Kuru v State of New South Wales - [2008] HCA 26

HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

MURAT KURU APPELLANT

AND

STATE OF NEW SOUTH WALES RESPONDENT

Kuru v State of New South Wales
[2008] HCA 26
12 June 2008
S649/2007

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 15 June 2007 and, in their place, order that the respondent's appeal to that Court on grounds 1, 2, 3 and 4 of the respondent's Notice of Appeal to that Court be dismissed.*

3. *Remit the matter to the Court of Appeal of the Supreme Court of New South Wales for further consideration and determination of grounds 5, 6, 7 and 8 of the respondent's Notice of Appeal to that Court.*

4. *Respondent to pay the appellant's costs of the appeal to this Court and of the proceedings in the Court of Appeal of the Supreme Court of New South Wales up to and including the entry of the order of that Court made on 15 June 2007.*

5. *Costs of the further hearing in the Court of Appeal of the Supreme Court of New South Wales to be in the discretion of that Court.*

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with M W Sneddon for the appellant (instructed by Carroll & O'Dea)

I D Temby QC with P R Sternberg for the respondent (instructed by Crown Solicitor (NSW))

CATCHWORDS

Kuru v State of New South Wales

Torts – Trespass to land – Power of police to enter private premises – Police officers went to suburban flat after receiving report of male and female arguing – Police treated report as "violent domestic" – Occupier invited police to "look around the flat" – Occupier later asked police to leave premises – Police did not leave and remained on premises for longer than it would reasonably have taken them to leave – Whether statutory justification for police to remain on premises – Proper construction of *Crimes Act* 1900 (NSW) ss 357F and 357H – Whether express refusal by occupier immediately terminated authority of police "to so enter or remain" on premises, irrespective of fulfilment of purposes for which entry effected.

Torts – Trespass to land – Power of police to enter private premises – Whether common law justification for police to remain on premises – Whether entry could be justified as directed to preventing a breach of the peace.

Words and phrases – "enter or remain", "expressly refused", "breach of the peace".

Crimes Act 1900 (NSW), ss 357F-357I .

1. GLEESON CJ, GUMMOW, KIRBY AND HAYNE JJ. In the early hours of 16 June 2001, police received a report of a male and female fighting in a flat in suburban Sydney. Police treated the report as a "violent domestic" requiring available officers to attend as quickly as possible. Six police officers went to the flat. Mr Murat Kuru (the appellant) and his then fiancée (now wife) who lived there had had a noisy argument, but, by the time police arrived, the fiancée had left the flat with the appellant's sister. When police arrived, the front door of the flat was open. The police officers went into the flat. Two friends of the appellant, who did not live in the flat, were in the living room and the appellant was taking a shower in the flat's bathroom.

2. When the appellant came out of the bathroom, he found that the police were in the flat. The police asked if they could "look around" and the appellant agreed. After the police had looked in the two bedrooms, they asked to see "the female that was here". The appellant said that she had gone to his sister's house. He asked the police to leave the flat. The police asked for the sister's address and telephone number. The appellant said he did not know the address but at some point he wrote a telephone number (presumably his sister's number) on a piece of paper. The appellant repeated his demand that the police leave. He did this several times, very bluntly and with evident anger. Still the police did not leave.

3. At some point the appellant jumped onto the kitchen bench. He was later to say that he did this to get the attention of everyone in the room. Whether he then jumped off the bench towards the police, or jumped off in the opposite direction, was disputed. That dispute need not be resolved. There is no dispute that having got down from the bench, the appellant moved towards the police, with his arms outstretched, and made contact with one of the officers. A violent struggle followed. The appellant was punched, sprayed with capsicum spray, and handcuffed. As he was led to a police vehicle, he twice fell down stairs leading from his flat to the ground floor. He was taken to a police station and lodged in a cell wearing nothing but his boxer shorts. He was released from custody some hours later.

4. The appellant brought proceedings against the State of New South Wales in the District Court of New South Wales claiming damages for trespass to land, trespass to the person, and false imprisonment. The appellant alleged in his pleading, and the State admitted in its defence, that the action was brought against the State in accordance with ss 8, 9 and 9B of the *Law Reform (Vicarious Liability) Act* 1983 (NSW) and s 5 of the *Crown Proceedings Act* 1988 (NSW) . The application of those provisions was examined by this Court in *New South Wales v Ibbett* [1] and *New South Wales v Fahy* [2] . No issue was argued in this appeal about the operation of these provisions, or about the liability of the State for any wrongs done by the individual police officers [3] , and it is not necessary to say more about them.

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[1] (2006) 229 CLR 638; [2006] HCA 57 .

[2] (2007) 81 ALJR 1021; 236 ALR 406; [2007] HCA 20 .

[3] Cf *Enever v The King* (1906) 3 CLR 969; [1906] HCA 3.

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5. At first instance the appellant succeeded. Judgment was entered for him for $418,265 with costs to be assessed on a "solicitor and client" basis.

6. The State appealed to the Court of Appeal of New South Wales. It alleged that it was not liable to the appellant and that, in any event, the damages awarded (which had included aggravated and exemplary damages) were excessive.

7. The appeal to the Court of Appeal was conducted on the basis that if the State's appeal against the finding that it was liable for trespass to land failed, its appeal against liability in respect of trespass to the person would also fail, and conversely, that if the appeal against the finding of

liability for trespass to land were to succeed, the appeal in respect of liability for trespass to the person would also succeed. The claim for false imprisonment was treated as standing or falling with the claim for trespass to the person. That is, the parties conducted the appeal to the Court of Appeal on the footing that the single determinative issue between them was whether the police officers were trespassing in the appellant's flat when the appellant first made physical contact with one of their number.

8. **Following paragraph cited by:**

   Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) (02 December 2016) (Hinton J)

Evidence given at the trial may well have permitted framing the issues between the parties differently. There was evidence that might have been understood as permitting, even requiring, examination of whether the appellant's conduct went beyond taking reasonable steps for the removal of trespassers, and whether the conduct of the police went beyond the application of reasonable force to arrest a person impeding them in the execution of their duty. But the parties having chosen to litigate the appeal to the Court of Appeal on the conventional basis that has been identified, neither sought in this Court to submit that any issue about the use of excessive force either by the appellant, if his ejecting the police officers was otherwise lawful, or by the police officers, if their restraining the appellant was otherwise lawful, should now be considered by this Court.

9. The Court of Appeal (Mason P, Santow and Ipp JJA) held[4] that the State's appeal should be allowed. All members of the Court of Appeal concluded that, despite the appellant's withdrawal of permission for police to remain in his flat, the police were not trespassers when the appellant first made physical contact with one of the officers. The judgment entered at trial was set aside and in its place judgment was entered for the State.

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[4] *State of New South Wales v Kuru* [2007] Aust Torts Reports ¶81893.

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10. The principal reasons for the Court of Appeal were given by Santow JA and Ipp JA. Those reasons differed in some respects but it is not necessary to explore those differences. Immediately, it is sufficient to say that both Santow JA and Ipp JA held that the police had both statutory and common law justification for remaining on the appellant's premises, despite the appellant having withdrawn permission for them to remain in his flat.

11. By special leave the appellant appeals to this Court.

12. **Following paragraph cited by:**

Catallyze Pty Ltd v JAB Holdings New Zealand Limited (19 June 2025) (E Bishop SC, Senior Member, P H Molony, Senior Member)
Dwyer Building Group Pty Ltd v Spicer; Spicer v Dwyer Building Group Pty Ltd (13 June 2025) (P H Molony, Senior Member, L Andelman, Senior Member)
Friseal & Friseal (04 June 2025) (Alstergren CJ; Kari and Christie JJ)

> 21. I am conscious that, ideally, intermediate appellate courts should deal with all grounds of appeal: *Kuru v New South Wales* (2008) 236 CLR 1 at [12] . However, in this case I have determined that there is some significant overlap such that it is appropriate that I dispose of the appeal by considering Ground 3. I am confident that the principles discussed at [7]–[8] of *Boensch v Pascoe* (2019) 268 CLR 593 approved by this Court in *Cantrell v North* (2020) FLC 93-976 at [128]- [130] are applicable.

Metal Manufactures Pty Limited t/as TLE Electrical v WesTrac Pty Limited (08 May 2025) (Gleeson and Mitchelmore JJA, Basten AJA)
Tok v Rashazar (07 May 2025) (Payne, Kirk and Stern JJA)

> 67. Whilst my conclusion as to ground one makes it unnecessary to consider the notice of contention ground, given that it was fully argued and consistent with *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] and *Boensch v Pascoe* (2019) 268 CLR 593; [2019] HCA 49 at [8] , I will deal with this ground.

Charlie v State of Queensland (17 April 2025) (Perry, Burley and Sarah C Derrington JJ)
Pirrottina v Pirrottina (02 April 2025) (Gleeson, Payne and Adamson JJA)

> 127. I have considered in accordance with *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] , and *Boensch v Pascoe* (2019) 268 CLR 593; [2019] HCA 49 at [8] whether the Court should resolve these asserted factual challenges and related issues although they cannot affect the outcome of the appeal, in light of the conclusions on Issues 1-4 above. In my view, the Court should not do so given the absence of a formal application by Rocco to amend the notice of appeal and the further absence of any substantive argument challenging these findings.

Northern Territory of Australia v Austral (28 March 2025) (Grant CJ; Reeves and Burns JJ)

> 78. Given the finding that the awards of exemplary damages were made in error and will be set aside, it is unnecessary to consider whether the awards of exemplary damages were manifestly excessive. This is also one of the exceptions to the general requirement expressed in *Kuru v State of New South Wales* that an intermediate court of appeal deal with all grounds of appeal. [48] That is because the finding that circumstances did not exist to warrant an award of exemplary damages precludes any contingent assessment of whether the quantum of exemplary damages awarded was manifestly excessive. The same considerations which

govern whether the circumstances existed to warrant an award of exemplary damages will also be decisive in the determination of the appropriate quantum of those damages.

via

[48] *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12].

Conexa Sydney Holdings Pty Ltd v Chief Commissioner of State Revenue (27 February 2025) (Ward P, Payne, Stern and McHugh JJA, Basten AJA)
Comcare v DSLB (14 February 2025) (Logan, Perry and Horan JJ)
Lewis v Estate of Juan Martinez (30 January 2025) (Payne, Mitchelmore and Stern JJA)
Alta Vale Residential Pty Ltd v The Owners - Strata Plan No. 95693 (30 October 2024) (R C Titterton Oam, Senior Member, P H Molony, Senior Member)
Zurich Australian Insurance Limited v CIMIC Group Limited (18 September 2024) (White and Stern JJA, Griffiths AJA)
Commissioner of Police, NSW Police Force v FYH (09 September 2024) (Seiden SC DCJ, Deputy P, D G Fairlie Senior Member)

90. It is important for an intermediate appellate court (or similarly, the Appeal Panel) to consider whether to determine all grounds of appeal to dispose of the matter without remitting below: *Kuru v State of New South Wales* [2008] HCA 26 at [12], *Imbree v Chief Commissioner of State Revenue* [2024] NSWCATAP 158 at [46].

Imbree v Chief Commissioner of State Revenue (09 August 2024) (Seiden SC DCJ, Deputy P, P H Molony, Senior Member)
Medical Device Technologies Pty Ltd v Health Administration Corporation (11 June 2024) (Payne, Stern and Harrison JJA)
Neilson v Secretary, Department of Planning and Environment (21 February 2024) (Ward P, Payne and White JJA)
Filby v Teg Live Pty Ltd (19 December 2023) (White and Stern JJA, Simpson AJA)
Finniss v State of New South Wales (08 December 2023) (Payne and Stern JJA, Basten AJA)
Eppinga v Kalil (01 December 2023) (Payne, Kirk and Stern JJA)

93. Had the appellant established malice, the imputation challenge may have been relevant to the assessment of damages. Since the appellant failed on those grounds, the imputation challenge is not strictly necessary to decide. Nonetheless, I will address it briefly: *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] and *Boensch v Pascoe* (2019) 268 CLR 593; [2019] HCA 49 at [8].

Croc's Franchising Pty Ltd v Alamdo Holdings Pty Ltd (27 October 2023) (Payne and Stern JJA, Basten AJA)

Construction, Forestry, Maritime, Mining and Energy Union v Quirk (11 October 2023) (Rares Acj, Katzmann and Colvin JJ)
Dwyer v Volkswagen Group Australia Pty Ltd (05 September 2023) (Gleeson, Leeming and White JJA)
Elite Realty Development Pty Ltd v Sadek (19 July 2023) (Payne, Mitchelmore and Stern JJA)

> 72. The appellants made clear that this ground was contingent upon success in grounds 1 or 2. Given my conclusions about those grounds this ground strictly does not arise. I will nevertheless deal with it for the reasons given in *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] .

Owners SP 92450 v JKN Para 1 Pty Limited (26 May 2023) (Gleeson, White and Brereton JJA)
Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council (27 March 2023) (Basten AJ)
Edwin Davey Pty Ltd v Boulos Holdings Pty Ltd (26 April 2022) (Macfarlan and Gleeson JJA, Simpson AJA)

> 113. Given the conclusion reached on the contract claim, it is not necessary to address the restitutionary claim. Nevertheless, in accordance with *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] and *Boensch v Pascoe* (2019) 268 CLR 593; [2019] HCA 49 at [7]-[8] , I have considered whether I should do so and have concluded that it is not appropriate to address the restitutionary claim on a contingent basis. That is for two reasons. One is that the prospect that the restitutionary claim may later become relevant seems to me to be remote.

FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (22 February 2022) (O'Callaghan, Colvin and Derrington JJ)
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd (08 September 2021) (Basten, Meagher and Leeming JJA)
Atanaskovic Hartnell v Birketu Pty Ltd (03 September 2021) (Basten, Gleeson and McCallum JJA)
SIF Holdings Pty Ltd v CRC Gosford Pty Ltd (17 August 2021) (Payne, White and Brereton JJA)

> 100. On the contingency that I am wrong about Ground 1 of the Notice of Contention and Grounds 1 and 2 of the Notice of Appeal, I will consider the alternative argument based on subrogation: *Kuru v New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] (Gleeson CJ, Gummow, Kirby and Hayne JJ) .

Combe International Ltd v Dr August Wolff GmbH & Co KG Arzneimittel (11 February 2021) (McKerracher, Gleeson and Burley JJ)
Australian Executor Trustees (SA) Ltd v Kerr (04 February 2021) (Gleeson and Leeming JJA, Emmett AJA)

Ghosh v Health Care Complaints Commission (22 December 2020) (Bell P, Payne JA and Stevenson J)
GC NSW Pty Ltd v Galati (11 December 2020) (Gleeson and White JJA, Emmett AJA)
Wormald v Maradaca Pty Ltd (13 November 2020) (Bathurst CJ, Bell P and Payne JA)
Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Bay Street Appeal) (10 November 2020) (Allsop CJ, Flick and White JJ)
Sydney Local Health District v Macquarie International Health Clinic Pty Ltd (02 November 2020) (Bell P, Gleeson and Payne JJA)

> 239. We have considered whether appeal grounds 4 and 11–14, all relating to the method of assessing damages in relation to the Hospital Site, should be resolved even though they cannot affect the outcome of the appeal in light of our conclusions in respect of appeal grounds 1 and 2: see *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] (**Kuru**) and *Boensch v Pascoe* (2019) 94 ALJR 112; [2019] HCA 49 at [8], [101] . Given that the grounds were fully argued and there remains the possibility of a further appeal, it is desirable to deal with these non-dispositive issues.

Sydney Local Health District v Macquarie International Health Clinic Pty Ltd (02 November 2020) (Bell P, Gleeson and Payne JJA)
SCRIVEN & SCRIVEN (23 September 2020) (Strickland J)
Alam v Giampietro (21 August 2020) (P Taylor SC DCJ)
Cantrell & North and Anor (23 July 2020) (Ryan, Aldridge & Austin JJ)
James Cook University v Ridd (22 July 2020) (Griffiths, Rangiah and SC Derrington JJ)
Left Bank Investments Pty Ltd v Ngunya Jarjum Aboriginal Corporation (13 July 2020) (Bathurst CJ, Bell P and Gleeson JA)
Spotlight Pty Ltd v Fatseas Investments Pty Ltd (03 July 2020) (Gleeson and White JJA, Emmett AJA)
Warner Capital Pty Ltd v Shazbot Pty Ltd (25 June 2020) (Macfarlan, Meagher and Gleeson JJA)
EL RASHIDY & EL RASHIDY (27 February 2020) (Ainslie-Wallace and Aldridge & Watts JJ)
Doyle v Commissioner of Police (14 February 2020) (Leeming and Payne JJA, Simpson AJA)
Sergio Andres Chocron v Mina Onkoud (23 December 2019) (N Adams J)
Wiggins Island Coal Export Terminal Pty Ltd v New Hope Corporation Ltd (20 December 2019) (Bell ACJ, Macfarlan and Payne JJA)

> 116. Given the conclusion I have reached about construction it is unnecessary to address the issues raised by the notice of contention. I have considered whether in accordance with *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] I should do so and have concluded that I should not. I have also taken into account the remarks of the plurality in *Boensch v Pascoe* [2019] HCA 49 at [7]-[8] in declining to do so.

Lou v IAG Ltd t/as NRMA Insurance (20 December 2019) (Gleeson, Payne and Brereton JJA)
Lovett & McGregor (18 December 2019) (Watts, Tree and Bennett JJ)
Emmert & Quarto (07 November 2019) (Alstergren CJ; Ainslie-Wallace & Watts J)

> 36. That conclusion effectively disposes of the appeal, and while not strictly necessary, we are conscious of the adjuration in *Kuru v New South Wales* (2008) 236 CLR 1 at [12] and propose to very briefly consider the arguments advanced by the appellant in challenge to her Honour's order. [10]

Advanced National Services Pty Ltd v Daintree Contractors Pty Ltd (05 November 2019) (Gleeson and White JJA, Barrett AJA)

> 88. I have considered in accordance with *Kuru v New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] whether the second question should be resolved, although it cannot affect the outcome of the appeal. Given Advanced's failure on the question raised in Daintree's notice of contention, I am satisfied that good reason exists not to deal with the second question.

MetLife Insurance Ltd v MX (16 September 2019) (Meagher, Gleeson and Payne JJA)
NSW Commissioner of Police v Rabbits Eat Lettuce Pty Ltd (25 July 2019) (Macfarlan, Leeming and White JJA)
Fairfax Media Publications Pty Ltd v Gayle; The Age Company Pty Ltd v Gayle; The Federal Capital Press of Australia Pty Ltd v Gayle (16 July 2019) (Bell P, Gleeson and Leeming JJA)

> 177. That said, although there is no universal rule, this Court should consider whether to deal with all grounds of appeal, not merely the decisive grounds of appeal: *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] . The question is a pure question of law, and of general application, in (largely) uniform legislation. At present, the authorities are unsettled, which is apt to present difficulties in the running of trials. If the submissions advanced in this Court had permitted me to resolve this ground satisfactorily, then I would have done so.

Jorgensen v Fair Work Ombudsman (08 July 2019) (Greenwood, Reeves and Wigney JJ)
Searle v Commonwealth of Australia (31 May 2019) (Bathurst CJ, Bell P and Basten JA)
Frederick v Frederick (28 May 2019) (Strickland, Aldridge & Austin JJ)

> 49. Given the success of Grounds 2, 4, 5 and 6, it is not strictly necessary to consider this ground but we shall do so because it may later become

relevant (*Kuru v New South Wales* (2008) 236 CLR 1 at [12] ; see also *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (2001) 207 CLR 1 at [34]).

Northern Land Council v Quall (20 May 2019) (Griffiths, Mortimer and White JJ)
Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd; TWT Property Group Pty Limited v Cenric Group Pty Limited (30 April 2019) (Meagher, Gleeson and McCallum JJA)

151. Nonetheless, in accordance with *Kuru v New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] , I have considered whether ground 4A should be resolved on the alternative assumption that there was no binding agreement on 19 February containing the terms found by the primary judge: relevantly, that TWT would not seek to recover liquidated damages from Cenric for delays up until 19 February, and extending the date for completion by the time sought by Cenric, namely seven weeks.

Davies v Lazer Safe Pty Ltd (26 April 2019) (Greenwood, White and Burley JJ)
Midland Metals Overseas Pte Limited v Australian Cablemakers Association Limited (17 April 2019) (Gleeson and Payne JJA, Sackville AJA)
Bezer v Bassan (21 March 2019) (Macfarlan, Leeming and Payne JJA)
DING & DING (28 February 2019) (Murphy, Kent & O'Brien JJ)
Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) (12 February 2019) (Leeming JA at [1]; Payne JA at [44]; White JA at [45]; Sackville AJA at [46]; Emmett AJA at [262].)
Cummings v Fairfax Digital Australia & New Zealand Pty Ltd; Cummings v Fairfax Media Publications Pty Ltd (17 December 2018) (Beazley P, McColl JA and Simpson AJA)
Cummings v Fairfax Digital Australia & New Zealand Pty Ltd; Cummings v Fairfax Media Publications Pty Ltd (17 December 2018) (Beazley P, McColl JA and Simpson AJA)
Real Estate Property Management Pty Ltd v WaterCorp Investments Pty Ltd (03 September 2018) (Basten and White JJA)
Gunasegaram v Blue Visions Management Pty Ltd (14 August 2018) (Basten, Meagher and Gleeson JJA)
South Western Sydney Local Health District v Gould (13 April 2018) (Basten, Meagher and Leeming JJA)
Capital Securities XV Pty Ltd (formerly known as Prime Capital Securities Pty Ltd) v Calleja (26 February 2018) (Basten, Gleeson and Leeming JJA)

7. In many cases, it is desirable to deal with the non-dispositive grounds of appeal: *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] ; *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (Receivers and Managers Appointed)* (2011) 244 CLR 1; [2011] HCA 18 at [56] . The main reason for this is to overcome the need for remittal in the event of a further appeal. But the present appeal presents large difficulties on that front. It is not only that the remaining grounds are numerous and not fully developed. The findings of credit made by the primary judge were highly significant in

determining a suite of contested findings of primary fact, including oral representations said to have induced Ms Calleja to take out the loan, and the circumstances in which Ms Calleja nevertheless maintained interest payments over the following 11 months. It would be highly artificial to hypothesise that the Baycorp documents were properly excluded, and on that basis to test the correctness of other aspects of her Honour's reasoning. Further, to proceed on that basis is apt to present difficulties at the retrial. For example, there may be arguments about the binding or persuasive value of statements made in those parts of this Court's reasons at a retrial when the file notes will have been tendered and cross-examined upon. Finally, it may be noted that on the second day of the appeal, and after obtaining instructions, Ms Calleja conceded that she could not defend all aspects of the relief ordered by the primary judge. This has a direct bearing on the prospects of an application for special leave to appeal to the High Court; cf *Morgan v District Court of New South Wales* (2017) 94 NSWLR 463; [2017] NSWCA 105 at [38] .

Lauvan Pty Ltd v Bega (22 February 2018) (Gleeson JA)

467. The issues raised by the *Brickenden* principle only arise if (contrary to my conclusion) there is a finding of breach of fiduciary duty. It may be accepted that it is generally desirable to deal with non-dispositive issues: *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] . However, it is somewhat artificial to attempt to do so in the present circumstances where I have found that there was no real or substantial possibility of a conflict between the personal interests of Mr Ciappara and the interests of Mrs Bega to whom the duty was owed.

Spata v Tumino (15 February 2018) (Macfarlan and Payne JJA, Sackville AJA)
Upside Property Group Pty Ltd v Tekin (18 December 2017) (McColl, Macfarlan and Meagher JJA)
Sharpcan Pty Ltd and Commissioner of Taxation (Taxation) (14 December 2017) (Deputy Pagone P)
Hawcroft v Jamieson (31 October 2017) (Gleeson JA)
Australian Olympic Committee Inc v Telstra Corporation Ltd (25 October 2017) (GREENWOOD, NICHOLAS AND BURLEY JJ)
John Edward Thornton v State of New South Wales (06 October 2017) (Meagher and Gleeson JJA, Fagan J)
Bay Simmer Investments Pty Ltd v State of New South Wales (15 June 2017) (Basten and Leeming JJA, Sackville AJA)
Morgan v District Court of New South Wales (23 May 2017) (Beazley ACJ, Macfarlan and Meagher JJA)
Morgan v District Court of New South Wales (23 May 2017) (Beazley ACJ, Macfarlan and Meagher JJA)
Coretell Pty Ltd v Australian Mud Company Pty Ltd (03 April 2017) (Jagot, Nicholas and Burley JJ)
Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government (27 March 2017) (Basten and Macfarlan JJA, Sackville AJA)

Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government (27 March 2017) (Basten and Macfarlan JJA, Sackville AJA)
Bruce v Baju Henley Square Pty Ltd (22 December 2016) (Kourakis CJ; Blue and Hinton JJ)
Bruce v Baju Henley Square Pty Ltd (22 December 2016) (Kourakis CJ; Blue and Hinton JJ)
State of New South Wales v Briggs (09 December 2016) (McColl, Ward and Leeming JJA)
Gulic v Boral Transport Ltd (22 September 2016) (Macfarlan and Gleeson JJA, Garling J)
Chen v State of New South Wales (26 July 2016) (Leeming JA)
Calvo v Ellimark Pty Ltd (17 June 2016) (Ward, Gleeson and Leeming JJA)
OXS Pty Ltd v Sydney Harbour Foreshore Authority (23 May 2016) (Macfarlan, Gleeson and Leeming JJA)
Royal Guardian Mortgage Management Pty Ltd v Nguyen (29 April 2016) (Basten and Ward JJA, Emmett AJA)
Ure v The Commonwealth of Australia (04 February 2016) (Perram, Robertson & Moshinsky JJ)

> 146. This Court, as an intermediate court of appeal, is urged by the High Court' s decision in *Kuru v New South Wales* (2008) 236 CLR 1 at [12] , to determine all issues raised before it and not just those actually requiring resolution. For completeness, therefore, we would say this.

Despot v Registrar General of New South Wales (03 February 2016) (Gleeson and Leeming JJA, Sackville AJA)
Vartuli v Chief Commissioner of State Revenue (30 November 2015) (Meagher, Ward and Gleeson JJA)
Alqudsi v Commonwealth of Australia; Alqudsi v The Queen (16 November 2015) (Basten and Leeming JJA, McCallum J)
Alqudsi v Commonwealth of Australia; Alqudsi v The Queen (16 November 2015) (Basten and Leeming JJA, McCallum J)
Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy (27 August 2015) (McColl, Basten and Leeming JJA)
Katter v Melhem (28 July 2015) (McColl and Leeming JJA, JC Campbell AJA)
Katter v Melhem (28 July 2015) (McColl and Leeming JJA, JC Campbell AJA)
Endeavour Energy v Precision Helicopters Pty Ltd (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)
White v Johnston (18 February 2015) (Barrett, Emmett and Leeming JJA)
Sze Tu v Lowe (23 December 2014) (Meagher, Barrett and Gleeson JJA)

> 263. Although the indefeasibility defences provide the decisive ground for disposing of the appeals, it is appropriate to deal with some of the other grounds of appeal in the event that my conclusion on indefeasibility is wrong: *Kuru v New South Wales* [2008] HCA 26; 236 CLR 1 at [12] .

Environment Protection Authority v Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq) (16 May 2014) (Bathurst CJ, McColl and Leeming JJA)
Boorer v HLB Mann Judd (NSW) Pty Ltd (03 April 2014) (Macfarlan and Leeming JJA, Sackville AJA)

Enders v Erbas & Associates Pty Ltd (19 March 2014) (Ward and Leeming JJA, Tobias AJA)
Bibby Financial Services Australia Pty Ltd v Sharma (05 March 2014) (Beazley P, Barrett and Gleeson JJA)
QBE v Orcher (23 December 2013) (McColl and Macfarlan JJA, Tobias AJA)
Smith's Snackfood Company Ltd v Chief Commissioner of State Revenue (NSW) (23 December 2013) (Beazley P, Gleeson JA and Sackville AJA)
Egan v Mangarelli (05 December 2013) (Barrett and Ward JJA, Tobias AJA)
Gazi v Minister for Immigration and Citizenship (23 October 2013) (Logan J)
Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)

> 81. In deference to the reasons of the primary judge whose decision was based on s 5D and the arguments which were at the forefront of the appeal, and, in accordance with *Kuru v New South Wales* [2008] HCA 26; (2008) 236 CLR 1 at [12] , I now turn to that section lest the foregoing be wrong.

Day v The Ocean Beach Hotel Shellharbour Pty Ltd (05 August 2013) (Meagher, Emmett and Leeming JJA)
Hoult & Hoult (26 July 2013) (Thackray, Strickland and Ainslie-Wallace JJ)
Ember & Assadi (19 July 2013) (Finn and Strickland & Ainslie-Wallace JJ)
Galaxy Homes Pty Ltd v The National Mutual Life Association of Australasia Ltd (03 May 2013) (Anderson, Peek and Stanley JJ)

> 11. The High Court has emphasised that while there can be no universal rule it is desirable intermediate courts of appeal consider whether to deal with all grounds of appeal, not merely any ground that is decisive of the appeal: see *Kuru v The State of New South Wales* (2008) 236 CLR 1 at [12] . We consider this approach applies also to grounds raised by a notice of contention. In this case, however, having considered the matter we are satisfied good reason exists not to deal with the grounds raised by the notice of contention. It is important that Mr Eden be allowed as much time as possible to get his affairs in order and make provisions in his will based on our decision.

Cox & Pedrana (27 March 2013) (May, Ainslie-Wallace and Murphy JJ)
Public Service Assn of SA Inc v Industrial Relations COMM'NR of SA & Chief Executive, Dept of Premier and Cabinet (28 February 2013) (Kourakis CJ; Gray and White JJ)
MM Constructions (Aust) Pty Ltd v Port Stephens Council (19 December 2012) (Allsop P, Basten JA and Bergin CJ in Eq)
Donnellan v Woodland (18 December 2012) (Beazley, Basten, Barrett and Hoeben JJA, Sackville AJA)
Marcourt v Clark (09 November 2012) (Beazley and Barrett JJA, Tobias AJA)
Spencer v Bamber (05 September 2012) (Basten, Campbell and Macfarlan JJA)
Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3) (17 August 2012) (Lee AJA Drummond AJA Carr AJA)
Bristow v Adams (22 May 2012) (Beazley and Basten JJA, Tobias AJA)
David v Abdishou (27 April 2012) (Beazley and McColl JJA, Sackville AJA)

Nominal Defendant v Meakes (04 April 2012) (McColl and Basten JJA, Sackville AJA)

> 6. Against the possibility that it was unsuccessful on the primary issue, the appellant also challenged the finding of the trial judge that the respondent had not been contributorily negligent and challenged various aspects of the assessment of damages. Against the possibility that a different view might be taken as to the operation of s 34 of the *Motor Accidents Compensation Act* , it is appropriate to consider those issues: *Kuru v New South Wales* [2008] HCA 26; 236 CLR 1 at [12] (Gleeson CJ, Gummow, Kirby and Hayne JJ) .

C G Maloney Pty Ltd v Noon (15 December 2011) (Campbell JA at [1], Handley AJA at [127], Tobias AJA at [169])

> 93. ***Kuru v State of New South Wales*** [2008] HCA 26; (2008) 236 CLR 1 at [12] instructs me to consider whether it is desirable to go on and decide the other questions involved in the attack on the dismissal of the 2010 Proceedings. I have done so.

Bondi Beach Astra Retirement Village Pty Ltd v Gora (15 December 2011) (Giles, Campbell and Whealy JJA)
Bondi Beach Astra Retirement Village Pty Ltd v Gora (15 December 2011) (Giles, Campbell and Whealy JJA)
Griffith v Australian Broadcasting Corporation (No 2) (08 June 2011) (Hodgson JA at 1; Basten JA at 30; McClellan CJ at CL at 41)
Jovanovski v Billbergia Pty Ltd (02 June 2011) (Giles, Hodgson and Macfarlan JJA)
Public Service Association of SA Inc v Industrial Relations Commission of SA (15 March 2011) (Doyle CJ; Duggan and Vanstone JJ)
Scharrer v The Redrock Co Pty Ltd (20 December 2010) (McColl and Basten JJA, Handley AJA)

> 89 Before turning to the remaining issues, I note that Basten JA (at [182]) has characterised the Deputy President's treatment of the remaining issues as "anticipatory comments", made "without a proper consideration of the relevant issues, and open to be given little or no weight". I do not so understand the balance of the Deputy President's reasons. Rather, I understand them as a consideration of the outstanding issues in the manner advised in *Kuru v State of New South Wales* [2008] HCA 26; (2008) 236 CLR 1 (at [12]) so that, in the event of s 353, WIM Act error, this Court will not have to remit the matter to the Commission for further consideration. Such an approach is consistent with the objectives of the workers compensation system which include being fair, affordable, and financially viable (s 3(d), WIM Act). The Deputy President had submissions from both parties before him. It was not suggested by either party in this Court that his findings on the remaining issues should be understood as other than finally dispositive.

Candetti Constructions Pty Ltd v Fonteyn (29 November 2010) (Bleby, Gray and Sulan JJ)

59. The first is that in *Kuru v State of New South Wales* , [49] the High Court referred to the need for an appellate court to consider as far as practicable all issues arising on the appeal. This is a pertinent observation when consideration is given to the history of this matter. During the course of their reasons, Gleeson CJ, Gummow, Kirby and Hayne JJ commented:

> The appeal to this Court should be allowed. There was neither statutory nor common law justification for the police remaining on the appellant's premises. The matter must be remitted to the Court of Appeal for consideration of the outstanding issues about damages. That outcome means that this Court cannot make orders disposing finally of the dispute between the parties. This Court has said on a number of occasions that, although there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal, not just with what is identified as the decisive ground. If the intermediate court has dealt with all grounds argued and an appeal to this Court succeeds, this Court will be able to consider all the issues between the parties and will not have to remit the matter to the intermediate court for consideration of grounds of appeal not dealt with below.
>
> [Footnote omitted]

via
[49] *Kuru v State of New South Wales* (2008) 236 CLR 1 at [12] .

Stockland Property Management Pty Ltd v Cairns City Council (16 October 2009) (McMurdo P, Keane JA and Wilson J,)

55. It is not necessary to address the other issues agitated by the parties: the observations of Basten JA in *Rebenta Pty Ltd v Wise* (with whom Ipp JA and Sackville AJA agreed) are apposite. His Honour said: [20]

> "In these circumstances, it is not necessary or appropriate to address the remaining issues, unless the efficient administration of justice renders that course desirable: see *Kuru v State of New South Wales* [2008] HCA 26; 236 CLR 1 at [12] . When such a course is appropriate will depend to a significant extent on whether the court is conducting a trial or is an intermediate court of appeal. It is often desirable in the case of a trial judge, who has heard evidence on a matter, to determine factual questions arising from the evidence, even if they are not necessary on conclusions which have been reached on other issues. That is because some account must always be taken of the possibility of a successful appeal, requiring the further evidence to be assessed, or in all likelihood repeated on a rehearing. The costs which are likely to flow to the parties in such an event will rarely be justified by the savings in judicial time. Further, such an event is more likely where there is a full appeal by way of rehearing, than where there is a more limited right of appeal.
>
> With respect to an intermediate court of appeal, there is no further right of appeal, absent a grant of special leave to appeal to the High Court. While it seems undesirable in many cases to assess the likelihood of a grant of

special leave and if granted, the likelihood of success on an appeal, in some cases such consideration may be appropriate: cf *Health World Ltd v Shin-Sun Australia Pty Ltd* [2009] FCAFC 14; 174 FCR 218 at [47] (Perram J, Emmett and Besanko JJ agreeing). Nevertheless, it will usually be open to the intermediate appellate court to work on the basis that a successful appeal is, in a run-of-the-mill case, a possibility, but not a probability.

There is also a principle of parsimony which applies in terms of the allocation of judicial resources. Parties in civil litigation do not have the right to demand that a court provide resources greater than those necessary to determine the dispute before it. An intermediate court of appeal is entitled to take into account the limits of its resources, its workload and the interests of other litigants: see *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206 at [824]–[833] (Ipp JA, Giles JA and Hodgson JA agreeing).

It is also appropriate to take into account the risk that a court will more readily fall into error in dealing with an issue which it knows does not arise in the circumstances of the case: cf *Wade v Burns* [1966] HCA 35; 115 CLR 537. In some cases, such a risk will be warranted; in other cases it will not be in the interests of the best administration of justice: see *Tarabay Pty Ltd v Leite* [2008] NSWCA 259 at [27]–[28] ; *Lindholdt v Hyer* [2008] NSWCA 264; 251 ALR 514 at [184]–[185] ."

Shimokawa v Lewis (11 September 2009) (Beazley, Giles and Ipp JJA)
Rebenta Pty Ltd v Wise (24 July 2009) (Ipp JA at 1; Basten JA at 2; Sackville AJA at 102)
Leerdam v Noori (01 May 2009) (Spigelman CJ at 1; Allsop P at 46; Macfarlan JA at 68)
Caterpillar of Australia Pty Ltd v Industrial Court of New South Wales (17 April 2009) (Spigelman CJ at 1; Allsop P at 165; Tobias JA at 166)
Gett v Tabet (09 April 2009) (Allsop P ; Beazley JA ; Basten JA)
Jeavons v Chapman (No 2) (12 January 2009) (Gray J)
Cyril Henschke Pty Ltd v Commissioner of State Taxation (18 December 2008) (Gray J)
Cyril Henschke Pty Ltd v Commissioner of State Taxation (18 December 2008) (Gray J)
Lindholdt v Hyer (24 October 2008) (Giles JA ; McColl JA; Basten JA)

184. In adopting that approach, it is sufficient to assume that the publications each occurred on an occasion of qualified privilege. In taking that approach, it is proper to recognise that an issue raised by the respondent on his notice of contention will not be fully addressed. In some circumstances that approach would not be acceptable. At the very least, it is necessary for the Court to consider whether it is sufficient to deal with an appeal on the basis of one dispositive issue, without addressing other issues: see *Kuru v State of New South Wales* [2008] HCA 26; 82 ALJR 1021 at [12] . In criminal appeals, where a failure to deal with all issues

may result in a person being incarcerated for longer than necessary, such a course should generally be avoided: see *Cornwell v The Queen* [2007] HCA 12; 232 CLR 260 at [105] . A similar conclusion may be reached in circumstances where the issue in dispute is the validity of a public instrument operating in rem: see *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* [2001] HCA 8; 207 CLR 1 at [34] ; *L ockwood Security Products Pty Ltd v Doric Products Pty Ltd* [2004] HCA 58; 217 CLR 274 at [105] . This is not such a case; rather the appeal, on which the appellant must succeed in order to overturn the judgment below, turns on a question of fact involving no matter of contentious principle, as to which there will now be the unanimous findings of four judges of the Court.

Tarabay v Leite (23 October 2008) (Allsop P ; Basten JA ; Bell JA)

24 The first step in considering the question of apportionment is to determine whether or not the plaintiff, as cross-appellant, needed to identify error in the assessment recorded by the trial judge. In terms of appellate jurisdiction, his Honour's conclusion in that respect formed no part of his reasons for the judgment given. Rather, like an assessment of damages in a case where liability has been held not to arise, such findings are made, in accordance with principles stated in this Court and in the High Court, in order to minimise the inconvenience and delay caused by appellate reversal of the decision on liability: see *Kuru v New South Wales* [2008] HCA 26; 82 ALJR 1021 at [12] . They are thus treated as having a contingent effect.

Public Trustee v O'Donnell (04 July 2008) (Gray J)

The appeal to this Court should be allowed. There was neither statutory nor common law justification for the police remaining on the appellant's premises. The matter must be remitted to the Court of Appeal for consideration of the outstanding issues about damages. That outcome means that this Court cannot make orders disposing finally of the dispute between the parties. This Court has said on a number of occasions [5] that, although there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal, not just with what is identified as the decisive ground. If the intermediate court has dealt with all grounds argued and an appeal to this Court succeeds, this Court will be able to consider all the issues between the parties and will not have to remit the matter to the intermediate court for consideration of grounds of appeal not dealt with below.

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[5] *Cornwell v The Queen* (2007) 81 ALJR 840 at 865 [105]; 234 ALR 51 at 85; [2007] HCA 12; *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd* (2004) 217 CLR 274 at 312 [105]; [2004] HCA 58; *KimberlyClark Australia Pty Ltd v Arico Trading International Pty Ltd* (2001) 207 CLR 1 at 1920 [34][35]; [2001] HCA 8.

Relevant statutory provisions

13. **Following paragraph cited by:**

Boydtown Pty Ltd v Minister for Planning and Public Spaces (03 May 2023) (Pritchard J)

At the time of the events giving rise to these proceedings s 357F to s 357I of the *Crimes Act* 1900 (NSW) made provision for powers of entry in cases of domestic violence [6] . Section 357F was directed to entry by invitation; s 357G concerned entry by warrant; s 357H made more particular provision in relation to the exercise of powers of entry under ss 357F and 357G ; and s 357I dealt with entry and search for firearms.

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[6] These provisions of the *Crimes Act* 1900 (NSW) were repealed by the *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW) . The latter Act made other provisions by ss 8187 for search, entry and seizure powers relating to domestic violence.

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14. It will be necessary to set out the text of s 357F . But because the section is long and its provisions dense, it is convenient to preface that by pointing out particular features of the provisions made by the section that are relevant to the present matter. The powers to enter a dwellinghouse that were given by s 357F were predicated upon a member of the police force being invited to enter or remain in the dwellinghouse "by a person who apparently resides in the dwellinghouse, whether or not the person is an adult"[7]. That is, the provisions of the section were engaged by the invitation of an apparent resident of the premises to enter or remain.

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[7] s 357F(2) .

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15. Further provision was then made by s 357F(3) and (4) for two different events. First, subs (3) provided for what was to happen if an "occupier" of the dwellinghouse expressly refused authority to a member of the police force to so enter or remain. That subsection invites attention to the definition [8] of an "occupier" ("a person immediately entitled to possession of the dwellinghouse"). It also invites attention to what is meant by the refusal of an invitation when s 357F(2) dealt separately with an invitation to enter a dwellinghouse and an invitation to remain in a dwellinghouse.

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[8] s 357F(1) .

16. Section 357F(4) qualified the effect of an occupier's refusal of authority. It did that by qualifying the operation of subs (3) in a case where a member of the police force enters or remains "by reason of an invitation given as referred to in subsection (2) by the person whom the member of the police force believes to be the person upon whom a domestic violence offence has recently been or is being committed, or is imminent, or is likely to be committed in the dwellinghouse". In such a case the member of the police force was entitled to enter or remain in the dwellinghouse "notwithstanding that an occupier of the dwellinghouse expressly refuses authority to the member of the police force to so enter or remain".

17. At the times relevant to this matter s 357F provided:

"**Entry by invitation**

(1) In this section, ***occupier*** , in relation to a dwellinghouse, means a person immediately entitled to possession of the dwellinghouse.

(2) A member of the police force who believes on reasonable grounds that an offence has recently been or is being committed, or is imminent, or is likely to be committed, in any dwellinghouse and that the offence is a domestic violence offence, may, subject to subsection (3):

(a) enter the dwellinghouse, and

(b) remain in the dwellinghouse,

for the purpose of investigating whether such an offence has been committed or, as the case may be, for the purpose of taking action to prevent the commission or further commission of such an offence, if invited to do so by a person who apparently resides in the dwellinghouse, whether or not the person is an adult.

(3) Except as provided in subsection (4), a member of the police force may not enter or remain in a dwellinghouse by reason only of an invitation given as referred to in subsection (2) if authority to so enter or remain is expressly refused by an occupier of the dwellinghouse and the member of the police force is not otherwise authorised (whether under this or any other Act or at common law) to so enter or remain.

(4) The power of a member of the police force to enter or remain in a dwellinghouse by reason of an invitation given as referred to in subsection (2) by the person whom the member of the police force believes to be the person upon whom a domestic violence offence has recently been or is being committed, or is imminent, or is likely to be committed in the dwellinghouse may be exercised by the member of the police force notwithstanding that an occupier of the dwellinghouse

expressly refuses authority to the member of the police force to so enter or remain."

18. Section 357G provided for police obtaining authority by warrant to enter a dwellinghouse by force. The section provided for a Magistrate, upon complaint made by a member of the police force, to issue a warrant which would "authorise and require the member of the police force to enter the dwellinghouse and to investigate whether a domestic violence offence has been committed or, as the case may be, to take action to prevent the commission or further commission of a domestic violence offence" [9] . A complaint could be made in person or by telephone [10] . The warrant could be granted by the Magistrate stating the terms of the warrant [11] . In executing a warrant granted under s 357G(3) a member of the police force was authorised to use force [12] , whether by breaking open doors or otherwise, for the purpose of entering a dwellinghouse.

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[9] s 357G(3) .

[10] s 357G(4) .

[11] s 357G(6) .

[12] s 357G(9) .

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19. Section 357H(1) regulated the powers of entry given by ss 357F and 357G . It provided that:

"**Provisions relating to powers of entry under sections 357F and 357G**

(1) Where a member of the police force enters a dwellinghouse in pursuance of an invitation (as referred to in section 357F), or in pursuance of a warrant granted under section 357G , for the purpose, in either case, of investigating whether an offence which the member of the police force suspects or believes to be a domestic violence offence has been committed, or, as the case may be, for the purpose of taking action to prevent the commission or further commission of such an offence, the member of the police force:

(a) is to take only such action in the dwellinghouse as is reasonably necessary:

(i) to investigate whether such an offence has been committed,

(ii) to render aid to any person who appears to be injured,

(iii) to exercise any lawful power to arrest a person, and

(iv) to prevent the commission or further commission of such an offence, and

(a1) must inquire as to the presence of any firearms in the dwellinghouse and, if informed that there is a firearm or firearms, must take all such action as is reasonably practicable to search for and to seize the firearm or firearms, and

(b) is to remain in the dwellinghouse only as long as is reasonably necessary to take that action."

20. Section 357H(2) addressed the continued existence of other powers of entry. It provided that:

"(2) Nothing in subsection (1) or in section 357F or 357G limits any other power which a member of the police force may have under this or any other Act or at common law to enter or remain in or on premises."

Application of ss 357F and 357H

21. The events described at the start of these reasons took several minutes to play out. In the Court of Appeal, Santow JA concluded [13] that "the duration of [the police officers'] further stay after being first told to 'get out of my house' was some five to eight minutes" (a period Santow JA described [14] as "not a very long time"). Inevitably, the evidence given at the trial about the events focused upon what the witnesses remembered of what was said and done. Using those descriptions to construct a comprehensive narrative of the events was not easy. It was not made any easier by the trial judge's finding that the evidence of the police officers was unsatisfactory in some respects. The narrative of events given in the Court of Appeal differed in some respects from that found by the trial judge. Those differences are not important for the resolution of the present appeal. What is important is how the Court of Appeal characterised what the police officers were doing in the appellant's flat when he made physical contact with one of the officers.

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[13] [2007] Aust Torts Reports ¶81893 at 69,703 [79] .

[14] [2007] Aust Torts Reports ¶81893 at 69,703 [79] .

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22. Central to the reasoning of the Court of Appeal was the conclusion [15] that the police officers had not finished investigating whether a domestic violence offence had been committed when the appellant walked towards the officers with his arms outstretched and came into contact with one of them. It is to be recalled that s 357F(2) provided that, if certain conditions are met, a police officer may enter and may remain in a dwellinghouse "for the purpose of investigating whether [a domestic violence] offence has been committed or, as the case may be, for the purpose of taking action to prevent the commission or further commission of such an offence".

[15] [2007] Aust Torts Reports ¶81893 at 69,704 [87] per Santow JA, 69,713 [161] per Ipp JA.

23. There is room for a deal of debate in this case about what exactly were the investigations that the police who attended the appellant's flat had not finished, and about whether the prosecution of those investigations required or was even assisted by police remaining in the appellant's flat. So, for example, there was debate in the Court of Appeal about whether the police wanted, or needed, to look in the flat's bathroom before they left the premises. They had looked in every other room in the flat but once violence broke out, and the appellant was forcibly removed from his flat, there was no evidence that any of the six officers who were at the scene then thought it necessary or desirable to look in the bathroom. This may suggest strongly that such a search formed no part of the investigations that the police were undertaking. There was also some debate about whether the police officers needed to confirm where the appellant's fiancée was, or needed to speak to her, before it could be said that their investigations were at an end. It is not immediately apparent why either of those steps required or was even assisted by the police officers staying in the appellant's flat. But these questions about what further police investigations were under way or were incomplete when violence erupted at the flat need not be pursued. Even if, as the Court of Appeal concluded, further police investigations were still under way, that fact is not relevant to the application of ss 357F and 357H in the present matter.

24. There are only three facts that are critical to the application of ss 357F and 357H in the present matter. Those facts are not disputed. They are:

    (a) an "occupier" of the dwellinghouse (the appellant) had invited the police to "look around" the flat;

    (b) an occupier of the dwellinghouse (again, the appellant) had then asked the police to leave; and

    (c) the police officers did not leave and remained on the premises for longer than it would reasonably have taken them to leave.

    Their remaining upon the premises after the appellant had asked them to go, and a reasonable time for their immediate departure had elapsed, was not authorised by the provisions of ss 357F and 357H .

25. To explain why the three facts identified, and only those, are the critical facts in this matter, it is necessary to deal with some issues about the proper construction of ss 357F and 357H .

    Construction of ss 357F and 357H

26. Section 357F treated entering a dwellinghouse and remaining in the dwellinghouse as distinct steps. In particular, s 357F(2) provided that, in the circumstances described in that provision, a member of the police force may:

"(a) enter the dwellinghouse, and

(b) remain in the dwellinghouse".

That distinction between entering and remaining is not marked by a bright line. Any entry upon premises necessarily constitutes remaining upon the premises for at least as long as the act of entering takes. And the marking and maintenance of a distinction between the two ideas is not made easier by the way in which s 357F(3) is framed. That subsection provided that "a member of the police force may not *enter or remain* ... if authority to so enter or remain is expressly *refused* by an occupier" (emphasis added). The use of the single verbal phrase "is expressly refused" may suggest that "enter or remain" is to be read as a portmanteau expression, and that the only refusal which the provision contemplated was a refusal at the point of initial entry to the premises. If that were so, the phrase "is expressly refused" might be said not to include a subsequent revocation of a permission granted earlier.

27. If there is any awkwardness in the operation of the provision that follows from the drafter treating entering and remaining on premises as distinct steps, those difficulties need not be resolved in this matter. They need not be resolved because it was accepted by both parties, correctly, that the phrase "is expressly refused" in s 357F(3) must be read as including revocation of permission given earlier. Nor is it necessary to consider how the provisions of s 357F applied to the conduct of the police when they first entered the flat through the open door. No one in the flat had asked them to come in, but the lawfulness of that initial entry was not put in issue in this matter. Rather, as noted earlier, attention was directed only to whether the police officers were trespassers when the appellant first came into physical contact with one of them. And the premise for that debate was that because the appellant had agreed that the police officers might "look around" the flat, they then had authority under s 357F to remain on the premises.

28. Once it is observed that s 357F recognises that an invitation to enter or remain in a dwellinghouse may be revoked by an occupier of the premises, attention must shift to what it is in the relevant provisions that would permit remaining on the premises after the invitation is revoked. And given that the power to enter and remain that is afforded by s 357F is a power that is predicated upon there being an invitation to enter (issued by someone who appears to be a *resident* of the premises) why should the revocation of permission (by an *occupier*) not take immediate effect by withdrawing the licence to remain that was founded in the combination of the invitation and the provisions of s 357F(2) ?

29. The Court of Appeal answered those questions by reference to the purposes of the entry specified in s 357F(2) : "for the purpose of investigating whether [a domestic violence] offence has been committed or, as the case may be, for the purpose of taking action to prevent the commission or further commission of such an offence". The permission to enter and to remain that was constituted by the invitation extended by an apparent resident of the premises coupled with s 357F(2) was treated as persisting for so long as a purpose of the entry that was a purpose identified in s 357F(2) remained unfulfilled. The purpose identified by the Court of Appeal as the purpose which remained unfulfilled was investigating whether a domestic violence offence had been committed.

30. Of course it is important to recognise that the statute prescribed the purposes that were to be effected when a member of the police force entered or remained in the dwellinghouse. But it is also essential to give proper effect to s 357F(3) .

31. Section 357F(3) provided, in part, that:

> "a member of the police force may not enter or remain in a dwellinghouse by reason only of an invitation given as referred to in subsection (2) if authority to so enter or remain is expressly refused by an occupier."

These express provisions of s 357F(3) preclude reading other provisions of the section as permitting a police officer to enter and remain for as long as it was necessary to effect the purposes for which the entry was effected. That is, the express provisions of s 357F(3) require the conclusion that, unless subs (4) was engaged, and that was not suggested here, an express refusal by an occupier immediately terminated the authority "to so enter or remain".

32. A construction of s 357F which attaches immediate consequences to the express refusal of an occupier is reinforced by consideration of ss 357G and 357H(1) . Section 357G is important because that section provided for compulsory entry to a dwellinghouse. The express provisions of s 357G reinforce the view that s 357F dealt only with entry to a dwellinghouse by invitation, and then for only so long as the relevant invitation remained unrevoked. In all but the case for which s 357F(4) provided, revocation by an occupier of an invitation to enter or remain sufficed to terminate then and there the permission for a police officer to remain on the premises. Only an invitation to enter or remain issued by the person reasonably believed to be the victim of a domestic violence offence trumped the occupier's revocation of permission.

33. Section 357H(1) further reinforces the view that an occupier's revocation or refusal of permission withdrew the authority given by s 357F for a police officer to remain in a dwellinghouse regardless of whether investigation of past or threatened offences was complete. Section 357H(1) identified the content of, and limitations upon, both the exercise of the powers to enter and remain pursuant to invitation conferred by s 357F and the exercise of the powers to enter and remain pursuant to a warrant granted under s 357G .

34. Section 357H(1)(a1) obliged a police officer who entered a dwellinghouse to ask about the presence of firearms and, if told that there was a firearm, obliged the officer to search for it and seize it. As explained in *Fahy* [16] , s 201 of the *Police Service Act* 1990 (NSW) ("the Police Act")[17] made it a criminal offence for a police officer to neglect or refuse either to obey any lawful order or to carry out any lawful duty as a police officer.

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[16] (2007) 81 ALJR 1021 at 1028 [21], 1029 [27]; 236 ALR 406 at 412, 413.

[17] The short title of this Act was later amended by the *Police Service Amendment (NSW Police) Act* 2002 (NSW) to the *Police Act* 1990 .

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35. In other respects, however, s 357H(1) *confined* what a member of the police force may do if he or she entered a dwellinghouse for the purposes there described: the purpose of investigating whether a domestic violence offence has been committed or the purpose of taking action to prevent the commission or further commission of such an offence. Section 357 H(1)(a) provided that a member of the police force was "to take *only* such action in the dwellinghouse as is reasonably necessary" to do certain things (including "to investigate whether [a domestic violence] offence has been committed"). Paragraph (b) of the same subsection provided that the member of the police force "is to remain in the dwellinghouse *onl y* as long as is reasonably necessary to take that action".

36. Each of par (a) and par (b) of s 357H(1) limited the exercise of the power to enter or remain on the premises. Neither can be read as granting a power to enter or a power to remain. The powers to enter and to remain were given by the other provisions of the Act: s 357F or s 357G as the case required. And as earlier observed by reference to s 357F(3) , the power to enter and remain given by s 357F could be, and in this case was, revoked. That the purposes identified in ss 357F and 357H for the police entering the appellant's premises had not been fulfilled when the appellant revoked their permission to remain neither precluded revocation of the invitation to remain in the flat nor engaged the relevant statutory provisions in a way that authorised the police officers to remain there.

37. **Following paragraph cited by:**

Smith v The Queen (02 June 2022) (The Honourable President Livesey, the Honourable Justice Lovell and the Honourable Justice Bleby)
Baker v Smith (No 2) (04 December 2019) (Porter QC DCJ)
R v Rockford (22 April 2015) (Kourakis CJ; Sulan and Stanley JJ)
R v Rockford (27 November 2014) (Reasons for Ruling and Verdict of His Honour Judge Soulio)
Simon v Condran (20 November 2013) (Macfarlan and Leeming JJA, Sackville AJA)

> 44. Ms Simon's submission is to be rejected because, as the primary judge held, s 22(2) confers authority to seize, injure or destroy a chattel - to do that which, absent statutory authority, would be a trespass to goods. It is silent in relation to trespass to land. (It may be contrasted with s 22(5) , which applies to trespass to land but only where a dog enters inclosed lands.) Settled principles of statutory construction require irresistible clarity before fundamental rights such as the exclusive possession of land are abrogated. In *Kuru v State of New South Wales* [2008] HCA 26; 236 CLR 1 at [37] the joint judgment rejected an argument that statute, by implication, might undercut the "strong principle of Australian law defensive of the quiet enjoyment by an occupier of that person's residence", described as an "important civil right in our society". In *Georg e v Rockett* (1990) 170 CLR 104 at 110-111, a unanimous High Court referred, in the course of construing a statute authorising a search warrant by insisting on strict compliance, to the need to keep in mind that such statutes "authorize the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect".

Australian Crime Commission v Stewart (30 January 2012) (Stone J)

> 41. Indeed, when the High Court refers to the common law of another jurisdiction it customarily makes that distinction clear as, for example, in *Kuru v New South Wales* (2008) 236 CLR 1 at [37] . Moreover, it should not be assumed that the High Court would take upon itself the authority to decide what would be an "important" or "fundamental" right in a common law jurisdiction other than Australia. It would follow that only an important Australian common law right or immunity would be protected by the principle referred to in *Daniels* .

Australian Crime Commission v Stewart (30 January 2012) (Stone J)
Police v Dafov (17 September 2008) (Gray, Vanstone and White JJ)

To the extent that, in the end, there was any ambiguity about the meaning and ambit of the authority provided to police by ss 357F and 357H to remain in the appellant's flat after he had made it clear that he was requiring them to leave, such ambiguity must be resolved in favour of the foregoing construction. This is because of the strong principle of Australian law defensive of the quiet enjoyment by an occupier of that person's residence. That principle has been recognised and upheld by this Court on numerous occasions [18] . It derives from the principles of the common law of England. Indeed, it appears to be a principle against which the provisions of ss 357F and 357H of the Act were written. It defends an important civil right in our society. If Parliament were to deprive persons of such a right, or to diminish that right, conventional canons of statutory construction require that it must do so clearly [19] .

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[18] *George v Rockett* (1990) 170 CLR 104 at 110111; [1990] HCA 26; *New South Wales v Corbett* (2007) 81 ALJR 1368 at 13721373 [18][22], 1382 [87] and cases there cited; 237 ALR 39 at 4344, 57; [2007] HCA 32 .

[19] *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93; [1925] HCA 53; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 558559 [28], 562563 [43], 577 [90]; [2002] HCA 49.

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38. **Following paragraph cited by:**

Splinter v Dunne (05 April 2024) (Blokland J)
Police v Dafov (17 September 2008) (Gray, Vanstone and White JJ)

We are mindful of the difficulties of police in responding to apparent complaints about domestic violence. Such difficulties obviously lay behind the conferral of police powers in terms of ss 357F, 357G and 357H . Properly, those difficulties, and the importance of

effective police intervention in response to suspected cases of domestic violence, were referred to by the Court of Appeal [20] . However, the powers there granted were not unlimited. They were granted, relevantly, subject to the provisions of the Act. Those provisions reserved the right to the occupier to withdraw an invitation to police to enter and remain on the premises. If, in the present case, the police considered that it was necessary to reenter the premises, the remedy was in their hands. They could seek a warrant from a magistrate, and this could be sought and provided by telephone [21] .

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[20] [2007] Aust Torts Reports ¶81893 at 69705 [93] per Santow JA, 69710 [138][139] per Ipp JA referring to the Second Reading Speech in support of the Crimes (Domestic Violence) Amendment Bill 1982 (NSW).

[21] Above at [18].

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39. It follows that the police officers who entered the appellant's flat had no statutory justification for remaining on the premises after he asked them to leave. Was there common law justification?

Common law justification?

40. **Following paragraph cited by:**

Nisar v Property Partners Canberra Pty Ltd (Civil Dispute & Residential Tenancies) (21 June 2024) (M Hanna M)
Glavinic v Commonwealth (01 December 2023) (Mossop J)
R v Kaufmann (27 November 2020) (Ruling Of Fuller J)
The Owners - Strata Plan 85044 v Murrell; Murrell v The Owners - Strata Plan 85044 (01 October 2020) (Williams J)
Crossley v State of South Australia (25 February 2020) (Tilmouth J)
R v Muja (04 June 2018) (Reasons For Ruling Of Costello J)
Cosenza v Origin Energy Ltd (12 October 2017) (Blue J)
R v McCarthy (20 March 2017) (Reasons For Ruling Of Nicholson J)
R v McCarthy (03 February 2015) (Blue J)

> 34. Before turning to the common law entitlement of police officers to enter land to prevent a breach of the peace, Gleeson CJ, Gummow, Kirby and Hayne JJ referred to the common law entitlement to enter or remain on land to preserve life or property in the following terms:
>
> > The common law has long recognised that any person may justify what would otherwise constitute a trespass to land in cases of necessity to preserve life or property. [10] The actions of fire-fighters, police and ambulance officers will often involve application of that principle. There being no evidence of danger to life or property, it was not suggested that this was such a case. [11]

via

[11] *Kuru v State of New South Wales* at [40] .

The common law has long recognised that any person may justify what would otherwise constitute a trespass to land in cases of necessity to preserve life or property [22] . The actions of firefighters, police and ambulance officers will often invoke application of that principle. There being no evidence of danger to life or property, it was not suggested that this was such a case.

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[22] *Maleverer v Spinke* (1538) 1 Dyer 35b at 36b [73 ER 79 at 81].

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41. The defence delivered by the State in answer to the appellant's claim in the District Court did not distinctly allege that the police officers remaining in the appellant's flat, after he had asked them to leave, was in exercise of any common law right to remain on the land. The defence was cast in terms that were apposite to invoke only a statutory right founded in s 357F of the *Crimes Act* . Yet at all stages of the proceeding, this litigation has been conducted on the footing that it was open to the State to rely not only on s 357F , but also on a common law justification for what otherwise would have been the police officers' trespass to land. As Mason P rightly pointed out [23] in the Court of Appeal, the State's failure to plead all of the defences on which it relied was and is unsatisfactory. It is unsatisfactory because there is no sufficient definition of what was said to be the justification, and there is no sufficient definition of what were the facts that were said to engage that justification.

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[23] [2007] Aust Torts Reports ¶81893 at 69,690 [3] .

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42. In its written submissions in this Court the State submitted that where police "apprehend on reasonable grounds that a breach of the peace has occurred and unless they involve themselves may recur, or alternatively that a breach of the peace is imminent, they may enter private dwelling premises for preventative and investigative purposes, acting only in a manner consistent with those purposes and remaining only for so long as is necessary for those purposes". It is convenient to treat this submission as identifying the asserted common law justification. It should also be said at once, however, that the submission was cast at a level of abstraction that did not identify the facts of this case that were said to engage the justification.

43. **Following paragraph cited by:**

Nisar v Property Partners Canberra Pty Ltd (Civil Dispute & Residential Tenancies) (21 June 2024) (M Hanna M)

31. The defences to an action for trespass to land are:

(a) The entry or interference was reasonably necessary to protect a person or property from a threat of real and imminent harm (the necessity defence). [7]

(b) The defendant has consent of the plaintiff (a licence) to enter onto the land or otherwise act in the manner that interferes with the plaintiff's exclusive possession of the land (the licence defence). [8]

(c) The defendant has lawful authority under statute or at common law to enter onto the land or otherwise act in the manner that interferes with the plaintiff's exclusive possession of the land (the lawful authority defence). [9]

via
[9] See *Kuru v New South Wales* [2008] HCA 26 at [43] per Gleeson CJ, Gummow, Kirby and Hayne JJ

Glavinic v Commonwealth (01 December 2023) (Mossop J)
Sohtra v Peddi (18 May 2023) (Derham AsJ)
Sohtra v Peddi (18 May 2023) (Derham AsJ)
Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) (24 March 2023) (Williams J)
Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) (24 March 2023) (Williams J)
Romani v State of New South Wales (07 February 2023) (Wright J)

41. Police officers have no special rights to enter land, except in cases provided for by the common law and by statute: *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ) . There was no suggestion in the present case that the police officers had any lawful right to enter the Warrazambil Creek property absent the consent or licence of the occupier.

R v Armistead (16 July 2019) (Kelly, Stanley and Hinton JJ)

70. It is settled that: [2]

> Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law.
>
> [footnotes omitted]

via

[2] *Coco v The Queen* (1994) 179 CLR 427 at 435-436 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Halliday v Nevill* (1984) 155 CLR 1 at 10 ; *Plenty v Dillon* (1991) 171 CLR 635 at 639 ; *Kuru v New South Wales* (2008) 236 CLR 1 at [43] .

R v Muja (04 June 2018) (Reasons For Ruling Of Costello J)

103. The aforementioned principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his or her duty, unless the entering or remaining on the premises is authorised or excused by the law. [2]

via

[2] *Halliday v Nevill* (1984) 155 CLR 1, 10 ; *Kuru v New South Wales* (2008) 236 CLR 1 at [43] .

Cosenza v Origin Energy Ltd (12 October 2017) (Blue J)
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) (02 December 2016) (Hinton J)
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) (02 December 2016) (Hinton J)
Bennett v Police (25 August 2016) (Doyle J)
State of New South Wales v McCarthy (03 June 2015) (Meagher and Gleeson JJA, Adamson J)
R v McCarthy (03 February 2015) (Blue J)

33. In *Kuru v State of New South Wales* ,[8] the High Court considered, but did not determine, the limits of the common law entitlement of police officers to enter land to prevent a breach of the peace. Gleeson CJ, Gummow, Kirby and Hayne JJ restated three general propositions in relation to trespass in the following terms:

> As was pointed out in this Court's decision in *Plenty v Dillon*, it is necessary to approach questions of the kind now under consideration by recognising the importance of two related propositions. First, a person who enters the land of another must justify that entry by showing either that the entry was with the consent of the occupier or that entry had lawful authority to enter. Secondly, except in cases provided for by the common law and by statute, police officers have no special rights to enter land. And in the circumstances of this case it is also important to recognise a third proposition: that an authority to enter land may be revoked and that, if the authority is revoked, the entrant no longer has authority to remain on land but must leave as soon as is reasonably practicable. [9]

(Footnotes omitted)

via

[9] Ibid at [43] .

Kazas-Rogaris v Gaddam (09 December 2014) (Davies J)
R v Rockford (27 November 2014) (Reasons for Ruling and Verdict of His Honour Judge Soulio)
R v Bossley (27 September 2012) (Dalton J)
Police v Dafov (17 September 2008) (Gray, Vanstone and White JJ)

12. The common law position was recently addressed by the High Court in *Kuru v State of New South Wales* , [3] where Gleeson CJ, Gummow, Kirby and Hayne JJ observed:

> As was pointed out in this Court's decision in *Plenty v Dillon* , it is necessary to approach questions of the kind now under consideration by recognising the importance of two related propositions. First, a person who enters the land of another must justify that entry by showing either that the entry was with the consent of the occupier or that the entrant had lawful authority to enter. Secondly, except in cases provided for by the common law and by statute, police officers have no special rights to enter land. And in the circumstances of this case it is also important to recognise a third proposition: that an authority to enter land may be revoked and that, if the authority is revoked, the entrant no longer has authority to remain on the land but must leave as soon as is reasonably practicable.
>
> …
>
> In *Halliday v Nevill* , this Court held that if the path or driveway leading to the entrance of a suburban dwelling-house is left unobstructed, with any entrance gate unlocked, and without indication by notice or otherwise that entry by visitors or some class of visitors is forbidden, the law will imply a licence in favour of *any* member of the public to go on that path or driveway for any *legitimate* purpose that in itself involves no interference with the occupier's possession or injury to the person or property of the occupier, or the occupier's guests. But as Brennan J pointed out in his dissenting opinion in *Halliday*, there are cases in which it is necessary to recognise that when it is police officers who seek to enter the land of another there is "a contest between public authority and the security of private dwellings".

via

[3] *Kuru v State of New South Wales* [2008] HCA 26 at [43] , [45] (footnotes omitted).

Police v Dafov (17 September 2008) (Gray, Vanstone and White JJ)

As was pointed out in this Court's decision in *Plenty v Dillon* [24] , it is necessary to approach questions of the kind now under consideration by recognising the importance of two related propositions. First, a person who enters the land of another must justify that entry by showing either that the entry was with the consent of the occupier or that the entrant had lawful authority to enter [25] . Secondly, except in cases provided for by the common law and by statute, police officers have no special rights to enter land [26] . And in the circumstances of

this case it is also important to recognise a third proposition: that an authority to enter land may be revoked and that, if the authority is revoked, the entrant no longer has authority to remain on the land but must leave as soon as is reasonably practicable.

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[24] (1991) 171 CLR 635 at 639 per Mason CJ, Brennan and Toohey JJ, 647 per Gaudron and McHugh JJ; [1991] HCA 5 .

[25] *Halliday v Nevill* (1984) 155 CLR 1 at 10; [1984] HCA 80; *Entick v Carrington* (1 765) 2 Wils KB 275 at 291 [95 ER 807 at 817]; *Great Central Railway Co v Bates* [1921] 3 KB 578 at 581582 ; *Southam v Smout* [1964] 1 QB 308 at 320 ; *Morris v Beardmore* [1 981] AC 446 at 464 ; *Eccles v Bourque* [1975] 2 SCR 739 at 742743 .

[26] *Halliday* (1984) 155 CLR 1 at 10.

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44. **Following paragraph cited by:**

Glavinic v Commonwealth (01 December 2023) (Mossop J)

In the case of a police officer's entry upon land, this is not necessarily a great burden. As has already been pointed out [27] , the police officer may then (or earlier) seek a warrant which may be granted in large terms [28] . Such a warrant may be sought by telephone[29]. It is granted by a Magistrate. Although the grant of a warrant is an administrative act, it is performed by an officeholder who is also a judicial officer enjoying independence from the Executive Government and hence from the police. This facility is thus an important protection, intended by Parliament, to safeguard the ordinary rights of the individual to the quiet enjoyment of residential premises. Where a case for entry can be made out to a Magistrate, the occupier's refusal or withdrawal of permission to enter or remain may be overridden. However, this is done by an officer who is not immediately involved in the circumstances of the case and who may thus be able to approach those circumstances with appropriate dispassion and attention to the competing principles at stake [30] .

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[27] Above at [18].

[28] s 357G(3) .

[29] s 359G(4).

[30] *Halliday* (1984) 155 CLR 1 at 20 per Brennan J.

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45. **Following paragraph cited by:**

Nisar v Property Partners Canberra Pty Ltd (Civil Dispute & Residential Tenancies) (21 June 2024) (M Hanna M)
Romani v State of New South Wales (07 February 2023) (Wright J)
Phillips v Police (03 November 2020) (Stanley J)
R v Armistead (16 July 2019) (Kelly, Stanley and Hinton JJ)
O'Neill v Roy (12 April 2019) (Mildren AJ)
R v Muja (04 June 2018) (Reasons For Ruling Of Costello J)
Cosenza v Origin Energy Ltd (12 October 2017) (Blue J)
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) (02 December 2016) (Hinton J)
Bennett v Police (25 August 2016) (Doyle J)
Katter v Melhem (28 July 2015) (McColl and Leeming JJA, JC Campbell AJA)

> 120. In *Kuru v State of New South Wales* , [45] the High Court urged intermediate appellate courts to consider whether to deal with all grounds of appeal, even if the appeal could be disposed of without deciding them all. There are sometimes significant reasons why it is not desirable for an appellate court to consider all the grounds that have been raised. [46] In the present case the argument on this topic in the written submissions was scarcely developed, and was not further explained in oral submissions. Whether an injunction is available in these circumstances is a topic of some difficulty, and considerable importance. In my view it is preferable not to embark on the topic when a clear basis exists for setting aside the judgment for $1 million.

In *Halliday v Nevill* [31] , this Court held that if the path or driveway leading to the entrance of a suburban dwellinghouse is left unobstructed, with any entrance gate unlocked, and without indication by notice or otherwise that entry by visitors or some class of visitors is forbidden, the law will imply a licence in favour of *any* member of the public to go on that path or driveway for any *legitimate* purpose that in itself involves no interference with the occupier's possession or injury to the person or property of the occupier, or the occupier's guests. But as Brennan J pointed out [32] in his dissenting opinion in *Halliday* , there are cases in which it is necessary to recognise that when it is police officers who seek to enter the land of another there is "a contest between public authority and the security of private dwellings".

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[31] (1984) 155 CLR 1 .

[32] (1984) 155 CLR 1 at 9.

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46. Argument in this Court about an asserted common law justification for the police officers remaining in the appellant's flat necessarily referred to general statements made in decided

cases, about "preventing" a breach of the peace, especially some statements on that subject made in the decision of a Divisional Court of the King's Bench Division in *Thomas v Sawkins* [33] . Particular emphasis was given to two statements in that case. First, Avory J said [34] tha t "[t]o prevent ... a breach of the peace the police were entitled to enter and to remain on the premises". Secondly, Lord Hewart CJ said [35] that "a police officer has ex virtute officii full right [to enter and remain on private premises] when he has reasonable ground for believing that an offence is imminent or is likely to be committed".

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[33] [1935] 2 KB 249 .

[34] [1935] 2 KB 249 at 257.

[35] [1935] 2 KB 249 at 255.

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47. **Following paragraph cited by:**

Criminal Charge Book (09 September 2025)

It is to be noted that neither of these statements countenances an entry or remaining on premises for *investigating* whether a breach of the peace has occurred or determining whether one is threatened or imminent. Nothing else that was said in *Thomas v Sawkins* would support such a power and no reference was made to any decision that would cast the power so widely. Rather, the focus of what was said in *Thomas v Sawkins* was upon prevention of a breach of the peace, not upon any power of investigation.

48. As has been cogently argued in academic commentary [36] on *Thomas v Sawkins* , the statements made by Avory J and Lord Hewart CJ that have been set out earlier were cast in "unnecessarily wide terms"[37]. The immediate context for the decision in *Thomas v Sawkins* was the attendance of police at a public meeting held to consider, among other things, a call for the dismissal of the chief constable of the county. For at least Avory J, and perhaps the third member of the Court, Lawrence J, much turned on the fact that the meeting was a public meeting to which all members of the public were invited. What was decided in *Thomas v Sawkins* must be approached with the facts of the case well in mind, and of course, the facts of the present case are very different.

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[36] Goodhart, " *Thomas v Sawkins* : A Constitutional Innovation", (1936) 6 *Cambridg e Law Journal* 22; Feldman, *The Law Relating to Entry, Search and Seizure,* (1986) ("Feldman") at 324331.

[37] Feldman at 324.

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49. **Following paragraph cited by:**

Glavinic v Commonwealth (01 December 2023) (Mossop J)

267 The judgment in *Kuru* (at [49]) questioned but did not answer what exactly was meant by "prevent" a breach of the peace and whether the power is one which permits forcible entry. Further, the judgment referred to what was said by Lord Diplock in *Lavin v Albert* [1982] AC 546 at 565 that:

These considerations apart, when it is said that a police officer may enter premises to "prevent" a breach of the peace, it is necessary to examine what is meant by "prevent" and what exactly is the power of entry that is contemplated. Is the power to enter one which permits forcible entry? Does preventing a breach of the peace extend beyond moral suasion to include arrest? Is the preventing of a breach of the peace that is contemplated directed ultimately to prevention by arrest?

50. **Following paragraph cited by:**

State of New South Wales v Bouffler (27 July 2017) (Beazley ACJ, Ward and Gleeson JJA)
R v Tran (Ruling No 4) (24 April 2013) (Lasry J)

Some of these questions have since been considered in English decisions [38] . Those later decisions proceed from the premise stated [39] by Lord Diplock in *Albert v Lavin* that:

> "[E]very citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will."

As is evident, not only from the passage just cited but also from some of the later English decisions, working out the application of a premise so broadly stated is not free from difficulty [40] , not least in deciding what constitutes an actual or threatened breach of the peace [41] and what steps, short of arrest, may be taken in response [42] .

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[38] See, for example, *McGowan v Chief Constable of Kingston upon Hull* [1968] *Criminal Law Review* 34; *Albert v Lavin* [1982] AC 546; *McLeod v Commissioner of Police of the Metropolis* [1994] 4 All ER 553.

[39] [1982] AC 546 at 565. See also *Coleman v Power* (2004) 220 CLR 1 at 24 [10] per Gleeson CJ; [2004] HCA 39 .

[40] See Feldman, "Interference in the Home and Anticipated Breach of the Peace", (1995) 111 *Law Quarterly Review* 562; cf *McLeod v United Kingdom* (1998) 27 EHRR 493.

[41] *Addison v Chief Constable of the West Midlands Police* [2004] 1 WLR 29 at 31-32 .

[42] *McLeod* [1994] 4 All ER 553 at 560.

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51. **Following paragraph cited by:**

R v Kaufmann (27 November 2020) (Ruling Of Fuller J)

And for the same reasons, the State's submission, set out earlier in these reasons, to the effect that police may enter premises if they apprehended on reasonable grounds that a breach of the peace has occurred and may recur, or that a breach of the peace is imminent, suffers the same difficulties. Further, the State's submission that police may enter for "preventative *and* investi gative purposes" would, by its reference to "investigative purposes", extend the power much further than any description of common law power given in the English cases. There is no basis for making that extension. Whatever may be the ambit of the power of police (or of a member of the public) to enter premises to *prevent* a breach of the peace, that power of entry does not extend to entry for the purposes of investigating whether there has been a breach of the peace or determining whether one is threatened.

52. Both parties in the present case accepted that police officers in New South Wales are duty bound to "keep the peace". A statutory source of that duty was not identified in argument but it may be that it is to be found in the then provisions of regs 8 and 9 of the Police Regulation 2000 (NSW) , coupled with ss 6 and 201 of the Police Act . Regulation 8 prescribed a form of oath or affirmation to be taken by a police officer under s 13 of the Police Act . The prescribed form of oath or affirmation contained a promise to "cause Her Majesty's peace to be kept and preserved", and a promise by the declarant to "prevent to the best of my power all offences against that peace". Regulation 9(1) provided that police officers were "to comply strictly with the Act and this Regulation and promptly comply with all lawful orders from those in authority over them". Section 6 of the Police Act stated the mission and functions of the Police Service. Those functions included providing police services for New South Wales and "police services" was defined in s 6(3) as including "services by way of prevention and detection of crime" and "the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way". And as noted earlier, s 201 of the Police Act made it an offence to neglect or refuse to carry out any lawful duty as a police officer.

53. It is not necessary to decide whether it is these provisions that obliged police officers in New South Wales to keep the peace. It is sufficient for present purposes to accept, without deciding, that at the time of the events giving rise to this litigation New South Wales police officers were bound to "keep the peace". But in the present matter, by the time police went to the appellant's flat, there was no continuing breach of the peace and nothing in the evidence of what happened thereafter suggested that, but for the police officers not leaving the flat when asked to do so, any further breach of the peace was threatened or expected, let alone imminent. However broadly understood may be the notion of a duty or right to take reasonable steps to make a person who is breaching or threatening to breach the peace refrain from doing so, that duty or right was not engaged in this case. It was not engaged because, by the time police arrived at the appellant's flat there was no continuing or threatened breach of the peace. And no breach of the peace was later committed or threatened before the eruption of the violent struggle that culminated in the appellant's arrest.

54. It follows that the continued presence of police officers in the appellant's flat, after he had asked them to go and a reasonable time for them to leave had elapsed, could not be justified as directed to preventing a breach of the peace. No other form of common law justification for remaining in the appellant's flat was suggested.

Conclusion and Orders

55. For these reasons, the question treated by the parties as dispositive of liability (were the police officers trespassers when the appellant first came into physical contact with one of them) should be resolved in the appellant's favour. It follows that the appeal to this Court should be allowed. The orders of the Court of Appeal of the Supreme Court of New South Wales made on 15 June 2007 should be set aside. In their place there should be orders that the State's appeal to that Court on grounds 1, 2, 3 and 4 be dismissed and that the appeal be remitted to that Court for further consideration of grounds 5, 6, 7 and 8 of the State's Notice of Appeal. The State should pay the appellant's costs of the appeal to this Court and of the proceedings in the Court of Appeal up to and including the entry of the order of the Court of Appeal made on 15 June 2007. The costs of the further hearing in the Court of Appeal should be in the discretion of the Court of Appeal.

56. HEYDON J. This appeal presents a difficult problem of statutory construction. The problem arises from a tension between s 357F(3) [43] and s 357H(1) [44] of the *Crimes Act* 1900 (NSW) . The former provision was relied on by the plaintiff to support the submission that at the instant the police officers failed to comply with the plaintiff's first request to leave the premises, they became trespassers. The latter provision was relied on by the defendant to support the submission that once police officers have lawfully entered premises, or remain lawfully on them by reason of a s 357F(2) invitation, they are entitled to stay on those premises for as long as is reasonably necessary to take, and complete, the actions described in s 357H(1)(a) and (a1). The defendant's construction is to be preferred for the following reasons.

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[43] Set out above at [17].

[44] Set out above at [19].

The construction of the legislation

57. The plaintiff's construction has the result that if police officers who had lawfully entered, or were lawfully remaining in, a dwelling-house because of a s 357F(2) invitation, on observing that a person present appeared to be badly injured, would have no statutory right to remain merely because an occupier of the dwelling-house expressly refused consent to remain. A construction of the legislation which would deprive police officers who, pursuant to s 357H(1)(a)(ii) , were trying to control severe haemorrhaging, or were trying to restore an injured person's heart beat, or were trying to prevent an injured person from choking to death, of any statutory right to remain and continue their endeavours once consent to remain was refused, must be rejected.

58. It is necessary also to reject a construction of the legislation which would deprive police officers, on the point of lawfully arresting someone pursuant to s 357H(1)(a)(iii) , of any statutory right to remain in order to do so the instant consent was refused.

59. It is necessary, further, to reject a construction of the legislation which would deprive police officers who are seeking to prevent the commission or further commission of a domestic violence offence within the meaning of s 357H(1)(a)(i) of any statutory right to remain in order to continue their endeavours once consent to remain was refused in circumstances not falling within s 357F(4) .

60. And it is necessary to reject a construction of the legislation which would deprive police officers who were about to inquire into the presence of firearms, search for them and seize them, or were in the process of conducting that inquiry, search and seizure as contemplated by s 357H(1)(a1) , of any statutory right to remain in order to continue that course of conduct once consent to remain was refused.

61. It is no answer to the difficulties posed by these four instances to say that the police officers, once they have left the premises, are at liberty speedily to obtain a telephone warrant to enter the premises for a second time. The plaintiff contended that that process would take very little time. But the process is not supposed to be a formality, and it could often take some time. By the time the police officers had departed and obtained a telephone warrant to re-enter, the injured person might have died or suffered irreparable physical injury; the person to be arrested might have fled and absconded for good; a domestic violence offence, or a further domestic offence, might have been committed, causing grave injury or death; and firearms might have been removed from the premises or used to commit a crime.

62. In each of the four instances just discussed, a correct construction of the legislation gives police officers who are lawfully present before consent to remain is withdrawn a statutory right to remain in order to commence or continue, and then to complete the actions described in s 357H(1)(a)(ii) , (iii) and (iv) and (a1), despite that withdrawal of consent. There is no reason not to adopt the same construction in relation to the action described in s 357H(1)(a)(i) – investigating whether a domestic violence offence has been committed. As the defendant

submitted, it follows from the fact that under s 357H(1)(b) the police officers are to remain "only as long as is reasonably necessary", that they may remain as long as is reasonably necessary.

63. Is there an absurdity or anomaly in the defendant's position arising from its contemplation that under the legislation consent to enter can be refused in the first place, and any entry therefore rendered unlawful, even if the police officer suspected a serious crime causing grave personal injury had just taken place, but withdrawal of consent to remain cannot render the continued presence of police already on the premises unlawful until the s 357H(1) actions are complete? In similar vein, the plaintiff submitted: "The notion that Parliament would have prevented you from saying, 'I know I let you in but I really do not like the way you are carrying on, I want you to go now', the notion that Parliament has abolished that common law possibility is ... unthinkable." That submission reveals a certain obliviousness to practical circumstances. Police officers who have lawfully entered pursuant to consent, or who remain lawfully after entry pursuant to consent, are likely in practice to know much more about what has happened or is likely to happen than police officers who were not given any consent to enter or remain and did not enter or remain. The compromise struck by the legislation is that police officers who have been refused consent to enter at all must obtain a warrant. Those who have entered or remained pursuant to consent which is then withdrawn may remain until the s 357H(1) proc esses, in the course of which they may well have learned information which makes the completion of questioning those persons desirable, are complete. To be balanced against the supposedly unthinkable consequences of the defendant's construction to which the plaintiff's submission referred is the fact that the consequences of the plaintiff's construction are, if not unthinkable, at least highly impractical and in particular circumstances undesirable. It would mean that the householder could forestall the lawful activities of police officers just as they were beginning to bear fruit.

64. The plaintiff's construction would read s 357F(3) as prevailing over s 357H(1) . On the defendant's construction, the two must be read together, and s 357H(1) prevails because police officers acting within that sub-section are not remaining, to use the language of s 357F(3) , "by reason only" of a s 357F(2) invitation: they are "otherwise authorised" by s 357H(1) .

The facts

65. The police officers entered the premises lawfully because a person who apparently resided on the premises invited them to do so. Even if that were not so, the police officers remained lawfully once the plaintiff encountered the police officers and said that they could look around. The state of affairs in which the police officers found themselves just before the plaintiff came into physical contact with them – just before the moment when the legality of their presence must be tested – was as follows. The police officers had heard a broadcast on their radios of a message preceded by two beeps. That signified a serious state of affairs like an armed robbery or a violent domestic incident. One message broadcast included the words: "Male and female fighting. Female heard screaming". A later message broadcast included the words: "The female had been screaming. Now it's all gone quiet." These signals and messages indicated a serious problem to be dealt with urgently by travelling as quickly as possible to the premises using lights and sirens. Three police vehicles, each containing two officers, responded. After speaking to two friends of the plaintiff, the police officers waited until the plaintiff came out of the shower. The evidence called for the plaintiff reveals that the following events then took place. The police officers informed the plaintiff that they were

investigating a domestic violence complaint made by a neighbour. He told them that no female was present and that his "Mrs" had left. They sought and obtained his permission to look around. Two of the officers looked in the two bedrooms in the plaintiff's unit. They asked him where the female who had been there was, and he said that she was at his sister's house around the corner. He could not give the precise address of the sister's house, but described what it looked like and how to get there. He then began to ask them to leave, and did so on a number of occasions (estimates varying from between two to three to at least six occasions) in a foul-mouthed way, accompanying what he said with violent acts like slamming down a piece of paper with his sister's telephone number on it. These were excessive and disproportionate reactions which were not calculated to allay the alarm which had brought the police officers to the premises. They were not obliged to accept his answers immediately, and their experience probably instructed them that it was prudent not to do so. The police officers continued to ask where the female was and where the house of the plaintiff's sister was. The plaintiff then climbed onto a bench between the kitchen and the living room and jumped off in the direction of the police. He came into physical contact with them, and they used force to subdue him and arrest him. They experienced difficulty in getting him down the stairs. After the plaintiff was put in a police car, one of the police officers asked Mr Guler, a friend of the plaintiff, who had been present when the police officers entered the unit, whether he knew where the plaintiff's sister lived. Mr Guler responded that he did not know the address but could show the police where the sister's house was. Mr Guler went in a police car to the sister's house where he then observed the police talking to the plaintiff's fiancée. At that time, at least the urgent stage of the police investigation into whether a domestic violence offence had been committed came to an end.

66. The view of the evidence just expressed corresponds with Ipp JA's approach in the Court of Appeal. Ipp JA did not accept that after the plaintiff had told the police to leave there was nothing to investigate. The mere fact that no person had been found in the unit did not put an end to the investigation of whether a domestic violence offence had been committed. The questions the police asked of the plaintiff in Mr Guler's presence as to the whereabouts of the female who had been heard screaming had not been answered to their satisfaction and were part of the police investigations. Although the plaintiff had given the police a telephone number for his sister, they had not had an opportunity to verify it. The police wanted to know what had happened to the female, they wanted to know where she was, and they were not going to leave until they got answers to those questions. In the few minutes between when the plaintiff first asked the police to leave and the time when he was arrested, they had not obtained an answer from anyone present giving the address of the plaintiff's sister and had not had an opportunity of calling the telephone number which the plaintiff had told them was the telephone number of his sister. The conduct of the police in those minutes was reasonably necessary in order to investigate whether a domestic violence offence had been committed. Santow JA gave a concurring summary, and Mason P agreed with both judgments. The approach of the Court of Appeal to the finding of facts is to be preferred to that of the trial judge, whose judgment is characterised by errors of fact (as the Court of Appeal demonstrated) and by facetiousness, exaggeration and excessive metaphor. The conclusion of the Court of Appeal that the investigation by the police officers of whether a domestic violence offence had been committed was not complete when the plaintiff came into physical contact with them was correct. The view that it was complete once the plaintiff had said the female had gone to his sister's house and could be contacted on a certain telephone number lacks all practical merit.

67. Hence at the time when the plaintiff came into physical contact with the police officers they had a statutory right to be present, and it is not necessary to consider the common law position.

Orders

68. The appeal should be dismissed with costs.

Cited by:

Criminal Charge Book [2023] JCV Criminal_Charges_Book -
Catallyze Pty Ltd v JAB Holdings New Zealand Limited [2025] NSWCATAP 140 -
Dwyer Building Group Pty Ltd v Spicer; Spicer v Dwyer Building Group Pty Ltd [2025] NSWCATAP 133 (13 June 2025) (P H Molony, Senior Member, L Andelman, Senior Member)

132. The reality is that the Tribunal did not address any of the claims for extension of time directly because it did not consider them applicable. This is most unfortunate as it requires the issues with respect to the extension of time claims determined. If the Tribunal had provided a view on the extension of time, despite it considering them inapplicable, we would not be faced with the dilemma of how to resolve the extension of time issues: see the discussion in *Kuru v State of New South Wales* [2008] HCA 26 at [131] below.

Dwyer Building Group Pty Ltd v Spicer; Spicer v Dwyer Building Group Pty Ltd [2025] NSWCATAP 133 -
Friseal & Friseal [2025] FedCFamC1A 102 (04 June 2025) (Alstergren CJ; Kari and Christie JJ)

21. I am conscious that, ideally, intermediate appellate courts should deal with all grounds of appeal: *Kuru v New South Wales* (2008) 236 CLR 1 at [12] . However, in this case I have determined that there is some significant overlap such that it is appropriate that I dispose of the appeal by considering Ground 3. I am confident that the principles discussed at [7]–[8] of *Boensch v Pascoe* (2019) 268 CLR 593 approved by this Court in *Cantrell v North* (2020) FLC 93-976 at [128]- [130] are applicable.

Metal Manufactures Pty Limited t/as TLE Electrical v WesTrac Pty Limited [2025] NSWCA 97 -
Tok v Rashazar [2025] NSWCA 94 (07 May 2025) (Payne, Kirk and Stern JJA)

67. Whilst my conclusion as to ground one makes it unnecessary to consider the notice of contention ground, given that it was fully argued and consistent with *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] and *Boensch v Pascoe* (2019) 268 CLR 593; [2019] HCA 49 at [8] , I will deal with this ground.

Charlie v State of Queensland [2025] FCAFC 55 -
Pirrottina v Pirrottina [2025] NSWCA 55 (02 April 2025) (Gleeson, Payne and Adamson JJA)

127. I have considered in accordance with *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] , and *Boensch v Pascoe* (2019) 268 CLR 593; [2019] HCA 49 at [8] whether the Court should resolve these asserted factual challenges and related issues although they cannot affect the outcome of the appeal, in light of the conclusions on Issues 1-4 above. In my view, the Court should not do so given the absence of a formal application by Rocco to amend the notice of appeal and the further absence of any substantive argument challenging these findings.

Northern Territory of Australia v Austral [2025] NTCA 3 (28 March 2025) (Grant CJ; Reeves and Burns JJ)

78. Given the finding that the awards of exemplary damages were made in error and will be set aside, it is unnecessary to consider whether the awards of exemplary damages were manifestly excessive. This is also one of the exceptions to the general requirement expressed in *Kuru v State of New South Wales* that an intermediate court of appeal deal with all grounds of appeal. [48] That is because the finding that circumstances did not exist to warrant an award of exemplary damages precludes any contingent assessment of whether the quantum of exemplary damages awarded was manifestly excessive. The same considerations which govern whether the circumstances existed to warrant an award of exemplary damages will also be decisive in the determination of the appropriate quantum of those damages.

via

[48] *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] .

Northern Territory of Australia v Austral [2025] NTCA 3 -
Conexa Sydney Holdings Pty Ltd v Chief Commissioner of State Revenue [2025] NSWCA 20 -
Comcare v DSLB [2025] FCAFC 13 -
Lewis v Estate of Juan Martinez [2025] NSWCA 2 -
Alta Vale Residential Pty Ltd v The Owners - Strata Plan No. 95693 [2024] NSWCATAP 212 -
Zurich Australian Insurance Limited v CIMIC Group Limited [2024] NSWCA 229 -
Commissioner of Police, NSW Police Force v FYH [2024] NSWCATAP 176 (09 September 2024) (Seiden SC DCJ, Deputy P, D G Fairlie Senior Member)

90. It is important for an intermediate appellate court (or similarly, the Appeal Panel) to consider whether to determine all grounds of appeal to dispose of the matter without remitting below: *Kuru v State of New South Wales* [2008] HCA 26 at [12] , *Imbree v Chief Commissioner of State Revenue* [2024] NSWCATAP 158 at [46] .

Imbree v Chief Commissioner of State Revenue [2024] NSWCATAP 158 -
Nisar v Property Partners Canberra Pty Ltd (Civil Dispute & Residential Tenancies) [2024] ACAT 44 (21 June 2024) (M Hanna M)

31. The defences to an action for trespass to land are:

(a) The entry or interference was reasonably necessary to protect a person or property from a threat of real and imminent harm (the necessity defence). [7]

(b) The defendant has consent of the plaintiff (a licence) to enter onto the land or otherwise act in the manner that interferes with the plaintiff's exclusive possession of the land (the licence defence). [8]

(c) The defendant has lawful authority under statute or at common law to enter onto the land or otherwise act in the manner that interferes with the plaintiff's exclusive possession of the land (the lawful authority defence). [9]

via

[9] See *Kuru v New South Wales* [2008] HCA 26 at [43] per Gleeson CJ, Gummow, Kirby and Hayne JJ

Nisar v Property Partners Canberra Pty Ltd (Civil Dispute & Residential Tenancies) [2024] ACAT 44 -
Nisar v Property Partners Canberra Pty Ltd (Civil Dispute & Residential Tenancies) [2024] ACAT 44 -
Medical Device Technologies Pty Ltd v Health Administration Corporation [2024] NSWCA 142 -
Splinter v Dunne [2024] NTSC 24 -
Splinter v Dunne [2024] NTSC 24 -
Kershaw v R [2024] NSWCCA 27 -
Neilson v Secretary, Department of Planning and Environment [2024] NSWCA 28 -
Filby v Teg Live Pty Ltd [2023] NSWCA 320 -
Filby v Teg Live Pty Ltd [2023] NSWCA 320 -
Finniss v State of New South Wales [2023] NSWCA 292 -
Eppinga v Kalil [2023] NSWCA 287 (01 December 2023) (Payne, Kirk and Stern JJA)

93. Had the appellant established malice, the imputation challenge may have been relevant to the assessment of damages. Since the appellant failed on those grounds, the imputation challenge is not strictly necessary to decide. Nonetheless, I will address it briefly: *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] and *Boensch v Pascoe* (2019) 268 CLR 593; [2019] HCA 49 at [8] .

Glavinic v Commonwealth [2023] ACTSC 361 (01 December 2023) (Mossop J)

267 The judgment in *Kuru* (at [49]) questioned but did not answer what exactly was meant by "prevent" a breach of the peace and whether the power is one which permits forcible entry. Further, the judgment referred to what was said by Lord Diplock in *Lavin v Albert* [1982] AC 546 at 565 that:

Glavinic v Commonwealth [2023] ACTSC 361 -
Glavinic v Commonwealth [2023] ACTSC 361 -
Glavinic v Commonwealth [2023] ACTSC 361 -
Secretary, Department of Communities and Justice v Farrugia [2023] NSWPICPD 75 -
Croc's Franchising Pty Ltd v Alamdo Holdings Pty Ltd [2023] NSWCA 256 -
Construction, Forestry, Maritime, Mining and Energy Union v Quirk [2023] FCAFC 163 -
Dwyer v Volkswagen Group Australia Pty Ltd [2023] NSWCA 211 -
Elite Realty Development Pty Ltd v Sadek [2023] NSWCA 165 (19 July 2023) (Payne, Mitchelmore and Stern JJA)

72. The appellants made clear that this ground was contingent upon success in grounds 1 or 2. Given my conclusions about those grounds this ground strictly does not arise. I will nevertheless deal with it for the reasons given in *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] .

Elite Realty Development Pty Ltd v Sadek [2023] NSWCA 165 -
Owners SP 92450 v JKN Para 1 Pty Limited [2023] NSWCA 114 -

Sohtra v Peddi [2023] VSC 262 -
Sohtra v Peddi [2023] VSC 262 -
Boydtown Pty Ltd v Minister for Planning and Public Spaces [2023] NSWLEC 47 (03 May 2023) (Pritchard J)

141. The applicants also referred to the reasons of Basten AJA in *Mangoola Coal Operations v Muswellbrook Shire Council* (***Mangoola Coal Operations***), [14] where his Honour held that it would generally be inefficient to repeat the process of calling and cross-examining witnesses in the event that there was error in the ruling as to the dispositive grounds. There, Basten AJA considered the authorities of the High Court in *Kuru v State of New South Wales* (***Kuru***) [15] and *Boensch v Pascoe* (***Boensch***). [16] In *Kuru* (a case concerning intermediate courts of appeal), Gleeson CJ, Gummow, Kirby and Hayne JJ said at [13] (footnotes omitted):

> 13. ...This Court has said on a number of occasions that, although there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal, not just with what is identified as the decisive ground. If the intermediate court has dealt with all grounds argued and an appeal to this Court succeeds, this Court will be able to consider all the issues between the parties and will not have to remit the matter to the intermediate court for consideration of grounds of appeal not dealt with below.

Boydtown Pty Ltd v Minister for Planning and Public Spaces [2023] NSWLEC 47 -
Boydtown Pty Ltd v Minister for Planning and Public Spaces [2023] NSWLEC 47 -
Boydtown Pty Ltd v Minister for Planning and Public Spaces [2023] NSWLEC 47 -
Boydtown Pty Ltd v Minister for Planning and Public Spaces [2023] NSWLEC 47 -
Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council [2023] NSWSC 262 -
Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council [2023] NSWSC 262 -
Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) [2023] NSWSC 274 -
Rove Estate Pty Ltd atf Lane Cove Estate Trust v Chomp Excavations & Demolition Pty Ltd (No 3) [2023] NSWSC 274 -
Romani v State of New South Wales [2023] NSWSC 49 (07 February 2023) (Wright J)

41. Police officers have no special rights to enter land, except in cases provided for by the common law and by statute: *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ) . There was no suggestion in the present case that the police officers had any lawful right to enter the Warrazambil Creek property absent the consent or licence of the occupier.

Romani v State of New South Wales [2023] NSWSC 49 -
Cosio & Cosio [2022] FedCFamC1A 187 -
Smith v The Queen [[2022]] SASCA 48 -
Smith v The Queen [[2022]] SASCA 48 -
Aerolink Air Services Pty Ltd v Bankstown Airport Ltd [2022] NSWSC 587 -
Maher v Kuperholz [2022] VSC 224 (09 May 2022) (Moore J)

22. The relevant legal principles are clear. As the High Court stated in *Kuru v New South Wales* , 'an authority to enter land may be revoked and ... if the authority is revoked, the entrant no longer has authority to remain on the land but must leave as soon as is reasonably practicable'. [13] As licensees occupying the relevant lands, David and Anthony would not become trespassers until they were notified that their licence to occupy the lands was revoked and a reasonable time had passed to enable them to remove themselves and their possessions from those lands. [14]

via

[13] *Kuru v New South Wales* (2008) 236 CLR 1, 14 [43] .

Maher v Kuperholz [2022] VSC 224 -
Maher v Kuperholz [2022] VSC 224 -
Edwin Davey Pty Ltd v Boulos Holdings Pty Ltd [2022] NSWCA 65 (26 April 2022) (Macfarlan and Gleeson JJA, Simpson AJA)

113. Given the conclusion reached on the contract claim, it is not necessary to address the restitutionary claim. Nevertheless, in accordance with *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] and *Boensch v Pascoe* (2019) 268 CLR 593; [2019] HCA 49 at [7] -[8] , I have considered whether I should do so and have concluded that it is not appropriate to address the restitutionary claim on a contingent basis. That is for two reasons. One is that the prospect that the restitutionary claim may later become relevant seems to me to be remote.

Edwin Davey Pty Ltd v Boulos Holdings Pty Ltd [2022] NSWCA 65 -
FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 19 -
LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17 -
Morton v Metal Manufactures Pty Ltd [2021] FCAFC 228 (16 December 2021) (Allsop CJ; Middleton and Derrington JJ)

185. The decision of Mansfield J in *Re Parker* was followed by Young JA in *Buzzle* . The case was concerned with the liability of directors (under s 588M) for contravention of the Act (being s 588G) for the failure to prevent insolvent trading by company. The relevant provisions had a similar form to ss 588V and 588W . The case against a company which was a creditor of the company in liquidation and the finance director of the creditor company as shadow directors of the company in liquidation failed. The appeal was dismissed. Thus the question of any contravention of s 588G was not necessary to answer for the resolution of the appeal. Justice of Appeal Young, however, conformably with then current practice dictated or influenced by the High Court decision in *Kuru v New South Wales* [2008] HCA 26; 236 CLR 1 , dealt with all other issues in the appeal including the question of set-off under s 553C if there had been liability proven. In respect of set-off Young JA said at 80–81 [274] and [278]:

> [274] The respondents rely on the decision of Mansfield J in the Federal Court in *Re Parker* (1997) 80 FCR 1; (1997) 25 ACSR 560. That was a case where a liquidator recovered under s 588W of the *Corporations Law* a debt from the holding company of a company in liquidation because of insolvent trading (s 588V). His Honour, in a thoroughly reasoned judgment based on authority, held that set-off under s 553C appli ed.
>
> ...
>
> [278] In the circumstances, especially as the point is not determinative, I consider that I should gratefully follow *Re Parker* and hold that, if it had been necessary, I would have declared that set-off was available under s 553C .

Nohra v Nando's Quality Meats Pty Ltd [2021] NSWSC 1209 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Atanaskovic Hartnell v Birketu Pty Ltd [2021] NSWCA 201 -

Seiffert v Commissioner of Police [2021] QCA 170 -
SIF Holdings Pty Ltd v CRC Gosford Pty Ltd [2021] NSWCA 174 (17 August 2021) (Payne, White and Brereton JJA)

100. On the contingency that I am wrong about Ground 1 of the Notice of Contention and Grounds 1 and 2 of the Notice of Appeal, I will consider the alternative argument based on subrogation: *Kuru v New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] (Gleeson CJ, Gummow, Kirby and Hayne JJ) .

Combe International Ltd v Dr August Wolff GmbH & Co KG Arzneimittel [2021] FCAFC 8 -
Australian Executor Trustees (SA) Ltd v Kerr [2021] NSWCA 5 -
Australian Executor Trustees (SA) Ltd v Kerr [2021] NSWCA 5 -
Ghosh v Health Care Complaints Commission [2020] NSWCA 353 -
GC NSW Pty Ltd v Galati [2020] NSWCA 326 -
Roy v O'Neill [2020] HCA 45 (09 December 2020) (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ)

80. Apart from the licence which is implied in law by the common law, there are cases "provided for by the common law and by statute" where police officers have "special rights to enter land" [80] . In those special cases, a balance is struck "between public authority and the security of private dwellings" [81] . Examples of those special cases include the common law power for a police officer to enter a home to arrest a person at or immediately after the time of commission of a misdemeanour or who is suspected on reasonable grounds of being the offender of a felony [82] , and arguably also in some cases of breach of the peace or apprehended breach of the peace [83] .

via

[81] *Kuru v New South Wales* (2008) 236 CLR 1 at 15 [45] , quoting *Halliday v Nevill* (1984) 155 CLR 1 at 9.

Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
Roy v O'Neill [2020] HCA 45 -
R v Kaufmann [2020] SADC 165 -
R v Kaufmann [2020] SADC 165 -
R v Kaufmann [2020] SADC 165 -
Wormald v Maradaca Pty Ltd [2020] NSWCA 289 -
Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Bay Street Appeal) [2020] FCAFC 192 -
Phillips v Police [2020] SASC 212 -
Phillips v Police [2020] SASC 212 -
Sydney Local Health District v Macquarie International Health Clinic Pty Ltd [2020] NSWCA 274 (02 November 2020) (Bell P, Gleeson and Payne JJA)

239. We have considered whether appeal grounds 4 and 11–14, all relating to the method of assessing damages in relation to the Hospital Site, should be resolved even though they cannot affect the outcome of the appeal in light of our conclusions in respect of appeal grounds 1 and 2: see *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] (**K**

uru) and *Boensch v Pascoe* (2019) 94 ALJR 112; [2019] HCA 49 at [8], [101] . Given that the grounds were fully argued and there remains the possibility of a further appeal, it is desirable to deal with these non-dispositive issues.

Sydney Local Health District v Macquarie International Health Clinic Pty Ltd [2020] NSWCA 274 -
Sydney Local Health District v Macquarie International Health Clinic Pty Ltd [2020] NSWCA 274 -
Ben-Pelech v Royle [2020] WASCA 168 -
Ben-Pelech v Royle [2020] WASCA 168 -
The Owners - Strata Plan 85044 v Murrell; Murrell v The Owners - Strata Plan 85044 [2020] NSWSC 20 -
SCRIVEN & SCRIVEN [2020] FamCAFC 236 -
SCRIVEN & SCRIVEN [2020] FamCAFC 236 -
Alam v Giampietro [2020] NSWDC 471 -
Cantrell & North and Anor [2020] FamCAFC 175 -
Cantrell & North and Anor [2020] FamCAFC 175 -
James Cook University v Ridd [2020] FCAFC 123 -
Left Bank Investments Pty Ltd v Ngunya Jarjum Aboriginal Corporation [2020] NSWCA 144 -
Spotlight Pty Ltd v Fatseas Investments Pty Ltd [2020] NSWCA 132 -
Warner Capital Pty Ltd v Shazbot Pty Ltd [2020] NSWCA 121 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 (15 April 2020) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)

148. Where, however, a thing is seized purportedly, but not lawfully, under Pt IAA of the *Crimes Act* , ss 3ZQU and 3ZQX of the Act have no application. In such a case, just as the unlawful execution of a warrant, including an otherwise apparently valid execution of an invalid warrant, may amount to trespass to land [182] , trespass to chattels, conversion and detinue [183] , so, too, may the retention and use of what has been unlawfully seized amount to a tort [184] , and, if the thing seized contains confidential or proprietary information, its retention and use may amount to a breach of confidence [185] or infringement of copyright [186] . It would not be a defence to such a claim, whether at law or in equity or under statute, that the only use that was made of the thing was one that would have been lawful if the thing had been lawfully seized under Pt IAA.

via

[182] See *Halliday v Nevill* (1984) 155 CLR 1 at 10, 20 per Brennan J; *Plenty v Dillon* (1991) 171 CLR 635 at 639640 per Mason CJ, Brennan and Toohey JJ, 647648 per Gaudron and McHugh JJ; *Kuru v New South Wales* (2008) 236 CLR 1 at 1415 [43] per Gleeson CJ, Gummow, Kirby and Hayne JJ .

Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Commissioner of Police v Seiffert [2020] QDC 50 (14 April 2020) (Judge AJ Rafter SC)
Kuru v New South Wales [2008] HCA 26; (2008) 236 CLR 1 , considered

Commissioner of Police v Seiffert [2020] QDC 50 -
Commissioner of Police v Seiffert [2020] QDC 50 -
R v Guode [2020] HCA 8 (18 March 2020) (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ)

62. Some of the analysis in the nine paragraphs that the Crown sought to impugn on this appeal was not strictly necessary for the resolution of the appeal to the Court of Appeal. But appellate legal reasoning is not always confined to those matters that are essential to the disposition of an appeal. Indeed, in some instances it is necessary for appellate judges to address submissions that are not dispositive of an appeal [35] . In many others it will be appropriate for appellate judges, in the exercise of judgment, to do so. In this case, involving the unique circumstance of overlapping charges of infanticide and murder, it was not inappropriate for the Court of Appeal to engage in nine paragraphs of discussion concerning

this overlap. This is particularly so given that, as the Court of Appeal said at the commencement of those paragraphs, "[m]uch of the discussion in this case concerned the ramifications of joining charges of infanticide and murder (and attempted murder) on the indictment; and more particularly, whether the charges of murder needed to be viewed through the 'prism' of infanticide" [36] .

via

[35] *Kuru v New South Wales* (2008) 236 CLR 1 at 6 [12] .

EL RASHIDY & EL RASHIDY [2020] FamCAFC 40 (27 February 2020) (Ainslie-Wallace and Aldridge & Watts JJ)
Kuru v New South Wales (2008) 236 CLR 1; [2008] HCA 26
Mann v Carnell

EL RASHIDY & EL RASHIDY [2020] FamCAFC 40 -
Crossley v State of South Australia [2020] SADC 14 -
Crossley v State of South Australia [2020] SADC 14 -
Crossley v State of South Australia [2020] SADC 14 -
Doyle v Commissioner of Police [2020] NSWCA 11 -
Sergio Andres Chocron v Mina Onkoud [2019] NSWSC 1823 -
Wiggins Island Coal Export Terminal Pty Ltd v New Hope Corporation Ltd [2019] NSWCA 316 (20 December 2019) (Bell ACJ, Macfarlan and Payne JJA)

116. Given the conclusion I have reached about construction it is unnecessary to address the issues raised by the notice of contention. I have considered whether in accordance with *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] I should do so and have concluded that I should not. I have also taken into account the remarks of the plurality in *Boensch v Pascoe* [2019] HCA 49 at [7]-[8] in declining to do so.

Lou v IAG Ltd t/as NRMA Insurance [2019] NSWCA 319 -
Lou v IAG Ltd t/as NRMA Insurance [2019] NSWCA 319 -
Lovett & McGregor [2019] FamCAFC 253 -
Lovett & McGregor [2019] FamCAFC 253 -
Fitzwater & Fitzwater [2019] FamCAFC 251 -
Fitzwater & Fitzwater [2019] FamCAFC 251 -
Boensch v Pascoe [2019] HCA 49 -
Baker v Smith (No 2) [2019] QDC 242 -
Baker v Smith (No 2) [2019] QDC 242 -
Baker v Smith (No 2) [2019] QDC 242 -
Baker v Smith (No 2) [2019] QDC 242 -
Baker v Smith (No 2) [2019] QDC 242 -
Murray v Raynor [2019] NSWCA 274 -
Murray v Raynor [2019] NSWCA 274 -
Emmert & Quarto [2019] FamCAFC 208 (07 November 2019) (Alstergren CJ; Ainslie-Wallace & Watts J)

36. That conclusion effectively disposes of the appeal, and while not strictly necessary, we are conscious of the adjuration in *Kuru v New South Wales* (2008) 236 CLR 1 at [12] and propose to very briefly consider the arguments advanced by the appellant in challenge to her Honour's order. [10]

Advanced National Services Pty Ltd v Daintree Contractors Pty Ltd [2019] NSWCA 270 (05 November 2019) (Gleeson and White JJA, Barrett AJA)

88. I have considered in accordance with *Kuru v New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] whether the second question should be resolved, although it cannot affect the outcome of the appeal. Given Advanced's failure on the question raised in Daintree's notice of contention, I am satisfied that good reason exists not to deal with the second question.

Advanced National Services Pty Ltd v Daintree Contractors Pty Ltd [2019] NSWCA 270 -
R v W, N P [2019] SADC 143 -
MetLife Insurance Ltd v MX [2019] NSWCA 228 -
O'Neill v Roy [2019] NTCA 8 (04 September 2019) (Southwood and Kelly JJ and Riley AJ)

Barker v The Queen (1983) 153 CLR 338, *Evans and Evans v The Queen* [1996] SCR 8, *Halliday v Nevill and Another* (1984) 155 CLR 1, *Howden v Ministry of Transport* [1987] 2 NZLR 747, *Kuru v New South Wales* (2008) 236 CLR 1 , *Lambert v Roberts* (1980) 72 Cr.App.R 223, *Lipman v Clendinnen* (1932) 46 CLR 550, *O'Connor v Police* [2010] NZAR 50, *O'Neill v Roy* [2019] NTSC 23, *Police v McDonald* [2010] NZAR 59, *R v Daka* [2019] SASCFC 80, *Robson v Hallett* [1967] 2 QB 939, *Tipa v Ministry of Transport* [1989] NZCA 7, referred to.

O'Neill v Roy [2019] NTCA 8 -
O'Neill v Roy [2019] NTCA 8 -
O'Neill v Roy [2019] NTCA 8 -
O'Neill v Roy [2019] NTCA 8 -
O'Neill v Roy [2019] NTCA 8 -
O'Neill v Roy [2019] NTCA 8 -
O'Neill v Roy [2019] NTCA 8 -
O'Neill v Roy [2019] NTCA 8 -
Elmi & Munro [2019] FamCAFC 138 (16 August 2019) (Strickland, Aldridge & Kent JJ)

56. As the matter will have to be reheard, the better approach is that we do not express an opinion on this issue as the course to be followed will be entirely a matter for the judge hearing it (*Kuru v New South Wales* (2008) 236 CLR 1).

Elmi & Munro [2019] FamCAFC 138 -
NSW Commissioner of Police v Rabbits Eat Lettuce Pty Ltd [2019] NSWCA 182 -
Fairfax Media Publications Pty Ltd v Gayle; The Age Company Pty Ltd v Gayle; The Federal Capital Press of Australia Pty Ltd v Gayle [2019] NSWCA 172 (16 July 2019) (Bell P, Gleeson and Leeming JJA)

177. That said, although there is no universal rule, this Court should consider whether to deal with all grounds of appeal, not merely the decisive grounds of appeal: *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] . The question is a pure question of law, and of general application, in (largely) uniform legislation. At present, the authorities are unsettled, which is apt to present difficulties in the running of trials. If the submissions advanced in this Court had permitted me to resolve this ground satisfactorily, then I would have done so.

R v Armistead [2019] SASCFC 85 (16 July 2019) (Kelly, Stanley and Hinton JJ)

70. It is settled that: [2]

> Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law.
>
> [footnotes omitted]

via

[2] *Coco v The Queen* (1994) 179 CLR 427 at 435-436 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Halliday v Nevill* (1984) 155 CLR 1 at 10 ; *Plenty v Dillon* (1991) 171 CLR 635 at 639 ; *Kuru v New South Wales* (2008) 236 CLR 1 at [43] .

R v Armistead [2019] SASCFC 85 -
Jorgensen v Fair Work Ombudsman [2019] FCAFC 113 -
R v Daka [2019] SASCFC 80 -
R v Daka [2019] SASCFC 80 -
R v Daka [2019] SASCFC 80 -
Searle v Commonwealth of Australia [2019] NSWCA 127 -
Frederick v Frederick [2019] FamCAFC 87 (28 May 2019) (Strickland, Aldridge & Austin JJ)

49. Given the success of Grounds 2, 4, 5 and 6, it is not strictly necessary to consider this ground but we shall do so because it may later become relevant (*Kuru v New South Wales* (2008) 236 CLR 1 at [12] ; see also *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (200 1) 207 CLR 1 at [34]).

Frederick v Frederick [2019] FamCAFC 87 -
Northern Land Council v Quall [2019] FCAFC 77 -
Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd; TWT Property Group Pty Limited v Cenric Group Pty Limited [2019] NSWCA 87 (30 April 2019) (Meagher, Gleeson and McCallum JJA)

151. Nonetheless, in accordance with *Kuru v New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] , I have considered whether ground 4A should be resolved on the alternative assumption that there was no binding agreement on 19 February containing the terms found by the primary judge: relevantly, that TWT would not seek to recover liquidated damages from Cenric for delays up until 19 February, and extending the date for completion by the time sought by Cenric, namely seven weeks.

Davies v Lazer Safe Pty Ltd [2019] FCAFC 65 -
Midland Metals Overseas Pte Limited v Australian Cablemakers Association Limited [2019] NSWCA 78 -
O'Neill v Roy [2019] NTSC 23 (12 April 2019) (Mildren AJ)

Barker v The Queen [1983] HCA 18; 153 CLR 338; *Fisher v Ellerton* [2001] WASCA 315; *Halliday v Nevill* [1984] HCA 80; 155 CLR 1; 246 ALR 260 ; *Morris v Beardmore* [1981] AC 446 ; *Munnings v Barrett* [1987] Tas R 80; 5 MVR 403; *Plen ty v Dillon and Others* [1991] HCA 5; 171 CLR 635; *Semayne's Case* (1604) 77 ER 194 ; *Tasmania v Crane* [2004] TASSC 80; 148 A Crim R 346; *Thomas v Sawkins* [1935] 2 KB 249; *Transport Ministry v Payne* [1977] 2 NZLR 50, referred to

O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
O'Neill v Roy [2019] NTSC 23 -
Bezer v Bassan [2019] NSWCA 50 -
State of New South Wales v Dargin [2019] NSWCA 47 (14 March 2019) (Basten and Leeming JJA, Sackville AJA)

34. His Honour also addressed a submission that there was authority to enter the plaintiffs' land at common law. After referring to *Johnson v Phillips* [1975] 3 All ER 682 and *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 , he concluded:

> "At common law a person with a legitimate purpose may enter upon the lands of a suburban dwelling house where the gate is unlocked and there is no indication by notice or otherwise that entry by visitors is forbidden. Such an entry is pursuant to an implied licence (*Halliday v Nevill* (1984) 155 CLR 1). The conduct of a bail compliance check without first obtaining an order pursuant to section 30 of the *Bail Act 2013* is not a legitimate purpose.
>
> ***Conclusion and Ruling***
>
> In the context of the *Bail Act 2013* (NSW) a bail compliance check may not be lawfully conducted in the absence of a court ordered Bail Enforcement Order."

DING & DING [2019] FamCAFC 35 -
DING & DING [2019] FamCAFC 35 -
Trebiano and Trebiano [2019] FamCAFC 16 -
Trebiano and Trebiano [2019] FamCAFC 16 -
Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) [2019] NSWCA 11 -
Cummings v Fairfax Digital Australia & New Zealand Pty Ltd; Cummings v Fairfax Media Publications Pty Ltd [2018] NSWCA 325 -
Cummings v Fairfax Digital Australia & New Zealand Pty Ltd; Cummings v Fairfax Media Publications Pty Ltd [2018] NSWCA 325 -
Cummings v Fairfax Digital Australia & New Zealand Pty Ltd; Cummings v Fairfax Media Publications Pty Ltd [2018] NSWCA 325 -
Real Estate Property Management Pty Ltd v WaterCorp Investments Pty Ltd [2018] NSWCA 194 -
Gunasegaram v Blue Visions Management Pty Ltd [2018] NSWCA 179 -
Gibb-Smith v State of New South Wales [2018] NSWDC 204 -
R v King [2019] SADC 107 (02 August 2018) (Reasons For Ruling Of Beazley J)

45. Counsel for the accused submitted that in accordance with the case of *Kuru v New South Wales* a person who enters the land of another must justify that entry by showing that the entry was with the consent of the occupier or that the entrant had lawful authority to enter. In the general sense, apart from cases at common law or by statute, police officers have no special right to remain on private property to conduct investigations.

R v King [2019] SADC 107 (02 August 2018) (Reasons For Ruling Of Beazley J)

44. I accept that at law a police officer has tacit approval to be on private property. See *Police v Williams* [16] and *Kuru v New South Wales* . [17]

R v King [2019] SADC 107 -
R v King [2019] SADC 107 -
Commissioner of State Revenue v Mondous [2018] VSCA 185 -
R v C, CJ [2018] SADC 76 -
Agtan Pty Ltd (ACN 007 410 077) v Caltex Australia Petroleum Pty Ltd(ACN 000 032 128) [2018] VSCA 169 -
R v Muja [2018] SADC 58 (04 June 2018) (Reasons For Ruling Of Costello J)

103. The aforementioned principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his or her duty, unless the entering or remaining on the premises is authorised or excused by the law. [2]

via

[2] *Halliday v Nevill* (1984) 155 CLR 1, 10 ; *Kuru v New South Wales* (2008) 236 CLR 1 at [43] .

R v Muja [2018] SADC 58 -
R v Muja [2018] SADC 58 -
R v Muja [2018] SADC 58 -
Officer JXR v Deputy Commissioner Gollschewski [2018] QCATA 55 -
Officer JXR v Deputy Commissioner Gollschewski [2018] QCATA 55 -
South Western Sydney Local Health District v Gould [2018] NSWCA 69 -
Roxburgh v Pyrenees Shire Council (Review [2018] VCAT 512 -
Harplex Pty Ltd v Konstandellos [2018] VSCA 67 -
Capital Securities XV Pty Ltd (formerly known as Prime Capital Securities Pty Ltd) v Calleja [2018] NSWCA 26 (26 February 2018) (Basten, Gleeson and Leeming JJA)

7. In many cases, it is desirable to deal with the non-dispositive grounds of appeal: *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] ; *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (Receivers and Managers Appointed)* (2011) 244 CLR 1; [2011] HCA 18 at [56] . The main reason for this is to overcome the need for remittal in the event of a further appeal. But the present appeal presents large difficulties on that front. It is not only that the remaining grounds are numerous and not fully developed. The findings of credit made by the primary judge were highly significant in determining a suite of contested findings of primary fact, including oral representations said to have induced Ms Calleja to take out the loan, and the circumstances in which Ms Calleja nevertheless maintained interest payments over the following 11 months. It would be highly artificial to hypothesise that the Baycorp documents were properly excluded, and on that basis to test the correctness of other aspects of her Honour's reasoning. Further, to proceed on that basis is apt to present difficulties at the retrial. For example, there may be arguments about the binding or persuasive value of statements made in those parts of this Court's reasons at a retrial when the file notes will have been tendered and cross-examined upon. Finally, it may be noted that on the second day of the appeal, and after obtaining instructions, Ms Calleja conceded that she could not defend all aspects of the relief ordered by the primary judge. This has a direct bearing on the prospects of an application for special leave to appeal to the High Court; cf *Morgan v District Court of New South Wales* (2017) 94 NSWLR 463; [2017] NSWCA 105 at [38] .

Capital Securities XV Pty Ltd (formerly known as Prime Capital Securities Pty Ltd) v Calleja [2018] NSWCA 26 -
Capital Securities XV Pty Ltd (formerly known as Prime Capital Securities Pty Ltd) v Calleja [2018] NSWCA 26 -
Lauvan Pty Ltd v Bega [2018] NSWSC 154 (22 February 2018) (Gleeson JA)

467. The issues raised by the *Brickenden* principle only arise if (contrary to my conclusion) there is a finding of breach of fiduciary duty. It may be accepted that it is generally desirable to deal with non-dispositive issues: *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12] . However, it is somewhat artificial to attempt to do so in the present circumstances where I have found that there was no real or substantial possibility of a conflict between the personal interests of Mr Ciappara and the interests of Mrs Bega to whom the duty was owed.

Spata v Tumino [2018] NSWCA 17 -
Spata v Tumino [2018] NSWCA 17 -
Upside Property Group Pty Ltd v Tekin [2017] NSWCA 336 -

Sharpcan Pty Ltd and Commissioner of Taxation (Taxation) [2017] AATA 2948 -
Filip Black v Regina [2017] NSWDC 326 -
BMB16 v Minister for Immigration & Border Protection [2017] FCAFC 179 (09 November 2017) (Gilmour, Bromberg and O'Callaghan JJ)

33. In our view, that paragraph demonstrates obvious error, not only because it is incorrect to characterise the Commissioner's reasons with respect to the coverage point as being the "end" of the issues necessary to be decided, but because it is also wrong for the Full Bench to have concluded that the Commissioner "decided to dismiss the application on the basis that the employees who voted for the Agreement were not covered by it". In our view, the approach taken by the Commissioner was entirely consistent with the proper approach to deciding cases, where multiple (substantial, clearly articulated) grounds are advanced, namely, that it is, generally speaking, necessary, or at least desirable, for the decision-maker to deal with all grounds, not just the ground that the decision-maker regards as decisive. Compare, with respect to the obligations of intermediate courts of appeal, *Kuru v New South Wales* (2008) 236 CLR 1 at 6 [12] . In our view, the position is no different in cases, such as this, before the Commission, where cumulative statutory criteria must be satisfied before the Commission can or must act. The Commission, ordinarily, must decide each of such necessary matters, not just that which is identified as the decisive ground. In our view, that is precisely what the Commissioner did in this case.

Hawcroft v Jamieson [2017] NSWSC 1478 -
Australian Olympic Committee Inc v Telstra Corporation Ltd [2017] FCAFC 165 -
Cosenza v Origin Energy Ltd [2017] SASC 145 -
Cosenza v Origin Energy Ltd [2017] SASC 145 -
Cosenza v Origin Energy Ltd [2017] SASC 145 -
John Edward Thornton v State of New South Wales [2017] NSWCA 248 -
Daniel Fromberg v The Queen [2017] NSWDC 259 -
State of New South Wales v Bouffler [2017] NSWCA 185 (27 July 2017) (Beazley ACJ, Ward and Gleeson JJA)

157. Logan J also referred, at [184], to *Kuru v State of New South Wales* where the Court had referred to the difficulties in " *deciding what constitutes an actual or threatened breach of the peace and what steps, short of arrest, may be taken in response*". His Honour, at [190], considered that there was a difference between a breach of the peace and an apprehended breach of the peace, having earlier, at [188], considered that it was probably erroneous to include the "*likelih ood*" of harm to a person or property as constituting a breach of the peace. However, in *Nilsson v McDonald* (2009) 19 Tas R 173, Crawford CJ had stated, at [7] , that:

> "... I am unaware of any authority in which it was held that a breach of the peace can occur in circumstances where the person concerned is merely argumentative or making excessive noise, without a **consequent likelihood** of violence or harm to any person or property, or of persons being put in fear of such violence or harm." (emphasis added)

State of New South Wales v Bouffler [2017] NSWCA 185 -
State of New South Wales v Bouffler [2017] NSWCA 185 -
State of New South Wales v Bouffler [2017] NSWCA 185 -
State of New South Wales v Bouffler [2017] NSWCA 185 -
State of New South Wales v Bouffler [2017] NSWCA 185 -
Woolworths Limited v Randwick City Council [2017] NSWCA 179 -
XYZ Pty Ltd and Anor & Charisteas & Ors; ABC Pty Ltd & Charisteas and Ors [2017] FamCAFC 112 (30 June 2017) (Bryant CJ, Ryan & Moncrieff JJ)

54. As we mentioned at the start of our discussion of the recusal challenge if the waiver challenge failed the recusal appeal and the cross-appeal would be dismissed. However, for completeness we will address the remaining grounds (*Kuru v State of New South Wales* (2008) 236 CLR 1 at 6).

Bay Simmer Investments Pty Ltd v State of New South Wales [2017] NSWCA 135 -
Bay Simmer Investments Pty Ltd v State of New South Wales [2017] NSWCA 135 -
Bay Simmer Investments Pty Ltd v State of New South Wales [2017] NSWCA 135 -
Morgan v District Court of New South Wales [2017] NSWCA 105 -
Morgan v District Court of New South Wales [2017] NSWCA 105 -
Morgan v District Court of New South Wales [2017] NSWCA 105 -
Yavuz and Yavuz & Anor [2017] FamCAFC 74 -
Bright Horizons Australia Childcare P/L v Childcare Providers P/L [2017] QSC 51 -
Mackah & Mackah [2017] FamCAFC 62 -
Coretell Pty Ltd v Australian Mud Company Pty Ltd [2017] FCAFC 54 -
Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government [2017] NSWCA 54 -
Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government [2017] NSWCA 54 -
Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government [2017] NSWCA 54 -
R v McCarthy [2017] SASC 36 -
R v McCarthy [2017] SASC 36 -
Britt & Britt [2017] FamCAFC 27 -
Britt & Britt [2017] FamCAFC 27 -
Bruce v Baju Henley Square Pty Ltd [2016] SASCFC 149 -
Bruce v Baju Henley Square Pty Ltd [2016] SASCFC 149 -
Bruce v Baju Henley Square Pty Ltd [2016] SASCFC 149 -
State of New South Wales v Briggs [2016] NSWCA 344 -
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) [2016] SASC 186 (02 December 2016) (Hinton J)

Moore v Hussey (1609) Hob 93; *Kirk v Gregory* (1876) 1 Ex D 55; *Cope v Sharpe (No. 2)* [1912] 1 KB 496; *Cresswell v Sirl* [1948] 1 KB 241; *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218; *Southwark London Borough Council v Williams* [1971] 1 Ch 734; *R v Rogers* (1996) 86 A Crim R 542; *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645; *Taiapa v The Queen* (2009) 240 CLR 95; *R v Latimer* [2001] 1 SCR 3; *Dehn v Attorney–General* [1988] 2 NZLR 564; *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962; *Haddrick v Lloyd* [1945] SASR 40; *Coco v The Queen* (1994) 179 CLR 427; *Kuru v New South Wales* (2008) 236 CLR 1 ; *Halliday v Nevill* (1984) 155 CLR 1; *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605; *Barker v The Queen* (1983) 153 CLR 338; *Wainohu v New South Wales* (2011) 243 CLR 181; *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Machado v Underwood* [2016] SASCFC 65; *Fox v Percy* (2003) 214 CLR 118; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Papps v Police* (2000) 77 SASR 210; *R v Keyte* (2000) 78 SASR 68; *AK v Western Australia* (2008) 232 CLR 438; *Devries v Australian National Railways Commission* (1993) 177 CLR 472, considered.

Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) [2016] SASC 186 -
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) [2016] SASC 186 -
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) [2016] SASC 186 -
Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital) [2016] SASC 186 -
Gulic v Boral Transport Ltd [2016] NSWCA 269 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Bennett v Police [2016] SASC 139 -
Chen v State of New South Wales [2016] NSWCA 177 -
HARRELL & NESLAND [2016] FamCAFC 122 (13 July 2016) (Murphy, Aldridge & Cronin JJ)

[xxiv] See, for example, *Kimberly Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (2001) 207 CLR 1; *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd* (2004) 217 CLR 274; *Cornwell v The Queen* (2007) 231 CLR 260 at 301 ; *Kuru v New South Wales* (2008) 236 CLR 1 at 6.

HARRELL & NESLAND [2016] FamCAFC 122 -
Calvo v Ellimark Pty Ltd [2016] NSWCA 136 -
Harold R Finger & Co Pty Ltd v Karellas Investments Pty Ltd [2016] NSWCA 123 (25 May 2016) (McColl and Ward JJA, Emmett AJA)

140. The conclusion that there was no repudiation by Karellas is determinative of these proceedings. However, it is necessary, in the event that that conclusion were later be found to be incorrect, to deal with the issues raised in Finger & Co's appeal (*Kuru v State of New South Wales* [2008] HCA 26; (2008) 236 CLR 1).

OXS Pty Ltd v Sydney Harbour Foreshore Authority [2016] NSWCA 120 -
Royal Guardian Mortgage Management Pty Ltd v Nguyen [2016] NSWCA 88 -
Royal Guardian Mortgage Management Pty Ltd v Nguyen [2016] NSWCA 88 -
Khoder Addouj v The Queen [2016] NSWDC 47 -
Ure v The Commonwealth of Australia [2016] FCAFC 8 (04 February 2016) (Perram, Robertson & Moshinsky JJ)

146. This Court, as an intermediate court of appeal, is urged by the High Court's decision in *Kuru v New South Wales* (2008) 236 CLR 1 at [12] , to determine all issues raised before it and not just those actually requiring resolution. For completeness, therefore, we would say this.

Despot v Registrar General of New South Wales [2016] NSWCA 5 -
Vartuli v Chief Commissioner of State Revenue [2015] NSWCA 372 -
Alqudsi v Commonwealth of Australia; Alqudsi v The Queen [2015] NSWCA 351 -
Alqudsi v Commonwealth of Australia; Alqudsi v The Queen [2015] NSWCA 351 -
Alqudsi v Commonwealth of Australia; Alqudsi v The Queen [2015] NSWCA 351 -
Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy [2015] NSWCA 253 -
Katter v Melhem [2015] NSWCA 213 (28 July 2015) (McColl and Leeming JJA, JC Campbell AJA)

In Kuru v State of New South Wales ,

[2008] HCA 26; 236 CLR 1 at [12] .

the High Court urged intermediate appellate courts to consider whether to deal with all grounds of appeal, even if the appeal could be disposed of without deciding them all. There are sometimes significant reasons why it is not desirable for an appellate court to consider all the grounds that have been raised.

Rebenta Pty Ltd v Wise [2009] NSWCA 212 at [9]–[12] (Basten JA, Ipp JA and Sackville AJA agreeing), Shimokawa v Lewis [2009] NSWCA 266 at [194]–[196] , Nominal Defendant v Saleh [2011] NSWCA 16; 57 MVR 412 at [316] , Environment Protection Authority v Condon as Liquidator for Orchard Holdings (NSW) Pty Ltd (in liq) [2014] NSWCA 149; 86 NSWLR 499 at [69]–[70] .

In the present case the argument on this topic in the written submissions was scarcely developed, and was not further explained in oral submissions. Whether an injunction is available in these circumstances is a topic of some difficulty, and considerable importance. In my view it is preferable not to embark on the topic when a clear basis exists for setting aside the judgment for $1 million.

Katter v Melhem [2015] NSWCA 213 (28 July 2015) (McColl and Leeming JJA, JC Campbell AJA)

120. In *Kuru v State of New South Wales* , [45] the High Court urged intermediate appellate courts to consider whether to deal with all grounds of appeal, even if the appeal could be disposed of without deciding them all. There are sometimes significant reasons why it is not desirable for an appellate court to consider all the grounds that have been raised. [46] In the present case the argument on this topic in the written submissions was scarcely developed, and was not further explained in oral submissions. Whether an injunction is available in these circumstances is a topic of some difficulty, and considerable importance. In my view it is preferable not to embark on the topic when a clear basis exists for setting aside the judgment for $1 million.

Katter v Melhem [2015] NSWCA 213 -
Katter v Melhem [2015] NSWCA 213 -
Katter v Melhem [2015] NSWCA 213 -
Housden v Boral Australian Gypsum Ltd [2015] VSCA 162 (25 June 2015) (Tate, Santamaria & McLeish JJA)

7. In *Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd* ,[7] this Court, relying on observations of the High Court in *Kuru v New South Wales* , [8] said:

> Whether in any given case a trial judge should proceed to decide issues which, strictly speaking, do not fall for decision is a matter of assessment in the circumstances of the case. But it is an assessment which trial judges should be astute to carry out. This is consistent with the observation made by the High Court, with respect to intermediate appellate courts:
>
> > [A]lthough there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal, not just with what is identified as the decisive ground. If the intermediate court of appeal has dealt with all grounds argued and an appeal to this Court succeeds, this Court will be able to consider all the issues between the parties and will not have to remit
>
> > the matter to the intermediate court for consideration of grounds of appeal not dealt with below. [9]

via

[8] (2008) 236 CLR 1 , 6 [12] .

Housden v Boral Australian Gypsum Ltd [2015] VSCA 162 -
Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 -
Angeleska (known as Slaveska) v State of Victoria [2015] VSCA 140 (10 June 2015) (Warren CJ, Tate JA and Ginnane AJA)

181. Given our conclusion regarding the respondents' abuse of process submission, it is unnecessary to determine the alternative *Anshun* estoppel point. However, as the parties' submissions on that issue were considered at length by the associate judge and were again emphasised by counsel on this appeal, we will address the parties' *Anshun* estoppel submissions for completeness. [182]

via

[182] The High Court has stated that 'although there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal, not just with what is identified as the decisive ground': *Kuru v New South Wales* (2008) 236 CLR 1, 6 [12] (Gleeson CJ, Gummow, Kirby and Hayne JJ) .

Nash v State of New South Wales [2015] NSWDC 144 -
State of New South Wales v McCarthy [2015] NSWCA 153 -
State of New South Wales v McCarthy [2015] NSWCA 153 -
R v Rockford [2015] SASCFC 51 (22 April 2015) (Kourakis CJ; Sulan and Stanley JJ)

R v Rockford [2014] SADC 199; *Bunning v Cross* (1978) 141 CLR 54; *R v Ireland* (1970) 126 CLR 321; *Cleland v The Queen* (1982) 151 CLR 1; *Pollard v The Queen* (1992) 176 CLR 177; *Ridgeway v The Queen* (1995) 185 CLR 19 ; *R v Swaffield* (1998) 192 CLR 159; *R v Lobban* (2000) 77 SASR 24; *Question of Law Reserved (No. 1 of 1998)* (1998) 70 SASR 281 ; *Director of Public Prosecutions (Vic) v Moore* (2003) 6 VR 430; *Kuru v New South Wales* (2008) 236 CLR 1 ; *R v Nguyen* (2013) 117 SASR 432; *R v Jongewaard* (2009) 266 LSJS 283; *House v The King* (2005) 228 CLR 357; *R v Kreutzer* (2013) 118 SASR 211; *R v Smith* (1987) 44 SASR 587; *R v Boyes* (2004) 8 VR 230; *R v Godwin* (2001) 80 SASR 195; *The Queen v Shrestha* (1991) 173 CLR 48; *R v Wirth* (1976) 14 SASR 291; *R v Barling* (1995) 79 A Crim R 131; *The Queen v Cardona* [2011] VSCA 58; *R v Williams* (Unreported, Victorian Court of Appeal, delivered 18 September 1995); *R v Wilson* [2003] SASC 18; *R v DVG* (1999) 109 A Crim R 145; *R v Sansbur* (2010) 107 SASR 570; *R v Sarandogolou* (2010) 107 SASR 396; *R v Creed* (1985) 37 SASR 566; *The Queen v Stewart* 1984) 35 SASR 477 , considered.

R v Rockford [2015] SASCFC 51 -
R v N [2015] QSC 91 -
X Pty Ltd (Administrator Appointed) and Milstead & Anor [2015] FamCAFC 50 -
X Pty Ltd (Administrator Appointed) and Milstead & Anor [2015] FamCAFC 50 -
White v Johnston [2015] NSWCA 18 -
DICKSON & DICKSON [2015] FamCAFC 11 -
DICKSON & DICKSON [2015] FamCAFC 11 -
Director Consumer Affairs Victoria v Xu and Meng (Review and Regulation) [2015] VCAT 127 -
Director Consumer Affairs Victoria v Xu and Meng (Review and Regulation) [2015] VCAT 127 -
R v McCarthy [2015] SASC 11 (03 February 2015) (Blue J)

34. Before turning to the common law entitlement of police officers to enter land to prevent a breach of the peace, Gleeson CJ, Gummow, Kirby and Hayne JJ referred to the common law entitlement to enter or remain on land to preserve life or property in the following terms:

> The common law has long recognised that any person may justify what would otherwise constitute a trespass to land in cases of necessity to preserve life or property. [10] The actions of fire-fighters, police and ambulance officers will often involve application of that principle. There being no evidence of danger to life or property, it was not suggested that this was such a case. [11]

via

[11] *Kuru v State of New South Wales* at [40] .

R v McCarthy [2015] SASC 11 (03 February 2015) (Blue J)

33. In *Kuru v State of New South Wales* ,[8] the High Court considered, but did not determine, the limits of the common law entitlement of police officers to enter land to prevent a breach of the peace. Gleeson CJ, Gummow, Kirby and Hayne JJ restated three general propositions in relation to trespass in the following terms:

> As was pointed out in this Court's decision in *Plenty v Dillon*, it is necessary to approach questions of the kind now under consideration by recognising the importance of two related propositions. First, a person who enters the land of another must justify that entry by showing either that the entry was with the

> consent of the occupier or that entry had lawful authority to enter. Secondly, except in cases provided for by the common law and by statute, police officers have no special rights to enter land. And in the circumstances of this case it is also important to recognise a third proposition: that an authority to enter land may be revoked and that, if the authority is revoked, the entrant no longer has authority to remain on land but must leave as soon as is reasonably practicable. [9]
>
> (Footnotes omitted)

via

[9] Ibid at [43] .

R v McCarthy [2015] SASC 11 -
R v McCarthy [2015] SASC 11 -
R v McCarthy [2015] SASC 11 -
Sze Tu v Lowe [2014] NSWCA 462 (23 December 2014) (Meagher, Barrett and Gleeson JJA)

263. Although the indefeasibility defences provide the decisive ground for disposing of the appeals, it is appropriate to deal with some of the other grounds of appeal in the event that my conclusion on indefeasibility is wrong: *Kuru v New South Wales* [2008] HCA 26; 236 CLR 1 at [12] .

Protec Pacific Pty Ltd v Steuler Services GmbH & Co KG [2014] VSCA 338 -
Kazas-Rogaris v Gaddam [2014] NSWSC 1465 -
R v Rockford [2014] SADC 199 (27 November 2014) (Reasons for Ruling and Verdict of His Honour Judge Soulio)

56. In *Kuru* , [13] the High Court had occasion to consider whether a provision of the *Crimes Act 1900 (NSW)* authorised police to enter and remain on private property, notwithstanding a direct request that they leave. Gleeson CJ, Gummow, Kirby and Hayne JJ confirmed the need for clear words to erode the common law protection. In that respect their Honours observed: [14]

> To the extent that, in the end, there was any ambiguity about the meaning and ambit of the authority provided to police by ss 357F and 357H to remain in the appellant's flat after he had made it clear that he was requiring them to leave, such ambiguity must be resolved in favour of the foregoing construction. This is because of the strong principle of Australian law defensive of the quiet enjoyment by an occupier of that person's residence. That principle has been recognised and upheld by this Court on numerous occasions. It derives from the principles of the common law of England. Indeed, it appears to be a principle against which the provisions of ss 357F and 357H of the Act were written. It defends an important civil right in our society. If Parliament were to deprive persons of such a right, or to diminish that right, conventional canons of statutory construction require that it must do so clearly.

Police v Williams [2014] SASC 177 (27 November 2014) (Peek J)
Barbu v Barbu [1920] SALR 244; *Colet v The Queen* [1981] 1 SCR 2; *Entick v Carrington* (1765) 2 Wils 275; *Ghys v Crafer* [1934] SASR 28; *Gray v Jones* [1948] SASR 201; *Great Central Railway Co v Bates* [1921] 3 KB 578; *Hayes v Quinn* (1992) 57 SASR 6; *Horton v Rowbottom* (1993) 61 SASR 313; *Hull v Nuske* (1974) 8 SASR 587; *Hunter v Walsh* [1928] SASR 334; *Kuru v State of New South Wales* (2008) 236 CLR 1 ; *Lippl v Haines* (1989) 18 NSWLR 620; *Morris v Breadmore* [1981] AC 446; *Parker v Comptroller-General of Customs* [2009] HCA 7; *Pollard v The Queen* (1992) 176 CLR 177; *R v Conley* (1982) 30 SASR 226; *R v Davidson* (1991) 54 SASR 580; *R v Hillier* (2007) 228 CLR 618; *R v O'Neill* (1988) 48 SASR 51; *R v Stafford* (1976) 13 SASR 392; *Smith v Samuels* (1976) 12 SASR 573; *Southam v Smout* [1964] 1 QB 308; *State of New South Wales v Corbett* (2007) 230 CLR 606; *Taylor v Hayes* (1990) 53 SASR 282; *Wark v Daire* (1983) 32 SASR 321; *Wheare v Police* [2008] SASC 13, considered.

R v Rockford [2014] SADC 199 -
Police v Williams [2014] SASC 177 -
Police v Williams [2014] SASC 177 -
R v Rockford [2014] SADC 199 -
R v Rockford [2014] SADC 199 -
R v Rockford [2014] SADC 199 -
Police v Williams [2014] SASC 177 -
R v Rockford [2014] SADC 199 -
Gallagher v McClintock [2014] QCA 224 -
Gallagher v McClintock [2014] QCA 224 -
Scrymegeour & Scrymegeour [2014] FamCAFC 130 -
Scrymegeour & Scrymegeour [2014] FamCAFC 130 -
CARROLL & CARROLL [2014] FamCAFC 118 (08 July 2014) (Strickland J)

98. That is sufficient to dispose of this appeal, but the question then becomes whether it is necessary to still address the remaining grounds of appeal. The High Court, in *Kuru v NSW* (2008) 236 CLR 1, at 6 , has suggested that it is necessary. However, given that I propose to remit the proceedings to the Federal Circuit Court of Australia for rehearing, it may restrict the exercise of discretion by the judge who hears the matter if I now address any grounds of appeal apart from those that relate to the issue of contributions or those in respect of which there can be no controversy. Thus, I propose to address Grounds 2, 3, 5, and 6, but not Ground 10. That ground challenges her Honour's treatment of the relevant factors under s 75 (2) of the Act .

CARROLL & CARROLL [2014] FamCAFC 118 -
Environment Protection Authority v Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq) [2014] NSWCA 149 (16 May 2014) (Bathurst CJ, McColl and Leeming JJA)

APPEALS - whether necessary to deal with notice of contention - not fully argued, not free from difficulty, not determined by primary judge - Kuru v New South Wales [2008] HCA 26 ; 236 CLR 1 a pplied

Environment Protection Authority v Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq) [2014] NSWCA 149 -
Environment Protection Authority v Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq) [2014] NSWCA 149 -
French & Fetala [2014] FamCAFC 57 -
French & Fetala [2014] FamCAFC 57 -
Boorer v HLB Mann Judd (NSW) Pty Ltd [2014] NSWCA 100 (03 April 2014) (Macfarlan and Leeming JJA, Sackville AJA)

69. What precisely was the duty was not explored in any detailed way in written or oral submissions in this Court. Competing expert evidence was given at trial. It was not resolved by her Honour, because of the narrower duty formulated by her Honour, and the factual finding that Mr Boorer had instructed Ms Von Lucken to lodge the form. While the precise content of the duty is an important question, it does not matter in this case because, even in the event of my finding it was breached, there was no loss. In the circumstances, it is neither necessary nor appropriate to say anything further about it. I do not consider that anything in *Kuru* requires any different course.

Boorer v HLB Mann Judd (NSW) Pty Ltd [2014] NSWCA 100 -
Boorer v HLB Mann Judd (NSW) Pty Ltd [2014] NSWCA 100 -
Enders v Erbas & Associates Pty Ltd [2014] NSWCA 70 -
Bibby Financial Services Australia Pty Ltd v Sharma [2014] NSWCA 37 -
Bolger & Headon [2014] FamCAFC 27 (27 February 2014) (Thackray, Murphy, Kent JJ)

20. As a result of that conclusion our reasons in respect of the remaining grounds will be brief. In saying that, we should echo what was said by this Court in *Whistler & Whistler* [2012] FamCAFC 97:

> 79. We are, of course, aware of what has been said by the High Court in cases such as *Kuru v New South Wales* (2008) 236 CLR 1 at 6 ("*Kuru*") and more recently in *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (Receivers & Managers Appointed)* (2011) 244 CLR 1 at [56] ("*Lanepoint*") as to the necessity for an intermediate court of appeal to deal with all grounds of appeal and not just those which are decisive.
>
> 80. However, specific considerations can be seen to apply to this Court (see, for example, ss 94(2A) ; 96AA and 97(3) of the Act). That more general issue aside, in this case reference to the other grounds in this appeal reveal what are essentially challenges to the exercise of discretion and to the weight attached to various specific parts of the evidence. The principles relating to the difficulties confronting appellants relying upon such grounds have frequently been referred to and do not bear repetition. In terms of the principles discussed in decisions such as *Kuru* and *Lanepoint* , those same considerations can be seen to apply *a fortiori* to an application for special leave to appeal to the High Court from a decision of this Court where grounds of that type are relied upon.

Bolger & Headon [2014] FamCAFC 27 -
QBE v Orcher [2013] NSWCA 478 -
Smith's Snackfood Company Ltd v Chief Commissioner of State Revenue (NSW) [2013] NSWCA 470 -
and a Woodley Osteopathic Services Pty Ltd v Transport Accident Commission andBRENDAN Woodley , , Brendan Woodley and Transport Accident Commission and a Woodley Osteopathic Services Pty Ltd [2013] VSCA 350 -
Egan v Mangarelli [2013] NSWCA 413 -
Maughan Thiem Auto Sales Pty Ltd v Cooper [2013] FCAFC 145 (29 November 2013) (Greenwood, Besanko, Katzmann JJ)

5. The Court heard full argument on the merits of the claims under challenge and we have given them the consideration necessary to determine the challenges. In fact, for a time we considered that we should do so. However, we have concluded that we should not express views on the merits which would inevitably be obiter observations. The difficulty is that if we were to do so and then there was an appeal after quantum had been determined which did not come back to the Court as presently constituted, there is potential for embarrassment on the hearing of such an appeal. We are mindful of the observations of the High Court in *Kuru v New South Wales* (2008) 82 ALJR 1021; 246 ALR 260 , but the difference in this case is that it is not a matter of dealing with the remaining grounds of appeal because the "appeal" in this case is, as we have held, incompetent.

Maughan Thiem Auto Sales Pty Ltd v Cooper [2013] FCAFC 145 -
and ACN 074 971 109 Pty Ltd (as trustee for the Argot Unit Trust)(ACN 074 971 109) v The National Mutual Life Association of Australasia Limited (ACN 004 020 437) [2013] VSCA 241 (27 November 2013) (Nettle, Neave JJA and Robson AJA)

63. Counsel for Argot submitted that, because this matter could go further, we should determine the basis on which damages would be calculated if the early realisation of non-cash assets were a breach of the Policy. Not without some hesitation, we have concluded that we should do so. [32]

via

[32] *Kuru v New South Wales* (2008) 236 CLR 1, 6 [12] .

Simon v Condran [2013] NSWCA 388 (20 November 2013) (Macfarlan and Leeming JJA, Sackville AJA)

44. Ms Simon's submission is to be rejected because, as the primary judge held, s 22(2) confers authority to seize, injure or destroy a chattel - to do that which, absent statutory authority, would be a trespass to goods. It is silent in relation to trespass to land. (It may be contrasted with s 22(5) , which applies to trespass to land but only where a dog enters inclosed lands.) Settled principles of statutory construction require irresistible clarity before fundamental rights such as the exclusive possession of land are abrogated. In *Kuru v State of New South Wales* [2008] HCA 26; 236 CLR 1 at [37] the joint judgment rejected an argument that statute, by implication, might undercut the "strong principle of Australian law defensive of the quiet enjoyment by an occupier of that person's residence", described as an "important civil right in our society". In *George v Rockett* (1990) 170 CLR 104 at 110-111, a unanimous High Court referred, in the course of construing a statute authorising a search warrant by insisting on strict compliance, to the need to keep in mind that such statutes "authorize the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect".

Gazi v Minister for Immigration and Citizenship [2013] FCA 1094 (23 October 2013) (Logan J)
Kuru v New South Wales (2008) 236 CLR 1 cited

Gazi v Minister for Immigration and Citizenship [2013] FCA 1094 -
Paul v Cooke [2013] NSWCA 311 (19 September 2013) (Basten, Ward and Leeming JJA)

81. In deference to the reasons of the primary judge whose decision was based on s 5D and the arguments which were at the forefront of the appeal, and, in accordance with *Kuru v New South Wales* [2008] HCA 26; (2008) 236 CLR 1 at [12] , I now turn to that section lest the foregoing be wrong.

Fazio v The City of Melville [No 2] [2013] WADC 147 (18 September 2013) (Principal Registrar Gething)

69 The law in relation to trespass to land was comprehensively summarised by Pritchard J in ***Hardie Finance Corporation Pty Ltd v***
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Ahern [No 3] [2010] WASC 403 , which I respectfully adopt [222] - [234]:

> 222 A trespass to land occurs (amongst other things) when a person intentionally or negligently enters into, or remains on, land which is in the possession of another. The emphasis of the tort is on physical interference with possession: see generally Balkin & Davis, *Law of Torts* (4 th ed) [5.1]. Accordingly, it is the person with the exclusive possession of the land, rather than the owner of the land, who may sue in trespass: see ***Barker v The Queen*** (1983) 153 CLR 338, 341 - 342 (Mason J). It is well established that the tort protects the interest of the plaintiff in maintaining the right to exclusive possession of the property, rather than to protect title in the sense of ownership (although the party in possession may often also be the owner): ***The State of New South Wales v Ibbett*** (2006) 229 CLR 638 [29] (the Court).
>
> 223 Entry onto another person's land without the permission of the occupier, or otherwise with lawful authority, will constitute a trespass: ***Kuru v The State of New South Wales*** (2008) 236 CLR 1 [43] (Gleeson CJ, Gummow, Kirby & Hayne JJ); ***Plenty v Dillon*** (1991) 171 CLR 635, 639 (Mason CJ, Brennan & Toohey JJ), 647 (Gaudron & McHugh JJ); ***Coco v The Queen*** (1

994) 179 CLR 427, 435 (Mason CJ, Brennan, Gaudron & McHugh JJ). Whether an occupier has granted a licence to another person to enter on the land is a question of fact: ***Halliday v Nevill*** (1984) 155 CLR 1, 6 - 7 (Gibbs CJ, Mason, Wilson & Deane JJ).

224 Justification or authority to enter land may take a variety of forms including a paramount right to possession, some other statutory or common law right of entry, the authority or permission of the person in possession and, in the absence of negligence, involuntary and inevitable accident: ***Barker v The Queen*** (356 - 357) (Brennan & Deane JJ).

225 The permission of the occupier may be given expressly, or implied from the circumstances. A licence to enter will be implied in certain circumstances, unless something in the facts is capable of founding the conclusion that any such implied licence was negated or revoked: ***Halliday v Nevill*** (7) (Gibbs CJ, Mason, Wilson & Deane JJ). Consent to an entry will be implied if the person entering on the land does so for a lawful purpose: ***Plenty v Dillon*** (647) (Gaudron & McHugh JJ); ***Robson v Hallett*** [1967] 2 QB 939, 951 (Lord Parker CJ). The implication of a licence will be precluded by an express or implied refusal of it, and an implied licence may be revoked at any time by an express or implied withdrawal of it: ***Halliday v Nevill*** (7) (Gibbs CJ, Mason, Wilson & Deane JJ).

(Page 27)

226 The occupier's authority to enter may be subject to express or implied limitations regarding the time, place, manner or purpose of entry, and if it is so limited, it will operate only to authorise an entry which comes within the scope of its limited terms: ***Barker v The Queen*** (357) (Brennan & Deane JJ) and the authorities cited therein. If, on the facts, the right or authority to enter onto land is limited in scope then an entry which is unrelated to the right or authority will amount to a trespass. Accordingly a person who has permission to enter onto land for a specific purpose commits a trespass if he enters onto land for any other purpose, especially if that other purpose is an unlawful purpose. That person will stand in no better position than a person who enters with no authority at all: ***Barker v The Queen*** (342, 346) (Mason J), (357) (Brennan & Deane JJ).

227 However, an authority to enter need not be limited. As Brennan and Deane JJ observed in ***Barker v The Queen*** , the authority to enter onto land need not be limited (in its character as an authority to enter land) by reference to the things which the person whose entry is permitted may legitimately do after he has entered or to the range of purposes which were or might have been in the contemplation of the grantor of the permission. If it is a general permission to enter in the sense that it is not limited, either expressly or by necessary implication, by reference to the purpose for which entry may be effected, it is not legitimate to cut back the generality of the permission to enter merely because it is probable that the grantor would, if the matter had been raised, have qualified it by excluding from its scope any entry for the purpose of committing an unauthorised act. When the permission is not in fact so limited, an unanticipated or illegitimate purpose on the part of the entrant does not, at common law, affect the status of his entry or make him a common law trespasser (357 - 358).

228 Their Honours went on to observe that if the authority to enter onto land is not limited by reference to the things the invitee may do once he or she has entered:

> [A] purpose of subsequently doing an unlawful act will not, under the common law, convert entry which was otherwise within the permission into entry as a trespasser. In particular, to take the example on which most reliance was placed, the implied invitation to enter which a shopkeeper extends to the public may ordinarily be limited to public areas of the shop and to hours in which the shop is open for business: it is not, however, ordinarily limited or confined by reference to purpose. Indeed, in the context of the importance of 'impulse buying', the mere presence of the prospective customer upon the premises is itself likely to be an object of the invitation and a person will be within the invitation if he enters for no particular

> purpose at all. The fact that a person enters with the purpose or some thought of possibly stealing an item of merchandise or of otherwise behaving in a manner which is beyond what he is authorised to do while on the premises does not, in the ordinary case where the invitation to enter is not confined by reference to purpose, result in the actual entry being outside the scope of the invitation and being trespassory (361 - 362).

229 Difficult questions can arise when the authority or permission to enter onto the land is limited to a particular purpose and a person enters onto the land for that purpose and for some other purpose: ***TCN Channel Nine Pty Ltd v Anning*** (2002) 54 NSWLR 333 [30] (Spigelman CJ, Mason P & Grove J agreeing). Whether the entry will constitute a trespass on the land is an issue which has not been finally resolved in the authorities: see ***Barker v The Queen*** (345 - 347) (Mason J), cf (365) (Brennan & Deane JJ); cf ***Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd*** (1968) 121 CLR 584, 599 (Barwick CJ & Menzies J), cf 606 (Kitto J); ***TCN Channel Nine v Anning*** [32] - [37] (Spigelman CJ, Mason P & Grove J agreeing) and the cases discussed therein; ***Byrne v Kinematograph Renters Society Ltd*** [1958] 1 WLR 762, 776 (Harman J).

230 A common example of the implication of a licence to enter relates to private homes, where a licence will ordinarily be implied in favour of any member of the public to go upon the path or driveway to the entrance of the home for the purpose of lawful communication with, or delivery to, any person in the house. The path or driveway will be viewed as having been held out by the occupier of the house as the link from the street to his or her home upon which members of the public may go for a legitimate purpose that in itself involves no interference with the occupier's possession nor injury to the occupier, his or her guests or his, her or their property: ***Halliday v Nevill*** (7) (Gibbs CJ, Mason, Wilson &

Deane JJ). However, a licence will not be implied in such a case if the path or driveway leading to the entrance of the house is obstructed or the gate locked: ***Halliday v Nevill*** (7 - 8) (Gibbs CJ, Mason, Wilson & Deane JJ).

231 The same principles apply in relation to the implication of a licence to enter business premises. In TCN Channel Nine v Anning the question was whether employees of the appellant, a television reporter and cameraman, had trespassed on business premises when they entered the premises and attempted to film an interview with a view to broadcasting it. At trial, the appellant was found to have committed a trespass. On appeal, the appellant submitted that the entry of its employees occurred pursuant to an implied licence because the use of the land as a business (either as a tyre dump or as a race track) necessarily involved permission for members of the

> public to enter, or on the basis that any member of the public has a right to enter a property in an attempt to lawfully communicate with the occupier, and specifically to do so for the purpose of requesting an interview. The evidence was that the gate to the property was unlocked at the time of the entry and that some form of implied licence to enter the property existed.

232 In determining whether the entry occurred pursuant to such licence, Spigelman CJ (with whom Mason P and Groves JA agreed) found that the purpose of the entry onto the land was a material consideration. His Honour held that:

> Whatever may have been the scope of a permission for entry with respect to the conduct of the used tyre business or the conduct of a race track, nothing the appellant did was referable to any such purpose. If there was an implied licence to enter for any such purpose, the appellant did not avail itself of such a licence [43].

233 His Honour also rejected a general submission by the appellant that by virtue of the unlocked gate to the property, there was an implied licence which was not limited in any way by what could be done by persons entering onto the property [46] - [49]. He held that most implied invitations will be for limited purposes, and that:

> Persons conducting business on private property are entitled to do so without others intruding for purposes unrelated to the business activities they are conducting. This includes those who wish to enter with a view to publicly exposing aspects of their business [58].
>
> Accordingly, he concluded that there was no implied licence for the appellant's employees to film on the property.

234 Similarly, an implied licence for members of the public to enter onto business premises was held, prima facie, to exist in ***Lincoln Hunt Australia Pty Ltd v Willesee*** (1986) 4 NSWLR 457 in the course of an application for an injunction based, in part, on an alleged trespass. However, that implied licence was held not to authorise entry for the purpose of a journalist and film crew filming a dissatisfied customer when she attended at the premises. Young J held that the evidence suggested that the implied invitation by the plaintiff for the public to visit its premises was limited to members of the public bona fide seeking information or business with it

> or to clients of the firm, but not to people, for instance, who wished to enter to hold up the premises and rob them or even to people whose motives were to go onto the premises with video cameras and associated equipment or a reporter to harass the inhabitants by asking questions which would be televised throughout the State (460).

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Fenton & Marvel [2013] FamCAFC 132 -
Day v The Ocean Beach Hotel Shellharbour Pty Ltd [2013] NSWCA 250 -
Day v The Ocean Beach Hotel Shellharbour Pty Ltd [2013] NSWCA 250 -
Hoult & Hoult [2013] FamCAFC 109 -
Hoult & Hoult [2013] FamCAFC 109 -
Ember & Assadi [2013] FamCAFC 107 (19 July 2013) (Finn and Strickland & Ainslie-Wallace JJ)
Kuru v New South Wales (2008) 236 CLR 1
MRR v GR

Ember & Assadi [2013] FamCAFC 107 -
Galaxy Homes Pty Ltd v The National Mutual Life Association of Australasia Ltd [2013] SASCFC 34 (03 May 2013) (Anderson, Peek and Stanley JJ)
McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579; *Hector Steamship Company v V O Sovfracht, Moscow* [1945] KV 343; *Lord Inglewood v Inland Revenue Commissioners* [1983] 1 WLR 366; *Kuru v The State of New South Wales* (2000) 236 CLR 1 , considered.

Galaxy Homes Pty Ltd v The National Mutual Life Association of Australasia Ltd [2013] SASCFC 34 (03 May 2013) (Anderson, Peek and Stanley JJ)

11. The High Court has emphasised that while there can be no universal rule it is desirable intermediate courts of appeal consider whether to deal with all grounds of appeal, not merely any ground that is decisive of the appeal: see *Kuru v The State of New South Wales* (2008) 236 CLR 1 at [12] . We consider this approach applies also to grounds raised by a notice of contention. In this case, however, having considered the matter we are satisfied good reason exists not to deal with the grounds raised by the notice of contention. It is important that Mr Eden be allowed as much time as possible to get his affairs in order and make provisions in his will based on our decision.

R v Tran (Ruling No 4) [2013] VSC 202 -
Cox & Pedrana [2013] FamCAFC 48 -
Cox & Pedrana [2013] FamCAFC 48 -
Public Service Assn of SA Inc v Industrial Relations COMM'NR of SA & Chief Executive, Dept of Premier and Cabinet [2013] SASCFC 5 -
Public Service Assn of SA Inc v Industrial Relations COMM'NR of SA & Chief Executive, Dept of Premier and Cabinet [2013] SASCFC 5 -
Li v Chief of Army [2013] FCAFC 20 (26 February 2013) (Keane CJ, Dowsett, Logan, Jagot & Yates JJ)

184. Later in time and in the High Court is *Kuru v New South Wales* (2008) 236 CLR 1 (*Kuru*). That case arose against the background of an alleged trespass to land by police officers responding to a domestic violence complaint. The defence pleaded justification for entry and remaining on the land in question arising under both statute and common law. In the course of discussing the latter, Gleeson CJ, Gummow, Kirby and Hayne JJ referred (at [49] - [50]) to the right at common law to prevent a breach of the peace and to what constituted a breach of the peace:

> 49 These considerations apart, when it is said that a police officer may enter premises to "prevent" a breach of the peace, it is necessary to examine what is meant by "prevent" and what exactly is the power of entry that is contemplated. Is the power to enter one which permits forcible entry? Does preventing a breach of the peace extend beyond

moral suasion to include arrest? Is the preventing of a breach of the peace that is contemplated directed ultimately to prevention by arrest?

50 Some of these questions have since been considered in English decisions. Those later decisions proceed from the premise stated by Lord Diplock in *Albert v Lavin* that:

> "[E]very citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will."

As is evident, not only from the passage just cited but also from some of the later English decisions, working out the application of a premise so broadly stated is not free from difficulty, **not least in deciding what constitutes an actual or threatened breach of the peace** and what steps, short of arrest, may be taken in response.

[Footnote references omitted]

Li v Chief of Army [2013] FCAFC 20 -
Li v Chief of Army [2013] FCAFC 20 -
Li v Chief of Army [2013] FCAFC 20 -
MM Constructions (Aust) Pty Ltd v Port Stephens Council [2012] NSWCA 417 -
Donnellan v Woodland [2012] NSWCA 433 -
Donnellan v Woodland [2012] NSWCA 433 -
Marcourt v Clark [2012] NSWCA 367 (09 November 2012) (Beazley and Barrett JJA, Tobias AJA)

Alexander v Cambridge Credit Corp Ltd (1987) 9 NSWLR 310 Barakat v Bazdarova [2012] NSWCA 140 British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Company of London Ltd [1912] AC 673 Gagner Pty Ltd (t/as Indochine Cafe) v Canturi Corporation Pty Ltd [2009] NSWCA 413; (2009) 262 ALR 691 Golden Strait Corp v Nippon Yusen Kubishika Kaisha [2007] 2 WLR 691; [2007] 3 All ER 1 Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [2000] FCA 660; (2000) 173 ALR 263 House v The King (1936) 55 CLR 499 Hussey v Eels [1990] 2 QB 227 Johnson v Perez [1988] HCA 64; (1988) 166 CLR 351 Koch Marine Inc v D'Amica Societa di Navigazione ARL (1980) 1 Lloyd's Rep 75 Kuru v New South Wales [2008] HCA 26; (2008) 236 CLR 1 Maitland Hospital v Fisher (No 2) (1992) 27 NSWLR 721 Morgan v Johnson (1998) 44 NSWLR 578 McCrohan v Harith [2010] NSWCA 67 Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd (1991) 33 FCR 1; (1991) 104 ALR 397 Nominal Defendant v Hawkins [2011] NSWCA 93; (2011) 58 MVR 362 Robinson v Harman (1848) 1 Exch 850; (1848) 154 ER 363 Ruthol Pty Ltd v Tricon (Australia) Pty Ltd [2005] NSWCA 443; (2006) NSW ConvR 56-145 Ruxley Electronics and Construction Ltd v Forsyth [1994] 1 WLR 650; [1994] 3 All ER 801 South Eastern Sydney Area Health Service v King [2006] NSWCA 2 St George Fertility Centre Pty Ltd v Clark [2011] NSWSC 1276 St George Fertility Centre v Clark (Supreme Court, Macready AsJ, 31 May 2010, unreported) St George Fertility Centre Pty Ltd v Clark (No 2) (Supreme Court, Gzell J, 8 November 2011, unreported) Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8; (2008-2009) 236 CLR 272 Tasman Capital Pty Ltd v Sinclair & Anor [2008] NSWCA 248; (2008) 75 NSWLR 1 The Commonwealth v Amann Aviation Pty Ltd [1991] HCA 54; (1991) 174 CLR 64

Marcourt v Clark [2012] NSWCA 367 -
R v Bossley [2012] QSC 292 (27 September 2012) (Dalton J)

(2008) 236 CLR 1
Malone v Metropolitan Police Commissioner

R v Bossley [2012] QSC 292 -
R v Bossley [2012] QSC 292 -
R v Bossley [2012] QSC 292 -

Spencer v Bamber [2012] NSWCA 274 -
Director of Public Prosecutions v Tamcelik [2012] NSWSC 1008 (31 August 2012) (Garling J)

91. In *Kuru v State of New South Wales* [2008] HCA 26; (2008) 236 CLR 1 , the High Court of Australia considered sections 357F to 357H of the *Crimes Act* 1900 . In all relevant respects, the provisions of Part 6 of LEPRA and in particular, sections 82 and 85, are in identical terms.

Director of Public Prosecutions v Tamcelik [2012] NSWSC 1008 (31 August 2012) (Garling J)

92. In the plurality judgment of Gleeson CJ, Gummow, Kirby and Hayne JJ in *Kuru* , when dealing with the interpretation of the statute, their Honours said that in resolving an ambiguity, a particular construction was to be preferred [at 37]:

> "...because of the strong principle of Australian law defensive of the quiet enjoyment by an occupier of that person's residence".

They further noted of the principle that:

> "...it appears to be a principle against which the provisions of s 357F [now s 82] and s 357H [now s 185] of the Act were written. It defends an important civil right in our society. If Parliament were to deprive person of such a right, as to diminish that right, conventional cannons of statutory construction require that it must do so clearly". (footnotes omitted)

Director of Public Prosecutions v Tamcelik [2012] NSWSC 1008 -
Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3) [2012] WASCA 157 (17 August 2012) (Lee AJA Drummond AJA Carr AJA)

3056. From ***Kuru*** one can discern that the purpose of the rule referred to in that case is to enable the High Court to consider all the issues between the parties. I do not think that there will be any difficulty for the High Court, if it has to deal with the ***Barnes v Addy*** issues, to do so. In ***In got Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd*** [2008] NSWCA 206; (2009) 73 NSWLR 653 [829] Ipp JA made a similar distinction between the circumstances of that case and those in ***Kuru*** . Everything that his Honour said at [826] [832] applies, in my view, to the present matter. See also ***Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd*** [2010] VSCA 355 at [103] ; ***SKA v The Queen*** [2001] HCA 13; (2001) 205 CLR 1 (where the Court of Criminal Appeal of New South Wales failed to make a critical determination in relation to the date upon which the offences were alleged to have occurred); ***KimberlyClark Australia Pty Ltd v Arico Trading International Pty Ltd*** [2001] HCA 8; (2001) 207 CLR 1 [34] (where the High Court conceded that plainly there can be no general principle that a court of first appeal should determine all the questions which have arisen); ***Lockwood Security Products Pty Ltd v Doric Products Pty Ltd*** [2004] HCA 58; (2004) 217 CLR 274 [105]; ***Cornwell v The Queen*** [2007] HCA 12; (2007) 231 CLR 260 [105].

Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3) [2012] WASCA 157 -
Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3) [2012] WASCA 157 -
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Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3) [2012] WASCA 157 -
WHISTLER & WHISTLER [2012] FamCAFC 97 (06 July 2012) (May, Ainslie-Wallace and Murphy JJ)

80. However, specific considerations can be seen to apply to this Court (see, for example, ss 94 (2A); 96AA and 97(3) of the Act). That more general issue aside, in this case reference to the other grounds in this appeal reveal what are essentially challenges to the exercise of discretion and to the weight attached to various specific parts of the evidence. The principles relating to the difficulties confronting appellants relying upon such grounds have frequently been referred to and do not bear repetition. In terms of the principles discussed in decisions such as *Kuru* and *Lanepoint* , those same considerations can be seen to apply *a fortiori* to an

application for special leave to appeal to the High Court from a decision of this Court where grounds of that type are relied upon.

WHISTLER & WHISTLER [2012] FamCAFC 97 -
WHISTLER & WHISTLER [2012] FamCAFC 97 -
Harden Shire Council v Richardson [2012] NSWSC 622 -
Harden Shire Council v Richardson [2012] NSWSC 622 -
Harden Shire Council v Richardson [2012] NSWSC 622 -
Bristow v Adams [2012] NSWCA 166 -
David v Abdishou [2012] NSWCA 109 -
Warren Shire Council v Kuehne [2012] NSWCA 81 -
Nominal Defendant v Meakes [2012] NSWCA 66 (04 April 2012) (McColl and Basten JJA, Sackville AJA)

6. Against the possibility that it was unsuccessful on the primary issue, the appellant also challenged the finding of the trial judge that the respondent had not been contributorily negligent and challenged various aspects of the assessment of damages. Against the possibility that a different view might be taken as to the operation of s 34 of the *Motor Accidents Compensation Act* , it is appropriate to consider those issues: *Kuru v New South Wales* [2008] HCA 26; 236 CLR 1 at [12] (Gleeson CJ, Gummow, Kirby and Hayne JJ) .

Nominal Defendant v Meakes [2012] NSWCA 66 -
Gaskin v Ollerenshaw [2012] NSWCA 33 -
Australian Crime Commission v Stewart [2012] FCA 29 (30 January 2012) (Stone J)

41. Indeed, when the High Court refers to the common law of another jurisdiction it customarily makes that distinction clear as, for example, in *Kuru v New South Wales* (2008) 236 CLR 1 at [37] . Moreover, it should not be assumed that the High Court would take upon itself the authority to decide what would be an "important" or "fundamental" right in a common law jurisdiction other than Australia. It would follow that only an important Australian common law right or immunity would be protected by the principle referred to in *Daniels* .

Australian Crime Commission v Stewart [2012] FCA 29 -
Body Corporate for Grand Pacific Resort v Cox [2012] QCATA 14 -
Body Corporate for Grand Pacific Resort v Cox [2012] QCATA 14 -
Starkey v State of South Australia [2011] SASCFC 164 -
Starkey v State of South Australia [2011] SASCFC 164 -
C G Maloney Pty Ltd v Noon [2011] NSWCA 397 (15 December 2011) (Campbell JA at [1], Handley AJA at [127], Tobias AJA at [169])

93. ***Kuru v State of New South Wales*** [2008] HCA 26; (2008) 236 CLR 1 at [12] instructs me to consider whether it is desirable to go on and decide the other questions involved in the attack on the dismissal of the 2010 Proceedings. I have done so.

Bondi Beach Astra Retirement Village Pty Ltd v Gora [2011] NSWCA 396 -
C G Maloney Pty Ltd v Noon [2011] NSWCA 397 -
Bondi Beach Astra Retirement Village Pty Ltd v Gora [2011] NSWCA 396 -
C G Maloney Pty Ltd v Noon [2011] NSWCA 397 -
Bondi Beach Astra Retirement Village Pty Ltd v Gora [2011] NSWCA 396 -
Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue [2011] NSWCA 366 -
Anne Penfold v John Betteridge and Carol Betteridge [2011] NSWDC 146 (27 July 2011) (Judge M Sidis)

34. In *Kuru v State of New South Wales* (2008) 236 CLR 1 , the High Court said:

... in the absence of any indication to the contrary, the implied or tacit licence to persons to go upon the open driveway of a suburban dwelling for legitimate purposes is not so confined as to

exclude from its scope a member of the police force who goes upon the driveway in the ordinary course of his duty for the purpose of questioning or arresting a trespasser or a lawful visitor upon it.

Griffith v Australian Broadcasting Corporation (No 2) [2011] NSWCA 145 -
Jovanovski v Billbergia Pty Ltd [2011] NSWCA 135 -
Jovanovski v Billbergia Pty Ltd [2011] NSWCA 135 -
Jovanovski v Billbergia Pty Ltd [2011] NSWCA 135 -
Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd [2011] HCA 18 -
MBF Investments Pty Ltd v Nolan [2011] VSCA 114 -
Public Service Association of SA Inc v Industrial Relations Commission of SA [2011] SASCFC 14 -
Public Service Association of SA Inc v Industrial Relations Commission of SA [2011] SASCFC 14 -
Australian Securities and Investments Commission v Landpoint Enterprises Pty Ltd (Receivers and Managers Appointed) [2011] HCATrans 49 [2011] HCATrans 49 (08 March 2011) (Gummow, Heydon, Crennan, Kiefel and Bell JJ)

MR DONALDSON: In *Kuru* there was no issue as to whether an outstanding issue or not.

Australian Securities and Investments Commission v Landpoint Enterprises Pty Ltd (Receivers and Managers Appointed) [2011] HCATrans 49 [2011] HCATrans 49 -
Maynes v Casey [2010] NSWDC 285 -
Maynes v Casey [2010] NSWDC 285 -
Maynes v Casey [2010] NSWDC 285 -
Maynes v Casey [2010] NSWDC 285 -
Hardie Finance Corporation Pty Ltd v Ahern [No 3] [2010] WASC 403 -
Hardie Finance Corporation Pty Ltd v Ahern [No 3] [2010] WASC 403 -
Scharrer v The Redrock Co Pty Ltd [2010] NSWCA 365 (20 December 2010) (McColl and Basten JJA, Handley AJA)

89 Before turning to the remaining issues, I note that Basten JA (at [182]) has characterised the Deputy President's treatment of the remaining issues as "anticipatory comments", made "without a proper consideration of the relevant issues, and open to be given little or no weight". I do not so understand the balance of the Deputy President's reasons. Rather, I understand them as a consideration of the outstanding issues in the manner advised in *Kuru v State of New South Wales* [2008] HCA 26; (2008) 236 CLR 1 (at [12]) so that, in the event of s 353, WIM Act error, this Court will not have to remit the matter to the Commission for further consideration. Such an approach is consistent with the objectives of the workers compensation system which include being fair, affordable, and financially viable (s 3(d), WIM Act). The Deputy President had submissions from both parties before him. It was not suggested by either party in this Court that his findings on the remaining issues should be understood as other than finally dispositive.

Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd [2010] VSCA 355 -
Scharrer v The Redrock Co Pty Ltd [2010] NSWCA 365 -
Morley v Australian Securities and Investments Commission [2010] NSWCA 331 (17 December 2010) (Spigelman CJ, Beazley and Giles JJA)

805 We think, however, that we should address whether there would have been contravention on the assumption that these appellants voted in favour of the Draft ASX Announcement Resolution: *Kuru v State of New South Wales* [2008] HCA 26; (2008) 236 CLR 1 . On that assumption, would they have exercised care and diligence as required by s 180(1) of the Act?

Morley v Australian Securities and Investments Commission [2010] NSWCA 331 (17 December 2010) (Spigelman CJ, Beazley and Giles JJA)

837 We have considered whether we should deal with the fall-back contraventions on the assumption that these appellants voted in favour of the Draft ASX Announcement Resolution, as

we have done in relation to the contraventions found: *Kuru v State of New South Wales* . The judge did not deal with them. We do not think it appropriate to address them in the first instance, and hypothetically.

6. CONTRAVENTION BY MESSRS GILLFILLAN AND KOFFEL

6.1 The pleaded contraventions

Carter v Walker [2010] VSCA 340 (14 December 2010) (Buchanan, Ashley and Weinberg JJA)

164. In our view, that submission should be rejected. It is one thing to postulate a test of this nature when considering ordinary questions of judicial review of administrative decisions. It is another thing altogether to apply that principle of restraint when determining the limits of reasonableness of conduct in the context of the exercise by police of their ordinary powers. So far as we can tell, no court has ever yet taken that step. [53] We can see no justification for its adoption.

via

[53] See *Lavin v Albert* [1982] AC 546; *Kuru v State of New South Wales* (2008) 236 CLR 1 ; and *State of Victoria v Horwarth* (2002) 6 VR 326.

Wilson v State of New South Wales [2010] NSWCA 333 -
Candetti Constructions Pty Ltd v Fonteyn [2010] SASCFC 63 (29 November 2010) (Bleby, Gray and Sulan JJ)

59. The first is that in *Kuru v State of New South Wales* , [49] the High Court referred to the need for an appellate court to consider as far as practicable all issues arising on the appeal. This is a pertinent observation when consideration is given to the history of this matter. During the course of their reasons, Gleeson CJ, Gummow, Kirby and Hayne JJ commented:

> The appeal to this Court should be allowed. There was neither statutory nor common law justification for the police remaining on the appellant's premises. The matter must be remitted to the Court of Appeal for consideration of the outstanding issues about damages. That outcome means that this Court cannot make orders disposing finally of the dispute between the parties. This Court has said on a number of occasions that, although there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal, not just with what is identified as the decisive ground. If the intermediate court has dealt with all grounds argued and an appeal to this Court succeeds, this Court will be able to consider all the issues between the parties and will not have to remit the matter to the intermediate court for consideration of grounds of appeal not dealt with below.
>
> [Footnote omitted]

Singler v Ferguson [2010] NSWCA 325 (29 November 2010) (Beazley and Young JJA, Handley AJA)
Kuru v New South Wales [2008] HCA 26; 236 CLR 1
McCarthy v Law Society of NSW

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>
> [Footnote omitted]

via

[49] *Kuru v State of New South Wales* (2008) 236 CLR 1 at [12] .

Candetti Constructions Pty Ltd v Fonteyn [2010] SASCFC 63 -
Singler v Ferguson [2010] NSWCA 325 -
Singler v Ferguson [2010] NSWCA 325 -
Zhang v Zemin [2010] NSWCA 255 (05 October 2010) (Spigelman CJ at 1; Allsop P at 157; McClellan CJ at CL at 174)

> 173 I agree with the Chief Justice that in the light of the proper construction of the Act , the questions whether a universal civil jurisdiction regarding torture exists and how it would be justiciable in Australia were the Act to be construed differently need not be discussed. None of the kinds of considerations referred to in *Kuru v New South Wales* [2008] HCA 26; 236 CLR 1 and like authorities concerning an intermediate court dealing with all issues before it are apposite. Not the least reason for this conclusion is that the expression of a view about such issues may play a part in the development of international law principles: see J G Starke *Introduction to International Law* (7th Ed, 1972) at 39 - 42. That would be inappropriate if, as here, the expression of a view is irrelevant to the disposition of the appeal. The controversy between the parties is able to be quelled by application of a law of the Parliament properly construed. There the matter should rest.

Zhang v Zemin [2010] NSWCA 255 -
Specialist Diagnostic Services Pty Ltd v Healthscope Ltd [2010] VSC 443 (01 October 2010) (Croft J)

> 164. It is not, however, necessary to consider this evidence having regard to the state of the evidence with respect to the claim by Symbion of derogation from grant with respect to the leases, as concluded below.[340] Neither, for the reasons already given, is this evidence presently relevant having regard to the positions I have reached with respect to the validity and enforceability of clause 20.1 of the leases as a restraint provision or the claimed good faith obligation attaching to these leases. Absent any immediate purpose in considering this evidence further, I am of the view that to do so would be undesirable. There were significant divergences and conflicts in the evidence and issues as to credit. Findings on some of these matters and an assessment of witnesses and the veracity of their evidence may affect reputations and careers and, possibly trigger the type of sanctions to which reference has been made. Consequently, it is not a process to be embarked upon "gratuitously". It should be stressed, however, that these comments should not be taken as indicative of any likely outcome of any findings on this evidence as the issues referred to are not confined to the evidence of either one of the cases of the main protagonists. In any event, the trial in this matter has already been "split", by agreement, in relation to liability and quantum issues, so that should it become necessary to consider this evidence further as a result of appeal, then this can be done conveniently with the second stage of the trial. In my opinion, this approach is entirely consistent with that discussed and adopted by Robson J in *Re S & D International Pty Ltd (No 4).* [341] In that case, Robson J reviewed the authorities and stated the position as follows: [342]

208 ... It is not the duty of a judge to decide every matter which is raised in argument. [343] As Mahoney JA said in *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd*:

> It is not the duty of the judge to decide every matter which is raised in argument. He may decide a case in a way which does not require the determination of a particular submission: in such a case he may put it aside or, as Lord Scarman said, merely salute it in passing: *R v Barnet London Borough Council: Ex parte Nilish Shah* [1983] 2 AC 309 at 350. A judge will, of course, appreciate the possibility of points being taken or decided on appeal which were not taken or decided below and for this reason he may decide, and give reasons for his decision on, matters which in strictness he need not decide.
>
> However, the decision of a particular submission may be an essential part of the judge's reasoning to his final conclusion. This may be so because it is necessarily so, ie, because he cannot come to his final conclusion without deciding it; or because the reasoning which in fact he follows makes it so. In such a case, the duty of the judge will vary according to the way in which the case has been conducted and according to the reasoning which he has followed. [344]

209 In *Kuru v New South Wales* , [345] the High Court emphasised the importance of intermediate appeal courts dealing with every ground of appeal so that the High Court can ultimately dispose of the matter without referring it back to the Court of Appeal. Gleeson CJ, Gummow, Kirby and Hayne JJ said:

> This Court has said on a number of occasions [346] that, although there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal, not just with what is identified as the decisive ground. If the intermediate court has dealt with all grounds argued and an appeal to this Court succeeds, this Court will be able to consider all the issues between the parties and will not have to remit the matter to the intermediate court for consideration of grounds of appeal not dealt with below.

210 Whether an issue argued in the case should be ruled on where it is not necessary to decide it to reach a finding on the ultimate issue is a matter for the trial judge. Clearly, factors such as those referred to by the High Court would be relevant matters for the trial judge to consider. It would be convenient in the event of an appeal to have decided all factual matters in dispute. On the other hand, it may be inappropriate to find on issues of credit and misconduct alleged against a party where such a finding is not essential to decide the case.

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>
> ...

via

[345] [2008] HCA 26 ; [2008] 236 CLR 1, 6.

Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Slaveski v State of Victoria [2010] VSC 441 -
Re S&D International Pty Ltd (No 4) [2010] VSC 388 -
Re S&D International Pty Ltd (No 4) [2010] VSC 388 -
Australian Style Pty Ltd v .Au Domain Administration Ltd [2010] VSCA 184 -
Australian Style Pty Ltd v .Au Domain Administration Ltd [2010] VSCA 184 -
Collier v State of Qld [2010] QSC 254 (20 July 2010) (Atkinson J)

52. Further, paragraph 1 of the proposed statement of claim purports to plead a claim in trespass to land. The plaintiff alleges that the premises were "exclusively occupied" by her and that the premises were "rented". She does not plead by whom the premises were rented and the terms of any rental agreement. She does not allege whether the entry by police officers was with or without her consent and whether her consent, if given, was withdrawn and whether the trespass occurred upon entry by the police or during the period after they had entered the premises or how, with reference to the statutory rights and duties of the police officers, they breached their statutory authority to be present on the premises. [35] The pleading of trespass to land is therefore defective.

via

[35] *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 .

Collier v State of Qld [2010] QSC 254 -
LMC Caravan GmbH and Co KG v GE Commercial Corporation (Australia) Pty Ltd [2010] NSWCA 120 -
LMC Caravan GmbH and Co KG v GE Commercial Corporation (Australia) Pty Ltd [2010] NSWCA 120 -
Gordian Runoff Ltd v Westport Insurance Corporation [2010] NSWCA 57 -
Gordian Runoff Ltd v Westport Insurance Corporation [2010] NSWCA 57 -
Dwyer v Craft Printing Pty Ltd [2009] NSWCA 405 -
Dwyer v Craft Printing Pty Ltd [2009] NSWCA 405 -
Bennett v Boyd [2009] TASSC 104 -
Bennett v Boyd [2009] TASSC 104 -
WO v Director of Public Prosecutions (NSW) [2009] NSWCCA 275 -
WO v Director of Public Prosecutions (NSW) [2009] NSWCCA 275 -
Stockland Property Management Pty Ltd v Cairns City Council [2009] QCA 311 (16 October 2009) (McMurdo P, Keane JA and Wilson J,)

55. It is not necessary to address the other issues agitated by the parties: the observations of Basten JA in *Rebenta Pty Ltd v Wise* (with whom Ipp JA and Sackville AJA agreed) are apposite. His Honour said: [20]

> "In these circumstances, it is not necessary or appropriate to address the remaining issues, unless the efficient administration of justice renders that course desirable: see *Kuru v State of New South Wales* [2008] HCA 26; 236 CLR 1 at [12] . When such a course is appropriate will depend to a significant extent on whether the court is conducting a trial or is an intermediate court of appeal. It is often desirable in the case of a trial judge, who has heard evidence on a matter, to determine factual questions arising from the evidence, even if they are not necessary on conclusions which have been reached on other issues. That is because some account must always be taken of the possibility of a successful appeal, requiring the further evidence to be assessed, or in all likelihood repeated on a

rehearing. The costs which are likely to flow to the parties in such an event will rarely be justified by the savings in judicial time. Further, such an event is more likely where there is a full appeal by way of rehearing, than where there is a more limited right of appeal.

With respect to an intermediate court of appeal, there is no further right of appeal, absent a grant of special leave to appeal to the High Court. While it seems undesirable in many cases to assess the likelihood of a grant of special leave and if granted, the likelihood of success on an appeal, in some cases such consideration may be appropriate: cf *Health World Ltd v Shin-Sun Australia Pty Ltd* [2009] FCAFC 14; 174 FCR 218 at [47] (Perram J, Emmett and Besanko JJ agreeing). Nevertheless, it will usually be open to the intermediate appellate court to work on the basis that a successful appeal is, in a run-of-the-mill case, a possibility, but not a probability.

There is also a principle of parsimony which applies in terms of the allocation of judicial resources. Parties in civil litigation do not have the right to demand that a court provide resources greater than those necessary to determine the dispute before it. An intermediate court of appeal is entitled to take into account the limits of its resources, its workload and the interests of other litigants: see *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206 at [824] –[833] (Ipp JA, Giles JA and Hodgson JA agreeing).

It is also appropriate to take into account the risk that a court will more readily fall into error in dealing with an issue which it knows does not arise in the circumstances of the case: cf *Wade v Burns* [1966] HCA 35; 115 CLR 537. In some cases, such a risk will be warranted; in other cases it will not be in the interests of the best administration of justice: see *Tarabay Pty Ltd v Leite* [2008] NSWCA 259 at [27]–[28] ; *Lindholdt v Hyer* [2008] NSWCA 264; 251 ALR 514 at [184]–[185] ."

Shimokawa v Lewis [2009] NSWCA 266 -
Shimokawa v Lewis [2009] NSWCA 266 -
Nilsson v McDonald [2009] TASSC 66 -
Rebenta Pty Ltd v Wise [2009] NSWCA 212 -
Rebenta Pty Ltd v Wise [2009] NSWCA 212 -
Rebenta Pty Ltd v Wise [2009] NSWCA 212 -
Symonds v Vass [2009] NSWCA 139 (10 July 2009) (Beazley JA at 1; Giles JA at 10; Ipp JA at 47)
Kuru v State of New South Wales [2008] HCA 26 ; (2008) 236 CLR

Symonds v Vass [2009] NSWCA 139 -
Symonds v Vass [2009] NSWCA 139 -
Leerdam v Noori [2009] NSWCA 90 -
Leerdam v Noori [2009] NSWCA 90 -
Duynstee v Dickens & Dickens [2009] NSWSC 292 -
Duynstee v Dickens & Dickens [2009] NSWSC 292 -
Caterpillar of Australia Pty Ltd v Industrial Court of New South Wales [2009] NSWCA 83 -
Caterpillar of Australia Pty Ltd v Industrial Court of New South Wales [2009] NSWCA 83 -
Gett v Tabet [2009] NSWCA 76 (09 April 2009) (Allsop P ; Beazley JA ; Basten JA)
Kuru v New South Wales [2008] HCA 26 ; 82 ALJR 1021
Laferrière v Lawson

Gett v Tabet [2009] NSWCA 76 -
McGuirk v University of New South Wales [2009] NSWADTAP 11 -

McGuirk v University of New South Wales [2009] NSWADTAP 11 -
McGuirk v University of New South Wales [2009] NSWADTAP 11 -
Health World Ltd v Shin-Sun Australia Pty Ltd [2009] FCAFC 14 (17 February 2009) (Emmett, Besanko and Perram JJ)

Kuru v New South Wales (2008) 246 ALR 260 considered

Health World Ltd v Shin-Sun Australia Pty Ltd [2009] FCAFC 14 -
Brodie v Brodie [2009] FamCAFC 6 (22 January 2009) (Boland, Thackray & Watts JJ)

Kuru v New South Wales (2008) 246 ALR 260; 82 ALJR 1021
Little & Little

Brodie v Brodie [2009] FamCAFC 6 -
Jeavons v Chapman (No 2) [2009] SASC 3 -
Jeavons v Chapman (No 2) [2009] SASC 3 -
Cyril Henschke Pty Ltd v Commissioner of State Taxation [2008] SASC 360 -
Cyril Henschke Pty Ltd v Commissioner of State Taxation [2008] SASC 360 -
Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd [2008] NSWCA 206 -
Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd [2008] NSWCA 206 -
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Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd [2008] NSWCA 206 -
Lindholdt v Hyer [2008] NSWCA 264 (24 October 2008) (Giles JA ; McColl JA; Basten JA)

Kuru v State of New South Wales [2008] HCA 26 ; (2008) 82 ALJR 1021 .

Lindholdt v Hyer [2008] NSWCA 264 (24 October 2008) (Giles JA ; McColl JA; Basten JA)

184. In adopting that approach, it is sufficient to assume that the publications each occurred on an occasion of qualified privilege. In taking that approach, it is proper to recognise that an issue raised by the respondent on his notice of contention will not be fully addressed. In some circumstances that approach would not be acceptable. At the very least, it is necessary for the Court to consider whether it is sufficient to deal with an appeal on the basis of one dispositive issue, without addressing other issues: see *Kuru v State of New South Wales* [2008] HCA 26; 82 ALJR 1021 at [12] . In criminal appeals, where a failure to deal with all issues may result in a person being incarcerated for longer than necessary, such a course should generally be avoided: see *Cornwell v The Queen* [2007] HCA 12; 232 CLR 260 at [105] . A similar conclusion may be reached in circumstances where the issue in dispute is the validity of a public instrument operating in rem: see *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* [2001] HCA 8; 207 CLR 1 at [34] ; *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd* [2004] HCA 58; 217 CLR 274 at [105] . This is not such a case; rather the appeal, on which the appellant must succeed in order to overturn the judgment below, turns on a question of fact involving no matter of contentious principle, as to which there will now be the unanimous findings of four judges of the Court.

Lindholdt v Hyer [2008] NSWCA 264 -
Tarabay v Leite [2008] NSWCA 259 (23 October 2008) (Allsop P ; Basten JA ; Bell JA)

24 The first step in considering the question of apportionment is to determine whether or not the plaintiff, as cross-appellant, needed to identify error in the assessment recorded by the trial judge. In terms of appellate jurisdiction, his Honour's conclusion in that respect formed no part of his reasons for the judgment given. Rather, like an assessment of damages in a case where liability has been held not to arise, such findings are made, in accordance with principles stated in this Court and in the High Court, in order to minimise the inconvenience and delay caused by appellate reversal of the decision on liability: see *Kuru v New South Wales* [2008] HCA 26; 82 ALJR 1021 at [12] . They are thus treated as having a contingent effect.

Tarabay v Leite [2008] NSWCA 259 (23 October 2008) (Allsop P ; Basten JA ; Bell JA)
Kuru v New South Wales [2008] HCA 26; 82 ALJR 1021
Lapcevic v Collier

Police v Dafov [2008] SASC 247 (17 September 2008) (Gray, Vanstone and White JJ)

12. The common law position was recently addressed by the High Court in *Kuru v State of New South Wales* , [3] where Gleeson CJ, Gummow, Kirby and Hayne JJ observed:

> As was pointed out in this Court's decision in *Plenty v Dillon* , it is necessary to approach questions of the kind now under consideration by recognising the importance of two related propositions. First, a person who enters the land of another must justify that entry by showing either that the entry was with the consent of the occupier or that the entrant had lawful authority to enter. Secondly, except in cases provided for by the common law and by statute, police officers have no special rights to enter land. And in the circumstances of this case it is also important to recognise a third proposition: that an authority to enter land may be revoked and that, if the authority is revoked, the entrant no longer has authority to remain on the land but must leave as soon as is reasonably practicable.
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> ...
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> In *Halliday v Nevill* , this Court held that if the path or driveway leading to the entrance of a suburban dwelling-house is left unobstructed, with any entrance gate unlocked, and without indication by notice or otherwise that entry by visitors or some class of visitors is forbidden, the law will imply a licence in favour of *any* member of the public to go on that path or driveway for any *legitimate* purpose that in itself involves no interference with the occupier's possession or injury to the person or property of the occupier, or the occupier's guests. But as Brennan J pointed out in his dissenting opinion in *Halliday*, there are cases in which it is necessary to recognise that when it is police officers who seek to enter the land of another there is "a contest between public authority and the security of private dwellings".

via

[3] *Kuru v State of New South Wales* [2008] HCA 26 at [43] , [45] (footnotes omitted).

Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
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Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Police v Dafov [2008] SASC 247 -
Public Trustee v O'Donnell [2008] SASC 181 -
State of New South Wales v Kuru [2007] NSWCA 141 -