SOME KEY DECISIONS OF THE COURT OF APPEAL IN 2021

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As with 2020, 2021 was dominated by the COVID-19 pandemic. As we are all acutely aware, this particularly affected jury trials because of social distancing requirements, the physical constraints of criminal courts including jury rooms, the vulnerability of participants in the criminal trial process to the virus and the externally imposed requirements of lockdowns and isolation for close contacts. The backlog of jury trials for the District Court and the Supreme Court presents a serious challenge which I anticipate will last for some time notwithstanding concerted efforts to address it.

Both the District Court and the Supreme Court also sought to utilise judicial resources which otherwise would have been engaged in jury trials, in judge-alone criminal trials and civil work which could be undertaken remotely, or which did not present the same logistical challenges as jury trials. In addition, 340 judgments were delivered in civil appeals and 327 judgments in criminal appeals in New South Wales. So appellate work continued apace in 2021 in New South Wales.

To assist both practitioners, judges and academics, in early 2021 the Court published an electronic document entitled "NSW Court of Appeal — A Year in Review: 2020" which digested in readily searchable and hyperlinked form all of the Court of Appeal's decisions given that year, arranged according to subject matter catchwords. It can be found on the New South Wales Court of Appeal website.[1] I commend it to you and hope you find it a useful research tool.

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[1] https://nswca.judcom.nsw.gov.au/wp-content/uploads/2021/04/2020-Year-in-Review.pdf

A similar Court of Appeal Year in Review has been published digesting the work of the Court of Appeal in 2021.[2]

For those interested in the criminal law, R A Hulme J publishes an annual Court of Criminal Appeal Year in Review which is an immensely valuable resource. That can be found on the judicial speeches page of the Court's website.[3]

I would also draw attention to his Honour's "Criminal Chronicle",[4] which contains a readily searchable, indexed and hyperlinked digest of all of the leading decisions of the NSW Court of Criminal Appeal over the last decade.

With that introduction and overview, I now wish to discuss a small selection of the Court of Appeal's decisions from 2021 which I think were both important and are of interest. I have divided them into topics:

(i) statutory interpretation;

(ii) decisions on practice and procedure; and

(iii) judicial review of District Court appeals from the Local Court.

Statutory interpretation

It is, perhaps, trite that much judicial work, in both the civil and criminal spheres, at first instance and on appeal, involves questions of statutory construction.

Lord Denning MR thought that he had come a long way when he wrote of statutes, in *The Discipline of Law*, that "[w]hen I was called [to the Bar] in 1923 there was one volume of [statutes] of 500 pages. Now in 1978 there are three volumes of more than 3,000 pages".[5]

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[2] https://nswca.judcom.nsw.gov.au/wp-content/uploads/2022/03/2021-Year-in-Review.pdf
[3] https://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_publications/SCO2_judicialspeeches/sco2_speeches_current_judicialofficers.aspx#hulme
[4] https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2020%20Speeches/Hulme_20200914.pdf
[5] Lord Denning, *The Discipline of Law* (1979, Butterworths) at 9.

Since then, in Australia at State and Commonwealth levels, there has been an exponential growth in the number and length of statutes, their complexity and the overlay of statute on areas traditionally dealt with purely by common law or equitable principle. Two obvious examples are the *Civil Liability Act 2002* (NSW) and statutory formulations of unconscionable conduct or dealings. One cannot argue or resolve a personal injury case without addressing the former, whilst the same applies to commercial disputes and the various incarnations of the latter, including s 21 of the *Australian Consumer Law*; and the *Contracts Review Act 1980* (NSW). And, of course, everyone's favourite, the *Evidence Act*.

It will be a very rare civil case that is determined simply and solely by the application of purely common law or equitable principles. Statute intrudes everywhere:

(1) family provision cases and the *Succession Act 2006* (NSW);

(2) cases concerning the administration of trusts and the *Trustee Act 1925* (NSW);

(3) insurance cases and the *Insurance Contracts Act 1984* (NSW);

(4) Commonwealth judicial review and the *Administrative Decisions (Judicial Review) Act 1977* (Cth);

(5) State judicial review for jurisdictional error and the relevant statutory provision vesting power in a court or other tribunal (see *Kirk v Industrial Court of New South Wales*[6]), a topic of frequent and recent judicial treatment which will be addressed in greater detail later in this paper;

(6) sentencing proceedings and the *Crimes (Sentencing Procedure) Act 1999* (NSW) or the *Crimes Act 1914* (Cth);

[6] (2010) 239 CLR 531; [2010] HCA 1 at [72].

(7) building and construction cases and the *Building and Construction Industry Security of Payment Act 1999* (NSW);

(8) workers compensation cases and the *Workers Compensation Act 1987* (NSW) and *Workplace Injury Management and Workers Compensation Act 1998* (NSW);

(9) State taxation cases and the *Taxation Administration Act 1996* (NSW); and

(10) planning and development cases and the *Environmental Planning and Assessment Act 1979* (NSW),

not to mention the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW).

The sheer breadth of territory occupied by the statute books — both Commonwealth and State — guarantees that virtually no question of law, in 2022, will be resolved solely by reference to pure principles of common law or equity.

In an article published soon after his retirement as the Chief Justice of Australia, the Hon. A M Gleeson AC QC observed that:[7]

> "One of the changes making the work of modern judges different from that of their predecessors is that most of the law to be applied is now found in Acts of Parliament rather than judge-made principles of common law … Over the past 30 years, there has been a surge of legislative activity reaching into areas that once were occupied exclusively by lawyers' law. This has been described as an 'orgy' of legislation."

In the thirteen years since that observation was published, it has taken on even greater relevance, with the number of cases turning upon questions of statutory construction increasing at an accelerating pace.

[7] A M Gleeson, "The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights" (2009) 20 *Public Law Review* 26 at 26.

In addressing the increasing volume of complex questions of statutory construction over the past decade, the High Court has stated that the relevant process must start and end with a consideration of the *text* of the statute: see, for example, *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd*;[8] *Maloney v The Queen*;[9] and *Alphapharm Pty Ltd v H Lundbeck A/S*.[10] Responding to this simple proposition in 2017, the current Commonwealth Solicitor-General, Dr Stephen Donaghue QC, observed that the High Court's statements:[11]

> "make it sound like all one need do is read the words. But, of course, it is not that easy. Indeed, even reading the words can be quite a task given the sheer volume of legislation that must now be navigated … which has the consequence that the journey between the beginning and end is quite long, even focusing just on the text. But, in addition, while one must begin and end with the text, there is often a considerable detour through legislative history and purpose, and through the common law background against which particular legislation was enacted, that must be negotiated before one can ultimately return to the text confident that its context is fully appreciated.
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> It is now common for Acts, that a few decades ago were slim volumes, to run into the hundreds of pages. Interlinking definitions, and primary legislation that depends for its content on matters prescribed in subordinate legislation, are now so common that the task of locating the relevant provisions can itself require considerable technical skill, before one even reaches the task of mastering the interaction of provisions in ever more complex and prescriptive statutory regimes. And, having found the relevant provisions … there are vast numbers of authorities interpreting the provisions, which not uncommonly establish that the legal meaning of a text does not correspond to the ordinary meaning of that text."

To the Solicitor's insightful comments may be added that the "principles of statutory construction", as they have emerged from the "vast number of authorities", are not necessarily uniform in their operation nor complementary to one another. They may point in different directions. There may be conflicts between text and context, between legislative history, policy and practicality, and between the statute being construed and other statutes *in pari materia* or

[8] (2012) 250 CLR 503; [2012] HCA 55 at [39].
[9] (2013) 252 CLR 168; [2013] HCA 28 at [324].
[10] (2014) 254 CLR 247; [2014] HCA 42 at [85].
[11] S P Donaghue, "Statute and Common Law" (Commentary, T C Beirne School of Law Current Legal Issues Seminar Series, 17 August 2017) at [3]–[4].

"covering the legislative field".[12] Some guidance is supplied by the relevant *Interpretation Acts*, with s 33 of the New South Wales Act requiring that:

> "In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object Is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object."

This section reflects the overarching aim of statutory construction — "to give effect to the intention of the Parliament as disclosed by the language used in the statute".[13]

This is reflected in the approach adopted by a majority of the Court of Appeal in *Australian Rail Track Corporation Ltd v Dollisson*,[14] a case considering s 134AB(1) of the *Accident Compensation Act 1985* (Vic). That provision operates to limit, or to set certain prerequisites for, an injured worker's recovery of damages under the Act if he or she is "entitled to compensation in respect of an injury arising out of or in the course or, or due to the nature of, employment" during a specified period.

The precise issue before the Court of Appeal was whether the limitations on, or prerequisites for, the recovery of damages under s 134AB(1) applied to a worker who had received or was entitled to compensation under any statutory regime in respect of an employment related injury, for example, pursuant to the *Workers Compensation Act 1987* (NSW), or whether they applied only to an injured worker who had received or was entitled to compensation under the Victorian *Accidents Compensation Act*.

In favour of the former construction, the Applicant relied heavily upon the text of the provision, in particular the absence of the qualifying words "under or in

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[12] P Herzfeld and T Prince, *Interpretation* (2nd ed, 2020, Lawbook Co) at [8.330]–[8.370] (**Herzfeld and Prince, Interpretation**); *Deputy Federal Commissioner of Taxes v Elder's Trustee & Executor Co Ltd* (1936) 57 CLR 610 at 625–626; *Sieders v The Queen* (2008) 72 NSWLR 417 at [122], [134].
[13] See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320 per Mason and Wilson JJ (**Cooper Brookes**); Herzfeld and Prince, *Interpretation* at [1.30].
[14] [2020] NSWCA 58 (**Dollisson**).

accordance with this Act" following the reference to "compensation". The argument in essence was that by failing to qualify the word "compensation" as it had in various other provisions of the Act, the Victorian Parliament intended s 134AB(1) to apply to a worker who had received compensation *under any statutory scheme*.

However, as was held by the majority (Bell ACJ, Macfarlan JA agreeing), this argument involved reading s 134AB(1) in isolation and did not sit comfortably with a thorough review of the Act read as a whole, taking into account its history and the policy of the Act. In view of those contextual considerations, the reference to "compensation" was held to be a reference to "compensation under or in accordance with the *Accidents Compensation Act*", notwithstanding the absence of those words in the text of the provision.[15]

Faced with two accepted principles of or approaches to statutory construction pointing in opposite directions, the majority considered context "in the first instance" in order to achieve a harmonious and workable construction giving effect to the intention of the Parliament. Although it was acknowledged that *expressio unius* reasoning may be a "valuable servant", its concurrent status as a "dangerous master"[16] was expressed in the following passage:[17]

> "*Expressio unius* reasoning of the kind sought to be invoked by ARTC attributes a rigorous linguistic logic and consistency to the author of the statute or instrument under consideration. Such characteristics, whilst not unattainable, are far from inevitable, especially when the authorship of a frequently amended statute undoubtedly changes over time and where it may be that amendments to existing Acts or the passage of new bills are subject to last minute political debate and compromise … 'Patchwork' statutes, to borrow Lord Hoffmann's language in *National Grid Co plc v Mayes* [2001] 1 WLR 864 at [55], rarely contain the linguistic logic and consistency upon which the *expression unius* maxim depends for it to operate as a useful construction tool. His Lordship described such arguments as 'often perilous'".

The fault line between the competing approaches to statutory construction as advanced in the *Dollisson* case was reasonably clear.

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[15] *Dollisson* at [13]–[16].
[16] *Colquhoun v Brooks* (1888) 21 QBD 52.
[17] *Dollisson* at [47].

Such a clear fault line will not always emerge, with the result that two *contextual* approaches, applied to the same statutory provision, may still point in opposing directions. The High Court, in *Taylor v Owners – Strata Plan No 11564*[18] and *SAS Trustee Corporation v Miles*,[19] has directly addressed circumstances of that nature by stating that:

> "Where the text *read in context* permits of more than one potential meaning, the choice between those meanings may ultimately turn on an evaluation of the relative coherence of each with the scheme of the statute and its identified objects or policies."

In *SZTAL v Minister for Immigration and Border Protection*, Kiefel CJ, Nettle and Gordon JJ observed that:[20]

> "Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."

In other words, the ordinary literal meaning of a statutory provision may need to give way to the context and purpose of the Act. The literal meaning of a statutory provision may not be its legal meaning: *Project Blue Sky Inc v Australian Broadcasting Authority*.[21] This proposition was clearly illustrated in *Sydney Seaplanes Pty Ltd v Page*.[22]

Beyond the literal meaning: Sydney Seaplanes Pty Ltd v Page (2021) 106 NSWLR 1; [2021] NSWCA 204

The facts may be stated succinctly.

On 31 December 2017, a seaplane departed Cottage Point bound for Rose Bay. Tragically, the aircraft crashed, resulting in the death of one of the passengers. The aircraft was operated by Sydney Seaplanes Pty Ltd, which was the applicant in the Court of Appeal. Within two years of the fatal accident,

[18] (2014) 253 CLR 531; [2014] HCA 9 at [66].
[19] (2018) 265 CLR 137; [2018] HCA 55 at [20].
[20] (2017) 262 CLR 362; [2017] HCA 34 at [14].
[21] (1998) 194 CLR 355; [1998] HCA 28 at [78].
[22] (2021) 106 NSWLR 1; [2021] NSWCA 204 (**Sydney Seaplanes**). Special leave to appeal from this decision was granted on 13 April 2022.

on 18 December 2019, the father of the deceased, Mr Page, who was the respondent to the appeal, commenced proceedings in the Federal Court of Australia seeking damages under ss 28, 31 and 35 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (**the Commonwealth Act**), which is incorporated into the law of New South Wales by s 5 of the *Civil Aviation (Carriers' Liability) Act 1967* (NSW).

On 24 April 2020, Griffiths J of the Federal Court dismissed Mr Page's proceedings for want of jurisdiction, the Federal Court having no jurisdiction to entertain a claim in respect of a flight taking place wholly within New South Wales: *Page v Sydney Seaplanes Pty Ltd*.[23] By the time of the dismissal, more than two years had passed since the accidence. This was significant, as s 34 of the Commonwealth Act required Mr Page to bring has action for damages within that period lest his right to damages be "extinguished".

Further to that effect, and despite Sir Anthony Mason's observation that "[t]he very mention of 'federal jurisdiction' is enough to strike terror in the hearts and minds of Australian lawyers who do not fully understand arcane mysteries",[24] practitioners should be aware of the ongoing implications of the High Court's seminal decision in *Re Wakim; Ex parte McNally*.[25] Again, as will become evident, the case of *Sydney Seaplanes* is particularly demonstrative of those implications, not just from a jurisdictional perspective, but also for the purposes of statutory construction in view of the prophylactic legislation that followed.

What, if anything, could Mr Page do?

Mr Page's solicitor filed a Summons in the Common Law Division of the Supreme Court seeking orders that the doomed federal proceedings be treated and recorded as proceedings in the Supreme Court deemed to have been

[23] (2020) 277 FCR 658; [2020] FCA 537.
[24] See the foreword to G Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (4th ed, 2016, Federation Press).
[25] (1999) 198 CLR 511; [1999] HCA 27 (**Re Wakim**).

brought on 18 December 2019, pursuant to s 11(2) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW) (**the State Jurisdiction Act**).

Prima facie, this looked to be an auspicious course of action, as s 11(2) of the *State Jurisdiction Act* provides that:

> "A person who was a party to a proceeding in which a ***relevant order*** is made may apply to the Supreme Court for an order that the proceeding be treated as a proceeding in the Supreme Court, and the Supreme Court may make such an order".

A "relevant order" is defined in s 11(1) as:

> "(a) an order of a federal court, whether made before or after the commencement of this section, dismissing, striking out or staying a proceeding relating to a State matter *for want of jurisdiction*, or
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> (b) a declaration by a federal court, whether made before or after the commencement of this section, that it has no jurisdiction to hear and determine a proceeding relating to a State matter, or
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> (c) any other decision by a federal court, whether made before or after the commencement of this section, that it has no jurisdiction to hear and determine a proceeding relating to a State matter." (emphasis added)

In s 3, a "State matter" is defined to mean a matter:

> "(a) in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State or a Territory, or
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> (b) which has been removed to the Supreme Court under s 8 of the *Jurisdiction of Courts (Cross-vesting) Act 1987*, or
>
> (c) in respect of which a relevant State Act purports or purported to confer jurisdiction on a federal court."

At first instance in the Common Law Division, it was held that s 11(2) of the *State Jurisdiction Act* was engaged by the federal proceedings, on the basis that their dismissal by Griffiths J was a "relevant order" for the purposes of sub-section (1).[26]

[26] *Page v Sydney Seaplanes Pty Ltd t/as Sydney Seaplanes* [2020] NSWSC 1502.

There could be no question that Griffiths J's order was a *relevant order* on a *literal* reading of s 11(1); his Honour having dismissed a proceeding relating to a State matter for want of jurisdiction. However, as noted earlier, a statutory provision is not construed solely by resort to its literal meaning: *Park Trent Properties Group Pty Ltd v ASIC*.[27]

It was the three words "want of jurisdiction" which prompted Sydney Seaplanes to appeal against the decision at first instance, on the basis that their literal meaning did not correspond to the intention of the Parliament, in accordance with the overarching aim of statutory construction to which I referred earlier.

Sydney Seaplanes contended that Griffiths J's decision was not a "relevant order" as the "want of jurisdiction" referred to in s 11(1) was limited to a want of jurisdiction consequent upon the High Court's decision *Re Wakim*, which had held that the conferral of state jurisdiction on the Federal Court by the *Cross-vesting Acts* was unconstitutional.

A thorough search of the body of case law considering the *State Jurisdiction Act* offered little to no assistance on this particular point, such that the Court of Appeal was seised of a genuinely novel argument on a point of law.

The text and context of the *State Jurisdiction Act*, including legislative history and extrinsic materials in light of s 34(1)(b) of the *Interpretation Act*, offered considerable assistance to the Court.

First, the Act contained an explicit statement of its purpose in s 1(2), namely:

> "to provide that certain decisions of the Federal Court of Australia or the Family Court of Australia have effect as decisions of the Supreme Court and to make other provision relating to certain matters relating to the jurisdiction of those courts."

[27] [2016] NSWCA 298; (2016) 116 ACSR 473.

Secondly, the Act's Long Title described "[a]n Act relating to the *ineffective conferral* of jurisdiction on the Federal Court of Australia and the Family Court of Australia with respect to certain matters".

It should be noted at this point that reference to a statutory "objects" provision or "statement of purpose" to give "practical content to particular terms used in a statute" is permitted by authority including *Russo v Aiello*.[28] So too there is a long line of High Court authority enabling reference to a statute's long title to shed light on the statutory purpose: see, for example, *Clunies-Ross v Commonwealth*.[29]

The reference in the long title to "the ineffective conferral of jurisdiction on the Federal Court of Australia and the Family Court of Australia" was plainly a reference to *Re Wakim*. By the time of that decision, the constitutionally-invalid cross-vesting scheme had been in operation for upwards of a decade and had seen the delivery and enforcement of many judgments in matters which had been cross-vested from state supreme courts to the federal and family courts. Following *Re Wakim*, the validity and efficacy of those judgments was suddenly thrown into question, and there was a significant volume of matters pending in the federal and family courts abruptly lacking a jurisdictional foundation.

This was the historical context in which the *State Jurisdiction Act*, relied upon by Mr Page in *Sydney Seaplanes*, was introduced. It was remedial legislation squarely and urgently directed to addressing the consequences of *Re Wakim*. This historical context cast bright light on the purpose of the *State Jurisdiction Act*, being "a statute passed in order to reverse, negate or accommodate the effect of" *Re Wakim*.[30] A similar approach to the ascertainment of statutory purpose, as a necessary aspect of the exercise of construction, had been taken

[28] (2003) 215 CLR 643; [2003] HCA 53.
[29] (1984) 155 CLR 193; [1984] HCA 65.
[30] *Sydney Seaplanes* at [38].

by the High Court in *Residual Assco Group Ltd v Spalvins*[31] and *Thiess v Collector of Customs*,[32] amongst others.

In the latter case, the Court noted at [32] that amendments to s 167 of the *Customs Act 1901* (Cth) under consideration were "an immediate prophylactic response to the spectre of widespread fiscal confusion raised by Isaacs J" in *Sargood Bros v The Commonwealth*.[33]

The remedial purpose of the *State Jurisdiction Act*, introduced into the Parliament within a week of the decision in *Re Wakim*, was also reflected in the terms of the Act considered as a whole, which included in s 4(1) the definition of an "ineffective judgment" as a "judgment of a federal court in a State matter given or recorded, before the commencement of this section, in the purported exercise of jurisdiction *purporting to have been conferred on* the federal court by a relevant State Act" (emphasis added).

The purpose of the *State Jurisdiction Act* was also made plain in the second reading speech, with the then Attorney-General referring explicitly to the effect of *Re Wakim* as being "to invalidate decisions previously made by the Federal Court and the Family Court relying purely on cross-vesting arrangements and to prevent the further exercise of such jurisdiction by those Federal courts".

This reference was also picked up in the explanatory memorandum of the preceding Bill, which followed a discussion of the implications of *Re Wakim* with a statement that the Bill would "provide for the transfer of *current proceedings* before a federal court in relation to State matters to the Supreme Court" (emphasis added). Notwithstanding their provenance in "extrinsic materials", these statements shed a particularly clear light on the relevant statutory purpose of the *State Jurisdiction Act*. That of course is not always (and indeed not often) the case.

[31] (2000) 202 CLR 629; [2000] HCA 33.
[32] (2014) 250 CLR 664; [2014] HCA 12.
[33] (1910) 11 CLR 258 at 301–303; [1910] HCA 45.

To adapt the language of Sir Anthony Mason and Sir Ronald Wilson in *Cooper Brookes* at 321, close regard to:

(1) the context and purpose of the *State Jurisdiction Act*, as explicitly stated and as is evident from its terms as a whole;

(2) the specific remedial context in which it was passed; and

(3) the mischief to which it was directed; in conjunction with

(4) the explanatory memorandum and second reading speech,

established that the literal construction of s 11(1) adopted by the primary judge "did not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions".

In practical terms, although Griffiths J's order dismissing the federal proceedings explicitly for "want of jurisdiction" came within the ordinary and natural meaning of a "relevant order" as defined in s 11(1) of the *State Jurisdiction Act*, the words "want of jurisdiction" as they appear in that sub-section are not expressed generally. Rather, they are limited to a want of jurisdiction resulting from the decision in *Re Wakim*.

The unfortunate consequence of this outcome was that Mr Page could not bring proceedings in the Supreme Court of New South Wales, his cause of action having been "extinguished" upon the passage of two years after the accident.

Close contact with the principle of legality: Kassam v Hazzard; Henry v Hazzard
(2021) 396 ALR 302; [2021] NSWCA 299

As noted at the outset of this paper, 2021 was dominated by the ongoing COVID-19 pandemic. Whilst my introductory comment was directed to the pandemic's effects on day-to-day life, legal practice and the operations of the Court, COVID has spawned its own body of case law as the consequences of the pandemic — and the various administrative and legislative instruments

enacted to address them — gave rise to justiciable issues in respect of a broad range of subject matter; from commerce[34] to the Constitution.[35]

In *Kassam v Hazzard; Henry v Hazzard*, two sets of applicants sought leave to appeal against Beech-Jones CJ at CL's dismissal of their challenges to the validity of three Public Health Orders (**the impugned Orders**) made by the Minister for Health and Medical Research, pursuant to s 7(2) of the *Public Health Act 2010* (NSW).

Titled "power to deal with public health risks generally", that section relevantly provides that:

> "(1) This section applies if the Minister considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health.
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> (2) In those circumstances, the Minister—
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> (a) may take such action, and
>
> (b) may by order give such directions,
>
> as the Minister considers necessary to deal with the risk and its possible consequences.
>
> (3) Without limiting subsection (2), an order may declare any part of the State to be a public health risk area and, in that event, may contain such directions as the Minister considers necessary—
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> (a) to reduce or remove any risk to public health in the area, and
>
> (b) to segregate or isolate inhabitants of the area, and
>
> (c) to prevent, or conditionally permit, access to the area."

Although this case gave rise to a number of issues of statutory construction — including the characterisation of the power to make a Public Health Order; the ascertainment of legislative purpose; and the *Anthony Hordern* principle[36] — it

[34] See, for example, *Dyco Hotels Pty Ltd v Laundy Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340; [2021] NSWCA 332; *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* (2020) 104 NSWLR 634; [2020] NSWCA 296; *Star Entertainment Group Ltd v Chubb Insurance Australia Ltd* [2022] FCAFC 16; (2022) 158 ACSR 474.
[35] See, for example, *Gerner v Victoria* (2020) 270 CLR 412; [2020] HCA 48.
[36] See *Anthony Hordern and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1; [1932] HCA 9.

is the Applicants' reliance on the "principle of legality" that holds the greatest interest.

The first of the impugned orders had the effect of conditioning the freedom of movement of certain persons, described as "authorised workers", residing in certain areas, described as "areas of concern" to leave the designated area in which they resided for the purposes of their work or employment upon having received at least one dose of an approved COVID-19 vaccine or having been issued with a medical contraindication certificate exempting them from the requirement to be at least partially vaccinated.

The remaining two impugned orders had the same operative effect, albeit that they applied to "authorised workers" at aged care facilities and schools irrespective of where they resided. Pursuant to the impugned orders, an "authorised worker" was also required to carry evidence of his or her vaccination or exemption when leaving the relevant "area of concern" in order to engage in work or employment.

Before the Chief Judge at Common Law and on appeal, the plaintiffs argued that the Health Minister had acted *ultra vires* in making the impugned orders on the basis that they infringed six distinct rights said to be recognised by the common law, contrary to the principle of legality. Those rights (**the asserted rights**) were:

(1) the right to bodily integrity;

(2) the right to earn a living;

(3) the right not to be discriminated against;

(4) the right to privacy;

(5) the privilege against self-incrimination; and

(6) the right to silence.

The impugned orders were said to infringe each of these rights by mandating or coercing the vaccination of "authorised workers", notwithstanding that all nine plaintiffs in both proceedings had chosen not to receive a COVID-19 vaccination in the absence of a valid medical exemption.

In its modern manifestation in Australian law, the principle of legality is closely associated with the decision of the High Court in *Coco v The Queen*.[37] At 437, in what may be considered a contemporary re-statement of the principle, the High Court noted that:

> "The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested my unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights."

Some 22 years later, in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)*,[38] the New South Wales Court of Appeal warned that "it is important to keep the principle of legality in perspective and it must be applied with care". A number of points about the principle of legality were made in *Kassam v Hazzard; Henry v Hazzard*:

(1) the principle of legality is not of universal application and the assistance to be gained from it varies widely;[39]

(2) the principle of legality is not a substitute for the usual process of contextual statutory construction. Instead, it is an occasionally-useful,

[37] (1994) 179 CLR 427; [1994] HCA 15. See also *Potter v Minahan* (1908) 7 CLR 277; [1908] HCA 63.
[38] (2016) 95 NSWLR 157; [2016] NSWCA 379 at [38].
[39] *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321; [2000] HCA 7; *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309; [2004] HCA 40.

context-dependent adjunct to the ultimate and central judicial task and responsibility of giving effect to legislative intention;[40] it follows that

(3) the principle of legality cannot override the intention of Parliament to abrogate or curtail a fundamental right, freedom or immunity;[41] thus

(4) the principle of legality will have little, if any, role to play in a context where the objects or purpose of an Act contemplate the curtailment of a particular right or particular rights;[42]

(5) the principle of legality will not necessarily be engaged or enlivened if the interference with fundamental rights authorised by a statute is slight or indirect or temporary;[43] and

(6) the principle of legality's insistence on clarity in a statute which authorises the curtailment of rights will be correlative to and vary with the strength or fundamental nature of the right(s) involved.[44]

An argument based upon the principle of legality ordinarily raises three issues:

(1) first, whether the right relied upon is in fact recognised at common law and is of such a fundamental nature or character to engage the principle;

(2) secondly, whether the legislative instrument or provision in question did in fact interfere with that right and, if so, to what extent; and

(3) thirdly, whether the principle of legality in fact operates to constrain any interference with the right, in view of the purpose for which the statutory power is conferred.

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[40] *Elliott v Minister Administering the Fisheries Management Act 1994* (2018) 97 NSWLR 1082; [2018] NSWCA 123 at [40].
[41] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; [1992] HCA 10.
[42] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; [2013] HCA 39 (**Lee**).
[43] *Lee* at [324]; *Hayward (a pseudonym) v R* (2018) 97 NSWLR 852; [2018] NSWCCA 104.
[44] *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560; [2019] HCA 32; *Malika Holdings v Pty Ltd v Stretton* (2001) 204 CLR 290; [2001] HCA 14 at [28]–[30].

Returning to the specific facts of *Kassam v Hazzard; Henry v Hazzard*, in respect of the first issue, it was held that only three of the asserted rights were "fundamental rights" recognised at common law, and therefore amenable to the principle of legality. Those rights were the right to bodily integrity, the privilege against self-incrimination, and the right to silence; and not the asserted rights to earn a living; to privacy and to silence.

As to the second issue, the Court held that none of those rights held to be fundamental were infringed, even indirectly, by the impugned orders. The orders did not force the Applicants to be vaccinated and did not have anything in truth to do with the right to silence or the privilege against self-incrimination. Far from forcing people such as the Applicants to be vaccinated, the impugned orders left that choice open to the Applicants and respected their choice. A consequence this free choice, of course, was the Applicants' inability to engage in work or employment whilst the impugned orders remained in effect.

On the basis of these conclusions, it was not strictly necessary for the Court to address the third issue, particularly in relation to those rights which were held to engage the principle in the first order but were not directly or indirectly infringed. In the interest of completeness, however, the Court turned its attention to the statutory purpose underpinning s 7 of the *Public Health Act*, pursuant to which the impugned orders were made.

The objects of the *Public Health Act* are set out in s 3 and include:

(a) the promotion, protection and improvement of public health;

(b) control of risks to public health;

(c) the promotion of the control of infectious diseases;

(d) the prevention of the spread of infectious diseases;

(e) the recognition of the role of local government in protecting public health; and

(f) the monitor of diseases and conditions affecting public health.

Crucially, s 3(2) provides that "the protection of the health and safety of the public is to be the *paramount consideration* in the exercise of functions under this Act" (emphasis added).

Further, on its face, s 7(2) confers a very broad discretion on the Health Minister, which, in sub-section (3), includes the express contemplation of "the segregation or isolation of inhabitants of an area of concern" and "the prevention, or conditional limitation, of access to an area of concern".

In view of the clear purpose of the *Public Health Act* being to "protect the health and safety of the public", and the express contemplation of the curtailment of freedom of movement in s 7, the Court concluded that:[45]

> "It would not be a sensible construction of s 7 of the *Public Health Act*, especially given the importance of its subject matter and the paramountcy provision in s 3(2) … for it to be construed as authorising the restriction of what would otherwise be the ability freely to move within New South Wales except to the extent that it impaired a person's right to work, to privacy and not to be discriminated against. Such a construction would be not only unworkable but corrosive of the obvious purpose of the statute. It would defy clear legislative intent."

A parallel was drawn to the reasoning of the High Court in *ASIC v DB Management Pty Ltd*.[46] In that case, the principle of legality was invoked to challenge the validity of a scheme for the compulsory acquisition of shares under ch 6 of the former *Corporations Law* (NSW). At [43], the High Court unanimously held that:

> "interference with vested property rights … is what compulsory acquisition is about … it does not help to say that legislation enabling abrogation of property rights should be strictly confined according to its terms, when the legislation confers a power upon a regulatory authority … to alter those terms."

In his Honour's judgment in *Kassam v Hazzard; Henry v Hazzard*, Leeming JA explained that "legal analysis is not much assisted by deploying the language

[45] *Kassam v Hazzard; Henry v Hazzard* at [112].
[46] (2000) 199 CLR 321; [2000] HCA 7.

of 'rights' and the 'principle of legality' in assessing whether s 7 [of the *Public Health Act*] authorise[d] the [impugned orders]. A more nuanced analysis is required, both of the rights upon which reliance is placed, and of the legal and practical operation of the orders".[47]

Practice and procedure

From time to time, issues of practice and procedure reach the Court of Appeal, which either raise new problems or invite a review of the principles and authorities. That is the topic to which I will now turn.

Two cases of significance decided in 2021 fell into these categories.

Whose legitimate forensic purpose? Secretary of the Department of Planning, Industry and Environment v Blacktown City Council [2021] NSWCA 145

As Brereton JA observed at the outset of his judgment on this appeal, "the essential place of the subpoena for production of documents in the Court's armoury to do justice has been recognised at least [for several centuries]".[48] His Honour noted that, in modern litigation, "the subpoena for production is crucial to the ability of a party to investigate the facts and assemble evidence to prove a case", particularly in civil litigation, where the extra-curial compulsive powers available to police and prosecutors in the criminal context do not accrue to plaintiffs.

Although, from time to time, intermediate appellate courts have undertaken to provide authoritative guidance on general questions of principle in respect of subpoenas,[49] the decisions in *Small* and *Waind* were respectively decided over 80 and 40 years ago. One principle with which practitioners are well familiar is that a subpoena must be issued for a "legitimate forensic purpose".[50]

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[47] At [167].
[48] *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145 at [83] (**Blacktown City Council**).
[49] See, for example, *National Employers' Mutual General Association Ltd v Waind; Waind v Hill* [1978] 1 NSWLR 372 (**Waind**); *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564 (**Small**).
[50] See, for example, *Maddison v Goldrick* [1976] 1 NSWLR 651 at 666–668; *Re Don* [2006] NSWSC 1125 at [25].

Blacktown City Council concerned whether, for a legitimate forensic purpose to be established, it is fatal that it cannot be shown that the documents subpoenaed will be likely to assist the case of the party issuing the subpoena, or whether it is sufficient that the documents sought are simply "apparently relevant".[51]

The origin of the expression "legitimate forensic purpose" in the context of subpoenas is uncertain, though it appears first to have been used by Samuels JA in *Maddison v Goldrick*.[52] Some eight years later, in *Alister v The Queen*,[53] Gibbs CJ observed that "[a]lthough a mere 'fishing' expedition can never be allowed, it may be enough [for the validity of a subpoena] that it appears to be 'on the cards' that the documents will materially assist the defence". This observation was followed by a practical example which bears close attention, the Chief Justice stating that:

> "if, for example, it were known that an important witness for the Crown had given a report on the case to ASIO it would not be right to refuse disclosure simply because there were no grounds for thinking that the report would assist the accused. To refuse discovery only for that reason would leave the accused with a legitimate sense of grievance, since he would not be able to test the evidence of the witness by comparing it with the report, and would be likely to give rise to the reproach that justice had not been seen to be done".

Gibbs CJ did not refer to *Maddison v Goldrick*, nor to its formulation of a "legitimate forensic purpose", in *Alister*. However, at least by the time of *R v Saleam*[54] and definitely by the time of *Attorney-General (NSW) v Chidgey*,[55] the distinct concepts of "legitimate forensic purpose" and "material assistance on the cards" had been married together. At [64] of *Chidgey*, Beazley JA (as her Excellency then was, and with whom James and Kirby JJ agreed) stated that:

> "The test for determining whether a party is required to produce documents pursuant to a subpoena was stated by Simpson J (Spigelman CJ and Studdert J agreeing) in *R v Saleam* [1999] NSWCCA 86 at [11], in the following terms:

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[51] See *ICAP Australia Pty Ltd v BGC Partners (Australia) Pty Ltd* [2009] NSWCA 307; *ICAP Pty Ltd v Moebes* [2009] NSWSC 306.
[52] [1976] 1 NSWLR 651 at 666.
[53] (1984) 154 CLR 404 at 414–415; [1984] HCA 85 (**Alister**).
[54] [1999] NSWCCA 86 (**Saleam**).
[55] (2008) 192 A Crim R 536; [2008] NSWCCA 65 (**Chidgey**).

> 'The principles governing applications [for an order that documents not be produced] are no different from those governing applications for access to documents produced in answer to a subpoena. Before access is granted (or an order to produce made) the applicant must (i) identify a legitimate forensic purpose for which access is sought; and (ii) establish that it is 'on the cards' that the documents will materially assist his case. So much was established in earlier proceedings brought by this applicant: *R v Saleam* (1989) 16 NSWLR 14, per Hunt CJ at CL; see also *R v Tastan* (1994) 75 A Crim R 498'."

It must follow from this passage that one does not embark on a "fishing expedition", and therefore manifest an illegitimate forensic purpose, by seeking to subpoena "apparently relevant" documents for the purposes of cross-examining an important witness, even if the issuing party does not know whether those documents will assist or advance its case. It also supports the view that a party may be materially *assisted* in its case by its knowledge of what "apparently relevant" documents say or contain, even if those documents may not ultimately advance that party's case materially.

It should be noted, however, that a degree of care is necessary in transposing Gibbs CJ's observations in *Alister*, which largely concerned a claim for public interest immunity, to the law pertaining to subpoenas, as occurred at least to a certain extent in *Saleam* and *Chidgey*.

Those cases illustrate and confirm that a party issuing a subpoena will not necessarily lack a legitimate forensic purpose if he, she or it is unable to establish that the documents sought by way of subpoena will assist or be likely to assist the issuing party's case.

However, a substantial body of authority makes clear that this does not equate to a lack of a legitimate forensic purpose should the issuing party not be able to establish that it is "on the cards" that the subpoenaed documents will or are likely to assist its case.[56]

[56] See, for example, *Brand v Digi-Tech* [2001] NSWSC 425; *Carroll v The Attorney-General for New South Wales* (1993) 70 A Crim R 162; *Commissioner of Taxation v Glastonbury Steel Fabrications Pty Ltd* (1984) 75 FLR 298; *Trade Practices Commission v Arnotts Limited (No 2)* (1989) 88 ALR 90; [1989] FCA 340; *Hatton v Attorney-General (Cth)* (2000) 158 FLR 31; [2000] FamCA 892; *Lower v Insurance*

Expressed in positive terms, the fact that the issuing party is likely to be assisted in its case by production of the subpoenaed documents may make it *more likely* that its forensic purpose will be held to be legitimate, but an *inability* to demonstrate that likelihood will not necessarily mean that the subpoena has been issued without a legitimate forensic purpose.

Thus, by reference to the specific issue before it, the Court in *Blacktown City Council* held that it is sufficient to justify a subpoena as having been issued for a legitimate forensic purpose if the documents specified therein are "apparently relevant" to the case, that is, there is a reasonable basis beyond speculation that it is likely that the documents subpoenaed will *materially assist on an identified issue* — as opposed to assisting in the issuing party's case.

The relevant principles emerging from this case are that:

(1) the power of the Court to set aside a subpoena is but an aspect of its inherent power to regulate its processes and to intervene in an abuse of them;

(2) a subpoena will be presumed to have been issued for a legitimate forensic purpose if the documents sought are "apparently relevant" to the issues in the proceedings;

(3) documents will add "in some way" to the relevant evidence and therefore be sought for a legitimate forensic purpose if they are capable of providing a legitimate basis for cross-examination, or go to credit, irrespective of whether they are inadmissible according to the rules of evidence;

Australia Ltd (2015) 90 NSWLR 320; [2015] NSWCA 303; *Nicholls v Michael Wilson & Partners Limited* [2010] NSWCA 100; *Portal Software v Bodsworth* [2005] NSWSC 1115.

(4) an issuing party's inability to show that the subpoenaed documents are likely to assist its case will not necessarily mean that the subpoena lacks a legitimate forensic purpose; however

(5) the absence of any apparent relevance of the subpoenaed documents to the issues in dispute may warrant the conclusion that the subpoena lacks a legitimate forensic purpose.

In light of these principles, I expressed my conclusion that:[57]

> "although a party will generally be able to demonstrate that it had a legitimate forensic purpose in issuing a subpoena where, to quote Simpson J … in *Saleam* at [11], it can:
>
> '(i) identify a legitimate forensic purpose for which access is sought; and
>
> (ii) establish that it is "on the cards" that the documents will materially assist his case',
>
> at least in civil matters, an inability to demonstrate that it is 'on the cards' that the documents sought will materially assist the subpoenaing party's case will not automatically require either that the subpoena be set aside or that access to the documents produced be refused. It will generally be sufficient and prima facie evidence of a legitimate forensic purpose if the documents sought to be produced on subpoena have an apparent relevance to the issues in the case or bear upon the cross-examination of witnesses expected to be called in the proceedings."

A slice of SEPA: Joshan v Pizza Pan Group Pty Ltd (2021) 106 NSWLR 104; [2021] NSWCA 219

In August 2020, the Respondent (**Pizza Pan**), which is the sub-franchisor of the Pizza Hut restaurant chain throughout Australia, commenced proceedings in the District Court of New South Wales against the Applicants (**the Joshans**), who were the franchisees of a Pizza Hut outlet in Salisbury, South Australia. Pizza Pan sued on a guarantee executed by the Applicants in its favour, with the focal point of the dispute being the ongoing viability of the outlet in South Australia.

[57] *Blacktown City Council* at [80].

Clause 7.6 of the guarantee contained was a non-exclusive jurisdiction clause, which provided that "the parties agree to submit to the non-exclusive jurisdiction of the courts of [New South Wales]" and that the guarantee was to be governed by New South Wales law.

The Joshans filed a Notice of Motion seeking a stay of Pizza Pan's proceedings in the District Court of New South Wales. The stay application was brought pursuant to s 20 of the *Service and Execution of Process Act 1992* (Cth) (**SEPA**), which relevantly provides that:

> "(1) This section does not apply in relation to a proceeding in which the Supreme Court of a State is the court of issue.
>
> (2) The person served may apply to the court of issue for an order staying the proceeding.
>
> (3) The court may order that the proceeding be stayed if it is satisfied that a court of another State that has jurisdiction to determine all the matters in issue between the parties is the appropriate court to determine those matters.
>
> (4) The matters that the court is to take into account in determining whether that court of another State is the appropriate court for the proceeding *include*:
>
> (a) the places of residence of the parties and of the witnesses likely to be called in the proceeding; and
>
> (b) the place where the subject matter of the proceeding is situated; and
>
> (c) the financial circumstances of the parties, so far as the court is aware of them; and
>
> (d) any agreement between the parties about the court or place in which the proceeding should be instituted; and
>
> (e) the law that would be most appropriate to apply in the proceeding; and
>
> (f) whether a related or similar proceeding has been commenced against the person served or another person;
>
> but do not include the fact that the proceeding was commenced in the place of issue." (emphasis added)

The Joshans argued that the District Court of South Australia was "the appropriate court" to determine the proceedings, by reference to evidence

addressing the matters listed in s 20(4) of SEPA. In response, Pizza Pan placed great emphasis on cl 7.6 of the guarantee, which was of course *non-exclusive*.

The primary judge dismissed the stay application, applying the decision of Olsson J of the Supreme Court of South Australia in *Rick Cobby Pty Ltd v Podesta Transport Pty Ltd*[58] to conclude that the Joshans had "fallen well short of establishing a *clear and compelling basis* for the relief which they [sought]". The primary judge also applied the dictum of Palmer J in *Asciano Services Pty Ltd v Australian Rail Track Corp Ltd*[59] to find that cl 7.6 represented "the parties' clearly expressed contractual preference for the jurisdiction of [New South Wales]".

It was contended on appeal that both of these conclusions were in error, as the relevant standard of proof was no greater than the "balance of probabilities" and a non-exclusive jurisdiction clause could not record the parties' "preference" for a particular forum.

In order to resolve these issues, close attention was given to the construction, operation and application of s 20 of SEPA as a distinct statutory basis for a stay of proceedings *within* Australia, that is, distinct from a stay pursuant to the common law doctrine of *forum non conveniens* or a transfer of proceedings under s 5 of the *Jurisdiction of Courts (Cross-vesting) Acts 1987* (Cth); (NSW) (**the Cross-vesting Acts**).

Although all three of these mechanisms are directed to the same functional end, each arises in a different context and applies a unique threshold test. A common law stay of *forum non conveniens* requires proof that the forum of issue is a "clearly inappropriate forum";[60] a transfer of proceedings under the *Cross-vesting Acts* requires proof that the alternative forum is "clearly or

[58] (1997) 139 FLR 54 (**Rick Cobby**).
[59] [2008] NSWSC 652 (**Asciano**).
[60] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; [1990] HCA 55.

distinctly more appropriate" than the forum of issue;[61] and a stay under s 20 of SEPA requires proof that the alternative forum is "the appropriate forum"; that is, "more appropriate than any other forum".[62] The conflation of these three separate mechanisms is apt to result in error.

I also noted the following principles governing an application for a stay of proceedings under s 20 of SEPA:[63]

(1) the statutory power to grant a stay of proceedings does *not* apply to a proceeding in which the Supreme Court of a State is the court of issue;

(2) service *under* SEPA requires copies of notices as a prescribed by the *Service and Execution of Process Regulations 2018* (Cth);

(3) the "court of another State" referred to in s 20(3) may be any court, including the *Supreme* Court, of another State or Territory;

(4) courts of two (or more) States may be equally appropriate, in which case the alternative court will not meet the description of being *the* appropriate court, and the discretionary power to stay proceedings will not be engaged;

(5) what is *the* appropriate court is not necessarily co-extensive with what is the more convenient court;[64]

(6) "appropriateness" is to be determined by reference to the "matters in issue", which parties must seek to identify in both submissions and in evidence;

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[61] *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357; [2000] NSWCA 353 at [87]–[94] (**James Hardie**); *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 477.
[62] *Re Featherstone Resources Ltd; Tetley v Weston* (2014) 101 ACSR 394; [2014] NSWSC 1139 at [53] (**Re Featherstone**).
[63] *Joshan v Pizza Pan Group Pty Ltd* (2021) 106 NSWLR 104; [2021] NSWCA 219 at [50]–[67] (**Joshan**).
[64] *Re Featherstone* at [53].

(7) the identification of all the "matters in issue" is a prerequisite to deciding on the appropriate court;[65]

(8) the proper identification of the "matters in issue" bears on the weight to be placed on the residences of the parties and the witnesses likely to be called;[66]

(9) s 20(4) does not provide an exhaustive list of matters to be taken into account by a court in determining a stay application[67] and the purpose of its express exclusion of consideration of the forum of issue is to "negate the common law approach to *forum non conveniens*", namely the "clearly inappropriate forum" test;[68]

(10) although they are non-exhaustive, the matters in s 20(4) will be the principal signposts to the appropriate forum;

(11) of the matters identified in s 20(4), some will be straightforward and uncontroversial, others, such as "the financial circumstances of the parties" will be contentious and require proper proof, and some may be neutral, such as the "most appropriate law to apply" where the proceedings involve the application of the common law;

(12) the requirement in s 20(4)(d) that a court consider "any agreement between the parties about the court or place in which the proceeding should be instituted" is directed to *exclusive*, rather than *non-exclusive*, jurisdiction clauses. The latter say nothing about the place in which proceedings *should be instituted* and speak merely to where proceedings *may* be instituted;[69]

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[65] *St George Bank Ltd v McTaggart* [2003] 2 Qd R 568; [2003] QCA 59 at [6] (**St George**).
[66] *Equus Financial Services Ltd v Francis Xavier LAH* (unreported, Full Court of the Supreme Court of Victoria, 8 September 1994); *McGregor v Potts* (2005) 68 NSWLR 109; [2005] NSWSC 1098.
[67] *St George* at [11].
[68] *Aqua Max Water Filtration Solutions Pty Ltd v Hurtado* [2017] SASC 165 at [29].
[69] *BP plc v Aon Ltd* [2006] 1 Lloyd's Rep 618 at 630; [2001] EWCA Civ 173.

(13) by analogy to the *Cross-vesting Acts*, the moving party bears the persuasive burden of convincing a court of issue to stay proceedings;[70]

(14) the relevant standard of proof is the ordinary civil standard of the balance of probabilities, there being no warrant for glossing the statutory language to require a "clear and compelling" basis for a stay of proceedings, as occurred in *Rick Cobby*;

(15) determining whether an alternative court is "the appropriate court" requires an evaluative, as opposed to discretionary, judgment. The discretionary aspect of an application under s 20 does not arise until *after* the evaluation of appropriateness;[71]

(16) as expressly noted in sub-section (9), a party bringing a stay application under s 20 of SEPA may concurrently bring an application for a stay of proceedings on the ground of *forum non conveniens* although, as referred to earlier, care must be taken not to conflate the applicable tests;[72]

(17) appeals from decisions in respect of a stay application under s 20 of SEPA should be rare and an appellate court should be slow to intervene, such decisions being interlocutory in character and concerning a matter of practice and procedure;[73] and

(18) finally, in view of its interlocutory nature, the refusal of a stay application under s 20 of SEPA does not preclude any subsequent application in the event that circumstances change as a result of, for example, amendment to a Statement of Claim or Defence or the filing of a cross-claim.

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[70] *James Hardie* at [100].
[71] *Julia Farr Services Inc v Hayes* [2003] NSWCA 37; (20023) 25 NSWCCR 138 at [90].
[72] *Rick Cobby* at 59.
[73] Cf, *Garsec Pty Ltd v His Majesty the Sultan of Brunei* (2008) 250 ALR 682; [2008] NSWCA 211 at [94]; see *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170; [1981] HCA 39.

The application of these principles to the issues before the Court in *Joshan* resulted in the appeal being upheld, it being concluded that the primary judge had erred in requiring proof of a "clear and compelling basis" for the stay of proceedings where s 20, construed in context and in light of the statutory purpose, does not provide for any standard of proof other than the "balance of probabilities".

The primary judge was also held to have erred in relying upon cl 7.6 of the guarantee as an "agreement between the parties about the court or place in which the proceeding should be instituted" for the purposes of s 20(4)(d) of SEPA. That sub-section is directed only to *exclusive* jurisdiction clauses, which is made clear by the use of the words "should be instituted", as opposed to "*could* be instituted", and the express direction in s 20(4) that regard is not to be paid to the fact that the proceeding was commenced in the forum of issue. To give effect to a non-exclusive jurisdiction clause, which does not manifest a shared *preference* as to jurisdiction but merely a *contemplation* of that jurisdiction should proceedings be instituted,[74] would undermine the express direction in s 20(4).

In light of these matters, it fell to the Court of Appeal to undertake its own evaluative determination of "the appropriate court" in s 20(3) of SEPA. Having taken account of the relevant matters, including but not limited to those in sub-section (4), the Court reached the conclusion that the Supreme Court of South Australia was the appropriate court for the resolution of Pizza Pan's proceedings. The Court placed emphasis on the following matters:

(1) all of the individual defendants and cross-defendants reside in South Australia;

(2) the relevant Pizza Hut outlet is located in South Australia;

[74] Cf, *Community First Inc v Job Futures Ltd* [2008] FCA 1265 at [9].

(3) admissible evidence as to the viability and failure of the outlet is likely to be given by witnesses in South Australia;

(4) by inference, the conduct of the litigation in Sydney would place a greater financial burden on the Joshans than litigating in South Australia would on Pizza Pan; and

(5) the "centre of gravity" of the dispute,[75] namely the failed Pizza Hut outlet, is in South Australia.

Consequently, the proceedings in the District Court of New South Wales were stayed.

Judicial review of District Court appeals from the Local Court

One might expect that a presentation titled "Some key decisions of the Court of Appeal in 2021" would have as its focus cases with subject matters referable entirely to civil proceedings, in recognition of the fact that the Court of Criminal Appeal is a distinct court within the New South Wales judicial hierarchy.

However, a not insignificant portion of the work of the Court of Appeal indirectly involves criminal proceedings: *Stanley v Director of Public Prosecutions (NSW)*.[76] That is not to say, of course, that the formal character of such matters changes from civil to criminal, despite the underlying subject matter: *Klewer v Director of Public Prosecutions (NSW) (No 2)*.[77]

For example, the Court determines appeals from: orders made under the *Crimes (High Risk Offenders) Act 2006* (NSW);[78] the dismissal of appeals against conviction in the Local Court, pursuant to pt 5 of the *Crimes (Appeal*

[75] See *Chubb Insurance Company of Australia Ltd v Moore* (2013) 302 ALR 101; [2013] NSWCA 212 at [36]; *Re HIH Insurance Ltd (in liq)* (2014) 104 ACSR 240; [2014] NSWSC 545 at [14]; *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* (2010) 267 ALR 144; [2010] NSWSC 270 at [162]; *Smart Electrical and Power Services Pty Ltd v Bednal* [2004] NSWSC 742 at [41]–[43].
[76] (2021) 398 ALR 355; [2021] NSWCA 337 at [33].
[77] (2020) 101 NSWLR 864; [2020] NSWCA 69 at [38]–[44], [107]–[113].
[78] See, for example, *Rigby v State of New South Wales* [2022] NSWCA 14.

and Review) Act 2001 (NSW), by judges of the Common Law division;[79] and actions for the tort of malicious prosecution in a criminal context.[80]

The substantial majority of the Court of Appeal's work indirectly involving criminal prosecutions and convictions occurs in judicial review proceedings brought in the Court's supervisory jurisdiction, pursuant to s 69 of the *Supreme Court Act 1970* (NSW). A significant portion of those judicial review proceedings heard by the Court of Appeal in 2021 concerned the dismissal of appeals from the Local Court to the District Court of New South Wales, brought pursuant to s 11(1) of the *Crimes (Appeal and Review) Act 2001* (NSW) (**the Appeal and Review Act**), which provides that "any person who has been convicted or sentenced by the Local Court may appeal to the District Court against the conviction or sentence (or both)". Section 20 vests the District Court with the power to determine appeals against conviction or sentence by setting aside the conviction or sentence, by dismissing the appeal, or by varying the sentence.

Sections 17 and 18 of the *Appeal and Review Act* respectively specify that appeals against sentence and conviction are to be conducted "by way of rehearing of the evidence".

The meaning of these general words was considered in *McNab v Director of Public Prosecutions (NSW)*.[81] The principal issue in that case was whether a District Court judge committed jurisdictional error by having regard to the reasons of the Magistrate, particularly where those reasons included credit findings.

McNab is one of four cases I propose to discuss briefly, encompassing three discrete issues in relation to the judicial review of District Court decisions which resulted in the dismissal of appeals from the Local Court under the *Appeal and Review Act*. The remaining three cases are:

[79] See, for example, *Will v Brighton* (2020) 104 NSWLR 170; [2020] NSWCA 355.
[80] See, for example, *State of New South Wales v Abed* (2014) 246 A Crim R 549; [2014] NSWCA 419.
[81] [2021] NSWCA 298 (**McNab**).

(a) *Quinn v Director of Public Prosecutions (Cth)*[82] and *Stanley v Director of Public Prosecutions (NSW)*.[83] Both of these cases concerned whether, in declining to make an intensive correction order for the service of a custodial sentence, a judge's failure to assess whether that order or an order for full-time detention was more likely to address the risk of re-offending, as expressly required by s 66(2) of the *Crimes (Sentencing Procedure) Act 199* (NSW) (**the Sentencing Act**), amounted to jurisdictional error (which had previously been held to be the case, only one year earlier, in *Wany v Director of Public Prosecutions (NSW)*[84]); and

(b) *Gibson v Director of Public Prosecutions (NSW) (No 2)*,[85] which concerned whether a District Court judge's decision to refuse to refer questions of law to the Court of Criminal Appeal, under s 5B of the *Criminal Appeal Act 1912* (NSW), involved jurisdictional error and, if so, whether such error was material so as to warrant the setting aside of the decision.

Despite the varying factual circumstances in which these cases arose, they all raised a common issue, namely jurisdictional error, which has been referred to as "the central concept in Australian administrative law".[86]

The principal reason why the establishment of jurisdictional error is so important in New South Wales is found in s 176 of the *District Court Act 1973* (NSW), which states succinctly that "no adjudication on appeal of the District Court is to be removed by any order into the Supreme Court". That section and its identical predecessor, s 146 of the *Justices Act 1902* (NSW), have long been identified as privative clauses which operate to limit any right of appeal from an

[82] (2021) 106 NSWLR 104; [2021] NSWCA 294 (**Quinn**).
[83] (2021) 398 ALR 355; [2021] NSWCA 337 (**Stanley**).
[84] (2020) 103 NSWLR 620; [2020] NSWCA 318 (**Wany**).
[85] (2021) 105 NSWLR 434; [2021] NSWCA 218 (**Gibson**).
[86] L Burton Crawford and J Boughey, "The Centrality of Jurisdictional Error: Rationale and Consequences" (2019) 30 *Public Law Review* 18 at 23; J Spigelman, "The Centrality of Jurisdictional Error" (2010) 21 *Public Law Review* 77.

appellate determination by the District Court.[87] In *Anderson v Judges of District Court (NSW)*, Kirby P (with whom Meagher and Sheller JJA agreed) observed, in relation to the identically worded predecessor of s 176, that:[88]

> "This Court may not simply ignore s 146 of the *Justices Act*. It is the provision of the law made with the authority of Parliament. It forbids intervention in the nature of certiorari in a case such as the present. If it did not, and this case were open to be brought up on certiorari, s 146 would be a dead letter despite its survival in the statute. Every error of law would circumvent its operation. Such a conclusion is incompatible with the purpose of Parliament as expressed in s 146. That section must be given effect. At least it operates in a case such as this where no excess of jurisdiction is shown and where no procedural unfairness has been demonstrated to permit this Court to avoid its prohibition."

Privative clauses such as s 176 "are construed by reference to the [principle of legality], [as] the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied".[89] Nonetheless, the express words of s 176 operate to oust any appeal from an appellate decision of the District Court and judicial review of such a decision for error of law on the face of the record; they do not, however, oust the right to seek judicial review entirely. This is of course by reason of the seminal decision of the High Court in *Kirk v Industrial Court of New South Wales*,[90] which recognised a constitutionally enshrined minimum guarantee of judicial review for jurisdictional error. In short, judicial review for jurisdictional error cannot be circumscribed or circumvented by privative clauses such as s 176 of the *District Court Act*.

As noted by Leeming JA in *Quinn* at [4], "determining what amounts to 'jurisdictional error' has proven somewhat elusive". To that effect, a "rigid taxonomy of jurisdictional error" was eschewed by the majority in *Kirk* at [73], on the tripartite basis that:

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[87] See *Director of Public Prosecutions (NSW) v Emanuel* (2009) 193 A Crim R 552; [2009] NSWCA 42 at [45]; *Hoffenberg v District Court of New South Wales* [2010] NSWCA 142 at [4].
[88] (1992) 27 NSWLR 701 at 718.
[89] *Public Service Association (SA) v Federated Clerks' Union (SA Branch)* (1991) 173 CLR 132 at 160; [1991] HCA 33.
[90] (2010) 239 CLR 531; [2010] HCA 1 (**Kirk**).

(1) the concept of jurisdictional error has evolved over time;[91]

(2) it is not characterised or marked by logical coherence;[92] and, most importantly and as is made clear by all four of the Court of Appeal's relevant decisions in 2021,

(3) whether non-compliance with a statutory decision-making power will result in jurisdictional error, such that an otherwise compliant decision will lack the characteristics necessary to be given force and effect by the statute, *turns on the construction of the statute*.[93]

To elaborate upon this last point, reference should also be made to the observations of the plurality of Kiefel CJ, Gageler and Keane JJ in *Hossain v Minister for Immigration and Border Protection*:[94]

> "27 … The question of whether a particular failure to comply with an express or implied statutory condition in purporting to make a particular decision is of a magnitude which has resulted in taking the decision outside the jurisdiction conferred by the statute cannot be answered except by reference to the construction of the statute.
>
> 28 The common law principles which inform the construction of statutes conferring decision-making authority reflect longstanding qualitative judgments about the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere in defining the bounds of such authority as it chooses to confer on a repository in the absence of affirmative indication of a legislative intention to the contrary. Those common law principles are not derived by logic alone and cannot be treated as abstractions disconnected from the subject matter to which they are to be applied. They are not so delicate or refined in their operation that sight is lost of the fact that '[d]ecision-making is a function of the real world'." (footnotes omitted)

Consistent with this, in *Quinn* at [5], Leeming JA emphasised that the irreducible focus of the enquiry into whether an asserted error is *jurisdictional* in character is *jurisdiction*. His Honour proceeded to state that:

> "[j]urisdiction in this sense is best understood as the body's authority to decide. Jurisdictional error turns on the limits of the authority that has been conferred

[91] *Kirk* at [62].
[92] *Kirk* at [63].
[93] *Stanley* at [44]; *Quinn* at [109]–[110]ff.
[94] (2018) 264 CLR 123; [2018] HCA 34 at [27]–[28] (**Hossain**).

on the [relevant decision-making] body. In *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34 at [24], Kiefel CJ, Gageler and Keane JJ gave this description:

> 'Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it. To describe a decision as "involving jurisdictional error" is to describe that decision as having been made outside jurisdiction.'"

In *Stanley* at [41], I made reference to the following non-exhaustive list of 10 categories of jurisdictional error as compiled by Professors Aronson, Groves and Weeks in their authoritative text *Judicial Review of Administrative Action and Government Liability*:[95]

(1) a mistaken assertion or denial of the very existence of jurisdiction;

(2) a misapprehension or disregard of the nature or limits of the decision-maker's functions or powers;

(3) acting wholly or partly outside the general area of the decision-maker's jurisdiction, by entertaining issues or making the types of decisions or orders which are forbidden under any circumstances. An example would be a civil court trying a criminal charge;

(4) mistakes as to the existence of a jurisdictional fact or other requirement when the relevant Act treats that fact or requirement as something which must exist objectively as a condition precedent to the validity of the challenged decision. The fact or requirement is not such a condition precedent if it suffices for the decision-maker to come to its own opinion or satisfaction as to whether it exists. In that case, the opinion is challengeable only on the other grounds in this list;

[95] M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017, Lawbook Co) at [1.140].

(5) disregarding relevant considerations or paying regard to irrelevant considerations, *if the proper construction of the relevant Act is that such errors should result in invalidity*;

(6) some, but not all, errors of law. In particular, if the decision-maker is an inferior court or other legally qualified adjudicative body, the error is likely to be jurisdictional only if it amounts to a misconception of the nature of the function being performed or of the body's powers;

(7) acting in bad faith;

(8) breaching the hearing or bias rules of natural justice;

(9) making decisions that are seriously illogical, irrational or unreasonable; and

(10) committing a mistake which justifies the conclusion that the repository of power simply failed to perform his or her job, even though the mistake may not easily fit within any of the above categories.

Quinn v Director of Public Prosecutions (Cth) (2021) 106 NSWLR 104; [2021] NSWCA 294; and *Stanley v Director of Public Prosecutions (NSW)* (2021) 398 ALR 355; [2021] NSWCA 337

In both *Quinn* and *Stanley*, it was contended that the failure of a District Court judge to conduct the assessment in s 66(2) of the *Sentencing Act* amounted to jurisdictional error, either as a failure to have regard to a mandatory consideration in light of the proper construction of the Act, or as a misconception of the function being undertaken by the judge.

Section 66 of the *Sentencing Act* is headed "community safety and other considerations" and appears in pt 5, div 2 of that Act, which is titled "restrictions on power to make intensive correction orders". The section provides that:

> "(1) Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender.

(2) When considering community safety, the sentencing court is to assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending.

(3) When deciding whether to make an intensive correction order, the sentencing court must also consider the provisions of section 3A (Purposes of sentencing) and any relevant common law sentencing principles, and may consider any other matters that the court thinks relevant."

Only one year prior to *Quinn* and *Stanley*, in *Wany*, a majority of the Court of Appeal had concluded (though it was not strictly necessary to decide) that failure to conduct the assessment required by s 66(2) gave rise to jurisdictional error. This conclusion was reversed in *Quinn* and *Stanley*, the latter being a decision of a specially convened five-member bench.

By a majority of 4:1 (McCallum JA dissenting), the *Stanley* Court held that *Wany* had been wrongly decided on this point, applying the reasoning of the Court (Leeming JA, Simpson AJA and Johnson J agreeing) some three weeks earlier in *Quinn*, which held that the s 66(2) assessment was not a consideration going to the Court's jurisdiction, nor a condition precedent to an order that a sentence of imprisonment not be served by way of an intensive correction order. This conclusion was reached on a construction of s 66 in context and according to the relevant statutory purpose, namely the paramount consideration of the "safety of the community" as enshrined in s 66(1).

Further, in both *Quinn* and *Stanley*, it was held that the judge's failure to conduct the assessment in s 66(2) did not disclose a misconception of their function, which was to determine an appeal against sentence by way of rehearing on the evidence, pursuant to s 17 of the *Appeal and Review Act*. At [151]–[152] of *Stanley*, Leeming JA reasoned that although s 66(2) involved a substantially binary assessment — between an intensive correction order or full-time detention — that character did not transpose it into a separate function for the purposes of the inquiry as to jurisdictional error. Put simply, in both *Quinn* and *Stanley* there was no jurisdictional error.

Referring back to the 10 categories of jurisdictional error conceived by Professors Aronson, Groves and Weeks, the judicial review in *Gibson* was more narrowly confined than in *Quinn* and *Stanley*, as it was asserted solely that the District Court judge had misconceived her function under s 5B of the *Criminal Appeal Act* by refusing to refer 12 questions of law to the Court of Criminal Appeal.

Section 5B of the *Criminal Appeal Act* states that:

> "(1) A Judge of the District Court may submit any question of law arising on any appeal to the District Court in its criminal and special jurisdiction coming before the Judge to the Court of Criminal Appeal for determination, and the Court of Criminal Appeal may make any such order or give any such direction to the District Court as it thinks fit.
>
> (2) At the request of a person who was a party to appeal proceedings referred to in subsection (1), a question of law may be submitted under that subsection to the Court of Criminal Appeal for determination *even though the appeal proceedings during which the question arose have been disposed of*." (emphasis added)

There was an issue as to whether or not the judge had declined to refer the questions of law because she considered herself *functus officio*. It is not necessary to delve into the reasons why this was an issue, save to say that the Court did not consider that this was the basis of the decision not to refer. If, however, the judge had considered herself to be *functus officio*, that clearly would have amounted to jurisdictional error on the ground of a misconception of function. This is because the words of s 5B(2) make it plain that questions of law may be referred after the disposal of an appeal under the *Appeal and Review Act*, such that her Honour was not *functus officio*.

The asserted jurisdictional error was held to be "immaterial" in any event, as Mr Gibson's request did not involve "questions of law".[96]

[96] See *Hossain*; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; [2019] HCA 3; *MZPAC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441; [2021] HCA 17.

The case of *McNab* raised the issue of whether a District Court judge, in determining an appeal against conviction in the Local Court under s 11 of the *Appeal and Review Act*, fell into jurisdictional error by misconceiving his statutory function.

On behalf of the Applicant, Mr McNab, it was put that the District Court judge had committed the asserted jurisdictional error by having regard to the reasons of the magistrate and, in particular, the assessment of the complainant as an "outstanding witness", where s 18 of the *Appeal and Review Act* required the appeal to be conducted "by way of rehearing on the basis of evidence given in the original Local Court proceedings".

The issue of the construction of those words in s 18 gave rise to two closely related sub-issues: whether an appeal under ss 11 and 18 of the *Appeal and Review Act* requires the demonstration of error; and whether the Crown retains the onus of proof to the criminal standard.

The construction advanced by the Applicant, that an appeal "by way of rehearing" was limited to the evidence before the Local Court and therefore precluded regard to the magistrate's reasons, involved a direct challenge to the reasoning of Mason P (with whom Kirby and Hoeben JJ agreed) in *Charara v The Queen*.[97] At [17]–[24] of those reasons, the then President held that:

> "17 The appeal is to be by way of rehearing on the Local Court transcripts (s 18(1)), obviously supplemented by reference to any exhibits tendered in the Local Court. Fresh evidence may be given by leave, subject to the District Court being satisfied that it is in the interests of justice that this should occur (s 18(2)).
>
> 18 The District Court is then required to apply the principles governing appeals from a judge sitting without a jury. The Judge is to form his or her own judgment of the facts so far as able to do so, i.e. recognising the advantage enjoyed by the magistrate who saw and heard the witnesses called in the lower court (*Fox v Percy* (2003) 214 CLR 118).

[97] (2006) 164 A Crim R 39; [2006] NSWCCA 244 (**Charara**).

> 19 The nature of an appeal 'by way of rehearing' has been discussed in many cases. The procedure to be adopted, powers to be exercised and function to be performed must *first be sought in the language of the particular statute*. One thing, however, is clear. The 'rehearing' does not involve a completely fresh hearing by the appellate court of all the evidence. That court proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits …
>
> …
>
> 23 Howie and Johnson, *Criminal Practice and Procedure NSW* state … that the reasons of the magistrate for finding the offence proved are not 'evidence' and that the District Court may not have regard to those reasons unless the parties consent to that course … I wish to express my doubts as to the correctness of this opinion of the learned authors. District Court judges traditionally and understandably refrained from reading the reasons of the Local Court when the appeal was [*de*] *novo*. But the nature of an appeal by way of rehearing on the transcript indicates to me that this approach is no longer justified. The magistrate's reasons are not part of the 'evidence' referred to in s 18(1) any more than the exhibits tendered in the Local Court. Nevertheless, as I see it, the District Court is *impliedly directed to consider the reasons because the stated appellate function could not properly take place without reference to them*.
>
> 24 The Local Court reasons will doubtless include an explanation why the conviction was entered at first instance, including an assessment of the credibility issues touching any factual dispute. Without reference to the reasons the District Court would be driven to speculation or deciding the issue entirely afresh. Neither such course would be consonant with the statutory scheme. In civil appeals, the court of appeal is not entitled to ignore the reasons in which findings based on credibility are to be found. *There is no basis in principle for a different approach in the criminal law*." (emphasis added)

In *McNab*, the Court agreed with the reasoning of Mason P in *Charara* and dismissed the Summons for judicial review. On a principled construction of s 18 of the *Appeal and Review Act*, taking account of its context, purpose and history, there was no basis (either express or implied) for concluding that, in an appeal against conviction under ss 11 and 18 of the Act, the District Court judge could not have regard to the reasons of the magistrate.[98] It followed that the Applicant had failed to demonstrate jurisdictional error in the dismissal of his appeal.

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[98] See, generally, *Federated Carters' and Drivers' Industrial Union of Australia v Motor Transport and Chauffers' Association of Australia* (1912) 6 CAR 122; *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22; *Knaggs v Director of Public Prosecutions (NSW)* (2007) 170 A Crim R 366; [2007] NSWCA 83; *Mordaunt v Director of Public Prosecutions (NSW)* (2007) 171 A Crim R 510; [2007] NSWCA 121.

Ancillary to this outcome, the Court concluded that an appeal under s 18 of the *Appeal and Review Act* requires the demonstration of a factual, legal or discretionary error in order to succeed, lest the express statutory requirement for a "rehearing" be frustrated.[99] However, this does not operate to reverse the onus of proof, which is retained by the Crown on appeal to the District Court.

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[99] See, generally, *Attorney-General (NSW) v Director of Public Prosecutions (NSW)* [2015] NSWCA 218; *Charara*; *Dyason v Butterworth* [2015] NSWCA 52; *Spanos v Lazaris* [2008] NSWCA 74; *Lunney v Director of Public Prosecutions (NSW)* (2021) 105 NSWLR 236; [2021] NSWCA 186; *McKellar v Director of Public Prosecutions (NSW)* [2011] NSWCA 91; *Mulder v Director of Public Prosecutions (Cth)* (2015) 250 A Crim R 154; [2015] NSWCA 92.