# HIGH COURT BULLETIN

Produced by the Legal Research Officer,
High Court of Australia Library
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A record of recent High Court of Australia cases: decided, reserved for judgment, awaiting hearing in the Court's original jurisdiction, granted special leave to appeal, refused special leave to appeal and not proceeding or vacated



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# SUMMARY OF NEW ENTRIES

## 1: Cases Handed Down

| **Case** | **Title** |
|---|---|
| *Wotton v The State of Queensland & Anor* | Constitutional Law |
| *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue* | Contracts |
| *Waller v Hargraves Secured Investments Limited* | Mortgages |
| *Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Haxton; Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Bassat; Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Cunningham's Warehouse Sales Pty Ltd* | Restitution |
| *Australian Education Union v Department of Education and Children's Services* | Statutes |
| *Strong v Woolworths Limited t/as Big W & Anor* | Torts |

## 2: Cases Reserved

| Case | Title |
|---|---|
| *The Pilbara Infrastructure Pty Ltd & Anor v Australian Competition Tribunal & Ors; The National Competition Council v Hamersley Iron Pty Ltd & Ors; The National Competition Council v Robe River Mining Co Pty Ltd & Ors* (Part Heard - Matter Relisted) | Competition Law |
| *Fortescue Metals Group Ltd v Australian Securities and Investments Commission & Anor; Forrest v Australian Securities and Investments Commission & Anor* | Corporations |
| *Baker v The Queen* | Criminal Law |
| *R v Getachew* | Criminal Law |
| *R v Khazaal* | Criminal Law |
| *Harbour Radio Pty Limited v Trad* | Defamation |

## 3: Original Jurisdiction

| Case | Title |
|---|---|
| *J T International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v Commonwealth of Australia* | Constitutional Law |

## 4: Special Leave Granted

| Case | Title |
|---|---|
| *Likiardopoulos v The Queen* | Criminal Law |
| *Madeleine Louise Sweeney bhnf Norma Bell v Thornton* (Matter Referred to Full Court) | Torts |

# 1: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the February-March 2012 sittings.

## Constitutional Law

*Wotton v The State of Queensland & Anor*
**S314/2010:** [2012] HCA 2.

**Judgment delivered:** 29 February 2012.

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Constitutional law (Cth) – Operation and effect of Constitution – Interpretation – Implied freedom of political communication about government or political matters – System of representative and responsible government – Validity of ss 132(1)(a) and 200(2) of *Corrective Services Act* 2006 (Q) – Whether statute complies with limitations on legislative power of State – Whether the impugned law effectively burdens freedom of communicating about government and political matters – Whether provisions reasonably appropriate and adapted to serve legitimate end in manner compatible with maintenance of representative and responsible government.

Administrative law – Relationship between *Judicial Review Act* 1991 (Q) and determination of issues of legislative validity – Whether validity of particular conditions imposed pursuant to s 200(2) of *Corrective Services Act* 2006 (Q) question of constitutional law or of compliance by repository of power with statutory limits.

Words and phrases – "constitutionally prescribed system of representative and responsible government", "effectively burdens freedom of communication", "impermissibly burdening", "implied freedoms", "political communication".

This matter was filed in the original jurisdiction of the High Court.

# Contracts

*ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue*
**S285/2011:** [2012] HCA 6.

**Judgment delivered:** 8 March 2012.

**Coram:** French CJ, Hayne, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Stamp duty – Agreement for sale or transfer of dutiable property – Cancelled agreement – Section 8(1)(b)(i) of *Duties Act* 1997 (NSW) ("Duties Act") charged duty on "an agreement for the sale or transfer of dutiable property" – Section 50(1)-(2) of Duties Act relevantly provided that cancelled agreement for sale or transfer of dutiable property not liable to duty and that respondent must refund duty paid on such agreement – Oakland Glen Pty Limited ("Oakland") entered into contract ("2003 contract") to sell property to Trust Company Fiduciary Services Limited ("Trust") – Oakland, Trust and appellant executed deed ("Deed of Consent") under which appellant assumed Trust's obligations under 2003 contract – Oakland and appellant executed deed ("Deed of Termination") which as rectified cancelled Deed of Consent – Whether Deed of Consent recorded agreement on which duty chargeable under s 8(1)(b)(i) of Duties Act – Whether Deed of Consent effected novation or assignment of Trust's rights under 2003 contract to appellant – Whether Deed of Consent rescinded 2003 contract – Whether Deed of Termination cancelled any agreement for sale or transfer of property recorded in Deed of Consent so that respondent must refund duty paid pursuant to s 50(2) of Duties Act.

Words and phrases – "an agreement for the sale or transfer of dutiable property", "assignment", "novation", "rescission".

**Appealed from NSW SC (CA):** (2011) 15 BPR 29,297; (2011) ATC 20-251; [2011] NSWCA 32.

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# Mortgages

*Waller v Hargraves Secured Investments Limited*
**S223/2011:** [2012] HCA 4.

**Judgment delivered:** 29 February 2012.

**Coram:** French CJ, Hayne, Heydon, Crennan and Kiefel JJ.

**Catchwords:**

Mortgages – Mortgagee's remedies – Farm Debt Mediation Act 1994 (NSW) ("Act") – Creditor must provide notice of intention to take "enforcement action" under "farm mortgage" ("Notice") – Notice must specify availability of mediation regarding farm debts – Creditor unable to take enforcement action until NSW Rural Assistance Authority ("Authority") issues certificate that Act does not apply because satisfactory mediation has occurred – Borrower mortgaged land to secure all monies owed under loan agreement – Borrower defaulted and lender provided Notice – Borrower requested mediation under Act – Following mediation parties executed second and third loan agreements, discharged previous debts and created new farm debts – Authority satisfied of successful mediation and issued certificate certifying that Act did not apply to farm mortgage – Borrower defaulted in making interest payments due under third loan agreement – Whether successive farm debts created new "farm mortgage" requiring satisfactory mediation before creditor could pursue enforcement action – Whether separate Notice required for enforcement action under subsequent loan agreements – Whether certificate issued by Authority void – Whether lender's entitlement to possession of secured land and outstanding monies barred.

Words and phrases – "enforcement action", "farm debt", "farm mortgage", "in respect of the farm debt involved", "in respect of the farm mortgage concerned".

**Appealed from NSW SC (CA):** (2010) 15 BPR 28,765; [2010] NSWCA 300.

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# Restitution

*Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Haxton; Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Bassat; Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Cunningham's Warehouse Sales Pty Ltd*
**M128/2010; M129/2010; M130/2010—M132/2010:**
[2012] HCA 7.

**Judgment delivered:** 8 March 2012.

**Coram:** French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Restitution – Restitution of benefits derived from unenforceable or illegal contracts – Recovery of money paid as money had and received – Respondents invested in tax driven blueberry farming schemes – Respondents borrowed funds to pay farm management fees – Each investment a "prescribed interest" under Companies Code of each respondent's home State ("Code") – Contrary to s 170(1) of Code, no valid prospectus registered when prescribed interests offered – Farming schemes collapsed – Respondents did not repay loan funds – Loan agreements unenforceable against respondents due to illegality – Whether restitution of loan funds available – Whether failure of consideration – Whether respondents' retention of loan funds unjust.

Personal property – Alienation of personal property – Assignment of choses in action – Assignment of right to restitution – Deed of assignment included assignment of legal right to debts and "all legal and other remedies" – Whether right to restitution capable of assignment – Whether deed of assignment assigned right to restitution.

Words and phrases – "bare right of action", "chose in action", "failure of consideration", "legal and other remedies", "money had and received", "prescribed interest", "unjust enrichment".

**Appealed from Vic SC (CA):** (2010) 28 VR 499; (2010) 265 ALR 336; [2010] VSCA 1.

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# Statutes

## *Australian Education Union v Department of Education and Children's Services*

**A4/2011:** [2012 ] HCA 3.

**Judgment delivered:** 29 February 2012.

**Coram:** French CJ, Hayne, Heydon, Kiefel and Bell JJ.

**Catchwords:**

Statutes – Acts of Parliament – Interpretation – Statutory powers and duties – Construction – Conferral and extent of power – Minister purportedly appointed persons as temporary "contract teachers" under s 9(4) of *Education Act* 1972 (SA) – Section 15 empowered Minister to appoint "officers of the teaching service" on permanent or temporary basis – Section 9(4) empowered Minister to appoint such officers and employees "in addition to" employees and officers of teaching service as Minister considered "necessary

for the proper administration of this Act or for the welfare of the students of any school" – Meaning of "in addition to" – Whether Minister empowered to appoint officers as teachers under s 9(4) – Whether s 15 provided exclusively for such appointments.

Words and phrases – "in addition to", "officers and employees", "officers of the teaching service".

**Appealed from SA SC (FC):** (2010) 270 LSJS 47; [2010] SASC 161.

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# Torts

*Strong v Woolworths Limited t/as Big W & Anor*
**S172/2011:** [2012] HCA 5.

**Judgment delivered:** 7 March 2012.

**Coram:** French CJ, Gummow, Heydon, Crennan and Bell JJ.

**Catchwords:**

Negligence – Causation – Slip and fall injury – Absence of adequate system for periodic inspection and cleaning – Whether factual causation under s 5D of *Civil Liability Act* 2002 (NSW) ("Act") excludes notions of "material contribution" – Whether appellant had proved factual causation under s 5D(1)(a) of Act – Whether open on evidence to apply probabilistic reasoning in *Shoeys Pty Ltd v Allan* (1991) Aust Torts Reports 81-104.

Words and phrases – "but for", "causation", "material contribution", "necessary condition", "slipping case", "system of periodic inspection and cleaning".

**Appealed from SC NSW (CA):** [2010] NSWCA 282.

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# 2: CASES RESERVED

The following cases have been reserved or part heard by the High Court of Australia.

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## Administrative Law

### *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia & Anor*

**A7/2011:** [2011] HCATrans 322.

**Date heard:** 29 November 2011 — *Judgment reserved.*

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Administrative law — Judicial review — Grounds of review — Jurisdictional error — Privative clauses — Applicant notified two disputes in Industrial Relations Commission of South Australia ("Commission") — Commission at first instance and on appeal ruled it lacked jurisdiction because no industrial dispute extant, as required by s 26 of *Fair Work Act* 1994 (SA) ("Act") — Section 206 of Act precludes review of Commission determinations unless "on the ground of an excess or want of jurisdiction" — Full Court of Supreme Court of South Australia held it lacked jurisdiction to review Commission's determinations because no "excess or want of jurisdiction" within s 206 of Act — Whether failure to exercise jurisdiction an act in "excess or want of jurisdiction" — Whether s 206 of Act precludes judicial review by Supreme Court of jurisdictional error not in "excess or want of jurisdiction" — Whether s 206 of Act beyond power of South Australian Parliament — Whether *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 impliedly overruled *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132.

Constitutional law (Cth) — *Commonwealth Constitution*, Ch III — State Supreme Courts — Power of State Parliament to alter defining characteristic of State Supreme Court — Supervisory jurisdiction — Whether all jurisdictional errors of tribunals subject to review by State Supreme Courts — Whether s 206 of Act impermissibly limits Supreme Court of South Australia's jurisdiction to exercise judicial review where jurisdictional error has occurred.

Words and phrases — "excess or want of jurisdiction".

**Appealed from SA SC (FC):** (2011) 109 SASR 223; (2011) 207 IR 1; [2011] SASCFC 14.

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*See also **Citizenship and Migration**: Plaintiff S10/2011 v Minister for Immigration and Citizenship & Anor; Kaur v Minister for Immigration and Citizenship & Anor; Plaintiff S49/2011 v Minister for Immigration and Citizenship & Anor; Plaintiff S51/2011 v Minister for Immigration and Citizenship & Anor.*

*See also **Competition Law**: The Pilbara Infrastructure Pty Ltd & Anor v Australian Competition Tribunal & Ors; The National Competition Council v Hamersley Iron Pty Ltd & Ors; The National Competition Council v Robe River Mining Co Pty Ltd & Ors.*

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# Citizenship and Migration

## *Plaintiff S51/2011 v Minister for Immigration and Citizenship & Anor*

**S51/2011:** [2012] HCATrans 16; [2012] HCATrans 17; [2012] HCATrans 18.

**Dates heard:** 7, 8 & 9 February 2012 — *Judgment reserved*.

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Citizenship and migration — Migration — Ministerial discretion — Non-compellable powers — Procedural fairness — Section 195A of *Migration Act* 1958 (Cth) ("the Act") empowers first defendant ("Minister") to grant visa to person in immigration detention pursuant to s 189 of the Act, if Minister thinks "in the public interest to do so" — Section 417 the Act of empowers Minister to substitute decision of Refugee Review Tribunal ("RRT") made under s 415 of the Act with another decision more favourable to an applicant, if Minister thinks "in the public interest to do so" — Section 48B of the Act empowers Minister to determine that s 48A of the Act does not apply to prevent application for protection visa made by non-citizen, if Minister thinks "in the public interest to do so" — In December 2009, favourable assessment made under Minister's Guidelines for s 195A in respect of plaintiff, though matter not referred to Minister ("the s 195A decision") — Plaintiff applied for Ministerial intervention pursuant to ss 48B and 417 of Act — In December 2010, Minister's delegate informed plaintiff that Minister had decided not to exercise power under s 417 of the Act ("the s 417 decision), and plaintiff's s 48B application had been assessed against Minister's Guidelines but was not referred to Minister ("the s

48B decision") — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 195A decision by denying plaintiff opportunity to make submissions addressing matters in s 195A and Department's adverse summary of initial departmental processes — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 417 decision by denying plaintiff opportunity to address criterion used in the s 195A decision — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 417 decision and the s 48B decision by denying plaintiff opportunity to address adverse material.

This application for an order to show cause was filed in the original jurisdiction of the High Court.

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## *Plaintiff S10/2011 v Minister for Immigration and Citizenship & Anor*

**S10/2011:** [2012] HCATrans 16; [2012] HCATrans 17; [2012] HCATrans 18.

**Dates heard:** 7, 8 & 9 February 2012 — *Judgment reserved*.

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Citizenship and migration — Migration — Ministerial discretion — Non-compellable powers — Procedural fairness — Section 417 of *Migration Act* 1958 (Cth) ("the Act") empowers first defendant ("Minister") to substitute decision of Refugee Review Tribunal ("RRT") made under s 415 of the Act with another decision more favourable to an applicant, if Minister thinks "in the public interest to do so" — Section 48B of the Act empowers Minister to determine that s 48A of the Act does not apply to prevent application for protection visa made by non-citizen, if Minister thinks "in the public interest to do so" — Plaintiff applied for Ministerial intervention pursuant to ss 48B and 417 of the Act — In October 2010, Minister's delegate informed plaintiff that Minister had decided not to exercise power under s 417 of the Act ("the s 417 decision), and plaintiff's s 48B application had been assessed against Minister's Guidelines but was not referred to Minister ("the s 48B decision") — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 48B decision and the s 417 decision by taking into consideration certain matters without providing plaintiff with opportunity to know about or comment on those matters — Whether plaintiff had legitimate expectation that information provided by him in respect of his applications would be considered in assessing whether he fell within Guidelines — Whether Minister

and/or second defendant through his officers failed to apply Minister's Guidelines correctly by taking into account irrelevant considerations or failing to take into account relevant considerations — Whether jurisdictional error occurred irrespective of privative clause in s 474(2) of the Act.

This application for an order to show cause was filed in the original jurisdiction of the High Court.

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## *Plaintiff S49/2011 v Minister for Immigration and Citizenship & Anor*

**S49/2011:** [2012] HCATrans 16; [2012] HCATrans 17; [2012] HCATrans 18.

**Dates heard:** 7, 8 & 9 February 2012 — *Judgment reserved*.

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Citizenship and migration — Migration — Ministerial discretion — Non-compellable powers — Procedural fairness — Section 417 of *Migration Act* 1958 (Cth) ("the Act") empowers first defendant ("Minister") to substitute decision of Refugee Review Tribunal ("RRT") made under s 415 of the Act with another decision more favourable to an applicant, if Minister thinks "in the public interest to do so" — Section 48B of the Act empowers Minister to determine that s 48A of the Act does not apply to prevent application for protection visa made by non-citizen, if Minister thinks "in the public interest to do so" — Plaintiff, an Indian national, arrived in Australia in 1998 carrying Indian passport issued in particular name — Plaintiff detained as unlawful non-citizen in 2003 — Plaintiff claimed to be national of Bangladesh with different name to that on Indian passport — In June 2009, plaintiff applied for Ministerial intervention under ss 48B and 417 of the Act — In October 2009, Minister's delegate informed plaintiff that his s 48B application did not meet Minister's Guidelines for intervention and was not referred to Minister ("the s 48B decision") — In December 2010, Minister's delegate informed plaintiff that Minister had decided not to exercise power under s 417 of the Act with respect to plaintiff ("the s 417 decision") — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 48B decision and the s 417 decision by taking into consideration certain matters without providing plaintiff with opportunity to know about or comment on those matters — Whether Minister and/or second defendant through his officers failed to apply Minister's Guidelines correctly by taking into account irrelevant considerations or failing to take into account relevant considerations — Whether jurisdictional error occurred irrespective of privative clause in s 474(2) of the Act.

This application for an order to show cause was filed in the original jurisdiction of the High Court.

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## *Kaur v Minister for Immigration and Citizenship & Anor*

**S43/2011:** [2012] HCATrans 16; [2012] HCATrans 17; [2012] HCATrans 18.

**Dates heard:** 7, 8 & 9 February 2012 — *Judgment reserved*.

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Citizenship and migration — Migration — Ministerial discretion — Non-compellable powers — Procedural fairness — Section 351 of *Migration Act* 1958 (Cth) ("the Act") empowers first defendant ("Minister") to substitute decision of Migration Review Tribunal ("MRT") made under s 349 of the Act with another decision more favourable to an applicant, if Minister thinks "in the public interest to do so" — Plaintiff granted Subclass 573 Higher Education Sector student visa in September 2005, expiring in August 2008 — In June 2006, Minister's delegate notified plaintiff by letter that she had been granted Subclass 573 Higher Education Sector student visa with permission to change education provider — Letter stated plaintiff's visa valid until June 2008 — Plaintiff applied for Subclass 572 Vocational Education and Training Sector visa in September 2008 — Applications for Subclass 572 visas must be made within 28 days after day when last substantive visa ceased to be in effect: Migration Regulations 1994 (Cth), Sched 2, sub-item 572.211(3)(c)(i) — Minister's delegate refused plaintiff's application for Subclass 572 visa because application filed out of time — MRT rejected plaintiff's application for review of delegate's decision — Plaintiff unsuccessfully applied for Ministerial intervention under s 351 of the Act — Federal Court of Australia rejected plaintiff's application for review of decision of MRT — Plaintiff again sought Ministerial intervention under s 351 of the Act — In January 2011, Minister's delegate informed plaintiff that second Ministerial intervention application would not be forwarded to Minister — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff by considering information or matters adverse to plaintiff without providing plaintiff with opportunity to know about or comment on those matters — Whether second defendant through his officers denied plaintiff procedural fairness by failing to apply Minister's Guidelines correctly — Whether jurisdictional error occurred irrespective of privative clause in s 474(2) of the Act.

This application for an order to show cause was filed in the original jurisdiction of the High Court.

# Competition Law

*The Pilbara Infrastructure Pty Ltd & Anor v Australian Competition Tribunal & Ors; The National Competition Council v Hamersley Iron Pty Ltd & Ors; The National Competition Council v Robe River Mining Co Pty Ltd & Ors*
**M45/2011; M46/2011; M155-157/2011:** [2012] HCATrans 52; [2012] HCATrans 53; [2012] HCATrans 54.

**Dates heard:** 6, 7 & 8 March 2012 — *Judgment reserved*.

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Competition law — Declared services — Rio Tinto Ltd and associated entities ("Rio") operate Hamersley and Robe railway lines in Pilbara region — The Pilbara Infrastructure Pty Ltd ("TPI") applied to National Competition Council ("NCC") for a recommendation that the Minister declare the Hamerlsey and Robe lines 'essential facilities', pursuant to s 44F of Trade Practices Act 1974 (Cth) (now Competition and Consumer Act 2010 (Cth)) ("Act") — Declaration would allow third party trains and rolling stock to move along the lines — Commonwealth Minister declared Hamersley and Robe lines for period of 20 years pursuant to s 44H of Act — Rio applied to Australian Competition Tribunal ("Tribunal") for review of decision to declare — Tribunal made determination, pursuant to s 44K(7) of Act, setting aside Hamersley declaration and varying Robe declaration to ten year period — Section 44H(4) of Act required Minister to be satisfied of certain matters — Tribunal found, inter alia, that s 44H(4)(b) was satisfied because Hamersley and Robe lines were natural monopolies — Tribunal found that s 44H(4)(f) was not satisfied in respect of Hamersley line because access would be contrary to public interest, because putative benefits associated with construction of alternate railway lines outweighed costs of providing access to existing railway lines — Tribunal held that it would at any rate exercise its residual discretion not to declare — Full Court of Federal Court upheld Tribunal's decision in respect of Hamersley line and set aside declaration in respect of Robe line — Full Court found that neither s 44H(4)(b) nor s 44H(4)(f) were satisfied — Full Court held, however, that Tribunal had denied procedural fairness to TPI and Fortescue Metals Group Ltd (together, 'Fortescue') in respect of Hamersley line proceedings, because the Tribunal relied on material irregularly provided to it by Rio Tinto to support its conclusion that it was likely that Fortescue would, in the absence of declaration, construct an alternate railway line — Whether criterion for declaration of service specified in s 44H(4)(b) of Act imposes test of

private profitability or test applying economic principles taking into account natural monopoly characteristics — Whether public interest criterion in s 44H(4)(f) of Act requires or permits inquiry into likely net balance of social costs and benefits that would arise were a declaration to be made — Scope of the residual discretion conferred by s 44H(2) of Act — Whether there was a denial of procedural fairness in denying Fortescue the opportunity to comment on Rio's submissions as to the alternate line

Application for leave to amend notice of appeal — In proceedings before the High Court of Australia on 8 March 2012, Fortescue sought leave to file an amended notice of appeal raising a new ground of appeal, namely, that Tribunal misconceived the nature of its role under s 44K of Act — Whether Tribunal was required to reconsider afresh the application made to NCC — Whether Tribunal's role was confined to considering the correctness of the Minister's decision to declare in light of the NCC's recommendation — Whether Tribunal could consider any material the parties considered relevant

Words and phrases — "uneconomical for anyone to develop another facility to provide the service" — "would not be contrary to the public interest" — "review by the Tribunal is a re-consideration of the matter".

**Appealed from FCA (FC):** (2011) 193 FCR 57; (2011) 277 ALR 282; [2011] FCAFC 58.

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# Constitutional Law

## *Sportsbet Pty Ltd v The State of New South Wales & Ors; Betfair Pty Ltd v Racing New South Wales & Ors*

**S118/2011; S116/2011:** [2011] HCATrans 230; [2011] HCATrans 231; [2011] HCATrans 232.

**Dates heard:** 30 & 31 August 2011, 1 September 2011 — *Judgment reserved.*

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Constitutional law (Cth) — Freedom of interstate trade, commerce and intercourse — Appellant Sportsbet Pty Ltd ("Sportsbet") a licensed wagering operator in Northern Territory ("NT") — Section 33 of *Racing Administration Act* 1998 (NSW) ("Racing Act") prohibited use of race field information by wagering operators unless operator authorised by approval and complied with

conditions of approval — Section 33A(2)(a) of Racing Act and reg 16 of Racing Administration Regulations 2005 (NSW) ("Regulations") gave racing control bodies, including second and third respondents, power to grant approvals and impose conditions including imposition of race field fee of up to 1.5 per cent of wagering turnover — Fees imposed on all wagering operators irrespective of whether in NSW — NSW racing control bodies set thresholds for payment of fees, and arranged reduction in pre-existing fees, such that NSW on-course bookmakers largely unaffected — Sportsbet required to pay fees without regard to fees paid as conditions for licence in NT — TAB Limited ("TAB"), dominant wagering operator in NSW, received sums of money by second and third respondents equal to fees paid by it to those bodies — Whether intended and practical effect of ss 33 and 33A of Racing Act and Pt III of Regulations ("Scheme") was to impose discriminatory burden of protectionist nature on Sportsbet and other interstate wagering operators by prohibiting use of essential element of interstate trade and commerce subject to discretion of racing control bodies — Whether purpose and effect of Scheme was imposition of economic impost on interstate traders which would not be borne by intrastate traders — Whether validity of Scheme to be determined by comparing interstate and intrastate traders' positions — Whether practical effect of Scheme determinable without consideration of offsetting reductions in existing fees payable by intrastate traders — Whether fee conditions imposed by racing control bodies inconsistent with freedom of interstate trade, commerce and intercourse — Whether necessary for Sportsbet to demonstrate that it had a competitive advantage derived from its place of origin, or that the Scheme sought to erode its competitive advantage — Whether arrangements amongst NSW wagering operators and TAB were private contractual arrangements falling outside the purview of s 49 of *Northern Territory (Self Government) Act* 1978 (Cth) — Whether Scheme appropriate and adapted to legitimate non-protectionist objective — Whether fee conditions, approvals or Scheme invalid — Whether Scheme can be read consistently with freedom of interstate trade, commerce and intercourse pursuant to s 31 of *Interpretation Act* 1987 (NSW) ("Interpretation Act") — *Commonwealth Constitution*, ss 92 and 109.

**S118/2011 appealed from FCA FC:** (2010) 189 FCR 448; (2010) 274 ALR 12; [2010] FCAFC 132.

Constitutional law (Cth) — Freedom of interstate trade, commerce and intercourse — Appellant Betfair Pty Limited ("Betfair") a licensed betting exchange domiciled in Tasmania — Section 33 of Racing Act prohibited use of race field information by wagering operators unless operator authorised by approval and complied with conditions of approval — Section 33A(2)(a) of Racing Act and reg 16 of Regulations gave racing control bodies, including first and second respondents, power to grant approvals and impose conditions including imposition of race field fee of 1.5 per cent of

wagering turnover — Wagering turnover defined as revenue from wagers that an event will occur ("back bets") — Fees imposed on all wagering operators irrespective of whether in NSW — Betfair generates revenue from back bets and bets that an event will not occur — Fees constituted greater proportion of Betfair's gross revenue than that of TAB and other wagering operators with different commission structures — Whether fee conditions imposed by first and second respondents pursuant to s 33 of Racing Act inconsistent with freedom of interstate trade, commerce and intercourse — Whether sufficient for Betfair to show that fee conditions imposed and were intended to impose significantly greater business costs on Betfair than on TAB — Whether Betfair required to demonstrate that practical effect or likely practical effect of fee conditions was to cause it to suffer loss of market share or profitability because fee conditions facially neutral — Whether Scheme appropriate and adapted to legitimate non-protectionist objective — Whether fee conditions, approvals or Scheme invalid — Whether Scheme can be read consistently with freedom of interstate trade, commerce and intercourse pursuant to s 31 of Interpretation Act — *Commonwealth Constitution*, s 92.

**S116/2011 appealed from FCA FC:** (2010) 189 FCR 356; (2010) 273 ALR 664; [2010] FCAFC 133.

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## *Williams v The Commonwealth*

**S307/2010:** [2011] HCATrans 198; [2011] HCATrans 199; [2011] HCATrans 200.

**Dates heard:** 9, 10 & 11 August 2011 — *Judgment reserved.*

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Constitutional law (Cth) — Executive — Plaintiff the parent of children enrolled at Darling Heights State Primary School ("School") — Commonwealth implemented National School Chaplaincy Programme ("NSCP") in 2007 — Commonwealth entered into funding agreement with Scripture Union Queensland ("SUQ") for provision of funding to School under NSCP ("Funding Agreement") — From 2007, chaplaincy services provided to School by SUQ for reward using NSCP funding — Whether Funding Agreement invalid by reason of being beyond executive power of Commonwealth — Whether executive power of Commonwealth includes power to enter into, and make payments pursuant to, contracts in respect of matters other than those in respect of which the *Constitution* confers legislative power — Whether executive power of Commonwealth includes power to enter into, and make payments pursuant to, contracts in respect of which the *Constitution* confers legislative power — Whether executive power of Commonwealth

includes power to enter into, and make payments pursuant to, contracts with respect to the provision of benefits to students within meaning of s 51(xxiiiA) of *Constitution* — Whether executive power of Commonwealth includes power to enter into contracts with trading corporations within meaning of s 51(xx) of *Constitution* — Whether payments to SUQ under Funding Agreement provide "benefits to students" — Whether SUQ a trading corporation — *Commonwealth Constitution*, ss 51(xx), 51(xxiiiA), 61.

Constitutional law (Cth) — Revenue and appropriation — Payments under Funding Agreement drawn from Consolidated Revenue Fund ("CRF") by Appropriation Acts — Whether drawing of money from CRF for purpose of making payments under Funding Agreement authorised by Appropriation Acts — Whether Appropriation Acts authorised expenditure only for "ordinary annual services of government" — Whether permitted and appropriate to have regard to practices of Parliament to determine "ordinary annual services of the Government" — Whether payments to SUQ under Funding Agreement were "ordinary annual services of government" — *Commonwealth Constitution*, ss 54, 56, 81, 83.

Constitutional law (Cth) — Restrictions on Commonwealth legislation — Laws relating to religion — Whether definition of "school chaplains" in NSCP Guidelines, as incorporated in Funding Agreement, invalid by reason of imposing religious test as qualification for office under the Commonwealth in contravention of s 116 of *Commonwealth Constitution*.

High Court of Australia — Original jurisdiction — Practice and procedure — Parties — Standing — Whether plaintiff has standing to challenge validity of Funding Agreement — Whether plaintiff has standing to challenge drawing of money from CRF for purpose of making payments pursuant to Funding Agreement — Whether plaintiff has standing to challenge Commonwealth payments to SUQ pursuant to Funding Agreement.

Words and phrases — "office under the Commonwealth", "ordinary annual services of the Government", "provision of benefits to students", "religious test", "school chaplains", "trading corporation".

This matter was filed in the original jurisdiction of the High Court.

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## *Phonographic Performance Company of Australia Ltd & Ors v The Commonwealth & Ors*

**S23/2010:** [2011] HCATrans 117; [2011] HCATrans 118; [2011] HCATrans 119.

**Dates heard:** 10, 11 & 12 May 2011 — *Judgment reserved*.

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Constitutional law (Cth) — Operation and effect of *Commonwealth Constitution* — Copyrights, patents and trade marks — Powers with respect to property — Power to acquire property on just terms — Whether some or all of provisions in ss 109 and 152 of *Copyright Act* 1968 (Cth) ("provisions") within legislative competence of Parliament by reason of s 51(xviii) of *Commonwealth Constitution* — Whether provisions beyond legislative competence of Parliament by reason of s 51(xxxi) of *Commonwealth Constitution* — Whether provisions should be read down or severed and, if so, how — Whether copyright in sound recordings under *Copyright Act* 1912 (Cth) property — Whether provisions effected acquisition of property — Whether any acquisition of property on just terms within s 51(xxxi) of *Commonwealth Constitution*.

This matter was filed in the original jurisdiction of the High Court.

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See also **Administrative Law**: *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia & Anor*.

See also **Industrial Law**: *Australian Education Union v General Manager of Fair Work Australia & Ors*.

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# Contracts

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See also **Corporations Law:** *Fortescue Metals Group Ltd v Australian Securities and Investments Commission & Anor; Forrest v Australian Securities and Investments Commission & Anor*.

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# Corporations Law

*Australian Securities and Investments Commission v Shafron;*
*Australian Securities and Investments Commission v Terry;*
*Australian Securities and Investments Commission v Hellicar;*
*Australian Securities and Investments Commission v Brown;*
*Australian Securities and Investments Commission v Gillfillan;*
*Australian Securities and Investments Commission v Koffel;*
*Australian Securities and Investments Commission v O'Brien;*

*Australian Securities and Investments Commission v Willcox; Shafron v Australian Securities and Investments Commission*
**S174/2011—S181/2011; S173/2011:** [2011] HCATrans 293; [2011] HCATrans 294; [2011] HCATrans 295.

**Dates heard:** 25, 26 & 27 October 2011 — *Judgment reserved*.

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Corporations — Management and administration — Civil penalties — Evidence — Misleading announcement describing corporate restructuring proposal issued by board of James Hardie Industries Limited ("JHIL") to Australian Stock Exchange ("ASX") — At trial, Australian Securities and Investments Commission ("ASIC") failed to call solicitor ("Mr Robb") advising JHIL who attended meeting of board at which draft ASX announcement allegedly approved — Trial judge made adverse findings and declarations of contravention against first to eighth respondents — Court of Appeal found ASIC failed to discharge burden of proof because it breached obligation of fairness in failing to call Mr Robb, which affected cogency of ASIC's case and vitiated finding that respondents breached s 180(1) of *Corporations Law* and *Corporations Act* 2001 (Cth) ("Acts") — Whether ASIC failed to discharge burden of proving that non-executive directors voted in favour of, and JHIL board passed, draft ASX announcement resolution ("Resolution") — Whether, in civil penalty proceedings, ASIC subject to obligation of fairness which can be breached by failure to call particular witness — Whether obligation of fairness inconsistent with s 1317L of Acts and s 64 of *Judiciary Act* 1903 (Cth) — Whether ASIC obliged to call Mr Robb to give evidence of firm's receipt of draft ASX announcement — Whether ASIC's failure to comply with obligation of fairness, if extant, had negative evidentiary impact on cogency of ASIC's case — Whether minutes of board meeting at which Resolution allegedly passed evidence of passing of Resolution — Whether amendments to draft ASX announcement, prior to issuing of final announcement to ASX, evidence that Resolution not passed — Whether oral evidence of respondents Brown and Koffel ought to have been accepted as correlating with terms of draft ASX announcement — Whether of evidentiary significance that company associated with respondents O'Brien and Terry produced to ASIC identical version of draft ASX announcement — Whether declarations of contravention made in respect of first to eighth respondents should be set aside.

Corporations — Management and administration — Civil penalties — Whether Shafron an officer of JHIL within meaning of s 9 of Acts, as person who participated in decisions affecting business of JHIL — Whether, in performing impugned conduct, Shafron discharged role as company secretary or general counsel of JHIL — If Shafron discharged role as general counsel, whether subject to s 180(1) of

Acts because also company secretary of JHIL — Whether Shafron failed to comply with duty imposed by s 180(1) of Acts.

Words and phrases — "obligation of fairness".

**Appealed from NSW SC (CA):** (2010) 274 ALR 205; (2010) 247 FLR 140; (2010) 81 ACSR 285; [2010] NSWCA 331.

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## *Fortescue Metals Group Ltd v Australian Securities and Investments Commission & Anor; Forrest v Australian Securities and Investments Commission & Anor*

**P44/2011; P45/2011:** [2012] HCATrans 48; [2012] HCATrans 49.

**Dates heard:** 29 February 2012 & 1 March 2012 — *Matter Relisted*.

**Coram:** French CJ, Gummow, Hayne, Heydon and Kiefel JJ.

**Catchwords:**

Corporations law — Continuous disclosure — Misleading and deceptive conduct — Fortescue Metals Group Ltd ("FMG") entered into framework agreements with three Chinese entities — Forrest Chairman and CEO of FMG — FMG made public announcements that FMG and Chinese entities had executed binding agreements to build, finance and transfer infrastructure for mining project in Pilbara region — Whether, in making announcements, FMG contravened ss 674(2) and 1041H of *Corporations Act* 2001 (Cth) ("Act"), and Forrest contravened ss 180(1) and 674(2A) of Act — Whether announcements made by FMG misleading or deceptive or likely to mislead or deceive in contravention of s 1041H of Act or s 52 of Trade Practices Act 1974 (Cth) — Whether announcements would have been understood by reasonable person as statement of FMG's honest, or honest and reasonable, belief as to legal effect of framework agreements rather than statements that warranted or guaranteed their truth — Whether FMG and Forrest honestly, or honestly and reasonably, believed framework agreements effective as binding contracts — Whether FMG contravened s 674(2) and Forrest contravened s 674(2A) of Act because neither had "information" that framework agreements unenforceable at law — Whether Forrest could avail himself of the defence under s 674(2B) of Act — Whether, if announcements by FMG misleading or deceptive or likely to mislead or deceive, Forrest failed to act with due care and skill contrary to s 180(1) of Act — Whether s 180(1) of Act provides for civil liability of directors for contraventions of other provisions of Act — Whether business judgment rule under s 180(2) of Act available as defence to alleged contravention of s 180(1) if proceedings based on contravention of provisions containing exculpatory provisions — Whether s 180(2) of Act applies to decisions concerning compliance with Act.

Contracts — Agreements contemplating existence of fuller contracts — Certainty — Whether framework agreements obliged Chinese entities to build, finance and transfer infrastructure for Pilbara project — Whether FMG and Chinese entities intended to create legal relations — Whether framework agreements uncertain as to subject matter — Whether provision for third party determination of certain matters rendered framework agreements certain.

**Appealed from FCA (FC):** (2011) 190 FCR 364; (2011) 274 ALR 731; (2011) 5 BFRA 220; (2011) 81 ACSR 563; (2011) 29 ACLC 11-015; [2011] FCAFC 19.

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# Criminal Law

## *Baiada Poultry Pty Ltd v The Queen*

**M126/2011:** [2012] HCATrans 15.

**Date heard:** 7 February 2012 — *Judgment reserved.*

**Coram:** French CJ, Gummow, Hayne, Heydon and Crennan JJ.

**Catchwords:**

Criminal law — Occupational health and safety — Duties of employer — Appellant convicted of breaching s 21(1) of *Occupational Health and Safety Act* 2004 (Vic) following death of driver ("deceased") engaged as independent contractor by appellant — Deceased struck by crate being moved by forklift operated by unlicensed driver employed by third party company engaged as independent contractor by appellant — Appellant contended that engagement of independent contractors sufficient to discharge any obligation owed by appellant under s 21(1) of *Occupational Health and Safety Act* 2004 (Vic) ("the defence") — Court of Appeal held trial judge's directions to jury in respect of defence inadequate — Jury ought to have been directed that they were bound to consider defence — Majority of Court of Appeal applied "proviso" to s 568(1) of *Crimes Act* 1958 (Vic) and dismissed appeal — Whether application of the proviso involves discretion — Significance of guilty verdict where jury misdirected as to a principal defence of appellant — Whether proviso should have been applied where jury misdirected as to a principal defence of appellant.

*Crimes Act* 1958 (Vic) – s 568(1).
*Occupational Health and Safety Act* 2004 (Vic) – s 21(1), s 21(2)(a), s 20.

Words and phrases — "reasonably practicable".

**Appealed from Vic SC (CA):** (2011) 203 IR 396; [2011] VSCA 23.

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## *Baker v The Queen*
**M154/2011:** [2012] HCATrans 47.

**Date heard:** 28 February 2012 — *Judgment reserved.*

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Criminal law — Evidence — Hearsay — Admissions — Applicant, along with co-accused at trial, LM, involved in altercation following which one Mr Snowball fell through glass window to street below and died — Applicant found guilty of murder of Mr Snowball — LM acquitted — Witnesses gave competing versions of events leading to death of Mr Snowball — Version implicating applicant as person who pushed or punched Mr Snowball in manner resulting in his fall was preferred by jury — In case against LM, Crown relied on evidence of admissions made by LM that suggested he was responsible for Mr Snowball's fall — Trial judge directed jury that case against each accused was to be assessed only in light of evidence applicable to each accused, meaning evidence of LM's admissions not evidence in case against applicant — Whether evidence of LM's admissions was admissible in exculpation of applicant — Whether potential exception to hearsay considered in *Bannon v The Queen* (1995) 185 CLR 1 ought to be recognised and whether LM's admissions within scope of any such exception — Whether applicant's trial miscarried and jury's verdict unsafe or unsatisfactory by reason of exclusion of LM's admissions.

**Appealed from Vic SC (CA):** [2010] VSCA 226.

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## *BBH v The Queen*
**B76/2010:** [2011] HCATrans 254.

**Date heard:** 7 September 2011 — *Judgment reserved*.

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Criminal law — Appeal and new trial — Evidence — Applicant found guilty by jury of maintaining indecent relationship with child under 16, indecent treatment of child under 16 and sodomy of a person under 18 — Complainant was applicant's daughter — Complainant's brother gave evidence of incident involving applicant and

complainant which was said to be capable of establishing the applicant's sexual interest in the complainant — Whether evidence of discreditable conduct admissible in a criminal trial when a reasonable view of that evidence is consistent with innocence— Whether evidence of complainant's brother admissible at applicant's trial — Whether test for admissibility in *Pfennig v The Queen* (1995) 182 CLR 461 applies to evidence of discreditable conduct.

Words and phrases — "discreditable conduct".

**Appealed from Qld SC (CA):** [2007] QCA 348.

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## *King v The Queen*
**M129/2011:** [2011] HCATrans 327.

**Date heard:** 6 December 2011 — *Judgment reserved.*

**Coram:** French CJ, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Criminal law — Dangerous driving causing death — Direction to jury — Appellant found guilty of two counts of culpable driving causing death contrary to s 318 of *Crimes Act* 1958 (Vic) ("Act") — Primary judge left to jury alternative charge of dangerous driving causing death contrary to s 319(1) of Act — Whether primary judge erred in directing jury that, in relation to dangerous driving charge, driving need only have significantly increased risk, or created real risk, of hurting or harming others, and that driving need not be deserving of criminal punishment — Whether a substantial miscarriage of justice in terms of s 568(1) of Act — *R v De Montero* (2009) 25 VR 694.

Words and phrases — "substantial miscarriage of justice".

**Appealed from Vic SC (CA):** (2011) 57 MVR 373; [2011] VSCA 69.

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## *PGA v The Queen*
**A15/2011:** [2011] HCATrans 267.

**Date heard:** 27 September 2011 — *Judgment reserved*.

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Criminal law — Rape and sexual assault — Consent — Existence of common law presumption of marital consent — Appellant charged

in 2010 with two counts of rape, allegedly committed in 1963, against then wife — In 1963, s 48 of *Criminal Law Consolidation Act* 1935 (SA) ("Act") made person convicted of rape guilty of felony — Where elements of offence of rape in South Australia in 1963 supplied by common law — Act amended in 1976 to remove presumption of marital consent to sexual intercourse in certain circumstances — Whether common law of Australia in 1963 permitted husband to be found guilty of rape of his wife — Whether common law recognises retrospective imposition of criminal liability absent statutory requirement — Whether appellant liable to be found guilty of offence of rape of his wife allegedly committed in 1963 — Effect of *R v L* (1991) 174 CLR 379 — Whether enactment of *Criminal Law Consolidation Act Amendment Act* 1976 (SA) precluded subsequent amendment of common law position prevailing in 1963 — Act, ss 48 and 73 — *Acts Interpretation Act* 1915 (SA), s 16.

**Appealed from SA SC (CCA):** (2010) 109 SASR 1; [2010] SASCFC 81.

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## *R v Getachew*

**M139/2011:** [2012] HCATrans 55.

**Date heard:** 8 March 2012 — *Judgment reserved*.

**Coram:** French CJ, Hayne, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Criminal law — Sexual penetration without consent — Section 38(2)(a)(i) of *Crimes Act* 1958 (Vic) provided that person commits rape if intentionally sexually penetrates another person without that person's consent "while being aware that the person is not consenting or might not be consenting" — Trial judge directed jury that awareness element in s 38(2)(a)(i) satisfied if accused ("respondent") aware that complainant might be asleep — Respondent led no evidence of his mental state at trial — Court of Appeal held direction precluded consideration by jury of possibility that respondent believed complainant was consenting to anal intercourse— Whether trial judge's direction wrong in law — Whether sufficient evidence before jury to require direction that respondent may have believed complainant consenting — Whether respondent able to hold belief that complainant gave consent where jury found beyond reasonable doubt that respondent knew or believed complainant asleep at time of penetration — *Crimes Act* 1958 (Vic), ss 36, 37, 37AA, 37AAA, 38 — *Pemble v The Queen* (1971) 124 CLR 107; *Worsnop v The Queen* (2010) 28 VR 187.

**Appealed from Vic SC (CA):** [2011] VSCA 164.

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*R v Khazaal*
**S344/2011:** [2012] HCATrans 50.

**Date heard:** 2 March 2012 — *Judgment reserved*.

**Coram:** French CJ, Gummow, Heydon, Crennan and Bell JJ.

**Catchwords:**

Criminal law — Terrorism — Collecting or making document likely to facilitate terrorist act — Section 101.5(1) of *Criminal Code* 1995 (Cth) ("Code") creates offence of collecting or making document "connected with preparation for, the engagement of a person in, or assistance in a terrorist act", where person knows of connection — Section 101.5(5) of Code creates defence if collection or making of document "not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act" — Defendant bears evidential burden under s 101.5(5), as defined in s 13.3(6) of Code — Respondent found guilty of offence of making document connected with assistance in terrorist act knowing of that connection contrary to s 101.5(1) of Code — Whether respondent discharged evidential burden under s 101.5(5) of Code, having regard to s 13.3(6) of Code — Whether evidence at trial suggested reasonable possibility that making of document by respondent not intended to facilitate assistance in terrorist act so as to engage defence in s 101.5(5) of Code — Whether trial judge required to direct jury that phrase "connected with" in s 101.5(1) of Code required more than tenuous or remote connection.

Words and phrases — "connected with", "evidential burden".

**Appealed from NSW SC (CCA):** [2011] NSWCCA 129.

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# Defamation

*Harbour Radio Pty Limited v Trad*
**S318/2011:** [2012] HCATrans 9; [2012] HCATrans 51.

**Dates heard:** 3 February 2012 & 5 March 2012 — *Judgment reserved*.

**Coram:** Gummow, Hayne, Heydon, Kiefel & Bell JJ.

**Catchwords:**

Torts — Defamation — Application of defence — Imputations reply to public attack — Defence of qualified privilege — Defences of

truth and contextual truth — Respondent engaged in public speech concerning activities of Radio 2GB, a station owned and operated by appellant — Radio 2GB broadcast response to respondent's speech consisting of presenter's monologue, audio recording of part of respondent's speech and talkback calls — Respondent brought proceedings for defamation — Jury found certain defamatory imputations arose from broadcast — Appellant relied on, inter alia, defences of qualified privilege, truth and contextual truth — Trial judge found appellant not actuated by malice and upheld defence of qualified privilege — Trial judge found certain imputations were matters of substantial truth and upheld defences of truth and contextual truth — Court of Appeal overturned trial judge's findings on all three defences — Whether common law defence of qualified privilege requires response to attack to be legitimate or proportionate to attack or requires merely absence of malice — Test to be applied in determining whether imputation a matter of 'substantial truth' — Whether Court of Appeal erred in exercising its jurisdiction under s 75A of the *Supreme Court Act* 1970 (NSW) — *Defamation Act* 1974 (NSW), ss 15 and 16.

**Appealed from NSW SC (CA):** (2011) 279 ALR 183; [2011] Aust Torts Reports 82-080; [2011] NSWCA 61.

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# Evidence

## *Aytugrul v The Queen*

**S315/2011:** [2011] HCATrans 329.

**Date heard:** 8 December 2011 — *Judgment reserved.*

**Coram:** French CJ, Hayne, Heydon, Crennan and Bell JJ.

**Catchwords:**

Evidence — Admissibility — Expert evidence — Identification evidence — DNA evidence — Appellant convicted of murder of former partner — Evidence led by prosecution at trial that a hair found on deceased's thumbnail consistent with appellant's mitochondrial DNA profile — Expert witness for prosecution gave evidence that one in 1600 people could be expected to share mito-type of the hair ("frequency estimate"), meaning 99.9 per cent of people in general population would not have a profile matching the hair ("exclusion percentage") — Whether trial judge ought to have applied s 137 (or, alternatively, s 135) of *Evidence Act* 1995 (NSW) ("Act") to exclude reference to exclusion percentage — Whether risk of unfair prejudice to appellant outweighed probative value of reference to exclusion percentage — Whether permissible for Court to determine s 137 question by reference to academic literature not in evidence at trial.

**Appealed from NSW SC (CCA):** (2010) 205 A Crim R 157; [2010] NSWCCA 272.

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# High Court of Australia

See also **Competition Law:** *The Pilbara Infrastructure Pty Ltd & Anor v Australian Competition Tribunal & Ors; The National Competition Council v Hamersley Iron Pty Ltd & Ors; The National Competition Council v Robe River Mining Co Pty Ltd & Ors*

See also **Constitutional Law:** *Williams v The Commonwealth*

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# Industrial Law

## *Australian Education Union v General Manager of Fair Work Australia & Ors*

**M8/2011:** [2012] HCATrans 5.

**Date heard:** 31 January 2012 — *Judgment reserved.*

**Coram:** French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

**Catchwords:**

Industrial law — Registered organisations — Statutory interpretation — Retrospective operation of statutes — Presumption against retrospectivity — Presumption that legislation not to interfere with final judgment — Interpretation of *Fair Work (Registered Organisations) Act* 2009 (Cth) ("FWRO Act") — Third respondent applied to Australian Industrial Relations Commission ("AIRC") for registration as an organisation under *Workplace Relations Act* 1996 (Cth) — Applicant objected to registration — AIRC granted application for registration — Full Court of Federal Court ("FCAFC") made order of certiorari to quash decision of AIRC to register third respondent because third respondent's rules did not contain "purging rule" — On 1 July 2009, s 26A of the FWRO Act, which provides that prior registration of organisation which would have been valid but for absence of purging rule is taken to be valid and always to have been valid, came into effect — Fair Work Australia regarded itself as obliged by s 26A of the FWRO Act to treat third respondent as registered organisation — Whether s 26A of the FWRO Act validates registration of third respondent when such registration previously quashed by FCAFC prior to commencement of s 26A.

Constitutional law (Cth) — Judicial power of Commonwealth — Commonwealth Constitution, Ch III — Whether s 26A of the FWRO Act invalid as impermissible usurpation of, or interference with, judicial power of Commonwealth — Whether s 26Aof the *FWRO Act* capable of being read down.

**Appealed from FC FCA:** (2010) 189 FCR 259; (2010) 201 IR 315; [2010] FCAFC 153.

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# Intellectual Property

## *Roadshow Films Pty Ltd & Ors v iiNet Limited*

**S288/2011:** [2011] HCATrans 323; [2011] HCATrans 324; [2011] HCATrans 325.

**Date heard:** 30 November 2011, 1 & 2 December 2011 — *Judgment reserved*.

**Coram:** French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

**Catchwords:**

Intellectual property — Copyright — Infringement — Authorisation — Appellants owners and exclusive licensees of copyright in commercially-released cinematograph films — Respondent an internet service provider whose agreements with customers contained terms requiring customers to comply with all laws and reasonable directions by respondent as well as obligation not to use service to infringe copyright — Respondent had legal and technical capacity to issue warnings to customers whose services were being used to infringe copyright — Australian Federation Against Copyright Theft, on behalf of appellants, served copyright infringement notices on respondent, alleging users of respondent's network infringing appellants' copyright in cinematographic films by making them available online — Respondent took no steps to notify customers that services being used to infringe copyright — Whether, and if so from what date, respondent authorised infringements of appellants' copyright by users of respondent's internet services ("infringing acts") — Whether respondent had sufficient knowledge of infringing acts to support finding of authorisation — Whether appellants required to present respondent with "unequivocal and cogent evidence" of infringing acts and provide undertaking to reimburse and indemnify respondent for reasonable cost of verifying infringing acts — Whether respondent's conduct constituted "countenancing" of infringing acts — *Copyright Act* 1968 (Cth), ss 36 and 101 — *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

Words and phrases — "authorise", "cinematograph films", "copyright", "countenance", "infringe", "unequivocal and cogent evidence".

**Appealed from FCA FC:** (2011) 194 FCR 285; (2011) 275 ALR 1; (2011) 89 IPR 1; [2011] AIPC 92-410; [2011] FCAFC 23.

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# Taxation and Duties

*The Commissioner of Taxation of the Commonwealth of Australia v Bargwanna & Bargwanna (as trustees of the Kalos Metron Charitable Trust)*
**S284/2011:** [2011] HCATrans 6.

**Date heard:** 1 February 2012 — *Judgment reserved.*

**Coram:** French CJ, Gummow, Hayne, Heydon & Crennan JJ.

**Catchwords:**

Taxation and duties — Income tax — Charitable purpose — Tax exemption — Non-assessable income — Fund established for public charitable purposes by instrument of trust — Section 50-105 of *Income Tax Assessment Act* 1997 (Cth) ("ITAA") requires Commissioner to endorse entity as exempt from income tax in certain circumstances — Section 50-60 of ITAA provides that funds established in Australia for public charitable purposes by will or instrument of trust are not exempt from income tax unless, inter alia, "the fund is applied for the purposes for which it was established" — Respondents constituted by deed the Kalos Metron Charitable Trust ("Fund") for public charitable purposes — Fund administered by accountant and held in accountant's trust account — Interest from Fund applied to pay accountant's fees — Respondents obtained housing loan with provision of mortgage security — Loan arrangements involved Fund depositing $210,000 into interest-offset account with lender — Respondents deposited other funds into account and withdrew funds in excess of deposits — Appellant refused Fund's application for endorsement under s 50-105 of ITAA — Whether application of part of Fund for purposes other than public charitable purposes meant criteria in s 50-60 of ITAA not satisfied — Whether misapplication of Fund moneys must be deliberate or intentional for conclusion that the "is applied" criterion in s 50-60 of ITAA not satisfied — Whether relevant inquiry is to application of Fund as a whole rather than individual transactions.

Words and phrases — "deliberate", "the fund is applied for the purposes for which it was established".

**Appealed from FCA FC:** (2010) 191 FCR 184; (2011) ATC 20-244; [2010] FCAFC 126.

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# 3: ORIGINAL JURISDICTION

The following cases are ready for hearing in the original jurisdiction of the High Court of Australia.

## Constitutional Law

### *Crump v State of New South Wales*
**S165/2011**

**Catchwords:**

Constitutional law (Cth) — Commonwealth Constitution, Ch III — State Supreme Courts — Variation or alteration of judgment, decree, order or sentence by Parliament — Plaintiff convicted of murder and conspiracy to murder and sentenced to life imprisonment on both counts — Sentencing judge expressed view that plaintiff should never be released — Pursuant to s 13A of *Sentencing Act* 1989 (NSW), Supreme Court of New South Wales subsequently fixed dates on which plaintiff eligible for release on parole — Section 154A of *Crimes (Administration of Sentences) Act* 1999 (NSW) ("Administration Act") provides that Parole Authority may make order directing release of person subject to non-release recommendation only in prescribed circumstances — Parole Board determined plaintiff ineligible for parole pursuant to s 154A of Administration Act — Whether s 154A of Administration Act invalid because it has effect of varying or otherwise altering a judgment, decree, order or sentence of Supreme Court of New South Wales in a matter within meaning of s 73 of *Commonwealth Constitution*.

This matter was filed in the original jurisdiction of the High Court.

### *J T International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v Commonwealth of Australia*
**S389/2011; S409/2011**

**Catchwords:**

Constitutional law (Cth) — *Commonwealth Constitution*, s 51(xxxi) — Constitutional guarantees — Express limits on Commonwealth legislative power — Implied limits on Commonwealth legislative power — Acquisition of property on just terms — Plaintiffs' hold trade marks some of which registered under *Trade Marks Act* 1995

(Cth) ("Trade Marks") — Plaintiffs were entitled to use Trade Marks for tobacco products and packaging of tobacco products — Plaintiffs' hold copyright in distinctive tobacco packaging ("Copyright Works") — Plaintiffs' registered owner of tobacco packaging designs registered under *Designs Act* 2003 (Cth) ("the Designs") — Plaintiffs' hold patents relating to form of tobacco products registered pursuant to *Patents Act* 1990 (Cth) ("the Patents") — Plaintiffs' tobacco products use distinctive trade dress and get up which utilise the Trade Marks and/or reproduce Copyright Works ("the Get Up") — The *Tobacco Plain Packaging Act* 2011 (Cth) ("the Packaging Act") regulates and standardises retail packaging and appearance of tobacco products — Section 15 of the Packaging Act provides, inter alia, that the Act does not apply to the extent (if any) that its operation would result in an unconstitutional acquisition of property from a person otherwise than on just terms — Whether the Packaging Act would, but for the operation of s 15, result in unconstitutional acquisition of plaintiffs' property comprising the Trade Marks, Copyright Works, the Get Up, licensing goodwill, the Designs, the Patents, packaging goodwill, packaging rights and intellectual property licence rights ("the Property") otherwise than on just terms — Whether by reason of s 15 the Packaging Act's operative provisions do not apply to and have no operation with respect to the Property — Whether the Packaging Act impermissibly confers legislative power upon judiciary — Whether if by purporting to identify the circumstances to which it validly applies the Packaging Act falls outside the scope of legislative power conferred by s 51(xxxi) — Whether the Packaging Act invalid because its purported enactment did not involve an exercise of legislative power to make "laws" conferred by s 51(xxxi).

This matter was filed in the original jurisdiction of the High Court.

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# 4: SPECIAL LEAVE GRANTED

The following cases have been granted special leave to appeal to the High Court of Australia.

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## Administrative Law

*Commonwealth of Australia v Kutlu & Ors; Commonwealth of Australia v Clarke & Ors; Commonwealth of Australia v Lee & Ors; The Hon Nicola Roxon, Commonwealth Minister of State for Health v Condoleon & Ors*
**S279/2011 — S283/2011:** [2012] HCATrans 35.

**Date heard:** 10 February 2012 – *Special leave granted*

**Catchwords:**

Administrative law — Jurisdictional error — Statutory construction — Ministerial appointments — De facto officer doctrine — Professional services review scheme — Non-compliance with statutory requirements for consultation before making appointments — *Health Insurance Act 1973* (Cth) ("the Act") provides that Minister must consult with and be advised by Australian Medical Association ("AMA") before appointing medical practitioner as a Deputy Director or member of the Professional Services Review ("PSR") Panel — Appointments made without consulting the AMA — Impugned appointees members of PSR Committees that subsequently made adverse findings against the five respondent medical practitioners — Challenge to validity of PSR Committees — Full Court of the Federal Court of Australia held the PSR Panel appointments and composition of PSR Committees including the appointees invalid — Findings by invalidly constituted PSR Committees of no legal effect — Whether an appointment to the PSR Panel under s 84(2) of the Act is invalid if there is a breach of the requirement in s 84(3) that the Minister consult the AMA before making the appointment — Whether an appointment of a Deputy Director under s 85(1) of the Act is invalid if there is a breach of the requirement in s 85(3) that the Minister consult the AMA before making the appointment — Whether the failure of the Minister to consult with the AMA before making an appointment to the PSR Panel results in the invalid constitution of any PSR Committee whose constitution includes such appointees — Whether the failure of the Minister to consult with the AMA before making an appointment to the PSR Panel results in the invalidity of the draft and final reports of a PSR Committee whose constitution includes such appointees — Whether de facto officer doctrine applicable to remedy decisions involving impugned appointees.

**Appealed from FCA (FC):** (2011) 197 FCR 177, (2011) 280 ALR 428, [2011] FCAFC 94.

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# Corporations Law

*Beck v Weinstock & Ors*
**S311/2011:** [2012] HCATrans 34.

**Date heard:** 10 February 2012 — *Special leave granted.*

**Catchwords:**

Corporations law — Redeemable preference shares — Validity of issue — Rights attaching to shares — Eight C class shares were allotted in the third respondent ("the Company") — No other shares in the Company over which the C class shares conferred any priority or preference were ever issued — Directors of the Company resolved to redeem the eight C class shares for a nominal amount — Whether other shares, over which preference is enjoyed, must exist for redeemable preference shares to be valid — Whether eight C class shares in the Company were redeemable preference shares for the purposes of the *Corporations Act* 2011 (Cth) notwithstanding that there were never any other shares issued in the Company by reference to which the C class shares conferred preference.

**Appealed from NSW SC (CA):** (2011) 252 FLR 462, [2011] NSWCA 228.

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*Kizon v The Queen; Mansfield v The Queen*
**P28/2011; P29/2011:** [2011] HCATrans 331.

**Date heard:** 9 December 2011 — *Special leave granted.*

**Catchwords:**

Corporations law — Insider trading — Inside information — Applicants prosecuted on indictment alleging offences contrary to *Corporations Act* 2001 (Cth) ("Act"), s 1043A and (former) s 1002G — Trial judge held inside information "must, in general circumstances, be a factual reality" and directed verdicts of acquittal on all but four counts against Mansfield — Whether "information", for purpose of offence in (former) s 1002G and s 1043A of Act, as defined in (former) s 1002G and s 1042A of Act, required to be truthful, a factual reality or based on reasonable

grounds — Whether element of offence of insider trading that inside information possessed by accused corresponds with information possessed by entity entitled to have or use it.

Words and Phrases — "information".

**Appealed from WA SC (CA):** (2011) 251 FLR 286; [2011] WASCA 132.

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## *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers & Managers Appointed) & Ors*

**S232/2011:** [2011] HCATrans 296.

**Date heard:** 28 October 2011 — *Special leave granted on condition of applicant's provision of security for costs.*

**Catchwords:**

Corporations law — Financial products — Litigation funding — Parties entered into funding deed under which applicant ("ILP") was to fund proceedings brought by first respondent ("CHM") ("Funding Deed") — Clause 4 of Funding Deed provided for early termination fee in event of change of control of CHM — CHM granted fixed and floating charge in favour of ILP as security for payment of moneys owed ("Charge") — CHM entered agreement with second respondent, Cape Lambert Resources Ltd ("CLR"), under which CLR provided standby facility to CHM in exchange for charge over CHM's assets — CHM notified ILP that it disputed ILP's entitlement to payment under funding deed on basis that ILP engaged in unlicensed financial services business in Australia and notified rescission of funding deed under s 925A of *Corporations Act* 2001 (Cth) ("Act) — ILP appointed receivers to CHM under Charge — Primary judge upheld ILP's entitlement to engage in litigation funding absent an Australian Financial Services License ("AFSL") and its right to early termination fee but dismissed claim to further payment — Whether Funding Deed a financial product within meaning of ss 762A-762C, 763A and 763C of Act as facility through which, or through acquisition of which, a person manages financial risk — If Funding Deed a statutory financial product, whether reasonable to assume that any financial product purpose of Funding Deed an incidental purpose such that Funding Deed not a financial product pursuant to s 763E of Act — If Funding Deed a statutory financial product, whether a credit facility within meaning of s 765A(h)(i) of Act and regs 7.1.06(1) and (3) of Corporations Regulations 2001 (Cth) and consequently excluded from being a financial product — Whether litigation funder required to comply with provisions of Act engaged by issuing of financial product, including requirement to obtain AFSL pursuant to s 911A of Act — Whether Funding Deed validly rescinded by CHM pursuant to s 925A(1) of Act.

**Appealed from NSW SC (CA):** (2011) 276 ALR 138; (2011) 248 FLR 149; (2011) 82 ACSR 517; [2011] NSWCA 50.

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# Costs

*Certain Lloyds Underwriters Subscribing to Contract No IHOOAAQS v Cross; Certain Lloyds Underwriters Subscribing to Contract No IHOOAAQS v Thelander; Certain Lloyds Underwriters Subscribing to Contract No IHOOAAQS v Thelander*
**S256/2011; S257/2011; S258/2011:** [2011] HCATrans 340.

**Date heard:** 9 December 2011 — *Special leave granted.*

**Catchwords:**

Costs — Recoverable costs — Limitations — Personal injury damages — Trial judge held respondents suffered injuries from assaults committed by employees of Australian Venue Security Services Pty Ltd ("Insured") — Trial judge held verdict for damages against Insured covered by Insured's insurance policy held with applicant — Whether respondents' claims were claims for personal injury damages within meaning of s 198D of *Legal Profession Act* 1987 (NSW) or s 338 of *Legal Profession Act* 2004 (NSW) — Whether expression "personal injury damages" in *Legal Profession Acts* has same meaning as in *Civil Liability Act* 2002 (NSW).

Words and phrases — "personal injury damages", "the same meaning".

**Appealed from NSW SC (CA):** [2011] NSWCA 136.

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*State of New South Wales v Williamson*
**S259/2011:** [2011] HCATrans 340.

**Date heard:** 9 December 2011 — *Special leave granted.*

**Catchwords:**

Costs — Recoverable costs — Limitations — Personal injury damages — Respondent sought damages from applicant for trespass to person constituting battery and false imprisonment — Judgment for respondent entered by consent without admission as to liability — Respondent sought declaration that costs of proceeding not regulated by s 338 of *Legal Profession Act* 2004 (NSW) — Whether respondent's claim a claim for personal injury damages — Whether deprivation of liberty and loss of dignity capable of being personal injury or "impairment of a person's physical or mental condition" for purpose of *Civil Liability Act* 2002

(NSW), s 11 — Whether claim for damages that includes claims based on false imprisonment and assault, which are not severable, a claim for personal injury damages — Whether claim for damages for false imprisonment severable from claim for damages for assault — Whether New South Wales Court of Appeal bound by decision in *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136.

**Appealed from NSW SC (CA):** [2011] NSWCA 183.

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# Criminal Law

## *Burns v The Queen*
**S339/2011:** [2012] HCATrans 32.

**Date heard:** 10 February 2012 — *Special leave granted.*

**Catchwords:**

Criminal law — Homicide — Manslaughter — Involuntary manslaughter — Criminal negligence — Duty of care to deceased — Existence of duty of care — Applicant the supplier of illicit drug to victim — Victim died after consuming an illicit drug at the applicant's premises — Victim had consumed two different types of drug — One type of drug was medication consumed by the victim prior to attending the applicant's premises — Victim refused an offer by the applicant's husband to call an ambulance — Whether the circumstances were capable of giving rise to a duty of care — Whether the trial judge's directions as to the existence of a duty of care were erroneous — Whether the trial judge's directions as to causation were erroneous — Whether causation could be established on either limb of involuntary manslaughter where a person by his or her own act voluntarily consumes the substance that is a substantial cause of his or her death.

**Appealed from NSW SC (CCA):** (2011) 205 A Crim R 240, [2011] NSWCCA 56

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## *Likiardopoulos v The Queen*
**M71/2011:** [2012] HCATrans 67.

**Date heard:** 9 March 2012 — *Special leave granted.*

**Catchwords:**

Criminal law — Homicide — Murder — Joint criminal enterprise — Counselling and procuring — Deceased victim an intellectually disabled 22 year old — Victim was missing for several months before body found — Applicant and others were charged with

murder — Evidence demonstrated that applicant and co-accused engaged in sustained assault over the course of several days on the victim — Crown accepted pleas of lesser offences by applicant's co-accused namely manslaughter and being an accessory after the fact to manslaughter — Applicant found guilty of murder — Whether it is an abuse of process for the Crown to present a case based on the allegation that an accused has counselled or procured another or others to commit murder (a derivative form of liability) when none of the alleged principals had been convicted of murder — Whether the trial judge erred in leaving to the jury the accused's liability for counselling or procuring another or others to commit murder when none of the alleged principals had been convicted of murder.

**Appealed from Vic SC (CA):**(2010) 208 A Crim R 84; [2010] VSCA 344.

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*Patel v The Queen*
**B25/2011:** [2012] HCATrans 19.

**Date heard:** 10 February 2012 — *Special leave granted.*

**Catchwords:**

Criminal law — Homicide — Manslaughter — Grievous bodily harm — Duty of persons doing dangerous acts — Medical practitioner — Surgery — Applicant convicted of manslaughter of three victims and unlawfully doing grievous bodily harm to one victim — Applicant a surgeon who operated on the four victims — Applicant convicted on the basis that his decision to operate in each case was so thoroughly reprehensible that the decision was criminal and deserved criminal punishment — Whether the applicant's decision to operate or to commend surgery to a patient was the doing of an "act" within the meaning of s 288 of the *Criminal Code* (Q) ("the Code") — Whether s 288 of the Code can have any application to a decision to conduct surgery upon a patient — Whether there was a miscarriage of justice in the conduct of the trial.

**Appealed from Qld SC (CA):** [2011] QCA 81.

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# Defamation

*Papaconstuntinos v Holmes a Court*
**S142/2011:** [2011] HCATrans 235.

**Date heard:** 2 September 2011 — *Special leave granted*.

**Catchwords:**

Defamation — Defence of qualified privilege — Respondent involved in bid to invest funds in South Sydney District Rugby League Football Club ("Club") in exchange for controlling interest — Applicant, employee of Construction, Forestry, Mining and Energy Union ("CFMEU"), opposed respondent's bid — Prior to Extraordinary General Meeting at which bid was to be put to Club members, respondent sent letter of complaint to State Secretary of CFMEU, copied to former Chairman of Club, which also came to attention of applicant's immediate supervisor — Trial judge found letter conveyed three defamatory imputations and rejected, inter alia, respondent's plea of common law qualified privilege on the basis that there was no "pressing need" for the respondent to protect his interests by volunteering the defamatory information — Court of Appeal held defence of qualified privilege established since respondent had a legitimate interest in publishing the defamatory letter, and that the trial judge erred in applying the test of "pressing need" to establish qualified privilege — Whether defence of qualified privilege at common law requires evidence of "pressing need" to communicate defamatory matter — Whether absence of "pressing need" decisive — Whether requisite reciprocity of interest existed on occasion of communication of defamatory matter — Whether respondent's communication of suspicion of applicant's criminality fairly warranted to protect of further respondent's interests.

Words and phrases — "pressing need".

**Appealed from NSW SC (CA):** [2011] Aust Torts Reports 82-081; [2011] NSWCA 59.

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# Extradition

## *The Hon Brendan O'Connor, Commonwealth Minister for Home Affairs v Zentai*

**P39/2011:** [2011] HCATrans 339.

**Date heard:** 9 December 2011 — *Special leave granted.*

**Catchwords:**

Extradition — Permissible circumstances for surrender — Hungarian Military Judge issued warrant for arrest of first respondent — Warrant alleged that during World War II first respondent committed war crime contrary to s 165 of *Criminal Code of Hungary* — Australian magistrate determined first respondent eligible for extradition — Federal Court affirmed magistrate's decision and Full Federal Court dismissed appeal — Whether extradition pursuant to Treaty on Extradition Between Australia and the Republic of

Hungary ("Treaty") permitted only where actual offence for which extradition sought an offence in requesting state at time conduct constituting offence took place — Whether extradition under Treaty permitted where conduct constituting offence for which extradition sought an offence in requesting state at time conduct took place — Treaty, art 2(5)(a) — *Extradition Act* 1988 (Cth), s 22(3)(e)(i) and (iii).

**Appealed from FCA (FC):** (2010) 195 FCR 515; (2010) 280 ALR 728; (2010) 122 ALD 455: [2011] FCAFC 102.

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# Industrial Law

## *Board of Bendigo Regional Institute of Technical and Further Education v Barclay & Anor*

**M18/2011:** [2011] HCATrans 243.

**Date heard:** 2 September 2011 — *Special leave granted.*

**Catchwords:**

Industrial law — Adverse action — General protection — First respondent ("Barclay") an employee of applicant ("Institute") and Sub-Branch President at Institute of second respondent ("AEU") — Barclay sent email to AEU members employed at Institute noting reports of serious misconduct by unnamed persons at Institute — Barclay did not advise managers of details of alleged misconduct — Chief Executive Officer ("CEO") of Institute wrote to Barclay requiring him to show cause why he should not be disciplined for failing to report alleged misconduct — Barclay suspended on full pay — Respondents alleged action taken by CEO of Institute constituted adverse action under s 342 of *Fair Work Act* 2009 (Cth) ("Act") — Trial judge found adverse action taken by CEO on basis of breach of Institute's code of conduct rather than Barclay's union activity — Full Court of Federal Court held that sending of email was part of Barclay's functions as AEU officer and therefore adverse action had been taken within meaning of Act — Whether evidence that adverse action taken for innocent and non-proscribed reason sufficient to establish defence to cause of action under Pt 3.1 of Act ("general protections provisions") — Whether a decision-maker who is not conscious of a proscribed reason able to be found to have engaged in adverse action contrary to general protection provisions — Whether a distinction exists between the cause of conduct said to constitute adverse action and the reason a person took adverse action — Act, ss 341, 342, 346, 360, 361 — *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605; *Purvis v State of New South Wales* (2003) 217 CLR 92.

**Appealed from FCA FC:** (2011) 182 FCR 27; [2011] FCAFC 14.

# Property Law

## *Clodumar v Nauru Lands Committee*
**M37/2011**

*Appeal as of right pursuant to s 5(1) of* Nauru (High Court Appeals) Act *1976 (Cth).*

**Catchwords:**

Property law — Transfers inter vivos — Presidential approval — Section 3 of *Lands Act* 1976 (Nauru) requires Presidential approval of land transfers — Mr Burenbeiya attempted to transfer inter vivos certain lands in Yaren District of Nauru to appellant ("Transfer") — Transfer not perfected, and therefore legally inoperative, by reason of finding of fact that Presidential approval not obtained, based on information provided to Court by respondent — Appellant subsequently made aware that Presidential approval had been given in respect of Transfer — Whether evidence of Presidential approval of Transfer admissible in appeal to High Court of Australia — Whether finding that Presidential approval of Transfer was not obtained, and judgment pursuant to that finding, should be set aside.

**Appealed from Supreme Court of Nauru**: Civil Action No 16/2000.

# Public International Law

## *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission*
**S166/2011:** [2011] HCATrans 280.

**Date heard:** 7 October 2011 — *Special leave granted*.

**Catchwords:**

Public international law — Jurisdiction — Sovereign immunity — Section 11(1) of *Foreign States Immunities Act* 1985 (Cth) ("Act") provides that a foreign State is not immune in a proceeding that concerns a "commercial transaction" — Respondent commenced proceedings against applicant alleging anti-competitive conduct in relation to international air freight contrary to Pt IV of *Trade Practices Act* 1974 (Cth) — Applicant a "separate entity" of Republic of Indonesia, as defined in s 22 of Act — Respondent alleges

applicant participated in conduct outside Australia amounting to arrangements or understandings with other carriers concerning fuel surcharges — Whether civil penalty proceeding brought by respondent against an entity otherwise entitled to sovereign immunity falls within "commercial transaction" exception in Act — Whether applicant immune under Act from exercise of jurisdiction.

Words and phrases — "commercial transaction", "concern".

**Appealed from FCA (FC):** (2011) 192 FCR 393; (2011) 277 ALR 67; [2011] FCAFC 52.

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# Statutes

*Newcrest Mining Limited v Thornton*
**P24/2011:** [2011] HCATrans 337.

**Date heard:** 9 December 2011 — *Special leave granted*.

**Catchwords:**

Statutes — Construction — Contribution — Respondent injured in workplace accident — Settlement reached with employer and consent judgment entered — Respondent subsequently issued summons against applicant, owner of mine site at which respondent injured — Applicant sought and received summary judgment on ground that respondent already compensated for injury by employer and s 7(1)(b) of *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) ("Act") precluded recovery of additional damages — Whether s 7(1)(b) of Act applies only to damages awarded following judicial assessment or also to judgments entered by consent — Whether Western Australia Court of Appeal ought to have followed decision of equivalent intermediate appellate court in respect of equivalent legislation — *Nau v Kemp & Associates* [2010] Aust Torts Reports 82-064.

**Appealed from WA SC (CA):** [2011] WASCA 92.

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# Taxation

*Commissioner of Taxation v Qantas Airways Ltd*
**B25/2011:** [2012] HCATrans 36.

**Date heard:** 10 February 2012 — *Special leave granted.*

**Catchwords:**

Taxation — Goods and services tax — Taxable supply — Contract for supply of services — Airline travel — When Goods and services tax ("GST") is payable — Passenger made booking and paid fare but did not take actual flight or receive refund — Whether taxable supply is the making of the reservation itself or the actual travel — Whether the respondent made a "taxable supply" within the meaning of section 9-5 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) in circumstances where passengers made and paid for reservations or bookings for flights which they subsequently did not take — Whether an amount received as consideration under a contract for supplies is to be excluded from the calculation of GST unless all of the supplies contemplated by the contract are made.

**Appealed from FCA (FC):** (2001) 195 FCR 260, (2011) ATC 20-276, [2011] FCAFC 113.

# Torts

## *Barclay v Penberthy & Ors*
**P25/2011:** [2011] HCATrans 333.

**Date heard:** 9 December 2011 — *Special leave granted.*

**Catchwords:**

Torts — Negligence — Duty of care — Economic loss — Loss of services — First respondent piloted aircraft that crashed, killing two and injuring three employees of third respondents — Cause of crash determined to be failure of part designed by applicant — Court of Appeal held applicant and first respondent owed third respondents duty of care, which they breached, causing economic loss to third respondents — Whether applicant owed third respondents duty of care in respect of economic loss claim — Whether existence of action for loss of services a relevant factor in determining whether applicant owed third respondents duty of care — Whether existence of action for loss of services requires imposition of common law duty of care.

**Appealed from WA SC (CA):** [2011] Aust Torts Reports 82-087; [2011] WASCA 102.

## *Madeleine Louise Sweeney bhnf Norma Bell v Thornton*
**S321/2011:** [2012] HCATrans 58.

**Date heard:** 9 March 2012 — *Matter referred to Full Court*.

**Catchwords:**

Torts — Negligence — Motor vehicle accident — Duty of care — Applicant learner driver — Content of duty of care owed by voluntary supervisor to learner driver — Applicant suffered personal injury when she crashed a car when navigating a bend — Whether supervisor's failure to warn driver to reduce speed constituted breach of the duty of care — Whether the Court of Appeal erred as to the content of the respondent's duty of care — Whether the Court of Appeal erred in its findings on causation — Whether the Court of Appeal erred in its limitation of effect of the respondent's admission on the content of the duty of care — Whether the Court of Appeal erred with respect to various factual findings.

**Appealed from NSW SC (CA):** (2011) 59 MVR 155; [2011] NSWCA 244.

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# 5: CASES NOT PROCEEDING OR VACATED

The following cases in the High Court of Australia are not proceeding or have been vacated since *High Court Bulletin* 1 [2012] HCAB 01.

# 6: SPECIAL LEAVE REFUSED

## Canberra: 29 February 2012

(Publication of reasons)

| *Applicant* | *Respondent* | *Court appealed from* | *Result* |
|---|---|---|---|
| Ferdinands | District Court of South Australia & Ors (A30/2011) | Full Court of the Supreme Court of South Australia [2011] SASCFC 139 | Application Dismissed [2012] HCASL 23 |
| Lance Alder as litigation guardian for Trent Ashley Alder | Khoo & Anor (B60/2011) | Supreme Court of Queensland (Court of Appeal) [2011] QCA 298 | Application Dismissed [2012] HCASL 24 |
| Bahonko | Casey City Council (M168/2011) | Supreme Court of Victoria (Court of Appeal) [2011] VSCA 357 | Application Dismissed [2012] HCASL 25 |
| SZNCR | Minister for Immigration and Citizenship & Anor (S313/2011) | Federal Court of Australia [2011] FCA 369 | Application Dismissed [2012] HCASL 26 |
| Krol | The Queen (S354/2011) | Supreme Court of New South Wales (Court of Criminal Appeal) [2011] NSWCCA 175 | Application Dismissed [2012] HCASL 27 |
| Watkins | The Queen (S370/2011) | Supreme Court of New South Wales (Court of Criminal Appeal) [2008] NSWCCA 88 | Application Dismissed [2012] HCASL 28 |
| SZPZQ & Ors | Minister for Immigration and Citizenship & Anor (S374/2011) | Federal Court of Australia [2011] FCA 1236 | Application Dismissed [2012] HCASL 29 |
| SZQCG | Minister for Immigration and Citizenship & Anor (S375/2011) | Federal Court of Australia [2011] FCA 1240 | Application Dismissed [2012] HCASL 30 |
| SZOYO | Minister for Immigration and Citizenship & Anor (S376/2011) | Federal Court of Australia [2011] FCA 1239 | Application Dismissed [2012] HCASL 31 |
| SZOSF | Minister for Immigration and Citizenship & Anor (S377/2011) | Federal Court of Australia [2011] FCA 1234 | Application Dismissed [2012] HCASL 32 |
| SZQAU & Ors | Minister for Immigration and | Federal Court of Australia [2011] FCA 1243 | Application Dismissed [2012] HCASL 33 |

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|---|---|---|---|
| | Citizenship & Anor (S379/2011) | | |
| SZOVR | Minister for Immigration and Citizenship & Anor (S381/2011) | Federal Court of Australia [2011] FCA 1248 | Application Dismissed [2012] HCASL 34 |
| Alam | Minister for Immigration and Citizenship & Anor (S382/2011) | Federal Court of Australia [2011] FCA 1274 | Application Dismissed [2012] HCASL 35 |
| SZOWJ | Minister for Immigration and Citizenship & Anor (S388/2011) | Federal Court of Australia [2011] FCA 1260 | Application Dismissed [2012] HCASL 36 |
| Singh | Minister for Immigration and Citizenship & Anor (S405/2011) | Federal Court of Australia [2011] FCA 1377 | Application Dismissed [2012] HCASL 37 |
| HZAAD | Minister for Immigration and Citizenship & Anor (H5/2011) | Federal Court of Australia [2011] FCA 1350 | Application Dismissed [2012] HCASL 38 |
| SZOVG | Minister for Immigration and Citizenship & Anor (S397/2011) | Federal Court of Australia [2011] FCA 1261 | Application Dismissed [2012] HCASL 39 |
| Winn | Blueprint Instant Printing Pty Ltd (M32/2011) | Federal Court of Australia [2011] FCA 293 | Application Dismissed With Costs [2012] HCASL 40 |
| Winn | Blueprint Instant Printing Pty Ltd & Anor (M69/2011) | Federal Court of Australia [2011] FCA 723 | Application Dismissed With Costs [2012] HCASL 41 |
| Zoltaszek | Downer EDI Engineering Pty Limited (S260/2011) | Federal Court of Australia [2011] FCA 744 | Application Dismissed With Costs [2012] HCASL 42 |

## Melbourne: 9 March 2012

*Civil*

| *Applicant* | *Respondent* | *Court appealed from* | *Result* |
|---|---|---|---|
| CGU Insurance Limited | Major Engineering Pty Limited (M118/2011) | Supreme Court of Victoria (Court of Appeal) [2011] VSCA 226 | Special leave refused with costs [2012] HCATrans 69 |
| FEA Plantations Limited (Subject to deed of company arrangement)(Receivers appointed) | Norman & Ors (M123/2011) | Full Court of the Federal Court of Australia [2011] FCAFC 99 | Special leave refused with costs [2012] HCATrans 71 |
| Pamamull | Albrizzi (Sales) Pty Ltd (M136/2011) | Supreme Court of Victoria (Court of Appeal) [2011] VSCA 260 | Special leave refused with costs [2012] HCATrans 63 |
| Primus Telecommunications Pty Ltd | Kooee Communications Pty Ltd (M138/2011) | Full Court of the Federal Court of Australia [2011] FCAFC 119 | Special leave refused with costs [2012] HCATrans 66 |
| Morris | Riverwild Management Pty Ltd & Ors (M142/2011) | Supreme Court of Victoria (Court of Appeal) [2011] VSCA 283 | Special leave refused with costs [2012] HCATrans 72 |
| Jones | Civil Aviation Safety Authority & Anor (M171/2011) | Full Court of the Federal Court of Australia [2011] FCAFC 157 | Special leave refused with costs [2012] HCATrans 64 |

*Criminal*

| *Applicant* | *Respondent* | *Court appealed from* | *Result* |
|---|---|---|---|
| FMT | The Queen (M63/2011) | Supreme Court of Victoria (Court of Appeal) [2011] VSCA 165 | Special leave refused [2012] HCATrans 70 |
| Director of Public Prosecutions | Dickson (M122/2011) | Supreme Court of Victoria (Court of Appeal) [2011] VSCA 222 | Special leave refused with costs [2012] HCATrans 65 |
| The Queen | Wilson (M161/2011) | Supreme Court of Victoria (Court of Appeal) [2011] VSCA 328 | Stood over [2012] HCATrans 68 |

## Sydney: 9 March 2012

### *Civil*

| *Applicant* | *Respondent* | *Court appealed from* | *Result* |
|---|---|---|---|
| Snedden | Nationwide News Pty Ltd (S330/2011) | Supreme Court of New South Wales (Court of Appeal [2011] NSWCA 262 | Special leave refused with costs [2012] HCATrans 61 |
| Ayoub | AMP Bank Limited (S334/2011) | Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 263 | Special leave refused with costs [2012] HCATrans 59 |
| Centro (CPL) Limited | Chief Commissioner of State Revenue (S365/2011) | Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 325 | Special leave refused with costs [2012] HCATrans 56 |
| Tabtill Pty Ltd & Ors | Creswick (B3/2012) | Supreme Court of Queensland (Court of Appeal) [2011] QCA 381 | Special leave refused with costs [2012] HCATrans 62 |
| Rinehart | Welker & Ors (S11/2012) | Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 403 | Special leave refused with costs [2012] HCATrans 57 |
| Rinehart | Welker & Ors (S14/2012) | Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 403 | Special leave refused with costs [2012] HCATrans 57 |

### *Criminal*

| *Applicant* | *Respondent* | *Court appealed from* | *Result* |
|---|---|---|---|
| Swansson | The Queen (S342/2011) | Supreme Court of New South Wales (Court of Criminal Appeal) [2011] NSWCCA 29 | Special leave refused [2012] HCATrans 60 |