

# The Federal and State Courts on Constitutional Law: The 2019 Term

*Gilbert + Tobin Constitutional Law Conference*  
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Justice A S Bell, President of the Court of Appeal,  
Supreme Court of New South Wales\*

- 1 It is a great pleasure and privilege to have been asked to deliver this paper at this annual conference. The conference has become an institution and a very valuable and important one, bringing together the profession and academy to digest and discuss developments in constitutional law particularly over the course of the previous year. I acknowledge the work of the Gilbert & Tobin Centre and its highly engaged and dynamic members.
- 2 This particular session reflects the important point that constitutional issues and their consideration are not the sole province of the High Court and will often arise in state and federal courts. That means that practitioners must be astute to constitutional law issues, including questions of federal jurisdiction (including diversity jurisdiction), Chapter III and judicial power and conflict of laws – not in the sense that I usually use that expression, namely as another name for private international law – but in the sense that Justice Leeming uses it in his excellent little book *Resolving Conflicts of Laws*<sup>1</sup>, ie. conflicts not only between federal and state laws but between state laws which both appear to speak to the same dispute but in a different terms.
- 3 Like issues of private international law, I suspect there are a significant number of cases resolved in state and federal courts each year in which constitutional issues “lurk” either undiscovered or at least not fully revealed,

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\*I acknowledge the research assistance of Mr James Monaghan, former Researcher to the New South Wales Court of Appeal, in the preparation of this paper.

<sup>1</sup> (2011, Federation Press).

- 4 My brief is to draw attention to the key constitutional cases in State Supreme Courts and in the Federal Courts from 2019. There has been a wealth of interesting cases in the last year raising important and at times complex questions of constitutional law.
- 5 I have not, in this paper, summarised every decision that raised a constitutional point, and nor is every such case included in the table annexed but the cases digested all present legal issues that should stimulate constitutional law scholars and practitioners.
- 6 As is usual, many of the constitutional arguments raised in State and federal courts in 2019 were non-starters or, consistent with well-established principle, positively not required to be determined in circumstances where the matter was able to be resolved on other (non-constitutional) grounds.<sup>2</sup> A notable example of that was the decision of the New South Wales Court of Appeal in *Searle v The Commonwealth* (2019) 345 FLR 356; [2019] NSWCA 127. Mr Searle sought to argue that an appropriation act could itself be the source of power or authorisation for particular executive action: see at [182]. This was a question which had been expressly left open by the High Court in *Williams v The Commonwealth (No 2)* (2014) 252 CLR 416; [2014] HCA 23 at [52]- [55]. We declined to delve into that particular Pandora's Box as the case against the Commonwealth could be despatched on other grounds which will also be of interest and to which I refer towards the end of this paper.
- 7 In what follows, I've focused on what I've judged to be the cases of most significant interest to constitutional lawyers in 2019.
- 8 The cases discussed fall into four broad categories.<sup>3</sup> First, cases raising issues of federal jurisdiction. This category in turn dividing those cases into

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<sup>2</sup> See, for example, *Lambert v Weichelt* (1954) 28 ALJR 282 at 283; *Wurridjal v Commonwealth* (2009) 237 CLR 309; [2009] HCA 2 at [355]; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; [2013] HCA 53 at [148]; *Duncan v New South Wales* (2015) 255 CLR 388; [2015] HCA 13 at [52]; *Knight v Victoria* (2017) 261 CLR 306; [2017] HCA 29 at [32].

<sup>3</sup> There are three cases in the attached table that are concerned with issues arising under a state constitution. They are: *Winline Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 1080 (question of whether application of *Payroll Tax Act 2007* (NSW) to the plaintiff within legislative

three sub-categories – diversity jurisdiction; cases considering the operation of state laws with respect to the exercise of federal jurisdiction; and cases about the jurisdiction of the Federal Court. After federal jurisdiction, other Chapter III cases and then two cases on s 109 inconsistency are discussed. Finally, three cases that raise questions about Commonwealth executive power which perhaps fit into a description of small “c” constitutional cases are discussed.

### **Federal Jurisdiction: diversity jurisdiction**

- 9 Three cases raised issues of diversity jurisdiction – that is, matters ‘between States, or between residents of different States, or between a State and a resident of another State’ (s 75(iv)). In different ways, these cases follow on from the High Court’s decision in *Burns v Corbett; Burns v Gaynor* [2018] HCA 15; (2018) 92 ALJR 423 and the New South Wales Court of Appeal’s decision in *Attorney General for New South Wales v Gatsby* (2018) 99 NSWLR 1; [2018] NSWCA 254.

*Gaynor v Local Court of NSW & Ors* [2019] NSWSC 805 (28 June 2019)

- 10 The first case was a challenge brought by Mr Gaynor to legislation passed in response to the Court of Appeal’s decision in *Burns v Corbett* (2017) 96 NSWLR 247; [2017] NSWCA 3; noting that an appeal to the High Court from the Court of Appeal’s decision was dismissed.
- 11 After the Court of Appeal had held that the *Constitution* precluded the NSW Parliament from conferring diversity jurisdiction on the NSW Civil and Administrative Tribunal – a body that did not meet the description of ‘a court of State’ within the meaning of s 77(iii) of the *Constitution* or s 39 of the *Judiciary*

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competence of NSW Parliament – unnecessary to decide on the facts); *Vickers v Queensland Building and Construction Commission & Ors* [2019] QCA 66 (whether subject matter of a Queensland statute with extraterritorial effects sufficiently connected to the State to be within legislative competence of Queensland Parliament – statute held to be valid); *Fidge v Municipal Electoral Tribunal* [2019] VSC 639 (application for leave to appeal against VCAT decision not to refer question to Supreme Court of Victoria, arguing, inter alia, that electoral mechanisms in the *Local Government Act 1989* (Vic) are inconsistent with terms of the *Constitution Act 1975* (Vic) and infringe upon the implied freedom of political communication – leave refused). They have been omitted from the main text only because it happens that they do not raise substantial questions of constitutional law.

*Act 1903 (Cth)* – the NSW Parliament inserted a new part 3A into the *Civil and Administrative Tribunal Act 2013 (NSW)*. That new part included s 34B, which when read with s 34A, provided, in broad terms, that where a person with appropriate standing has made an original application in or an external appeal to the Tribunal, and the determination of that application or appeal would require the Tribunal to exercise federal jurisdiction, and the Tribunal would otherwise have had jurisdiction to determine the application or appeal, the District Court or Local Court may grant leave to hear the application or appeal instead of the Tribunal.

- 12 Mr Gaynor challenged the validity and operation of s 34B on various bases. His central challenge, however, was this: given that the Tribunal cannot adjudicate upon ‘diversity matters’ (in light of the Court of Appeal and the High Court’s decisions in *Burns v Corbett*), any jurisdiction conferred on the Local Court (and, presumably, the District Court) that is conditioned on an application first being made to the Tribunal must be invalid.<sup>4</sup>
- 13 Harrison J dismissed Mr Gaynor’s challenges to the validity of s 34B. His Honour held that s 34B does not purport to confer federal judicial power on the Tribunal. Rather, the statutory scheme is quite carefully structured so as to confer diversity jurisdiction upon the Local and District Courts, *not* the Tribunal. The conferral of that jurisdiction is conditioned upon on ‘specified events that merely happen to involve the Tribunal’. His Honour held that the Tribunal lacks jurisdiction to determine an application or appeal that involves a diversity matter in no way precludes an applicant from lodging the relevant kind of application with the Tribunal in order to fulfil the conditions necessary to enliven the Local or District Courts’ jurisdiction.<sup>5</sup>
- 14 A notice of appeal from Harrison J’s decision was filed on 7 August 2019. The appeal has been listed for hearing in the Court of Appeal on 24 February 2020.

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<sup>4</sup> *Gaynor v Local Court of NSW & Ors* [2019] NSWSC 805 at [22].

<sup>5</sup> *Gaynor v Local Court of NSW & Ors* [2019] NSWSC 805 at [25], [28], [78].

*Attorney-General for the State of South Australia v Raschke & Anor* (2019) 133 SASR 215; [2019] SASCFC 83 (11 July 2019).

15 The second case on diversity jurisdiction was *Attorney-General for the State of South Australia v Raschke & Anor* (2019) 133 SASR 215; [2019] SASCFC 83.

16 Ms Firinauskas owned residential premises. Mr Raschke rented those premises. Ms Firinauskas sought vacant possession on the basis that Mr Raschke had failed to pay outstanding rent. She served him with a notice in the appropriate form. On 14 May 2018, pursuant to its jurisdiction to hear and determine disputes under the *Residential Tenancies Act 1995* (SA), the South Australian Civil and Administrative Tribunal held that the notice Ms Firinauskas had served validly terminated the lease, and ordered Mr Raschke to vacate the premises in due course.

17 Mr Raschke sought internal review of that decision. An important fact was disclosed at a preliminary hearing for that review: Ms Firinauskas was a Victorian resident; Mr Raschke was a South Australian resident. Given this interstate dimension, the question arose as to whether the Tribunal could determine the dispute. That question was referred to the President of the Tribunal. The President held that:

- making the decision of 14 May 2018 and undertaking an internal review of that decision did involve, and would involve, an exercise of federal judicial power;
- the Tribunal could not exercise such power, as it was not a 'court of a State';
- so the order of 14 May 2018 should be set aside, so far as was necessary.

18 The Attorney-General for South Australia appealed against the President's decision. The Attorney accepted that the Tribunal was not a court. She

challenged the President's decision that the Tribunal exercised judicial power in making the orders of 14 May 2018 and would be exercising judicial power if it conducted the review sought by Mr Rashcke. The Attorney contended that the power exercised by the Tribunal was not *judicial* on two grounds. First, the discretions which the Residential Tenancies Act conferred on the Tribunal were said to be too wide to amount to exercises of judicial power. Second, the Tribunal's inability to enforce its own decisions (except through its bailiff) was said to indicate that the powers it exercised under the Act were administrative.

19 The Full Court – constituted by Kourakis CJ, Kelly J, and Hinton J – dismissed the appeal.<sup>6</sup>

20 The Court rejected the Attorney's submission that in determining the dispute between Ms Firinauskas and Mr Raschke, the Tribunal had not exercised judicial power or would not be exercising judicial power on any review. Amongst other reasons, the Court held that the Tribunal would be exercising judicial power because:<sup>7</sup>

- The subject matter of the controversy (recovery of possession of leased premises) has historically been a matter for the common law courts;
- Determining the dispute would involve applying existing law to facts as found;
- The dispute only affected the parties to it and the proceedings would be *inter partes*;
- The proceeding is adversarial (though the Tribunal may intervene), the factual inquiry is limited to the parties' circumstances, and the law is identified, not made; and

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<sup>6</sup> *Attorney-General for the State of South Australia v Raschke & Anor* (2019) 133 SASR 215, 250 at [101]-[103].

<sup>7</sup> *Attorney-General for the State of South Australia v Raschke & Anor* (2019) 133 SASR 215, 248 at [95], 249-50 at [100].

- The enforcement of the Tribunal's order (by the bailiff) is mandated by statute, such that no further act or proceeding is required.

21 The Court held that the South Australian provisions in this case were not relevantly different from the NSW provisions considered in *Gatsby*, and accordingly, that the result – that the Tribunal, not being a Court of a State, would be impermissibly exercising federal judicial power if it determined a diversity matter – should be the same.<sup>8</sup>

*GS v MS* (2019) 344 FLR 386; [2019] WASC 255 (19 July 2019)

22 The third case on diversity jurisdiction involved two appeals from two decisions of the Western Australian State Administrative Tribunal. The first appeal was brought from orders made by the Tribunal in respect of an application made under s 40 of the *Guardianship and Administration Act 1990* (WA) for a guardianship order and an administration order with respect to a person known as GS. The second appeal concerned a point about costs. Our interest lies in the first appeal.

23 In the s 40 proceedings, a person known as MS, a resident of NSW, applied for a guardianship order and an administration order with respect to GS, who was a resident of Western Australia. GS is MS's mother. The Tribunal determined that it had jurisdiction to make the guardianship order but that it did not have jurisdiction to make the administration order, that is an order for the administration of GS's Estate. The Tribunal arrived at that conclusion in the following way:<sup>9</sup>

- (1) The Tribunal accepted that it was not a 'court of a State'. In light of the High Court's decision in *Burns v Corbett*, it was therefore clear that if a Ch III 'matter' arose, the Tribunal would not be a body that had jurisdiction to determine that matter.

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<sup>8</sup> *Attorney-General for the State of South Australia v Raschke & Anor* (2019) 133 SASR 215, 248-9 at [96]-[99], 250 at [101].

<sup>9</sup> *GS v MS* (2019) 344 FLR 386, 391-2 at [17]-[26].

- (2) The Tribunal considered whether the applications were ‘matters ... between residents of different States’ (in the language of s 75(iv)). The Tribunal was satisfied that the s 40 applications involved ‘matters’, so focused on the requirement that they be matters *between* residents of different States.
- (3) The Tribunal held that the application for a guardianship order did not raise a matter *between* MS and GS – and so there was no constitutional barrier to the Tribunal hearing and determining the application.
- (4) By contrast, the Tribunal held that the application for an administration order did raise a matter *between* MS and GS, as MS sought an order appointing himself as administrator for GS.

24 The question on appeal to the Supreme Court of Western Australian was whether the Tribunal had jurisdiction to make the two orders sought under s 40.

25 Chief Justice Quinlan held that the Tribunal had jurisdiction to make *both* a guardianship order and an administration order. His Honour reasoned that, when one examines the relevant provisions of the *Guardianship and Administration Act 1990* (WA), they do not confer judicial power on the Tribunal. That being the case, the Tribunal has jurisdiction, and it is irrelevant where the persons involved in the proceedings reside. If judicial power is not involved, he reasoned, then one does not have a ‘matter’ at hand – and if there is no ‘matter’, then there is no scope for the constitutional limitations identified in *Burns v Corbett* to apply.<sup>10</sup>

26 In the alternative, and on the assumption that there was a matter in the relevant sense, Quinlan CJ considered whether there was a matter meeting the description in s 75(iv) – that is, one ‘between residents of different States’. His Honour concluded that applications for guardianship orders and

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<sup>10</sup> *GS v MS* (2019) 344 FLR 386, 402-7 at [77]-[106], 411 at [130].

administration orders, even if they are matters, are not matters *between* anyone: applications to appoint guardians and administrators are protective in nature, not fundamentally *inter partes* ‘in the ordinary sense of that expression’. That being the case, even if such applications raise a matter, they do not raise one *between* the persons who may participate in such proceedings within the meaning of s 75(iv) of the *Constitution*.<sup>11</sup>

- 27 Given the social importance of guardianship orders, the enormous volume of guardianship work which tribunals such as Western Australian State Administrative Tribunal and NCAT in New South Wales do and the increasingly mobile nature of our population, this is a decision of great practical significance,

#### **Federal jurisdiction: operation of state legislation**

- 28 I now turn to three cases on the operation of state legislation in the context of federal jurisdiction – an issue that the High Court addressed head-on in 2017 in *Rizeq v Western Australia* (2017) 262 CLR 1; [2017] HCA 23.

*Treasury Wine Estates Vintners Limited v Pearson* (2019) 367 ALR 29; [2019] FCAFC 21 (13 February 2019).

- 29 A dispute arose between a worker, Mr Pearson, and his employer, Treasury Wine Estates Vinters Ltd (‘Treasury Wine’). Mr Pearson’s employment was governed by an enterprise agreement approved by the Fair Work Commission, pursuant to the *Fair Work Act 2009* (Cth). The dispute between the parties concerned the interpretation of a clause of that agreement.
- 30 Mr Pearson commenced proceedings in the Industrial Court of South Australia, invoking the small claims procedure under the *Fair Work Act*. The industrial magistrate who heard the matter dismissed Mr Pearson’s application.

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<sup>11</sup> *GS v MS* (2019) 344 FLR 386, 408-9 at [114]-[120], 411 at [130].

- 31 Mr Pearson filed a notice of appeal in the Industrial Court in April 2017. That appeal was heard in May 2017, and the judge who heard it reserved his decision.
- 32 On 1 July 2017, the *Statutes Amendment (South Australian Employment Tribunal) Act 2016* (SA) commenced. That Act dissolved the Industrial Court of South Australia and removed from office all of that Court's judicial officers – though that Court exercised both state and federal jurisdiction. The transitional provisions provided that 'Any proceedings before [the Industrial Court] under the principal Act immediately before [1 July 2017] will ... be transferred to the [South Australian Employment] Tribunal where they may proceed as if they had been commenced before the Tribunal.'
- 33 As at 1 July, the decision in Mr Pearson's appeal was still reserved. The parties agreed to have it dealt with by the Full Bench of the Tribunal in Court Session. On 21 December 2017, having conducted no further hearing, the Full Bench allowed Mr Pearson's appeal and ordered that Treasury Wine pay him \$232.36.
- 34 Treasury Wine appealed to the Federal Court. Mr Pearson was given leave to file an appeal directly from the industrial magistrate's original decision in the event that the appeal to the Full Bench was found to have been incompetent.
- 35 The Full Court of the Federal Court dismissed Treasury Wine's appeal as incompetent, declaring that the purported orders of the Full Bench of the Tribunal in Court Session were made without jurisdiction. So far as the substance of the dispute between the parties was concerned, the Federal Court upheld the industrial magistrate's orders.
- 36 The Court's conclusion on the jurisdiction point was grounded in the terms of the transitional provisions. Those provisions only transferred to the Tribunal a proceeding in the Industrial Court 'under the principal Act' – namely, the South Australian *Fair Work Act 1994* (SA). The provisions did not transfer Mr Pearson's proceeding, as it was a controversy arising under a federal law, the

Commonwealth *Fair Work Act*. Mr Pearson's appeal from the industrial magistrate's decision was a matter wholly in federal jurisdiction. Whatever else the *Statutes Amendment (South Australian Employment Tribunal) Act 2016* (SA) did, it did not operate to transfer his appeal from the Industrial Court to the Tribunal.<sup>12</sup>

- 37 No application for special leave was filed from the Full Federal Court's decision.

*Onley v Commissioner of the Australian Federal Police; Menon v Commissioner of the Australian Federal Police; Anquetil v Commissioner of the Australian Federal Police* (2019) 367 ALR 291; [2019] NSWCA 101 (10 May 2019)

- 38 In May 2017, the Commissioner of the Australian Federal Police commenced proceedings under the *Proceeds of Crime Act 2002* (Cth) against 66 defendants, including Messrs Onley, Menon, and Anquetil. The Commissioner alleged that the defendants were involved in a conspiracy to defraud the Australian Taxation Office with the intention of dishonestly causing a loss to the Commonwealth in the amount of over \$83m, contrary to s 135.4 of the Commonwealth Criminal Code (the schedule to the *Criminal Code Act 1995* (Cth)).

- 39 On 16 May 2017, Fullerton J made three sets of *ex parte* orders under the *Proceeds of Crime Act*.

- (1) Orders restraining the defendants from dealing with certain property;
- (2) Orders directing that the Official Trustee in Bankruptcy take custody and control of that property; and
- (3) Examination orders under s 180 of the Act, together with orders directing the defendants to supply sworn asset statements.

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<sup>12</sup> *Treasury Wine Estates Vintners Limited v Pearson* (2019) 367 ALR 29, 39 at [42]-[44].

- 40 On 17 and 18 May, Messrs Onley, Menon, and Anquetil were each arrested and charged with offences against the Criminal Code. On 5 and 6 June 2017, examination notices were issued under s 183 of the *Proceeds of Crime Act* requiring that each of them attend for examination.
- 41 On 15 and 16 June 2017, each of Messrs Onley, Menon, and Anquetil filed notices of motion seeking stays of the proceeds of crime proceedings pending finalisation of the criminal proceedings commenced against them or, alternatively, seeking stays of the examination orders pending the finalisation of the criminal proceedings.
- 42 In March 2018, Fullerton J dismissed the notices of motion.
- 43 Messrs Onley, Menon, and Anquetil sought leave to appeal. They wished to have the *ex parte* examination orders applicable to them revoked or set aside, and challenged Fullerton J's refusal to stay the proceedings.
- 44 There were a number of complex issues on appeal. For present purposes, however, our focus is on one question of federal jurisdiction.
- 45 Before the primary judge, Mr Anquetil had sought to have the examination order revoked under the *Proceeds of Crime Act* or set aside under r 36.16(2)(b) of the Uniform Civil Procedure Rules 2005 (NSW), or alternatively, to have the examination summons stayed. Mr Anquetil's grounds of appeal alleged that the primary judge had erred in concluding that Mr Anquetil bore the onus of showing that the *ex parte* examination order made against him should be revoked or set aside – an onus which he had not discharged. The grounds also went to questions of onus in relation to an order to have the examination order stayed.
- 46 To deal with the stay issue first: Bathurst CJ, Basten JA, and Meagher JA all held that s 319 of the *Proceeds of Crime Act* confers upon the Court a power to stay proceedings under the Act. That power must be exercised in

accordance with the conditions in that section.<sup>13</sup> Though the point was not argued, Basten JA expressed ‘serious doubt’ that there would be any scope for state laws conferring powers to grant a stay on broader terms to be picked up and applied by s 79 in this context.<sup>14</sup> Bathurst CJ further held that s 317 of the Act had the effect that the onus of establishing that a stay would be justified fell on the applicant for the stay.<sup>15</sup>

- 47 As to the question of onus in relation to the revocation or setting aside of *ex parte* examination orders, Bathurst CJ considered that, in one sense, this issue was quickly addressed: it was clear from her reasons that the primary judge had not decided the case on the basis that the appellants had failed to discharge any onus that they bore; it followed that she had not erred in the manner alleged on appeal.<sup>16</sup>
- 48 The Chief Justice did, nonetheless, consider the relationship between r 36.16 of the UCPR and the *Proceeds of Crime Act* on the question of where the onus would lie in an application to revoke or set aside an examination summons made *ex parte*. Rule 36.16(2)(b) gives the Supreme Court a power to set aside or vary a judgment or order given or made in the absence of a party. At general law, a person affected by a judgment or order who had not been heard in respect of that judgment or order is entitled as of right to have the order set aside. So, in the proceeds of crime context, *if* Mr Anquetil could invoke r 36.16(2)(b) to have the *ex parte* examination orders set aside, the

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<sup>13</sup> *Onley v Commissioner of the Australian Federal Police; Menon v Commissioner of the Australian Federal Police; Anquetil v Commissioner of the Australian Federal Police* (2019) 367 ALR 291, 346 at [216]-[217]; 374 at [348].

<sup>14</sup> *Onley v Commissioner of the Australian Federal Police; Menon v Commissioner of the Australian Federal Police; Anquetil v Commissioner of the Australian Federal Police* (2019) 367 ALR 291, 372 at [339].

<sup>15</sup> *Onley v Commissioner of the Australian Federal Police; Menon v Commissioner of the Australian Federal Police; Anquetil v Commissioner of the Australian Federal Police* (2019) 367 ALR 291, 346 at [213].

<sup>16</sup> *Onley v Commissioner of the Australian Federal Police; Menon v Commissioner of the Australian Federal Police; Anquetil v Commissioner of the Australian Federal Police* (2019) 367 ALR 291, 345 at [207].

onus would be on the Commissioner to establish that the orders should be continued.<sup>17</sup>

49 The Chief Justice held that there was no express power in the *Proceeds of Crime Act* to revoke an examination order.<sup>18</sup> It was argued, however, that the Court had power to set aside the order under r 36 of the UCPR. That rule would only operate in the proceeds of crime context – an area within federal jurisdiction – if picked up and applied by s 79 of the *Judiciary Act 1903* (Cth). The question, therefore, became whether the *Proceeds of Crime Act* expressly or by necessary implication indicated that the person subject to an examination order bore the onus of establishing that it should be set aside. If it did, then a State provision to the contrary – like r 36, as interpreted in accordance with the general law – would not be picked up by s 79, and would have no application in the proceedings.<sup>19</sup> The Chief Justice concluded that, properly construed, the *Proceeds of Crime Act* did place the onus on the party seeking to have an order revoked, such that there was no scope for r 36 to apply.<sup>20</sup>

50 Justice Basten held that there was no express power within the *Proceeds of Crime Act* to revoke an examination order. But the absence of a specific power ought not, in this context, be taken to suggest that there is room for the operation of r 36. His Honour considered that a number of other features of the *Proceeds of Crime Act* indicated that the Commonwealth Parliament intended that the procedural scheme of that Act should operate coherently

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<sup>17</sup> *Onley v Commissioner of the Australian Federal Police; Menon v Commissioner of the Australian Federal Police; Anquetil v Commissioner of the Australian Federal Police* (2019) 367 ALR 291, 346 at [214].

<sup>18</sup> *Onley v Commissioner of the Australian Federal Police; Menon v Commissioner of the Australian Federal Police; Anquetil v Commissioner of the Australian Federal Police* (2019) 367 ALR 291, 346 at [212].

<sup>19</sup> *Onley v Commissioner of the Australian Federal Police; Menon v Commissioner of the Australian Federal Police; Anquetil v Commissioner of the Australian Federal Police* (2019) 367 ALR 291, 346 at [215].

<sup>20</sup> *Onley v Commissioner of the Australian Federal Police; Menon v Commissioner of the Australian Federal Police; Anquetil v Commissioner of the Australian Federal Police* (2019) 367 ALR 291, 346-7 at [216]-[219].

without being supplemented by state laws picked up by s 79.<sup>21</sup> And further, his Honour concluded that there was in fact no power to set aside, revoke, or vacate an order for examination, whether made *ex parte* or not.<sup>22</sup> Justice Meagher agreed with Justice Basten on this point.<sup>23</sup>

- 51 In the result, the appeals were dismissed. An application for special leave to appeal was refused with costs on 4 September 2019.

*Elzahed v Kaban* [2019] NSWSC 670 (7 June 2019)

- 52 In late 2016, Ms Elzahed was a party to civil proceedings in the District Court of New South Wales which she brought against the Commonwealth. Her Honour Judge Balla presided over those proceedings. On multiple occasions, Ms Elzahed did not stand when Judge Balla entered and left the courtroom.

- 53 Ms Elzahed was subsequently charged with offences against s 200A of the *District Court Act 1973* (NSW). That section relevantly provides that a party to proceedings before the District Court who intentionally engages in behaviour in the Court which, according to established court practice and convention, is disrespectful to the Court or the presiding Judge, commits an offence. A Local Court magistrate found Ms Elzahed guilty of nine offences against s 200A and sentenced her to perform 75 hours of community service.

- 54 Ms Elzahed sought to appeal against her conviction and sentence. Amongst the eleven grounds of appeal directed to her conviction, two raised constitutional issues – one concerning federal jurisdiction, and one concerning the implied freedom of political communication.

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<sup>21</sup> *Onley v Commissioner of the Australian Federal Police; Menon v Commissioner of the Australian Federal Police; Anquetil v Commissioner of the Australian Federal Police* (2019) 367 ALR 291, 365 at [309]-[312].

<sup>22</sup> *Onley v Commissioner of the Australian Federal Police; Menon v Commissioner of the Australian Federal Police; Anquetil v Commissioner of the Australian Federal Police* (2019) 367 ALR 291, 366 at [317].

<sup>23</sup> *Onley v Commissioner of the Australian Federal Police; Menon v Commissioner of the Australian Federal Police; Anquetil v Commissioner of the Australian Federal Police* (2019) 367 ALR 291, 391 at [418].

## The federal jurisdiction ground

- 55 The proceedings before Balla DCJ involved an exercise of federal jurisdiction because the Commonwealth was the defendant. Ms Elzahed, drawing on a statement of the majority of the High Court in *Rizeq v State of Western Australia* (2017) 262 CLR 1; [2017] HCA 23 to the effect that a State Parliament lacks legislative capacity ‘to affect the exercise of federal jurisdiction by a State court’, argued that the ‘purported operation’ of s 200A in the hearing before Balla DCJ affected the exercise of federal jurisdiction by the District Court. The gist of the argument was that s 200A affected the conduct and behaviour of parties and witnesses in the District Court proceedings – and so impermissibly affected the exercise of federal jurisdiction by the District Court.
- 56 Harrison J rejected the premise of this argument – namely, that s 200A affected the exercise of the *jurisdiction* of the District Court. His Honour insisted upon the fundamental distinction between a provision that affects jurisdiction – understood as authority to adjudicate – and a provision which merely regulates the procedure of a court or the conduct of parties in court. He did not accept that s 200A affected the exercise of federal jurisdiction, understood as authority to adjudicate.<sup>24</sup>
- 57 Ms Elzahed also submitted that Chapter III contains an implication to the effect that ‘a law may not unduly burden a party’s participation in the exercise of Commonwealth judicial power’ – and that s 200A was inconsistent with that implication.
- 58 In response to this submission, Harrison J assumed – without deciding – that Ch III did contain such an implication. On that assumption, his Honour held that there was no inconsistency between s 200A and the implication: s 200A did not burden a party’s participation in the exercise of Commonwealth judicial power; s 200A was ‘no more than what amounts in effect to a limited codification of the law of contempt’. If it is unarguable that the laws of

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<sup>24</sup> *Elzahed v Kaban* [2019] NSWSC 670 at [140]-[145].

contempt unduly restrict a party's access to court or participation in the exercise of judicial power, then it was not arguable that s 200A did so.<sup>25</sup>

### **The implied freedom ground**

59 Ms Elzahed argued that s 200A was invalid on the basis that it infringed the implied freedom of political communication. In the Supreme Court, the defendant/respondent took the preliminary point that Ms Elzahed's conduct in not standing was not *political* communication – and she had not argued that it had been – and so there was no scope to consider whether s 200A fell foul of the implied freedom. If the preliminary point did not succeed, then it would be necessary to go through a full *McCloy* analysis.<sup>26</sup>

60 Harrison J – referring to Mrs Clubb's case in the High Court's decision in *Clubb v Edwards; Preston v Avery* [2019] HCA 11; (2019) 366 ALR 1 – held that the preliminary point was dispositive in the circumstances. That is, he was not satisfied that Ms Elzahed was engaging in political communication in not standing when Balla DCJ entered and left the courtroom.<sup>27</sup>

61 No appeal was filed from Harrison J's decision.

### **Federal jurisdiction: jurisdiction of the Federal Court**

62 To close off this section on federal jurisdiction, I summarise five cases on the jurisdiction of the Federal Court. They raise issues of what constitutes a Ch III matter and the application of ss 39 and 39B of the *Judiciary Act 1903* (Cth), as well as a case on the cross-vesting legislation.

*Helicopter Resources Pty Ltd v Commonwealth of Australia* (2019) 365 ALR 233; [2019] FCAFC 25 (15 February 2019)

63 *Helicopter Resources Pty Ltd v Commonwealth of Australia* (2019) 365 ALR 233; [2019] FCAFC 25 concerned proceedings arising out of a tragic incident in the Australian Antarctic Territory. In January 2016, a helicopter pilot,

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<sup>25</sup> *Elzahed v Kaban* [2019] NSWSC 670 at [148]-[149].

<sup>26</sup> *Elzahed v Kaban* [2019] NSWSC 670 at [91]-[99].

<sup>27</sup> *Elzahed v Kaban* [2019] NSWSC 670 at [109]-[121].

Captain David Wood, employed by Helicopter Resources Pty Ltd ('Helicopter Resources') landed a helicopter across a hidden crevasse in ice. When attempting to reboard the helicopter, Captain Wood slipped and fell into the crevasse. He died the following day.

64 An inquest into his death was commenced in the ACT Coroner's Court, with hearings commencing in September 2017.

65 In December 2017, Helicopter Resources and the Commonwealth were charged on information and summons in the ACT Magistrates Court with three offences against the *Work Health and Safety Act 2011* (Cth). It was alleged that Helicopter Resources and the Commonwealth had failed to comply with health and safety duties owed to workers employed by the Commonwealth or employed by Helicopter Resources and assigned to work with the Commonwealth's Australian Antarctic Division. One of the charges concerned the incident in which Captain Wood died.

66 In January 2018, the Commonwealth notified the office of the Chief Coroner that it requested to have Helicopter Resources' Chief Pilot available for cross-examination at the inquest. The topics on which the Commonwealth wished to cross-examine him overlapped with the subject matter of the criminal proceedings commenced in the Magistrates Court.

67 Concerned that compelling the Chief Pilot to give evidence in the inquest amounted to an interference with the accusatorial system (and possibly a contempt of the Magistrates Court), Helicopter Resources sought to restrain the Coroner's Court from allowing the Chief Pilot to be questioned.

68 The primary judge, Bromwich J, did not grant the relief sought by Helicopter Resources.<sup>28</sup>

69 The Full Court of the Federal Court – constituted by Rares, McKerracher, and Robertson JJ – allowed an appeal,<sup>29</sup> publishing its reasons on 15 February

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<sup>28</sup> *Helicopter Resources Pty Ltd v Commonwealth of Australia (No 2)* [2018] FCA 991.

2019. The Full Court ordered that the Coroner's Court was not to compel the Chief Pilot or any other director or employee of Helicopter Resources to give evidence into the death of Captain Wood until the prosecution of Helicopter Resources in the Magistrates Court had been finalised.

70 Special leave to appeal from the Full Court's orders was granted on 21 June 2019. The appeal was part heard after a hearing on 10 October 2019 and the balance of the hearing took place in the first week of this year's High Court sittings. The High Court reserved its judgment in this matter on 5 February 2020.

71 The appeal raises interesting questions as to the application of the X7 line of cases (*X7 v Australian Crime Commission* (2013) 248 CLR 92; [2013] HCA 29, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; [2013] HCA 39, *Lee v The Queen* (2014) 253 CLR 455; [2014] HCA 20, and *Strickland v DPP* [2018] HCA 53; (2018) 93 ALJR 1), and the submissions in the High Court focus on the application of the principles from those cases.

72 So far as our present interest in federal jurisdiction is concerned, the Full Federal Court considered the possible bases of the Federal Court's jurisdiction to intervene.

73 The Court expressed doubt about the suggestion that its jurisdiction could be grounded in the fact that the Coroner, conducting the inquest under a Commonwealth statute, was an 'officer of the Commonwealth'.<sup>30</sup>

74 Although it was unnecessary to decide, the Court considered that the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) did not confer jurisdiction on the Court in this matter either.

75 The Court considered that it had jurisdiction under s 39B of the *Judiciary Act 1903* (Cth). But arriving at that conclusion involved consideration of two provisions in s 39B concerning concurrent criminal proceedings.<sup>31</sup>

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<sup>29</sup> *Helicopter Resources Pty Ltd v Commonwealth of Australia* (2019) 365 ALR 233.

<sup>30</sup> *Helicopter Resources Pty Ltd v Commonwealth of Australia* (2019) 365 ALR 233, 238 at [20].

- 76 The first issue arose under s 39B(1A)(c). That section provides that ‘The original jurisdiction of the Federal Court of Australia ... includes jurisdiction in any matter: ... (c) arising under any laws made by the Parliament, *other than in respect of which a criminal prosecution is instituted or any other criminal matter.*’ (emphasis added) The Court held that it was clear that the matter before it – the validity of the Coroner’s Court’s decision to issue a subpoena to the Chief Pilot – was not one in respect of which a criminal prosecution had been instituted, and nor was it ‘any other criminal matter’.<sup>32</sup>
- 77 The second issue arose under s 39B(1C). That section provides that at any time when ‘a prosecution for an offence against a law of the Commonwealth, a State or a Territory is before a court of a State or Territory’, the Federal Court ‘does not have jurisdiction with respect to any matter in which the person who is or was the defendant in the prosecution seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth in relation to a related criminal justice process decision.’ Though the ACT Coroner’s Court is clearly a court of a Territory, the Court held that this section was not applicable in the circumstances because, amongst other reasons, the decision of the Coroner’s Court under challenge was not a decision made in relation to a ‘related criminal justice process decision’ (within the meaning of that phrase in s 39B(3)). Further, the Court doubted whether the Coroner was an officer of the Commonwealth within the meaning of s 39B(1C)(c).<sup>33</sup>
- 78 The Court also considered that it had authority to decide the dispute before it under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).<sup>34</sup>
- 79 Based on the parties’ written submissions in High Court, it does not appear that the Full Court’s analysis of the basis of the Federal Court’s jurisdiction has been challenged on appeal.

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<sup>31</sup> *Helicopter Resources Pty Ltd v Commonwealth of Australia* (2019) 365 ALR 233, 240 at [29].

<sup>32</sup> *Helicopter Resources Pty Ltd v Commonwealth of Australia* (2019) 365 ALR 233, 240 at [29], 241 at [32].

<sup>33</sup> *Helicopter Resources Pty Ltd v Commonwealth of Australia* (2019) 365 ALR 233, 241 at [33]-[35].

<sup>34</sup> *Helicopter Resources Pty Ltd v Commonwealth of Australia* (2019) 365 ALR 233, 241 at [30], [36].

*Weston (Trustee), in the matter of Jeffrey v Jeffrey* [2019] FCA 554 (12 April 2019)

- 80 Mr Weston had been appointed the trustee of Mr Jeffrey's bankrupt estate, pursuant to the terms of the *Bankruptcy Act 1966* (Cth). At the time when he became bankrupt, Mr Jeffrey and his wife were joint owners of a piece of land. When he became bankrupt, his interest in that land vested in the trustee, and the joint tenancy was severed in equity with the effect that the trustee and Mrs Jeffrey held their respective interests as tenants-in-common. The trustee registered his interest in the land.
- 81 The trustee applied for orders that the land be sold. The trustee also sought orders for vacant possession of the land in order to facilitate the sale, to provide for marketing of the property ahead of sale, and for the preservation and application of the sale proceeds.
- 82 Charlesworth J made the orders sought.<sup>35</sup> For our purposes, the case is of interest because there was some dispute between the parties as to whether the Federal Court had jurisdiction to make those orders.
- 83 That dispute arose because the trustee contended that the Court's power to order sale of the property arose under a State law – the *Law of Property Act 1936* (SA). (The power of sale in s 30(1) of the *Bankruptcy Act 1966* (Cth) is not available with respect to property co-owned by someone who is not the bankrupt.)<sup>36</sup> Mr and Mrs Jeffrey – the first and second respondents in the proceedings – contended that the Federal Court was not a 'court' within the definition of that term in the *Law of Property Act 1936* (SA), and so was not vested with jurisdiction to make the orders sought.

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<sup>35</sup> *Weston (Trustee), in the matter of Jeffrey v Jeffrey* [2019] FCA 554 at [102].

<sup>36</sup> *Weston (Trustee), in the matter of Jeffrey v Jeffrey* [2019] FCA 554 at [59], following *Coshott v Prentice* (2014) 221 FCR 450; [2014] FCAFC 88.

- 84 Charlesworth J rejected that argument. Her Honour considered that there were two possible routes to a conclusion that the Federal Court had jurisdiction in the matter and power to make the orders sought.<sup>37</sup>
- 85 First, section 19 of the *Federal Court of Australia Act 1976* (Cth) gives the Federal Court such original jurisdiction as is vested in it by laws made by the Commonwealth Parliament. Section 22 of that Act provides that the Court shall grant ‘all remedies to which any of the parties appears to be entitled ... so that, as far as possible, all matters in controversy between the parties may be completely and finally determined...’. Section 32(1) of that Act provides that, to the extent permitted by the Constitution, the Court has jurisdiction in respect of matters not otherwise within its jurisdiction that are associated with matters in respect of which its jurisdiction is invoked.<sup>38</sup>
- 86 A law of the Parliament – the *Judiciary Act 1903* (Cth) – provides in s 39B(1A)(c) that the original jurisdiction of the Federal Court includes jurisdiction in any matter arising under any laws made by the Parliament (subject to exceptions that were irrelevant in this case). This aspect of the Federal Court’s original jurisdiction mirrors the High Court’s original jurisdiction under s 76(ii) of the *Constitution*.<sup>39</sup>
- 87 Charlesworth J held that the matter before her was principally a controversy between the trustee and Mrs Jeffrey as to whether the land in question should be divided and sold. The trustee sought relief for the purposes of exercising powers under a Commonwealth enactment – the *Bankruptcy Act*. The matter arose under a law made by the Commonwealth Parliament, and therefore involved the exercise of federal jurisdiction. This was so whether or not the power to make the orders sought by the trustee arose under the *Bankruptcy*

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<sup>37</sup> *Weston (Trustee), in the matter of Jeffrey v Jeffrey* [2019] FCA 554 at [41].

<sup>38</sup> *Weston (Trustee), in the matter of Jeffrey v Jeffrey* [2019] FCA 554 at [43]. I note that s 32 has little work to do in civil litigation in light of s 39B(1A) of the *Judiciary Act 1903* (Cth): see Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2012) 116.

<sup>39</sup> *Weston (Trustee), in the matter of Jeffrey v Jeffrey* [2019] FCA 554 at [44].

Act or another act of the Commonwealth Parliament. This was the first basis on which the Federal Court had authority to adjudicate upon the matter.<sup>40</sup>

88 The second, alternative, basis on which the Court had jurisdiction was that the orders sought by the trustee included orders under s 30 of the *Bankruptcy Act* that would enforce the bankrupt's duties under s 77 of that Act to assist the trustee. Those orders related to some matters that were not directly related to the land – water entitlements, for example – but were associated with the matters in respect of which the Court's jurisdiction was invoked. By this route, whether or not s 39B(1A)(c) of the *Judiciary Act* was relied upon, the Federal Court's jurisdiction was enlivened – and that jurisdiction was federal jurisdiction.<sup>41</sup>

89 Turning from authority to adjudicate to the particular power to make the orders sought, her Honour held that this was a case where s 79 of the *Judiciary Act* operated to pick and apply the South Australian *Law of Property Act* because she was satisfied that no Commonwealth law otherwise provided for a power of sale in the circumstances.<sup>42</sup>

90 As far as I am aware, no appeal was brought against her Honour's decision.

*RNB Equities Pty Ltd v Credit Suisse Investment Services (Australia) Limited* (2019) 370 ALR 88; [2019] FCA 760 (28 May 2019)

91 Seven applicants commenced proceedings in the Federal Court against Credit Suisse Investment Services (Australia) Limited ('Credit Suisse') and Regal Funds Management Pty Limited ('Regal'). The claim against Regal alleged that Regal had engaged in market manipulation, contrary to s 1041A of the *Corporations Act 2001* (Cth). The claim against Credit Suisse was a common law claim for breach of contract.

92 Credit Suisse filed an interlocutory application, seeking an order that the applicants' originating application be set aside and further, or alternatively,

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<sup>40</sup> *Weston (Trustee), in the matter of Jeffrey v Jeffrey* [2019] FCA 554 at [45]-[52].

<sup>41</sup> *Weston (Trustee), in the matter of Jeffrey v Jeffrey* [2019] FCA 554 at [53]-[54].

<sup>42</sup> *Weston (Trustee), in the matter of Jeffrey v Jeffrey* [2019] FCA 554 at [55]-[63].

that summary judgment be granted in Credit Suisse's favour. In support of its application, Credit Suisse argued that though the Federal Court had jurisdiction to determine the market manipulation claim against Regal – being a claim that arose under the *Corporations Act* – the Court lacked jurisdiction to hear and determine the contractual claim brought against Credit Suisse.

93 Anderson J accepted that the contractual claim would not, of itself, constitute a Chapter III matter.<sup>43</sup> His Honour held, however, that the contractual claim against Credit Suisse and the allegation of market manipulation against Regal arose out of a common substratum of transactions and facts, such that there was just one matter before the Court. Accordingly, in circumstances where the Court unambiguously had authority to adjudicate on part of that matter by operation of federal law, it had jurisdiction to hear and determine the whole matter.<sup>44</sup>

94 As far as I'm aware, no appeal was brought against Anderson J's interlocutory orders; the primary dispute continues to be litigated.

*Powell v Depuy International Ltd & Anor* (2019) 343 FLR 309; [2019] SASC 116 (9 July 2019)

95 In 2010, Ms Powell underwent hip replacement surgery in which a prosthetic system manufactured, distributed, and sold by Depuy International Ltd ('Depuy') was implanted in her. Ms Powell commenced proceedings against Depuy, alleging that the system was defective, and that excessive wear between moving parts had caused metal shavings to enter her bloodstream, causing a wide range of harmful symptoms. She claimed damages for negligence, for breach of statutory warranty under s 4 of the *Manufacturers Warranties Act 1974* (SA), and under ss 74B and 74D of the *Trade Practices Act 1974* (Cth).

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<sup>43</sup> *RNB Equities Pty Ltd v Credit Suisse Investment Services (Australia) Limited* (2019) 370 ALR 88, 102-104 at [54]-[64].

<sup>44</sup> *RNB Equities Pty Ltd v Credit Suisse Investment Services (Australia) Limited* (2019) 370 ALR 88, 104-106 at [65]-[78]. Though the term has been deprecated, this is, of course, an example of 'accrued jurisdiction'.

- 96 Depuy applied to have the proceeding transferred from the Supreme Court of South Australia to the Federal Court, pursuant to the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth). That application was essentially put on two bases: first, that the proceedings were a ‘special federal matter’ within the meaning of s 3 of the *Cross-vesting Act*; or, second, that it was in the interests of justice that the proceedings be determined in the Federal Court.
- 97 Parker J rejected the transfer application.
- 98 The *Cross-vesting Act* relevantly defines a ‘special federal matter’ as a matter in respect of which the Supreme Court would not have jurisdiction other than by operation of the *Cross-vesting Act*. The question was whether the Supreme Court would have had jurisdiction to hear the claim for damages arising under the *Trade Practices Act* if not for the *Cross-vesting Act*. The clear answer to that question was yes: s 39(2) of the *Judiciary Act 1903* (Cth) operated to vest the Supreme Court with jurisdiction over claims arising under ss 74B and 74D (on the basis that the High Court had original jurisdiction over such claims by operation of s 76(ii) of the *Constitution* – those claims involving matters arising under laws made by the Commonwealth Parliament). It followed that the Supreme Court had jurisdiction to hear and determine the claims for damages under the *Trade Practices Act* independently of any jurisdiction conferred by the *Cross-vesting Act* – and so those claims were not ‘special federal matters’ within the meaning of the *Cross-vesting Act*. As a consequence, the *Cross-vesting Act* did not require the Supreme Court to transfer the proceedings to the Federal Court.<sup>45</sup>
- 99 The second basis for transferring the application – that it would be in the interests of justice to do so – was similarly unsuccessful. Parker J did not consider that it had been established that the Federal Court was the more appropriate forum. Indeed, the fact that significant aspects of the claim were governed by South Australian statute law outweighed the possible

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<sup>45</sup> *Powell v Depuy International Ltd & Anor* (2019) 343 FLR 309, 321-3 at [61]-[70].

convenience that a transfer to the Federal Court might have afforded to Depuy's solicitors.<sup>46</sup>

*National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543 (20 September 2019)

- 100 The UK Financial Services Authority – later the Financial Conduct Authority – identified deficiencies in the way that a subsidiary of National Australia Bank Limited ('NAB') had sold certain financial products to customers. NAB and its subsidiary established a review and redress schemes, and settled claims with many of its customers.
- 101 NAB was insured by Nautilus Insurance Pte Ltd ('Nautilus'), and Nautilus had policies of reinsurance with a number of other insurers. NAB made claims on Nautilus and on three groups of Nautilus' reinsurers in respect of payments made in the review and redress schemes. The reinsurers denied indemnity in respect of some of the claims. The amount in issue exceeded £357 million.
- 102 A dispute between NAB, on the one hand, Nautilus and its reinsurers, on the other, arose in respect of NAB's claim to indemnity. After lengthy correspondence between the parties in which the key issues in dispute were identified and refined, in May 2019, NAB commenced proceedings in the Federal Court, seeking declarations as to the proper construction of the insurance and reinsurance contracts.
- 103 In June 2019, the reinsurers – the second, third, and fourth respondents in the proceedings – filed interlocutory applications broadly seeking to have the originating application set aside on the basis that the Court lacked jurisdiction to hear and determine the case and to have the proceedings dismissed on the basis that NAB had no reasonable prospects of success, or an order for summary judgment.
- 104 For our purposes, the jurisdiction argument is central – though I note that the arguments on reasonable prospects of success raised important and

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<sup>46</sup> *Powell v Depuy International Ltd & Anor* (2019) 343 FLR 309, 326-9 at [91]-[108].

interesting questions about the circumstances in which a Court might refuse to make a declaration on the basis of inutility.<sup>47</sup>

105 The reinsurers made a three-pronged attack on the Court's jurisdiction. First, they submitted that there was that there was no 'matter'. Second, they submitted that if there was, it did not engage any particular part of ss 75 or 76 of the *Constitution* and was not a matter arising under a law of the Parliament. Third, they argued that the nature of the proceeding did not raise a matter, alleging that the proceeding lacked an essential aspect or aspects of judicial power, such that it could not be said that there was a matter *before the Court*.

106 Allsop CJ rejected the submission that there was no matter. His Honour held that there was a single controversy between NAB, Nautilus, and the reinsurers, arising out of common transactions and a common substratum of facts. It could not be said that NAB's claims under the different insurance and reinsurance policies were 'completely disparate or completely separate and distinct or distinct and unrelated.'<sup>48</sup> His Honour highlighted the important distinction between a controversy and 'the proceeding in which the controversy might be resolved', and noted that when identifying whether a matter arises within the meaning of Chapter III, 'it is the real human dispute to be quelled that is within the jurisdiction... not merely what is within the confines of the articulation as to how relief may be framed from time to time.'<sup>49</sup> The point here – worth remembering more generally – is that '[f]or the concept of "matter" under Ch III one looks to the *controversy* between or among the parties as identified independently of the proceedings which are or may be brought for its determination.'<sup>50</sup> And his Honour went on to say that:<sup>51</sup>

[o]nce one appreciates that the controversy identified independently of the proceedings is the matter, and if the matter is one that engages s 75 or s 76, the whole or part of that matter can be subject of proceedings in a federal court if that court has jurisdiction to hear the matter by conferral of the relevant jurisdiction by reference to s 75 or s 76. If only part of the matter is

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<sup>47</sup> *National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543 at [122]-[165].

<sup>48</sup> *National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543 at [78].

<sup>49</sup> *National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543 at [80].

<sup>50</sup> *National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543 at [82].

<sup>51</sup> *National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543 at [84].

sought to be resolved by the proceeding the court will not be denied authority to decide it because no federal issue is involved in the proceeding, as long as the question that arises in the proceeding can properly be seen to be part of a matter within federal jurisdiction...'

107 Having established that there was a matter and having established that it was no barrier to jurisdiction that the declaratory relief claimed did not resolve every aspect of that controversy, his Honour went on to accept NAB's submission that the Federal Court had jurisdiction to hear and determine the dispute, because the matter arose under a law made by the Parliament. The relevant law here – which NAB sought to rely on in various respects – was the *Insurance Contracts Act 1984* (Cth).<sup>52</sup> That is, the matter did engage a particular aspect of ss 75 and 76 of the *Constitution* (namely, s 76(ii)), and by operation of s 39B(1A)(c) of the *Judiciary Act 1903* (Cth), was within the original jurisdiction of the Federal Court.

108 The reinsurers' third attack on the Court's jurisdiction – that the *nature* of the proceeding did not raise a matter – was grounded in the claim that the declarations sought by NAB would produce no foreseeable consequences for the parties, and would be impermissibly hypothetical, divorced from the facts.<sup>53</sup>

109 In dealing with this submission, Allsop CJ noted that it raised an important point about the limits of judicial power – namely, that the Court has no power to make declarations that are not grounded in concrete facts. The facts that need to be found or agreed are not, however, all of the facts that might be relevant to determining the whole controversy; they simply need to be the 'relevant facts *for the subject of the declaration*.'<sup>54</sup> In the circumstances of this dispute, there was nothing hypothetical about making the declarations sought<sup>55</sup>

'in circumstances where there is no dispute about the terms of the contract, where the relevance of any surrounding circumstances can be debated and

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<sup>52</sup> *National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543 at [86]-[97].

<sup>53</sup> *National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543 at [100].

<sup>54</sup> *National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543 at [109] (emphasis in original).

<sup>55</sup> *National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543 at [110].

found, where the parties are in precise and clearly articulated disagreement as to the meaning of or part of the contract [sic], and where the proper construction of that part is clearly a part, indeed an important part, of an overall controversy about one party's asserted and disputed entitlement to be indemnified under the whole of the contract.'

110 Allsop CJ rejected the submission that making the declarations would have no foreseeable consequences. In doing so, he noted that it is not to the point that a declaration will not settle the whole controversy between the parties; that some issues would be outstanding even if the declarations as to construction were made did not mean that making the declarations would have no foreseeable consequences.<sup>56</sup>

111 In the result, Allsop CJ dismissed the reinsurers' interlocutory applications, and ordered that the originating application filed by NAB be fixed for hearing in November 2019. As far as I'm aware, no appeal was brought against the Chief Justice's orders on the interlocutory applications, and NAB's claim proceeded to trial before Justice Lee.

### **Other cases on Chapter III**

*Nguyen v Director of Public Prosecutions* (2019) 368 ALR 344; [2019] VSCA 20 (13 February 2019)

112 Section 40I of the *Confiscation Act 1997* (Vic) conferred power on the County Court or the Supreme Court of Victoria to make "unexplained wealth restraining orders."<sup>57</sup> Property which was the subject of such an order was forfeited to the Minister after six months. An unexplained wealth restraining order could be made *ex parte*, and forfeiture could occur after six months despite no *inter partes* hearing having occurred.

113 The registered owner of certain properties subject to an unexplained wealth restraining order challenged the constitutional validity of s 40I. The owner had applied to the County Court to have the properties excluded from the

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<sup>56</sup> *National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543 at [115]-[120].

<sup>57</sup> This is not a defined term (other than being an order made under s 40I of the Act) but it is clear from s 40I that the reference to "unexplained" is not to relieve the Court of its duty to provide reasons for its orders but rather relates to the circumstances in which particular persons came to hold valuable property.

restraining order (which had been made *ex parte*) – but that application had been refused. The owner sought leave to appeal to the Victorian Court of Appeal. She accepted that the County Court had not erred in the conduct of the proceedings or in applying the *Confiscation Act 1997* (Vic); rather, her challenge was to the validity of the statutory scheme. She raised three grounds of appeal.

- 114 First, the owner argued that the initial *ex parte* restraining order and the subsequent final order refusing to exclude the properties from the ambit of the restraining order were void because s 40I did not preserve a right for respondents to a restraining order to obtain an *inter partes* rehearing of orders made *ex parte*. This ground of appeal relied on the principle expressed by the High Court in *Kable v DPP (NSW)* (1996) 189 CLR 51; [1996] HCA 24, as applied in *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319; [2009] HCA 49.<sup>58</sup> In these proceedings, Tate JA summarised the decision in *International Finance* as follows:<sup>59</sup>

‘The *Kable* principle was applied in *International Finance* to invalidate s 10 of the *Criminal Assets Recovery Act 1990* (NSW) ... because s 10 engaged the State Supreme Court of New South Wales in an activity repugnant to the judicial process in a fundamental degree. Section 10 provided that the New South Wales Crime Commission (‘the Commission’) could apply *ex parte* for a restraining order preventing dealings with specified property. The majority of the Court construed s 10 as requiring the court to conduct an *ex parte* hearing, if the Commission sought one. A subsequent forfeiture order could be made in respect of the restrained property. Section 10 was held to be void because it conscripted the State Supreme Court into a process which required the mandatory *ex parte* sequestration of property upon suspicion of wrongdoing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure that applies to *ex parte* applications.’

- 115 In this case, the owner cited *International Finance* for the proposition that a statute that does not provide, as of right, for an *inter partes* hearing is void as contrary to the *Constitution*. She submitted that s 40I, when read in the

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<sup>58</sup> In *Ng v Commissioner of the Australian Federal Police* [2019] WASCA 195 (published 29 November 2019), in the context of an application for a stay of examination orders made under the *Proceeds of Crime Act 2002* (Cth), Murphy and Mitchell JJA considered that a challenge to the validity of ss 180 and 182 of that Act drawing on *International Finance* was ‘arguable’ – although they would not have put it higher than that. In the circumstances, the Court held that the balance of convenience did not favour granting the stay sought.

<sup>59</sup> *Nguyen v Director of Public Prosecutions* (2019) 368 ALR 344, 363 at [59].

context of Pt 4A of the Act, establishes a regime under which property can be forfeited without an *inter partes* hearing – and that as such, s 40I is invalid.

116 In response, the Director of Public Prosecutions argued that three features of the *Confiscation Act 1997* (Vic) distinguished it from the legislation struck down in *International Finance*:

- (1) The court has a power under s 40H(1) to direct the DPP to give notice to an affected person that an application for a restraining order has been made;
- (2) The Act does not affect the court's inherent (or, in the case of the County Court, implied) power to set aside an *ex parte* order;
- (3) There is no indication in Pt 4A that it was intended to operate as a code, excluding a court's powers to manage its own processes, or to set aside *ex parte* orders.

117 The Victorian Court of Appeal accepted the Director's argument that the scheme established by the *Confiscation Act* was distinguishable from that considered in *International Finance*. The *Confiscation Act* expressly conferred a power on the court to determine if notice should be given to an affected person of an application for an unexplained wealth restraining order, and there was no impermissible 'direction' from the Executive to the court as to how proceedings should be conducted.<sup>60</sup> Further, the Act did not affect the Supreme Court's inherent power to set aside an *ex parte* order (or the County Court's implied power to do the same), and in fact, s 40W of the Act provided a statutory power to do the same.<sup>61</sup> And finally, properly construed, pt 4A was not intended to be a code, operating to exclude a court's other powers or procedural protections.

118 The second ground was that the restraining order and subsequent final order were void because orders under s 40I were self-executing, regardless of

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<sup>60</sup> *Nguyen v Director of Public Prosecutions* (2019) 368 ALR 344, 368-9 at [81].

<sup>61</sup> *Nguyen v Director of Public Prosecutions* (2019) 368 ALR 344, 374 at [100], 376 at [108].

whether notice was given to a respondent to such orders, and in circumstances where a respondent had no right of reinstatement to challenge the *ex parte* restraining order. Given the detailed constructional analysis undertaken by Tate JA in dealing with the first ground, this ground could be dealt with relatively briefly. Rejecting this ground, her Honour reasoned that:<sup>62</sup>

‘[n]othing in pt 4A excludes the inherent jurisdiction of the court to ensure that it is not ‘converted into [an] instrument of injustice or unfairness’. Thus, if it was not possible to locate the respondent to a restraining order and serve written notice upon him or her, and the court was not satisfied that any other form of notice would be adequate, the court could discharge the restraining order leaving the DPP or an appropriate officer to make a subsequent application for a restraining order when more information about the location had become available.’

119 The third ground was that the restraining order and subsequent final order were void because orders under s 40I were self-executing upon the expiry of a six month period, whether or not a court is able to comply with the hearing rule in relation to an *ex parte* restraining order within that time. The owner’s submissions on this point rested on the assumption that public officers – like the DPP – might seek to exploit the six-month period in order to secure forfeiture, and in doing so ‘would act so as to undermine the court’s supervision of the mandatory requirement under the Act for notice to be given’.<sup>63</sup> That assumption – and the submission built on it – was rejected. The Act ought not be construed on the basis that public officers will act to subvert its operation; as Tate JA put it: ‘[o]ne cannot approach the construction of the Act on the basis that it gives rise to a consequence of arbitrary forfeiture because of consequences that would occur if all the requirements and safeguards of the Act were disregarded.’<sup>64</sup>

120 In the result, leave to appeal was granted, but the appeal was dismissed. In concluding her reasons, Tate JA upheld the validity of s 40I, and added:<sup>65</sup>

‘More generally, I do not accept that *International Finance* stands for the broad proposition that the absence of an ‘as of right’ *inter partes* hearing in

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<sup>62</sup> *Nguyen v Director of Public Prosecutions* (2019) 368 ALR 344, 383 at [141].

<sup>63</sup> *Nguyen v Director of Public Prosecutions* (2019) 368 ALR 344, 384 at [145].

<sup>64</sup> *Nguyen v Director of Public Prosecutions* (2019) 368 ALR 344, 384 at [146].

<sup>65</sup> *Nguyen v Director of Public Prosecutions* (2019) 368 ALR 344, 385 at [150].

legislation renders the legislation void as contrary to the Commonwealth *Constitution*.<sup>1</sup>

121 Niall JA agreed with Tate JA, subject to some brief comments, and Maxwell P agreed with them both.

122 An application for special leave to appeal to the High Court was dismissed with costs on 14 August 2019.<sup>66</sup>

*Alou v R* (2019) 373 ALR 347; [2019] NSWCCA 231 (4 October 2019)

123 Mr Raban Alou pleaded guilty to aiding, abetting, counselling, or procuring the commission of a terrorist act – an offence against s 101.1(1) of the Commonwealth Criminal Code (the schedule to the *Criminal Code Act 1995* (Cth)). The act in question was the brutal killing of Mr Curtis Cheng outside NSW Police Headquarters in Parramatta by Mr Farhad Mohammad.

124 In sentencing proceedings in the Common Law Division of the Supreme Court of New South Wales, Johnson J sentenced Mr Alou to a term of imprisonment of 44 years with a non-parole period of 33 years.

125 In sentencing Mr Alou, Johnson J's exercise of discretion was fettered by s 19AG of the *Crimes Act 1914* (Cth). For a 'minimum non-parole offence' – a term which included Mr Alou's crime – s 19AG provided that the non-parole period imposed had to be at least three-quarters of the head sentence. For the purposes of the section, a life sentence was taken to be 30 years, with the consequence that the minimum non-parole period for a life sentence would be 22 years and 6 months.

126 Mr Alou appealed against his sentence. He raised nine grounds of appeal. Bathurst CJ and Price J rejected all nine and dismissed the appeal.<sup>67</sup> Justice Natalie Adams rejected eight of the grounds, but dissented on the question of

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<sup>66</sup> *Nguyen v Director of Public Prosecutions & Anor* [2019] HCASL 238.

<sup>67</sup> *Alou v R* (2019) 373 ALR 347, 380 at [197], [198].

whether the sentence was manifestly excessive.<sup>68</sup> For present purposes, we only need consider three of the grounds of appeal. They were:

- (1) That the sentencing judge erred in failing to determine an appropriate non-parole period;
- (2) That the sentencing judge erred in fixing the non-parole period; and
- (3) That s 19AG of the *Crimes Act 1914* (Cth) was invalid.

127 These grounds were dealt with together by Bathurst CJ, and Price J and N Adams J each separately agreed with the Chief Justice's reasons in respect of these three grounds.<sup>69</sup>

128 Bathurst CJ noted that it was clear that the sentencing judge was aware of s 19AG, and of the fact that that it mandated a minimum non-parole period, while leaving a sentencing judge free to impose a non-parole period longer than that minimum if appropriate. There was nothing to suggest that the sentencing judge had held anything other than an accurate view of the law, and there was nothing to suggest that he had failed to determine an appropriate non-parole period.<sup>70</sup>

129 Counsel for Mr Alou had pointed out that s 19AG creates an incongruity, namely that in imposing a life sentence, a sentencing court can impose a shorter non-parole period than the court is required to impose if it imposes a determinate sentence greater than 30 years. That was, of course, precisely the situation here: if a life sentence had been imposed on Mr Alou, the *minimum* non-parole period required by s 19AG would have been 22 years and 6 months; but in circumstances where a determinate head sentence of 44 years was imposed, the sentencing court could not fix the non-parole period at less than 33 years.

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<sup>68</sup> *Alou v R* (2019) 373 ALR 347, 381 at [201]-[203].

<sup>69</sup> See *Alou v R* (2019) 373 ALR 347, 380 at [198] (Price J) and 381 at [201]-[202] (N Adams J).

<sup>70</sup> *Alou v R* (2019) 373 ALR 347, 378 at [183].

- 130 Bathurst CJ and N Adams J each acknowledged that there was indeed an incongruity here – but, in the Chief Justice’s words, it did not affect ‘the clear meaning and effect of the provision’.
- 131 The heart of the constitutional argument was that s 19AG exceeded the legislative power of the Commonwealth because it imposed on a sentencing court obligations that were ‘inconsistent with the essential character of a court or with the nature of judicial power’, as the High Court put it in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1982) 176 CLR 1 at 27; [1992] HCA 64.
- 132 The Chief Justice noted that it would be difficult to accept that a provision imposing a minimum non-parole period – or even a provision ruling out any parole period – could infringe the principle in *Lim* in circumstances where the High Court has made clear that the Commonwealth Parliament can impose mandatory minimum sentences.<sup>71</sup>
- 133 Mr Alou sought to rely on remarks in *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520; [2010] HCA 45 to the effect that in sentencing for Commonwealth offences, the determination of a non-parole period does not depend on an a priori norm.<sup>72</sup> The Commonwealth Director of Public Prosecutions replied that the remarks in *Hili* were concerned with judicially determined norms, not norms fixed by statute.<sup>73</sup> The Court accepted the Director’s submission.<sup>74</sup>
- 134 The Court held that though s 19AG may generate an incongruity, nothing in that section imposes on a sentencing court obligations inconsistent with the essential character of a court or with the nature of judicial power. As the Chief Justice put it:<sup>75</sup>

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<sup>71</sup> *Alou v R* (2019) 373 ALR 347, 379 at [191].

<sup>72</sup> *Alou v R* (2019) 373 ALR 347, 377 at [173].

<sup>73</sup> *Alou v R* (2019) 373 ALR 347, 378 at [179].

<sup>74</sup> *Alou v R* (2019) 373 ALR 347, 379 at [192].

<sup>75</sup> *Alou v R* (2019) 373 ALR 347, 379 at [194].

‘...the function of the Court is to determine the head sentence and determine the non-parole period having regard to the statutory fetter. If a non-parole period greater than the statutory minimum is thought appropriate in respect of the life sentence imposed, that should be set, otherwise it is necessary to set the statutory minimum. There is nothing incompatible with the exercise of judicial power for a court to carry out its functions in this manner.’

135 No application for special leave has been filed.

*Question of Law Reserved (No. 1 of 2019)* [2019] SASFC 149 (3 December 2019)

136 South Australian legislation – formerly s 23 of the *Criminal Law (Sentencing) Act 1988* (SA), and more recently s 57 of the *Sentencing Act 2017* (SA) – allowed for the indefinite detention of (to use the language of s 57) ‘Offenders incapable of controlling, or unwilling to control, sexual instincts’. The same legislation conferred a power on judges to order the release on licence of persons subject to an order under s 23 or s 57.

137 If a court orders that a person subject to such detention be released on licence, Schedule 2 of the *Sentencing Act 2017* (SA) provided a mechanism by which the Director of Public Prosecutions could apply for judicial reconsideration of the order authorising release.

138 In 2006, Mr Humphrys was convicted of five counts of unlawful sexual intercourse with a person under 17 years of age. He was sentenced to a term of imprisonment of 10 years, starting in December 2003. In 2009, a judge of the Supreme Court of South Australia made an order for his ongoing detention. In March 2018, a judge of the Supreme Court made an order authorising Mr Humphrys’ release on licence.

139 The Director of Public Prosecutions appealed against that decision. Before the Court of Criminal Appeal gave judgment in that matter, the South Australian Parliament enacted sch 2 of the *Sentencing Act 2017* (SA). The schedule commenced operation on 25 June 2018. On that day, the Court of Criminal Appeal dismissed the Director’s appeal.

140 The Director then made an application under sch 2 for judicial reconsideration of the order authorising Mr Humphrys' release on licence. When that application was heard, the Court referred a question to the Full Court, namely:

'Is Schedule 2 of the *Sentencing Act 2017* invalid on the basis that it infringes the principle enunciated in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.'

141 Before the Full Court, Mr Humphrys submitted that the question should be answered in the affirmative. He submitted that sch 2 infringed the *Kable* principle in two ways. First, he submitted that sch 2 infringed the institutional integrity of the Court because it was *ad hominem* legislation, designed to ensure that he remained in preventive detention. Second, he submitted that sch 2 impaired the institutional integrity of the Court and impermissibly interfered with the judicial process in a manner incompatible with the Court's role as a receptacle of federal judicial power because the enactment of sch 2 while the CCA proceedings were on foot interfered with that judicial process. The Director's position was that the legislation was not invalid.<sup>76</sup>

142 The Full Court answered the reserved question in the negative.

143 As to the first challenge, it was held that the legislation was not *ad hominem*. Properly construed, sch 2 applied to a class of persons. Mr Humphrys fell within that class, but it was common ground that he was not alone in it. Further, sch 2 did not direct a particular outcome in relation to members of the class or in relation to Mr Humphrys specifically. More to the point, sch 2 did not impair the institutional integrity of the Court in applying it; proceedings on an application made under sch 2 were to be conducted in accordance with the ordinary judicial processes of the courts of South Australia. Stanley J concluded that: 'No aspect of the function [conferred on the Court by sch 2] impairs the Court's character as a Court or impugns its integrity.' Nicholson J and Doyle J agreed.<sup>77</sup>

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<sup>76</sup> *Question of Law Reserved (No. 1 of 2019)* [2019] SASCF 149 at [17].

<sup>77</sup> *Question of Law Reserved (No. 1 of 2019)* [2019] SASCF 149 at [24]-[31].

144 The Court also rejected the second challenge. Schedule 2 did not interfere with a judicial process that was on foot. Rather, it conferred an additional jurisdiction on the Court to resolve a distinct controversy from that which had been before the CCA – namely, the controversy arising from the Director’s sch 2 application.<sup>78</sup>

### s 109 inconsistency

145 I now turn to two cases – one from the Full Court of the Supreme Court of South Australia, and one from the Queensland Court of Appeal – which raised questions of inconsistency under s 109 of the *Constitution*.<sup>79</sup> In neither case was there held to be any inconsistency between the relevant Commonwealth law and the relevant State law.<sup>80</sup>

*Return to Work Corporation of South Australia v Renfrey* (2019) 133 SASR 31; [2019] SASCFC 26 (21 March 2019)

146 Mr Renfrey was employed by TNT Express from 1978 to 2011. When he was first employed, his workers’ compensation entitlements were governed by the *Workmen’s Compensation Act 1971* (SA). From 30 September 1987, they were governed by the *Workers Rehabilitation and Compensation Act 1986* (SA) (the ‘WRC Act’). Under the WRC Act, the Return to Work Corporation (‘RTWC’) was liable to make compensation payments for injuries that Mr Renfrey suffered in the course of his employment.

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<sup>78</sup> *Question of Law Reserved (No. 1 of 2019)* [2019] SASCFC 149 at [40].

<sup>79</sup> Also note *Maribyrnong City Council v Australian Municipal, Administrative, Clerical and Services Union* [2019] FCA 773. That case involved a dispute over the construction of an enterprise agreement. One of the respondents submitted that the principles concerning inconsistency under s 109 of the *Constitution* could be of assistance in resolving apparent inconsistencies in the agreement. In the end, Wheelahan J held that s 109 principles ultimately did not help with the contractual construction problem before him, because ‘the issue is the interaction of the terms of the contract rather than any question of laws having a paramount operation such that any alteration, impairment or detractor by a subordinate provision might amount to inconsistency’ (at [48]).

<sup>80</sup> In *Murphy Toenies v Family Holdings Pty Ltd as Trustee for the Conway Family Trust* [2019] WASC 423, in the context of applications to extend certain caveats, a question arose as to whether there was a direct inconsistency between s 568D of the *Corporations Act 2001* (Cth) and s 60(1) of the *Residential Tenancies Act 1987* (WA). Given the nature of the applications and the other arguments put in support of them, it was not necessary for Smith J to express a view on that constitutional question beyond noting that it was arguable that the provisions were inconsistent.

- 147 From 1 July 2008, TNT Express became a licenced corporation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the 'SRC Act'); from that date, the workers' compensation entitlements of TNT Express employees were governed by the SRC Act – a Commonwealth Act, unlike the earlier South Australian Acts.
- 148 On 15 February 2013, Mr Renfrey gave notice of, and made a claim for, noise induced hearing loss. RTWC rejected the claim. It relied on s 113(2) of the WRC Act, which provides that the whole of a worker's noise-induced hearing loss 'shall be deemed to have occurred immediately before notice was given and, subject to any proof to the contrary, to have arisen out of employment in which the worker was last exposed to noise capable of causing noise induced hearing loss'. Because he made his claim on 15 February 2013, when no longer a TNT Express employee, RTWC contended that it was not liable to compensate him under the WRC Act. And further, it contended that because when he was last employed by TNT Express he was not subject to the WRC Act, any entitlement to compensation he did have was governed exclusively by the SRC Act.
- 149 Mr Renfrey took his claim to the South Australian Employment Tribunal (SAET), where the President determined that he was entitled to compensation under the WRC Act. RTWC appealed to a Full Bench of the SAET, which dismissed the appeal.
- 150 RTWC then appealed to the Full Court of the Supreme Court of South Australia. Before the Full Court, the two main issues concerned the interpretation of s 113(2), and whether there was any inconsistency between the SRC Act and the WRC Act, such that the latter was inoperable to the extent of the inconsistency pursuant to s 109 of the *Constitution*.
- 151 The Court – constituted by Kourakis CJ, Nicholson and Parker JJ – dismissed the appeal.

152 On the statutory interpretation issue, the Court held that the term ‘employment’ in s 113(2) meant ‘employment with respect to which the WRC Act confers a worker’s compensation entitlement for hearing loss. Consequently, s 113(2) deemed the whole of Mr Renfrey’s loss to have occurred during his employment with TNT Express irrespective of when notice was given.’<sup>81</sup>

153 On the inconsistency issue, the Court held that because Mr Renfrey’s injury arose before RTWC was licensed, the SRC Act did not apply to it, and there was no inconsistency between that Act and the WRC Act so far as his entitlements were concerned.<sup>82</sup>

154 No application for special leave was filed.

*Awabdy & Anor v Electoral Commission of Queensland & Anor* (2019) 372 ALR 740; [2019] QCA 187 (13 September 2019)

155 The second case raising inconsistency under s 109 was *Awabdy & Anor v Electoral Commission of Queensland & Anor*.

156 In March 2018, on an application by the Electoral Commission of Queensland, a judge of the Supreme Court of Queensland made a declaration that: ‘sections 290 and 291 of the *Electoral Act 1992* (Qld) are not inconsistent with sections 314AB and 314AC of the *Commonwealth Electoral Act 1918* (Cth) within the meaning of s 109 of the *Constitution*.’

157 Sections 290 and 291 of the *Electoral Act 1992* (Qld) placed obligations on the agents of political parties registered in Queensland to report to the Electoral Commission of Queensland gifts or loans that exceed a certain value.

158 Sections 314AB and 314AC of the *Commonwealth Electoral Act 1918* (Cth) placed obligations on the agents or financial controllers of registered political

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<sup>81</sup> *Return to Work Corporation of South Australia v Renfrey* (2019) 133 SASR 31, 47 at [57]-[58].

<sup>82</sup> *Return to Work Corporation of South Australia v Renfrey* (2019) 133 SASR 31, 48 at [64], 49 at [66].

parties, State branches of registered political parties, and political campaigners to lodge returns with the Australian Electoral Commission declaring amounts received, paid, or incurred each financial year.

- 159 The appellant appealed against the primary judge's declaration. The Attorney-General for the Commonwealth intervened in support of the appellant. The Attorney-General for Queensland had intervened in aid of the Electoral Commission of Queensland at first instance, and remained a party to the proceedings on appeal.
- 160 Broadly, the key issues on appeal were: (1) what was the relevant Commonwealth law, what was the relevant State law, and how should their subject matters be characterised?; (2) was there a direct inconsistency between the Commonwealth law and the State law?; (3) was there an indirect inconsistency between the Commonwealth law and the State law?
- 161 The Queensland Court of Appeal – constituted by Sofronoff P, Fraser JA, and Douglas JA – dismissed the appeal.
- 162 On the first issue, the Court held that the relevant Commonwealth law was not merely ss 314AB and 314AC, rather, it was the whole of Part XX of the *Commonwealth Electoral Act*. The subject matter of that Act was the integrity of the Commonwealth Parliament; the Commonwealth Act was silent about State elections or about how payments to political parties might affect State elections. The relevant State law was pt II of the *Electoral Act*, and its subject matter was the integrity of Queensland state elections.<sup>83</sup>
- 163 On the second issue, the Court held that there was no direct inconsistency between the Commonwealth law and the State law: though the two laws would require disclosure of the same payments in some circumstances, the obligations could be simultaneously complied with.<sup>84</sup>

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<sup>83</sup> *Awabdy & Anor v Electoral Commission of Queensland & Anor* (2019) 372 ALR 740, 747 at [24], 748 at [30], 749 at [32], [36].

<sup>84</sup> *Awabdy & Anor v Electoral Commission of Queensland & Anor* (2019) 372 ALR 740, 750 at [37].

164 On the third issue, the Court held that there was no indirect inconsistency between the two laws: the Commonwealth law did not evince an intention to cover the field concerning political payments generally; indeed, the two laws were directed to different purposes – the integrity of federal and state elections respectively.<sup>85</sup>

165 Again no application for special leave appears to have been filed.

### **Executive power and small-c constitutionalism**

166 Finally, I want to consider three interesting cases that deal in one way or another with the executive arm of government, and what might be described as “small-c” constitutional cases.

*Hocking v Director-General of the National Archives of Australia* (2019) 366 ALR 247; [2019] FCAFC 12 (8 February 2019)

167 The first case is the Full Court of the Federal Court’s decision in *Hocking v Director-General of the National Archives of Australia* [2019] FCAFC 12.

168 Professor Jennifer Hocking applied to the National Archives of Australia, seeking access to originals and copies of correspondence between the former Governor-General Sir John Kerr (or his Official Secretary) and The Queen (by means of Her Private Secretary). Access was refused in May 2016, on the basis that the records sought were not ‘Commonwealth record[s]’ within the meaning of s 3(1) of the *Archives Act 1983* (Cth), as they were not ‘property of the Commonwealth’, and were therefore not subject to the access provisions in Div 3 of Part V of the Act.

169 Professor Hocking applied for judicial review of that decision in the Federal Court, seeking a declaration that the records sought were ‘Commonwealth records’ within the meaning of the Act. The primary judge, Griffiths J, did not make the declaration sought, finding that the records in question were not ‘the

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<sup>85</sup> *Awabdy & Anor v Electoral Commission of Queensland & Anor* (2019) 372 ALR 740, 750 at [38]-[39], 751 at [40].

property of the Commonwealth', but were rather the personal property of Sir John Kerr.<sup>86</sup>

170 Professor Hocking appealed to the Full Court of the Federal Court on the ground that the primary judge should have found that the records, or some of them, were the property of the Commonwealth because they were created or received by the Governor-General in performance of his office and concern the government of the Commonwealth.<sup>87</sup>

171 Allsop CJ and Robertson J dismissed the appeal, holding that the records in question were 'private or personal', in the sense that they arose 'from the unique representative character of the relationship between The Monarch and the Governor-General'. They were not 'personal' in the sense of 'intimate' – rather, they were 'personal' in the sense that they remained 'the property of the person then holding the office of Governor-General'. As 'personal' records in this sense, they were not 'property of the Commonwealth' within the meaning of the Act, and therefore not 'Commonwealth records' within the meaning of the Act.<sup>88</sup>

172 Flick J would have allowed the appeal, holding that the records sought by Professor Hocking were 'Commonwealth records'. His Honour noted that.<sup>89</sup>

'The documents [sought by Professor Hocking] include[d] correspondence between a former Governor-General of this country, written in his capacity as Governor-General, to the Queen of Australia in her capacity as Queen of Australia, concerning "political happenings" going to the very core of the democratic processes of this country.'

173 In light of the nature of the records sought and the subjects they addressed, the importance of those matters to the constitutional system of government in Australia, the positions occupied by the Queen and the Governor-General, and the functions discharged by the Governor-General, his Honour

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<sup>86</sup> *Hocking v Director-General of National Archives of Australia* (2018) 255 FCR 1, 29-32 at [107]-[118].

<sup>87</sup> *Hocking v Director-General of the National Archives of Australia* (2019) 366 ALR 247, 250 at [10].

<sup>88</sup> *Hocking v Director-General of the National Archives of Australia* (2019) 366 ALR 247, 265-8 at [86]-[106].

<sup>89</sup> *Hocking v Director-General of the National Archives of Australia* (2019) 366 ALR 247, 268-9 at [110].

considered that it was ‘difficult to conceive of documents which are more clearly “*Commonwealth records*” and documents which are not “*personal*” property.’<sup>90</sup> His Honour also suggested that, with the benefit of hindsight, it may have been preferable for the matter not to have proceeded on the basis of an agreed statement of facts, as ‘[m]uch may depend on the manner in which [the] correspondence is expressed and the precise subject matter being addressed.’<sup>91</sup>

174 Special leave to appeal was granted in August 2019, and the appeal was heard in the first week of this year’s sittings. The High Court reserved its judgment in this matter on 5 February 2020.

*Searle v Commonwealth of Australia* (2019) 345 FLR 356; [2019] NSWCA 127 (31 May 2019)

175 The second case concerned with executive power is the decision of the New South Wales Court of Appeal in *Searle v Commonwealth of Australia* [2019] NSWCA 127.

176 Mr Searle had enlisted in the Royal Australian Navy as a marine technician. He subsequently entered into a contract with the Commonwealth, under which he was to receive training over a four year period that would qualify him for a Certificate IV in Engineering. A number of other people enlisted in the armed forces entered into similar contracts with the Commonwealth. Mr Searle did not receive the training contemplated by the contract. He commenced representative proceedings against the Commonwealth in the Common Law Division of the Supreme Court, seeking damages for breach of contract. The primary judge, Fagan J, dismissed his claim, holding that the contract fettered the exercise of the Commonwealth’s power of naval command, and it was therefore beyond the power of the Commonwealth to enter the contract.<sup>92</sup> His Honour also found that the contract was not supported by consideration on

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<sup>90</sup> *Hocking v Director-General of the National Archives of Australia* (2019) 366 ALR 247, 268-9 at [110], 270-1 at [119] (emphasis in original).

<sup>91</sup> *Hocking v Director-General of the National Archives of Australia* (2019) 366 ALR 247, 270 at [118].

<sup>92</sup> *Searle v Commonwealth of Australia* [2018] NSWSC 1017; *Searle v Commonwealth of Australia (No 2)* [2019] NSWSC 14 (the costs judgment).

the part of Mr Searle. Had the contract been valid, Fagan J would have assessed Mr Searle's damages for breach of contract at \$60,000.

177 Mr Searle appealed. The three issues on appeal were: (1) whether the contract had the effect of fettering the exercise of the Commonwealth's power of naval command and was, as a consequence, void; (2) whether Mr Searle provided consideration; and (3) whether the primary judge erred in his contingent assessment of damages.

178 The Court of Appeal – constituted by Bathurst CJ, myself, and Basten JA – allowed the appeal.<sup>93</sup>

179 Insofar as the case might be considered significant, its significance lies in the extended consideration of the so-called “fettering doctrine”, the notion that a government or public authority may not fetter the future exercise of discretionary powers reposed in the executive or a public authority. The doctrine is problematic because, as Sir Harry Gibbs observed in *A v Hayden (No 2)* (1984) 156 CLR 532; [1984] HCA 67 at 543, every contractual undertaking by a government or governmental or public authority may be seen in some way to fetter or potentially to fetter the exercise of that government's or authority's discretion in the future.

180 The doctrine against the fettering of executive discretion has variously been described as “exceedingly vague and far-reaching”<sup>94</sup> and “ill-defined”.<sup>95</sup>

181 On the fettering issue, we held that where a broad power to contract is conferred on the executive or a public authority, and a contract is entered into that is not specifically enforced or enforceable, that contract cannot be said to have the effect of fettering the Commonwealth's exercise of discretion unless the award or potential award of damages for its breach itself had or has that effect.

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<sup>93</sup> *Searle of Commonwealth of Australia* (2019) 345 FLR 356, 360 at [1], 406-7 at [241]-[245], [246].

<sup>94</sup> P Hogg *Liability of the Crown in Australia, New Zealand and the United Kingdom* (Law Book Co) at 130.

<sup>95</sup> DW Greig and JLR Davis, *The Law of Contract* (1987, Law Book Co) at 218.

182 In Mr Searle's case, we held that an award of damages for breach of contract would not impermissibly fetter the Commonwealth's power of naval command, and thus that the contract was not void, so that, in circumstances where it had been breached, Mr Searle could proceed to a claim for damages.<sup>96</sup>

183 No application for special leave was filed.

*Ogawa v Attorney-General (No 2)* (2019) 373 ALR 689; [2019] FCA 1003 (28 June 2019)

184 The final case to note is *Ogawa v Attorney-General (No 2)* (2019) 373 ALR 689; [2019] FCA 1003, a decision of Logan J.

185 Following convictions for carriage services offences against the *Criminal Code* (Cth) and for contempt of the District Court of Queensland, and following unsuccessful appeals against those convictions, Dr Megumi Ogawa lodged a petition with the Commonwealth Attorney-General's Department in which she sought either to be pardoned by the Governor-General, in the exercise of the Royal Prerogative of Mercy, or alternatively, to have her case referred to the Queensland Court of Appeal.

186 That petition was not acted on for some years. Dr Ogawa then applied to the Federal Court for an order in the nature of mandamus, directing the Attorney to consider her petition. After that application was filed, the Attorney acted on the petition, rendering the proceedings unnecessary.

187 The Attorney declined to recommend that the Governor-General exercise the prerogative in Dr Ogawa's favour. The Attorney also decided not to refer her case to the Queensland Court of Appeal.

188 Dr Ogawa commenced further proceedings in the Federal Court, seeking judicial review of the Attorney's conduct in declining to recommend to the

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<sup>96</sup> *Searle of Commonwealth of Australia* [2019] NSWCA 127, 389-90 at [139]-[145], 391-2 at [151]-[152], [155]-[156].

Governor-General that he grant her a pardon, and of the Attorney's decision not to refer her case to the Queensland Court of Appeal.

- 189 In relation to the referral decision, Justice Logan held that the Attorney made no error in not referring the contempt conviction to the Queensland Court of Appeal, though His Honour held that the Attorney did err in not referring the convictions for the carriage service offences to that Court.
- 190 For present purposes, the more interesting part of the case concerns whether the Attorney's conduct in declining to recommend that the Governor-General grant Dr Ogawa a pardon was amenable to judicial review.
- 191 The Royal Prerogative of Mercy forms part of the executive power of the Commonwealth, vested in the Queen, and exercisable by the Governor-General as Her Majesty's representative.<sup>97</sup>
- 192 Justice Logan accepted that he was bound to hold that a vice-regal officer's decision in the exercise of the prerogative of mercy is not amenable to judicial review.<sup>98</sup> But the question His Honour was faced with concerned the Attorney's conduct, not a decision of a vice-regal officer.
- 193 Justice Logan found that the Attorney had proceeded on the basis of an incorrect understanding of the nature and extent of the prerogative of mercy, the Attorney having accepted advice that according to long-standing convention, a recommendation for clemency should only be made to the Governor-General if the Attorney was satisfied that the petitioner was morally and technically innocent of the offence or offences in question.
- 194 Having surveyed relevant Australian, English, and US authorities on the prerogative, Justice Logan made a declaration that:<sup>99</sup>

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<sup>97</sup> *Ogawa v Attorney-General (No 2)* (2019) 373 ALR 689, 693 at [11], 698 at [32].

<sup>98</sup> *Ogawa v Attorney-General (No 2)* (2019) 373 ALR 689, 695-6 at [21]-[22].

<sup>99</sup> See the orders made in *Ogawa v Attorney-General (No 2)* (2019) 373 ALR 689 and Logan J's reasons: 703 at [48].

'the exercise of the power under s 61 of the *Constitution* to grant, in the exercise of the Royal Prerogative of Mercy, a pardon is not, by convention, limited to cases where there is satisfaction that the petitioner is morally and technically innocent of the offence but is a flexible power the exercise of which may be adapted to meet the circumstances of the particular case.'

- 195 His Honour made a further declaration that Dr Ogawa was not precluded from lodging a further petition seeking a pardon, and nor was the Attorney precluded by his earlier conduct from making a positive recommendation to the Governor-General on receipt of such a petition, if the Attorney determined that was the appropriate course on the merits of the petition.
- 196 A notice of appeal against Justice Logan's decision was lodged on 26 July 2019 by the Attorney-General, with a hearing in front of the Full Court set down for February 2020.<sup>100</sup>

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<sup>100</sup> In related proceedings (*Minister for Home Affairs v Ogawa* [2019] FCAFC 98), a majority of the Full Federal Court dismissed an appeal that the Minister for Home Affairs had brought from a decision of a single judge of the Federal Court quashing the Minister's decision to refuse an application that Dr Ogawa made for a partner visa.

<b>Name</b>	<b>Citation</b>	<b>Date</b>	<b>Topic</b>	<b>Status of any appeal</b>
<b>FCAFC</b>				
<i>Hocking v Director-General of the National Archives of Australia</i>	(2019) 366 ALR 247; [2019] FCAFC 12	8 February 2019	s 61 – relationship between Queen and Governor-General	Special leave granted on 16/8/19 Decision reserved on 5/2/20
<i>Treasury Wine Estates Vinters Limited v Pearson</i>	(2019) 367 ALR 29; [2019] FCAFC 21	13 February 2019	Federal jurisdiction – attempt by SA parliament to vest South Australian Employment Tribunal in Court Session with federal judicial power	No application for special leave filed
<i>Helicopter Resources Pty Ltd v Commonwealth of Australia</i>	(2019) 365 ALR 233; [2019] FCAFC 25	15 February 2019	Federal jurisdiction – jurisdiction of Federal Court to judicially review a decision of the ACT Coroner’s Court in an inquest into a death in the Australian Antarctic Territory	Special leave granted on 21/6/19 Decision reserved on 5/2/20
<i>Westpac Banking Corporation v Lenthall</i>	(2019) 265 FCR 21; [2019] FCAFC 34	1 March 2019	Ch III – whether power to make common fund order part of or incidental to exercise of judicial power – acquisition of property on just terms	Special leave granted on 15/5/19 Appeals allowed and dismissed on 4/12/19
<b>FCA</b>				
<i>Weston (as trustee of the bankrupt estate of Jeffrey) v Jeffrey</i>	[2019] FCA 554	12 April 2019	Federal jurisdiction – s 39B <i>Judiciary Act 1903</i> (Cth)	[No indication that an appeal has been filed as

				at 10/2/20]
<i>RNB Equities Pty Ltd v Credit Suisse Investment Services (Australia) Ltd</i>	(2019) 370 ALR 88; [2019] FCA 760	28 May 2019	Federal jurisdiction – s 39B <i>Judiciary Act</i> – ‘accrued jurisdiction’	[No indication that an appeal has been filed as at 10/2/20]
<i>Ogawa v Attorney-General (No 2)</i>	(2019) 373 ALR 689; [2019] FCA 1003	28 June 2019	s 61 – prerogative of mercy – amenability to judicial review of A-G’s conduct in relation to a pardon decision	Appeal filed by the Attorney-General with the Full Court of the Federal Court, hearing set down for February 2020
<i>Re Senvion GmbH</i>	[2019] FCA 1124	22 October 2019	Federal jurisdiction – importance of comity between courts	[No indication that an appeal has been filed as at 10/2/20]
<i>One Tree Community Services Inc v United Voice</i>	[2019] FCA 1309	19 August 2019	Ch III – whether Fair Work Commission would be exercising judicial power in determining dispute by way of arbitration	[No indication that an appeal has been filed as at 10/2/20]
<i>National Australia Bank Ltd v Nautilus Insurance Pte Ltd (No 2)</i>	[2019] FCA 1543	20 September 2019	Federal jurisdiction – whether whole controversy arose under law of the Commonwealth	[No indication that an appeal has been filed as at 10/2/20]
<i>RSA Express Pty Ltd v Guilfoyle, sued in his Capacity as a Work Health and Safety Prosecutor</i>	[2019] FCA 1605	30 September 2019	s 92 – application for interlocutory injunction – s 92 issue raised – prima facie case not established	[No indication that an appeal has been filed as at 3/12/19]
<b>NSWCA/NSWCCA</b>				

<i>Brewster v BMW Australia Ltd</i>	(2019) 366 ALR 171; [2019] NSWCA 35	1 March 2019	Judicial power – power to make common fund orders – separation of powers – acquisition on just terms	Special leave granted on 15/5/19 Appeal allowed on 4/12/19
<i>Onley v Commissioner of the Australian Federal Police;</i> <i>Menon v Commissioner of the Australian Federal Police;</i> <i>Anquetil v Commissioner of the Australian Federal Police</i>	(2019) 367 ALR 291; [2019] NSWCA 101	10 May 2019	Federal jurisdiction – whether state procedural laws operative with respect to exercise of federal jurisdiction under <i>Proceeds of Crime Act 2002</i> (Cth)	Special leave refused with costs on 4/9/19
<i>Searle v Commonwealth of Australia</i>	(2019) 345 FLR 356; [2019] NSWCA 127	31 May 2019	Executive power – fettering doctrine	No application for special leave filed
<i>Alou v R</i>	(2019) 373 ALR 347; [2019] NSWCCA 231	4 October 2019	Ch III – whether minimum non-parole period in s 19AG of the <i>Crimes Act 1914</i> (Cth) inconsistent with essential character of Court with the nature of judicial power	[No special leave application filed as at 10/2/20]
<b>NSWSC</b>				
<i>New South Wales Crime Commission v D154</i>	[2019] NSWSC 1	10 January 2019	Ch III – whether s 35A of the <i>Crime Commission Act 2012</i> (NSW) purported to confer executive power on the Supreme Court	[No indication that an appeal has been filed as at 10/2/20]

			– held that notice of motion raising this argument was, in the circumstances, an abuse of process, or alternatively, that the Court of Appeal had effectively already determined that s 35A did not confer executive power	
<i>Elzahed v Kaban</i>	[2019] NSWSC 670 (appeal against conviction) [2019] NSWSC 1466 (appeal against sentence)	7 June 2019	Implied freedom of political communication – whether s 200A of the <i>District Court Act 1973</i> (NSW) infringed implied freedom Federal jurisdiction – operation of State law	[No indication that an appeal has been filed as at 10/2/20]
<i>Gaynor v Local Court of New South Wales</i>	[2019] NSWSC 805	28 June 2019	Federal jurisdiction – diversity jurisdiction	Notice of appeal filed 7/8/19
<i>Wilmington Pty Ltd v Chief Commissioner of State Revenue</i>	[2019] NSWSC 1080	28 August 2019	NSW Constitution – whether <i>Payroll Tax Act 2007</i> (NSW), in application to plaintiff, within legislative competence of NSW Parliament – unnecessary to	[No indication that an appeal has been filed as at 10/2/20]

			decide on facts	
<b>QCA</b>				
<i>Vickers v Queensland Building and Construction Commission &amp; Ors</i>	[2019] QCA 66	16 April 2019	Qld const – whether statute with extraterritorial effects beyond legislative competence of Queensland Parliament	[Does not appear that any application for Special Leave was filed – 10/2/20]
<i>Awabdy &amp; Anor v Electoral Commission of Queensland &amp; Anor</i>	(2019) 372 ALR 740; [2019] QCA 187	13 September 2019	s 109 – whether Queensland statute governing political donations inconsistent with Commonwealth statute governing political donations	[Does not appear that any application for Special Leave was filed – 10/2/20]
<b>SASCFC/SASC</b>				
<i>Return to Work Corporation of South Australia v Renfrey</i>	(2019) 133 SASR 31; [2019] SASCFC 26	21 March 2019	s 109 – whether inconsistency arose between South Australian workers' compensation legislation and Commonwealth workers' compensation legislation	[Does not appear that any application for Special Leave was filed – 10/2/20]
<i>Powell v Depuy International Ltd</i>	(2019) 343 FLR 309; [2019] SASC 116	9 July 2019	Federal jurisdiction – jurisdiction of Federal Court – cross-vesting scheme	[No indication that an appeal has been filed as at 10/2/20]
<i>Attorney-General for the State of South Australia v Raschke &amp; Anor</i>	(2019) 133 SASR 215; [2019] SASCFC 83	11 July 2019	Federal jurisdiction – diversity jurisdiction	[Does not appear that any application for Special

				Leave was filed – 10/2/20]
<i>Question of Law Reserved (No. 1 of 2019)</i>	[2019] SASCFC 149	3 December 2019	Ch III – whether sch 2 of <i>Sentencing Act 2017</i> (SA) infringes <i>Kable</i> principle	[Does not appear that any application for Special Leave was filed – 10/2/20]
<b>VSCA/VSC</b>				
<i>Nguyen v DPP</i>	(2019) 368 ALR 344; [2019] VSCA 20	13 February 2019	Ch III – <i>Kable</i> – <i>International Finance</i> – validity of provisions permitting forfeiture after <i>ex parte</i> hearing	Application for Special Leave dismissed with costs on 14 August 2019
<i>Fidge v Municipal Electoral Tribunal</i>	[2019] VSC 639	20 September 2019	Application for leave to appeal against VCAT decision not to refer question to Supreme Court of Victoria, arguing, inter alia, that electoral mechanisms in the <i>Local Government Act 1989</i> (Vic) are inconsistent with terms of the <i>Constitution Act 1975</i> (Vic) and infringe upon the implied freedom of political communication – leave refused	[No indication that an appeal has been filed as at 10/2/20]
<i>Deputy Commissioner of</i>	[2019] VSCA 221	11 October 2019	s 51(ii) – incontestable	[Does not appear that

<i>Taxation v Buzadzic</i>			tax – argument had no real prospects of success Ch III – tax provisions impermissibly vested Deputy Commissioner with federal judicial power – provisions required Victorian Supreme Court to act in manner inconsistent with position as repository of federal judicial power – no real prospects of success	any application for Special Leave was filed – 10/2/20]
<b>WASCA/WASC</b>				
<i>GS v MS</i>	(2019) 344 FLR 386; [2019] WASC 255	19 July 2019	Federal jurisdiction – diversity jurisdiction – whether State Administrative Tribunal exercising judicial power	[No indication that an appeal has been filed as at 10/2/20]