that the extension regime operated only by reference to the patentee's goods, not those of a competitor.

In *Merck Sharp & Dohme*, more than one pharmaceutical substance had been disclosed and claimed in the patent. The primary judge found that the term of any extension had to be calculated by reference to the earliest first regulatory approval date in relation to any of those pharmaceutical substances, such that the term of the extension was equal to zero.

The Full Court emphasised that it was the fundamental duty of a court, when undertaking statutory construction, to give meaning to the legislative command according to the terms in which it has been expressed. The Full Court found that the extension of term regime seeks to balance a range of competing interests, not just the interests of the patentee, and that it could be taken that the legislature saw the correct balance as being achieved by the very words it chose to implement that regime.

The Full Court found that patent term extensions were to be calculated by reference to the first regulatory approval date of any goods included in the Australian Register of Therapeutic Goods containing, or consisting of any of the pharmaceutical substances disclosed and claimed in the patent.

Contrary to the conclusion of the primary judge in *Ono*, the Full Court found that the inquiry ought not to be restricted to the goods of a particular person.

The Full Court agreed with the primary judge in *Merck Sharp & Dohme* that where more than one substance was disclosed and claimed in the patent, any extension to be granted had to be calculated by reference to the earliest first regulatory approval date in relation to any of those pharmaceutical substances.

The Full Court allowed the appeal in *Ono* and dismissed the appeal in *Merck Sharp & Dohme*.

Intellectual Property NPA | Trade Marks sub-area

Allergan Australia Pty Ltd v Self Care IP Holdings Pty Ltd [2021] FCAFC 163

(7 September 2021, Jagot, Lee and Thawley JJ)

Allergan Inc is the manufacturer of Botox and the owner of various trade marks for BOTOX, including the word mark BOTOX. Self Care IP Holdings Pty Ltd and Self Care Corporation Pty Ltd (together Self Care) supply cosmetic products, including topical anti-wrinkle skincare products under the trade mark FREEZEFRAME.

Allergan Inc and its subsidiary, Allergan Australia Pty Ltd (together Allergan), brought proceedings against Self Care, alleging trade mark infringement and misleading and deceptive conduct. The primary judge found that Allergan failed to establish infringement of the BOTOX trade mark. The primary judge concluded that the ubiquitous reputation in the BOTOX mark successfully countered a finding of deceptive similarity, as consumers would be unlikely to have an imperfect recollection of such a renowned mark.

The Full Court agreed with the primary judge that PROTOX was used by Self Care as a trade mark and that it was used independently of the mark FREEZEFRAME. The Full Court concluded that consumers would not have confused PROTOX for BOTOX, as the words were sufficiently different. However, as there was a real risk that consumers might think the different products came from the same source, the Full Court held that PROTOX was deceptively similar to BOTOX and therefore infringed Allergan's trade mark.

In considering the phrase 'instant Botox® alternative', the Full Court found the word 'alternative' implied that Self Care's Inhibox product was different to Botox, but it did not necessarily imply that the products were not associated or that they did not come from the same or an associated source. The Full Court found that the phrase 'instant Botox® alternative' so nearly resembled BOTOX that it was likely to deceive or cause confusion and thereby constituted trade mark infringement.

The Full Court also found a reasonable consumer would have understood the phrase '*instant Botox® alternative*' to mean the effects of Inhibox lasted as long as Botox, or at least that it prolonged Botox's effects. In circumstances where there was no scientific or other material from which such a representation could reasonably be made, the Full Court held this representation was misleading or deceptive.

The Full Court allowed the appeal and remitted the matter to the primary judge for determination of damages or an account of profits.

An appeal is currently pending in the High Court of Australia, special leave having been granted on 13 May 2022.

Native Title NPA

District Council of Streaky Bay v Wilson [2021] FCAFC 181

(18 October 2021, Mortimer, Perry and SC Derrington JJ)

The respondent filed a native title determination application in 1997 claiming native title rights and interests over an area of land situated on the west coast of South Australia that includes the Streaky Bay golf course and other parts of the town of Streaky Bay. The District Council of Streaky Bay (Council) contended that native title had been extinguished with respect to the whole of the golf course on the basis of construction of a public work in the nature of major earthworks, namely the golf course, or alternatively by reason of a lease it had granted the Streaky Bay and Districts Golf Club Inc (Club) in 1994.

A separate question in relation to extinguishment of native title was determined by the primary judge, namely whether native title was wholly extinguished by either the construction of public works in the nature of major earthworks on the land where the golf course was situated on or before 31 December 1993, (the Earthworks question) or by a lease granted or intended to be granted by the Council to the Club, after 1 January 1994 and before 23 December 1996 (the Lease question). The primary judge determined the separate question in favour of the respondent.

The Full Court held that leave to appeal was required on the basis that the primary judge's decision on the separate question was interlocutory in character, having resolved only one issue while the native title determination application proceedings continued.

In considering the Earthworks question, the primary judge's interpretation and application of the definition of 'major earthworks' was central to several grounds of the proposed appeal. The Full Court found the earthworks grounds of appeal were not established and in some instances did no more than assert error without any corresponding contention of what the precise error was, or what the correct finding should have been. The Full Court found that the primary judge's construction of major earthworks was consistent with the authorities and accepted the primary judge's reasoning that a major disturbance to the land was required in order to satisfy the definition of major earthworks. The Full Court found that the primary judge correctly considered and applied the evidence in forming the conclusion that no major earthworks had been undertaken on the disputed parcels of land. The Full Court also rejected the Council's construction of section 251D of the *Native Title Act 1993*, instead finding that provision operated to extinguish native title in land adjacent to that on which a public work is constructed only so far as the use of the additional land is or was necessary for, or incidental to, the construction, establishment or operation of the public work.

In relation to the Lease question, the Full Court accepted the primary judge's findings that in circumstances where the lease had not been produced, the evidence considered as a whole was insufficient to conclude that there existed a specifically enforceable agreement for a lease, or a lease that was otherwise enforceable at any time before 23 December 1996. Having located the Lease, the Club's minute books for the period 1992–2002 and end-of-year financial summaries for 1992–1998 two months after the primary judge delivered judgment, the Council sought to adduce fresh evidence on appeal. The Full Court was not satisfied that the Council could not have been, with reasonable diligence, made aware of the physical existence of the Lease, and found that had the fresh evidence been adduced at the trial, the result would not have been different.

The Full Court granted leave to appeal but dismissed the appeal.

Other Federal Jurisdiction NPA

Bazzi v Dutton [2022] FCAFC 84

(17 May 2022, Rares, Rangiah and Wigney JJ)

On 25 February 2021, Mr Bazzi published a tweet on Twitter about then Home Affairs Minister, Peter Dutton. The tweet contained a statement that 'Peter Dutton is a rape apologist' with a link to an online article published by *The Guardian* reporting on Mr Dutton's comments concerning allegations of rape made by women in refugee centres on Nauru. The primary judge found that the tweet conveyed the imputation that Mr Dutton excuses rape and that he was entitled to damages of $35,825. The primary judge rejected Mr Bazzi's defences of honest opinion and fair comment on a matter of public interest.

The sole ground on appeal was whether the primary judge erred in finding that the tweet conveyed the imputation. The Full Court was unanimous in its view that the tweet was offensive and derogatory, but found that it did not convey the imputation.

Justices Rares and Rangiah found the primary judge did not explain in his reasons why the ordinary reasonable reader would have understood that the tweet conveyed the imputation, nor did he explain how the primary judge moved from the meaning of 'apologist' as a person who defends someone or something, to the meaning that Mr Dutton is a person who excuses rape. Their Honours held that ordinary reasonable readers of social media publications, like tweets, do not engage in elaborate analysis, but read such material using their general knowledge, impressionistically, in the context in which it is published. Their Honours were of the view that when *The Guardian* material was read, fleetingly, with Mr Bazzi's six word statement, the ordinary reasonable reader of the tweet would conclude that it suggested that Mr Dutton was sceptical about claims of rape and in that way was an apologist, which was very different from imputing that he excuses rape itself.

Justice Wigney agreed that the impugned tweet did not convey the imputation. Justice Wigney found that while the primary judge correctly identified the principles on which to assess whether a matter conveys a defamatory imputation, the primary judge misapplied them in at least three respects. First, the primary judge unduly focused on the first six words of the tweet and was wrong to dissect and segregate them from *The Guardian* material. Secondly, the primary judge erred by allowing his analysis and interpretation of the tweet to be overly influenced by dictionary definitions, particularly in relation to the word 'apologist'. Thirdly, the primary judge erred by approaching the meaning of the tweet as involving a binary choice between the meaning alleged by Mr Dutton and the alternative meaning proposed by Mr Bazzi during the trial.

The Full Court allowed the appeal and set aside the decision of the primary judge. An application for special leave to appeal is currently pending in the High Court of Australia.

Taxation NPA

Hurley v Collector of Customs [2022] FCAFC 92

(24 May 2022, Moshinsky, Banks-Smith and Colvin JJ)

Mr Hurley was the sole director of a company that imported alcohol into Australia. The alcohol was delivered into home consumption in advance of duty being paid pursuant to a number of periodic settlement permissions given by the Collector. The company later failed to pay the requisite duty within time or at all.

The Collector served three demands for payment on Mr Hurley on the basis that he had, or had been entrusted with, the possession, custody or control of dutiable goods that were subject to customs control and failed to keep those goods safely. Mr Hurley applied to the Administrative Appeals Tribunal for review of the decisions to make the demands for payment. Mr Hurley did not dispute that he had, or had been entrusted with, the possession, custody or control of dutiable goods. The Tribunal concluded that, in circumstances where the duty on the goods was not paid, Mr Hurley had failed to keep the goods

safely. The Tribunal affirmed the decisions to make the three demands (adjusting, by consent, the amount of one of the demands).

Mr Hurley appealed on a question of law from the decision of the Tribunal. The original jurisdiction of the Court was exercised by a Full Court.

The Collector submitted that, unless and until duty was paid, the relevant goods remained 'subject to customs control'. The Full Court found this submission to be irreconcilable with the legislative text. The Full Court found that the relevant alcoholic beverages ceased to be subject to customs control when they were delivered into home consumption pursuant to a periodic settlement permission given by the Collector.

The Full Court explained that in each of the cases relied on by the Collector, something in the nature of loss, destruction or consumption happened to the goods, resulting in a loss of duty, while the goods were subject to customs control. However, in the present case, nothing relevantly happened to the goods, and there was no loss of duty (because duty was not yet due), while the goods were subject to customs control.

The Full Court found that Mr Hurley had not failed to keep the dutiable goods safely as the goods were not lost, destroyed or consumed, and there was no failure to pay duty while the goods were subject to customs control. The Full Court allowed the appeal and set aside the decisions of the Tribunal and the Collector, as well as the relevant demands for payment.

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