The State, Territory and Federal Courts on Constitutional Law in the 2023 Term

The Hon Justice Kristen Walker[*]

A paper delivered at the Gilbert & Tobin Constitutional Law Conference on 9 February 2024

PART A: INTRODUCTION

1 I would like to begin by also acknowledging the Gadigal people of the Eora Nation as the traditional custodians of the land on which we are meeting.

2 And I'd like to thank the organisers for inviting me to give this paper.

3 It is a somewhat tricky paper to deliver. It tends to be very descriptive, yet in my experience it is immensely useful to practitioners and, I hope, the audience more generally, to hear what has been happening in the world of constitutional law outside the High Court. Most of us will know what is happening in our own jurisdiction, but not necessarily in other jurisdictions.

4 In keeping with those observations, I am aiming for a mix of breadth and depth. That is, I will attempt to mention every case involving constitutional law that I thought had some point of interest. That was a lot of cases! But I will touch lightly on some cases, and in more depth on others. I have omitted all of the litigant in person cases, as they were generally unedifying. I have also omitted some other cases that I considered insufficiently interesting.

5 I will make available, through the organisers, my PowerPoint slides and a complete list of the cases I considered, so that there is no need to take note of citations during the paper.

6 A further issue that arises with this particular paper is how to organise the cases. I have chosen to organise them by constitutional topic, to draw out some themes across jurisdictions.

---

[*] Judge of Appeal, Supreme Court of Victoria. LLB(Hons), BSc, LLM (Melb); LLM (Columbia).

CHAPTER III OF THE CONSTITUTION

(1) Burns v Corbett: State Tribunals and federal jurisdiction

7 It will come to no surprise to anyone that the fallout from *Burns v Corbett*[1] continued to provide fodder for the State courts. However, to some extent we are now seeing certain issues being bedded down across jurisdictions, and the resolution of various procedural issues that flow from *Burns v Corbett*.

8 There were five cases raising *Burns v Corbett* issues in the State courts in 2023:

- *AG (NSW) v FJG* [2023] NSWCA 34
- *Kanajenahalli v NSW* [2023] NSWCA 202
- *Wojciechowska v Sec, Dept of Communities and Justice* [2023] NSWCA 191
- *German v Germantsis* [2023] VSC 7
- *Krongold Constructions (Aus) Pty Ltd v Thurin* [2023] VSCA 191

9 Of these, *FJG* and *Krongold* raised procedural questions.

10 *Attorney-General (NSW) v* ***FJG***[2] concerned the ability of a trans person to amend their marriage certificate under State law to recognise their gender as later recorded on their birth certificate or equivalent document. The NSW AG raised a section 109 issue, namely whether the State *Births, Deaths and Marriages Registration Act 1995* (NSW) could authorise an amendment to the State register in a way that would result in the recording of particulars of a marriage which were inconsistent with the official certificate of marriage produced under the Commonwealth *Marriage Act 1961* (Cth). NCAT referred the constitutional question (and other questions) to the Supreme Court.

11 The Court of Appeal held that there was no *Burns v Corbett* difficulty in the Tribunal referring a question of law involving a Commonwealth law or the Constitution to the Court, and no difficulty in the Court answering the question. That was because the

---

1 (2018) 265 CLR 304.

2 [2023] NSWCA 34.

proceedings in NCAT involved merits review of the Registrar's decision, which did not involve a 'matter' within the meaning of Ch III and thus did not involve the exercise of federal jurisdiction.

12 Nor did the mere exercise of the power to refer questions of law to a court for final determination mean that the Tribunal was somehow purporting to exercise jurisdiction in respect of a 'matter'. The Court drew an analogy with the power of the AAT to refer a question of law to the Federal Court, which does not involve the exercise of such jurisdiction in respect of a 'matter'. However, the exercise of the power to *answer* a question involving a Commonwealth law or the Constitution by a court *does* involve the determination of a 'matter' and thus involves the exercise of federal jurisdiction.

13 The Court distinguished *Citta Hobart Pty Ltd v Cawthorn*,[3] and the NSW decisions *Sunol v Collier*[4] and *Attorney-General (NSW) v Gatsby*[5], because they had each involved an exercise of judicial power.

14 This reaffirms, once again, the importance of whether the State Tribunal is exercising judicial or non-judicial power. If the latter, the referral powers of the Tribunal operate according to their terms, even if a constitutional or federal question is raised. If the former, then the Tribunal's powers — and the court's powers on a referral — are considerably more constrained.

15 ***Krongold*** *Constructions (Aus) Pty Ltd v Thurin*[6] explained the effect of the referral of a matter involving federal jurisdiction from VCAT to the Supreme Court. This was a follow-on from the 2022 decision *Thurin v Krongold*,[7] in which the Court of Appeal had held that if a matter in VCAT involved the exercise of federal jurisdiction, the Tribunal could refer the matter to the Supreme Court pursuant to an existing statutory power.[8]

---

3 [2022] HCA 16.

4 (2012) 81 NSWLR 619; [2012] NSWCA 14.

5 (2018) 99 NSWLR 1; [2018] NSWCA 254.

6 [2023] VSCA 191.

7 [2022] VSCA 226.

8 Section 77 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

16 In the more recent case, the Court held that the effect of the referral order was to remove the VCAT proceeding from VCAT's list, invoke the jurisdiction of the Supreme Court to hear and determine the controversy that was the subject of the VCAT proceeding, and require the Court to commence the process of hearing and determining that controversy. A referral invokes the jurisdiction of the Court without the need for any further initiating process. There was no constitutional barrier to this conclusion.

17 The consequence was that, for the purposes of the relevant limitation period, the proceeding was regarded as having been brought at the time the VCAT proceeding was initiated. The referral did not create a new proceeding that was required to have been brought within the limitation period.

18 The other three cases concerned the substantive question of whether a particular proceeding involved an exercise of judicial power so as to attract the application of *Burns v Corbett*.

19 In ***Kanajenahalli*** *v New South Wales*[9] the NSW Court of Appeal held, by consent and with short reasons, that the Personal Injury Commissioner was exercising administrative, not judicial power; thus there was no *Burns v Corbett* issue. The Commissioner had made a determination that Mr Kanajenahalli, who was a resident of Queensland, was entitled to compensation for a psychological injury suffered in the course of his employment in NSW. The State appealed to the Commission. A Deputy President of the Commission considered that the determination involved an exercise of judicial power, thus the Commission lacked jurisdiction. Mr Kanajenahalli appealed that decision. Both parties, and the State of NSW intervening, agreed that neither the Commissioner nor the Deputy President were exercising judicial power.

20 The Court held that the Commission was exercising administrative power. That was because there was no dispute that Mr Kanajenahalli had suffered any injury; the only contested issue was whether a particular statutory provision applied, namely, s 11A of the *Workers Compensation Act 1987* (NSW), which precluded liability if the injury was

9 [2023] NSWCA 202.

caused by reasonable action with respect to performance appraisal or discipline. The Court said this:

> That is to say, the only issue was whether a statutory prohibition, framed on whether reasonable action taken by the employer was the whole or predominant cause of the injury prevented Mr Kanajenahalli's entitlement to statutory benefits. There is no close analogy to any issue arising at general law. The closest analogy would be a claim for negligence. But in order to obtain the statutory benefits he seeks, Mr Kanajenahalli does not have to prove duty, or breach, or causation, and not only does he not have to prove loss, but the statutory benefits he claims do not necessarily have a close relationship with any loss he has suffered. This is considerably removed from traditional aspects of judicial power; cf *Attorney General for New South Wales v Gatsby* (2018) 99 NSWLR 1; [2018] NSWCA 254 at [125]-[126].[10]
>
> …
>
> What is determinative of this appeal is the nature of the particular dispute between the parties. More general considerations do not all point in the same direction. Thus (and without being exhaustive), although its decisions are final and binding, the Commission is empowered to "reconsider any matter that has been dealt with by the Commission in the Workers Compensation Division" and "rescind, alter or amend any decision previously made or given by the Commission in that Division": *Personal Injury Commission Act 2020* (NSW), ss 56 and 57. It is also true that the certificate of the Commission may be filed in a court and will thereafter operate as a judgment: *Personal Injury Commission Act*, s 59.[11]

21 The Court made it clear that it was only considering the particular dispute concerning s 11A; it was not making any more general determination about the nature of the powers exercised by the Commission.

---

10 *Kanajenahalli* [9] (the Court).

11 *Kanajenahalli* [12] (the Court).

22 Personally, I have some doubt about whether this conclusion was correct. It was determined without a contradictor, which is a shame. It would have been possible for the Court to have obtained a contradictor to put the contrary argument.

23 In ***Wojciechowska*** *v Sec, Dept of Communities and Justice*[12] two powers conferred on NCAT were in issue:

(1) a power to undertake review of certain governmental decisions under the *Government Information (Public Access) Act 2009* (NSW) ('GIPA Act'); and

(2) a power under s 55(2)(a) of the *Privacy and Personal Information Protection Act 1998* (NSW) ('PPIP Act') to award damages for breach of that Act.

24 The plaintiff was a resident of another state, and the respondents were emanations of the State of NSW, thus diversity jurisdiction within s 75(iv) was engaged.

25 The NSW Court of Appeal held that the review power under the GIPA Act was non-judicial in nature. It involved the Tribunal standing in the shoes of the administrative decision-maker. Thus *Burns v Corbett* had no application.

26 But the Court held that power under the PPIP Act to award damages for breach of that Act was judicial in nature, so that the *Burns v Corbett* restriction applied. The Tribunal did not stand in the shoes of the decision-maker, but made orders directed to the agency in question. Furthermore, those orders could be certified and then registered with a court and would then be enforceable as a judgment of the court. This was a fairly straightforward application of *Brandy v HREOC*.[13]

27 In *German v Germantsis*,[14] the Victorian Supreme Court held that the appointment of a guardian under the *Guardianship and Administration Act 1986* (Vic) involved an administrative, not a judicial, function; thus there was no *Burns v Corbett* problem.

---

12 [2023] NSWCA 191.

13 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

14 [2023] VSC 7.

Furthermore, such a proceeding was not a matter 'between' anyone. The Court followed the WA Court of Appeal decision in *GS v MS.*[15]

(2) Kable / Kirk

28 Several cases raised questions concerning *Kable*[16] and/or *Kirk*[17] in relation to the jurisdiction of Supreme Courts.

29 *Tasmania v RBAY*[18]concerned the question whether the removal of the requirement for extended unanimity in relation to the charge of persistent abuse of a child was invalid by reason of *Kable* principle. The argument was that this worked a radical alteration to the conventional mode of trial by jury, so as to impair the institutional integrity of the Supreme Court. There had been previous challenges of this kind in Qld (*CAZ*),[19] and SA (*Henry*),[20] which had rejected that argument. It was likewise rejected in this case.

30 *Conway v Leeroy Property Investments Pty Ltd*[21] concerned whether s 71 of the NSWLEC Act,[22] which conferred exclusive jurisdiction on the LEC in relation to certain matters, contravened the *Kirk* principle because it removed the State Supreme Court's supervisory jurisdiction. The LEC held that there was no contravention, because under s 149 the LEC could transfer a proceeding to the Supreme Court, which could then exercise jurisdiction. Furthermore, the Court concluded that there was no obstacle to a State providing for dual supervisory pathways:

> The effect of s 71 is to direct a person making a claim under a planning or environmental law to one of two parallel superior Courts of record, each having its place within the system of appellate review mandated by the Constitution.[23]

---

15 (2019) 344 FLR 386; [2019] WASC 255.

16 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

17 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

18 [2023] TASSC 41.

19 *R v CAZ* [2012] 1 Qd R 440; [2011] QCA 231.

20 *Henry v The Queen* (2022) 141 SASR 230; [2022] SASCA 60.

21 [2023] NSWLEC 86.

22 *Land and Environment Court Act 1979* (NSW).

23 *Conway* [60] (Pritchard J)

…

> Nor does any constitutional implication … "prohibit" an exercise of State legislative power to establish a superior court with the function of judicial review over State executive actions, provided only that that court is within the system of constitutionally mandated appellate review provided for in s 58 of the LEC Act.[24]

31 *Harkness v Banks*[25] concerned the question whether the prosecutorial discretion to discontinue criminal charges is entirely non-justiciable. That question involved consideration of the impact of *Kirk* — and the concept that there are no 'islands of power' — on the principle that such decisions are non-justiciable articulated in *Maxwell*.[26] Reference was made to French CJ's *obiter* remarks in *Likiardopoulos*,[27] that the constitutionally-protected supervisory role of the State Supreme Courts raises the question whether there is any statutory power or discretion that is immune to judicial review.

32 The Court did not resolve the question, but ordered that s 78B notices be served. Thus: watch this space.

(3) Federal separation of powers

33 The federal separation of powers got a run in three cases, two of which concerned the same issue.

34 *Elliott-Carde v McDonald's Australia Ltd*[28] concerned the making of common fund orders, under which all group members in a class action could be made to contribute a litigation funder's commission even if they had not signed a funding agreement. A question had been reserved for the consideration of the Full Court as to whether the Court has statutory power, pursuant to s 33V of the *Federal Court of Australia Act 1976*

---

24 *Conway* [66] (Pritchard J)

25 [2023] VSC 588.

26 *Maxwell v The Queen* (1996) 184 CLR 501.

27 *Likiardopoulos v The Queen* (2012) 247 CLR 265.

28 [2023] FCAFC 162.

(Cth), to make an order distributing money paid under a settlement. The case raised three constitutional issues, two of which were interconnected:

(a) Was there a matter before the Court? Or is the question merely advisory?

(b) Did the making of a settlement CFO fall outside the judicial power of the Commonwealth because it involved the alteration or creation of rights, rather than merely giving effect to existing rights?

(c) Did the power in question involve 'impermissible policy-making and market-setting', so as to 'violate the bounds of judicial power'?

35 You might recall that a majority of the High Court had held, in *BMW v Brewster*,[29] that a different provision — s 33ZF — did not, as a matter of statutory construction, authorise the making of a CFO at the commencement of a proceeding. The judicial power issue had been raised in that case. Two judges (Gageler and Edelman JJ) had dismissed the argument, but the remainder of the Court had not found it necessary to decide this question.

36 In *Elliott-Carde* the Full Court held, in three separate judgments, that:

(a) there was a matter before the Court, because there was a dispute between the parties concerning the Court's power to make the order sought;[30] and

(b) the Court had such a power (as a matter of statutory construction) and that the power was not inherently non-judicial in nature. The fact that it involved the creation of new rights and duties did not render the power non-judicial.[31] Nor would it involve the Court impermissibly in policy issues.[32]

---

29 *BMW Australia Ltd v Brewster* (2019) 269 CLR 574.

30 *Elliot-Carde* [11] (Beach J)

31 *Elliot-Carde* [12] (Beach J)

32 *Elliot-Carde* [13] (Beach J)

37 Section 33V also arose in a different case, *Casey v DePuy International Ltd*, [33] however, time, and the relative dullness of the case, means I will not deal with it in any detail.

38 *Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs*[34] and *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs*[35] both concerned Commonwealth legislation overturning the effect of an earlier Full Federal Court decision, *Pearson.*[36] In that case, the Full Court had held that an aggregate sentence of 12 months' imprisonment did not involve being sentenced to a term of imprisonment of 12 months or more for the purposes of s 501(7) of the *Migration Act 1958* (Cth) (and thus did not trigger the duty of the Minister to cancel a person's visa). In response, the Commonwealth Parliament enacted the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) ('Amending Act'). That Act purported to validate things that had been done under the *Migration Act* prior to the commencement of the Amending Act.

39 I will discuss only *Tapiki*, because it contains the substantive reasons of the same Full Court, which are then cross-referenced in *JZQQ*. *Tapiki* is somewhat procedurally complex, but the chronology needs to be briefly explained.

40 Mr Tapiki, a non-citizen, had been sentenced in 2020 to an aggregate sentence of more than 12 months for the offences of affray and assault. His visa had been cancelled pursuant to s 501(3A). A delegate of the Minister decided not to revoke the original decision; and Mr Tapiki sought review of the delegate's decision in the AAT. The AAT affirmed the delegate's decision, and Mr Tapiki applied for judicial review. A single judge dismissed his application. He then appealed to the Full Federal Court. While the Full Federal Court was reserved, *Pearson* was handed down in December 2022. Mr Tapiki was released from immigration detention the next day. In February 2023, the Full Court held that the cancellation decision was invalid, and that therefore the power of revocation never arose. It quashed the AAT's decision.

---

33 [2023] FCA 254.

34 [2023] FCAFC 167.

35 [2023] FCAFC 168.

36 (2022) 295 FCR 177; [2022] FCAFC 203.

41 However, following the commencement of the Amending Act, on 8 March 2023, Mr Tapiki was taken back into immigration detention. He then challenged the validity of the Amending Act. One basis for the claim of invalidity was that the impugned provisions involved a usurpation of, or interference with, the judicial power of the Commonwealth. (A second basis was acquisition of property other than on just terms, which I will discuss later.)

42 There were two aspects of this argument:

(a) First, that by validating the cancellation decision the legislation required that the rights of the parties were taken to be (and to have always been) to the contrary of the rights that were declared by the Full Court; and

(b) Second, that the intention of the legislature was that the orders made in the Full Court would not preclude the cancellation decision and things done in reliance on it being treated for all purposes as valid. Thus, that which was quashed by the Full Court was no longer quashed, and the declarations of right made by the Court no longer bind the parties. This reversed or dissolved the Full Court's earlier decision.

43 The Court held that the that the legislation was valid. It was in substance no different from the legislation upheld by the High Court in *AEU*.[37] It did not 'reverse or dissolve' the Full Court's earlier decision in relation to Mr Tapiki. It did not purport to set aside the Court's earlier decision. Rather, it changed the rule of law embodied in the statute – it enacted legislation which attached new legal consequences to an act that the court had held, on the previous state of the law, did not to attract such consequences. That is permissible.

44 There were also several cases reflecting the working through of the High Court's decision in *NZYQ*,[38] concerning the illegality of indefinite detention of persons for whom there is no practical likelihood of removal. *AZC20 v Secretary, Department of*

---

37 *Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117.

38 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

Home Affairs (No 2)[39] was one such case. In that case, the Federal Court held that *NZYQ* had not overruled *Plaintiff M47/2018*,[40] where the Court held that it would not accept that there was no 'real prospect' of removal in circumstances where it was the detained person himself who, through deliberate lack of cooperation or falsehoods prevents any prospect of removal from even being explored. An alien who has no legal right to remain in Australia is not permitted to engineer their own release into the community by frustrating the efforts of officers to carry out their duty under s 198 of the Act.

(4) State laws and federal jurisdiction

45 *Selkirk v Hocking*[41] raised the interesting question of whether, in a defamation proceeding instituted in federal jurisdiction, the procedural aspects of the new 'serious harm' requirement in the various State Defamation Acts are picked up and applied by s 79 of the *Judiciary Act 1903* (Cth). Those procedural aspects concern when in the course of the proceeding the question of serious harm is to be determined: they direct a court to determine the issue as soon as practicable before trial if a party applies for that course, unless special circumstances exist. The Court held that the State Act cannot apply of its own force, and that it was arguable that the relevant procedural provisions were inconsistent with various provisions in the *Federal Court of Australia Act 1976* (Cth).

46 Ultimately, the Court side-stepped the issue by dealing with the application before it pursuant to s 37P of the *Federal Court Act*.

(5) Matter / standing

47 As noted above, the question of whether there was a 'matter' was raised in *Elliott-Carde*, but resolved fairly easily.

---

39 [2023] FCA 1497.

40 *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285.

41 [2023] FCA 432.

48 The question of standing and the related question of whether there was a 'matter' was also raised in the litigation concerning the referendum on the Voice to Parliament: *Babet v Electoral Commissioner*[42]

49 As you will recall, under the *Referendum (Machinery Provisions) Act 1984* (Cth), a referendum is conducted by putting to the electors a proposed law for their approval, which they are to signify by writing yes or no. However, if the elector's intention is otherwise revealed by their marking of the ballot paper, their vote may be counted even if they did not write yes or no. If their intention is not clear, their vote is informal.

50 The case concerned the manner in which the Commissioner was to interpret ballot papers where the elector had marked an X, rather than yes or no. Senator Babet and Clive Palmer sought a declaration to the effect that a ballot paper marked with an X should be treated as revealing the elector's intention not to approve the proposed law. Alternatively, they sought a declaration that a ballot paper marked with a tick would not clearly demonstrate the voter's intention. The trial judge refused the relief, holding that a tick manifests a clear intention to vote in favour of the proposed law, but that a cross is inherently ambiguous as to the voter's intention. His Honour did not decide whether Babet and Palmer had standing. They then appealed.

51 The questions for the Full Court were,

(a) First, whether the judge erred in failing to determine standing, and deciding the case on the merits; and,

(b) second, whether the appellants had standing. They asserted standing on the basis that they were electors qualified to vote in the referendum, and, in addition for Senator Babet, that he was an elected member of the Senate.

52 The appellants submitted not only that the trial judge had erred, but that the Full Court has a duty to satisfy itself of its jurisdiction. They argued that the Full Court did not have a discretion to decline to address its own jurisdiction, thus it was required to determine whether the appellants had standing and whether there was a 'matter'. They

---

42 [2023] FCAFC 164.

relied on the High Court's decision in *AZC20*,[43] where the majority held that the Full Court in that case had erred approaching the question of whether it should hear the appeals as a matter of discretion, not jurisdiction, and in holding that it did have jurisdiction.

53 In *Babet* the Full Court distinguished *AZC20* and held that a court – including the Full Court itself – has a discretion to determine a proceeding on its merits without considering an issue of standing or jurisdiction.[44] They relied principally on the High Court's decisions in *Combet*[45] and *Wilkie*[46], and on the Full Federal Court decision in *Phong*.[47] Given the difficulty and importance of the question of the standing of electors, and the short timeframe in which the appeal had to be resolved, the Court held that the trial judge did not err, and that it would adopt the same approach and not decide the question of standing.

IMPLIED FREEDOM OF POLITICAL COMMUNICATION

54 Three cases, all concerning public health orders, dealt with the implied freedom of political communication.

55 In Victoria, in *Cotterill v Romanes*,[48] the Court of Appeal rejected an appeal from Justice Niall's first instance decision upholding the validity of public health orders that burdened the implied freedom of political communication.

---

43 *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 26.

44 *Babet* [60].

45 *Combet v Commonwealth of Australia* (2005) 224 CLR 494.

46 *Wilkie v Commonwealth* (2017) 263 CLR 487.

47 *Phong v Attorney-General (Cth)* (2001) 114 FCR 75; [2001] FCA 1241.

48 [2023] VSCA 7.

56 In NSW there were two first instance decisions, *Stratton v New South Wales*[49] and *Tey v New South Wales*,[50] each of which also upheld the validity of public health orders that restricted gatherings.

57 Each of the three cases applied the well-established approach to the implied freedom, and there is no need for me to traverse that in detail. In short:

(a) the powers in question were a proportionate response to a critically important legislative purpose;

(b) it was not shown that there was any obvious or compelling alternative way of achieving that purpose which would have significantly reduced the burden on the implied freedom;

(c) it was not shown that the benefit sought to be achieved — the reduction of serious risks to public health — was manifestly outweighed by the adverse effect on the implied freedom.

58 In all three cases the Courts held that the constitutional question had to be directed to the Act, not the public health orders. This was hardly surprising given the High Court's decision in *Palmer.*[51] However, in *Tey* Basten J pointed out that a particular order may be relevant to illustrate kinds of orders that can be made under the Act.

59 In *Cotterill* the Court of Appeal observed that, if the legislation must be read down to preserve its validity, then attention will shift to the particular exercise of executive power, and 'the constitutional and statutory questions may converge'.[52] But in the public health context, the legislation was 'so hedged with limits on the powers in question' that it did not to infringe the relevant constitutional limit.[53] The limits on the power included:

---

49 [2023] NSWSC 396.

50 [2023] NSWSC 266.

51 *Palmer v Western Australia* (2021) 272 CLR 505.

52 [82], referring to Gageler J and Edelman J in *Palmer*.

53 [88]ff

(a) the gradation of powers in the Act, so that emergency powers would be available only when all other available powers were inadequate to respond to the risk to public health;

(b) the CHO must consider it reasonably necessary to authorise the use of the emergency powers;

(c) the express proportionality principle in the Act required that actions taken be proportionate to the public health risk in question, and not be taken in an arbitrary manner.

(d) the specific power in issue (in s 200(1)(d)) was specifically conditioned on the authorised officer considering the exercise of power to be reasonably necessary to protect public health; and

(e) the exercise of the powers is subject to administrative law requirements of reasonableness, logic and rationality.

60 The Court also relied upon Edelman J's observations in *Palmer* concerning the need for flexibility in emergency powers. The also observed that the powers upheld as valid in *Palmer* were in some respects broader than the powers under the Victorian legislation.

61 Given the validity of the statutory powers, the separate attack on the particular public health orders necessarily failed.

SECTION 109

62 There were several s 109 cases in the State and federal courts in 2023.

63 In *Kikuyu v Minister for Health NSW*[54] the Full Federal Court rejected an argument that public health orders made under State legislation were inconsistent with the Commonwealth *Biosecurity Act 2015* (Cth). The public health orders in question made it a condition of employment for employees of the NSW Health Service that they have

54 [2023] FCAFC 36.

received the covid-19 vaccine. Ms Kikuyu's employment was terminated because she had not complied with this condition.

64 The *Biosecurity Act* included a concurrent operation provision, s 8(1), which stated that the Commonwealth Act did not exclude or limit a law of a State that was capable of operating concurrently with it. However, s 8(2) made s 8(1) 'subject to' certain provisions, relevantly including provisions relating to human biosecurity emergencies. Those provisions permitted the Governor-General to declare that a biosecurity emergency existed, and permitted the Health Minister to exercise various emergency powers. Determinations made under those powers were expressed to apply 'despite any provision of any other Australian law'. Ms Kikuyu argued that once the Governor-General had made a declaration of a biosecurity emergency, the *Biosecurity Act* covered the field. The declaration enlivened the Minister's powers, which circumstance alone rendered any exercise of State power inconsistent with the Commonwealth law.

65 The Full Court rejected that argument. It held that only if and when the Health Minister exercised one of the relevant powers would the *Biosecurity Act* exclude the operation in that field of any inconsistent law of a State or Territory. In the instant case, there was no relevant exercise of power by the Health Minister.

66 The Court further observed that Ms Kikuyu's argument would neuter effective responses to the pandemic, in circumstances where it might be necessary for the differing polities to formulate their own bespoke responses to the public health emergency, and said that she had advanced no rational purpose for her proposed construction of s 8.

67 The Court concluded that there was no direct inconsistency, no indirect inconsistency and no operational inconsistency between the State law and the Commonwealth law. Section 8, read with the *Biosecurity Act* as a whole did not purport to state completely, exhaustively or exclusively the law governing the particular matter to which it is directed is to be.

68 In *Athwal v Queensland*[55] we saw a successful invocation of s 109. Section 51 of the *Weapons Act 1990* (Qld) prohibited the possession of a knife in a public place or school without reasonable excuse.

(a) Section 51(2) contained a variety of reasonable excuses, including carrying a knife as an accessory while playing in a pipe band, carrying a Swiss army knife for use for its normal utility purposes, or preparing using a knife to prepare food in a public pace.

(b) Section 51(4) made religious purposes a reasonable excuse to possess a knife in a public place, giving the possession a kirpan by a Sikh as an example.

(c) However, s 51(5) provided that religious purposes were **not** a reasonable excuse in relation to possession of a knife in a school.

The Queensland Court of Appeal held that this provision was inconsistent with s 10 of the Commonwealth *Racial Discrimination Act 1975* (Cth).

69 Mitchell JA, with whom the other members of the Court agreed, observed that s 10 is not engaged when a *general law* prohibits certain conduct by all members of the community, even where that conduct may be the subject of religious belief only by persons of a particular ethnic origin. For example, provisions such as those which impose a general restriction on bringing knives on to an aircraft are not inconsistent with s 10 of the RDA. Likewise, a general weapons offence could be consistent with s 10 of the RDA.

70 The vice in the Queensland regime was that a 51(5) qualified the general operation of the offence in a way that was particularly directed to Sikhs. Section 51 did not contain a general prohibition against bringing knives into schools. It permitted knives to be brought into schools without committing an offence for a variety of reasons. For example, a parent may send their child to school with a pocketknife for utility purposes or a paring knife to cut up fruit at lunchtime without committing an offence against s 51(1). However, a Sikh parent is prohibited from sending their child to school with a

---

55 [2023] QCA 156.

kirpan, which may be much less dangerous than a pocketknife or paring knife. Thus the law impermissible targeted the physical possession of a knife in a school for religious purposes, when other uses which do not involve using a knife offensively or for purposes of self-defence are not prohibited.

71 Because there was no evidence of any other groups in society whose religion involves physical possession of a knife, the practical operation of s 51(5) was, in effect, that a Sikh does not have a reasonable excuse to possess a kirpan at a school. That limited their freedom of religion compared to other religious groups.

72 In *Carr v Attorney-General (Cth)*,[56] the Federal Court held that, in so far as the Victorian Voluntary Assisted Dying Act[57] purports to authorise a medical practitioner to provide information about methods of committing suicide using a carriage service, it purports to authorise conduct that the Commonwealth Criminal Code[58] has criminalised. That would detract from or impair the operation of the Commonwealth law. There is a thus direct inconsistency between the State and Commonwealth laws, and the State Act is invalid in relation to the use of a carriage service, but not otherwise.

73 In *Dietman v Karpany*[59] Mr Karpany, a Narungga man, had been acquitted of a State offence of unlawful possession of abalone, by reason of s 211 of the *Native Title Act 1993* (Cth). That section applied only if certain conditions were satisfied. If those conditions were satisfied, the effect of s 211 was to suspend the operation of the State law in order to allow the enjoyment of native title rights; but the State law remained valid.

74 The informant appealed the acquittal. The parties agreed that Mr Karpany bore an evidential onus in relation to s 211. The question for the Court of Appeal was who bore the persuasive onus:

(a) Did Mr Karpany bear the onus of making good the application of the section?

---

56 [2023] FCA 1500.

57 *Voluntary Assisted Dying Act 2017* (Vic).

58 *Criminal Code Act 1995* (Cth).

59 [2023] SASCA 52.

(b) Or did the informant bear the onus of disproving the operation of s 211 beyond a reasonable doubt. (If the informant bore the onus, it was common ground that it had not discharged it, so that the acquittal would stand.)

75 In the course of its decision the South Australian Court of Appeal observed that the constitutional context might be thought to support the informant's contention that Mr Karpany bore the persuasive onus to establish the conditions for the operation of s 211(2). It is generally for the party seeking to rely on a superior statute to exclude the operation of an inferior statute — such as a Commonwealth statute prevailing over a State statute by reason of s 109 — to establish the conditions for that to occur. However, the Court was ultimately unpersuaded that much support could be garnered from the constitutional context. Rather, the general rules in relation to criminal prosecutions had to be considered, regardless of the constitutional context. While that may not be true in relation to constitutional facts (where there may be no onus, properly described), the Court considered that the facts relevant to the operation of s 211 were not constitutional facts:

> Consideration of the existence of a native title right with a particular content, and of whether the defendant was exercising that right and doing so for personal, domestic or non-commercial communal needs … involves consideration of facts which are adjudicative in nature, rather than constitutional in nature. It involves consideration of matters arising between the parties, and relating to the rights and activities of the particular defendant (and the Narrunga peoples of whom he is a member), rather than facts of a more general nature and significance. … As such, the ordinary rules governing the allocation of onus apply in relation to these matters, and lead to the conclusion that they were matters to be proved by the defendant on the balance of probabilities.[60]

76 The Court held, according to ordinary principles, that s 211 operated as exception to the State offence provisions, with the defendant bearing the persuasive onus on the balance of probabilities of establishing the conditions for the operation of the native title 'defence'.

---

60 *Karpany* [102] (the Court).

77 For completeness, let me note *Drummond v Gordian Runoff Ltd*,[61] in which the NSW Supreme Court found that there was no inconsistency between certain provisions of the Home Building Act 1989 (NSW) and a section of the *Insurance Contracts Act 1984* (Cth).

78 I will conclude by mentioning *Minister for Immigration, Citizenship and Multicultural Affairs v EVE21,*[62] in which the Full Federal Court used constitutional law cases and principles concerning s 109 to inform the analysis of whether a regulation was inconsistent with its authorising statute.

EXCISE

79 There was one excise case brought in the State and Federal Courts in 2023: *Aymsheem P/L v Chief Commissioner of State Revenue*.[63] In that case, which is ongoing, the plaintiff claims that the imposition of payroll tax under the *Payroll Tax Act 2007* (NSW) on certain payments made by it to 'fleet owners' who are engaged in the haulage of goods is a duty of excise and thus invalid by reason of s 90. That is, it is not an argument that *all* payroll tax constitutes a duty of excise: but payroll tax that relates to the haulage of goods constitutes a duty of excise because it is a tax on the step of the distribution of goods to the point of receipt by the consumer.

80 As is apparent, this argument is independent of the recent extension of the conception of duties of excise to encompass consumption taxes. It turns on the traditional analysis in *Ha*[64] concerning what constitutes a duty of excise.

81 The decision in issue was in fact a procedural one: the Court declined to determine the constitutional issue as a separate question. So I mention it not for the outcome, but for an indication of an interesting excise case that is making its way through the Courts.

82 I also note the Court's reasons for refusing to order a separate question included that the question is hypothetical, because an earlier plank in the plaintiff's case is that the

---

61 [2023] NSWSC 607.

62 [2023] FCAFC 91.

63 [2023] NSWSC 1237.

64 *Ha v New South Wales* (1997) 189 CLR 465.

Payroll Tax Act does not impose payroll tax on payments by the plaintiff to the fleet owners. If that argument were to be determined in the plaintiff's favour, the constitutional issue would not arise. The Court referred to the High Court's statement in *Mineralogy Pty Ltd v Western Australia* that constitutional questions should not be decided 'unless there exists a state of facts which makes it necessary to decide the question'.[65]

SECTION 51(31)

83 There were two cases in which s 51(31) was raised in 2023. The first was *Tapiki*, which I have already touched on in relation to the separation of powers. The second was *Yunupingu v Commonwealth*,[66] which concerned the application of s 51(31) to native title rights and the relationship between s 51(31) and s 122 of the Constitution.

84 In *Tapiki* the issue was whether legislation that retrospectively validated certain things purportedly done under the *Migration Act* – including the detention of Mr Tapiki – involved an acquisition of property other than on just terms because the effect of the legislation was to extinguish Mr Tapiki's right to bring a claim for false imprisonment against the Commonwealth, without providing just terms. This was based on the High Court's decision in *Georgiadis*,[67] which held that a right to bring an action for damages is a form of property for the purposes of s 51(31) and that a law that extinguished such a right, conferring a corresponding benefit on the person against whom the action might be brought, effected an acquisition of such property.

85 Ultimately the s 51(31) argument was defeated by s 3B of the Amending Act, which provided that if the Act resulted in an acquisition of property, then the Commonwealth must pay a reasonable amount of compensation – a standard clause often included in Commonwealth legislation. That section provided just terms and thus satisfied the

---

65 [2021] HCA 30, [56] (the Court).

66 (2023) 298 FCR 160; [2023] FCAFC 75.

67 *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297.

requirements of s 51(31), as had been held in *Bainbridge,*[68] concerning an analogous provision.

86 In *Yunupingu* questions arising in a claim for compensation under the *Native Title Act 1993* (Cth) were referred to the Full Federal Court for determination. One of those questions was whether the requirement in s 51(31) that acquisitions of property be on just terms qualified the legislative power in s 122 – the territories power.

87 You might think that that question had been resolved by the High Court in *Wurridjal*.[69] And, it turns out, you would be right.

88 But you might also remember that in *Teori Tau*,[70] the High Court had decided that s 51(31) did not qualify s 122. The Commonwealth argued that *Wurridjal* had not overruled *Teori Tau*, thus *Teori Tau* continued to bind lower courts. The Commonwealth submitted that the remarks by various judges in *Wurridjal* concerning *Teori Tau* did not form part of the ratio of the case.

89 At [231], the Full Court observed that this was a surprising submission, given that the authorised report states '*Teori Tau* … overruled'.

90 However, the Commonwealth argued that dissenting judgments are to be ignored in determining the ratio, and that, counting only the members of the majority, the ratio reflects only the reasoning that is common to a numerical majority of the Court as a whole. That is, if there are no reasons that are common to four or more members of the majority, then there is no ratio. Further, if reasoning is not 'necessary' for a particular judge's conclusion, then it is to be ignored in determining the ratio. Applying that to the High Court's consideration of *Teori Tau*, the Commonwealth submitted that there was no holding by at least four members of the majority that *Teori Tau* should be overruled. [detailed analysis of separate judgments set out at [254]]

---

68 *Bainbridge v Minister for Immigration and Citizenship* (2010) 181 FCR 569; [2010] FCAFC 2.

69 *Wurridjal v Commonwealth* (2009) 237 CLR 309.

70 *Teori Tau v Commonwealth* (1969) 119 CLR 564.

91 The Full Court concluded that *Wurridjal* had indeed overruled *Teori Tau.* This turned in large measure on the Court's consideration of the process of a demurrer.

92 In *Wurridjal*, the Commonwealth demurred on three grounds, the first being that the legislation in issue was not subject to s 51(31). The Court, by a 6:1 majority, had allowed the demurrer, but not on that ground. Rather, the basis was the final demurrer point, that s 60(2) of the legislation provided for just terms and hence the legislation was not invalid. Kirby J dissented in the outcome.

93 Three of the majority Justices (French CJ, Gummow, Hayne) held that *Teori Tau* should be overruled, as did Kirby J – but he dissented in the orders made. Thus *Teori Tau* could only be regarded as having been overruled if it was permissible to count Kirby J in determining the ratio.

94 The Court held that the principles regarding identification of a ratio were to be applied to the conclusion reached in respect of each ground of the demurrer in *Wurridjal*, rather than by reference to the orders of the Court. That treats a ground of demurrer as being in substance the same as if a question of law had been reserved in a case stated. The Court pointed out that, if there had been questions reserved, five of the Justices would have answered the first question 'yes' (the legislation is subject to s 51(31)) and an essential step in the reasoning of four of those Justices would have that s 51(31) applies to acquisitions of property pursuant to laws made only under s 122.

95 This approach enabled the Full Court to utilise the reasoning of Justice Kirby, even though he was in dissent on the orders.

96 The Court also drew on various remarks in both *Wurridjal* itself,[71] and in later High Court judgments, that supported the conclusion that *Wurridjal* had overruled *Teori Tau*.[72]

---

71 The judgments of Kirby J and Heydon J in *Wurridjal*; and

72 *Queanbeyan City Council v ACTEW Corporation Ltd* [2011] HCA 40; 244 CLR 530, six members of the High Court stated that "it is established by subsequent authorities, the most recent of which is *Wurridjal*, that s 122 is not disjoined from the body of the Constitution". See also *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51; 240 CLR 140.

97 The Full Court then considered the Commonwealth's argument that native title is 'inherently defeasible', or 'inherently susceptible' to extinguishment by a valid exercise of the Crown's sovereign power to grant interests in land and to appropriate to itself unalienated land. This argument turned on a passage from Gummow J's judgment in *Newcrest*.[73] The consequence of it was said to be that native title rights were not capable of amounting to an acquisition of property within the meaning of s 51(31).

98 The Court observed that the Commonwealth had not clearly articulated which of three possible pathways its argument about inherent defeasibility turned on:

(a) Was it that native title is not "property"?

(b) Was it that there was no "acquisition" of property?

(c) Or was it that, even if there was an acquisition of property, it was not for the purposes of s 51(xxxi) but was for other purposes?

99 However, the Commonwealth ultimately accepted in argument that, at least in some contexts, native title rights are 'property' for the purposes of s 51(31).

100 The Full Court then considered various High Court and Federal Court authorities relevant to the question of inherent defeasibility, in particular *Mutual Pools*,[74] *Peverill,*[75] *Georgiadis,*[76] *WMC Resources,*[77] *Cunningham,*[78] *Telstra Corporation v Commonwealth*[79] and *Newcrest Mining*.

101 Following that discussion, the Court observed that native title rights are rights in land and waters and, in that sense, are 'quintessentially proprietary in nature'. Referring to

---

73 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

74 *Mutual Pools & Staff v Commonwealth* (1994) 179 CLR 155.

75 *Health Insurance Commission v Peverill* (1994) 179 CLR 226.

76 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

77 *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1.

78 *Cunningham v Commonwealth* (2016) 259 CLR 536.

79 (2008) 234 CLR 210.

the description in *Yarmirr*[80] of native title rights as 'inherently fragile', the Full Court said this:

> Post-colonisation, the language of "fragility" conveys no more than an acknowledgement that the Crown's assertion and exercise of powers to control ownership of land will prevail over the rights of the native title holders, where a sufficiently clear intention by the Crown to grant rights inconsistent with native title is established. … [N]ative title is defeasible, just as common law property rights are, but this is a characteristic shared by many rights of a proprietary nature found to be protected by s 51(xxxi) against exercises of federal legislative power.[81]

102 The Court further held that laws that diminish native title confer an identifiable proprietary benefit on others, which constitutes an acquisition of property within the meaning of s 51(31). The Court pointed to the recent statement by the plurality in *Griffiths*:[82]

> [A]lthough native title rights and interests have different characteristics from common law land title rights and interests, and derive from a different source, native title holders are not to be deprived of their native title rights and interests without the payment of just compensation any more than the holders of common law land title are not to be deprived of their rights and interests without the payment of just compensation. Equally, native title rights and interests cannot be impaired to a point short of extinguishment without payment of just compensation on terms comparable to the compensation payable to the holders of common law land title whose rights and interests may be impaired short of extinguishment.[83]

103 The Court thus declined to extend the *Mutual Pools* 'inherently defeasible' line of authority beyond statutory rights, to native title.

---

80 *Commonwealth v Yarmirr* (2001) 208 CLR 1.

81 *Yunupingu* [458] (the Court).

82 *Northern Territory v Griffiths* (2019) 269 CLR 1.

83 *Yunupingu* [462] (the Court).

104 In short, native title rights fall within the scope of s 51(31). In light of the High Court's decision in *Griffiths*, that conclusion might be thought to be unsurprising.

105 However, I note that the High Court has granted special leave to appeal in *Yunupingu*, so we will no doubt hear more about these issues at next year's G&T conference.

OTHER HEADS OF POWER

106 Heads of power were not a popular topic in 2023, but there were a few cases in which a head of power issue arose.

107 *R v TB (No 6)*[84] concerned the admissibility of evidence obtained pursuant to a warrant issued under the *Surveillance Devices Act 2004* (Cth). Under that Act, the evidence would be admissible in relation to State offences if the offences had a 'federal aspect' (to use the language of s 4AAA(1A) of the *Australian Federal Police Act 1979* (Cth)). State offences have a federal aspect if, had they been enacted by the Commonwealth Parliament, rather than the State, they would have been valid. That required attention to whether the offences in question fell within a Commonwealth head of power.

108 In this case, the State offences included firearms offences that the Crown accepted did not have a federal aspect. However, one charge was alleged to have a federal aspect: the offence of participation in a criminal organisation, contrary to s 83E(1) of the *Criminal Law Consolidation Act 1935* (SA). The prosecution contended that that section could have been validly enacted by the Commonwealth pursuant to s 51(29) of the Constitution, relying on the *United Nations Convention against Transnational Organized Crime.* In contrast, the defendants contended that s 83E was not reasonably appropriate and adapted to implementation of the Convention, given various differences between the statutory regime and the text of the Convention.

109 The Court concluded that s 83E, had it been enacted by the Commonwealth, would have been valid. It observed that there is no need for a precise correspondence between the law and the Convention, and held that the differences identified by the defendants were

84 [2023] SASC 140.

not such as to mean that the law could not have been enacted by the Commonwealth in reliance on s 51(29).

110 Section 51(29) was also in issue in *Barngarla Determination Aboriginal Corporation RNTBC v Minister for Resources.*[85] The Commonwealth Minister had made a decision concerning the site for a radioactive waste facility. The applicant challenged that decision, in part on the basis that the legislation in question was not supported by a head of power. In response, the Commonwealth relied upon s 51(29) and also on the defence power. In relation to s 51(29), the applicants contended that the relevant international convention had to be interpreted in light of customary international law concerning indigenous rights.

111 The Court held that the legislation in question was reasonably capable of being considered to be appropriate and adapted to implement Australia's obligations under the Convention. Her Honour was not satisfied that the asserted customary international law rights existed, and thus held that they had not bearing on the interpretation of the Convention. The judge also held that the legislation fell within the defence power, because it authorised the storage of material generated as a result of defence related activities. It did not matter that the facility may, in fact, store only a small proportion of defence related material, in comparison to material that is not defence related.

112 The constitutional challenge was thus rejected, although the applicant succeeded on administrative law grounds.

EXECUTIVE POWER

113 *Azimitabar v Commonwealth*[86] involved a novel challenge to immigration detention. The applicant, an unlawful non-citizen, had been detained in hotels, and he argued that the detention was unlawful because the Commonwealth lacked authority, under either statute or s 61 of the Constitution, to contract and spend public monies to create and operate the Hotels as places of immigration detention. Relying on High Court's decision

85 [2023] FCA 809.

86 [2023] FCA 760.

in *Behrooz,*[87] the Federal Court held that the lawfulness of the applicant's detention did not turn on whether the Commonwealth's contracting and expenditure was lawfully authorised. Further, drawing on *Pape*,[88] *Williams (No 1)*[89] and *Davis*,[90] the Court held that authorisation was to be found in s 61, which authorises expenditure necessary or reasonably incidental to the execution and maintenance of a valid Commonwealth statute.

114 In *CEU22 v Minister for Home Affairs (No 2)*[91] the Federal Court, following *Re Patterson*[92] and *Davis*,[93] held that the appointment of more than one person to administer a portfolio is permitted by s 64 of the Constitution.

115 *M House Pty Ltd v Secretary, Department of Health*[94] raised the question whether the non-compulsive sampling and testing of certain goods (surgical face masks) was within the non-statutory executive capacity of the Executive under s 61 of the Constitution. The Federal Court opined, by way of *obiter*, that it was, and that this capacity had not been displaced by statute. However, that was not the question before the Court: the question before the Court was whether a particular section of the *Therapeutic Goods Act 1989* (Cth) authorised the publication of a determination derived from that non-statutory sampling and testing. The Court held that it did not.

FINAL COMMENTS

---

87 *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.

88 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

89 *Williams v Commonwealth* (2014) 248 CLR 156.

90 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10.

91 [2023] FCA 867.

92 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

93 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10.

94 [2023] FCA 768.