FEDERAL COURT OF AUSTRALIA

 Luck v Secretary of Services Australia [2022] FCAFC 195

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| Appeal from: | *Luck v Secretary of the Department of Human Services (No 4)* [2016] FCA 950 |
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| File number(s): | VID 1044 of 2016 |
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| Judgment of: | **FARRELL, SARAH C DERRINGTON AND RAPER JJ** |
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| Date of judgment: | 5 December 2022 |
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| Catchwords: | **BANKRUPTCY** – Effect of bankruptcy on proceedings –Commencement of appeal by bankrupt before sequestration – Stay of proceedings until election by trustee – Whether proceedings deemed abandoned – Proceedings for judicial review of decision by Administrative Appeals Tribunal relating to documents sought under *Freedom of Information Act 1982* (Cth) – Whether proceedings to vindicate breach of human rights – Whether proceedings in respect of “any personal injury or wrong” within s 60(4) *Bankruptcy Act 1966* (Cth) |
|  |  |
| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth), ss 2A, 27A, 37(1), 44*Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5*Australian Human Rights Commission Act 1986* (Cth), ss 46PO(3A), (4)(d), Pt IIB*Bankruptcy Act 1966* (Cth), ss 60, 116(2)(g) *Disability Discrimination Act 1992* (Cth)*Federal Court Act 1976* (Cth), s 25(2B)*Freedom of Information Act 1982* (Cth), ss 3, 11, 28, 55*Judiciary Act 1903* (Cth), ss 40, 78B*Privacy Act 1988* (Cth), s 36(1), Pts VI, VIB*Convention on the Rights of Persons with Disabilities*. Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2009) *International Covenant on Civil and Political Rights*. Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 |
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| Cases cited: | *Commissioner of Police v Mohamed* [2009] NSWCA 432*Cox v Journeaux* *(No 2)* [1935] HCA 48; 52 CLR 713*Cummings v Claremont Petroleum NL* [1996] HCA 19; 185 CLR 124*Fisher v Transport for NSW* [2016] NSWSC 1888*Fuller v Beach Petroleum NL* [1993] FCA 453; 43 FCR 60*Garrett v Federal Commissioner of Taxation* [2015] FCA 665; 233 FCR 226*In the matter of an application by Gaye Luck for leave to appeal* [2022] HCASL 177*Luck v Chief Executive Officer of Centrelink*[2015] FCAFC 75*Luck v Chief Executive Officer of Centrelink* [2017] FCAFC 92; 251 FCR 295*Luck v Department of Human Services* [2010] AATA 6; 51 AAR 265*Luck v Federal Court of Australia* [2011] HCATrans 290*Luck v Secretary, Department of Human Services* [2014] FCA 344*Luck v Secretary, Department of Human Services (No 2)* [2014] FCA 798*Luck v Secretary, Department of Human Services* [2015] FCAFC 111*Luck v Secretary, Department of Human Services (No 3)* [2016] FCA 100.*Luck v Secretary, Department of Human Services* *(No 4)* [2016] FCA 950; 70 AAR 60*Luck v Secretary, Department of Human Services* *(No 4)* [2019] FCA 2071*University of Southern Queensland v Luck* [2017] FCCA 639*Luck v University of Southern Queensland* [2018] FCAFC 102; 265 FCR 304 *Luck v University of Southern Queensland* [2019] HCASL 20*Moss v Eaglestone* [2011] NSWCA 404; 83 NSWLR 476*Picos v Australian Federal Police* [2015] FCA 118*Primelife Corporation Ltd v Buffalo* [2008] FCA 1742*Re Lofthouse* (In the matter of Guss) [2001] FCA 25; 107 FCR 151*Sheehan v Brett-Young* *& Ors* *(No 3)* [2016] VSC 39 |
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| Division: | General Division |
|  |  |
| Registry: | Victoria |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 73 |
|  |  |
| Date of hearing: | 7 November 2022 |
| Date of last submissions: | 28 November 2022 |
|  |  |
| Counsel for the Applicant: | The applicant appeared in person  |
|  |  |
| Counsel for the First Respondent:  | Ms Z Maud SC |
|  |  |
| Solicitor for the First Respondent: | Australian Government Solicitor |
|  |  |
| Counsel for the Second and Third Respondents: | The second and third respondents filed submitting notices |
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ORDERS

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| --- | --- |
|  | VID 1044 of 2016 |
|   |
| BETWEEN: | GAYE LUCKApplicant |
| AND: | SECRETARY OF SERVICES AUSTRALIAFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond RespondentSTEPHANIE ANN FORGIE (AS DEPUTY PRESIDENT OF THE AAT)Third Respondent |

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| order made by: | FARRELL, SARAH C DERRINGTON AND RAPER JJ |
| DATE OF ORDER: | 5 December 2022 |

THE COURT ORDERS THAT:

1. Pursuant to s 25(2B) of the *Federal Court of Australia Act 1976* (Cth), the appeal be summarily dismissed.

2. The applicant’s interlocutory applications:

a. Lodged 4 November 2022 and filed 7 November 2022

b. Lodged 12 May 2021 and filed 27 May 2021

c. Lodged 9 March 2020 and filed 20 March 2020

d. Lodged 19 December 2019 and filed 20 December 2019

e. Lodged 21 November 2019 and filed 26 November 2019

f. Lodged 21 August 2019 and filed 23 August 2019

g. Made in paragraph 16 of her submissions dated 12 August 2019

h. Lodged 31 July 2019 and filed 9 August 2019

i. Lodged 24 July 2019 and filed 9 August 2019

j. Lodged 5 July 2019 and filed 24 July 2019

k. Lodged 17 May 2019 and filed 20 May 2019

be dismissed.

3. The applicant pay the first respondent’s costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 These proceedings concern interlocutory applications in relation to an appeal filed by Ms Luck with the Full Court of the Federal Court on 2 September 2016. This bench of the Full Court was convened for the purpose of hearing and determining the interlocutory applications.

2 Ms Luck’s appeal is against the decision in *Luck v Secretary, Department of Human Services* *(No 4)* [2016] FCA 950 (***Luck (No 4)* [2016]**). The **primary judge** dismissed an appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) from a decision of the Administrative Appeals **Tribunal** made on 8 January 2010 that the Tribunal lacked jurisdiction to review certain decisions made by the Department of Human Services (**DHS**) (now known as Services Australia) under the *Freedom of Information Act 1982* (Cth) (**FOI Act**): *Luck v Department of Human Services* [2010] AATA 6; 51 AAR 265. The Full Court is yet to hear the appeal against the primary judge’s decision, despite it being filed over 6 years ago.

3 Relevant to the issues before this Court, a sequestration order was made against Ms Luck’s estate on 4 April 2017 by the Federal Circuit Court of Australia (as the Federal Circuit and Family Court of Australia (Div 2) was then known): *University of Southern Queensland v Luck* [2017] FCCA 639. The Full Court dismissed an appeal from that order on 29 June 2018: *Luck v University of Southern Queensland* [2018] FCAFC 102; 265 FCR 304. Ms Luck’s application for special leave to appeal was refused by the **High Court** of Australia on 13 February 2019: *Luck v University of Southern Queensland* [2019] HCASL 20. Ms Luck was discharged from bankruptcy on 20 April 2020.

# BACKGROUND

## Procedural History

4 The procedural history of this matter is complex and spans 13 years in total. Accordingly, it is prudent to deal with the different aspects of the procedural history in turn. Nevertheless, the essence of the proceedings is captured by the primary judge in *Luck (No 4)* [2016] at [5]-[7]:

5 … I am compelled to some observations. This litigation started with Ms Luck’s application to the AAT dated 16 July 2009. More than seven years have since passed. Before the AAT, there was an application for a stay pending determination of an application to the High Court (*Luck v Department of Human Services* (2010) 51 AAR 265; AATA 6). On appeal to this Court, before Tracey J, Ms Luck made an application for recusal (*Luck v Secretary, Department of Human Services* [2014] FCA 344) and for a stay pending the removal of the proceeding to the High Court (*Luck v Secretary, Department of Human Services (No 2)* [2014] FCA 798). Before a Full Court, there was another application for a stay (*Luck v Chief Executive Officer of Centrelink*[2015] FCAFC 75). On remittal to me it has involved applications for recusal and a stay (*Luck* [2016] FCA 100). Before the High Court, at least two of the removal applications have been heard and determined (*Luck v Federal Court of Australia* [2011] HCATrans 290; *Luck v University of Southern Queensland* [2015] HCATrans 125). The proceeding has involved the judgement of Tracey J from which Ms Luck appealed (*Luck*[2014] FCA 798), and the judgment on appeal (*Luck v Secretary, Department of Human Services* (2015) 233 FCR 494). It has now required this judgment.

6 What is striking about the matter is this, which Crennan J noted in the course of *Luck* [2011] HCATrans 290 at [744]–[750: “the matter carried forward into the Federal Court was a decision of the Administrative Appeals Tribunal refusing review of a decision by the Department of Human Services. The decision made by the Department of Human Services was to grant Ms Luck access to documents as requested by her under the *Freedom of Information Act*. *In other words, the decision was in Ms Luck’s favour*” (my emphasis). That is a reference to a decision of a Dr Rumble, to be discussed below, providing to Ms Luck a CD purportedly containing the documents she had requested.

7 Ms Luck does not see it this way. As she said in a letter dated 4 September 2009 to the AAT, “According to my own computer security protocol, I do not open any documents on my computer received from insecure sources and to receive a CD in the circumstances was inappropriate and unwanted, and as such I have no knowledge of its contents.” On one view, the proceeding has lurched along these seven years because Ms Luck was not prepared to insert a CD into her own computer, or (it appears) to insert it into another computer in, say, a public library, with a view to ascertaining whether it contained what she sought. Or, viewed from another perspective, it is because DoHS has not provided the documents on printed paper, or made them available for inspection in an office somewhere.

### Appeal from the Tribunal before Tracey J

5 On 8 January 2010, the Tribunal made the decision referred to above at [2] regarding several Freedom of Information requests made by Ms Luck for documents held by the DHS and Centrelink.

6 Ms Luck appealed the Tribunal’s decision pursuant to s 44 of the AAT Acton 4 February 2010. However, the matter was not heard until 2014 because of significant delays caused by Ms Luck’s applications to the High Court and further applications by her for the appeal to be adjourned pending the outcome of her High Court proceedings.

7 On 4 April 2014, at a case management hearing relating to the appeal of the Tribunal’s decision, before Tracey J, Ms Luck made an application for his Honour’s recusal which was refused: *Luck v Secretary, Department of Human Services* [2014] FCA 344.

8 On 30 July 2014, Tracey J upheld the DHS’s notice of objection to competency and dismissed the appeal: *Luck v Secretary, Department of Human Services (No 2)* [2014] FCA 798. Ms Luck argues “there have been breaches of the separation of powers doctrine by [Tracey J] and others ‘because of the continued failure of the Attorney-General and the Executive Government to properly administer the relevant provisions of human rights legislation’”, at [4]. His Honour observed that this ground “has, at best, a tenuous relationship to the issues arising on the present appeal” noting “she has failed to articulate how such maladministration (if there be any) could provide her with a cause of action in this Court in a proceeding such as the present which arises under the [FOI Act]”, at [6]. His Honour also dismissed Ms Luck’s interlocutory application for a stay of the proceedings pending the outcome of a Full Court appeal by Ms Luck against the University of Southern Queensland.

### Appeal to the Full Court (Collier, Griffiths and Mortimer JJ) from Tracey J’s decision

9 On appeal, a Full Court of this Court composed of Collier, Griffiths and Mortimer JJ refused a further application for a stay (*Luck v Chief Executive Officer of Centrelink*[2015] FCAFC 75) and allowed the appellant’s appeal in part: *Luck v Secretary, Department of Human Services* [2015] FCAFC 111 (***Luck Full Court* [2015]**).

10 As was observed by the Full Court, at [18], shortly after filing her notice of appeal, Ms Luck sought to remove the appeal to the High Court pursuant to s 40 of the ***Judiciary Act*** *1903* (Cth). That application was dismissed by the High Court on 13 November 2011: *Luck v Federal Court of Australia* [2011] HCATrans 290. Ms Luck’s application to the High Court delayed the hearing of the appeal.

11 In allowing the appeal on the question of competency, the Full Court identified the questions of law that had been sufficiently raised by the notice of appeal as being:

1. The nature of the Tribunal’s obligations and powers under ss 29 and 37 of the AAT Act, at [49];

2. The nature of the Tribunal’s jurisdiction under the FOI Act, including its jurisdiction in relation to deemed decisions, at [49]; and

3. Whether Ms Luck had been denied procedural fairness, at [50].

12 Having identified those questions of law, the Full Court remitted the matter for hearing by a single judge of the Federal Court, limited to the following three questions, as numbered in the notice of appeal dated 4 February 2010:

o.Whether the Tribunal was required to give notice to the respondent under s 29, of the *Administrative Appeals Tribunal* Act 1975, as the decision maker of the decision that was the subject of the applicant’s valid application, to furnish to the applicant the documents pursuant to section 37 of that Act, upon lodgement and filing of the application documents and properly constituting the Tribunal?

u. Whether the Administrative Appeals Tribunal had jurisdiction to review the respondent’s decisions made and deemed made in response to the requests made by the applicant pursuant to *section* *15* and *25* of the *Freedom of Information Act 1982 (Cth)* on 20 January 2009, 9 February 2009, 16 February 2009, 10 March 2009 and 23 March 2009 and a formal request for an internal review made on 24 March 2009 and a decision as identified on the valid Application Form lodged with the Tribunal on 16 July 2009, and a decision as identified on the application form, as being made on or about 22 May 2009, and in respect of further and better particulars for clarification of the matter, provided by the applicant in correspondences to the AAT and the respondent on 4 September 2009, 18 September 2009, 21 October 2009, 22 October 2009, 23 October 2009, 16 November 2009, prior to the decisions made by the Deputy President and the Tribunal; those abovementioned requests were for access to the following documents at an Information Access Office at the nearest possible location to the Applicant’s home address – Documents as defined by Section 4 document (a–e) of Act caused to be published in accordance with Section 9(1)(a–d), (2), (3), (4), (5), (6), (7), (8) and (9) pertaining to the use of, or which are used by, Centrelink and the Department of Human Services and their officers in making decision or recommendations, under or for the purposes of the enactments the Social Security Law *(including all legislation and amendments from 1998 to this date in 2009), Commonwealth Services Delivery Agency Act 1997 (Cth), Public Service Act 1999 (Cth), Public Order (Protection of Persons and Property) Act 1971 (Cth), Data-matching Program (Assistance and Tax) Act 1990, Higher Education Funding Act 1988 (Cth) (Additional Funding for Disabled Students Programme), the Disability Discrimination Act 1992 and the Disability Services Act 1986 (Cth), University of Southern Queensland Act 1998, Monash University Act 1958, Deakin University Act 1974 (Vic), Austudy and related schemes administered by Centrelink and Department of Human Services, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to which the applicant is or may be entitled or subject –*as per particulars provided on the completed and signed *Administrative Appeals Tribunal Application for Review of Decision* form and attached documents, filed by the Applicant by Facsimile on 16 July 2009 in the Victorian District Registry at Melbourne.

aa. Whether the applicant was subject to disability discrimination by the Tribunal and the Deputy President in relation to the refusal of the Deputy President to refuse the applicant’s rights to the grant of extensions of time and adjournments of hearings as reasonable adjustments in accordance with the provisions of the *Disability Discrimination Act 1992* and the *Articles of the* *United Nations Convention on the Rights of Persons with Disabilities*, the *Australian Human Rights Commission Act 1986*, the *Covenants* and *Treaties* scheduled thereto, and the *International Covenant on Civil and Political Rights*?

13 Neither of those questions left open the question of breach of the separation of powers nor of maladministration of human rights legislation by the Executive. Indeed, the Full Court said, at [58]:

The only questions of law to be remitted are questions of law “o”, “u” and “aa”. Those are the matters which should now be determined, against a proper evidentiary base of what occurred in the Tribunal. That limited remitter should not be seen as precluding Ms Luck from seeking leave to amend the questions after consideration of these reasons.

14 No such leave was sought.

15 The matter was listed before the primary judge. On 23 October 2015, Ms Luck made an application for the primary judge’s recusal, which was heard on 29 October 2015, and refused on 16 February 2016: *Luck v Secretary, Department of Human Services (No 3)* [2016] FCA 100.

16 On 15 August 2016, the primary judge dismissed the appeal from the Tribunal’s decision, finding against Ms Luck in respect of the three grounds above: *Luck (No 4)* [2016]. His Honour’s reasons are discussed below at [63]-[66].

### Current appeal to the Full Court and case management by Anderson J

17 Ms Luck filed a notice of appeal from the decision in *Luck (No 4)* [2016] on 2 September 2016 and, on 22 September 2016, a notice of a constitutional matter under s 78B of the *Judiciary Act*. By that notice of a constitutional matter, Ms Luck also made application for removal of part of an appeal cause from the Full Court to the High Court. None of the State or Territory Attorneys-General sought to intervene.

18 In respect of Ms Luck’s notice of appeal, filed 2 September 2016, from the primary judgment in *Luck No 4* [2016], the Full Court was originally constituted as Justices Kerr, Moshinsky and O’Callaghan.

19 The matter was referred to Anderson J in October 2019 for determination of certain interlocutory matters and for case management, prior to a Full Court hearing.

20 Justice Anderson conducted a case management hearing on 6 December 2019 and asked the parties to consider the best way to manage all extant interlocutory applications so that the matter could proceed.

21 During the case management hearing on 6 December 2019, Ms Luck indicated that she wished the matter to be heard by a Full Court and made an oral application for Anderson J to recuse himself, which his Honour refused (*Luck v Secretary, Department of Human Services* *(No 4)* [2019] FCA 2071 (***Luck (No 4)* [2019]**)).

22 As explained by his Honour in *Luck (No 4)* [2019] as to the state of affairs at that point in the proceedings at [3]-[7]:

3. The appeal to the Full Court was commenced by Ms Luck on 3 September 2016. However, as at the date of the publication of these reasons, 9 December 2019, the Full Court is yet to hear the appeal. Thus far, 11 interlocutory applications have formally been filed in the proceeding, ten of which were filed by Ms Luck.

4. There have been three interlocutory decisions of the Court to date in the proceeding. These decisions involved the dismissal of applications by Ms Luck for certain judges to recuse themselves from sitting on the Full Court to hear her appeal:

(a) on 18 May 2017, by Kerr J: *Luck v Secretary, Department of Human Services*[2017] FCA 540 (Kerr Recusal Decision);

(b) on 18 August 2019, by Snaden J: *Luck v Secretary, Department of Human Services (No 2)*[2019] FCA 1290 (Snaden Recusal Decision); and

(c) on 18 August 2019, by O’Callaghan J: *Luck v Secretary, Department of Human Services (No 3)*[2019] FCA 1335 (O’Callaghan Recusal Decision).

**Outstanding interlocutory applications**

5 My immediate role in this proceeding is to case manage, and, where appropriate, determine, the eight interlocutory applications outstanding in the proceeding. Seven of the outstanding interlocutory applications were made by Ms Luck. They comprise the following:

(1) interlocutory application dated 15 May 2019, which seeks orders granting:

(a) leave to appeal the Kerr Recusal Decision; and

(b) an extension of time to comply with procedural orders (for the filing of submissions and a list of authorities and legislation) made by Moshinsky J on 19 May 2017;

(2) interlocutory application dated 5 July 2019, which seeks an order amending the orders of Moshinsky J made on 25 June 2019 such that the Full Court would hear Ms Luck’s application for leave to appeal the Kerr Recusal Decision;

(3) interlocutory application dated 24 July 2019, which seeks an order, amongst others, that the Commonwealth Attorney-General be joined to the proceeding;

(4) interlocutory application dated 1 August 2019, which seeks an order that the Commonwealth of Australia be joined to the proceeding;

(5) application to amend Ms Luck’s notice of appeal, as identified in paragraph 16 of Ms Luck’s written submissions dated 12 August 2019;

(6) interlocutory application dated 21 August 2019, which seeks a declaration that Ms Luck has been denied natural justice and orders granting:

(a) leave to appeal the O’Callaghan Recusal Decision;

(b) leave to appeal the Snaden Recusal Decision;

(c) the joinder of the Principal Registrar of the Federal Court to the proceeding;

(d) the joinder of the Chief Executive Officer of the Federal Court to the proceeding; and

(7) interlocutory application dated 21 November 2019, which seeks orders that:

(a) the Full Court hear and determine:

(i) each of the applications set out above; and

(ii) an application by Ms Luck for a declaration that her appeal was commenced by her in relation to “a personal injury or wrong” done to her for the purposes of s 60(4)(a) of the Bankruptcy Act 1966 (Cth); and

(b) my recusal from this proceeding should I not determine her interlocutory application dated 21 November 2019 without taking further submissions from the parties.

6 On 4 December 2019, the first respondent, the Secretary of the Department of Human Services (Secretary), lodged her own interlocutory application. It relevantly seeks the dismissal of Ms Luck’s appeal from the decision of Bromberg J on the basis of a want of prosecution or, alternatively, on a summary basis.

7 A case management hearing was listed on 6 December 2019 for the parties to address me on procedural orders in advance of the consideration and determination of these interlocutory applications. In advance of the hearing, Ms Luck provided to the Court a minute of proposed orders in which she sought an order from me that the Full Court itself hear the interlocutory applications made by her in the proceeding. The Secretary had also provided a minute of proposed orders in which she proposed certain procedural orders in relation to the hearing of outstanding interlocutory applications by a single judge of the Court.

23 Following the case management hearing on 6 December 2019, Anderson J made orders listing all extant interlocutory applications for hearing by his Honour on 6 April 2020.

24 Ms Luck then filed an application on 19 December 2019 seeking leave to appeal Anderson J’s decision not to recuse himself and seeking Moshinsky J’s recusal. She also requested in written correspondence to the Court that the hearing scheduled for 6 April 2020 be vacated and all matters be heard by a Full Court.

25 Ms Luck lodged a further interlocutory application on 9 March 2020 (signed 10 March 2020) seeking that the 6 April 2020 hearing date be vacated, and the proceedings be stayed pending the hearing and determination of Ms Luck’s application for leave to appeal in the High Court.

26 In March 2020, Anderson J recommended that the proceedings be dealt with by a Full Court.

27 Ms Luck lodged a further interlocutory application on 12 May 2021 to the same effect as the 9 March 2020 interlocutory application.

28 Since then, the matter has been status checked on occasion for listing in a Full Court sitting period, but it has not been possible to list it until November 2022 before us.

29 At the conclusion of the hearing before us, Ms Luck was given leave to file supplementary submissions, which she did on 28 November 2022. To the extent that those submissions raised, for the first time, allegations against the DHS of misfeasance in public office and contempt of court, they have been disregarded.

### Application to the High Court – “special case questions”

30 Ms Luck brought an application in the High Court (*In the matter of an application by Gaye Luck for leave to appeal* [2022] HCASL 177) seeking the resolution of what she described as the “special case questions” and the issue of the constitutional writs to prevent a single judge of the Federal Court from determining and summarily dismissing the appeal. Ms Luck’s submissions related to the hearing before us on 7 November 2022 state that the “special case questions” were formulated as follows:

(a) Whether a justice or justices, as appointed by the Governor General of Australia in accordance with *Chapter III of the Constitution,* would, whilst exercising the judicial power of the Commonwealth, as vested in the High Court of Australia and the federal courts created by Parliament, and such other courts as it invests with federal jurisdiction, breach the doctrine of the separation of powers, when appropriately constituted to hear and determine a proceeding, properly instituted by a party in a court so vested with Commonwealth judicial power, by making an assessment of the party’s disabilities and a subsequent decision to refuse or grant a request from that party to the proceeding, for ‘*reasonable adjustments’* sought in relation to the party’s involvement in the administration and process of that proceeding, based on the party’s disability needs, pursuant to the party’s rights under the *Disability Discrimination Act 1992 (Cth),* an Act administered by the Executive Government, the Attorney General of the Commonwealth, and which incorporates the *Articles of the Australian Treaty*, the *Convention on the Rights of Persons with Disabilities (New York, 30 March 2007) - [2008] ATS 12?*

(b) If the answer is *‘no’*, whether a ‘hypothetical *bystander’* might apprehend bias on the part of the justice or justices, whilst the justice or justices exercised an executive power simultaneously with the exercise of judicial power, by making a decision in respect of the administrative conduct of the proceeding for which the party to the proceeding had requested of the appropriate officer of the Executive Government, that certain reasonable adjustments be granted pursuant to the party’s rights under the *Disability Discrimination Act 1992 (Cth)* and the *Articles of the Australian Treaty*, the *Convention on the Rights of Persons with Disabilities (New York, 30 March 2007) - [2008] ATS 12?*

(c) If the answer is ‘no’ whether the concept of judicial immunity applies to the justice or justices whilst exercising the power under a Commonwealth law or for the purposes of a Commonwealth program or has any other responsibility for the administration of a Commonwealth law or for the purposes of a Commonwealth program, contrary to the express proscription in *section 29* of the *Disability Discrimination Act 1992 (Cth)*.

31 Justice Bell dismissed Ms Luck’s application on 4 August 2020. Ms Luck sought leave to appeal. On 13 October 2022, Justices Keane and Gordon refused Ms Luck’s application (*In the matter of an application by Gaye Luck for leave to appeal* [2022] HCASL 177) stating at [1]:

On 4 August 2020, Bell J refused the applicant’s ex parte application for leave to issue or file a proposed writ of summons in M19 of 2020 on the grounds that the applicant appeared to be seeking to challenge decisions of the Federal Court of Australia and that to permit the applicant to prosecute the proceeding would be to permit her to bypass the ordinary mechanisms of appeal and potentially avoid the restrictions imposed by statute on appeals to this Court from certain decisions of the Federal Court; the particulars given of the proposed claims were incoherent; no arguable basis was disclosed for any of the relief sought and it would be an abuse of the process of the Court if the matter were permitted to proceed. An appeal to this Court would enjoy no prospect of success. Leave to appeal should be refused.

# APPLICATIONS FOR DETERMINATION

32 This Court is now asked to determine 12 interlocutory applications,. The most recent application is that lodged by Ms Luck on 4 November 2022 seeking directions in relation to the “special case questions” and summary dismissal of the DHS’s application filed on 5 December 2019 to dismiss Ms Luck’s appeal for want of prosecution, or alternatively, summarily.

33 In the Federal Court’s appellate jurisdiction, s 25(2B) of the *Federal Court Act 1976* (Cth) **(FCA Act)** provides for a single Judge or a Full Court to order summary judgment or dismiss an appeal for want of prosecution:

**25 Exercise of appellate jurisdiction**

…

(2B) A single Judge (sitting in Chambers or in open court) or a Full Court may:

…

(aa) give summary judgment;

…

(ba) make an order that an appeal to the Court be dismissed for want of prosecution.

34 The remaining 10 applications of Ms Luck can be grouped and summarised as relating to the following issues:

(1) the consequences of s 60 of the *Bankruptcy Act* 1966 (Cth) for the continuation of the appeal;

(2) the resolution of the “special case questions” raised by Ms Luck;

(3) the resolution of the applications for leave to appeal the decisions of Kerr, O’Callaghan, Snaden and Moshinsky JJ not to recuse themselves; and

(4) the joinder of the Chief Executive Officer of the Federal Court of Australia, the Principal Registrar of the Federal Court of Australia, the Attorney-General of Australia and the Commonwealth of Australia.

35 It is convenient to deal first with the applications relating to the operation of s 60. Resolution of that application will have consequences for the remaining applications.

## The consequences of s 60 of the *Bankruptcy Act*

36 Section 60 provides:

**60**  **Stay of legal proceedings**

(1) The Court may, at any time after the presentation of a petition, upon such terms and conditions as it thinks fit:

(a) discharge an order made, whether before or after the commencement of this subsection, against the person or property of the debtor under any law relating to the imprisonment of fraudulent debtors and, in a case where the debtor is imprisoned or otherwise held in custody under such a law, discharge the debtor out of custody; or

(b) stay any legal process, whether civil or criminal and whether instituted before or after the commencement of this subsection, against the person or property of the debtor:

(i) in respect of the non‑payment of a provable debt or of a pecuniary penalty payable in consequence of the non‑payment of a provable debt; or

(ii) in consequence of his or her refusal or failure to comply with an order of a court, whether made in civil or criminal proceedings, for the payment of a provable debt;

and, in a case where the debtor is imprisoned or otherwise held in custody in consequence of the non‑payment of a provable debt or of a pecuniary penalty referred to in subparagraph (i) or in consequence of his or her refusal or failure to comply with an order referred to in subparagraph (ii), discharge the debtor out of custody.

(2) An action commenced by a person who subsequently becomes a bankrupt is, upon his or her becoming a bankrupt, stayed until the trustee makes election, in writing, to prosecute or discontinue the action.

(3) If the trustee does not make such an election within 28 days after notice of the action is served upon him or her by a defendant or other party to the action, he or she shall be deemed to have abandoned the action.

(4) Notwithstanding anything contained in this section, a bankrupt may continue, in his or her own name, an action commenced by him or her before he or she became a bankrupt in respect of:

(a) any personal injury or wrong done to the bankrupt, his or her spouse or de facto partner or a member of his or her family; or

(b) the death of his or her spouse or de facto partner or of a member of his or her family.

Note:    See also subsection 5(6).

(4A) Notwithstanding paragraph (1)(b), this section does not empower the Court to stay any proceedings under a proceeds of crime law.

(5) In this section, ***action*** means any civil proceeding, whether at law or in equity.

37 Section 60 concerns the effect of bankruptcy on property and proceedings. It provides for circumstances where the court may intervene and discharge an order (s 60(1)(a)) and stay any legal process (s 60(1)(b)) including until a trustee makes an election (s 60(2)). In addition, s 60(3) deems proceedings to have been abandoned where the trustee does not make an election to proceed within 28 days after notice of the action is served on him or her. The DHS contends that this is the circumstance here. Ms Luck claims, to the contrary, that her proceedings are caught by the exception under s 60(4) such that there can be no deemed abandonment arising from the inaction of the trustee.

38 The parties agree that an appeal is within the meaning of “action” in s 60(5): ***Cummings*** *v Claremont Petroleum NL* (1996) 185 CLR 124 at 130 per Brennan CJ, Gaudron and McHugh JJ.

39 It is uncontentious that Ms Luck was the subject of a sequestration order on 4 April 2017 by the Federal Circuit Court of Australia. Ms Luck was unsuccessful on appeal in relation to the sequestration order before the Full Court (*Luck v University of Southern Queensland* [2018] FCAFC 102) and was refused special leave to appeal to the High Court (*Luck v University of Southern Queensland* [2019] HCASL 20). As a result, on or about 5 June 2019, the DHS served notice of the appeal in this case on the **Official Trustee** in Bankruptcy, the trustee of Ms Luck’s bankrupt estate.

40 Although Ms Luck’s present appeal proceedings predated her bankruptcy, the Official Trustee did not elect to prosecute or discontinue Ms Luck’s appeal. Accordingly, the DHS submits that the trustee is deemed by s 60(3) to have abandoned the proceeding and, on the basis of abandonment, the appeal should be dismissed, or alternatively summarily dismissed.

41 The DHS submits that the deemed abandonment which occurs by force of s 60(3) “destroys the trustee’s right to pursue the action” even though the underlying cause of action is not necessarily extinguished. Subject then to the operation of s 60(4), Ms Luck has no standing to prosecute an appeal in her name: *Cummings* at 137-138.

42 The purpose of s 60(4) is to be gleaned from its words (and that of its cognate provision under s 116(2)(g)), as recognised by Allsop P, as the Chief Justice then was, in ***Moss*** *v Eaglestone* [2011] NSWCA 404; 83 NSWLR 476at [64], namely that the distinction in s 60(4) and s 116(2)(g) between person and property is a substantive one:

… It was a distinction made by courts and judges of the highest authority who declared it to be unjust and harsh that the estate of the bankrupt and the participating creditors should be swelled and advantaged by a wrong to the person or reputation of the bankrupt.

43 Section 116(2)(g)(i) excludes, from the property which is divisible among creditors, “any right of the bankrupt to recover damages or compensation … for personal injury or wrong done to the bankrupt”. It therefore picks up the same language as in s 60(4).

44 The purpose of s 60 was canvassed by Gray J in *Re Lofthouse* (In the matter of Guss) [2001] FCA 25; 107 FCR 151 at [18]-[20]:

18 Section 60 is an adjunct to the scheme of the Act whereby the property of a bankrupt passes to the bankrupt’s trustee consequent upon a sequestration order. By s 58 of the Act, the property of a bankrupt vests forthwith in the Official Trustee or a trustee in bankruptcy when a debtor becomes a bankrupt. That section has the effect of vesting in the trustee in bankruptcy all rights of action in pending proceedings commenced by the bankrupt. Even if it be the case that property of which a bankrupt is a bare trustee for someone else does not pass to the trustee in bankruptcy (because such property is not available for distribution to the bankrupt's creditors), it does not follow that s 60 must be construed as excluding proceedings brought by the bankrupt as trustee.

19 Section 60 is not the provision that vests the right of action in the trustee in bankruptcy. It has a different, and in some respects wider, role. It operates to stay pending proceedings unless the trustee elects to prosecute or discontinue them. It also provides the machinery for a defendant or other party to a pending proceeding to force the making of an election. It is directed towards the protection of the bankrupt's creditors, by preventing the unnecessary dissipation of the assets of the estate in fruitless litigation. *In my view, s 60 also has the purpose of protecting a defendant or other party to a pending proceeding. A defendant or other party to a pending proceeding suffers an immediate detriment upon the plaintiff becoming a bankrupt. The detriment is that if the defendant or other party should be successful in the proceeding, and should obtain an order that the plaintiff pay the costs of the proceeding, the order will be effectively unenforceable because of the bankruptcy.* The rationale behind s 60(2) and (3) is therefore, at least in part, to protect those whom the bankrupt has been suing. Such protection would be lost if the word “action” in s 60 were to be construed as excluding a proceeding in which the bankrupt has sued as a trustee for someone else.

20 In my view, s 60 has been enacted deliberately as a broad provision, so as to encompass any proceeding brought by a bankrupt before bankruptcy. The exceptions have been expressed quite narrowly. *The intention is that, once a bankruptcy occurs, no further costs should be incurred in a proceeding unless the trustee in bankruptcy makes an election to continue the proceeding.* If such an election is made, the trustee in bankruptcy will ordinarily become substituted as plaintiff in the pending proceeding, in the capacity of trustee in bankruptcy for the former plaintiff. The trustee in bankruptcy will thereby become liable for the costs of the proceeding in the event that it is unsuccessful and a costs order is made in favour of the defendant in the proceeding or some other party to it. The trustee in bankruptcy may be entitled to an indemnity in respect of those costs out of the bankrupt estate, as expenses of the administration of the estate, to the extent to which the estate has assets. The trustee in bankruptcy will obviously consider whether continuing to prosecute the proceeding will be likely to have any benefit to the estate of the bankrupt, and therefore to the bankrupt's creditors. One of the elements that the trustee in bankruptcy will take into account is whether the bankrupt is suing in a personal capacity or some other capacity, particularly that of trustee for someone else. If the bankrupt has sued as trustee for another person, and the estate will not benefit, the trustee in bankruptcy would no doubt usually elect not to continue to prosecute the proceeding. This would protect any defendant, and perhaps other parties to the proceeding, with respect to costs. Of course, it may impact on the beneficiary of the trust of which the bankrupt claims to be trustee. The beneficiary may be forced to institute proceedings in his or her own right to enforce the trustee’s legal right, as can be done where there are “exceptional circumstances”. See *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432.

 (Emphasis added)

45 Consequently, in circumstances such as the present, where the appeal was commenced by Ms Luck before the date of the sequestration order, the appeal cannot now be revived by Ms Luck in her name given the operation of s 60(3). In *Primelife Corporation Ltd v Buffalo* [2008] FCA 1742, Jessup J referred to the judgment of the Full Court in *Fuller v Beach Petroleum NL* [1993] FCA 453; 43 FCR 60 and said, at [35]:

… I read this passage as recognising that it is a policy of s 60 that a respondent to a proceeding previously commenced by a bankrupt should not be subjected to the risk of sustaining further costs in that proceeding. It follows, in my view, that the abandonment of such a proceeding under subs (3) should, as a matter of law, be regarded as bringing it to an end finally, without any prospect of revival. If it were possible, notwithstanding such an abandonment, for the trustee of a bankrupt estate (or the bankrupt himself or herself after discharge) to apply for the reinstatement of the proceeding, the respondent could never confidently close the file, as it were.

46 Similarly, in ***Garrett*** *v Federal Commissioner of Taxation* [2015] FCA 665; 233 FCR 226 at [35], Kenny J drew attention to the purpose of s 60(2), which the DHS submitted assists one’s interpretation of s 60(4), namely its intention is to protect a successful respondent from losing the practical opportunity to recover costs:

Whilst *Lofthouse*[107 FCR 151](https://jade.io/citation/2363744) and [*Duckworth*](https://jade.io/article/260718) 261 FLR 185 did not specifically deal with the issue arising in this case, they nonetheless provide firm support for the propositions referred to at [[27]](https://jade.io/article/260718/section/140176) above: namely, that s [60(2)](https://jade.io/article/218327/section/3261) is intended to protect a successful respondent from losing the practical opportunity to recover costs and applies to any action instituted by the bankrupt before bankruptcy, irrespective of whether there is a connection between the action and the bankrupt estate beyond the fact that the bankrupt had commenced the action before becoming a bankrupt. [*Re Lofthouse*](https://jade.io/citation/17877876)107 FCR 151 and [*Duckworth*](https://jade.io/article/260718) 261 FLR 185 do not support the supposed implied limitation on pre-bankruptcy actions begun by the bankrupt that are subject to s [60(2)](https://jade.io/article/218327/section/3261). The interpretation of s [60(2)](https://jade.io/article/218327/section/3261) in [*Re Lofthouse*](https://jade.io/citation/17877876)107 FCR 151 and [*Duckworth*](https://jade.io/article/260718) 261 FLR 185 should be applied in deciding whether that provision should be construed to apply to Mr Garrett’s application for leave to institute an appeal under s [37AR](https://jade.io/article/218757/section/294473) of the [Federal Court Act](https://jade.io/article/218757).

47 Accordingly, this application depends upon the characterisation of Ms Luck’s substantive claim, namely whether it can be characterised as one “in respect of any personal injury or wrong done to the bankrupt”: s 60(4).

48 Proceedings that have been held to be “in respect of any personal injury or wrong done to the bankrupt” include:

(a) ***Moss***, in which an action for professional negligence against a solicitor in relation to a failure to plead a case of defamation in earlier litigation was excluded from s 60(2) by the operation of s 60(4). Allsop P reviewed the legislative history and authorities relating to s 60(4), and concluded that it reflects a distinction of long standing between actions relating to rights to the person and rights concerning property. Only if the personal hurt or wrong is inseverable from a claim relating to property will it fall outside the scope of s 60(4);

(b) *Sheehan v Brett-Young* *& Ors (No 3)* [2016] VSC 39, where the Supreme Court of Victoria held that claims based on malicious prosecution and misfeasance in public office against the applicant were excluded from the operation of s 60(2) by s 60(4); and

(c) ***Fisher*** *v Transport for NSW* [2016] NSWSC 1888, where the Supreme Court of NSW concluded that an appeal on a question of law from an administrative tribunal was a proceeding in respect of a wrong done to a bankrupt under s 60(4), where the tribunal had affirmed a decision to cancel a licence on the ground that the applicant was not a fit and proper person on the basis of their character and behaviour. Justice McCallum reasoned, at [37]:

If this was an action for damages for defamation arising from the publication of an imputation that Mr Fisher is not a fit and proper person to engage in his chosen occupation of a bus driver, the decision in *Moss v Eaglestone* would hold that the action fell within the exception in s 60(4) … It seems to me that, for coherence, the law should similarly regard an action seeking to impugn an administrative finding that Mr Fisher is not a fit and proper person to engage in the occupation of a bus driver to be an action “in respect of” a personal injury or wrong.

49 These authorities reveal that the exception applies to that narrow class of action where it relates to the “personal” – the injury is one to the person, their character, or feelings.

50 One helpful, pithy way in which Ms Luck described her action, was as follows:

If the cause of action in this case is examined, that being the reason why I was seeking to access, under FOI, documents in the possession of the first respondents, both personal and other documents related to my rights and obligations which directly relate to my eligibility for, and responsibilities in regard to the receipt of Social Security benefits and my entitlement to the services offered by the Respondent and its agencies. and it is necessary to refer back to the causes in my cases Luck v CEO Centrelink & Anor VID488/2008 and Luck v University of Southern Queensland VID476/2008, whereby exchanges of communications between the respondents in both cases, in relation to my enrolment in courses, units and programs at the University, involved serious errors and misrepresentations, including in relation to the obligations of the University and Centrelink in respect of the Data-matching Program (Assistance and Tax) Act 1990 which caused me to be denied certain benefits by Centrelink and resulting in suspension of me from the courses, units and programs of the University. I sought FOI documents relating to my personal documents and to other documents, from which I stated clearly in my FOI request dated 20 January 2009 (typo error with date 20 January 2008) filed with my Application to the AAT on 16 July 2009

51 Ms Luck contends her proceedings comprise an action in respect of “[a] personal injury or wrong done” to her which she asserts constitutes a denial of “her personal and human rights” not related to her property rights, given:

(a) her “Review Rights” under s 27A of the AAT Act, include an implied right under s 2A of that Act – that the Tribunal would act, amongst other things, in a “fair, just” way in carrying out its functions;

(b) her “Review Rights” include a “right to access information” under ss 3 and 11 of the FOI Act;

(c) her “Review Rights” constitute “human rights” as recognised under the *Australian Human Rights Commission Act 1986* (Cth) and constitute rights recognised under the *Disability Discrimination Act 1992* (Cth) (**DDA**)*,* by reason of the objects of the DDA, including with particular emphasis to the elimination, as far as possible, discrimination against persons on the grounds of disability in a number of areas, including “existing laws” and “the administration of Commonwealth laws and programs: and “ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community and promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community;

(d) her “Review Rights” are consistent with rights recognised under the ***Convention*** *on the Rights of Persons with Disabilities*. Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2009)as contained in Articles 1 (Purpose), 2 (Definitions), 4 (General Obligations), 5 (Equality and non-discrimination), 12 (Equal recognition before the Law), 13 (Access to justice), 20 (Personal mobility), 21 (Freedom of expression and opinion, and access to information) and 22 (Respect for privacy).

52 Ms Luck catalogued 30 personal injuries and wrongs done to her “causing pain felt by [her] in respect of her mind, body and character” being the manner in which “damages or part of them are to be estimated” when a proceeding is for “any personal injury or wrong”. In obiter dicta in *Cox v Journeaux* *(No 2)* [1935] HCA 48; (1935) 52 CLR 713 at 721, Dixon J observed that this formulation, as articulated by Ms Luck, “appears” to be the test. The test will however only be enlivened if there is “injury which remains actionable at the suit of the bankrupt”

53 Quite understandably, Ms Luck submits that the wrongs done to her are intensely personal because they arise out of her request for personal information and her subsequent requests for reasonable adjustments on account of her disability.

54 The wrongs may be summarised as follows:

(a) the DHS:

(i) breached its obligations under the FOI Act and the *Convention* by misleading and deceiving Ms Luck into believing she would be granted access to the information she sought;

(ii) failed to give her access to her requests which included inspection of the information at an authorised Information Access Office, pursuant to s 28 of the FOI Act;

(iii) failed to comply with s 37(1) of the AAT Act;

(iv) misled and deceived the Tribunal and the Deputy President by informing them at the hearing on 23 October 2009 that it had no more relevant documents than those attached to Ms Luck’s application for review;

(v) provided communications and documents sent between the DHS, the Tribunal, and the Deputy President (between 23 October 2009 and 7 January 2010), including a transcript of the hearing held on 23 October 2009;

(vi) notifying Ms Luck, on or about 8 January 2010, of the orders of the Tribunal and the Deputy President relating to its jurisdiction and that the DHS was not obliged to comply with s 37 of the AAT Act; and

(vii) providing the reasons of the Tribunal and the Deputy President dated 8 January 2020, which are alleged to breach her rights to privacy in respect of her medical conditions, and publishing them on the internet,

(b) the Tribunal:

(i) required her to pay an application fee if she did not provide her health care card;

(ii) failed to enforce the law such that she did not receive the “T” documents (or s 37 documents)

(c) the DHS, the Tribunal, and the Deputy President of the AAT produced correspondence (between 23 July 2009 and 23 October 2009) in relation to the DHS’ assumption of its power to determine the jurisdiction of the Tribunal and the Deputy President and notifying her of such;

(d) the Tribunal and the Deputy President of the AAT:

(i) listed a jurisdictional hearing for 23 October 2009 rather than the substantive application for review and conducting that hearing in the absence of Ms Luck; and

(ii) refused to grant Ms Luck a reasonable adjustment by way of an adjournment of the hearing on 23 October 2009.

55 This summary reveals the difficulty Ms Luck faces in establishing that the pain felt by her in respect of her mind, body and character caused by the alleged wrongs is actionable.

56 The international human rights obligations under the international human rights treaties to which Ms Luck referred in her submissions, being the *Convention* and the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (***ICCPR***), are only partially incorporated into Commonwealth domestic legislation. The scope of rights given protection by statute is narrower than that protected by international human rights law. Furthermore, there is no right of direct access to a court or tribunal to enforce compliance with human rights obligations, nor to prosecute for breach. Neither the DDA, the *Australian Human Rights Commission Act 1996* (Cth) (**AHRC Act**), nor the***Privacy Act*** *1988* (Cth) create private causes of action. The *Privacy Act* enables an individual to complain about an act or practice that may be an interference with the privacy of the individual (s 36(1)) but the relief available under the Act is limited to public interest declarations (Part VI) and the imposition of civil penalties (Part VIB) or criminal sanctions. Part IIB of the AHRC Act governs claims for redress under the DDA. Proceedings may only be instituted in this Court for relief arising from a claim under the DDA, where a complaint has been lodged with the Australian Human Rights Commission (**AHRC**) and that complaint has been terminated by the President or her delegate: AHRC Act s 46PO (3A); *Picos v Australian Federal Police* [2015] FCA 118 at [36]-[40]. If a complaint is not resolved by the AHRC during a conciliation process or is terminated on a basis which allows it to proceed, only then may enforcement proceedings be commenced in the Federal Court of Australia or the Federal Circuit and Family Court of Australia. Section 46PO(4)(d) of the AHRC Act provides that a court may make an order requiring a respondent to pay damages by way of compensation for any loss or damage suffered because of unlawful discrimination by the respondent.

57 The statutory wrongs created by Commonwealth anti-discrimination are *sui generis*; they are not the same as torts. In *Commissioner of Police v Mohamed* [2009] NSWCA 432 at [47]-[48], Baston JA said:

47 [t]he submission that a complaint under the *Anti-Discrimination Act* gives rise to an action in tort is of limited assistance. In *Australian Postal Commission v Dao* (1985) 3 NSWLR 565 at 604-605 McHugh JA described an action under the *Anti-Discrimination Act* as “an action in tort”, but in a context in which he was considering the operation of s 64 of the *Judiciary Act 1903* (Cth) in rendering a Commonwealth authority liable to suit under the *Anti-Discrimination Act.* That description, as noted by Spigelman CJ in Russell, was adopted from the judgment of Lee J in *Allders International Pty Ltd v Anstee* *(1986) 5 NSWLR 47* at 65: see *Russell* at [55]. In considering the application of the *Law Reform (Vicarious Liability) Act 1983* (NSW) to a cause of action under the *Anti-Discrimination Act*, the Chief Justice said “it is not accurate to describe proceedings by way of complaint before a tribunal as a ‘right of action’”: at [71]. Rather, his Honour preferred the reasoning of Menhennitt J in *Philip Morris Ltd v Ainley & Inc Nominal Defendant* [[1975] VR 345](http://classic.austlii.edu.au/cgi-bin/LawCite?cit=%5b1975%5d%20VR%20345?stem=0&synonyms=0&query=title(Commissioner%20of%20Police%20near%20Mohamed)) at 349 that “an action of tort is one in which the remedy is a common law cause of action although the right being enforced in the action may be a right created by either the common law or statute: at [72].

48 However one characterises the cause of action under the *Anti-Discrimination Act*, it does not involve the creation of a general law duty of care, of the kind discussed in *Hill*, *Tame* and *Sullivan*. Nor does it give rise to the kind of policy questions which affect the scope of such a duty. Rather, its scope is to be identified as a matter of statutory interpretation. If the Parliament seeks to subject the Police Force to statutory prohibitions, with civil remedies for breach, the courts must apply the statute, which is not in any sense contingent upon the existence of a general law duty of care, nor on matters of legal principle which underlie the existence or absence of such a duty. Accordingly, submissions based on these authorities should be rejected.

58 Ms Luck frankly informed the Court that she has never brought any complaint before the AHRC with respect to any of the purported “treatment” she has received. Any opportunity that she may have had to pursue such a complaint has long since passed. It cannot be accepted that Ms Luck’s action is one under the Australian human rights legislation. Ms Luck is precluded from bringing any claim under the DDA in this Court without first having made a complaint to the AHRC and that complaint being terminated by the President or her delegate of the AHRC: s 46PO of the AHRC Act.

59 Further, at no stage of the proceedings has Ms Luck sought to frame her cause of action as one for damages. During the hearing, Ms Luck informed the Court candidly that she made no claim for damages as part of her initial claim to the Tribunal. Rather, she described her underlying claim as being one for “documents”, not damages. Unlike the circumstances in *Fisher*, and as submitted by the DHS, nothing done by any of the respondents in relation to her application for production of documents impugned her character such that her claim became analogous with one for defamation. Further, as the DHS contended there was no evidence that the purpose of Ms Luck’s request related to employment or income. Her request was for what might be described in broad terms as various manuals and documents relating to the policies and procedures of the DHS.

60 Likewise, the obiter dicta of the Full Court in *Luck v Chief Executive Officer of Centrelink* [2017] FCAFC 92; 251 FCR 295 at [25] that Ms Luck’s application for judicial review under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) was “a right of action (if it be a right of action) that relates to the appellant’s “person or feelings” and thus remains with her” do not assist. The impugned decision in that case was one which prevented Ms Luck from entering Centrelink’s premises for three months, thereby allegedly impugning her character in various different ways. The Court upheld the decision at first instance that decision was not reviewable, it not having been made “under an enactment”.

61 In*Garrett*, the applicant sought judicial review of the validity of tax assessments and the existence or quantum of prior tax debts. In determining whether the applicant was able to continue the proceedings because of s 60(4), Kenny J considered whether Mr Garrett’s claim fell within the species of an action in respect of “any personal injury or wrong” and concluded that it was not, at [39]:

When Mr Garrett’s application and statement of claim is examined, it is clear that the action was not in respect of “any personal injury or wrong” as that phrase has been interpreted by the authorities. Mr Garrett sought judicial review on the basis that the respondent Commissioner and other public officers have misconducted themselves with respect to his taxation liabilities. His proposed appeal is in respect of the primary judge’s disposition of that judicial review proceeding. This is not an action of a kind to which s 60(4) applies: cf *Bryant v* *Commonwealth Bank of Australia* (1997) 75 FCR 545 at 564 per O’Loughlin and Merkel JJ. Whilst this judicial review proceeding was brought to an end at first instance on the making of the vexatious proceedings order and not on any other basis, this does not convert Mr Garrett’s proposed appeal against this order into an action in respect of a “personal injury or wrong” under s 60(4) of the Bankruptcy Act. Nor does Mr Garrett’s asserted reliance on claimed human rights issues under the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) and *Charter of Human Rights and Responsibilities Act* 2006 (Vic) or his assertion that he has suffered “damages to mind and body” from the respondents’ asserted unconscionable conduct and criminal acts, which apparently related to his judicial review proceeding.

62 Notably, as can be seen from the end of the above extract, her Honour considered like assertions by Mr Garrett to that of Ms Luck regarding his reliance of claimed human rights issues. Assertions of having suffered “damages to mind or body” are not sufficient to bring the action under the scope of s 60(4). Attention must be given to the word “action” defined in s 60(5), namely “any civil proceeding, whether at law or in equity”. Justice Kenny considered the same earlier argument in her Honour’s judgment at [24]:

[*Want v Moss*](https://jade.io/citation/4754657)10 LR (NSW) 274, *[Daemar](https://jade.io/article/801038)* 12 NSWLR 45, [*Cummings*](https://jade.io/article/67949) 185 CLR 124 and [*Sarkis v Moussa*](https://jade.io/article/264980)262 FLR 359 indicate that the word “proceeding” in s [60(5)](https://jade.io/article/218327/section/12132) bears a meaning generally co-incident with its ordinary meaning and, in particular, co-incident with the definition of proceeding in s [4](https://jade.io/article/218757/section/82) of the [Federal Court Act](https://jade.io/article/218757). The ordinary meaning of the word “proceeding” was mentioned earlier (at [[11]](https://jade.io/article/401358/section/140185) above). In the [Federal Court Act](https://jade.io/article/218757), s [4](https://jade.io/article/218757/section/82), the word “proceeding” is defined as “a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connexion with, a proceeding, and also includes an appeal”. An application under s [37AR](https://jade.io/article/218757/section/294473) of the [Federal Court Act](https://jade.io/article/218757), for leave to institute an appeal that is subject to a vexatious proceeding order, falls within this definition. This indicates that not only is Mr Garrett’s current application properly characterised as a “civil proceeding” within s [60(5)](https://jade.io/article/218327/section/12132) but also as an “action” within s [60(2)](https://jade.io/article/218327/section/3261). It is only if there is some implied additional requirement, such as some further connection with the bankrupt’s estate, that the application could fall outside s [60(2)](https://jade.io/article/218327/section/3261).

63 That the character of Ms Luck’s action was not sufficient to bring it within the scope of s 60(4) can be seen from the primary judge’s summary (he used the term “recasting”) of the three matters which had been remitted to him (*Luck No 4 [2016]*) at [3]:

*first*, the Administrative Appeals Tribunal (“**AAT**”) was wrong to deny that it had jurisdiction (ground u); *second*, the AAT was wrong to have failed to require the Department of Human Services (“DoHS”) to provide Ms Luck with the documents contemplated by s 37(1)(b) of the *Administrative Appeals Tribunal Act 1975* (Cth) (“AAT Act”) (ground o); *third*, the AAT and the third respondent (“Forgie DP”) denied Ms Luck procedural fairness by refusing to grant her extensions of time and adjournments (ground aa).

64 As to the first question, the primary judge held the Tribunal was correct to hold that its ability to review a decision is dependent on it having been given jurisdiction by statute, relevantly to Ms Luck’s claims, pursuant to s 55 of the FOI Act. No such jurisdiction having been conferred on the Tribunal, it did not err in concluding that it lacked jurisdiction: *Luck No 4 [2016]* at [18]-[19]. Although this conclusion was sufficient to dispose of the question, the primary judge undertook an analysis, on the basis of all the documents available to him, of whether there were any decisions made by the DHS that were reviewable and of which Ms Luck sought review. The primary judge concluded that there were no decisions meeting both of those criteria: *Luck No 4 [2016]* at [86]. This question, as remitted to the primary judge, cannot be characterised as one giving rise to an action for a personal injury or wrong.

65 As to the second question, the essence of the complaint before the primary judge was that the Tribunal was not entitled to have permitted the DHS to delay compliance with or ignore its requirement to lodge the documents contemplated by s 37(1)(b). Having already determined that the Tribunal lacked jurisdiction, the underlying premise of the complaint fell away: *Luck No 4 [2016]* at [91]. Further, the primary judge held that Ms Luck had failed to identify which documents, had they been before the Tribunal, would have led to a different outcome: *Luck No 4 [2016]* at [96]. Similarly, this question, as remitted to the primary judge, cannot be characterised as one giving rise to an action for a personal injury or wrong.

66 As to the third question, the primary judge concluded that it was unnecessary to decide the question because unless the Tribunal actually had jurisdiction to deal with Ms Luck’s application, which it did not, a procedurally fair hearing would necessarily have resulted in the same conclusion. Consequently, there was no utility to the relief sought: *Luck No 4 [2016]* at [112]. The question of whether a person has been denied procedural fairness is not one giving rise to an action for a personal injury or wrong.

67 The irresistible conclusion is that the pain felt by Ms Luck in respect of her mind, body and character said to be caused by the injuries inflicted and wrongs done to her by the DHS, the Tribunal, and the Deputy President are simply not actionable and certainly did not form the basis of any pleaded cause of action in the proceedings before the primary judge. Her application was, and always has been, one for judicial review.

68 That being so, there is in fact no extant action in respect of any personal injury or wrong done to Ms Luck which could be continued in her name. As such, the appeal is deemed to be abandoned by force of s 60(3) and it should be summarily dismissed pursuant to s 25(2B) of the FCA Act.

## The “special case questions”

69 Ms Luck’s application in relation to the special case questions is for directions in relation to the management, conduct and hearing of those questions as set out in her outline of submissions lodged on 31 October 2022 or referral of those questions to a Full Court of the High Court. Given the conclusion we have reached in relation to the operation and effect of s 60 of the *Bankruptcy Act*, we cannot accede to any of these proposed courses.

## The non-recusal applications

70 Likewise, given the conclusion we have reached in relation to the operation and effect of s 60 of the *Bankruptcy Act*, there is no utility in considering the applications in relation to non-recusal by Kerr, O’Callaghan, Snaden and Moshinky JJ.

## Joinder applications

71 For the same reason, it is unnecessary to deal with the application for the joinder of the Chief Executive Officer of the Federal Court of Australia, the Principal Registrar of the Federal Court of Australia, the Attorney-General of Australia and the Commonwealth of Australia.

## Disposition

72 For these reasons the DHS’s interlocutory application filed on 5 December 2019 to summarily dismiss Ms Luck’s appeal should be allowed. The corollary is that Ms Luck’s interlocutory application filed on 7 November 2022 for summary dismissal of the DHS’s application should be dismissed.

73 Further, Ms Luck’s interlocutory applications filed on 27 May 2021; 20 March 2020; 20 December 2019; 26 November 2019; 23 August 2019; 9 August 2019; 9 August 2019; 24 July 2019; 20 May 2019; and made in submissions dated 12 August 2019 should also be dismissed.

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| I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Farrell, Sarah C Derrington and Raper. |

Associate:

Dated: 5 December 2022