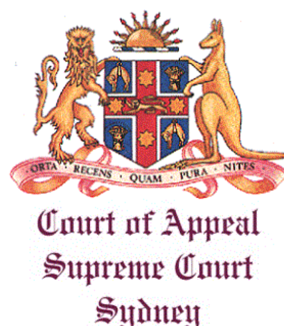

Decisions of Interest

10 April 2023 – 23 April 2023

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

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New South Wales Court of Appeal Decisions of Interest

Administrative Law: jurisdictional error

***Cooper v Director of Public prosecutions (NSW)* [[2023] NSWCA 65]**

Decision date: 14 April 2023

White, Brereton and Kirk JJA

On 28 September 2021, Mr Cooper, was convicted of a string of offences and sentenced in the Drug Court of New South Wales to an aggregate sentence of imprisonment of 27 months, which was immediately suspended so as to enable him to commence a program under s 7A of the *Drug Court Act 1998* (NSW) ("the Act"), provided that certain conditions were adhered to. Mr Cooper complied with those terms until 1 November 2021, when he was arrested for fresh charges alleging the dishonest obtainment of financial advantages by deception. Mr Cooper was detained on remand and was unable to comply with the imposed conditions. The Director of Public Prosecutions ("DPP"), applied to the Drug Court for an order terminating Mr Cooper's program under ss 10(1) and 11(1)(c) of the Act. Section 10(1) of the Act relevantly provided that the Drug Court's discretion to cancel a program imposed under s 7A was predicated on its being satisfied that, on the balance of probabilities, Mr Cooper had failed to comply with his program, and was unlikely to make any further progress or posed an unacceptable risk of recidivism to the community were he to continue the program. The primary judge terminated Mr Cooper's Drug Court program on the basis that given his detention on remand and the likelihood of a custodial sentence, Mr Cooper was not able to meet the conditions of the program. Mr Cooper appealed that decision

Held: allowing the appeal and remitting the matter to the Drug Court

- The primary judge's reasons conveyed an implicit satisfaction that, by virtue of his being detained on remand, Mr Cooper had failed to comply with his Drug Court program, so as to engage the first precondition to the exercise of the discretion to terminate the program under s 10(1) of the Act: [57], [69]. However, the primary judge's reasons revealed an erroneous focus on the appropriateness of dealing with the fresh charges through the diversionary procedures of the Drug Court, rather than on whether Mr Cooper was unlikely to make further progress in his current program, or posed an unacceptable risk to the community were he to continue that program. By misconceiving the nature of the Drug Court's jurisdiction, and constructively failing so to exercise that jurisdiction, the primary judge's decision was afflicted by jurisdictional error: [58]-[63], [68], [70]-[84].

- In dissent, White JA found that the matters conditioning the exercise of the Drug Court's discretion in s 10(1) to terminate a program are, in nature, subjective jurisdictional facts, the establishment of which is necessary before the Drug Court's jurisdiction so to order is enlivened: [37]. The focus of the inquiry was whether the primary judge could be, and was, satisfied on the balance of probabilities that Mr Cooper was unlikely to make any further progress in his program, or that Mr Cooper's continued participation therein posed an unacceptable risk to the community: [39]. While the primary judge's reasons do not expressly deal with the matters referred to in s 10(1)(b), it can be implied that her Honour was satisfied that Mr Cooper was unlikely to make any further progress in his program as a result thereof: [40]-[44]. For the same reasons, her Honour did not have regard to irrelevant considerations, or fail to take account of relevant considerations: [45]-[46]. While the rejection of Mr Cooper's claims for jurisdictional error does not necessitate the rejection of his claims for error of law on the face of the record, no such error was here apparent on the record of proceedings which included the transcript of the oral application: [48]-[52].

Building and Construction: statutory warranties

***Parkview Constructions Pty Ltd v The Owners – Strata Plan No 90018* [2023] NSWCA 66**

Decision date: 17 April 2023

Ward P, Leeming JA and Simpson AJA

Parkview Constructions Pty Ltd was the builder and the second respondent was the developer of a residential apartment building in the Sydney CBD. The building plan was registered in 2014, resulting in the property vesting in the first respondent. A final occupation certificate was then issued, engaging s 3C(2) of the *Home Building Act 1989* (NSW), which deemed the completion of the residential building work to have commenced on that date for the purposes of that statute. The first respondent commenced proceedings in the Supreme Court alleging defects in the common property that were caused by breach of "one or more" of the six statutory warranties in s 18B of the *Home Building Act*. The Owners Corporation asserted that, as the immediate successor in title to the Developer in relation to the common property, it was entitled to the benefit of those warranties under s 18D. The Owners Corporation further asserted that the Developer was taken to have done the residential building work under s 18C(2), and that by s 18C(1), it was entitled to the benefit of the statutory warranties. There were 85 major and minor alleged defects. In 2021, three further alleged defects were added, including the external façade of the building not meeting the requirements of the Building Code of Australia. The primary judge held that there was a single cause of action to enforce the promises made in each of the six statutory warranties, and accordingly granted the Owners Corporation leave to include the three new alleged defects. The Developer and the Builder appealed that decision.

Held: granting leave to appeal but dismissing the appeal

- The Owners Corporation's claims were best regarded as claims for breach of contract. While it was never a party to any contract, it had, by reason of the *Home Building Act*, the capacity to sue for breaches of the actual contract between the Builder and the Developer into which the statutory warranties in s 18B were taken to have been incorporated by reason of s 18D(1). The Owners Corporation was also entitled to sue the Developer on statutory warranties in respect of work deemed to have been done by the Developer under s 18C: [24]-[32], [86]. In a conventional case for breach of contract, there is a single cause of action, complete when a defective structure is provided, irrespective of the number of ways in which those defects manifested themselves: [90]. Although the *Home Building Act* makes important inroads into the position at general law, those changes do not alter the fact that the nature of the Owners Corporation's claim is that the building which is the subject of the contract has not been provided in accordance with the terms of the contract: [91].

- Where a successor in title sues a builder or developer on the statutory warranties in s 18B of the *Home Building Act*, the proceeding is for breach of the single contract (which may be actual or deemed) against that party. An amendment which does nothing more than introduce further departures from the building as promised will not give rise to a new cause of action because the cause of action is for breach of the same contract. The Owners Corporation's amendments did not therefore introduce a new cause of action, and so could be permitted without resort to s 65(2)(c) of the *Civil Procedure Act 2005* (NSW). [88]-[89], [103]-[106]. Statutory modifications following *Onerati v Phillips Constructions Pty Ltd (in liq)* (1989) 16 NSWLR 730 and *Honeywood as Executrix of the Estate of the late Neville Honeywood v Munnings* (2006) 67 NSWLR 466; [2006] NSWCA 215 preserved the singleness of the cause of action in some circumstances for the purposes of res judicata. The statutory modifications do not produce the result that there is a different cause of action for each defect said to have been caused by a breach of a statutory warranty for the purposes of s 65 of the *Civil Procedure Act*: [80]-[84], [93]-[102].

Equity: agency; ostensible authority; estoppel

***183 Eastwood Pty Ltd v Dragon Property Development & Investment Pty Ltd* [[2023] NSWCA 72]**

Decision date: 19 April 2023

Bell CJ, Ward P and Leeming JA

The appellant is the trustee of the Eastwood Unit Trust. In 2018, Mr Chan (who controlled a company owning a minority interest in the Unit Trust) lodged two false Form 484 documents notifying ASIC that he was the sole director, secretary and shareholder of the appellant. The true officeholders became aware that Mr Chan had changed the ASIC record and had raised $4 million by way of mortgage over a property owned by the appellant. An agreement was executed under which certain unitholders agreed to sell their units to Mr Chan's company. Meanwhile, from 2017, unbeknownst to the true officeholders, Mr Chan had been negotiating with Mr Feng, the sole director of the respondent. The respondent's solicitor sought documents including an ASIC search of the appellant. In April 2018, Mr Chan (purportedly on behalf of the appellant) and the respondent executed a deed under which 19 units in the Unit Trust were to be transferred to the respondent. The respondent paid the purchase price of the units by way of a cheque to a bank account in the name of the appellant but which was controlled by Mr Chan. The units were never transferred. In June 2018, the ASIC record was corrected and the deed was terminated. The respondent commenced proceedings in the Supreme Court. The primary judge found that Mr Chan was held out by the appellant as possessing authority to bind the company to contracts, due to the appellant's failure to do anything to remove Mr Chan's ability to use the false ASIC register until June 2018, and the unitholders preparation to sell their units and leave the appellant in Mr Chan's control. The appellant appealed that decision.

Held: dismissing the appeal

- The primary judge did not err in referring to a lack of objective evidence that any advice was sought on correcting the register earlier than June 2018. The true officeholders' evidence led to the conclusion that any request for advice would most likely have been about what to do about the situation, rather than on the need to correct the register: [73]-[78]. The situation known to both parties was that the publicly accessible ASIC register disclosed that Mr Chan was the sole director and shareholder of the appellant and thus in a position to bind the appellant to transactions involving its assets. The fact that the true officeholders did not know of the existence or interests of the respondent is not to the point. To the extent that equivalence of factual knowledge is required, this was met by the true officeholders' knowledge that Mr Chan had already taken steps to portray himself in a position to bind the company since he had done so in relation to the mortgage. A reasonable person in the respondent's position would expect that if the true officeholders were aware of the false information and that the rogue had acted upon it, then that officeholder would act within a reasonable time of that discovery to correct the public register: [128]-[130].

- Irrespective of whether the test as to a representation by silence is framed as requiring "the existence of a duty", "an unjust departure from an assumption" or "circumstances which call for action", the primary judge correctly found that a representation was made by reason of the appellant's failure to take steps to correct the ASIC register. Assuming that a duty must be established, there was a duty on the part of those who knew the ASIC register had been falsified to speak out: [130]-[137]; [170]. A finding that there was reliance on the false information on the ASIC register was sufficient to establish detriment. The only reasonable inference available from the respondent's solicitor seeking the information that included the ASIC search was that this was information to be relied upon in advising the respondent as to the transaction: [158].

Consumer Law: remedies; statutory guarantees

***Scenic Tours Pty Ltd v Moore* [2023] NSWCA 74**

Decision date: 20 April 2023

Ward P, Kirk JA and Griffiths AJA

In 2014, Mr Moore, commenced representative proceedings in the Supreme Court against Scenic Tours Pty Ltd ("Scenic Tours"), in relation to 13 European river cruises conducted by Scenic Tours which were disrupted by actions taken by Scenic Tours when it was confronted with high water levels. In 2017, the primary judge relevantly found that Scenic Tours breached the consumer guarantees in ss 61(1) and (2) of the Australian Consumer Law ("ACL"), found that the defence under s 61(3) did not apply as regards Mr Moore, and awarded damages to Mr Moore for a reduction in the value of services (s 267(3) of the ACL), and damages for distress and disappointment (s 267(4) of the ACL). His Honour did not assess the application of the defence or damages in respect of other group members. The Court of Appeal held that Mr Moore and the group members were precluded from claiming damages for distress and disappointment. The High Court overturned that decision. The matter returned to the primary judge who found that the defence in s 61(3) of the ACL did not apply to the other group members and awarded damages to various group members comprising one or more of the following components: the reduction in the value of the services arising from Scenic Tours' breach of the statutory guarantees under s 267(3)(b) ("Reduction in Value Damages"); distress and disappointment under s 267(4) ("Distress Damages"); and the refund of airfares to and from Europe under s 267(4) ("Airfares Damages"). Scenic Tours appealed that decision.

Held: allowing the appeal in part

- The relevant services the subject of the findings of breach of the statutory guarantees were not confined to cruising and extended to a broader concept of "services": [112]-[129], [138]-[139]. Scenic Tours' statements in its Brochures and Terms and Conditions did not intimate to passengers that it could not guarantee to provide services in accordance with the Brochures if external circumstances beyond its control made it impossible to do so: [131]-[137]. The fact that consumers were urged to take out insurance does not suggest that consumers could not rely on Scenic Tours to use its skill or judgment in providing the services: [158]. The primary judge properly applied s 61(3), taking into account the effect of s 61(3) and issues such as partial and unreasonable reliance: [140]-[157], [159]-[170].

- Mr Moore's expert correctly focused upon the market value of a cruise by reference to what a reasonable consumer fully informed would have paid at the time of booking: [174]-[178]. The assessment of Distress Damages turns on its own facts rather than the application of a rigid rule: [188]-[190]. The primary judge gave careful and detailed attention to the individual circumstances of the relevant group members and the Distress Damages awarded were not manifestly excessive in the circumstances of this case: [191]-[198].

- In relation to the Airfares Damages, the claims on consumer guarantees set out in s 61(1) and (2) are statutory causes of action conferred by s 267, which link closely with contractual rights. Consequently, contractual principles are relevant in interpreting these statutory causes of action: [4]-[8], [11], [13], [39]. The rights given to the consumer relating to a failure to comply with a consumer guarantee are of a kind with contractual rights in presupposing the transaction has taken effect: [23]-[29]. The claimants are claiming damages for breach of the consumer guarantees whilst also seeking a refund of an inevitable cost of being in a position where the consumer guarantees were or were not fulfilled, which is contrary to the principle that a plaintiff cannot recover more than they lost: [39]-[44]. In dissent, Griffiths AJA considered that damages were properly awarded for the loss of the cost of airfares, which was "wasted expenditure" having regard to Scenic Tours' breach of the relevant statutory guarantees and a separate head of compensation (s 267(5)): [203], [209]-[210].

Australian Intermediate Appellate Decisions of Interest

Worker's Compensation: cessation; entitlement

***Northern Territory of Australia v Noaks* [[2023] NTCA 4]**

Decision date: 14 April 2023

Blokland and Brownhill JJ and Riley AJ

On 29 March 2018, Mr Noaks was certified unfit for work by his general practitioner following complaints he had been bullied and harassed by his co-workers. On 10 April 2018, the respondent made a successful claim for compensation under the *Return to Work Act 1986* (NT) ("RWT Act"). The appellant commenced paying weekly compensation payments to Mr Noaks, which were backdated to 29 March 2018. On 11 March 2019, the appellant issued a Notice of Decision under s 69 of the RTW Act stating that these payments would cease. The Notice of Decision was based on a report provided by Dr Hundertmark who diagnosed Mr Noaks with a mixed personality disorder and considered that his absence from the workplace was related primarily to his personality difficulties and that Mr Noaks was capable of a graduated return to work. Mr Noaks commenced proceedings in the Work Health Court. The trial judge set aside the Notice of Decision. An appeal to the Supreme Court was dismissed. The appellant appealed that decision.

Held: Dismissing the appeal

- The trial judge did not fail to address an admission by the respondent that a letter was written by Dr Anchan in 2012, in which he opined that Mr Noaks was suffering from an Acute Adjustment Disorder with reactive mood changes complicated, when concluding that it was not possible to determine whether the respondent had a diagnosable mental illness prior to his being declared unfit for work: [18]-[21]. The purported admission was of the fact that the letter was sent, and of the words it contained, not the diagnosis itself. The use of the word "opined" lends weight to this construction: [22]. Consequently, it was open to the trial judge to consider and reject Dr Achan's diagnosis, especially in circumstances in which the appellant did not call Dr Achan as a witness: [23]-[26].

- The trial judge did not fail to give a proper and reasoned articulation of why he preferred the evidence of Mr Noak's expert over Dr Hundertmark's evidence: [36], [44]. The trial judge preferred Mr Noak's expert's evidence because: Dr Hundertmark's report stated that he was unable to obtain a reliable history from Mr Noak, and Dr Hundertmark was briefed with less source material relating to the medical treatment of Mr Noak in the relevant period: [38]-[43].

- The Supreme Court did consider the validity of the Notice of Decision when assessing the trial judge's finding of Mr Noak's incapacity: [46]-[48], [57]. Dr Takyar's report must be read in context, as a whole, with the qualification of the referral, and should not be temporally constrained to the date of the report when it was prepared with reference to the initial injury and triggered by the Notice of Decision: [54]. Therefore, it was open to the trial judge to conclude that the respondent did suffer an injury in the course of his employment with the appellant; the injury was causative of his loss of capacity for work or loss of earning capacity and had not improved since; and the incapacity did arise out of or in the course of his employment with the employer: [55].

Discrimination: employment

***Austin Health v Tsikos* [[2023] VSCA 82]**

Decision date: 15 February 2023

Emerton P, Walker JA and Forrest AJA

In 2009, Ms Tsikos, was employed by Austin Health. She was allocated the grade and pay specified in the relevant enterprise agreement. In 2010, when she was 31 years old, Ms Tsikos was promoted to a managerial role. Her pay and grade classification were increased in accordance with the enterprise agreement. Ms Tsikos, relevantly, managed 10 male employees, six of whom were paid above the rates specified in the enterprise agreement ('above-agreement remuneration'). All were classified at a level higher than their role attracted. Between 2011 and 2014, Ms Tsikos asked to negotiate her remuneration on six occasions and was rebuffed. In 2018, Ms Tsikos wrote to Austin Health noting her past requests to negotiate above-agreement remuneration and the rate of pay of the men she managed which, in Mr Spalding's case, was up to $41,000 per annum more than her. Austin Health's response said nothing about Ms Tsikos' request for an opportunity to negotiate her remuneration. Ms Tsikos commenced proceedings in the Victorian Civil and Administration Tribunal ("Tribunal") under the *Equal Opportunity Act 2010* (Vic) ("EO Act") claiming that she had been directly discriminated against in her employment on the basis of her age and sex. The Tribunal dismissed Ms Tsikos' complaint. She successfully appealed the Tribunal's decision to the Supreme Court. The Court held, relevantly, that the Tribunal had applied the wrong test for direct discrimination under s 8(1) of the EO Act and remitted the matter to the Tribunal. Austin Health sought leave to appeal that decision.

Held: granting leave to appeal but dismissing the appeal

- The primary judge correctly found that the Tribunal applied the wrong test under s 8(1) of the EO Act: [81], [88]-[90]. The Tribunal's decision turned on whether Ms Tsikos had established that she was treated unfavourable only with respect to Mr Spalding and only in regard to the opportunity to engage in salary negotiations: [82], [86]. The Tribunal's analysis failed to consider the complex picture of unfavourable treatment advanced: [83]-[86].

- The Tribunal erred in failing to consider the whole of the period between 2011 and 2018 in respect of either sex or age: [95]. The complaint of discrimination was a complaint of conduct over time. In 2011, Ms Tsikos was a 'young manager' and susceptible to discrimination on the basis of both her age and her sex. The Tribunal's error in relation to the application of s 8(1) of the EO Act infected the entirety of its consideration of Ms Tsikos' claim: [97]. The primary judge did not err in finding that the Tribunal failed to consider Ms Tsikos' formal letter: [99], [111]-[112]. There is scant reference to the sixth attempt in the "Discussions and Findings" subheading of the reasons, although attempts one to five are discussed in some detail: [108].

- The trial judge did not err in characterising Ms Tsikos' claim as one of "systemic discrimination": [135]-[137]. The primary judge's use of the word "actuated" referred to the conscious reasons of the particular managers, not the overarching cause of the unfavourable treatment: [119]-[123]. In general, use of the term "actuated" should be avoided because it is not the statutory language and it is apt to mislead in addressing the statutory question in s 8 since the discrimination need not be conscious: [124]-[127].

- If there was an error of law in the test to be applied by the Tribunal, then a finding of fact regarding s 18 of the EO Act made in the application of that test cannot survive an appeal under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). Furthermore, a finding of fact by the Tribunal regarding s 18 is a finding of mixed fact and law: [141].

Asia Pacific Decision of Interest

Contracts: preferred supplier clause

***Kiri Industries Ltd v DyStar Global Holdings (Singapore) Pte Ltd and another appeal* [[2023] SGCA(I) 3]**

Decision date: 14 April 2023

Court: Singapore Court of Appeal

Judith Prakash JCA, Robert French IJ and Jonathan Mance IJ

In 2010, Kiri Industries Ltd ("Kiri") entered into a share subscription and shareholders agreement ("the SSSA") with DyStar Global Holdings (Singapore) Pte Ltd ("DyStar"). Clause 7.2 of the SSSA provided, relevantly, that Kiri be a preferred supplier of goods and services in connection with the purchase of textile chemicals and dyes by the DyStar Group. Following a series of proceedings, Kiri brought a counterclaim in the SICC alleging that DyStar had breached cl 7.2 by ceasing or reducing its purchases of products from Kiri from 2012. DyStar's defence was that the counterclaim was barred by issue estoppel, that it was an abuse of process; or that cl 7.2 was unenforceable for uncertainty. Alternatively, DyStar argued that it had ceased or reduced its purchases of Kiri's products for genuine commercial reasons and thus did not breach cl 7.2. The primary judge held that cl 7.2 obliged DyStar's to afford Kiri a reasonable opportunity to quote prices or tender for the supply of products; that, where everything else was equal, DyStar should prefer Kiri to other suppliers; and that DyStar had not breached cl 7.2 because its decision to reduce or cease purchases from Kiri had been a commercial one which was made after affording Kiri the required reasonable opportunity. Despite harbouring justifiable doubts about Kiri's supply reliability, Dystar had placed an order for 503mt of finished dyes ("the 503mt Order") in December 2012, and it was Kiri's unsatisfactory handling of that order that prompted DyStar to regard Kiri as an unreliable supplier. Kiri and Dystar both appealed that decision.

Held: dismissing both Kiri's and Dystar's appeals

- Until October 2012, there was no improvement in Kiri's supply situation and there remained a substantial backlog of unfulfilled orders. Kiri's financial difficulties in 2012 contributed to the supply reliability issues: [43]-[46]. DyStar had not made a decision by December 2012 to cut off Kiri as a preferred supplier, evident by Dystar placing the 503mt Order in spite of the supply reliability issues it had experienced earlier: [47]-[48]. The primary judge correctly found that DyStar would have been commercially justified in concluding from Kiri's handling of the 503mt Order that Kiri was an unreliable supplier, especially in the context of the entire history of the parties' supply relationship: [58]-[59]. DyStar preferred Lonsen Kiri Chemical Industries Ltd ("LSK") to Kiri from 2012 because of Kiri's supply reliability issues in 2012 and DyStar's subsequent decision in 2013 to regard Kiri as an unreliable supplier. This was done to mitigate the disruptions of DyStar's operations caused by Kiri's non-performance and was undertaken with regard to DyStar's own commercial interests, such that DyStar's preference for LSK over Kiri did not constitute a breach of cl 7.2: [32], [67]-[71].

- Had DyStar's appeal arisen for consideration, Kiri's counterclaim would not have been barred by issue estoppel because the issue of breach of cl 7.2 was not fundamental to Kiri's allegation of oppression arising from the loss of its preferred supplier status as put forward in the earlier litigation: [78]-[79]. The primary judge had taken into account the relevant facts in considering whether Kiri's counterclaim was barred by the extended doctrine of abuse of process: [81]-[82]. Clause 7.2 of the SSSA was not too uncertain to be enforceable because, where parties have entered into what they believed to be a binding agreement, the court would endeavour to give effect to it rather than strike it down: [83].

International Decision of Interest

Constitution; Jurisdiction

***Axon Enterprise Inc v Federal Trade Commission et al* [(2023) USSC 598]**

Decision date: 14 April 2023

Court: United States Supreme Court

Roberts CJ, Kagan, Thomas, Alito, Sotomayor, Kavanaugh, Barrett, Gorsuch and Jackson JJ

Ms Cochran and Axon Enterprise Inc., were respondents in separate enforcement actions initiated by the Securities and Exchange Commission ("SEC") and the Federal Trade Commission ("FTC"), each commenced proceedings in the federal district court to challenge the constitutionality of those proceedings. A party objecting to the Commission proceedings makes its claims first within the Commission, and then in a federal court of appeals. The parties here brought their claims in the district court, seeking to enjoin the administrative proceedings. Cochran and Axon asserted that the tenure protections of the agencies' Administrative Law Judges render them insufficiently accountable to the President, in violation of separation-of-powers principles. Axon also attacked as unconstitutional the combination of prosecutorial and adjudicatory functions in the FTC. Each suit premised jurisdiction on district courts' ordinary federal-question authority to resolve "civil actions arising under the Constitution, laws, or treaties of the United States." Both suits were initially dismissed for lack of jurisdiction. On appeal, the Ninth Circuit, relevantly, affirmed the district court's dismissal of Axon's constitutional challenges to the FTC proceeding. Axon appeals that decision.

Held: allowing the appeal

- Although district courts may ordinarily hear challenges to federal agency actions, Congress may substitute an alternative review scheme which divests district courts of their ordinary jurisdiction over covered cases. This was done in the Exchange Act and the *Federal Trade Commission Act* 15 USC (1914) ("FTC Act"). The Thunder Basin factors determine whether particular claims concerning agency action are of the type Congress intended to be reviewed within the statutory structure (*Thunder Basin Coal Co. v. Reich* 510 US 200 (1994)): first, could precluding district court jurisdiction "foreclose all meaningful judicial review" of the claim; second, is the claim "wholly collateral" to the statute's review provisions, finally, is the claim "outside the agency's expertise": Pp. 7–10

- The claims were not the type the statutory review schemes at issue reach. In applying the first Thunder Basin factor, because Cochran and Axon assert a "here-and-now injury" from being subjected to an illegitimate proceeding by an illegitimate decisionmaker, Axon and Cochran will lose their rights not to undergo the agency proceedings if they cannot assert those rights until the proceedings are over. In applying the second factor, the challenges to the Commissions' authority have nothing to do with either the enforcement-related matters the Commissions regularly adjudicate or those they would adjudicate in assessing the charges against Axon and Cochran, and are thus 'collateral' to any Commission orders or rules from which review might be sought. In applying the third factor, Cochran's and Axon's claims are outside the Commissions' expertise" because although the Commission knows a good deal about competition policy, agency adjudications are generally ill suited to address the constitutional challenges that arise in this matter: Pp. 10–18.

- Justice Gorsuch considers that the *Thunder Basin* factors defy foundational rules and the statutes do provide for exceptions in these circumstances: Pp. 4, 6-8. Similarly, Thomas J expresses concerns about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights: Pp. 1, 8.