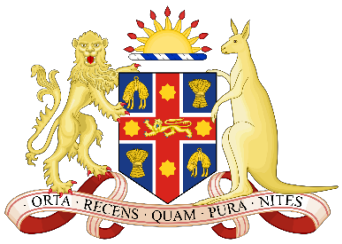

Decisions of Interest

31 March to 30 April 2025

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

Contents

New South Wales Court of Appeal Decisions of Interest

Administrative law: power of the ICAC to institute criminal proceedings

***Gamage v Riashi* [2025] NSWCA 84**

Decision date: 30 April 2025

Leeming JA, Basten AJA, Griffiths AJA

In October 2011, the respondent, an officer of the Independent Commission Against Corruption (ICAC), issued 13 court attendance notices (CANs) alleging offences committed by the applicant under the *Crimes Act 1900* (NSW) and the *Independent Commission Against Corruption Act 1988* (NSW). The applicant sought to vacate the hearing of the charges on numerous grounds, one being a challenge to the jurisdiction of the Local Court, based upon the asserted lack of power of the respondent to commence the criminal proceedings. The Local Court and, on appeal, the Supreme Court, rejected the applicant's challenge. On appeal to this Court, the respondent claimed his authority to commence proceedings derived from the "common informer" provision of the *Criminal Procedure Act 1986* (NSW) which allows "any person" to institute criminal proceedings under an Act unless the right to institute the proceeding is expressly conferred by that Act on a specified person or class of person.

The Court held (Basten AJA, Leeming JA and Griffiths AJA agreeing), unanimously allowing the appeal in part:

- Under s 173 of the *Criminal Procedure Act*, in accordance with the general power provided by s 14, the respondent could only have validly issued the CANs if he was "acting in an official capacity" and was therefore a public officer under s 3(1). The respondent was "acting in an official capacity" only if it was within the powers and functions of the ICAC to prosecute for offences: [13]-[18].
- There being no express conferral of power to prosecute in the ICAC Act, the power to prosecute must be implied (if it exists). The objects and principal functions of the ICAC are to investigate, communicate to appropriate authorities about, and take steps to limit opportunities for, corrupt conduct. Sections 13(4) and 74B of the ICAC Act, precluding the ICAC including in a report a finding of guilt or a statement "recommending prosecution", or even forming an opinion as to such matters, are inconsistent with the ICAC having an implied power to institute a prosecution. The extrinsic material supports this conclusion. The power to institute a criminal prosecution is not an incidental power provided for by s 19. The ICAC had no express or implied power to prosecute for matters the subject of an investigation by it into corrupt conduct involving the applicant: [28]-[34], [47], [63].
- Offences created by the ICAC Act are protective of the integrity of the investigative process of the ICAC. Steps taken to protect the integrity of its own investigation fall within the scope of the incidental powers conferred by s 19, as necessary for or reasonably incidental to the exercise of its functions. The issuing of the three CANs against the applicant alleging breaches of the ICAC Act was valid. The issuing of the CANs for the Crimes Act offences was not: [41]-[45], [50], [54].

Costs: class actions, *Corporations Act 2001* (Cth), 1335(1), UCPR, r 51.50

Litigation Fund WCX Pty Ltd v Mitchell (No 3) **[2025] NSWCA 67**

Decision date: 11 April 2025

Mitchelmore JA, McHugh JA, Ball JA

The Mitchells brought a class action as lead plaintiffs against Transport for NSW. WCX provided the Mitchells with funding in respect of that class action which is yet to be heard. Disputes arose between WCX and the Mitchells concerning the management of the class action which ultimately led to WCX terminating its funding. A question then arose concerning who was entitled to the balance (amounting to $135,180.55) of an amount that WCX had paid into the trust account of the solicitors who had been retained to conduct the litigation. On 20 September 2024, McGrath J made orders in chambers giving effect to conclusions he had reached on 13 September 2024 that the Mitchells were entitled to an order pursuant to s 183 of the *Civil Procedure Act 2005* (NSW) that the remaining funds were held for the benefit of the Mitchells and could be applied towards the legal costs they incurred as lead plaintiffs in the class action. On 11 December, McGrath J made a gross sum costs order in the Mitchells' favour. WCX sought a stay and leave to appeal. Before Griffiths AJA, the sole question was whether a condition of the stay of the gross sum costs order should be that the costs the subject of the order be paid into Court pending resolution of the application for leave to appeal. The Mitchells relied on Uniform Civil Procedure Rules 2005 (NSW) r 51.50(1), r 42.21. and s 1335(1) of the *Corporations Act 2001* (Cth). Griffiths AJA found that the threshold requirement in s 1335(1) was satisfied and ordered WCX to provide security for costs. WCX applied to have that order varied under s 46(4) of the *Supreme Court Act 1970* (NSW).

The Court held (Ball JA, Mitchelmore JA and McHugh JJA agreeing) unanimously dismissing the notice of motion:

- In the present case, security was only sought against a corporation. Section 1335 of the *Corporations Act* provides a separate and independent basis for ordering security against a corporate appellant from that provided by UCPR r 51.50 and its predecessors. Whether security should be ordered in accordance with s 1335 is to be determined by reference to the principles applicable to that section, not the principles applicable to UCPR r 51.50. The existence of special circumstances is not a requirement of s 1335. UCPR r 51.50 does not limit the operation of s 1335: [26].
- Section 1335 of the *Corporations Act* and UCPR r 51.50 do not set out cumulative requirements that must be satisfied before security is ordered. Rather, each provides an independent basis on which security may be ordered: [27].
- Griffiths AJA correctly summarised and applied the principles applicable to the question whether the threshold requirement set out in s 1335 is satisfied. As Beazley ACJ pointed out in *Treloar Constructions Pty Limited v McMillan* [2016] NSWCA 302, the test is often described as "undemanding": [30]-[31].

Courts and tribunals: forensic patients, variation of orders by Tribunal

***KP v Minister for Mental Health* [2025] NSWCA 69**

Decision date: 14 April 2025

Basten AJA, Griffiths AJA, Price AJA

KP has been a "forensic patient" within the meaning of s 72(1)(c) of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) (MHCIFPA) since 2011. Following a review by the Mental Health Review Tribunal on 15 November 2023, the applicant was granted conditional release which allowed him to reside in supported accommodation in the community. On 28 December 2023, concerns were raised about the applicant's mental state and following breaches of his conditional release order, he was scheduled under s 19 of the *Mental Health Act 2007* (NSW). On 9 January 2024, a review by the Tribunal determined that the applicant's conditional release be revoked and that he be detained at a forensic hospital. The Tribunal's orders were made pursuant to ss 79, 81 and 94 of the MHCIFPA. The principal issue on appeal was whether the revocation and detention orders made by the Tribunal on 9 January 2024 (and its written reasons dated 19 January 2024) were valid. The applicant submitted that s 109 of the MHCIFPA provided a mandatory scheme which must be followed when there has been a breach of a conditional release order and contended that it was necessary for an apprehension order to be issued by the Tribunal under s 109(1) for any step to be taken in respect of the applicant's conditional release and detention.

The Court held (Basten AJA, Price AJA, Griffiths AJA agreeing) unanimously dismissing the appeal:

- The power of the Tribunal to revoke a forensic patient's conditional release may be implied from the express power of detention conferred under s 81 of the MHCIFPA as it makes little sense that a detention order may be made but a conditional release order may not be revoked. Section 109 of the MHCIFPA does not either expressly, or by implication, restrict or qualify the general powers conferred on the Tribunal in the earlier Divisions of the Act: [4]-[10] (Basten AJA); [73]-[80] (Price AJA).
- There is no practical purpose or utility for the Tribunal to make an order under s 109 of the MHCIFPA for the apprehension of a forensic patient when that person is already detained in a mental health facility The Tribunal may review the forensic patient without the President making an order for apprehension: [9] (Basten AJA); [68], [81]-[83] (Price AJA).
- It is inevitable that an order varied by the Tribunal will be inconsistent with the previous order. It does not follow that the previous order must be formally "revoked" whenever a new order is made: [10] (Basten AJA).
- Section 109 of the MHCIFPA does not have no role to play. In such cases where the forensic patient is not detained and on conditional release, the President of the Tribunal may issue an apprehension order and accordingly, s 109 of the MHCIFPA applies, not ss 79 and 81: [84] (Price AJA).

Land Law: construction of easements in a written instrument

Theunissen v Barter **[2025] NSWCA 50**

Decision date: 31 March 2025

Mitchelmore JA, Kirk JA, Griffiths AJA

The Theunissens and Ms Barter live on adjoining blocks of land in Mosman, being respectively Lots 1 and 2 in the deposited plan. Lot 1 is a battle-axe block located to the rear of, and at a higher elevation, than Lot 2. The creation of the lots resulted from a subdivision effected by the registration of the DP in July 1994. An instrument setting out five easements was registered at the same time. One of those easements was later replaced with the easement in dispute on appeal. That easement relates to the flat rooftop terrace area of the dwelling on Lot 2 (the servient tenement). That area sits immediately in front of the dwelling on Lot 1 (the dominant tenement) and Ms Barter can access it via a metal ladder ascending through a skylight. In dispute was whether the easement grants to the owners of the dominant tenement (the Theunissens) an exclusive set of rights to use the rooftop terrace for the purposes "of recreation and enjoyment and as a balcony, terrace or garden". The primary judge held that the set of rights was not exclusive. The Theunissens appealed.

The Court held (Kirk JA, Mitchelmore JA and Griffiths AJA agreeing), unanimously allowing the appeal:

- Construction of an easement in a written instrument involves determining the party or parties' intention in light of the instrument's text, context and purpose, assessed from the perspective of a reasonable person in the party or parties' position, and in light of admissible evidence: [27].
- Various factors supported the Theunissen's position that the rights for the stated purposes were exclusive. The only factor supporting Ms Barter's argument was that it was not expressed exclusively, where that could readily have been done. A reasonable person in the parties' position would have concluded that the rights were exclusive: [33]-[51].
- When construing a registered easement, it is permissible to take into account relevant physical characteristics of the servient and dominant tenements, and the surrounding land, at the time of the grant which were reasonably ascertainable by a third party at that time. The characteristics which may be considered are the broad and reasonably enduring characteristics, not fine details, of the land or of its fixtures. These characteristics strengthened the conclusion that the rights were exclusive: [108]-[117].
- An easement will be invalid if it substantially deprives the servient owner of proprietorship or legal possession to such an extent as to be inconsistent with ownership, which is a matter of fact and degree. It was not so in this case. The question involves considering the physical area affected by the putative easement by reference to the servient tenement as a whole. A grant of a sole right to the dominant owner to use the subject area for some particular purpose does not of itself establish that the easement is invalid: [140]-[150].

Tort: negligence, vicarious liability, non-delegable duty

***Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* [2025] NSWCA 72**

Decision date: 15 April 2025

Bell CJ, Leeming JA, Ball JA,

AA brought proceedings against the appellant for sexual assaults alleged to have been perpetrated on him in 1968 by Father Ronald Pickin, who was then an assistant priest in Wallsend, NSW, claiming that the appellant was liable in negligence, vicariously liable and liable for breach of a non-delegable duty. The assaults were alleged to have occurred when AA and a friend, Mr Perry, were invited by Fr Pickin into the presbytery of the local church on Friday nights to consume alcohol, smoke cigarettes and play on a gambling machine in the bedroom when they were teenagers. The parish priest and the Bishop died years before the litigation commenced. AA's account was inconsistent with the evidence of Mr Perry in material respects. The trial judge accepted that the abuse occurred on the basis that AA's account was "vivid" and was consistent with tendency evidence that Fr Pickin had sexually touched other boys. The judge found that the appellant breached a duty of care owed by it to AA and also held it vicariously liable for the assaults. Her Honour did not determine the claim that there was a non-delegable duty.

The Court held (Leeming JA, Bell CJ agreeing, Ball JA agreeing in the result but dissenting in part), allowing the appeal:

- The primary judge did not sufficiently address clear inconsistencies in the AA's account with the findings her Honour made, did not address the possibility that the AA's "vivid" recollection was a sincerely held but erroneous belief, and appeared to have relied on the removal of the limitation period to alter the process of evaluating the evidence: [131]-[152] (Leeming JA), [16] (Bell CJ).
- There was no material appellable error in the fact-finding process: [253]-[271] (Ball JA).
- No duty of care was owed by the Trustees to AA in 1969. Knowledge of every priest was not taken to be the knowledge of the appellant. The fact that Parliament chose to impose a prospective duty of care under Part 1B of the *Civil Liability Act 2002* (NSW) was a powerful consideration against a retrospective reformulation of judge-made law to impose a novel duty of care on the appellant: at [12]-[13] (Bell CJ); [196]-[197], [228]-[241] (Leeming JA); [253] (Ball JA).
- Having found no duty of care, it was unnecessary to decide whether the assault actually occurred: [16] (Bell CJ); [154] (Leeming JA).
- There is no non-delegable duty to ensure that a delegate does not commit an intentional criminal act: [17] (Bell CJ); [156]-[168] (Leeming JA); [253] (Ball JA).
- AA's pleadings used the term "the Diocese" to refer interchangeably to a geographical area and a body corporate established by *Roman Catholic Church Trust Property Act 1936* (NSW). This was not a model of clear drafting. AA did not choose to sue an unincorporated association, "the Diocese", although it was

entitled to do so under s 6K of the *Civil Liability Act*, and instead chose to sue the body corporate in which Church property was vested: [178]-[193] (Leeming JA).

Australian Intermediate Appellate Decision of Interest

Bankruptcy and equity: effect of bankruptcy on rights under trust

HBSY Pty Ltd v Lewis (No 2) **[2025] FCAFC 44**

Decision date: 3 April 2025

Markovic J, Downes J, Kennett J

Marjorie Lewis died on 15 August 2008. The biggest asset of her estate was an amount of around $550,000 due to it from the Sir Moses Montefiore Jewish Home. The residuary beneficiaries of the estate were Marjorie's brother Allan Lewis and his four sons. Allan and one son, Anthony, were named as executors but renounced their executorship. Letters of administration were granted to another son, Geoffrey, in January 2009. Ten days after Marjorie's death, Anthony, purporting to be the executor of her will, contacted the debtor and procured payment of the $550,000. The sum was deposited in a general trading account with an investment company that Anthony controlled and operated, and which went into liquidation in February 2009. The liquidators paid the estate only one fifth of the misappropriated amount. On 2 April 2009, Anthony was declared bankrupt. Geoffrey, as administrator, lodged a proof of debt with Anthony's trustee in bankruptcy. No money was received. On 21 July 2011, Anthony's trustee in bankruptcy entered into an agreement with HBSY to sell Anthony's interest in the estate. Anthony was discharged from bankruptcy in April 2012. In November 2015, Anthony became the registered owner of all of the share capital of HBSY. The issue in the appeal was whether HBSY, as Anthony's assignee, was entitled to receive his share of the estate without the monies misappropriated by Anthony having been repaid to the estate. The NSW Supreme Court found that it was not. The High Court confirmed that an appeal lay to a Full Court of the Federal Court.

The Court held, unanimously dismissing the appeal:

- Anthony rendered himself an executor *de son tort*. His renunciation of his office did not free him of his obligation to make good his default: [17].
- Upon discharge from bankruptcy, Anthony was, with some exceptions (e.g., debts incurred through fraud: s 153(2)(b)), freed from all "debts… provable in the bankruptcy" by s 153 of the *Bankruptcy Act 1966* (Cth). The "equity" entitling a trustee to treat a debtor/beneficiary as having already been paid to the extent of their debt is distinct from the debt itself. The "equity" is not a "debt" that is "provable in the bankruptcy" under s 153(1), and, if it comes into existence before the debt is extinguished, it survives that extinguishment: [35]-[60].
- A "fraudulent breach of trust" under s 153(2)(b) includes a breach of the trustee's duties that have a fiduciary character. Those duties can in some circumstances be breached without any particular state of mind being present. Actual dishonesty, or "fraud" in the common law sense, is not necessarily an element of such a breach. Anthony's conduct was a "fraudulent breach of trust" within the meaning of s 153(2)(b) as correctly construed: [80]-[108].

Asia Pacific Decision of Interest

Crime: sexsomnia, defences of insanity and sane automatism

Cook v The King **[2025] NZSC 44**

Decision date: 28 April 2025

Winkelmann CJ, Glazebrook J, Williams J, Kós J, O'Regan J

A birthday party was held at Mr Cook's flat. One of the participants became intoxicated and passed out. She was put to bed in Mr Cook's room while he continued partying. Later, she woke to find he had joined her in that bed and was sexually violating her. At trial, Mr Cook advanced a defence of sexsomnia, a parasomnia characterised by displays of sexual behaviour while asleep. The trial judge classified the defence as one of insane automatism – based on a disease of the mind – thus falling within the "insanity" defence in s 23 of the *Crimes Act 1961* (NZ) and meaning Mr Cook had to establish his defence on the balance of probabilities. The judge rejected an argument that the defence should be categorised as sane automatism, a common law defence which, unlike insanity, places only an evidential burden on the accused. The jury was not satisfied of the insanity defence. Mr Cook was convicted and sentenced to eight years' imprisonment. The Court of Appeal rejected Mr Cook's appeal, ruling that the defence was correctly classified as one of insanity.

The Court held, (Kós J, on behalf of the Court) unanimously dismissing the appeal:

- The treatment of sexsomnia among common law jurisdictions varies. In NSW, where the statutory regime differs, a defence on the basis of sexsomnia has been classified as one of sane automatism, the physical acts being held to be involuntary, not the product of a disordered mind, and to amount to an absence of, rather than disturbance of, volition: [35]-[81] citing *R v DB* [2022] NSWCCA 87.
- Where a defence of automatism is presented, the court is obliged to classify it as either sane or insane automatism. A classification of insanity disadvantages the defendant in terms of the burden of proof and pejorative connotations of a verdict of "insanity" ("conjuring up the gothic imagery of grim Victorian lunatic asylums in which inmates were detained perpetually at Her Majesty's pleasure"). However, the "special verdict should be seen for what it is: an acquittal… with limitations that are therapeutic and protective only, rather than punitive": [106], [109]-[112].
- The argument that insane automatism is an illogical construct because it is based on a state of mind incapable of any understanding or knowledge, thereby compelling the defendant to advance inconsistent defences, was rejected. The threshold for engaging s 23 is whether, on the balance of probabilities, a disease or functional psychological disorder (those being legal, not medical, terms) so affected the defendant's mental faculties of reason, memory or understanding as to render them incapable of understanding the nature and quality (or moral error) of their actions at the time they occurred. The sexsomnia defence satisfied that test in this case and fell within s 23: [114]-[122], [140]-[144].

International Decision of Interest

Anti-discrimination law: statutory interpretation

For Women Scotland Ltd v The Scottish Ministers **[2025] UKSC 16**

Decision date: 16 April 2025

Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lady Rose, Lady Simler

Scottish ministers issued guidance associated with the *Gender Representation on Public Boards (Scotland) Act 2018* (Scot). The guidance states that, under the 2018 Act, the definition of a "woman" is the same as that in the *Equality Act 2010* (UK) (EA). Section 212 of the EA defines "woman" as "a female of any age". The statutory guidance also states that a person with a Gender Recognition Certificate (GRC) recognising their gender as female is considered a woman for the purposes of the 2018 Act. In 2022, the appellant challenged the lawfulness of the new statutory guidance. It submitted that the definition of a "woman" under the EA refers to biological sex, meaning that a trans woman with a GRC (a biological male with a GRC in the female gender) under the *Gender Recognition Act 2004* (UK) (GRA) is not considered a woman under the EA, and consequently the 2018 Act. The Outer House dismissed the appellant's petition, and the Inner House dismissed its appeal.

The Court held (Lord Hodge, Lady Rose and Lady Simler, Lord Reed and Lord Lloyd-Jones agreeing), unanimously allowing the appeal:

- Section 9(1) of the GRA establishes that trans people with a GRC are to be considered the gender reflected on their GRC "for all purposes". Under s 9(3), the rule in section 9(1) may be disapplied by "any other enactment" if the terms and context of the enactment demonstrate that provision is made in it that negates the effect of s 9(1): [99]-[104], [156].
- As a matter of ordinary language, the provisions relating to sex discrimination can only be interpreted as referring to biological sex, e.g., "woman" is used in provisions relating to pregnancy and maternity, medical services, single sex, communal accommodation, higher education institutions, single sex characteristic associations, sport, and the armed forces. These provisions are practically unworkable unless "man" and "woman" have a biological meaning: [168]-[172], [177]-[188], [211]-[247].
- Interpreting "sex" as certificated sex would: (i) cut across the definitions of "man" and "woman" in an incoherent way, (ii) hamper the clarity and consistency with respect to how to identify protected groups, that being essential to the practical operation of the EA, (iii) give trans people with a GRC greater rights than those without one and leave those seeking to perform their obligations under the EA with no obvious means of distinguishing between the two sub-groups, and (iv) interfere with protections given to those with the protected characteristic of sexual orientation. This interpretation of the EA does not remove protections under the Act for trans people, with or without a GRC: [151]-[154], [198]-[203], [248]-[263].