FEDERAL COURT OF AUSTRALIA

Luck v Chief Executive Officer of Centrelink [2015] FCAFC 75

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| Citation: | Luck v Chief Executive Officer of Centrelink [2015] FCAFC 75 |
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| Appeal from: | Luck v Chief Executive Officer of Centrelink [2008] FCA 1506 |
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| Parties: | **GAYE LUCK v CHIEF EXECUTIVE OFFICER OF CENTRELINK****GAYE LUCK v SECRETARY, DEPARTMENT OF HUMAN SERVICES, ADMINISTRATIVE APPEALS TRIBUNAL AND STEPHANIE ANN FORGIE (AS DEPUTY PRESIDENT OF THE AAT)** |
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| File numbers: | VID 898 of 2008VID 512 of 2014 |
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| Judges: | **COLLIER, GRIFFITHS AND MORTIMER JJ** |
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| Date of judgment: | 21 May 2015 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – applications for stay or adjournment pending removal applications under s 40 *Judiciary Act 1903* (Cth) – stay not necessary to preserve subject matter – consideration of prospects of success of removal applications – applications dismissed**PRACTICE AND PROCEDURE** – applications for adjournment for health-related reasons – consideration of s 37M *Federal Court of Australia Act 1976* (Cth) – consideration of other relevant factors including persuasiveness of medical evidence, choices made by the appellant, time since appeals first instituted and proportionality of resources expended to subject matter of appeals – applications dismissed |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 44*Administrative Decisions (Judicial Review) Act 1977* (Cth)*Defence Force Discipline Act 1982* (Cth)*Federal Court of Australia Act 1976* (Cth) ss 37M, 37M(2)*Freedom of Information Act 1982* (Cth)*Judiciary Act 1903* (Cth) s 40 |
|  |  |
| Cases cited: | *Aon Risk Services Australia Pty Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27*Bienstein v Bienstein* (2003) 195 ALR 225; [2003] HCA 7*Birdon Pty Ltd v Houben Marine Pty Ltd* [2011] FCA 1217*Luck v Chief Executive Officer of Centrelink* [2008] FCA 1506*Luck v Chief Executive Officer, Centrelink* [2009] FCAFC 54*Luck v Secretary, Department of Human Services* [2014] FCA 1060*Luck v Secretary, Department of Human Services (No 2)* [2014] FCA 798*Luck v University of Southern Queensland* (2009) 176 FCR 268;[2009] FCAFC 73*Luck v University of Southern Queensland* [2011] FCA 1335*Luck v University of Southern Queensland (No 4)* [2011] FCA 433*Luck v University of Southern Queensland* [2013] HCATrans 163*Luck v University of Southern Queensland (No 2)* [2013] FCA 1141*Luck v University of Southern Queensland* [2014] HCASL 34*Luck v University of Southern Queensland* [2014] FCAFC 135*Luck v University of Southern Queensland* [2015] HCATrans 125*NAKX v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1559*Ponnambalam v The State of Western Australia* [2013] WASCA 101*Sali v SPC Ltd* (1993) 116 ALR 625 |
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| Date of hearing: | 21 May 2015 |
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| Date of publication of reasons: | 1 June 2015 |
|  |  |
| Place: | Brisbane (Heard in ) |
|  |  |
| Division: | GENERAL DIVISION |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 57 |
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| In VID 898 of 2008 |  |
| Counsel for the Appellant: | The Appellant did not appear |
|  |  |
| Counsel for the Respondent: | Ms Z Maud  |
|  |  |
| Solicitor for the Respondent: | Australian Government Solicitor |
|  |  |
| In VID 512 of 2014 |  |
| Counsel for the Appellant: | The Appellant did not appear |
|  |  |
| Counsel for the First Respondent: | Ms Z Maud |
|  |  |
| Solicitor for the First Respondent: | Australian Government Solicitor |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent filed a submitting appearance save as to costs |
|  |  |
| Counsel for the Third Respondent: | The Third Respondent filed a submitting appearance save as to costs |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 898 of 2008 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN | GAYE LUCKAppellant |
| AND: | CHIEF EXECUTIVE OFFICER OF CENTRELINKRespondent |

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| JUDGES: | COLLIER, GRIFFITHS AND MORTIMER JJ |
| DATE OF ORDER: | 21 MAY 2015 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. The appellant’s interlocutory applications for stays or adjournments of the appeal proceedings VID 898/2008 and VID 512/2014 each filed with the Court on 22 April 2015, be dismissed.
2. The appellant’s interlocutory applications for adjournments of the appeal proceedings VID 898/2008 and VID 512/2014 made on 1 May 2015, be dismissed.
3. The appellant pay the costs of the respondent in VID 898/2008 and the first respondent in VID 512/2014 of the interlocutory applications dated 22 April 2015 and 1 May 2015.
4. The appellant has leave to file and serve any written submissions she wishes to make on the appeal in VID 898/2008 on or before 4 pm on 18 June 2015.
5. The respondent in VID 898/2008 has leave to file and serve any submissions in reply to any submissions filed by the appellant on or before 4 pm on 2 July 2015.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 512 of 2014 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | GAYE LUCKAppellant |
| AND: | SECRETARY, DEPARTMENT OF HUMAN SERVICESFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond RespondentSTEPHANIE ANN FORGIE (AS DEPUTY PRESIDENT OF THE AAT)Third Respondent |

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| JUDGEs: | COLLIER, GRIFFITHS AND MORTIMER JJ |
| DATE OF ORDER: | 21 may 2015 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. The appellant’s interlocutory applications for stays or adjournments of the appeal proceedings VID 898/2008 and VID 512/2014 each filed with the Court on 22 April 2015, be dismissed.
2. The appellant’s interlocutory applications for adjournments of the appeal proceedings VID 898/2008 and VID 512/2014 made on 1 May 2015, be dismissed.
3. The appellant pay the costs of the respondent in VID 898/2008 and the first respondent in VID 512/2014 of the interlocutory applications dated 22 April 2015 and 1 May 2015.
4. The appellant has leave to file and serve any written submissions she wishes to make on the appeal in VID 898/2008 on or before 4 pm on 18 June 2015.
5. The respondent in VID 898/2008 has leave to file and serve any submissions in reply to any submissions filed by the appellant on or before 4 pm on 2 July 2015.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 898 of 2008 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | GAYE LUCKAppellant |
| AND: | CHIEF EXECUTIVE OFFICER OF CENTRELINKRespondent |

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| JUDGEs: | COLLIER, GRIFFITHS AND Mortimer JJ |
| DATE: | 1 JUNE 2015 |
| PLACE: | MELBOURNE |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 512 of 2014 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | GAYE LUCKAppellant |
| AND: | SECRETARY, DEPARTMENT OF HUMAN SERVICESFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond RespondentSTEPHANIE ANN FORGIE (AS DEPUTY PRESIDENT OF THE AAT)Third Respondent |

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| JUDGEs: | COLLIER, GRIFFITHS AND Mortimer JJ |
| DATE: | 1 JUNE 2015 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

# THE COURT:

# SUMMARY

1. By applications dated 22 April 2015, the appellant, Ms Gaye Luck, applied for orders to stay or adjourn the appeal proceedings VID 898/2008 and VID 512/2014, listed to be heard together before the Full Court on 21 May 2015. Ms Luck sought stays of each appeal pending the hearing and determination of her applications to remove these appeals to the High Court. By correspondence filed on 1 May 2015, Ms Luck further sought a three-month adjournment of appeal proceedings VID 898/2008 and VID 512/2014 on the basis that she required time for treatment and recovery in connection with a medical condition, during which time she said she would be unable to take steps in these proceedings.
2. On 21 May 2015 we dismissed those applications. We now set out our reasons for the orders we made.

# A BRIEF HISTORY OF THESE APPEALS

1. The underlying subject matter of both appeals concerns several, separate applications made by Ms Luck in 2005 (in the case of VID 898/2008) and 2009 (in the case of VID 512/2014) under the *Freedom of Information Act 1982* (Cth) (**the FOI Act**) for documents held by Centrelink and the Department of Human Services respectively. Both appeals have been attended by very significant delays due to applications made by Ms Luck to the High Court and consequent applications by her for these appeals to be adjourned pending the outcome of her High Court proceedings.
2. Mortimer J was assigned to case manage the preparation of the appeals. Case management orders were made in both appeals on 30 January 2015 preparing the appeals for hearing in the May 2015 Full Court sittings, including filing submissions and appeal books. Both parties cooperated in the making of these case management orders, and the orders were made taking into account Ms Luck’s submissions about the various “accommodations” she needed in order to be able properly to conduct her appeals as a litigant in person and, she submitted, as a person with disabilities.
3. As at the date of making our orders dismissing the applications, while Ms Luck had filed an outline of submissions in her appeal in VID 512/2014, she has not filed an outline of her submissions in VID 898/2008. This outline was initially due on 23 April 2015, with an extension subsequently granted on 4 May 2015 to 13 May 2015. Instead, as events transpired, Ms Luck indicated to the Court in her correspondence of 1 May 2015 that she was no longer able to undertake any further tasks in these appeals. She confirmed this in a subsequent email to the Victorian Registry of this Court on 18 May 2015, to which we refer in more detail at [26] to [29] below. On 21 May 2015, Ms Luck did not appear when the appeals were called on. The Court proceeded in her absence on these applications. Having made orders on those applications, the Court proceeded to deal with the two appeals themselves.

## Appeal proceeding VID 898/2008

1. In appeal proceeding VID 898/2008, the appellant appeals from the judgment of a single judge of this Court, Tracey J, on 8 October 2008: *Luck v Chief Executive Officer of Centrelink* [2008] FCA 1506. The underlying proceeding concerns a proposed appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) and a proposed application under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**AD(JR) Act**). There is a question, raised by the respondent, whether Ms Luck needs leave to appeal in this proceeding.
2. The primary judge refused an application by Ms Luck for an extension of time within which to appeal against and seek judicial review of certain decisions and determinations made by the Administrative Appeals Tribunal on 13 May 2008, on the basis that the proposed appeal was bound to fail and the application under the AD(JR) Act had no reasonable prospects of success. The present appeal, and the originating process before the primary judge for an extension of time, arises in the unusual circumstances of the Tribunal having not yet proceeded to a final hearing of Ms Luck’s FOI review application. That is because what Ms Luck has sought to appeal and have reviewed in this Court are directions made by the Tribunal seeking to prepare the merits review for hearing, refusal of leave by the Tribunal to amend her originating merits review application and certain other procedural decisions taken by the Tribunal.
3. The VID 898/2008 appeal was first listed by order of Ryan J dated 3 February 2009 for hearing by the Full Court in the May 2009 sittings. The hearing of this appeal has subsequently been relisted or adjourned on no fewer than five occasions: by order of Gray J in April 2009 listing the appeal for hearing in the August 2009 sittings; by order of Finn, Sundberg and Edmonds JJ in July 2009 listing the appeal for hearing in the November 2009 sittings; by order of Jacobson, Gordon and Jagot JJ in November 2009 adjourning the appeal to a date to be fixed following the determination of a High Court removal proceeding brought by Ms Luck in 2009; by order of Gray J in April 2012 further adjourning or staying the appeal pending the determination of other High Court proceedings brought by Ms Luck in 2012; and by order of Marshall J in October 2013 adjourning the hearing of this appeal still further pending the hearing and determination of a further High Court proceeding brought by Ms Luck in 2013. In each case the reason for the adjournment has been an application by Ms Luck, or because of other proceedings initiated by Ms Luck.

## Appeal proceeding VID 512/2014

1. In appeal proceeding VID 512/2014, Ms Luck appeals from orders dated 30 July 2014, in a separate proceeding: *Luck v Secretary, Department of Human Services (No 2)* [2014] FCA 798. These orders were made by Tracey J, this proceeding having also been allocated to his Honour’s docket. The proceeding in which the orders were made was an appeal under s 44 of the AAT Act. His Honour dismissed an interlocutory application by Ms Luck for a stay and adjournment of her proceeding. He also dismissed her s 44 appeal on the basis of upholding the first respondent’s objection to the competency of the appeal, finding that Ms Luck’s notice of appeal did not identify any questions of law and therefore the Court had no jurisdiction.
2. The Tribunal had decided, after the respondent had raised the matter, that it did not have jurisdiction to review the decisions Ms Luck had identified in her review application to the Tribunal. The Tribunal’s decision was taken in the midst of injunction and stay applications against the Tribunal and its officers by Ms Luck in the High Court. These events are recounted in more in detail in the decision on Ms Luck’s application for leave to appeal from Tracey J’s orders, decided by Mortimer J in October 2014, which led to this appeal, albeit with the grounds available to Ms Luck being limited by Mortimer J’s grant of leave: see *Luck v Secretary, Department of Human Services* [2014] FCA 1060.
3. As in VID 898/2008, in VID 512/2014, until the orders made on 30 July 2014 which are the subject of this appeal, the Court and the first respondent had accommodated Ms Luck’s requests about the timing and manner with which this Court should deal with this proceeding. The nature and extent of these extensive accommodations is set out in Mortimer J’s decision at [15]-[17], as well as in Tracey J’s original reasons (see *Luck v Secretary, Department of Human Services (No 2)* [2014] FCA 798 at [8]-[10] and the attached chronology).

# THE APPELLANT’S APPLICATIONS FOR STAY AND ADJOURNMENT OF THESE APPEALS

## Ms Luck’s first applications for stay or adjournment

1. On 21 April 2015, Ms Luck filed applications in the Melbourne Registry of the High Court to remove the present two appeals (together with other proceedings commenced by Ms Luck in this Court) to the High Court pursuant to s 40 of the *Judiciary Act 1903* (Cth) (**Judiciary Act**). The timing of these removal applications by Ms Luck should be noted: they were made well into the final stages of preparation for the hearing of these appeals, and only a month before the date allocated for the hearing of the appeals.
2. Ms Luck also sought from the High Court the stay or adjournment of these appeals pending the hearing and determination of her application for special leave to appeal to the High Court in respect of other proceedings in this Court brought by Ms Luck and also determined by Tracey J (*Luck v University of Southern Queensland (No 2)* [2013] FCA 1141; from which Ms Luck appealed unsuccessfully to the Full Court of this Court: *Luck v University of Southern Queensland* [2014] FCAFC 135). The removal proceedings bear the proceeding numbers M52/2015 in respect of VID 898/2008 and M51/2015 in respect of VID 512/2014.
3. On 22 April 2015, Ms Luck also filed interlocutory applications in both VID 898/2008 and VID 512/2014 seeking a stay or adjournment of these proceedings pending the hearing and determination of her applications to remove these appeals to the High Court. That is, Ms Luck has sought stays and adjournments of these appeals from both the High Court and from this Court.
4. On 23 April 2015, the parties were advised that the two applications filed in this Court for stay or adjournment of VID 898/2008 and VID 512/2014 would be made returnable on 21 May 2015, at the same time the appeals themselves were listed to be heard together. The parties were also advised:

In the event Ms Luck is unsuccessful in her interlocutory applications, their Honours intend to deal with Ms Luck’s appeals, VID512/2014 and VID898/2008 on Thursday, 21 May 2015, after the hearing and determination of Ms Luck’s interlocutory applications. The parties should prepare for 21 May 2015 on that basis.

1. Also on 23 April 2015, the Court directed that the appellant file and serve submissions by 14 May 2015 on why the Court should stay the present appeals pending the outcome of her applications to the High Court. The Court also directed that Centrelink and the Department file and serve submissions in response by 18 May 2015.
2. Ms Luck did not file any submissions in support of her stay applications pursuant to the directions made on 23 April 2015. Giving Ms Luck the benefit of the doubt, we proceed on the basis that she intends to rely, insofar as they are relevant to the question of stay or adjournment, upon the grounds and evidence set out in support of the two removal applications and supporting affidavits in the High Court, which she had enclosed with the applications filed in this Court for stay or adjournment. In the affidavits, both sworn on 21 April 2015, the terms of which are substantially similar, Ms Luck stated:

My substantive ground for seeking an order for a stay or an adjournment of this matter and my other matters below, is one whereby constitutional matters require determination by the High Court in respect of the validity of the determinations of the sitting primary judge and the Full Court of the Federal Court, and in addition, I reasonably apprehend institutional bias toward me, and a fair minded lay observer (the public) could reasonably apprehend that the Federal Court and the primary judge might not bring impartial and unprejudiced minds to the deciding of the matters, because of the constitutional issues raised and the continued failure of the Court to grant my numerously and formerly requested reasonable adjustments pursuant to my rights under the *Disability Discrimination Act 1992* and the *United Nations Convention of the Rights of Persons with Disabilities*, for times and numbers of appearances at Court, which, for reasons specifically related to my disabilities, I have repeatedly requested be after 10:30am and generally not for more than one matter per day.

## Ms Luck’s second adjournment applications

1. On 1 May 2015, Ms Luck filed correspondence with the Court, the effect of which appeared to be informal applications for an adjournment of three months in both appeals:

I will be unable to undertake any further tasks in respect of these matters, as I am currently suffering severe pain and cannot cope with the physical and mental stress and extreme discomfort of doing the work required of me to complete my litigation related tasks.

I will be unable to meet the requisite filing, serving and submission tasks, or appear at Court for about three months, in accordance with my doctor’s recommendations for my treatment and recovery. I am also going through preparatory procedures and assessments for a serious operation to amputate part of, and possibly my entire great toe. I have attached a copy of my current medical certificate, which provides an explanation of my unfortunate circumstances.

In addition to my application of 21 April 2015 for a stay or adjournment pending the hearing and determination of my Removal Applications by the High Court, in these matters, *M51/2015* and *M52/2015*, and my Special Leave to Appeal Application in matter *Gaye Luck v University of Southern Queensland and Anor M116/2014* and subsequently the appeal if granted, I make application to have these matters adjourned until I am able to undertake the work necessary, which, if given some time for treatment, rest and recuperation, I expect will be within the next three months. I have attached my submissions for the hearing of my stay application in the matter of *Luck v CEO of Centrelink and Anor VID488/2008,* made in person (under great duress) on 27 April 2015, in which I submitted the same fundamental grounds as I do in these matters, as the primary judge heard and determined these matters, hence a stay should be made pending the High Court’s determination of the issue of the validity of the primary judge’s role as a Federal Court Justice at the same time as he performed his role as Judge Advocate General of the Defence Force, in which he was responsible directly to a Minister of the Australian Government.

1. Attached to that correspondence were copies of a letter dated 30 April 2015 from a Dr Priscilla Leow, which was addressed “To Whom It May Concern”, and submissions filed by Ms Luck in proceeding VID 488/2008 entitled *Luck v Chief Executive Officer of Centrelink and Anor*.
2. The correspondence from Dr Leow stated in part:

This is to certify that Ms Luck suffered from severe acute symptoms relating to her heart and was referred for acute assessment for myocardial infarction at a local hospital on 3 June 2013.

…

She seeks accommodation of reasonable adjustments due to the stresses continually induced by matters which exacerbate her symptoms, both mental and physical. She is now unable to cope with multiple tasks in her daily life, including her litigation duties. She requires a 3-month period of treatment and recovery before an assessment of her capacity to return to her usual duties.

Her physical disabilities necessitate the use of assistive technology by way of digital note-taker, as well as extensions of time, when she finds herself incapable of performing the tasks required of her. Over time, I have observed that when Ms Luck is anxious and stressed, she speaks loudly and agitatedly and I have accepted that this is an involuntary response she has developed over many years of her condition of the post traumatic and adjustment disorder.

1. The remainder of the letter sets out some of the detail of Ms Luck’s medical conditions, which we need not reproduce in our reasons.
2. On the next business day, 4 May 2015, the parties were advised:

The Court has already made additional directions to accommodate Ms Luck’s application for a stay of these two appeals. Ms Luck has not withdrawn these applications and the directions made on 23 April [2015] remain operative. The appellant is to file submissions in support of her applications by 14 May and the respondents are to file submissions by 18 May.

The Court does not propose at this time, and before the hearing of the appeals, to grant the 3 month adjournment sought by Ms Luck. It will however, hear any adjournment application Ms Luck wishes to make on the day scheduled for the appeals, at the same time it proposes to deal with Ms Luck’s stay applications.

In addition, the Full Court considers some further modifications to the preparation for the appeals should be made, given the difficulties Ms Luck has expressed in her correspondence. Directions giving effect to those modifications are enclosed with this correspondence. Although these directions do make some further accommodation for Ms Luck, the directions are not only for Ms Luck’s benefit. Rather, they are intended to ensure the Court has the material it needs for the scheduled appeals on 21 May 2015 at 11 am [sic].

…

The parties should ensure they comply with all the Court’s directions. Ms Luck is expected to appear on 21 May 2015, and will be able to address the Court orally on her applications for a stay and adjournment. The Court will consider those applications and make a ruling. If either of those applications are successful, orders and directions will be made accordingly. If the applications are rejected, the appeals will proceed.

1. The directions made on 4 May 2015 included directions:
* extending the time for Ms Luck to file and serve her outline of submissions in VID 898/2008, originally due on 23 April 2015, to 13 May 2015;
* relieving Ms Luck from the requirement to file and serve a chronology of events;
* requiring that the respondents, rather than Ms Luck, prepare Part C of the appeal books; and
* that Ms Luck not be required to supply copies to either the respondents or the Court of authorities on which she relied.
1. Those directions supplemented the case management orders made previously on 30 January 2015 which provided that the respondents rather than Ms Luck prepare copies of a joint folder of authorities. Other accommodations by the Court, following concerns raised by Ms Luck on 21 April 2015 about the conflicting numbers, times and dates of her various matters listed for hearing in this Court, included vacating the case management conference in these appeals originally listed for 28 April 2015 (on the basis that any case management matters needing to be addressed could be dealt with on the papers) and accommodating Ms Luck’s request that the hearing on 21 May 2015 commence no earlier than 10.30 am.

## The respondents’ submissions on the stay and adjournment applications

1. On 18 May 2015, pursuant to the Court’s directions, the respondent in VID 898/2008 and first respondent in VID 512/2014 (collectively, **the** **respondents**) filed joint submissions opposing Ms Luck’s applications for stay or adjournment of these appeals. In brief, the respondents submitted:
2. First, no live issues involving the Constitution were raised in these appeals.
3. Second, s 40 of the *Judiciary Act 1903* (Cth) does not, in terms, prevent this Court from proceeding with the appeals: *Luck v University of Southern Queensland* [2011] FCA 1335 at [18]-[20] per Kenny J; *Ponnambalam v The State of Western Australia* [2013] WASCA 101 at [9]-[10] (per McClure P, Buss and Newnes JJA agreeing). The respondents referred to the decision of the High Court in *Bienstein v Bienstein* (2003) 195 ALR 225; [2003] HCA 7 at [45]: “Only where the issues are important and require this court’s urgent decision should the court make an order for removal”. Citing the decision of Kenny J in *Luck v University of Southern Queensland* [2011] FCA 1335at [20], the respondents contended that it was permissible for this Court to consider the prospects of success of the removal applications, and submitted that the removal applications were unlikely to succeed.
4. Third, insofar as stay or adjournment was sought pending the determination of Ms Luck’s special leave application in relation to the Full Court decision in *Luck v University of Southern Queensland* [2014] FCAFC 135, the Constitutional issues raised in that matter did not arise in the present appeals.

## High Court applications to stay these appeals

1. On 18 May 2015, three days prior to the hearing of these applications, Ms Luck sent an email to the Victorian Registry of this Court, copied to the Deputy Registrar of the High Court, to the respondents’ solicitors and to the Chambers of Mortimer J, who has been case managing these matters.
2. The correspondence concerned, first, bankruptcy proceedings (MLG 737/2015) issued in the Federal Circuit Court against Ms Luck, and a proposed adjournment of those proceedings pending a further appeal (VID 189/2015) by Ms Luck to a Full Court of this Court, which relates to her unsuccessful attempts to have the bankruptcy notice issued against her set aside. That appeal is scheduled to be listed in the August 2015 Full Court sittings. However, in this correspondence, Ms Luck also sought a stay of her appeal in VID 189/2015, pending her special leave application from the Full Court’s decision in VID 1158/2013 (*Luck v University of Southern Queensland* [2014] FCAFC 135). That is, although the appeal in VID 189/2015 was given by Ms Luck as the reason for adjourning the bankruptcy proceedings against her in the Federal Circuit Court, rather than pressing on with that appeal, she sought in turn that it be stayed pending her special leave application. This is not the first time Ms Luck has made what might be described as cascading applications for stays and adjournments in various proceedings.
3. Ms Luck notes in this correspondence that “the Federal Court has refused to stay or adjourn the matter of VID189/2015”. That is a correct statement: on 4 May 2015, Beach J refused Ms Luck’s stay and adjournment applications in VID 189/2015. Ms Luck also states however that “the Federal Court has refused to stay or adjourn … matters VID 898/2008, VID 512/2014 …”. That is not entirely correct. We did not grant a three-month adjournment immediately to Ms Luck prior to the hearing of the appeals, as she had sought. However Ms Luck’s applications for stay and adjournment were listed to be heard and determined on 21 May 2015 and are the subject matter of this judgment.
4. Further, in this correspondence, Ms Luck asserts that “I am not capable, due to disability (medical certificate provided), at this time, of managing any appearances before the Court or undertaking work that is necessary and required to prepare for and make comprehensive and proper submissions to the Court, either written or oral”. That is the reason she gives for consenting to the adjournment of the bankruptcy proceedings, and, we infer, it is the basis on which she has agreed to the High Court determining her stay applications on the basis of the written material.
5. On 19 May 2015, Nettle J heard and dismissed with costs Ms Luck’s applications in the High Court to stay the present appeals, on the basis that he was not persuaded of any need or justification for a stay: *Luck v University of Southern Queensland* [2015] HCATrans 125. As at the date of judgment on 21 May 2015 and the date of publishing these reasons, Ms Luck’s applications to remove these appeals to the High Court have not yet been listed for hearing or determination.

# RESOLUTION OF THE STAY AND ADJOURNMENT APPLICATIONS

1. We do not consider it is in the interests of the administration of justice for the stays sought by Ms Luck to be granted. Nor do we consider we should adjourn the appeals for the period of three months she seeks, or for any lesser period.

## The stay applications

1. What Ms Luck seeks is to put these appeals on hold until the High Court has determined her removal applications. Nettle J found on 19 May 2015 that there was no need or justification for such a stay. That is also our view. In *Birdon Pty Ltd v Houben Marine Pty Ltd* [2011] FCA 1217, Rares J said (at [10]):

It is necessary to have regard to the orderly administration of justice in considering whether to grant interlocutory relief in aid of an application for special leave to appeal to the High Court: *Paringa Mining & Exploration Co plc v North Flinders Mines Ltd* (1988) 165 CLR 452 at 458 per Mason CJ, Brennan and Gaudron JJ. The jurisdiction of this Court, and the High Court, for this purpose is concurrent. The question for decision is whether or not the refusal of interim relief would render nugatory an appeal to the High Court, were special leave granted (*Paringa* 165 CLR at 459-460). The principles on which the High Court will grant such an injunction in aid of an application for special leave to appeal were also discussed in the much cited judgment of Brennan J in *Jennings Construction Ltd v Burgundy Royale Investments Pty Limited [No 1]* (1986) 161 CLR 681 at 683-684. Similar considerations apply to an application for a stay, as Spigelman CJ noted in *Minister for Local Government v South Sydney City Council (No 3)* [2002] NSWCA 327 at [10]-[13]. These considerations were summarised by Ipp J, with whom Pidgeon J agreed, in the Full Court of the Supreme Court of Western Australia in *Hamersley Iron Pty Ltd v Lovell (No 2)* (1998) 20 WAR 79 at 85D as follows:

Generally speaking, the court will only stay proceedings when it is necessary to preserve the subject matter or integrity of the litigation or where refusal of a stay could create practical difficulties in the relief available to the High Court, or where there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed.

1. We respectfully agree with his Honour’s summary of the approach to be taken. In *Birdon* at [11], Rares J also referred to s 37M of the *Federal Court of Australia Act 1976* (Cth) (**the FCA Act**), and the need for the Court’s powers (including powers such as the power to grant a stay) to be exercised so as to facilitate the just resolution of disputes according to law, and to do so as quickly, inexpensively and efficiently as possible. As his Honour noted, pursuit of that objective requires the Court to consider the efficient and effective use of judicial resources, as well as the resources of the parties. Generally, some proportionality should be maintained between what is at stake in the proceeding and the cost and time taken to resolve it.
2. The subject matter of Ms Luck’s litigation, whether it is removed to the High Court or remains in this Court to be dealt with on the appeals, is threefold. In relation to VID 512/2014, it is whether Tracey J was in error to make orders dismissing her proceeding on the basis of an objection to competency. In relation to VID 898/2008, it is whether Tracey J was in error in dismissing Ms Luck’s application for an extension of time within which to appeal against and seek judicial review of the determinations made by the Administrative Appeals Tribunal on 13 May 2008, on the basis that the proposed appeal and application had no reasonable prospects of success. Third, in relation to VID 898/2008 only (given the limits on the grant of leave to appeal in VID 512/2014: see *Luck v Secretary, Department of Human Services* [2014] FCA 1060), the subject matter of the appeal extends to Ms Luck’s repeated contentions about why it was unlawful, or alternatively, inappropriate for Tracey J in particular to hear and determine the applications, because of the position formerly held by Tracey J as Judge Advocate General of the Australian Defence Force under the *Defence Force Discipline Act 1982* (Cth).
3. A stay of the appeals pending removal is not necessary to preserve the subject matter of these appeals. The subject matter is capable of being determined in the exercise of this Court’s appellate jurisdiction and that is the ordinary forum for its determination. Removal to the High Court is exceptional.
4. Further, there are no practical difficulties for the High Court in considering the removal applications if a stay of the appeals is not granted by this Court. The determination by Nettle J on 19 May 2015 makes this clear: *Luck v University of Southern Queensland* [2015] HCATrans 125. If the High Court considered a stay was required in order that it determine the removal applications, it would have granted one itself.
5. Finally, we note the following observations by Kenny J in *Luck v University of Southern Queensland* [2011] FCA 1335 at [19]-[20], where Ms Luck also sought stays pending High Court removal applications:

After hearing the parties on 15 December 2011 and bearing in mind their submissions, I am of the clear view that the applications for extension of time should not be adjourned (or the proceedings stayed) whilst the removal applications are determined. First, it is clear that the mere making of an application under s 40 of the *Judiciary Act 1903* (Cth) does not preclude this Court from proceeding to consider interlocutory or final issues in a proceeding in relation to which the removal application is made. Secondly, I have borne in mind the observations of the High Court itself in *Bienstein v Bienstein* (2003) 195 ALR 225 at 234 [45], in which it was said:

Orders for removal interfere with the processes of the courts hearing the proceedings sought to be removed. Only where the issues are important and require this court’s urgent decision should the court make an order for removal. … The s 40(1) power to remove is not intended to convert this court into a court exercising a general supervisory jurisdiction over lower courts.

In light of this, after perusing the removal applications filed by Ms Luck in the High Court and considering her submissions, it seems to me a real likelihood that the High Court, on the removal application, might well decline to make an order for removal.

1. We respectfully adopt her Honour’s observations and consider them applicable to the current circumstances. We also consider Ms Luck’s removal applications have little or no prospects of success, especially given that the question of Ms Luck’s challenges to Tracey J hearing and determining her proceedings in this Court has been rejected three times by Full Courts of this Court, including recently: see *Luck v Chief Executive Officer, Centrelink* [2009] FCAFC 54; *Luck v University of Southern Queensland* (2009) 176 FCR 268;[2009] FCAFC 73; *Luck v University of Southern Queensland* [2014] FCAFC 135.
2. Aside from the allegations concerning Tracey J, there is nothing else in these two appeals which could reasonably justify removal under s 40 of the Judiciary Act. The High Court has previously determined that Ms Luck’s allegations concerning Tracey J are not appropriate for removal: see *Luck v University of Southern Queensland* [2013] HCATrans 163 (5 August 2013) per Gageler J, special leave to appeal from Gageler J’s decision refused: *Luck v University of Southern Queensland* [2014] HCASL 34 (6 March 2014).
3. Our views as to the prospects of success of the removal applications, while not determinative, confirm our opinion that stays of these appeals should not be granted.

## The adjournment applications

1. These applications are based on Ms Luck’s current health conditions, and her claimed inability to manage both the preparation and appearances necessary to conduct her appeals and make proper submissions. She relies on the letter dated 30 April 2015 from Dr Leow, to which we have referred above.
2. In considering an application for an adjournment, issues particular to the parties and the circumstances of the case must be considered. The Court must also determine how the grant or refusal of an adjournment will promote the overarching purpose of the civil practice and procedure provisions governing the exercise of its jurisdiction, here its appellate jurisdiction, including the objectives in s 37M(2) of the FCA Act, to which we have referred earlier in these reasons in summary form.
3. These objectives set out in statutory form some of the considerations earlier expressed as conditioning a discretion to adjourn a hearing. In *Sali v SPC Ltd* (1993) 116 ALR 625 at 629, Brennan, Deane and McHugh JJ said the Court is entitled to be conscious of the “effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties”.
4. In *Aon Risk Services Australia Pty Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27, the plurality of the High Court recognised four matters which should, in the circumstances of that particular case, have been taken into account by the Court when exercising its discretion whether to grant an adjournment so as to allow substantial amendments to be made to the statement of claim. Those factors were: the explanation for the adjournment sought (at [108]), the parties’ choices to date in the litigation (and the consequences of those choices) (at [112]), the detriment to other parties, and the detriment to other litigants in the Court (at [114]).
5. In *Aon* at [5], French CJ referred to the broader considerations at work in considering an adjournment application:

In the proper exercise of the primary judge’s discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to Aon could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system.

1. The plurality in *Aon* expressed a similar opinion at [93]:

[T]he rules concerning civil litigation no longer are to be considered as directed only to the resolution of the dispute between the parties to a proceeding. The achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the court and upon other litigants.

1. Whether examined on the basis of factors particular to the parties in these appeals, or the basis referred to at [43]-[46] above, we do not consider an adjournment should be granted to Ms Luck.
2. Her medical evidence is unpersuasive. It is not verified on affidavit, a matter which has been highlighted in earlier cases in which Ms Luck has unsuccessfully relied on similarly worded assessments by Dr Leow: see for example *Luck v University of Southern Queensland* [2014] FCAFC 135 at [16], referring to *Luck v University of Southern Queensland (No 2)* [2013] FCA 1141 at [11]-[17] (in turn discussing *Luck v University of Southern Queensland (No 4)* [2011] FCA 433). Dr Leow’s letter in this proceeding refers to conditions Ms Luck has suffered since at least 2013. There is nothing in the letter concerning any recent development, exacerbations, or new diagnoses. The treatment to which it refers appears to be treatment Ms Luck has been undergoing for some time, and at least since 2009: see *Luck v Chief Executive Officer, Centrelink* [2009] FCAFC 54 at [23]. It is unclear what Dr Leow means by “litigation duties”. No “duty” is imposed on Ms Luck in relation to litigation: rather, she has elected to bring multiple proceedings in this Court, and in other courts, challenging a variety of decisions which generally relate to applications (such as FOI applications) she has chosen to make. Ms Luck herself compounds the amount of litigation she has to deal with by applications such as repeated stay and removal, and special leave, applications to the High Court. The amount of preparation for hearings, interlocutory applications and appeals she needs to undertake is in that sense a self-fulfilling prophecy. Despite the underlying subject matter of all Ms Luck’s litigation concerning events which happened many years ago, and flowed from choices she made to make certain applications, Dr Leow says nothing about whether she has recommended to Ms Luck any voluntary reduction in her litigation in order to assist her to recover her health.
3. There is nothing in Dr Leow’s letter which suggests Ms Luck’s conditions have worsened, and certainly not in any way which could be said to be connected to what she must do in the month leading up to 21 May 2015 to prepare for these two appeals: see generally the observations of Lindgren J in *NAKX v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1559 at [6]-[8] where his Honour said (in relation to medical certificates which certified an applicant as unfit to attend for work):

The medical certificates are quite unsatisfactory. They do not address the critical question whether, and if so why, the medical condition would prevent the appellant from travelling to the Court and participating effectively in a court hearing.

I do not accept that either of the medical conditions referred to would make the sufferer ‘unable to attend court’ — apparently each was able to attend upon the medical practitioner.

If the certificates were meant to say that the medical condition would prevent the sufferer from participating effectively in a court hearing, they do not in fact say that and do not explain why the medical condition would have that effect.

1. The absence of any such specific evidence about how her conditions are affecting preparation is particularly relevant given the extensive accommodations already made for Ms Luck in terms of preparation, and the shifting of some of the preparation burden (such as appeal books) to the respondents. It is also to be noted that, inconsistently with Dr Leow’s assessment, Ms Luck was able as recently as 8 May 2015 to file in the High Court a 12 paragraph affidavit dated 7 May 2015, which in substance was her submission in support of her applications in that Court to stay these appeals.
2. These matters have been on foot in this Court for a long time: in the case of VID 898/2008, for seven years. Their longevity in this Court is because of Ms Luck’s own decision-making about other litigation she seeks to conduct, and appeals she seeks to bring, combined with what we view as a remarkably tolerant and generous history (by various respondents and the Court) of acquiescing in Ms Luck’s requests for postponements, adjournments, extensions of time and other accommodations. What is at stake through the subject matter of the appeals (undetermined and/or historical FOI applications, and issues about Tracey J’s role in the Australian Defence Force already determined adversely to Ms Luck on more than one occasion) has become entirely disproportionate to the resources which are being consumed by Ms Luck’s litigation – both the Court’s publicly funded resources, and the publicly funded resources of the respondents.
3. To ensure that the resources of this Court are not unduly consumed with the claims of one litigant over others, to ensure the Court can effectively dispose of cases before it and to ensure that some finality can be achieved to claims made in this Court, these appeals should be heard and determined. Their merit does not improve with delay: either Ms Luck’s arguments are persuasive or they are not.
4. Finally, given what Ms Luck has herself said about the impact of this litigation on her own wellbeing, we cannot see how it is in her own interests to further delay these appeals. She has been given considerable accommodation in the preparation of these appeals, both with longer periods for preparation and by being relieved of some tasks entirely, and having others assigned to the respondents. We consider her arguments are as well prepared as they will ever be.
5. We acknowledge Ms Luck has not filed written submissions in VID 898/2008, but as part of our orders on 21 May 2015 we granted her a further and final indulgence by giving her four weeks from 21 May 2015 in which to file any written submissions she wishes to make in VID 898/2008 and a further two weeks from then for the respondent to respond. As we have said, the subject matter of these appeals are legal arguments that either Ms Luck has run many times before, or with which she has had years to come to terms, including for example having the benefit of decisions such as the leave to appeal decision from Mortimer J: see *Luck v Secretary, Department of Human Services* [2014] FCA 1060. Ms Luck’s correspondence and material in fact shows great familiarity with the issues in these appeals.
6. In our opinion, if Ms Luck is given yet another extension, there is no reasonable basis to believe she cannot make submissions in writing. Despite what Dr Leow says, Ms Luck has continued to file documents and correspondence at length with this Court, and the High Court. On the basis of the evidence before us, it seems to us Ms Luck, rather than being physically unable to do any more, has elected to draw a line in the sand concerning what she will agree to do, and what she will not. That is a matter for her, but this Court will not delay the hearing and determination of her appeals any longer.

# CONCLUSION

1. The applications for stay and adjournment were accordingly dismissed.
2. We see nothing in the material which would cause us to make anything other than the usual orders as to costs.

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| I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Collier, Griffiths and Mortimer. |

Associate:

Dated: 1 June 2015