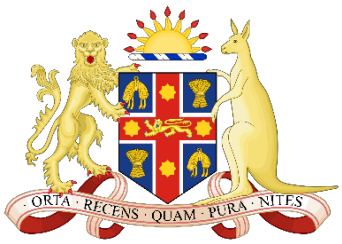


# Decisions of Interest

15 February 2025 – 6 March 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

## Corporations: statutory derivative action, good faith requirement

***Gillespie v Gillespie*** **[2025] NSWCA 24**

**Decision date:** 27 February 2025

Gleeson, Mitchelmore, Ball JJA

Between October 1988 and June 1994, Robert Gillespie (the **appellant**) was a director of Gillespie's Cranes Nominees Pty Ltd (**GCN**), a company which was and is the trustee of the Gillespie Family Trust (the **Trust**). The appellant is a discretionary beneficiary of the Trust. The appellant sought leave under s 237 of the *Corporations Act 2001 (*Cth) to bring statutory derivative proceedings on behalf of GCN seeking relief against two directors of GCN for an alleged breach of their duties as directors of GCN, and two other companies for their knowing involvement in the breach. The alleged wrongdoing occurred in 2005 and 2012. To grant leave, the Court must be satisfied that an applicant is acting in good faith. The primary judge concluded that the appellant was not acting in good faith due to the time elapsed since he was a director and the apparent lack of connection between his holding that office and the relief claimed.

**The Court held**, unanimously dismissing the appeal with costs:

- The requirement of good faith in s 237 applies *both* to the application for leave and the desire to bring the underlying action. Generally, a right is exercised in good faith if it is exercised for a purpose for which the right is conferred. The purpose of the right is to permit an applicant (**A**) to seek to vindicate a right of the company that those in control of the company are not pursuing themselves. If the application has some other purpose and that is the sole or principal purpose of the application, A will not be acting in good faith: [28]-[31].
- If there is no connection between the capacity in which A seeks to bring the claim and the relevant loss or injury or if a significant amount of time has elapsed since A was a director or shareholder, it will be difficult to find that the purpose of the action is to vindicate some right of the company. This is because A will have less of an interest in the company. These factors are not requirements of a grant of leave or requirements to establish good faith, but rather evidentiary considerations from which absence of proper purpose may be inferred [32]-[33], [36]-[37].
- Where the company is a trustee and A is a beneficiary of the trust, care must be taken to ensure A in seeking to bring proceedings on behalf of the trustee is not acting in A's interests as a beneficiary: [35].
- In this case, it was apparent that the appellant was acting to advance his own interests as a beneficiary of the Trust, as evidenced by the time delay, time elapsed since he was a director of GCN and because he had commenced separate proceedings asserting rights as a beneficiary of the Trust: [38].

## Taxes and duties: whether infrastructure is "land holdings" or "goods"

***Conexa Sydney Holdings Pty Ltd v Chief Commissioner of State Revenue* [2025] NSWCA 20**

**Decision date:** 27 February 2025

Ward P, Payne, Stern, McHugh JJA, Basten AJA

In 2019, Conexa Sydney Holdings Pty Ltd (the **appellant**) acquired all the shares in SGSP Rosehill Network Pty Ltd (**Rosehill**) for $74,700,000 with provision for adjustments. Rosehill was the owner of a water-carrying pipeline which connects a recycled water plant to large industrial sites. The *Water Industry Competition Act 2006* (NSW) (***WIC Act***) provides for ownership of water industry infrastructure and gave Rosehill its "interest" in the pipeline. The issue on appeal was whether the appellant's interest in the pipeline and related infrastructure which it acquired was, as the Commissioner claimed, an interest in land or goods for the purposes of ss 147 and 155 of the *Duties Act 1997* (NSW) (***Duties Act***), or whether it was, as the appellant asserted, an indeterminate (and non-dutiable) interest that could not be characterised for *Duties Act* purposes as either an interest in land or goods. The primary judge found that the appellant's interest in the pipeline and related infrastructure was an interest in "goods" for the purposes of s 155 of the *Duties Act*.

**The Court held** (Payne JA, Ward P, Stern and McHugh JJA agreeing; Basten AJA agreeing as to orders), dismissing the appeal with costs:

- The appellant's interest in the pipeline was an interest in land for the purposes of the *Duties Act*. The meaning of "land" depends on the context and purpose of the legislation in which it appears: [55]-[65]. The pipeline and associated infrastructure were affixed to the land and would be regarded as a fixture and form part of the land. The character of the pipeline as part of the land was not affected by the fact that the pipeline is owned by an entity other than the proprietor of the surrounding land. A statutory right to exclusive possession of a stratum of land occupied by a pipeline may create an interest in that stratum of the land for the purposes of the *Duties Act*: [66]-[84]. The interest of the owner of the pipeline conferred by s 64 of the *WIC Act* was an interest in the stratum of land occupied by the pipeline: [84]-[140].
- Alternatively, the word "goods" in ss 163K and 155 of the *Duties Act* extends to any such interests of the kind at issue in this case. The text, context and purpose of the *Duties Act* suggest that the interest conferred by the *WIC Act* is not a sui generis, "novel property right" which exists outside the reach of s 155 of the *Duties Act*: [141]-[167]. Kirk JA was therefore correct in his Honour's interpretation of the word "goods" in *Chief Commissioner of State Revenue v Shell Energy Operations No 2 Pty Ltd* [2023] NSWCA 113.

## Crime: common law offence of escaping lawful custody

***Elali v R* [2025] NSWCCA 9**

**Decision date:** 19 February 2025

Price AJA, Ierace, McNaughton JJ

On 29 December 2021, a police pursuit ensued with the applicant travelling at speeds in excess of the speed limit. The pursuit ended when the applicant lost control of the vehicle and crashed into a tree. After throwing several punches at the arresting officer (which did not land) and making threats to "slash", "stab" and "shoot" the officer, the applicant was arrested. The next day, two police officers escorted the offender from Mount Druitt Hospital to their vehicle. Whilst walking back to the car, the offender ripped free from the officers and ran away from the car park. A foot pursuit ensued. The applicant entered residential premises and hid in the guest bedroom. When the officers arrived, one of the occupants directed police towards the guest bedroom. Following the arrest, a further victim approached police and advised that the offender ran through her house as well. The applicant pleaded guilty to the offence of entering a building with intent to commit an indictable offence contrary to s 114(1)(d) of the *Crimes Act 1900* (NSW). The parties agreed that the relevant indictable offence was the common law offence of escaping from lawful custody. The primary ground on appeal was that a miscarriage of justice was occasioned by the appellant's conviction in circumstances where, on the agreed statement of facts, the applicant could not in law have been convicted of the offence. That was because the common law offence of escaping from lawful custody is not a continuing offence. By the time he entered the residence, he had already escaped custody, the indictable offence was complete and he did not enter with requisite intent.

**The Court held** (Price AJA, Ierace and McNaughton JJ agreeing) granting leave, dismissing the appeal against conviction, allowing the appeal against sentence and resentencing the applicant:

- Applying *R v Tommy Ryan* (1890) 11 LR (NSW) 171: The common law offence of escaping from lawful custody is a continuing offence, contrary to Victorian and New Zealand authority (see *R v Scott* [1967] VR 276; *R v Keane* [1921] NZLR 581 and *R v Kura* [2008] NZCA 337). Whether an escape has ended is a question of fact. That determination is not constrained by the imposition of boundaries such as the lack of immediate pursuit, loss of control or being out of sight. However, that does not necessarily mean that the offence will continue so long as the person escaping is kept out of imprisonment: [34]-[66].
- The applicant was in the process of escaping when he entered the premises and was guilty of the offence: [32]-[33], [38], [62].

## Trusts: existence and termination of trust

***Tjiong v Chang* [2025] NSWCA 25**

**Decision date:** 28 February 2025

Basten, Griffiths and Price AJJA

On 15 March 1976, Hok Njan Tjiong sent a letter to his son George Tjiong which was held by Palmer J in 2009 to have established a trust with respect to a unit purchased in George's name for $25,000 (the **Trust**). The terms of the Trust were later amended by another letter on 10 October 1978. The amended terms provided that the unit was to be sold after Hok's death to provide funds for his wife, and after her death, for his son from an extramarital relationship if in need, but otherwise for family in need. The unit sold in 1996 and the proceeds were deposited by George into an existing bank account and comingled with his personal funds. George appointed his brother, Richard Tjiong, as executor and left his estate (in equal shares) to his children, Katrina Tjiong and Lindsay Tjiong. In June 2009, Katrina replaced Richard as administrator of the estate. Tzer Chang (the **plaintiff**), one of Hok's grandsons and an eligible beneficiary under the Trust, sought an account and the appointment of new trustees. Katrina, as administrator of her father's estate, and in that capacity, trustee of the Trust, was named defendant. The issue was whether the Trust was extant or whether it had been terminated by a payment of $199,000 made by Hok to Lindsay in 1999. The payment was not in dispute: the question was whether it came from the trust moneys. On 16 August 2022, the trial judge upheld the plaintiff's claim that the Trust was extant.

**The Court held** (Basten AJA, Price AJA agreeing; Griffiths AJA dissenting) allowing the appeal:

- The plaintiff bore the burden of demonstrating that there was a trust fund, which had not been fully distributed: [34]-[36]. The letter from George and a statement made to Lindsay supported a finding that the 1999 payment exhausted the corpus of the available funds; the plaintiff therefore failed to demonstrate that the Trust existed at the time of George's death: [105], [106].
- Though the point was not explicitly addressed by Basten AJA, Griffiths AJA held that the defendant bore the onus of establishing that the Trust had been terminated by the payment to Lindsay: [493].
- If the Trust was determined in 1999, the claims of Katrina as the retiring trustee to indemnity were irrelevant: [110].
- The trial judge erred in rejecting Katrina's submission that where legal costs were incurred to preserve the estate, an indemnity should be available against the trust funds in accordance with the proportion which the trust funds bore to the general estate: [111]. Katrina's subjective belief that the Trust no longer existed did not disentitle her to indemnification for costs; the proper question is whether there was a material benefit to the Trust: [115]-[116] (per Basten AJA, Price AJA not deciding).

# Australian Intermediate Appellate Decision of Interest

## Constitutional law: judicial independence of Western Australian magistrates

***Crawford v State of Western Australia*** **[2025] FCAFC 18**

**Decision date:** 25 February 2025

Mortimer CJ, Stewart and O'Bryan JJ

In 2006, the appellant became a magistrate of both the Magistrates Court of Western Australia (**MC**) and the Children's Court of Western Australia (**CC**) under the *Children's Court of Western Australia Act 1988* (WA) (***CCWA Act***) and the *Magistrates Court Act 2004* (WA) (***MC Act***). The practice in regional areas was for magistrates (who since 1996 were all dually appointed) to sit on both MC and CC matters when required. In 2012, the appellant was allocated primarily CC matters. In early 2021, the appellant foresaw that she might be required to sit in fewer CC matters, so she commenced proceedings against the President of the CC. This resulted in an agreement that the appellant would sit in the CC on a full-time basis. On 1 March 2022, the *Courts Legislation Amendment (Magistrates) Act 2022* (WA) came into effect. It empowered the President to: (1) direct magistrates as to which cases they would deal with and which duties they would perform, including where and when they would do so; and (2) notify the Chief Magistrate (who might consent to or refuse to consent to the notice) that a magistrate should sit in the CC on a full or part-time basis only (s 11, 12A *CCWA Act*). The President notified the appellant and the Chief Magistrate that it was "necessary and desirable" for the appellant to sit predominantly in the MC and to sit in the CC only when "required and directed to do so". The Chief Magistrate consented whilst the appellant consented only to sitting full-time in the CC. On appeal, the appellant argued that: (1) by virtue of Sch 1 cl 5 of the *MC Act*, only the Governor could direct her to work part-time in the CC; and (2) the powers conferred by s 11 of the *CCWA Act* were constitutionally invalid because they undermined judicial independence of dually appointed magistrates.

**The Court held**, unanimously dismissing the appeal:

- The giving of a commission to a person by the Governor, and the acceptance of it by an individual, is a consensual act. Only by consent could a fundamental aspect of the office be altered. Whether an individual is working full-time as a magistrate is expressly identified by the parliament as such a fundamental tenet. While the work allocated to her changed, the appellant was still working full-time as a magistrate. That was a matter for express direction by the President and the appellant's consent was not required: [68]-[94].
- The powers to re-calibrate the performance of judicial functions of dual appointees do not in themselves constitute a threat to the judicial independence of magistrates. The allocation and distribution of work is a basic aspect of the role of a head of jurisdiction. While a decision to distribute work may be subject to judicial review for improper purpose, bad faith, unreasonableness etc., the appellant did not bring such a case: [95]-[117].

# Asia Pacific Decision of Interest

## Criminal & administrative law: Hong Kong National Security Law and fair trials

***HKSAR v Kwan; Kwong; Tung*** **[2025] HKCFA 3**

**Decision date:** 6 March 2025

Cheung CJ, Ribeiro, Fok and Lam PJJ and Chan NPJ

Under the *National Security Law 2020* (HK), where the Commissioner of Police reasonably believes it is necessary, for the "prevention or investigation of an offence endangering national security", to require a "foreign agent" to produce certain information, the Commissioner may issue a notice requiring that agent to provide such information. It is an offence to fail to comply with a notice. The office-bearers and persons managing or assisting in the management of an alleged "foreign agent" organisation will be bound by the same obligations as the organisation if those persons are served with the notice. On 25 August 2021, the Commissioner issued notices requiring the Hong Kong Alliance in Support of Patriotic Democratic Movements of China (HKA) to provide certain information. The Commissioner also served the notices on the appellants in their capacity as office-bearers. The appellants refused to comply on the basis that the notices were not issued legally as HKA was not a "foreign agent". The appellants were tried and convicted for failing to comply with the notices. At first instance and before the High Court it was held that for the notices to be lawfully issued, it was sufficient for the Commissioner to assert that he had reasonable grounds to believe that HKA was a foreign agent, and it was unnecessary for the prosecution to prove that HKA was in fact a foreign agent.

**The Court held**, unanimously allowing the appeal, quashing the convictions:

- Interpretation of the relevant provisions showed that it was necessary to prove, as an element of the offence, that a person or organisation issued with a notice was in fact (and not merely reasonably believed to be) a "foreign agent": [19]-[25], [102].
- There was a strong presumption in favour of allowing a defendant to challenge, in criminal proceedings, the validity of an administrative order or decision which was an element of the underlying criminal offence. This presumption was only displaced where the defendant was the "same person" who has been made subject to the relevant order or decision and where it was compellingly clear that the legislative intention required a departure from this strong presumption. The presumption was not rebutted in this case: [47]-[60], [102].
- Where the Commissioner had very substantially redacted an investigation report which concluded there were reasonable grounds for believing HKA was a foreign agent, the redactions made it impossible for the appellants to have a fair trial as they were deprived of all knowledge of the nature of the prosecution's case: [94]-[102].

# International Decision of Interest

## Migration law: Validity of deprivation orders rendering persons stateless

***N3 v Secretary of State for the Home Department; ZA v Secretary of State for the Home Department*** **[2025] UKSC 6**

**Decision date:** 26 February 2025

Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Sales and Lord Stephens

In 2017, the Secretary of State for the Home Department made separate deprivation orders under section 40 of the *British Nationality Act 1981* (UK) (the **Act**) depriving E3 and N3 of their British citizenship because it was assessed that they posed a threat to the United Kingdom's national security. Whilst the applicants were Bangladeshi citizens at the time of their births, the effect of Bangladeshi law was that they no longer remained Bangladeshi citizens after turning 21. Therefore, depriving them of their British citizenship rendered them stateless. On 20 April 2021, the Secretary wrote informing the applicants that in light of a newly delivered Special Immigration Appeals Commission (**SIAC**) judgment on the status of Bangladeshi-British dual citizens, the deprivation orders were withdrawn and that the applicants' "British citizenship [had] therefore been reinstated". The Secretary maintained that the original orders were not unlawful and were effective to deprive E3 and N3 of status as British citizens between the dates upon which they were made and the date upon which they were withdrawn. The Secretary also maintained that E3's daughter (ZA) who was born during the period when the deprivation order affecting E3 was in force, was not a British citizen at birth. The applicants commenced judicial review proceedings challenging the validity of the orders. At first instance and before the Court of Appeal, the deprivation orders were upheld.

**The Court held** (Lord Sales and Lord Stephens, Lord Reed, Lord Hodge and Lord Lloyd-Jones agreeing), unanimously allowing the appeal:

- The effect of the decision by the Secretary of State to withdraw the deprivation orders was the same as if there had been a successful appeal to SIAC: [6].
- The purpose of the relevant statutory provisions is to protect the Secretary and her officials in relation to immigration enforcement measures in the period before the determination of an appeal by SIAC. This purpose allows an interpretation which respects the fundamental right of citizenship and the United Kingdom's international obligations. Once SIAC determines that a deprivation order would render the individual stateless and allows the appeal against the order, then for the purpose of determining the individual's citizenship status in the period from the date of the making of the order until the appeal is allowed the order is to be treated as having no effect. This means that both N3 and E3 were British citizens throughout the relevant period. The consequence of this for ZA was that she was a British citizen by virtue of E3's status as a British citizen at the time of her birth: [89]-[91].