

MICHAEL McHUGH SC

Barrister

WARDELL CHAMBERS

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A distinguished leader in both civil and criminal litigation, Michael maintains a broad practice and has acquired considerable appellate and trial law experience before both judges and juries, across a broad range of jurisdictions.

He has developed a strong reputation and significant practice prosecuting and defending large and complex white-collar crime matters, particularly regulatory matters involving the Commonwealth DPP. The nature of the disputes in which Michael is regularly briefed to advise and/or appear includes insider trading, money laundering, tax fraud and matters involving misconduct in public office. He also appears for the defence in matters in which indictable offences are alleged, including major drug importation and sex offences cases.

Michael's civil law practice has seen him appear in a diverse range of commercial matters (including shipping, aviation and contract law disputes) and common law matters, particularly defamation. He is a BarADR Arbitrator, as well as a Mediator, in complex arbitrations and mediations. Notably, Michael has been listed as a recommended Leading Transport Senior Counsel in Australia in the *Doyle's Guide* for five consecutive years, from 2014 – 2019.

Primarily appearing in appellate Courts, Michael is a flexible, experienced and highly skilled advocate who is focused on the early and expeditious identification of the most pertinent issues on which a case will turn. His extensive courtroom experience includes representing clients such as high-net-worth individuals, corporations and government bodies in NSW and interstate appellate Courts, including in the Queensland and Northern Territory Supreme Courts. Michael's matters have included cases in the High Court of Australia, the Federal Court, Supreme Court of New South Wales, and occasionally in the District Court of New South Wales. His expansive case list (below) is a testament to the depth and breadth of his experience.

Michael has always had significant involvement with the New South Wales Bar Association. He is the current Senior Vice President and has served, and continues to serve, on various committees including as Chair of a Professional Conduct Committee. He is an original and continuing contributor to the *NSW Civil Practice & Procedure* and *Uniform Civil Procedure Rules* loose-leaf service and throughout his legal career has engaged in pro bono work, including as a panel member on the HIV Aids Legal Centre.

APPOINTMENTS AND ADMISSIONS TO PRACTICE

- 2012 Appointed Senior Counsel
- 1999 Called to the Bar of New South Wales

PROFESSIONAL QUALIFICATIONS AND COURSES

- Australian Bar Association Appellate Advocacy Course: 2012
- Australian Bar Association Advanced Trial Advocacy Course: 2010 and Coach: 2018

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PRINCIPAL AREAS OF PRACTICE

- Administrative Law
- Alternative Dispute Resolution
- Appellate
- Commercial Law
- Common Law
- Constitutional Law
- Criminal Law
- Defamation
- Inquests and Commissions of Inquiry
- Transportation (Maritime and Aviation)

PROFESSIONAL EXPERIENCE

- 2012 – present Senior Counsel and barrister, Wardell Chambers

Prior to being called to the Bar, Michael practised as a solicitor at Sparke Helmore Lawyers, as well as at Butterworths Legal Publishers and Registered Representatives of the Sydney Futures Exchange

PROFESSIONAL APPOINTMENTS AND MEMBERSHIPS

- Member, New South Wales Bar Association
- Senior Vice President, New South Wales Bar Association (2019)
- Junior Vice President, New South Wales Bar Association (2018)
- Bar Councillor, New South Wales Bar Association (2001 – 2014; 2016 – 2019)
- Secretary, New South Wales Bar Association (2010)
- Treasurer, New South Wales Bar Association (2013 – 2014)
- Chair, Finance, Investment and Audit Committee, New South Wales Bar Association
- Chair, Professional Conduct Committee No. 4, New South Wales Bar Association
- Panel Member, HIV Aids Legal Centre (pro bono)
- NSW Attorney General Civil Procedure Working Party (2003 – 2006)

PUBLICATIONS

- *NSW Civil Practice & Procedure* Thomson Reuters loose-leaf:
 - Civil Procedure Act 2005 (Part 6 – ss 56 – 65 (case management and interlocutory matters))
- *Uniform Civil Procedure Rules*:
 - Part 2 – case management generally
 - Part 5 – preliminary discovery and inspection
 - Part 14 – pleadings
 - Part 15 – particulars
 - Part 19 – amendment
 - Part 20.4 – compromise
 - Part 21 – discovery, inspection and notice to produce documents
 - Part 22 – interrogatories

SPEAKING ENGAGEMENTS

- Michael has delivered several papers, and most recently, has presented a paper entitled “*Cross-Examination on Documents*”, presented at Bar Conferences and for Legalwise

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SELECT CASES

- ***Maitland v R; Macdonald v R*** [2019] NSWCCA 32
CRIMINAL LAW – appeal against conviction; principal offender; 2 counts of wilful misconduct in public office – common law offence
CRIMINAL LAW – appeal against conviction; accessory; 2 counts accessory before the fact to wilful misconduct in public office
CRIMINAL LAW – appeal against conviction; directions to jury; misdirection; mental element of offence of misconduct in public office
CRIMINAL LAW – appeal against conviction; unreasonable verdict
CRIMINAL LAW – appeal against conviction; miscarriage of justice
CRIMINAL LAW – appeal against sentence; application for leave to appeal
Legislation Cited: *Court Suppression and Non-publication Orders Act 2010* (NSW) *Criminal Appeal Act 1912* (NSW) *Criminal Code RSC 1985, c. C-46* *Environmental Planning Act 1979* (NSW) *Mining Act 1992* (NSW) *Environmental Planning Act 1979* (NSW)
- ***The Queen v McRoberts (No 2)*** [2018] NTSC 42
CRIMINAL LAW – submission of no case to answer; circumstantial case; charge of attempting to pervert the course of justice; whether there was evidence fit to go to the jury; whether the Crown case as presented to the jury materially differed from the particulars provided
Legislation Cited: *Criminal Code* (NT) ss 23, 26, 109, *Police Administration Act* (NT) ss. 5(2), 6, 7, 14
- ***Director of Public Prosecutions (Cth) v Pratten (No 2)*** (2017) 94 NSWLR 194; [2017] NSWCCA 42
CRIMINAL LAW – federal offence; prosecution appeal against sentence; sentence imposed following second trial; whether error in taking “double jeopardy” into consideration; whether general law doctrine of “double jeopardy” applicable to federal sentencing governed by *Crimes Act 1914* (Cth) s 16A
CRIMINAL LAW – federal offence; prosecution appeal against sentence; taking hardship to family into consideration; whether *Crimes Act 1914* (Cth) s 16A(2)(p) reflects general law principle that hardship can only be relied on to reduce sentence where circumstances “exceptional”; whether hardship established
CRIMINAL LAW – prosecution appeal against sentence; whether error in assuming that respondent’s tax liabilities had been repaid in absence of evidentiary foundation for assumption; whether erroneous assumption resulted in overly lenient sentence
CRIMINAL LAW – prosecution appeal against sentence; whether respondent entitled to leniency as a first-time offender; whether error in finding that respondent had no prior criminal record in circumstances where some offences, but not convictions, pre-dated other offences; where respondent also had separate prior conviction; application of *Crimes Act 1914* (Cth) s 16A(2)(m)
STATUTORY INTERPRETATION – *Crimes Act 1914* (Cth) s 16A – whether terms of provision reflect general law sentencing principles; whether general law principles able to be accommodated within terms of provision
Legislation Cited: *Crimes Act 1914* (Cth), ss 4AA, 4B, 4J, 16A, 19AB-19AK, 19AN; Pt 1B; *Crimes Legislation Amendment Act (No 2) 1989* (Cth), s 6; *Crimes (Sentencing Procedure) Act 1999* (NSW), s 44; *Criminal Code* (Cth), ss 11.1, 134.2; *Judiciary Act 1903* (Cth), ss 68, 79, 80; *Proceeds of Crime Act 2002* (Cth), ss 17, 37

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- **Woods v R** [2017] NSWCCA 5
CRIMINAL LAW – appeal – whether dextromethorphan was a prohibited drug under the *Drug Misuse and Trafficking Act 1985* (NSW); Crown concession; indictment quashed
CRIMINAL LAW – costs – application for certificate under s 2(1)(a) of Costs in *Criminal Cases Act 1967* (NSW); whether applicant was “discharged in relation to offence concerned”; certificate granted
Legislation Cited: *Costs in Criminal Cases Act 1967* (NSW), ss 2, 3 *Criminal Appeal Act 1912* (NSW), s 5F(3)(b) *Drug Misuse and Trafficking Act 1985* (NSW), ss 3, 25(2), sch 1 *Poisons and Therapeutic Goods Act 1966* (NSW), s 8
- **Obeid v R (No 2)** [2016] NSWCCA 321
CRIMINAL LAW – procedure – bail; application for release on bail pending appeal; whether special or exceptional circumstances exist justifying a decision to grant bail; various factors relied upon; age and ill-health; level of uncertainty in area of law that is the subject of one ground of appeal; significant proportion of custodial sentence likely to be served before appeal finalised; whether sufficient prospects of a successful appeal; majority of proposed grounds of appeal concern points that should have been raised at trial; no explanation given for failure to raise at trial; special or exceptional circumstances not shown; bail refused
Legislation Cited: *Bail Act 2013* (NSW), ss 17, 18, 19, 20, 22, 61, 62, *Criminal Appeal Act 1912* (NSW) s10(2)(b) *Criminal Appeal Rules* (NSW) r 4
- **Dickson v R** [2016] NSWCCA 105
CRIMINAL LAW – appeal – appeal against conviction complex tax fraud; money laundering; question of whether change in Crown case; whether appellant’s conviction inconsistent with asserted innocence of co-conspirator; whether plea in bar exists for a count on indictment; whether criminality of one count on indictment considerably different to a second count on indictment; whether count duplicitous; whether trial judge failed to adequately put the appellant’s case to the jury; conviction appeal dismissed
CRIMINAL LAW – appeal – Crown appeal against sentence; whether sentence manifestly inadequate; whether misapplication of principle; aggregate sentence unreasonable or unjust; residual discretion; appeal against sentence upheld; appellant re-sentenced
Legislation Cited: *Copyright Act 1968* (Cth) *Crimes (Sentencing Procedure) Act 1999* (NSW) *Crimes Act 1900* (NSW) *Crimes Act 1914* (Cth) *Criminal Appeal Act 1912* (NSW) *Criminal Code 1995* (Cth) *Criminal Procedure Act 1986* (NSW) *Financial Transaction Reports Act 1988* (Cth)
- **R v Michael John Issakidis** [2015] NSWSC 834
CRIME – accused’s first trial aborted on 55th day; trial continued against co-accused; co-accused convicted and sentenced to significant term of imprisonment; accused privately funded defence at first trial; trial aborted because of Crown’s failure to disclose email chain and circumstance revealed that Crown had access to documents held by the Australian Taxation Office but accused did not; Crown intends to proceed to second trial ;application for a stay based on *Dietrich v The Queen*; application for stay pending the payment by the Crown of costs thrown away at first trial; Crown case complex;– accused unable to represent himself – first trial aborted because of fault of the Crown; accused’s assets frozen in proceedings under the *Proceeds of Crime Act 2002* (Cth); accused’s funds exhausted; accused not properly pursued application for legal aid; *Dietrich* not satisfied; applicant’s circumstances and fault of the Crown justified stay pending payment of costs; form of order and quantification of costs
Legislation Cited: *Criminal Code Act 1995* (Cth), a 11.5, s 135.4, s 400.3 *Criminal Procedure Act 1986*, s142 *Income Tax Assessment Act 1936* (Cth), s 263, s 264 *Judiciary Act 1903* (Cth), s 68 *Proceeds of Crimes Act 2002* (Cth)

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- ***Enders v Erbas & Associates Pty Limited*** [2014] NSWCA 70
DEFAMATION - defences - common law qualified privilege; whether primary judge erred in not making a finding of malice; knowledge of falsity of imputations where the defendant does not intend to convey the imputations
DEFAMATION - defences - statutory qualified privilege; application of s 30(3)(h) of *Defamation Act 2005* - whether reasonable in the circumstances not to have sought a response from the plaintiff; whether it may be reasonable to seek a response after publication of defamatory matter
DEFAMATION - defences - defence of triviality; whether the primary judge applied the wrong test; whether "any harm" includes hurt feelings
Legislation Cited: *Defamation Act 1974* (NSW) *Defamation Act 2005* (NSW)

 - ***Monis v R; Droudis v R*** (2013) 249 CLR 92; (2013) 295 ALR 259; (2013) 87 ALJR 340; [2013] HCA 4
CONSTITUTIONAL LAW - Implied freedom of communication on government and political matters; Criminal offence under s 471.12 of *Criminal Code* (Cth) for person to use postal or similar service in way that "reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive"; Appellants allegedly sent communications to relatives of Australian soldiers and officials killed in Afghanistan and Indonesia; communications criticised deployment of Australian troops in Afghanistan in terms critical of deceased; Appellants charged with using and aiding and abetting use of postal service in way that reasonable persons would regard as offensive; whether s 471.12 in its application to "offensive" uses of postal service effectively burdens implied freedom of political communication; whether s 471.12 in its application to "offensive" uses of postal service is reasonably appropriate and adapted to legitimate end in manner compatible with system of representative and responsible government
STATUTES – Interpretation; whether purpose of s 471.12 of *Criminal Code* (Cth) in its application to "offensive" uses of postal service is only to prohibit those offensive uses; whether purpose of s 471.12 in its application to "offensive" uses of postal service is to prohibit misuse of service for intrusion of seriously offensive material into home or workplace; whether s 471.12 in its application to "offensive" uses of postal service is limited to seriously offensive uses
WORDS AND PHRASES - "Effectively burden"; "Legitimate end"; "Offensive"; "Proportionality"; "Reasonable person"; "Reasonably appropriate and adapted"
Legislation Cited: (Cth) *Constitution*, ss 7, 24, 128, (Cth) *Criminal Code* Div 471, s 471.12

 - ***Dai v Zhu*** [2013] NSWCA 412
SUMMARY DISPOSAL - applicants in default of discovery obligations; orders made striking out their defence and entering judgment against them; whether primary Judge erred in factual findings; re-exercise of discretion
SUMMARY DISPOSAL - Judgment entered in default of filing a defence; whether primary Judge erred in refusing to set aside judgment; re-exercise of discretion; significance of failure to put on evidence of a bona fide defence
Legislation Cited: *Civil Procedure Act 2005*, ss 56, 57, 58, 59, 61, *Fair Trading Act 1987*, s 42
Supreme Court Act 1970, s 101(2)(e) *Uniform Civil Procedure Rules 2005*, rr 12.7, 14.28, 16.2, 16.3, 16.7, 21.3, 36.16

 - ***Khoo v R*** [2013] NSWCCA 323
CRIMINAL LAW - appeal against sentence - insider trading; tipping; whether sentence manifestly excessive; whether sentencing judge failed to take proper account of individual factors
Legislation Cited: (Cth) *Corporations Amendment (No1) Act 2010*, (Cth) *Corporations Act 2001*
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- ***Macedonian Orthodox Community of Australia Ltd v Subeski*** [2013] NSWSC 22
ASSOCIATIONS AND CLUBS - Expulsion, Suspension and Disqualification; Council of plaintiff expelled defendant from membership; whether procedure for expulsion from membership of council should have been used
Legislation Cited: *Corporations Act 2001 (Cth)*

- ***Karim v R; Magaming v R; Bin Lahaiya v R; Bayu v R; Alomalu v R*** (2013) 83 NSWLR 268; (2013) 227 A Crim R 1
CONSTITUTIONAL LAW - criminal law - mandatory minimum sentences; two overlapping provisions for sentences; whether valid
Legislation Cited: *Acts Interpretation Act 1901 (Cth)*, *Anti-People Smuggling and Other Measures Act 2010 (Cth)*, *Black Marketing Act 1942 (Cth)*, *Border Protection (Validation and Enforcement Powers) Act 2001 (Cth)*, *Convention for the Protection of Human Rights and Fundamental Freedoms Crimes Act 1914 (Cth)*, *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002 (Cth)*, *Criminal Appeal Act 1912 (NSW)*, *Criminal Code Act 1995 (Cth)*, *Director of Public Prosecutions Act 1983 (Cth)*, *Immigration Restriction Act 1901 (Cth)*, *International Covenant on Civil and Political Rights Migration Act 1958 - 1973 (Cth)*, *Migration Act 1958 (Cth)*, *Migration Amendment (Excision from Migration Zone) Act 2001 (Cth)*, *National Security Regulations National Security Act 1939 (Cth)*, *National Service Act 1951 (Cth)*, *Universal Declaration of Human Rights*

- ***Tsoukaris v Royal Motor Yacht Club of New South Wales Ltd*** [2012] NSWSC 1190
ADMINISTRATIVE LAW - Procedural fairness - Requirements of procedural fairness where member of club facing expulsion
CORPORATIONS LAW - Oppression
Legislation Cited: *Corporations Act 2001 (Cth)*

- ***Branson v Tucker*** [2012] NSWCA 310
COSTS - recovery of costs by barrister; bill of costs rendered to a firm of solicitors by a barrister pursuant to a costs agreement; dispute over charges after time expired to seek assessment under the *Legal Profession Act 2004*; barrister commenced action to recover charges; defence pleaded that charges were not reasonable having regard to skill of barrister and requirements of work undertaken; barrister moved the court to strike out the defence on the basis that the *Legal Profession Act* provided an exclusive regime for assessing the reasonableness of costs; strike out refused; the jurisdiction of the District Court to determine the reasonableness of disputed items in a bill of costs rendered by a law practice or practitioner in the course of the legal practice or practitioner suing for unpaid fees is not ousted by the statutory costs assessment regime.
PRACTICE AND PROCEDURE - Court of Appeal; leave to challenge Court's own previous decision; application for - circumstances in which leave will be granted; requirement that sitting judges have strong conviction that previous decision was incorrect; requirement not met; leave refused
Legislation Cited: *Civil Procedure Act 2005*, *Corporations Act 2001 (Cth)*, *District Court Act 1973*, *Interpretation Act 1987*, *Legal Profession Act 1987*, *Legal Profession Act 2004*, *Legal Profession Regulations 2002* *Sale of Goods Act 1923*, *Solicitors Act 1843 (Eng)*, *Solicitors Act 1974 (Eng)*, *Uniform Civil Procedure Rule 14.28*

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- ***Foote and Ors v Acceler8 Technologies Pty Ltd and Ors*** [2012] NSWSC 635
CONTRACT - Construction - Conditional agreement to lease - Option given to one party to terminate if conditions not satisfied - Conditionality not absolute.
CONTRACT - Void for uncertainty - Agreement apparently incomplete as to essential matter - Mechanism for curing omission - Matter left for determination of one of contracting parties - Not agreement to agree - Not incomplete.
CONTRACT - Void for uncertainty - Unworkability - Applicable principles - Agreement prepared without legal assistance - Necessity to strive for contractual intention - Agreement enforceable.
Health Practitioners Regulation National Law (NSW) National Health Act 1953 (Cth) Retail Leases Act 1994
 - ***Monis, Man Haron v R; Droudis, Amirah v R*** (2011) 256 FLR 28; (2011) 215 A Crim R 64; [2011] NSWCCA 231
CONSTITUTIONAL LAW - Constitutional challenge to validity of statute - Whether s 471.12 Criminal Code infringes implied freedom of political communication - Test in *Lange v Australian Broadcasting Commission* - Whether section burdens freedom of communication about government or political matters - Whether reasonably appropriate and adapted to serve legitimate end compatible with maintenance of system of government prescribed by the Constitution (Cth).
CONSTITUTIONAL LAW - Constitutional challenge to validity of statute - Implied freedom of political communication - Whether necessary to have regard to actual communication.
CRIMINAL LAW - Using a postal service to menace, harass or offend - Constitutional validity of statutory offence - Whether s 471.12 *Criminal Code* infringes implied freedom of political communication.
STATUTORY INTERPRETATION - Section 471.12 *Criminal Code* - Meaning of "offensive".
Acts Interpretation Act 1901 (Cth), s 15A Criminal Appeal Act 1912 Criminal Code 1995 (Cth), s 470, s471 Customs Act 1901 (Cth) Police Offences Act 1928 (Vic), s 25 Police Offences Ordinance 1930-1961 (ACT), s 17(d) Summary Offences Act 1988 Vagrants, Gaming and Other Offences Act 1931 (Qld), s7(1)(d)
 - ***Gilgandra Marketing Co-Operative Limited v Australian Commodity & Merchandise Pty Ltd (in liquidation) & Ors*** [No. 3] [2011] NSWSC 69
LIENS - General possessory lien - Vendor entitled to exercise right of stoppage in transitu - Carriers claim lien for unpaid freight charges, demurrage and legal costs - Vendor seeks redelivery and sale of wheat - Wheat perishable - Urgent sale of wheat required - Carriers seek preservation of their claimed lien over the proceeds of sale, to be paid into court - Risk that sale proceeds may not be paid into court due to circumstances beyond the parties' control.
LEGISLATION CITED:
Civil Procedure Act 2005, s 93 Sale of Goods Act 1923, s 48 Uniform Civil Procedure Rules 2005, s 25.4
 - ***ICM Agriculture Pty Ltd v Commonwealth of Australia & Anor*** (2009) 240 CLR 140; (2009) 261 ALR 653; [2009] HCA 51
CONSTITUTIONAL LAW (Cth) – Powers of Commonwealth Parliament – Agreement between Commonwealth and a State – National Water Commission Act 2004 (Cth) authorised Chief Executive Officer ("CEO") of National Water Commission to enter into funding agreement with State – Whether CEO authorised to enter into funding agreement with State for purpose of State acquiring property on other than just terms – Whether legislative power conferred by s 96 of Constitution, or by s96 with s51(xxvi), is subject to limitations contained in s 51(xxvi) – Relevance of distinction between coercive and non-coercive legislative power.
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CONSTITUTIONAL LAW (Cth) – Powers of Commonwealth Parliament – Acquisition of property on just terms – Plaintiffs held bore licences under *Water Act 1912* (NSW) ("Water Act") – Plaintiffs' licences replaced with aquifer access licences under *Water Management Act 2000* (NSW) – Whether Water Act divested common law rights with respect to extraction of groundwater – Whether plaintiffs' Water Act licences property within s 51(xxxi) of Constitution – Whether replacement of licences amounted to acquisition of property.

WORDS AND PHRASES – "abstraction", "acquisition", "coercive and non-coercive power", "control", "just terms", "property", "the use and flow".

Constitution, ss 51(xxxi), 51(xxxvi), 61, 96.

Irrigation, Water, Crown Lands and Hunter Valley Flood Mitigation (Amendment) Act 1966 (NSW), s 3.

National Water Commission Act 2004 (Cth), s 24.

Water Act 1912 (NSW).

Water Management Act 2000 (NSW), s 45(1), Sched 10, item 3.

Water Rights Act 1896 (NSW), s 1(l).

- ***Equititrust Ltd & Anor v Franks*** (2009) 258 ALR 388; [2009] NSWCA 128
ESTOPPEL - promissory estoppels; representations by financier that would not charge interest at default rate; extent of detrimental reliance on representations by borrower
SET-OFF - set-off at law under s 21 *Civil Procedure Act 2005*; no set-off where debt sought to be set-off was owed to joint but not joint and several creditor
Legislation Cited: *Civil Procedure Act 2005*, *Conveyancing Act 1919*, *Corporations Act 2001* (Cth), *Managed Investments Act 1998* (Cth), *Property Law Act 1974* (Qld), *Real Property Act 1900*
- ***New Guinea Line Pty Limited v Board of Trustees of Papua New Guinea National Museum and Art Gallery*** [2006] FCA 171
INTERPLEADER - Order 44 r 2; ocean carrier of cargo interpleads after threat of suit by someone claiming to be the owner of cargo; no letter of indemnity proffered by consignee and bill of lading holder
- ***English v Rogers*** (2005) Aust Torts Reports 81-800; [2005] NSWCA 327
NEGLIGENCE – employer's duty of care; non-delegable duty; contractor; late-night cleaner at a hotel; armed robbery; hostage at gun-point; adequacy of security measures; psychiatric injury; consequent physical injury; special vulnerability; absence of instructions; voluntary human intervention; coordinating role of the Hotel; causal relation of motor accidents to psychological injury; interest on non-economic loss; general damages at common law; s151M, s151Z *Workers Compensation Act 1987*; apportionment of damages as between employer and Hotel (D)
Legislation Cited: *Law Reform (Miscellaneous Provisions) Act 1946*, *Workers Compensation Act 1987*
- ***El Greco (Australia) Pty Ltd v Mediterranean Shipping Company SA*** [2004] 2 Lloyd's Rep 537, 593; (2004) 140 FCR 296
ADMIRALTY AND MARITIME LAW – carriage of goods by sea; Hague-Visby Rules; Australian COGSA