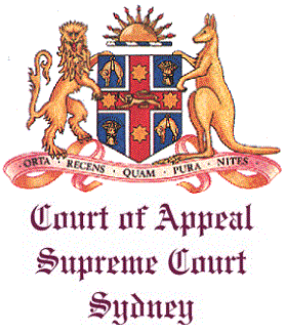

Decisions of Interest

1 July 2021 – 15 July 2021

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

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New South Wales Court of Appeal Decisions of Interest

Appeals: prosecution appeal against sentence

DK v Director of Public Prosecutions **[2021] NSWCA 134**

Decision date: 2 July 2021

Brereton and McCallum JJA, Simpson AJA

DK was given a suspended sentence of 15 months juvenile detention in the Children's Court. The Director of Public Prosecutions ("Director") appealed to the District Court under s 23(1) of the *Crimes (Appeal and Review) Act 2001* (NSW), alleging manifest inadequacy. The primary judge allowed the appeal and, while not increasing the term of detention, declined to suspend its execution. DK sought judicial review of that decision, arguing that the primary judge failed to consider a residual discretion to dismiss the appeal notwithstanding error. The Director denied the existence of such a discretion, arguing that the District Court's jurisdiction on a s 23(1) appeal involves a fresh exercise of the sentencing discretion.

Held: dismissing the summons seeking judicial review.

- The nature of an appeal depends on its enabling legislation: [7]. Thus an appeal against sentence by the Director may be different to an appeal by an offender: [10]. There are statutory indications that the former is error-based: by s 26 the Director must demonstrate exceptional circumstances in order to adduce fresh evidence ([13], [28]); by s 27 the District Court may simply dismiss an appeal ([20]-[22]). Changes in context, including the qualified nature of magistrates, also support that interpretation: [22]. That the Court may impose a "more *or less* severe" sentence does not show that the sentencing discretion is to be exercised afresh; the same is true of the Court of Criminal Appeal's error-based jurisdiction under s 5D *Criminal Appeal Act 1912* (NSW). Moreover, the common law's antagonism towards the injustice that may result from a second sentencing exercise speaks in favour of an error-based jurisdiction: [29]-[32].

- It is uncontroversial that s 5D of the *Criminal Appeal Act* involves a residual discretion ([33]), though it is unclear whether the standard for appellate review differs from that on a s 23 appeal: [34]-[35]. The discretion is a product of the institutional requirements of fairness within the criminal justice system: [38]. The kinds of unfairness that may warrant its exercise include Crown delay, Crown contribution to sentencing error, conducting an appeal on a different basis to that advanced at sentencing, interference with rehabilitation, disparity among co-offenders, or returning an offender, after completion of a sentence, to custody: [39]. Those considerations all apply to a s 23 appeal. Moreover, the existence of a residual discretion formed the premise of earlier amendments: [40]-[42].

- The primary judge did turn his mind to the residual discretion ([45], [67]), considering it under the broader "principle of restraint": [59]-[60]. There was nothing before him to justify the exercise of that discretion: [55].

Insurance: claims made and notified; non-disclosure and misrepresentation

P & S Kauter Investments Pty Ltd v Arch Underwriting at Lloyds Ltd **[2021] NSWCA 136**

Decision date: 2 July 2021

Bathurst CJ, Bell P and Meagher JA

Acting on financial planning advice from Moylan Retirement Solutions Pty Ltd (MRS), the appellants made various investments in projects or entities in which MRS's principal, Mr Moylan, had financial interests, making unsecured loans to Moylan Investments Group Pty Ltd (MIG). MRS also misapplied funds of some of the appellants, treating them as funds available to MIG rather than investing them as instructed. No payments were made in respect of these investments after 2009; MIG was wound up in 2010, and MRS was deregistered in late 2014. The appellants sued MRS' professional indemnity insurers directly, seeking indemnity in respect of MRS's liability for negligent financial advice, misleading and deceptive conduct, and breach of fiduciary duty under one of two policies. Both were "claims made and notified" policies. During the currency of the 2012/13 policy, whilst applying to renew it for 2013/14, MRS purported to notify the insurers of "a chance of a claim". The primary judge found that this purported notification did not satisfy s 40(3) of the *Insurance Contracts Act 1984* (Cth) so as to bring the subsequent claim within the 2012/13 policy, and that the insurers were entitled to avoid the 2013/14 policy during which that claim was made.

Held: Dismissing the appeal

- MRS's purported notification was not of "facts that might give rise to a claim" so as to engage s 40(3). That provision requires a sufficient correspondence between the facts notified as likely to give rise to a claim and any subsequent claim for the latter to be identified as arising from the former: [31]. Notification must be of objective matters that bear on the possibility of a claim being made, rather than matters of belief or opinion as to the possibility of a claim; the characterisation of notified facts and the possibility of their giving rise to a claim are to be approached objectively: [33]. It will not suffice if reasonable minds might differ as to the capacity of certain facts to potentially give rise to a claim: [35]. In this case the facts notified were not, taken objectively, such as to give rise to a claim; they did not represent that any loss had been suffered or was any more than a potential possibility in relation to any particular client ([37]). Not only did the notified facts not identify any defects in financial advice given, it was positively asserted in the notification that there was no such defect: [43].

- MRS breached its duty under s 21 of the *Insurance Contracts Act* to disclose to the insurer every matter which it knew would be relevant to the decision of the insurer to accept the risk. It failed to disclose the facts, known to Mr Moylan, that clients' money was being used for unauthorised investments in which Mr Moylan had a financial interest: [47], [58]-[59]. Moreover, the notifications discussed above contained fraudulent misrepresentations within the meaning of s 26(2), entitling the insurers to avoid the 2013/14 policy: [74], [77]-[81].

Negligence: duty of care; breach

JFIT Holdings Pty Ltd t/as New Dimensions Health & Fitness v Powell **[2021] NSWCA 137**

Decision date: 8 July 2021

White JA, Simpson AJA and Harrison J

Ms Powell injured her back when lifting a 25kg weight plate from the floor to replace it on the rack, in a gym operated by JFIT Holdings Pty Ltd ("JFIT"). The weight plate had been left on the floor by another gym user. While it was a rule of gym membership that users put away their weights after use, that rule was not enforced, with equipment often left out to be put away by subsequent gym users. This was known to be particularly problematic between 3pm and 5pm weekdays, the period following which Ms Powell was injured. The primary judge, rejecting defences of contributory negligence, obvious risk and waiver, awarded Ms Powell damages for negligence. JFIT appealed against the finding of liability, arguing that the primary judge erred in failing to properly identify the risk of harm, in determining that the risk was not insignificant, and in finding that the duty had been breached.

Held: dismissing the appeal

- The primary judge formulated the relevant risk of harm as including "the risk of injury from lifting heavy weight plates from the floor in the course of undertaking housekeeping activity as distinct from undertaking an exercise regime, where those weight plates had been left strewn there in circumstances in which gymnasium staff had not taken steps to inspect the area, collect and appropriately store those weights". This formulation was unduly narrow, focusing purely and precisely on the circumstances in which Ms Powell suffered her injury: [35]. However, the alternative formulation of the risk of harm proposed by JFIT – as "the risk of suffering injury whilst lifting up a weight and putting it away" – was not shown to yield any different result: [32]-[33]. Indeed if anything the generality of that formulation tended to support Ms Powell's case: [35].

- The risk of harm, however formulated, was not insignificant: [42]. The relevant standard, involving a combined evaluation of the significance of potential injury and the likelihood of its occurring, is not particularly high: [39]. It is notorious that lifting heavy weights can cause back injury; that risk was no less significant because part of Ms Powell's exercise regime involved lifting weights. Her regime did not involve lifting such heavy weights, at least not without the assistance of a trainer, and certainly not from the floor, which also, as a matter of common knowledge, increases the risk of injury: [40].

- Compliance with the duty found by the primary judge was not unfeasible or unreasonable, and did not require "constant supervision" of the facility: [46], [48]. There was a known problem, at particular hours, giving rise to an elevated risk of injury, and no reason why JFIT could not have implemented a system, either maintaining compliance with its own rules or, failing that, arranging for a staff member to put equipment away, to deal with that known problem: [49]-[50].

Statutory Interpretation: *Health Care Complaints Act 1993* (NSW)

***Kirby v Health Care Complaints Commission* [2021] NSWCA 139**

Decision date: 9 July 2021

Gleeson and White JJA, Emmett AJA

Dr Kirby is a registered dentist. A complaint was made about him to the Health Care Complaints Commission ("Commission"). After temporary suspension of his registration and subsequent imposition of conditions on his practice by the Dental Council, the matter was investigated by the Commission and referred to the Director of Proceedings ("Director"), who determined that the complaint should be prosecuted before the NSW Civil and Administrative Tribunal ("NCAT"). Section 90B of the *Health Care Complaints Act 1993* (NSW) ("HCC Act") confers on the Director the function of determining whether to prosecute a complaint before a disciplinary body and of prosecuting such complaints; "disciplinary body" is defined in s 4 of the HCC Act as a person or body established under the *Health Practitioner Regulation National Law* (NSW) ("National Law") with the power to discipline a practitioner or suspend or cancel a practitioner's registration. Dr Kirby sought relief by way of judicial review against complaint proceedings commenced by the Commission in NCAT, arguing that NCAT did not have jurisdiction to deal with the complaint as it is not a "disciplinary body" established under the National Law. The primary judge rejected that jurisdictional challenge, and Dr Kirby appealed.

Held: dismissing the appeal.

- NCAT was established by the *Civil and Administrative Tribunal Act 2013* (NSW) ("Tribunal Act"): [31]. The National Law was simultaneously amended to provide special constitutional and procedural requirements for health practitioner matters before NCAT. These are given effect in Schedule 5 of the Tribunal Act, which provides that the special constitutional requirements of the National Law apply to the NCAT occupational division when exercising functions under the HCC Act or National Law of hearing complaints referred by the Commission: [32]-[37]. No other body has power to suspend or cancel a practitioner's registration beyond the limited power in s 150(1) of the National Law to suspend registration for the protection of patients' health and safety and the public interest: [44].

- The phrase "established under the National Law" does not limit disciplinary bodies to those established "*by*" the National Law: [59]-[60]. It indicates a relationship with the National Law that a person or body has, namely the power to discipline a health practitioner or to suspend or cancel a practitioner's registration: [61]. This extends to bodies *authorised* by the National Law to exercise such powers, which includes NCAT when appropriately constituted: [62], [81]. Numerous contextual indications confirm this view, including the fact that the Commission's functions under s 80(1)(c) of the National Law (to prosecute complaints "before appropriate bodies, including … tribunals") would otherwise be inutile: [64]. The alternative construction would be incoherent with the legislative scheme conferring the s 90B function on the Director: [66]-[68].

Civil Procedure: subpoenas

***Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145**

Decision date: 15 July 2021

Bell P, Brereton and McCallum JJA

Blacktown City Council issued a subpoena to the Secretary of the Department of Planning, Industry and Environment ("the Secretary") in relation to forthcoming proceedings in the Land and Environment Court. The Secretary unsuccessfully applied to have the subpoena set aside for want of a legitimate forensic purpose. The Secretary appealed from that decision, contending that the primary judge applied the wrong test for setting aside a subpoena. The Secretary submitted that the correct test was whether or not the documents sought would materially assist the case of the party issuing the subpoena.

Held: dismissing the appeal

- The power to set aside a subpoena is an instance of the Court's power to intervene to prevent abuse of its processes; the notion of "legitimate forensic purpose" is the converse of an abuse of process: [32], [88]. The power is not restricted to closed categories: [60], [98]. Though a subpoena is more likely to have been issued for a legitimate forensic purpose where it can be shown that the subpoenaed material will assist the issuing party's case, inability to show such assistance does not rule out the existence of a legitimate forensic purpose: [63]-[64]. It will generally be sufficient and prima facie evidence of a legitimate forensic purpose if the subpoenaed material is of apparent relevance to the issues in the case (that is, if it can be shown that it is likely that it will add, in one way or another, to the relevant evidence in the case) or bears upon the examination of witnesses expected to be called: [61], [65], [70], [80], [89]. This is consistent with the purpose of subpoenas in facilitating justice by requiring production of documents capable of casting light on the issues: [56].

- Apparent relevance is to be ascertained by an examination of the description of the documents sought in the schedule to the subpoena in light of the issues in the case. The word "apparent" admits of the possibility that the documents sought may not ultimately turn out to be relevant: [68]. To insist on a further requirement that it must be shown that material sought is likely to advance the issuing party's case would require that party to be able to predict *ex ante* the contents of documents, unduly constraining its ability to investigate the facts: [57], [90]. So long as subpoenaed documents can plausibly be seen to relate to an issue in the proceedings or to "cast light" on such an issue, and the subpoena is not otherwise too vague or oppressive, a subpoena should not be set aside: [57], [70]. What is required by the interests of justice will be informed by the nature of the proceedings and any available legislative guidance. In the present case, s 38 of the *Land and Environment Court Act* arguably favours a more generous approach to the scrutiny of subpoenas than in ordinary adversarial litigation: [59].

Australian Intermediate Appellate Decisions of Interest

Private International Law: stay application

Epic Games, Inc v Apple Inc **[2021] FCAFC 122**

Decision date: 9 July 2021

Middleton, Jagot and Moshinsky JJ

Epic Games, Inc ("Epic") develops games for use inter alia on iOS devices, which it is required to distribute through Apple Inc ("Apple")'s App Store. Apple deducts a 30% commission for in-app payments. In contravention of its agreement with Apple, Epic provided an update to its popular game 'Fortnite' circumventing this payment system, in response to which Apple blocked any further downloads of or updates to the application. The agreement between Epic and Apple includes an exclusive jurisdiction clause nominating the Northern District of California. Epic commenced proceedings seeking injunctive relief against Apple's response to its actions in that jurisdiction. Judgment in those proceedings is currently reserved. Epic subsequently brought proceedings against Apple in the Federal Court, alleging contraventions of Pt IV of the *Competition and Consumer Act 2010* (Cth) ("CCA"). The primary judge ordered a stay of those proceedings, against which Epic appealed.

Held: Allowing the appeal

- Claims under Pt IV of the CCA have an important public dimension, as indicated by the statute itself: s 80 permits any person to apply for an injunction for a breach of its provisions ([23]); s 83 includes a mechanism by which persons having suffered similar loss or damage can rely on findings of fact or admissions in subsequent actions for compensation ([30]); s 87 confers a wide power to make remedial orders, including declarations of invalidity: [26]-[28]. This legislative policy reflects the public interest in the protection of competition in Australian markets ([99]-[101]), which the primary judge was required to assess in determining the stay application: [53]-[53].
- If litigated in California, complex questions of competition law would be approached through the lens of expert evidence, appellate review would not be directed to the question of how the law should develop, and the role of the High Court of Australia as the ultimate explicator of Australian competition law would be undermined: [57]. The CCA also provides legitimate juridical advantages, including specific remedies and procedural advantages, the deprivation of which may constitute strong reasons against a stay: [60]-[67], [82]. By characterising the role of Apple Pty Ltd (Apple's Australian Subsidiary) as "merely ornamental or parasitic", the primary judge failed to consider that an important aspect of Epic's claim was against an Australian company for conduct undertaken in Australia in connection with arrangements affecting Australian consumers in an Australian sub-market: [78]. There were thus strong reasons not to grant a stay, including that enforcement of the exclusive jurisdiction clause would offend the public policy of the forum: [20], [87], [122].

Negligence: duty of care; public authorities

***Herridge Parties v Electricity Networks Corporation T/As Western Power* [2021] WASCA 111**

Decision date: 2 July 2021

Buss P, Murphy and Mitchell JJA

Mrs Campbell owned a point of attachment pole ("PA pole") on her land, supporting an electrical apparatus owned and operated by the first respondent ("WP"), the public authority operating the electricity network. In 2014 the PA pole collapsed, causing a bushfire that resulted in damage to the various appellants. The primary judge held Mrs Campbell and WP's service contractor (who had performed work in the area six months earlier) liable, dismissing all claims against Western Power. The main question on appeal concerned WP's liability in negligence.

Held: Allowing the appeal

- A common law duty of care owed by a public authority must be consistent with the relevant statutory scheme: [103]. Reasonable foreseeability of harm, while necessary, is not sufficient: [105]. WP's statutory functions include managing and maintaining an electricity distribution network ([107]-[110]); it has powers to enter onto any land or premises to carry out necessary work ([119]-[124]), and a duty to maintain network apparatus on the premises of any consumer in a safe and fit condition for the supply of electricity: [125]-[126]. The provision conferring that duty provides an administrative remedy for consumer complaints but is only directed to the relationship between the network operator and a consumer ([137]-[138]); it is not an exhaustive statement of an operator's duties, and the duty it imposes is not inconsistent with a common law duty of care: [135]. Moreover, the duty to maintain service apparatus belonging to the operator in a safe and fit condition logically includes a duty to ensure the safety of poles supporting that apparatus, whether owned by the operator or not: [140], [143].

- WP elected to use Mrs Campbell's pole to support its apparatus. Thus the allegation is of negligent exercise of a statutory function, rather than negligent failure to exercise: [153]-[155]. It is readily foreseeable that failure of a structure supporting a live electrical apparatus is likely to result in death, injury or property damage to those in the vicinity: [157]. WP owed a duty of care to those persons to minimise the risk of injury or loss from the ignition and spread of fire in connection with the delivery of electricity through its network: [158]. A reasonable electricity network operator would have established a system of periodic inspection of consumer-owned PA poles: [165]-[167]. The cost of such a system would not be disproportionate to the risk, and in any case could be recovered under the statutory scheme through consumer charges: [169]-[173]. The duty was not, however, non-delegable: ([225]-[229]). WP's statutory powers did not give rise to a relationship of control and reliance of the kind in *Burnie Port Authority*: [228]. WP was responsible for the greatest extent of the loss, as it had the greatest appreciation of and resources to deal with the risk: [353].

Asia Pacific Decisions of Interest

Constitutional Law: religious freedom; anti-discrimination

Attorney General v Vatuvonu Seventh Day Adventist College **[2021] FJCA 115**

Decision date: 3 June 2021

Lecamwasam and Tuilevuka JJA

Vatuvonu Seventh Day Adventist College ("SDA College"), like most schools in Fiji, is an "aided school", receiving aid by way of recurrent grants of public funds. A teacher appointed and paid by the State to teach in an aided school is a civil servant. The Permanent Secretary for Education ("the Secretary") appointed as Head Teacher of the SDA College a person not of the Seventh Day Adventist faith. The school board argued that this violated its constitutional right to religious freedom, including the s 22(4) right to establish and maintain faith-based schools. The Secretary insisted that she would be in violation of anti-discrimination provisions of the Constitution if she were to appoint a candidate based on any faith-based criterion. The key question on appeal was whether the appointment limits the Seventh Day Adventists' constitutional right to freedom of religion and, if so, whether that limitation is justifiable in a democratic society.

Held: allowing the Attorney General's appeal

- The Fijian Constitution establishes a secular State by imposing a number of duties on the State and public officials, including the duty in s 4(3) not to prefer or advance, by any means, any particular religion: [55]. That provision imposes a mandatory obligation on public officials: [56]-[61]. The Constitution also generally prohibits, by s 26(3), discrimination on grounds including a person's religion. While s 26(7), read in conjunction with the *Human Rights Anti-Discrimination Act 2009*, effectively provides an exception for the employment practices of organised religions, the State cannot avail itself of that exception: [82]-[90].

- While religious communities have a freedom to decline State funding ([92]), fulfilling the religious expectations of a faith-based school cannot be a lawful criterion for the Secretary's appointments, nor part of the lawful job description of any teaching position in the civil service: [93], [120], [127]. The Secretary has no discretion but to appoint to most qualified candidate; the SDA college may choose to accept that appointment or to appoint and employ its own candidate: [95]. Secularism and the duty to protect against unfair discrimination require the former constraint on the State as employer; religious liberty requires the latter freedom for religious schools: [97]. The constitutional right to establish religious schools is not protected under all circumstances, but only where the school is established and maintained without expense to the State: [117]. Thus the Secretary's decision does not impose any limitation on the s 22(4) right, making it unnecessary to consider its proportionality: [137]-[142]. Even assuming that the appointment did in some way involve a limitation of the constitutional right, it would be justified by the legitimate secular goals of the State: [149]-[152].

Contract: interpretation; implication of terms

***Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85**

Decision date: 14 July 2021

Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ

In 2010 Bathurst Resources Ltd ("Bathurst") purchased coal exploration rights from L&M Coal Holdings Ltd ("L&M"). The agreement provided for an initial payment of $40M, and two further "performance payments" of $40M, payable when 25,000 tonnes and then one million tonnes of coal had been "shipped from the Permit areas" (cl 3.4). Bathurst was required to pay royalties to L&M of 10% of gross revenue until the first performance payment was made, 5% after the first payment and 1.75% after the second payment. Development of the mine was delayed, during which time the international price of coking coal collapsed. In 2012 the parties by deed inserted cl 3.10, which provided that failure by Bathurst to make a performance payment was not an actionable breach so long as relevant royalty payments continued to be made. In 2014 Bathurst began producing non-coking (lower value) coal for domestic sale, 25,000 tonnes of which had been moved out of the permit areas by 2015. The first performance payment was not made, but royalties continued to be paid until early 2016, when mining operations were suspended. L&M successfully sued for the first Performance Payment, and Bathurst appealed. The key questions on appeal were whether cl 3.4 was triggered by domestic sales, and, if so, whether cl 3.10 allows for deferral of a Performance Payment where no royalties are being paid because no mining is being undertaken.

Held: Allowing the appeal.

- Though the parties understood the main commercial purpose of the operation to be the extraction of coking coal for export to foreign markets, the word "shipped" in cl 3.4 refers in its broader sense to any transportation away from the Permit Areas: [134]-[138]. The fact that the feasibility study to which the agreement was subject only refers to coking coal only demonstrates that Bathurst would not have entered the agreement without confirming the profitability of that operation: [141]-[145]. Evidence of post-formation communications and the subjective understandings of the negotiators was inadmissible: [149]-[155].

- Though it was assumed that Bathurst would develop the mine and exploit it to the fullest extent, there was no legal obligation to that effect: [236], [245]. It was always a possibility under the contract that L&M would receive no more than the $40M purchase price: [243], [253]. That risk was extended beyond the 25,000 tonne milestone by the insertion of cl 3.10 ([244]), which imposes no new royalty obligation: [248]. It is not possible to imply any term as to the continuation of mining: [263]. The uncertainty of any such term would be undesirable given the commercial consequences (the $40M payment obligation) ([266]) and it is not needed to give business efficacy to the contract: [270]. [Winkelman CJ and Ellen France J, in dissent: "relevant royalty payments" in cl 3.10 refers to those arising from a level of mining consistent with that which triggered the payment: [174].]