Decisions of Interest

14 August 2023 – 27 August 2023

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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Sunaust Properties Pty Ltd t/as Central Sydney Realty v The Owners – Strata Plan No 64807 **[2023] NSWCA 188**

Decision date: 14 August 2023

Meagher and Stern JJA and Basten AJA

The owners corporation of a strata scheme brought proceedings in the Civil and Administrative Tribunal against the caretaker of that strata scheme, appointed under a Caretaker Agreement. Relevantly, the owners corporation was granted an order terminating the Caretaker Agreement under s 72(1)(a) of the *Strata Schemes Management Act 2015* (NSW) ("2015 Act"). On appeal, the Appeal Panel of the Tribunal ("Appeal Panel") decided that it did not have jurisdiction to hear the matter on account of the concurrent proceedings in the Supreme Court of NSW. The Appeal Panel remitted the matter without considering any of the other grounds of appeal on the basis that it was not necessary for them to do so. The owners corporation wrote to the Appeal Panel stating that they wished to draw to its attention, under s 63 of the *Civil and Administrative Tribunal Act 2013* (NSW) ("the Tribunal Act"), a failure to deal with the grounds of appeal which went to jurisdiction under s 72 of the 2015 Act. The Tribunal, in its decision rejected the owners corporation's grounds of appeal and decided that it did not need to amend its orders.

Held: granting leave to appeal but dismissing the appeal

- Justice Basten (with whom Meagher JA agreed) found that the criterion contained in s 63(1) of "an obvious error" was not wide enough to permit the reopening of a decision in order to address substantive issues which had not been previously addressed: [1], [154], [159]. The power to make a reopening decision made by the Appeal Panel falls within the breadth of procedural powers conferred on it under Tribunal Act, s 38. That conclusion flows from the obligation imposed by the guiding principle in s 36(1) to facilitate the just, quick and cheap resolution of the real issues in the proceedings: [1], [90], [160]-[162].

- Justice Stern considered that Section 63 must be construed having regard to the objects of the Tribunal: s 3 of the Tribunal Act and in a manner that seeks to ensure that it facilitates the just, quick and cheap resolution of the real issues: s 36 of the Tribunal Act: [54], [63]. The Appeal Panel made an error arising from an accidental omission within s 63(3)(b) and jurisdiction under a rule such as s 63 is available where an order is deliberately made but an error was made by the Court. The decision to remit the matter to the Tribunal was inconsistent with the Appeal Panel's observations in its reasons that it was unnecessary to consider any further grounds of appeal within s 63(3)(d). The decision to correct its error could not be properly characterised as the exercise of an independent discretion beyond the ambit of s 63 of the Tribunal Act, construed in its statutory context: [70], [74], [82].

- The Tribunal had power under s 72 of the 2015 Act to consider the termination application with respect to the Caretaker Agreement. A purposive construction of the provisions in Sch 3 to the 2015 Act requires that Sch 3, cl 15 picks up that limited category of agreements where the caretaker is not entitled to exclusive possession of a lot, while the bulk of caretaker agreements covered by the Strata Schemes Management Act 1996 (NSW) are picked up by Sch 3, cl 3: [1], [137], [185]. The reasoning in [340] and [341] of *Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111* [2021] NSWCA 162 was not based upon careful consideration of the detail of the legislative scheme, was expressed tentatively and was not dispositive, has not been followed in later cases, and is, not correct and should not be followed: [1], [190].

Civil Procedure: cross-vesting

***Huynh v Attorney General (NSW)* [2023] NSWCA 190**

Decision date: 16 August 2023

Bell CJ, Kirk JA and Simpson AJA

Mr Huynh was seeking to appeal a conviction for importing a commercial quantity of border-controlled precursor, with the intention that the substance would be used to manufacture a controlled drug. A majority of the High Court, held that ss 78(1) and 79(1)(b) (but not s 79(1)(a)) of the *Crimes (Appeal and Review) Act 2001 (NSW)* (CAR Act) were "picked up" and applied as surrogate federal laws by s 68(1) of the *Judiciary Act 1903 (Cth).* It followed that the primary judge's decision to dismiss Mr Huynh's application for a post-appeal inquiry was made under a law of the Commonwealth. The High Court then remitted the matter to the Court of Appeal for determination of the substance of the Applicant's application for judicial review. A threshold jurisdictional issue arose as to whether: the remitted judicial review proceedings involved a "special federal matter" within the meaning of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) (Cross-vesting Act), such that they were, subject to s 6(3), required to be transferred to the Federal Court (the "special federal matter issue"); and if so, whether pursuant to s 6(3) of the Cross-vesting Act, there were "special reasons" to make an order that the proceedings be determined by the Court of Appeal (the "special reasons issue").

Held: the application for judicial review is be determined by the Court of Appeal

- The definition "special federal matter" raises two issues: whether the matter falls within one of the categories relied upon and, if so, whether the Supreme Court would only have jurisdiction under the *Cross-Vesting Act.* The first issue can be addressed by reference to s 3(1)(e), which was satisfied here as jurisdiction arose under a law made by the federal Parliament, namely s 68 of the *Judiciary Act*: [18]-[21], [37]. As to the second issue, s 9(1) of the *ADJR Act* deprives the Supreme Court of jurisdiction to review decisions to which the *ADJR Act* applies, namely decisions of an administrative character made under an enactment, and vests that jurisdiction solely in the Federal Court. If s 9(1) applies, then it is only by way of s 4(1) of the *Cross-vesting Act* that jurisdiction to review such decisions is reinvested in the Supreme Court: [21]-[22], [33]-[36].

- "Special reasons" in the context of s 6(3) of the *Cross-vesting Act* do not require exceptionality. The reasons will take their character as special from the context of the proceeding and may include issues of costs and delay which are not purely matters of convenience to the parties: [39]-[44]. There were several special reasons why an order pursuant to s 6(3) of the *Cross-vesting Act* should be made, notwithstanding the general rule that special federal matters should be heard by the Federal Court, these being: consistency with the Commonwealth's scheme for territorially uniform criminal procedure, the proceedings involved a State law, and the Court of Appeal's familiarity with the proceedings and the CAR Act: [45]-[50], [53].

Constitutional Law: Federal jurisdiction

Wojciechowska v Secretary, Department of Communities and Justice; Wojciechowska v Registrar, Civil and Administrative Tribunal **[2023] NSWCA 191**

Decision date: 17 August 2023

Mitchelmore and Kirk JJA and Griffiths AJA

Ms Wojciechowska commenced various proceedings in the New South Wales Civil and Administrative Tribunal in relation to decisions made under the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act); and the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act). Three of the proceedings concerned applications to review decisions under s 80 of the GIPA Act involving access to information held by public sector agencies, and two other Tribunal proceedings concerned an application for damages under s 55(2)(a) of the PPIP Act. Ms Wojciechowska lives interstate and her claims were against persons who were emanations of the State. Her claims were of a kind potentially falling within s 75(iv) of the *Constitution*. She argued that the Tribunal did not have jurisdiction to determine any of the proceedings because to do so would infringe the limitation recognised in *Burns v Corbett* (2018) 265 CLR 304; [2018] HCA 15.

Held: allowing the appeal in part

- *Burns v Corbett* does not prevent State tribunals from exercising any power, including power of a non-judicial kind: [40]. The *Burns v Corbett* restriction involves three core issues: Is the proceeding of a kind potentially falling within ss 75-76 of the *Constitution*; would resolution of the dispute involve exercising the judicial power of the Commonwealth; and is the decision-maker a court in the relevant sense? If the first two questions are answered "yes", and the third question is answered "no", the *Burns v Corbett* restriction applies: [42]-[43].

- The features of the functions exercised by the Tribunal point towards characterising the decision-making functions as involving non-judicial power: [87]. The Tribunal bears features characteristic of administrative tribunals, but also some of the judicial process: [90]-[96]. The Tribunal is making a decision standing in the shoes of the administrator, where the decision is treated as a decision of the administrator, and where the burden of the decision relevantly falls on the administrator. That outcome weighs significantly in favour of characterising the function as involving executive, not judicial, power: [98]. The Tribunal's power to deal with contempt or civil penalty applications are distinct processes: [102]-[103]. None of the impugned functions of the Tribunal in reviewing decisions under the GIPA Act involve exercise of judicial power: [105].

- Many features, in relation to the PPIP Act and the GIPA Act, indicate a non-judicial characterisation of the powers: [134]-[135]. When exercising the powers under s 55(2), the Tribunal is making orders directed to the agency, rather than in lieu of the agency's own decision: [136]. An order for damages made pursuant to s 55(2)(a) of the PPIP Act is to be certified by a registrar under s 78(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) and is enforceable as a judgment of the court when registered. Section 78(1) applies to s 55(2)(a) orders and should not be read down or severed: [138]-[139].

- The Tribunal would therefore be exercising judicial power if and when an order for damages under s 55(2)(a) of the PPIP Act is sought: [140]-[142].

Negligence: occupier's liability

Venues NSW v Kane **[2023] NSWCA 192**

Decision date: 18 August 2023

Leeming and Adamson JJA and Simpson AJA

Ms Kerri Kane fell as she descended some steps within the lower concourse of the western grandstand of the McDonald Jones Stadium. The steps formed part of an aisle with seats on one side and a concrete wall on the other side. The main issue in the Court below and on appeal was: whether a reasonable person in Venue NSW's position, a government agent that occupied the site, would have installed a handrail. The primary judge answered that question in the affirmative. Her Honour entered judgment in Ms Kane's favour in the amount of $91,117.

Held: granting leave and allowing the appeal

- The finding of breach by the primary judge could not stand for multiple reasons, including that it proceeded on an erroneous construction of s 5B of the *Civil Liability Act 2002* (NSW) and the obvious nature of the danger presented by the steps: [58]-[70].
- A reasonable occupier would not have installed a handrail. The risk was familiar and obvious. The use of stepped aisles without handrails in similar stadiums is commonplace. The structure had been certified as fully compliant eight years earlier. The evidence did not disclose any history of earlier falls resulting in injury, despite the stairs being used by millions of spectators over the previous eight years: [71]-[73], [96].
- Justice Leeming considered (and Adamson JA agreed) that the fact that a handrail would have been an ineffective precaution for many or most users was a matter, albeit one of lesser significance, contributing to the conclusion that it was not a precaution which a reasonable occupier would implement: [77].
- Justice Simpson, in contrast, found that the fact that some patrons may choose not to use a handrail does not bear upon whether a reasonable occupier would install a handrail: [94]-[95].

Australian Intermediate Appellate Decisions of Interest

Marriage: meaning of "real consent"

***Sambucco v Sambucco* [2023] VSCA 199**

Decision date: 25 August 2023

McLeish and Walker JJA and Gorton AJA

On 8 June 2019, Marco and Mara Sambucco took part in a marriage ceremony, conducted by Reverend Rock, according to the Rites of the Baptist Union of Australia. Neither Marco, Mara nor Rev Rock believed that the ceremony would result in a lawful marriage as certain legal formalities had not been complied with. The parties were unaware that the formalities that were not complied with would not invalidate a marriage, due to s 48(2)(a) of the *Marriage Act 1961* (Cth). They intended to complete the formal requirements on 21 September 2019 but Marco died before that time. Mara was granted Letters of Administration of Marco's estate. Marco's family members commenced proceedings on the basis that a will made by Marco in 2015 was not revoked because the marriage was not legally effective or, alternatively, that it was void because Marco and Mara were mistaken as to the nature of the ceremony. The primary judge dismissed those arguments. On appeal, the applicants seek to argue that the marriage was void under s 23B(1)(d)(iii) because Marco and Mara did not understand the nature and effect of the ceremony.

Held: granting leave to appeal but dismissing the appeal

- The applicant's literal reading of s 23B(1)(d)(iii) was rejected because it would render the latter part of (ii) otiose and would mean that the 2018 amendment, that removed the reference to mental incapacity, made a fundamental change to the scope of (iii): [64], [73]-[74]. If every marriage in which a party did not understand the effect of the marriage ceremony was void, regardless of whether that lack of understanding vitiated the consent to the marriage, the opening words of (d) would have no function: [69].

- The correct interpretation should be determined by considering that: consent is central to the decision of marriage, meaning that s 23B(1)(d) should be construed to focus on the reality of consent; the purpose of s 23B(1)(d) indicates that it operates to void only those marriages where the consent of the parties is not a "real consent", in the circumstances identified in (i), (ii) or (iii): [70]-[72]. This interpretation is supported by Parliament's limited purpose in enacting the 2018 amendments, and the fact that the concept of "duress" in (i) has been construed as involving a vitiating of consent: [79], [81]. Section 23B(1)(d)(iii) operates to render a marriage void only if the lack of understanding as to the nature and effect of the marriage was such as to mean that the person did not really consent: [88]-[90], [92]. Marco and Mara understood that they were voluntarily committing to a union to each other for life, such that their consent remained real: [93]-[94].

Taxes and Duties: stamp duty

***Edge Developments Pty Ltd & Ors v Commissioner of State Taxation* [2023] SASCA 88**

Decision date: 17 August 2023

Doyle, Bleby and Nicholson JJ

Edge is Trustee of a unit trust, of which the second ("Adabco") and third appellants ("Tabco") are unit holders. The parcels of land owned by Adabco and Tabco were adjacent. Moore Park Pty Ltd (a previous unit holder) was deregistered in 2018. Pursuant to the Deed of Settlement, Adabco and Tabco were jointly issued with 3,000,000 units in the Unit Trust. Moore Park was issued with 1,250,000 units. In 2014, Edge executed a Deed of Redemption, redeeming the Moore Park units, which were valued at $2,350,000. Edge paid that amount to Moore Park and the redeemed units were cancelled. Adabco and Tabco executed a deed of indemnity and a deed of release in favour of Moore Park. In 2015, Moore Park executed a transfer of one ordinary share in Edge to Adabco. The Commissioner issued a Stamp Duty Notice of Assessment ("Redemption Assessment") in respect of the redemption transaction. The appellants objected to the assessment under s 82 of the *Taxation Administration Act 1996* (SA). Later, the Commissioner issued a further Assessment reducing the assessment of duty and interest. In 2022, an appeal by the appellants against a decision of the Commissioner that the redemption transaction attracted an obligation to pay stamp duty was dismissed.

Held: dismissing the appeal

- Sections 2(2) and 92 operate such that a legal or equitable interest (not being a mortgage, lien or charge) in the proceeds of sale of a land asset is taken to be an interest of the same kind in that land asset. That deemed interest in the land under s 2(2), and thereby under s 92, was the contingent, potential beneficial interest in the proceeds of sale created by cl 3.1.1.3 of the Performance Charge. The interest created by cl 5 was a charge. By reason of s 92(1)(a), that was not an interest in the land. The interest created by cl 3.1.1.3 was separate from that charge, and as deemed by the Act, an interest in the land.

- The calculation of duty under s 102A(2) attached, relevantly, to a hypothetical conveyance of the underlying assets of the Edge land as a consequence of the redemption transaction, not the Performance Charge. The relevant increased prescribed interest (as defined in s 91(1)) in the underlying local land asset (that being the deemed interest by operation of s 2(2)), was the unitholding in the Unit Trust. It was not the charge created by cl 5 of the Performance Charge.

- Section 102F did not apply. The redemption transaction caused Adabco and Tabco to increase their prescribed interest in a land holding entity.

- In dissent, Nicholson AJA found that s 2(2) of the *Stamp Duties Act 1923* (SA) did not capture the contractual arrangement between Edge, and Adabco and Tabco during the Redemption and Edge was not a holding entity at that time.

Defamation

***Hanson v Burston* [2023] FCAFC 124**

Decision date: 16 August 2023

Wigney, Weelahan and Abraham JJ

Mr Burston alleged that Ms Hanson had made eight allegedly defamatory imputations across three publications. The primary judge found that two of the imputations had been established, being that Mr Burston sexually abused a female staff member in his Parliamentary office and that Mr Burston physically assaulted James Ashby in Parliament House without provocation. These two imputations arose from a televised interview of Ms Hanson. On appeal, Ms Hanson sought to establish that the fourth and sixth imputations were not carried, alternatively that either the defence of substantial truth or the defences of statutory and common law privilege has been established.

Held: allowing the appeal

- The fourth imputation was carried. Although Ms Hanson did not name Mr Burston, an ordinary reasonable person would understand from the plain words conveyed, that Mr Burston sexually abused and harassed a female staffer. Even if the phrase "sexual abuse and harassment" is considered as a composite expression, that does not mean that an ordinary reasonable person would understand the phrase only conveyed sexual harassment. Sexual abuse and sexual harassment are different concepts, albeit what would be understood as to the meaning of each of the concepts in this case is coloured by the context, being a live interview such that the statement could have been seen as having been said in the heat of the moment as deflection: [56].

- The defence of substantial truth was established: [58], [77]. Mr Burston held a position of power over his employees. That power differential, and the working environment, colours Mr Burston's conduct and its characterisation: [56]. The evidence established that Mr Burston repeatedly inflicted non-consensual, verbal and physical sexual behaviour on the employees: [60]. The ordinary meaning of sexual abuse does not require either an ongoing course of conduct, nor something beyond physical contact: [64]-[65]. The primary judge's approach to determining whether sexual abuse had been established was unduly narrow: [68]-[69]. Regardless, Mr Burston's conduct carried the features of the primary judge's description of sexual abuse: [70]-[75]. Regardless, the issue is how the ordinary reasonable person hearing the interview would construe the words sexual abuse, in the context in which they were said: [76].

- The sixth imputation was not carried: [84]. The phrase, "never laid a hand on" refers to physically laying a hand on, or physical touching. It does not convey Mr Burston was unprovoked. The ordinary reasonable viewer would have understood that it was not a fight, but that Mr Burston was the physical aggressor as Mr Ashby had not physically touched Mr Burston: [83].

Asia Pacific Decision of Interest

Misleading or deceptive conduct; Companies: directors; Securities

***Banks v Farmer* [2023] NZCA 383**

Decision date: 23 August 2023

Cooper P, Gilbert and Katz JJ

Mr Banks made various unsecured advances to Mako Network Holdings Ltd (Mako). Mr Banks' advances were made pursuant to three Agreements and totalled approximately $3.5 million. The respondents were directors of Mako. Mako was placed in receivership and liquidation owing creditors more than $30 million, including almost $27 million to its sole secured creditor, Telecom Rentals Ltd. Mako's assets were sold for around $3 million. The unsecured creditors, including Mr Banks, lost all of their invested money. Mr Banks claimed that he was misled about the true financial state of Mako and its business prospects when he made his investments. He advanced four causes of action under s 37 of the *Securities Act 1978* (NZ), s 9 of the *Fair Trading Act 1986* (NZ) (FTA), and s 131 and 135-137 of the *Companies Act 1993* (NZ) (director's duties). Mr Banks also alleged a breach of s 55G of the *Securities Act*. Mr Banks challenges the primary judges' analysis of ss 9 and 43 of the FTA, and the findings in relation to the *Companies Act*. He also claims that the primary judge wrongly conflated the expansive concept of an offer to the public with the restrictive exceptions under the Securities Act.

Held: dismissing the appeal

- The appeal in respect of the FTA claims must be dismissed: [222]. There was a reasonable factual foundation for the projections made in the 2011 Financial Year PPM (private placement memorandum) at the time they were prepared. The forecasts represented the honestly held opinions of the directors at that time. The representations said to have induced Agreement 1 were not actionable under the FTA because they were not misleading or deceptive: [143]-[149]. Mr Farmer genuinely believed that an IPO was likely at the time Agreement 2 was signed. This belief was reasonably held. Mr Banks had not proved his claims of misleading or deceptive conduct prior to Agreement 2: [188]. Mr Banks claim that he ought to have been told that Mako was unlikely to be able to complete an agreement with Sprint should be dismissed as he was not aware of any potential agreement with Sprint at that time: [211], [221].

- The directors did not breach their obligations under s 135 by allowing the company to continue to trade until Telecom Rentals suspended funding in 2013: [240]. An expert appraisal in October 2013 indicated that the company was not in an unsalvageable position: [244]. When Telecom Rentals withdrew its funding, the directors made significant expenditure cuts and invested their personal savings into the company, indicating their confidence in the company's outlook: [245]-[248]. The directors were not in breach of their duty under s 135 by allowing the company to trade between February to April/May 2014 because the anticipated contract with Sprint would have produced sufficient funding to allow the company to continue trading profitably: [255].

- The *Securities Act* did not apply to the three Agreements because there was no offer of securities to the public within the inclusive part of the definition in s 3(1) and Mr Banks was selected otherwise than as a member of the public (thus, the exclusion in s 3(2)(a)(iii) applies): [324]-[326], [329]-[330], [333].