Andrew Yuile's High Court Judgments

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NOVEMBER

ADMINISTRATIVE LAW

Migration – jurisdictional error – multiple bases for decision – materiality

In *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 (15 August 2018) the High Court held that there was no jurisdictional error in a decision of the Administrative Appeals Tribunal (AAT) notwithstanding that the AAT had erred considering one visa criterion, because the AAT had correctly found that the appellant did not meet another, independent visa criterion. The appellant applied for a Partner visa. To be granted the visa, the appellant had to show, relevantly, that the application had been made within 28 of his ceasing to hold another visa "unless the Minister was satisfied exceptional circumstances existed". He also had to show that he did not have a debt to the Commonwealth. The AAT was not satisfied either criterion had been met. In the Federal Circuit Court, the Minister conceded that the AAT had erred by considering the exceptional circumstances criterion as at the date of the visa application, not the date of the AAT decision. However, the Minister contended that the decision should not be set aside because the finding as to the debt to the Commonwealth was correct. The Court rejected that argument, finding that the error in respect of exceptional circumstances was jurisdictional and the AAT's decision was therefore invalid. The Full Federal Court on appeal held that the error was jurisdictional, but that the AAT still retained authority to make the decision on the other criterion. The High Court held that to describe an error as jurisdictional refers not only to the existence of error, but also to the gravity of that error. The extent of non-compliance required to make out jurisdictional error will turn on the construction of the statute. The question is whether, on the proper construction, the error is of a magnitude that takes the decision outside the jurisdiction conferred. Statutes are "ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance". That threshold "would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made". In this case, the AAT's error could have made no difference, because the AAT was correctly satisfied that the second, independent criterion, about the debt to the Commonwealth, was not met. The error was therefore not material and not jurisdictional. Kiefel CJ, Gageler and Keane JJ jointly; Nettle J and Edelman J separately concurring. Appeal from the Full Federal Court dismissed.

Migration – jurisdictional error – multiple bases for decision – materiality

Shrestha v Minister for Immigration and Border Protection; Ghimire v Minister for Immigration and Border Protection; Acharya v Minister for Immigration and Border Protection [2018] HCA 35 (15 August 2018) was heard concurrently with *Hossain* (above) and concerned similar legal principles about jurisdictional error and materiality. In these cases, the appellants had been granted student visas. A requirement of the visa grant was that the students were "eligible higher degree students", which in turn required that the visa applicants be enrolled in a relevant preliminary course of study. The appellants' visas were cancelled because a circumstance necessary to the grant of the visa was no longer met. Although the appellants had been enrolled in the required preliminary courses of study when granted the visas, they were no longer so enrolled. The AAT affirmed the decisions to cancel the visas in each case. The Full Federal Court held that the word "circumstance" referred to a factual state of affairs, rather than a legal characterisation of a state of affairs. The AAT had erred by focussing on whether the appellants satisfied the definition of "eligible higher degree students", rather than on whether the prerequisite of enrolment in the relevant course was satisfied. However, the Full Court refused to set aside the AAT's decision because the error could have made no difference. The High Court dismissed the appeal because, following the principles from Hossain, even if the AAT had made the error alleged, that error could have no impact on the decisions. At most, the error meant that the AAT asked a superfluous question. The AAT's factual findings, reasoning and exercise of discretion were not impacted. Any error was not material and not jurisdictional. Kiefel CJ, Gageler and Keane JJ jointly; Nettle and Edelman JJ separately concurring and holding that there was no error in the AAT's approach. Appeal from the Full Federal Court dismissed.

PROBATE

Interest in a will – procedural fairness – new trial

In *Nobarani v Mariconte* [2018] HCA 36 (15 August 2018) the High Court held that the appellant had an interest in a will under contest and had been denied procedural fairness because of the circumstances surrounding the hearing of a claim for probate. The appellant, who was unrepresented, claimed an interest in challenging a handwritten will. He filed two caveats against a grant of probate without notice to him. The respondent brought proceedings for the caveats to cease. The respondent also sought probate of the will and filed a statement of claim. The appellant was not named as a party in the probate proceedings. The probate claim was listed for hearing on 20 and 21 May 2015. At a directions hearing on 23 April 2015, the appellant was told by a judge that the trial would be limited to the caveat issue. Until that point, he had not been the subject of any orders to file evidence or take steps towards a trial of the probate claim. On 14 May 2015, the trial judge held a directions hearing at which he told the appellant that the trial would be of the claim for probate, and also instructed the appellant to file a defence and any evidence on which he wished to rely for the probate claim by 18 May 2015. The trial judge was not told, at that time, that the appellant was not a party to the proceedings or that his evidence to that point was limited to the caveat issue. On 20 May 2015, the appellant was joined. His applications for adjournments were refused. On 22 May 2015 the trial judge gave judgment orally, granting probate and ordering the appellant to pay the respondent's costs. A majority of the Court of Appeal dismissed an appeal. Ward JA held that, although there had been a denial of procedural fairness, there was no possibility that the outcome would have been any different. Emmett AJA held that the appellant did not have an interest in challenging the 2013 Will. The appellant sought to have the Court of Appeal's decision overturned and a new trial ordered. A new trial could only be ordered if there had been a denial of procedural fairness and "some substantial wrong or miscarriage" had resulted. The High Court held that a denial of procedural fairness would cause a substantial wrong if it "deprived the affected person of the possibility of a successful outcome". The High Court held that the appellant had an interest in challenging the will, and that he had been denied the possibility of a successful outcome by a denial of procedural fairness. That followed from the consequences, and effect on the appellant, of altering

the hearing, at short notice, from a hearing of the caveat motion to a trial of the claim for probate. The High Court ordered a new trial. Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (NSW) allowed.

CRIMINAL LAW

Evidence – admissibility – tendency – prior recording – hearsay – separate trial

In *The Queen v Dennis Bauer* (a pseudonym) [2018] HCA 40 (12 September 2018) the High Court upheld an appeal and clarified several aspects of the law concerning the admissibility of evidence on different grounds.

The respondent was charged with 18 sexual offences, alleged to have taken place over around 11 years. At trial, the respondent sought to exclude the following evidence relied on by the Crown: a recording of evidence from the complainant from an earlier trial; tendency evidence from the complainant relating to Charges 1 and 3-18; tendency evidence from the complainant's half-sister relating to Charge 2 and an uncharged act involving the complainant, and tendency evidence from the complainant about other uncharged sexual acts (the "tendency evidence"); and evidence from a second witness (a school friend) of things said by the complainant (the "complaint evidence"). The respondent also sought to sever the trial in respect of Charge 2. The trial judge admitted all of the evidence and refused to sever the trial, including after separately considering the High Court's decision in *IMM v The Queen* (2016) 257 CLR 300 (*IMM*). The respondent was convicted on all charges.

On appeal, the Court of Appeal held that none of the evidence should have been admitted and held that the trial on Charge 2 should have been severed. The High Court upheld the Crown's appeal in respect of all the evidence and the severance issue. In respect of the recording, there was no error given the complainant's strong preference to avoid giving evidence again if possible and in the absence of competing considerations or outweighing disadvantage to the respondent. In respect of the complainant's tendency evidence, the Court set out a unanimous view on admissibility of tendency evidence in single complainant sexual offence cases. Here, there was no need for a "special feature" as referred to in *IMM* to make the evidence admissible. All the relevant acts were committed against one complainant and none was far separated in time or much different in nature or gravity. The probative value of the complainant's evidence was high and not productive of unfair prejudice.

The Court also made some observations about tendency evidence in multiple complainant sexual offence cases, and about risks of contamination, concoction or collusion. The tendency evidence of the half-sister had high probative value and no real risk of misuse by the jury. It was admissible. The complaint evidence was admissible, as an inference was available that the evidence was fresh in the complainant's memory when the conversation took place and the probative value of the evidence outweighed any prejudicial effect. Finally, there was no basis for Charge 2 to be severed. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (Vic) allowed.

CRIMINAL LAW

Voluntary administration – deed of company arrangement

In *Mighty River International Limited v Hughes; Mighty River International Limited v Mineral Resources Limited* [2018] HCA 38 (orders 19 June 2018; reasons 12 September 2018) the High Court upheld the validity of a deed of company arrangement implementing a moratorium on claims, requiring further investigations by the administrators and a report to creditors on possible amendments to the deed in six months' time, and preventing distribution of property of the company.

Mesa Minerals went into voluntary administration and administrators were appointed. At the second meeting of creditors, a majority of creditors voted to enter into a deed of company arrangement with the features above. Mighty River, a creditor, began proceedings claiming that the deed was void. It argued that the deed was inconsistent with the purpose of Part 5.3A of the *Corporations Act 2001* (Cth); that it invalidly sought to sidestep the requirements of s 439A(6) of that Act, which allows for a court to extend the period within which to hold a second meeting of creditors; that it did not comply with an alleged requirement in s 444A(4)(b) to distribute at least some company property; and that certain required opinions had not been formed under the Act.

At first instance, the Master upheld the deed. An appeal to the Court of Appeal was dismissed. A majority of the High Court held that the deed was valid. It had been executed in compliance with Part 5.3A and was consistent with and aimed to fulfil the purposes of that Part, noting the intended flexibility of possible deeds of company arrangement. It was not simply an extension of time; rather, the deed was an otherwise valid instrument that incidentally extended time for investigations pending possible variations. The moratorium was valid and accorded with the purposes of Part 5.3A. The deed also did not need to specify property to be available for the purposes of s 444A, and the administrators had formed and expressed the opinions required by ss 438A(b) and 439A(4). Kiefel CJ and Edelman J jointly; Gageler J separately concurring; Nettle and Gordon JJ jointly dissenting. Appeal from the Court of Appeal (WA) dismissed.

EQUITY

Doctrine of part performance

In *Pipikos v Trayans* [2018] HCA 39 (12 September 2018) the High Court considered the requirements of the equitable doctrine of part performance and whether those requirements should be relaxed.

The respondent and her then husband purchased a property (the "Clark Road property") and made improvements. The respondent was the sole registered proprietor. The respondent and her husband later jointly purchased a second property with the appellant (also the respondent's brother) and his wife, financed by both couples and a bank loan. The appellant and his wife jointly held a half-share in the property, with the other half in the name alone of the respondent's husband. The couples then bought a third property (the "Penfield Road property"), financed in part by bank loan. The appellant and his wife paid the deposit and the balance. Each couple held a half share in the property.

In these proceedings, the appellant alleged that he and the respondent's husband had agreed that the appellant would acquire half of the Clark Road property (not including the improvements), to be paid largely by the appellant funding the share of the respondent and her husband in the Penfield Road property. The only evidence of the agreement was a handwritten note signed by the respondent. That note did not meet the requirements for contracts of sale for land in the Law of Property Act 1936 (SA). The appellant argued that he was entitled to specific performance through the doctrine of part performance. Under existing authority, where a person has partly performed a bargain made and the acts relied upon to show part performance are unequivocally and by their own nature referable to the alleged agreement, the other party may be prevented from resiling from the bargain. The appellant argued for a relaxation of the requirement for acts to be unequivocally referable to the agreement asserted by the applicant. He urged an approach akin to equitable estoppel, focussed on "whether a contracting party has knowingly been induced or allowed by the counterparty to alter his or her position on the faith of the contract".

After review of the authorities, the Court unanimously rejected the argument, affirming the requirement of unequivocal referability. In this case, the bargain did not meet that requirement (which the appellant conceded in the High Court). Kiefel CJ, Bell, Gageler and Keane JJ jointly; Nettle and Gordon JJ jointly concurring; Edelman J separately concurring. Appeal from the Full Court of the Supreme Court (SA) dismissed.

DECEMBER

COMPANY LAW

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At first instance, the Master upheld the deed. An appeal to the Court of Appeal was dismissed. A majority of the High Court held that the deed was valid. It had been executed in compliance with Part 5.3A and was consistent with and aimed to fulfil the purposes of that Part, noting the intended flexibility of possible deeds of company arrangement. It was not simply an extension of time; rather, the deed was an otherwise valid instrument that incidentally extended time for investigations pending possible variations. The moratorium was valid and accorded with the purposes of Part 5.3A. The deed also did not need to specify property to be available for the purposes of s 444A, and the administrators had formed and expressed the opinions required by ss 438A(b) and 439A(4). Kiefel CJ and Edelman J jointly; Gageler J separately concurring; Nettle and Gordon JJ jointly dissenting. Appeal from the Court of Appeal (WA) dismissed.

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Under existing authority, where a person has partly performed a bargain made and the acts relied upon to show part performance are unequivocally and by their own nature referable to the alleged agreement, the other party may be prevented from resiling from the bargain. The appellant argued for a relaxation of the requirement for acts to be unequivocally referable to the agreement asserted by the applicant. He urged an approach akin to equitable estoppel, focussed on "whether a contracting party has knowingly been induced or allowed by the counterparty to alter his or her position on the faith of the contract".

After review of the authorities, the Court unanimously rejected the argument, affirming the requirement of unequivocal referability. In this case, the bargain did not meet that requirement (which the appellant conceded in the High Court). Kiefel CJ, Bell, Gageler and Keane JJ jointly; Nettle and Gordon JJ jointly concurring; Edelman J separately concurring. Appeal from the Full Court of the Supreme Court (SA) dismissed.

Breach of fiduciary duty – account of profits

In *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited* [2018] HCA 43 (10 October 2018) the High Court considered the necessary causal nexus for an account of profits following a breach of fiduciary duties. Lifeplan operated a funeral products business through a subsidiary Funeral Plan Management(FPM). Foresters ran a similar business, though with a smaller market share. Mr Woff and Mr Corby were employed by Lifeplan in management positions. While still employed at Lifeplan, Woff and Corby approached Foresters with a plan to divert business from FPM to Foresters. They created a five year business concept plan to carry this through, based on the "wholesale plundering of the confidential information and business records of Lifeplan". Lifeplan and FPM brought proceedings for breach of fiduciary duty and contravention of the *Corporations Act 2001* (Cth). They sought an account of profits. The primary judge found against Woff and Corby on the breaches and found that Foresters had knowingly assisted in some, but not all actions. The judge also found that Foresters would not have proceeded absent the business plan. When considering account of profits, the primary judge held that the confidential information had not itself been used to generate profit for Foresters and did not order an account of profits against it. On appeal, the Full Court held that was too narrow a view of the causation required and ordered Foresters also to account for profits. Foresters appealed

to the High Court; Lifeplan cross-appealed against the finding of quantum. Foresters argued that the account of profits should be limited to the profits from the direct results of the acts amounting to knowing assistance. The High Court held that the profits of those acts could not be separated from the general scheme. The liability to account extended to "any benefit" arising "as a result of" the knowing participation. On the cross-appeal, once causation was found, it was for the appellants to show why amounts should not be included in the account of profits. In this case, there was no reason to restrict Foresters' obligation to disgorge less than the entire capital value of the business it acquired. Kiefel CJ, Keane and Edelman JJ; Gageler J separately concurring; Nettle J concurring separately on the appeal but dissenting on the cross-appeal. Appeal from the Full Federal Court dismissed; cross-appeal allowed.

CRIMINAL LAW

Fresh evidence – miscarriage of justice

In *Rodi v Western Australia* [2018] HCA 44 (10 October 2018) the High Court held that fresh evidence relevant to the applicant's case had caused a miscarriage of justice requiring a new trial. Police found 925.19g of cannabis in the appellant's house. He was charged with possession of a prohibited drug with intent to sell or supply. At trial, the appellant admitted possession but argued that the cannabis came from two plants found at his house and that it was purely for his personal use. At trial, a Detective Coen gave evidence that plants of the kind found would normally yield between 100 and 400g, and that the plants found would be at the lower end of the scale. The appellant later sought to appeal out of time based on material that showed Detective Coen had given evidence in an earlier case that the plants could yield between 300 and 600g. That evidence was not disclosed to the defence, and would have been consistent with the appellant's account. The Court of Appeal found that the evidence was "fresh evidence" and admitted it, as well as an explanation from Detective Coen that his opinions had changed over time based on his experiments and discussions. However, the Court held that the fresh evidence and the non-disclosure had not caused a miscarriage of justice. The High Court held that the fresh evidence was a blow to Detective Coen's credibility, and the jury might have taken a more favourable view to the appellant's evidence. The Court of Appeal misunderstood its role as an appellate court in the circumstances by finding that it would accept the Detective's explanation for the fresh evidence. The Court should have considered whether the verdict was impugned based on the most favourable view of the fresh evidence that a jury of reasonable people could properly take. Detective Coen's explanation was a matter for a jury at trial. The conviction had to be quashed and a new trial ordered. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly. Appeal from the Supreme Court of Western Australia allowed.

JANUARY/FEBRUARY

ABUSE OF PROCESS

Practice and procedure – permanent stay – abuse of process

In *UBS AG v Scott Francis Tyne as Trustee of the Argot Trust* [2018] HCA 45 (17 October 2018) the High Court considered the power of courts to permanently stay proceedings as an abuse of process, where related proceedings were brought in another jurisdiction. The respondent, Mr Tyne, started proceedings in the Federal Court in his capacity as trustee of the Argot Trust. The proceedings concerned representations made by UBS to Mr Tyne and, through him, related entities, including the former trustee (ACN 074) and an investment company (Telesto Investments Limited). At all times, Mr Tyne was the controlling mind of these entities. ACN 074, Telesto and Mr Tyne (in his personal capacity) had previously brought proceedings in the NSW Supreme Court arising out of the same facts and making essentially the same claims. In addition, UBS had earlier brought proceedings in Singapore against Telesto and Mr Tyne for default on credit facilities. Mr Tyne and the Trust ultimately discontinued their claims in the NSW proceedings. The NSW proceedings were then permanently stayed on the basis that Telesto was trying to re-litigate causes of action that had been determined in the Singapore proceedings. UBS applied to have the Federal Court proceedings stayed as an abuse of process. The claims in the Federal Court arose out of the same facts, and were essentially the same claims, as those in the NSW proceedings. The primary judge made the stay, because the Trust could and should have brought its clams in the NSW proceeding. A majority of the Full Federal Court allowed an appeal, in part because the Trust's claims had not been decided on the merits. A majority of the High Court allowed the appeal, reinstating the stay. The majority held that "timely, cost effective and efficient conduct of modern civil litigation takes into account wider public interests than those of the parties to the dispute". In this case, the time to agitate the factual issues underlying the Trust's claim were the NSW proceedings. After the final determination of those proceedings, UBS was entitled to

think the dispute was at an end. It was an abuse of process for the Federal Court to allow for staged conduct of what is factually one dispute prosecuted by related parties under common control, with all the duplication, vexation and waste of resources that followed. Kiefel CJ, Bell and Keane JJ jointly; Gageler J separately concurring; Nettle and Edelman JJ jointly dissenting; Gordon J separately dissenting. Appeal from the Full Federal Court allowed.

CRIMINAL LAW

Evidence – context evidence – propensity evidence – uses of evidence

Johnson v The Queen [2018] HCA 48 (17 October 2018) concerned the admission of historical evidence of sexual misconduct other than the conduct charged for purposes of "context". The appellant was tried and convicted of five counts of historical sexual offences against his sister. Count 1 concerned an indecent assault when the appellant was 11 or 12, and he was presumed doli incapax. At trial, to rebut the doli incapax presumption and to provide context of the relationship between the appellant and his sister, the Crown relied on evidence from the complainant about the appellant's other sexual misconduct against her, including one that occurred in a bath. The Court of Criminal Appeal quashed the verdicts on charges 1 and 3, but rejected a contention that joinder of those counts with the others had occasioned a miscarriage of justice. The High Court unanimously held that the whole of the evidence except for the evidence about the bath incident was admissible in respect of the remaining counts. The evidence was relevant context of the appellant's highly dysfunctional family background. Its probative value outweighed its prejudicial effect. Although evidence of the bath incident should not have been adduced, its wrongful admission did not lead to a miscarriage of justice in light of jury directions and other relevant evidence. Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ jointly. Appeal from the Supreme Court of South Australia dismissed.

Evidence – tendency evidence – significant probative value

McPhillamy v The Queen [2018] HCA 52 (orders 9 August 2018, reasons 8 November 2018) concerned the admission of evidence of previous acts of sexual misconduct as tendency evidence. The appellant was charged and convicted of six sexual offences against 'A' said to have taken place in 1995 and 1996. At the time of the alleged offending, A was an 11-year-old altar boy under the supervision of the appellant, an acolyte. The appellant's case was that A had made up the allegations to get compensation from the Catholic Church. A had previously admitted to making false statements about part of the alleged offending in his compensation application. At trial, the Crown led evidence (over objection) from two men who alleged to have been the victims of sexual misconduct of the appellant in 1985. The evidence was led to show that the appellant had a sexual interest in male children in their early teenage years under his supervision. The evidence of the two men was not challenged at trial. The issue on appeal was whether the evidence had "significant probative value". A majority of the Court of Criminal Appeal held that the evidence strongly supported the Crown case and was rightly admitted. The High Court held that the evidence was capable of showing that the appellant had a sexual interest in young teenage boys (the first step of assessing the probative value of tendency evidence). However, there was no evidence to show that the tendency had manifested in the 10 years prior to the present charges (that is, that the appellant had acted on the sexual interest) and the previous conduct occurred in different circumstances. The evidence was not capable of significantly affecting the assessment of the likelihood of the appellant committing the offences alleged by A (the second step in assessing probative value). Kiefel CJ, Bell, Keane and Nettle JJ jointly; Edelman J separately concurring. Appeal from the Court of Criminal Appeal (NSW) allowed.

Abuse of process – permanent stay – use of compulsory powers – fair trial

In *Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions; Donald Galloway (a pseudonym) v Commonwealth Director of Public Prosecutions; Edmund Hodges (a pseudonym) v Commonwealth Director of Public Prosecutions; Rick Tucker (a pseudonym) v Commonwealth Director of Public Prosecution*s [2018] HCA 53 (8 November 2018) a majority of the High Court granted permanent stays of criminal prosecutions following the unlawful use of powers conferred on the Australian Crime Commission (ACC) for the purposes of the prosecutions. In December 2008, the ACC received information that a company, XYZ Limited (a pseudonym) was involved in criminal activity. The ACC referred the investigation to the Australian Federal Police (AFP). The ACC also offered for the AFP to use the ACC's coercive examinations powers. The ACC did not conduct its own investigation, but "acted

at all times 'as a facility for the AFP to cross examine under oath whoever the AFP wished, for the AFP's own purposes'". In 2010, each of the appellants was examined by the ACC. Each of the appellants had previously refused to participate in police interviews. AFP officers secretly watched each of the examinations and the ACC examiner made orders allowing for the dissemination of the examination material to the AFP and the CDPP. In pre-trial argument, the primary judge ordered that the prosecutions be permanently stayed as an abuse of process. In reality, the examination process was driven by the AFP for its investigation. The material obtained from the examinations was used in the prosecution brief and to obtain further evidence. The prosecution had gained an unfair forensic advantage and the appellants had lost the chance to make forensic choices about how to run their trials. The Court of Appeal set aside those orders. Although the ACC had acted unlawfully, the prosecution had not been unfairly advantaged, nor the appellants unfairly disadvantaged. The High Court unanimously held that the ACC had acted unlawfully. There was no special ACC investigation; the statutory requirements of such an investigation were not met. The ACC had acted simply as a facility for the AFP to cross-examine the appellants for the AFP's purposes. Kiefel CJ, Bell and Nettle JJ held that the prosecution had derived a forensic advantage, including by compelling the appellants to answer questions they had previously lawfully refused to answer, which locked the appellants into certain versions of events at trial (a forensic disadvantage). The material had been extraordinarily widely disseminated and the lack of clear records about dissemination meant it was practically impossible to try the appellants without subjecting them to forensic disadvantage. The continuation of the prosecution would also bring the administration of justice into disrepute. Keane J concurred on a narrower basis, holding that continuing the trials of the appellants would bring the administration of justice into disrepute, because of the unlawful actions of the ACC and AFP, regardless of whether those actions caused ongoing forensic disadvantage. Edelman J separately concurred, agreeing with the reasons of Keane J. Gageler J and Gordon J separately dissented. Appeal from the Court of Appeal of the Supreme Court (Vic) allowed.

CUSTOMS AND EXCISE

Statutory interpretation – "possession, custody or control" of dutiable goods

In *Comptroller General of Customs v Zappia* [2018] HCA 54 (14 November 2018) the High Court considered the level of authority or control needed to be in possession, custody or control of goods in a warehouse. The respondent was an employee of Zaps Transport (Aust) Pty Ltd, acting as the general manger and warehouse manager. His father was Zaps' sole director. A warehouse operated by Zaps stored goods subject to customs control under the *Customs Act 1901* (Cth). In May 2015, "dutiable goods" were stolen from the warehouse. Section 35A(1) of the *Customs Act* relevantly provided that if a person who has or has been entrusted with "possession, custody or control" of dutiable goods subject to customs control fails to keep those goods safely, a demand can be issued to that person to pay to the Commonwealth the amount of customs duty that would have been payable. A demand was issued to the respondent, his father and Zaps. Each of them sought review before the Administrative Appeals Tribunal (AAT). The AAT affirmed the decision, finding that the respondent had sufficient control for the demand. The Full Federal Court allowed an appeal on that point, holding that an employee of a warehouse licence holder, acting as an employee, does not have the necessary control. The High Court unanimously allowed the appeal. The Court held that an employee of a warehouse licence holder is capable of having the requisite control. The reference to "possession, custody or control" is a reference to the degree of power or authority which is sufficient to enable a person to meet the obligations to keep goods safely and to be able to show the goods to a collector or satisfy a collector that goods have been dealt with in accordance with the *Customs Act*. A person with that level of authority meets the requirements of the section, regardless of how they may choose to exercise that power. This was not limited to the warehouse licence holder. In this case, the facts found by the AAT established that the respondent had the necessary control. Kiefel CJ, Bell, Gageler and Gordon JJ jointly; Nettle J separately concurring. Appeal from the Full Federal Court allowed.