



# HIGH COURT BULLETIN

Produced by the Legal Research Officer,  
High Court of Australia Library  
[2012] HCAB 09 (19 September 2012)

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

<b>Case</b>	<b>Title</b>
<a href="#"><i>Plaintiff S10/2011 v Minister for Immigration and Citizenship; Kaur v Minister for Immigration and Citizenship; Plaintiff S49/2011 v Minister for Immigration and Citizenship; Plaintiff S51/2011 v Minister for Immigration and Citizenship</i></a>	Administrative Law
<a href="#"><i>Andrews v Australia and New Zealand Banking Group Ltd</i></a>	Banker and Customer
<a href="#"><i>Burns v The Queen</i></a>	Criminal Law
<a href="#"><i>Douglass v The Queen</i></a>	Criminal Law
<a href="#"><i>Likiardopoulos v The Queen</i></a>	Criminal Law
<a href="#"><i>Board of Bendigo Regional Institute of Technical and Further Education v Barclay</i></a>	Industrial law
<a href="#"><i>P.T. Garuda Indonesia Ltd v Australian Competition &amp; Consumer Commission</i></a>	Public International Law

<a href="#"><i>The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal; The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal; The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal; The National Competition Council v Hamersley Iron Pty Ltd; The National Competition Council v Robe River Mining Co Pty Ltd</i></a>	Trade Practices

## 2: Cases Reserved

<b>Case</b>	<b>Title</b>
<a href="#"><i>The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment &amp; Ors</i></a>	Constitutional Law
<a href="#"><i>Google Inc v Australian Competition and Consumer Commission</i></a>	Consumer Law
<a href="#"><i>Westfield Management Limited as Trustee for the Westart Trust v AMP Capital Property Nominees Limited as Nominee of Unisuper Limited in its Capacity as Trustee of the Complying Superannuation Fund Known as Unisuper &amp; Anor</i></a>	Corporations Law
<a href="#"><i>Stanford v Stanford</i></a>	Family Law

## 3: Original Jurisdiction

<b>Case</b>	<b>Title</b>
There are no new matters ready for hearing in the original jurisdiction of the High Court since <i>High Court Bulletin 8</i> [2012] HCAB 08.	

## 4: Special Leave Granted

<b>Case</b>	<b>Title</b>
<a href="#"><i>Weinstock &amp; Anor v Beck &amp; Anor</i></a>	Corporations Law
<a href="#"><i>Huynh v The Queen</i></a>	Criminal Law
<a href="#"><i>Karpany &amp; Anor v Dietman</i></a>	Native Title
<a href="#"><i>Castle Constructions Pty Limited v Sahab Holdings Pty Ltd &amp; Anor</i></a>	Property
<a href="#"><i>Hunt &amp; Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd &amp; Ors</i></a>	Torts

# 1: CASES HANDED DOWN

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

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## Administrative Law

*Plaintiff S10/2011 v Minister for Immigration and Citizenship; Kaur v Minister for Immigration and Citizenship; Plaintiff S49/2011 v Minister for Immigration and Citizenship; Plaintiff S51/2011 v Minister for Immigration and Citizenship*  
**S10/2011;S43/2011;S49/2011;S51/2011: [\[2012\] HCA 31](#).**

**Judgment delivered:** 7 September 2012.

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

### Catchwords:

Administrative law – Procedural fairness – Migration – Refugees – Review by Refugee Review Tribunal and Migration Review Tribunal – Ministerial discretion – *Migration Act* 1958 (Cth) confers powers upon Minister to dispense with statutory requirements for visa if "in the public interest to do so" – Dispensing powers must be exercised personally and are non-compellable – Plaintiffs refused visas and unsuccessfully sought merits review of those refusals – Plaintiffs requested Minister to consider exercising and to exercise dispensing powers – Requests by three plaintiffs refused by departmental officers pursuant to guidelines issued by Minister not forwarded to Minister – Request by one plaintiff refused by Minister – Whether statutory provisions conferring dispensing powers apt to affect adversely the sufficient interest of a party seeking exercise of those powers – Whether statutory provisions conferring dispensing powers excluded any obligation of Minister to accord plaintiffs procedural fairness.

These applications for an order to show cause were filed in the original jurisdiction of the High Court.

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## Banker and Customer

*Andrews v Australia and New Zealand Banking Group Ltd*  
**M48/2012:** [\[2012\] HCA 30](#).

**Judgment delivered:** 6 September 2012.

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

**Catchwords:**

Banker and customer – Penalty doctrine – Consumer and commercial credit card accounts – Honour fee – Dishonour fee – Late payment fee – Non-payment fee – Over limit fee – Whether those fees penalties – Whether penalty doctrine limited to circumstances where there is breach of contract – Significance of law respecting penal bonds – Grounds for equitable intervention – Whether penalty doctrine now wholly a rule of common law.

Equity – Doctrines and remedies – Relief against penalties – Significance of law respecting penal bonds – Whether relief available only in cases of breach of contract – Whether penalty doctrine now wholly a rule of common law.

Words and phrases – "bond", "condition", "dishonour fee", "exception fees", "honour fee", "penalty".

**Cause Removed from the Federal Court of Australia:** (2011) 86 ACSR 292; [2011] FCA 1376.

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## Criminal Law

*Burns v The Queen*  
**S46/2012:** [\[2012\] HCA 35](#).

**Judgment delivered:** 14 September 2012.

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

**Catchwords:**

Criminal law – Manslaughter by unlawful and dangerous act – Appellant party to joint enterprise to supply methadone to deceased – Deceased died from combined effect of methadone and prescription drug – Whether appellant's supply of prohibited drug to deceased unlawful and dangerous act – Whether sufficient evidence to warrant order for new trial on basis that appellant administered or assisted in administering drug to deceased.

Criminal law – Manslaughter by criminal negligence – Appellant party to joint enterprise to supply methadone to deceased – Deceased suffered adverse reaction to drugs in appellant's presence – Appellant failed to obtain medical treatment for deceased – Whether appellant under legal duty to take steps to preserve deceased's life.

Words and phrases – "legal duty", "omission", "supplier of prohibited drug", "unlawful and dangerous act".

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

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*Douglass v The Queen*

**A/17:** [\[2012\] HCA 34](#).

**Date heard:** 11 September 2012.

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

**Catchwords:**

Criminal law – Evidence – Trial by judge alone – Appellant convicted of aggravated indecent assault of granddaughter ("CD") – CD aged three years at time of alleged offence – Appellant gave sworn evidence denying offence – CD's unsworn statement only evidence of offence – Trial judge did not record any finding respecting appellant's evidence – Whether reasons sufficient to make clear appellant's evidence rejected beyond reasonable doubt – Whether CD's evidence reliable – Whether evidence sufficient to prove offence beyond reasonable doubt.

**Appealed from SASC (CCA):** [2010] SASCF 66.

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*Likiardopoulos v The Queen*

**M24/2012:** [\[2012\] HCA 37](#).

**Date heard:** 14 September 2012.

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

**Catchwords:**

Criminal law – Murder – Accessorial liability – Appellant convicted of murder – Crown accepted guilty pleas from five other participants to lesser offences – Trial judge left to jury Crown case based on accessorial liability – Whether appellant could be convicted as accessory to murder when Crown had accepted pleas from all other participants to lesser charges – Whether trial judge should have left

accessorial case to jury – Whether Crown could lead evidence that other participants murdered the deceased – Whether inconsistency between convictions of other participants and accused – Whether exercise of prosecutorial discretion an abuse of process.

Words and phrases – "abuse of process", "accessory", "aiding and abetting", "counselling or procuring", "principal", "prosecutorial discretion".

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

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## Industrial Law

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

**M128/2011:** [\[2012\] HCA 32](#).

**Judgment delivered:** 7 September 2012.

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

### Catchwords:

Industrial law (Cth) – General protections – Adverse action – Section 346 of *Fair Work Act* 2009 (Cth) prohibits employer from taking adverse action against employee because employee "is ... an officer or member of an industrial association" or "engages ... in industrial activity" – Section 361 creates presumption that adverse action taken for prohibited reason unless employer proves otherwise – First respondent was employee of appellant and officer of second respondent – Second respondent was industrial association – First respondent engaged in industrial activity – Chief Executive Officer of appellant took adverse action against first respondent – Chief Executive Officer gave evidence at trial that adverse action taken for innocent reasons and not for prohibited reasons – Trial judge accepted that evidence – Whether adverse action taken for prohibited reason.

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

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## Public International Law

*P.T. Garuda Indonesia Ltd v Australian Competition & Consumer Commission*

**S343/2011:** [\[2012\] HCA 33](#).

**Judgment delivered:** 7 September 2012.

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

**Catchwords:**

Public international law – Foreign State immunity – Sections 11(1) and 22 of *Foreign States Immunities Act* 1985 (Cth) ("Act") together provide that a separate entity of a foreign State is not immune from jurisdiction in a proceeding that concerns a "commercial transaction" – Respondent commenced proceedings against appellant for conduct allegedly contrary to Pt IV of *Trade Practices Act* 1974 (Cth) – Whether appellant immune under Act from exercise of jurisdiction – Whether civil penalty proceeding concerns a "commercial transaction".

Words and phrases – "commercial transaction", "conferral of jurisdiction", "jurisdiction", "sovereign immunity".

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

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## Trade Practices

*The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal; The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal; The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal; The National Competition Council v Hamersley Iron Pty Ltd; The National Competition Council v Robe River Mining Co Pty Ltd* **M155/2011, M156/2011, M157/2011, M45/2011 & M46/2011:** [\[2012\] HCA 36](#).

**Judgment delivered:** 14 September 2012.

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

**Catchwords:**

Trade practices – Access to services – Minister's decision whether to declare services relating to railway lines in Pilbara pursuant to s 44F of Trade Practices Act 1974 (Cth) – Section 44H(4) required Minister to be satisfied of certain matters – Whether criterion for declaration of service in s 44H(4)(b) imposes test of private profitability – Whether public interest criterion in s 44H(4)(f) requires or permits inquiry into likely net balance of social costs and benefits – Whether any residual discretion.

Administrative law – Application to Australian Competition Tribunal ("Tribunal") under s 44K for review of Minister's decision to declare pursuant to s 44F – Review by Tribunal is re-consideration of the matter – Nature of review to be undertaken by Tribunal – Whether Tribunal could consider any material parties considered relevant.

Words and phrases – "public interest", "re-consideration of the matter", "re-hearing of the matter", "uneconomical for anyone to develop another facility to provide the service".

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

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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

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See also [Citizenship and Migration](#): *Plaintiff M47/2012 v Director General of Security & Ors*.

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### Citizenship and Migration

*Plaintiff M47/2012 v Director General of Security & Ors*

**M47/2012:** [\[2012\] HCATrans 144](#); [\[2012\] HCATrans 145](#); [\[2012\] HCATrans 149](#).

**Dates heard:** 18, 19 & 21 June 2012 – *Judgment reserved*.

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

**Catchwords:**

Citizenship and migration – Migration – Refugees – Plaintiff Sri Lankan national seeking asylum – Australian Security and Intelligence Organisation ("ASIO") officers interviewed Plaintiff – ASIO subsequently issued adverse security assessment of Plaintiff – Plaintiff therefore did not meet requirements for protection visa – Whether ASIO failed to accord Plaintiff procedural fairness – Whether Plaintiff notified of relevant matters and provided with meaningful opportunity to respond to allegations.

Citizenship and migration – Unlawful non-citizen – Plaintiff refused protection visa – Plaintiff held in mandatory detention – Plaintiff found to be owed "protection obligations" within meaning of s 36 *Migration Act* 1958 (Cth) ("the Act") – Plaintiff refused visa because he did not satisfy public interest criterion 4002 due to ASIO's adverse security assessment – Plaintiff held in detention as unlawful non-citizen – No third country currently available to receive Plaintiff – Whether s 198 of the Act authorises Plaintiff's removal from Australia – Whether ss 189 and 196 of the Act authorise Plaintiff's detention – Whether cl 866.225 of Sched 2 of the Migration Regulations 1994, to the extent it establishes public interest criterion 4002, beyond the delegated legislative power conferred by

the Act – Whether *Al-Kateb v Godwin* (2004) 219 CLR 562 correctly decided.

Constitutional law (Cth) – Judicial power of Commonwealth – Unlawful non-citizen in immigration detention – No real prospect of removal from Australia in reasonably foreseeable future – Whether indefinite detention without judicial order infringes Ch III of Constitution – Whether detention for period within control of Executive involves exercise of judicial power of Commonwealth by Executive.

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

## Constitutional Law

*J T International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v Commonwealth of Australia*

**S389/2011; S409/2011:** [\[2012\] HCATrans 91](#); [\[2012\] HCATrans 92](#); [\[2012\] HCATrans 93](#); [\[2012\] HCA 30](#).

**Dates heard:** 17, 18 & 19 April 2012 – *Orders made on 15 August 2012, Court will publish reasons at later date.*

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

### Catchwords:

Constitutional law (Cth) – Legislative power – Acquisition of property on just terms – Plaintiffs hold registered and unregistered trade marks and other intellectual property rights in relation to tobacco products and packaging – Tobacco Plain Packaging Act 2011 (Cth) ("Packaging Act") regulates and standardises retail packaging and appearance of tobacco products – Packaging Act, s 15 provides, among other things, that Packaging Act "does not apply to the extent (if any) that its operation would result in an acquisition of property from a person otherwise than on just terms" – Whether Packaging Act would, but for s 15, result in acquisition of plaintiffs' property (including intellectual property rights, goodwill, and rights to determine appearance of tobacco products and packaging) otherwise than on just terms – Whether plaintiffs' rights constitute "property" for purposes of Constitution, s 51(xxxi) – Whether Commonwealth has acquired rights in plaintiffs' property for purposes of Constitution, s 51(xxxi) – Whether any acquisition of property effected by Packaging Act an "acquisition-on-just-terms" within meaning of compound expression in Constitution, s 51(xxxi) or Packaging Act a law with respect to alternative head of legislative power – Whether "just terms" provided for purposes of

Constitution, s 51(xxxi) – Whether, by reason of s 15, operative provisions of Packaging Act have no operation with respect to plaintiff's property.

Constitutional law (Cth) – Judicial power – Constitution, Ch III – Implied limits on Commonwealth legislative power – Whether Packaging Act, s 15 impermissibly confers legislative power upon judiciary – Whether Packing Act, s 15 invalid.

These matters were filed in the original jurisdiction of the High Court.

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*The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment & Ors*  
**S127/2012:** [\[2012\] HCATrans 207](#).

**Date heard:** 5 September 2012.

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

**Catchwords:**

Constitutional law (Cth) – Constitution, Ch III – Vesting of federal jurisdiction in State courts – Institutional integrity of State courts – Power of State Parliament to alter defining characteristic of Court of a State – Relationship between the NSW Industrial Commission and the Industrial Court – Presidential members of the NSW Industrial Commission are the only persons who may be appointed as members of the Industrial Court – Certain functions of the NSW Industrial Commission can only be exercised by the Commission constituted as Industrial Court – Section 146C of the *Industrial Relations Act 1996 (NSW)*, inserted by the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 (NSW)* ("Act"), effectively requires the NSW Industrial Commission, not Industrial Court, to give effect to executive policies as promulgated in regulations – Whether the Act is invalid by reason that it undermines the institutional integrity of the NSW Industrial Relations Commission when constituted as Industrial Court – Whether imposition of a requirement upon judges of a State court to give effect to executive policy when exercising non-judicial functions as part of an arbitral tribunal undermines institutional integrity or appearance of independence and impartiality of that court – Whether requirement imposed upon judicial members to give effect to executive policy when sitting as the NSW Industrial Commission undermines institutional integrity of the Industrial Court.

**Appealed from NSWIRComm (FB):** [2011] NSWIRComm 143.

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*RCB as Litigation Guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest, One of the Judges of the Family Court of Australia & Ors*  
**B28/2012:** [\[2012\] HCATrans 178](#).

**Date heard:** 7 August 2012 – *Orders made on 7 August 2012, Court will publish reasons at later date.*

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

**Catchwords:**

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III – Family court proceedings – Director-General of the Department of Child Safety (Queensland) initiated proceedings in the Family Court of Australia under Family Law (Child Abduction Convention) Regulations 1986 ("regulations") – Court ordered that EKV, CEV, CIV and LRV ("the affected children") be returned to Italy – Affected children did not have separate and independent legal representation in proceedings – Section 68L(3) of *Family Law Act 1975* (Cth) ("Act") provides that in proceedings under the regulations a court "may order that the child's interests ... be independently represented ... only if the court considers there are exceptional circumstances that justify doing so" – Whether s 68L(3) of Act and the regulations require a Chapter III court to exercise judicial power in a manner repugnant to the judicial process.

Administrative law – Procedural fairness – Scope and content of duty of procedural fairness – Application by litigation guardian to intervene in hearing of application to discharge return order – Whether refusal of opportunity to have separate and independent representation denied affected children procedural fairness.

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

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See also [Citizenship and Migration](#): *Plaintiff M47/2012 v Director General of Security & Ors*.

See also [Family Law](#): *Stanford v Stanford*

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## Consumer Law

*Google Inc v Australian Competition and Consumer Commission*  
**S175/2012:** [\[2012\] HCATrans 224](#).

**Date heard:** 11 September 2012.

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

**Catchwords:**

Consumer law – Misleading or deceptive conduct – Online advertising – Appellant operator of free internet search engine – Advertisers promoted their goods or services by means of sponsored links that appeared on search result pages displayed by appellant's internet search engine – Advertisements displayed in response to user's search query – Whether in displaying sponsored links appellant engaged in conduct that was misleading or deceptive or likely to mislead or deceive for the purposes of s 52 of *Trade Practices Act 1974* (Cth) (now s 18 *Australian Consumer Law*) – Whether in displaying advertisements in response to particular user's search query appellant made representations contained in advertisements.

**Appealed from FCA (FC):** [\[2012\] FCAFC 49](#).

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## Contract Law

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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

*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](#);  
[\[2012\] HCATrans 84](#).

**Dates heard:** 29 February 2012, 1 March 2012 & 30 March 2012 –  
*Judgment reserved.*

**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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*International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers & Managers Appointed) & Ors*  
**S262/2011:** [\[2012\] HCATrans 146](#)

**Date heard:** 20 June 2012 – *Judgment reserved*.

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

**Catchwords:**

Corporations law – Financial products – Litigation funding – Parties entered into litigation funding agreement ("funding deed") – Respondent disputed payment owed under funding deed on basis that appellant engaged in an unlicensed financial services business and notified rescission of funding deed under s 925A of *Corporations Act 2001* (Cth) ("the Act") – Whether funding deed a financial product within meaning of ss 762A-762C, 763A and 763C of the 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 the deed is an incidental purpose such that it is not a financial product under s 763E of the Act – If funding deed a statutory financial product, whether it is a credit facility within meaning of s 765A(h)(i) of the Act and reg 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 the Act engaged by issuing of financial product, including requirement to obtain license pursuant to s 911A of the Act – Whether funding deed validly rescinded.

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

*Mansfield v The Queen; Kizon v The Queen*

**P60/2011; P61/2011:** [\[2012\] HCATrans 102](#).

**Date heard:** 9 May 2012 – *Judgment reserved*.

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

**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, must be, a factual reality and cannot include falsehoods or lies – 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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*Westfield Management Limited as Trustee for the Westart Trust v AMP Capital Property Nominees Limited as Nominee of Unisuper Limited in its Capacity as Trustee of the Complying Superannuation Fund Known as Unisuper & Anor*  
**S181/2012:** [\[2012\] HCATrans 208](#).

**Date heard:** 6 September 2012.

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

**Catchwords:**

Corporations law – Managed investment scheme – Proposed resolution to wind up trust – Trust deed entered for the establishment of a Trust and the acquisition by the Trust of a major shopping centre – Trust registered as managed investment scheme under Ch 5C of the *Corporations Act* 2001 (Cth) (“the Act”) – Unitholders in the Trust entered into an Agreement to record the arrangements relating to the Trust, including managing shopping centre – Agreement provided that each of the unitholders agreed to exercise their voting rights under the Trust deed in accordance with the Agreement – Appellant held one third of the units in the Trust – Responsible entity proposed an extraordinary resolution pursuant to ss 601NB and 601NE of the Act to wind up the managed investment scheme – Whether a unitholder can, by contract, fetter or forgo the right to vote at a meeting under s 601NB of the Act to wind up a managed investment scheme – Whether the Agreement prevents a unitholder from voting for an extraordinary resolution to direct the winding up of the managed investment scheme.

**Appealed from NSW SC (CA):** [2011] NSWCA 386.

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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*  
**S418/2011; S419/2011:** [\[2012\] HCATrans 182](#).

**Date heard:** 15 August 2012.



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

**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*

**S416/2011:** [\[2012\] HCATrans 182](#).

**Date heard:** 15 August 2012.

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

**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 and undifferentiated sum paid in settlement of all claims – 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

*Cooper v The Queen*

**S135/2011:** [\[2012\] HCATrans 180](#).

**Date heard:** 9 August 2012.

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

### Catchwords:

Criminal law – Homicide – Appeal against conviction – Appellant convicted of murder – Appellant originally stood trial with co-accused – Co-accused acquitted of the murder at separate trial – Co-accused subsequently gave evidence at appellant's trial – Co-accused gave evidence that appellant assaulted deceased with bat and axe – Evidence was adduced that suggested deceased threatened appellant's daughter and assaulted appellant – Another witness "C" gave evidence that co-accused admitted hitting deceased with an axe – Crown presented case as appellant solely responsible for the death or alternatively guilty for participation in a joint criminal enterprise with co-accused – Trial judge included joint criminal enterprise in written directions and further written directions to jury – Culpability for joint criminal enterprise was said to be founded on C's evidence coupled with a rejection of self-defence – Court of Criminal Appeal accepted that joint criminal enterprise was not supported by the evidence but applied the proviso in s 6(1) of the *Criminal Appeal Act 1912* (NSW) – Whether the error upheld in appellant's appeal, in which joint criminal enterprise liability was left to the jury when it was not open on the evidence, so fundamental as to preclude application of the proviso – Whether the Court erred in holding that there was no error or inadequacy in the trial judge's directions on joint criminal enterprise, self-defence (or defence of another) and the co-accused's confession to witness "C" – Whether the Court of Criminal Appeal erred in holding that defence counsel's failure to adduce relevant evidence in relation to the deceased's mental condition did not occasion a miscarriage of justice.

**Appealed from NSW (CCA):** [2011] NSWCCA 258.

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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.

*Papaconstuntinos v Holmes a Court*

**S319/2011:** [\[2012\] HCATrans 103](#).

**Date heard:** 10 May 2012 – *Judgment Reserved*.

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

**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 conduct warranted to protect or further respondent's interests.

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

## Family Law

*Stanford v Stanford*

**P3/2012:** [\[2012\] HCATrans 206](#).

**Date heard:** 4 September 2012.

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

### Catchwords:

Family law – Property settlement – Property proceedings conducted by case guardians of H (aged 87) and W (aged 89) – Marriage still intact but spouses physically separated due to W's poor health – W died and Full Court allowed proceedings to be continued under s 79(8) of the *Family Law Act 1975* (Cth) by W's legal personal representatives – Full Court made orders under s 79 of Act requiring H upon his death to pay a judgment sum to W's estate – Whether Full Court empowered to make a property settlement order under s 79 to benefit W's estate where W's need no longer existed.

Constitutional law – Powers of Commonwealth Parliament – Sections 51(xxi) and 51(xxii) – Whether the Full Court's application of s 79 of the Act was invalid – Whether the Full Court's decision went beyond the power conferred on Family Court of Australia because the matter was not a matrimonial cause as specified in s 4(1)(ca) of the Act.

**Appealed from FamCA (FC):** 46 Fam LR 240; [2011] FLC 93-483; [2011] FamCAFC 208.

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## Statutes

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See also [Torts](#): *Newcrest Mining Limited v Thornton*

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## Taxation

*Commissioner of Taxation v Qantas Airways Ltd*  
**S47/2012:** [\[2012\] HCATrans 131](#); [\[2012\] HCATrans 132](#).

**Dates heard:** 4 & 5 June 2012 – *Judgment Reserved*.

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

**Catchwords:**

Taxation – Goods and services tax – Taxable supply – Contract for supply of services – Airline travel – Whether goods and services tax ("GST") payable – Passenger made booking and paid fare but did not take actual flight or receive refund – Whether taxable supply occurred when customer made reservation or whether actual travel required – Whether appellant's assessment "excessive" within s 14ZZK of the *Taxation Administration Act* 1953 (Cth) – Whether respondent made a "taxable supply" within the meaning of section 9-5 of *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.

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

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## Torts

*Barclay v Penberthy & Ors*  
**P55/2011;P57/2011:** [\[2012\] HCATrans 98](#).

**Date heard:** 1 May 2012 – *Judgment Reserved*.

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

**Catchwords:**

Torts – Negligence – Duty of care – Economic loss – Loss of services – action *per quod servitium amisit* – 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 appellant – Court of Appeal held appellant and first respondent owed third respondents duty of care, which they breached, causing economic loss to third respondents – Whether appellant owed third respondents duty of care in respect of economic loss – Whether existence of action *per quod servitium amisit* relevant in determining whether appellant owed third respondents duty of care – Whether existence of action *per quod servitium amisit* requires imposition of common law duty of care.

Torts – action *per quod servitium amisit* – Loss of services – Whether action *per quod servitium amisit* continues to exist in Australian common law – Whether appellant and first respondent liable to third respondents in action *per quod servitium amisit*.

Torts – Wrongful death – Rule in *Baker v Bolton* (1808) 1 Camp 493;[170 ER 1033] – Lord Campbell's Act – Fatal Accidents Act 1959 (WA) – Whether action for wrongful death exists at common law.

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

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*Newcrest Mining Limited v Thornton*

**P59/2011:** [\[2012\] HCATrans 130](#).

**Date heard:** 1 June 2012 – *Judgment Reserved*.

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

**Catchwords:**

Torts – Joint or several tortfeasors – Contribution – Satisfaction – Double recovery – Statutory prohibition – Respondent injured in workplace accident – Settlement reached with employer and consent judgment entered – Respondent subsequently issued summons against appellant, owner of mine site at which respondent injured – Appellant 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 – *Nau v Kemp & Associates* (2010)  
77 NSWLR 687.

Statutes – Statutory construction – Whether consent judgment is a  
judgment within the meaning of s 7(1)(b) of Act.

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

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## 3: ORIGINAL JURISDICTION

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

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### Constitutional Law

*TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia and Anor*  
**S178/2012.**

**Catchwords:**

Constitutional law – Judicial power of Commonwealth – Constitution, Ch III – Following an arbitral hearing conducted in Australia in accordance with an agreement between the parties, the second defendant was awarded damages and costs ('arbitral awards') – Second defendant commenced proceedings in the Federal Court of Australia seeking enforcement of the arbitral awards – Plaintiff resisted the enforcement proceedings – Whether Arts 35 and 36 of the UNCITRAL Model Law on International Commercial Arbitration, read with s 7 and Pt III of the *International Arbitration Act 1974* (Cth) ('the provisions') purport to confer the judicial power of the Commonwealth on arbitral tribunals contrary to the requirements of Ch III of the Constitution – Whether the provisions impermissibly interfere with the judicial power of the Commonwealth – Whether the provisions undermine the institutional integrity of Ch III Courts and are thus invalid.

This application for an order to show cause was filed in the Original Jurisdiction of the High Court of Australia.

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*X7 v Australian Crime Commission and Anor*  
**S100/2012.**

**Catchwords:**

Constitutional law – Judicial power of Commonwealth – Constitution, Ch III – By summons under s 28 of the *Australian Crime Commission Act 2002* (Cth) ('ACC Act') an ACC examiner required the plaintiff to attend before an examiner to give evidence on a set date – Before the set date, the Plaintiff was charged with offences under the *Criminal Code* (Cth) – Plaintiff subsequently interviewed by an ACC examiner – Whether Div 2 of Pt II of the ACC Act



empowers an ACC examiner to conduct an examination of a person charged where that examination concerns the subject matter of the offence so charged – If so, whether Div 2 of Pt II of the ACC Act invalid to the extent that it is contrary to Ch III of the Constitution.

This writ of summons was filed in the Original Jurisdiction of the High Court of Australia.

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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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### Constitutional Law

*Attorney-General for the State of South Australia v Corporation of the City of Adelaide & Ors*

**A22/2011:** [\[2012\] HCATrans 107](#).

**Date heard:** 11 May 2012 – *Special leave granted*

**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 – Local government – Clauses 2.3 and 2.8 of the Corporation of the City of Adelaide By-Law No 4 (Roads), inter alia, prohibited preaching, canvassing, haranguing, and distribution of printed matter without permission on roads ("by-law") – Application of constitutional freedom of communication about government and political matters where possible to seek judicial review of an administrative decision that refused consent to communicate – Whether by-law complies with limitations on legislative power delegated to local government under s 667(1)9(XVI) of the *Local Government Act 1934* (SA) – Whether impugned by-law effectively burdens freedom of communicating about government and political matters – Whether by-law reasonably appropriate and adapted to serve legitimate end in manner compatible with maintenance of representative and responsible government – Whether potential that by-law may be erroneously administered relevant to validity.

**Appealed from SASC (FC):** (2011) 110 SASR 334, (2011) 182 LGERA 181, (2011) 252 FLR 418, [2011] SASFC 84.

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*Monis v The Queen & Anor; Droudis v The Queen & Anor*

**S2/2012; S4/2012:** [\[2012\] HCATrans 161](#).

**Date heard:** 22 June 2012 – *Special leave granted*.

**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 – Applicants charged under s 471.12 of the *Criminal Code* 1995 (Cth) ("the Code") which creates an offence of using a postal or similar service in a way that reasonable persons would consider menacing, harassing or offensive – Whether s 471.12 of the Code invalid because it infringes the implied freedom of political communication about government or political matters.

**Appealed from NSW SC (CCA):** (2011) 256 FLR 28; [2011] NSWCCA 231.

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## Corporations Law

*Beck v Weinstock & Ors; Weinstock & Anor v Beck & Anor*  
**S311/2011:** [\[2012\] HCATrans 34](#); [\[2012\] HCATrans 148](#); [\[2012\] HCATrans 218](#).

**Dates heard:** 10 February 2012 & 7 September 2012 – *Special leave granted* – appeals to be listed consecutively.

### 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.

Corporations law – Management and administration – Directors and other officers – Appointment removal and retirement of directors – Power of court to rectify corporate act which is taken in contravention of corporate constitution – Section 1322(4) of the *Corporations Act* 2001 (Cth) confers on a court power to make an order that any "act, matter or thing purporting to be have been done" either under the *Corporations Act*, or "in relation to a corporation" is not invalid by reason of any "contravention of a provision of [the *Corporations Act*] or a provision of the constitution

of a corporation" – Whether purported act contravening constitution by person never validly appointed to office is a "contravention" that can be cured by s 1322(4) – Scope of power conferred by s 1322(4) of the *Corporations Act* 2001.

**Both matters appealed from NSW SC (CA):** (2011) 252 FLR 462, [2011] NSWCA 228; (2012) 87 ACSR 672, [2012] NSWCA 76.

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## Criminal Law

*Baini v The Queen*

**M145/2011:** [\[2012\] HCATrans 197](#).

**Date heard:** 17 August 2012 – *Special leave granted*.

### Catchwords:

Criminal law – Appeal – Application of 'proviso' – Criminal charges improperly joined – Blackmail – Applicant convicted of 35 counts of blackmail – Most counts referable to one complainant – Trial judge refused applicant's application to sever a single count ('count 50') relating to a second complainant pursuant to ss 371 and 372 of the *Crimes Act* 1958 (Vic) – Prejudice to applicant – Court of Appeal ordered retrial with respect to count 50 only, but not the other 49 counts – Whether the Court of Appeal erred, having determined that the trial judge was in error regarding non-severance of count 50, by failing to order a retrial on the other counts – Whether the Court of Appeal erred in deciding that there was a substantial miscarriage of justice by adopting the approach dictated in *Weiss v The Queen* (2005) 224 CLR 300 and thereby failing to properly apply s 276 of the *Criminal Procedure Act* 2009 (Vic).

**Appealed from Vic SC (CA):** [2011] VSCA 298.

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*Huynh v The Queen*

**A33/2011:** [\[2012\] HCATrans 212](#).

**Date heard:** 7 September 2012 – *Special leave granted*.

### Catchwords:

Criminal law – Appeal – Jury misdirection – Applicant and co-accused convicted of murder after trial before jury – Trial judge provided written directions on request from jury – Trial judge's directions omitted element of joint enterprise liability and failed to

apply substituted legal directions to the evidence against the applicant – Whether appellate court able to conclude no substantial miscarriage of justice.

**Appealed from SA SC (CCA):** (2011) 110 SASR 296; [2011] SASCFC 100.

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## Jurisdiction

*Commissioner of Police v Eaton and Anor*  
**S86/2012:** [\[2012\] HCATrans 189](#).

**Date heard:** 17 August 2012 – *Special leave granted*.

### Catchwords:

Jurisdiction – Subject matter jurisdiction – Industrial Relations Commission NSW ('IRC') – Probationary police officer employed and dismissed by Commissioner of Police ('Commissioner') under s 80(3) of the *Police Act* 1990 ('Police Act') – Probationary officer made an application to the IRC claiming dismissal was harsh, unreasonable or unjust under s 84(1) of the *Industrial Relations Act* 1996 (NSW) ('IR Act') – Whether the Industrial Relations Commission of NSW has the jurisdiction to hear and determine a claim alleging unfair dismissal under Part 6 of Chapter 2 of the IR Act brought by a probationary police officer employed and dismissed under s 80(3) of the Police Act 1990 – Whether Police Act contains an exhaustive regime for the appointment and termination of probationary police officers.

Statutes – Implied repeal – Inconsistency or incongruity between the provisions of Police Act and IR Act – Whether Parliament intended the specific regime for appointment and termination of probationary police officers contained in the Police Act to be affected by the general provisions of the IR Act.

**Appealed from NSW SC (CA):** [2012] NSWCA 30.

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## Native Title

*Karpany & Anor v Dietman*  
**A18/2012:** [\[2012\] HCATrans 210](#).

**Date heard:** 7 September 2012 – *Special leave granted*.

**Catchwords:**

Native title – Preservation of native title rights – Prior extinguishment – Native title right to take fish – Applicants convicted of possession of an aquatic resource contrary to s 72(2)(c) Fisheries Management Act 2007 (SA) – Whether native title rights to take fish extinguished by virtue of s 29 of the Fisheries Act 1971 (SA) – Whether s 72(2)(c) Fisheries Management Act 2007 (SA) inoperative due to inconsistency with s 221 of the Native Title Act 1993 (Cth).

**Appealed from SA SC (FC):** (2012) 112 SASR 51; (2012) 262 FLR 292; [2012] SASCFC 53.

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## Property

*Castle Constructions Pty Limited v Sahab Holdings Pty Ltd & Anor* **S110/2012** [\[2012\] HCATrans 223](#).

**Date heard:** 7 September 2012 – *Special leave granted*.

**Catchwords:**

Property – Real property – Powers of Registrar-General – On applicant's request the Registrar-General intentionally, albeit incorrectly, removed easement from applicant's property in the nature of a right of way benefitting neighbouring property – Subsequent purchaser of neighbouring property requested Registrar-General reinstate easement – Registrar-General declined – Whether, contrary to the principles of indefeasibility embodied in the *Real Property Act* 1900 (NSW) ('the Act') the easement should be reinstated to the Register – Whether Registrar-General has power to reinstate easement under s 12(1)(d) of the Act – Whether the term 'omission' in ss 12(1)(d) and 42(1)(a1) of the Act encompasses deliberate removal of easement from the Register – Whether a court has power to reinstate easement under s 138 of the Act – Whether proceedings barred by s 12A(3) of the Act by reason of a failure to respond to notice of intention to remove the easement.

**Appealed from NSW SC (CA):** (2011) 15 BPR 29,627; [2011] NSWCA 395; [2012] NSWCA 42; [2012] NSWCA 72

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## Statutes

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See also [Jurisdiction](#): *Commissioner of Police v Eaton and Anor*

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## Taxation

*Commissioner of Taxation v Consolidated Media Holdings Ltd*  
**S98/2012** [2012] HCATrans 186.

**Date heard:** 17 August 2012 – *Special leave granted.*

**Catchwords:**

Taxation – Income tax – Company share buy-back – Off-market purchase – Respondent at relevant time held 100% of issued shares in Crown Melbourne Ltd ('Crown') – Crown resolved to undertake a partial share buy-back – Agreement for off-market share buy-back subsequently entered into – Transfer of shares in Crown by the Respondent was executed for consideration of \$1 billion – Whether consideration constituted a dividend within the meaning of s 159GZZZP of the Income Tax Assessment Act 1936 (Cth) or a net capital gain treated as assessable income pursuant to Pt 3-1 of Income Tax Assessment Act 1997 (Cth) – Meaning of 'share capital account' in s 6D(1) of the Income Tax Assessment Act 1936 (Cth) – Income Tax Assessment Act 1936 (Cth), ss 6D, 159GZZZP, 159GZZZQ

**Appealed from FCA (FC):** (2012) 201 FCR 470; 87 ACSR 512; 2012 ATC 20-308; [2012] FCAFC 36.

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*Mills v Commissioner of Taxation*  
**S9/2012** [2012] HCATrans 185.

**Date heard:** 17 August 2012 – *Special leave granted.*

**Catchwords:**

Taxation – Income tax – Anti-avoidance provisions – Imputation benefits – Scope of *Income Tax Assessment Act* 1936 (Cth), s 177EA – Bank issued securities comprising a non-redeemable preference share 'stapled' to a subordinate note issued by Bank

from its New Zealand branch ('Securities'), so that it enjoyed both tax deductions on the distributions in New Zealand as well as a cost advantage in offering Australian residents an imputation benefit (or an equivalent adjustment) – Securities 'equity' and not 'debt' for income taxation purposes – Holders of the Securities may receive discretionary, non-cumulative, preferential franked distributions at a specified rate, payable as interest on the note unless an 'assignment event' occurs in which case the distribution is payable as a dividend on the preference share – Subsequent determination by Commissioner of Taxation denying franking credits to security-holders upon distribution – Whether bank entered into or carried out a scheme for disposition of membership interests for the purpose (not being an incidental purpose) of allowing security-holders to obtain an imputation benefit.

**Appealed from FCA (FC):** (2011) 198 FCR 89; [2011] FCAFC 158; 2011 ATC 20-295.

## Torts

*Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd & Ors* **S95/2012:** [\[2012\] HCATrans 216](#).

**Date heard:** 7 September 2012 – *Special leave granted*.

### Catchwords:

Torts – Negligence – Proportionate liability – Loan and mortgage transactions effected by forged signatures of purported borrower/mortgagor – Mortgage registered but respondent lender's interest not indefeasible as security for loan amount – Respondent's solicitors ('the applicant') liable to respondent for negligence in failing to word mortgage so as to be indefeasible as security for loan amount – Sections 34 and 35 of the *Civil Liability Act 2002* (NSW), inter alia, limit liability of a defendant who establishes that other parties are concurrently liable to a plaintiff in respect of the damage or loss that is the subject of plaintiff's claim against the defendant – Whether insolvent fraudsters concurrent wrongdoer together with applicant – What is the correct approach to identifying 'the damage or loss that is the subject of the claim' within the meaning of s 34(2) of the *Civil Liability Act 2002*.

Torts – Negligence – Damages – Financial loss – Loss of Interest component – Forged mortgage – Scope of liability under s 5D *Civil Liability Act 2002* (NSW) – Whether Court of Appeal erred in holding that damages payable by applicant included amounts referable to interest rate provided in forged mortgage.



**Appealed from NSW SC (CA):** [2012] NSWCA 38.

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## Trusts

*Montevento Holdings Pty Ltd & Anor v Scaffidi & Anor*  
**P35/2011:** [\[2012\] HCATrans 150](#)

**Date heard:** 22 June 2012 – *Special leave granted.*

**Catchwords:**

Trusts – Trustees – Eligibility for appointment as trustee – Construction of power of appointment in trust deed – Trust deed provides "[i]f, and so long as any individual Appointer is a Beneficiary, that individual shall not be eligible to be appointed as Trustee" – Second applicant ("E") beneficiary and appointer under trust deed – E sole shareholder and director of Montevento Holdings Pty Ltd ("the Company") – E in his capacity as appointer under trust deed sought to appoint the Company as trustee – Whether the Company eligible for appointment as trustee.

**Appealed from WA SC (CA):** [2011] WASCA 146.

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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* 8 [2012] HCAB 08.

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## 6: SPECIAL LEAVE REFUSED

### Sydney: 7 September 2012

#### *Civil*

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Singtel Optus Pty Ltd	Australian Rugby Football League Limited (S116/2012)	Federal Court of Australia [2012] FCAFC 59	Special leave refused with costs <a href="#">[2012] HCATrans 214</a>
Singtel Optus Pty Ltd	Australian Football League (S117/2012)	Federal Court of Australia [2012] FCAFC 59	Special leave refused with costs <a href="#">[2012] HCATrans 214</a>
Paul's Retail Pty Ltd	Sporte Leisure Pty Ltd (S113/2012)	Federal Court of Australia [2012] FCAFC 51	Special leave refused with costs <a href="#">[2012] HCATrans 219</a>
Stephen Parbery In His Capacity As Special Purpose Liquidator of One.Tel Limited (In Liquidation)	Publishing and Broadcasting Ltd (S115/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 79	Special leave refused with costs <a href="#">[2012] HCATrans 217</a>
SZQHH	Minister for Immigration and Citizenship (S104/2012)	Federal Court of Australia [2012] FCAFC 45	Special leave refused with costs <a href="#">[2012] HCATrans 220</a>
Tuitaalili	Minister for Immigration and Citizenship (S92/2012)	Federal Court of Australia [2012] FCAFC 24	Special leave refused with costs <a href="#">[2012] HCATrans 222</a>
Saraceni	Jones (P8/2012)	Supreme Court of Western Australia (Court of Appeal) [2012] WASCA 59	Special leave refused with costs <a href="#">[2012] HCATrans 215</a>

#### *Criminal*

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Calcutt	The Queen (S118/2012)	Supreme Court of New South Wales (Court of Criminal Appeal) [2012] NSWCCA 40	Stood over <a href="#">[2012] HCATrans 221</a>

### Canberra (by video link to Adelaide and Hobart): 7 September 2012

*Civil*

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
John Holland Pty Ltd	Coastal Dredging & Construction Pty Limited & Ors (B31/2012)	Supreme Court of Queensland (Court of Appeal) [2012] QCA 150	Discontinued
ACN 068 691 092 Pty Ltd & Anor	Plan 4 Insurance Services Pty Ltd & Ors (A8/2012)	Full Court of the Supreme Court of South Australia [2012] SASCF 25	Special leave refused with costs <a href="#">[2012] HCATrans 209</a>
Salia Property Pty Ltd	Commissioner of Highways (A13/2012)	Full Court of the Supreme Court of South Australia [2012] SASCF 33	Special leave refused with costs

*Criminal*

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Neill-Fraser	The State of Tasmania (H3/2012)	Supreme Court of Tasmania (Court of Criminal Appeal) [2012] TASCCA 2	Special leave refused <a href="#">[2012] HCATrans 213</a>