



HIGH COURT BULLETIN

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[2012] HCAB 11 (21 November 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

Case	Title
<i>Mansfield v The Queen; Kizon v The Queen</i>	Corporations Law
<i>Cooper v The Queen</i>	Criminal Law
<i>Montevento Holdings Pty Ltd v Scaffidi</i>	Equity
<i>RCB as litigation guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest</i>	Family Law
<i>Stanford v Stanford</i>	Family Law
<i>Mills v Commissioner of Taxation</i>	Taxation

2: Cases Reserved

Case	Title
<i>TCL Air Conditioner (Zhongshan) Co Ltd vThe Judges of the Federal Court of Australia and Anor</i>	Constitutional Law

<i>Beck v Weinstock & Ors; Weinstock & Anor v Beck & Anor</i>	Corporations Law
<i>Baini v The Queen</i>	Criminal Law
<i>X7 v Australian Crime Commission and Anor</i>	Statutes
<i>Commissioner of Taxation v Consolidated Media Holdings Ltd</i>	Taxation

3: Original Jurisdiction

Case	Title
<i>Tahiri v Minister for Immigration and Citizenship</i>	Citizenship and Migration
<i>Plaintiff M79 v Minister for Immigration and Citizenship</i>	Citizenship and Migration
<i>Fortescue Metals Group Limited and Ors v The Commonwealth of Australia</i>	Constitutional Law

4: Special Leave Granted

Case	Title
<i>Minister for Immigration and Citizenship v Li and Anor</i>	Citizenship and Migration
<i>SZOQQ v Minister for Immigration and Citizenship and Anor</i>	Citizenship and Migration
<i>Yates v The Queen (matter referred to Full Court)</i>	Criminal Law
<i>Aristocrat Technologies Australia Pty Ltd and Ors v Global Gaming Supplies Pty Ltd and Ors (matter referred to Full Court)</i>	Evidence

1: CASES HANDED DOWN

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

Corporations Law

Mansfield v The Queen; Kizon v The Queen
P60/2011; P61/2011: [\[2012\] HCA 49](#).

Judgment delivered: 14 November 2012.

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

Catchwords:

Corporations law – Insider trading – Appellants allegedly possessed inside information concerning listed public company – Appellants allegedly bought or procured purchase of shares in that company – Information was false – *Corporations Act 2001 (Cth)* prohibits certain conduct by person who possesses inside information about company – Whether person in possession of false information can contravene insider trading prohibitions.

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

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Criminal Law

Cooper v The Queen
S135/2012: [\[2012\] HCA 50](#).

Judgment delivered: 14 November 2012.

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

Catchwords:

Criminal law – Appeal – Misdirection – Application of "proviso" – Appellant convicted of murder – Prosecution alleged at trial that either appellant hit and killed deceased or alternatively another person hit and killed deceased pursuant to joint criminal enterprise with appellant – Jury instructed to consider case of joint criminal enterprise as alternative to primary case that appellant hit and

killed deceased – Court of Criminal Appeal held no evidence of joint criminal enterprise – Whether "no substantial miscarriage of justice" occurred.

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

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Equity

Montevento Holdings Pty Ltd v Scaffidi

P22/2012: [\[2012\] HCA 48](#).

Judgment delivered: 7 November 2012.

Coram: French CJ, Hayne, Crennan, Bell and Gageler JJ.

Catchwords:

Equity – Trusts and trustees – Trust deed for discretionary family trust provided that "[i]f, and so long as any individual Appointor is a Beneficiary that individual shall not be eligible to be appointed as a Trustee" – Individual who was appointor of trust was also beneficiary of trust – Whether corporation of which appointor was sole director and shareholder eligible to be appointed trustee of trust.

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

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Family Law

RCB as litigation guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest

B28/2012: [\[2012\] HCA 47](#).

Judgment delivered: 7 August 2012 (Orders), 7 November 2012 (Reasons).

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

Catchwords:

Family law – Children – *Family Law Act* 1975 (Cth) – Family Law (Child Abduction Convention) Regulations (Cth) – Convention on

the Civil Aspects of International Child Abduction – Wrongful removal – Order for return to country of habitual residence – Discretion to refuse to make return order – Objection of child to return – Ascertaining child's views and interests – Appointment of family consultant.

Practice and procedure – Procedural fairness – Mother removed children from country of habitual residence in Italy – Father sought children's return – Family Court has discretion not to make return order if person opposing return establishes child objects to being returned with strength of feeling beyond mere preference or ordinary wish and child has attained appropriate age and maturity – Family Court made return order notwithstanding children objected to their return – Family Court received evidence and report by family consultant about children's views – Children unsuccessfully applied at late stage to intervene by case guardian in proceedings between mother and father – No evidence of exceptional circumstances to suggest Family Court should have ordered independent representation for children under s 68L of *Family Law Act 1975* (Cth) – Whether children denied procedural fairness in making of return order – Whether procedural fairness required children to have independent legal representation.

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

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Stanford v Stanford

P23/2012: [\[2012\] HCA 52](#).

Date heard: 15 November 2012.

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

Catchwords:

Family law – Family Court – Jurisdiction – Proceedings to alter property interests – Husband and wife lived apart after wife admitted into full time residential care – Husband continued to live in matrimonial home and provide financially for wife's care – Husband and wife had separate wills in favour of their children from earlier marriages – Wife by case guardian applied for order altering interests in marital property between husband and wife – Wife died before Full Court of Family Court delivered judgment and daughters continued proceeding as wife's legal personal representatives – Whether "matrimonial cause" within definition of *Family Law Act 1975* (Cth) – Whether there was power to make property settlement order.

Family law – Proceedings to alter property interests – Property settlement order – Death of either party to pending proceedings – Whether it would have been just and equitable to make property settlement order had wife remained alive – Whether still appropriate despite wife's death to make property settlement order.

Constitutional law (Cth) – Powers of Commonwealth Parliament – Whether provision for adjudication of claim for property settlement order continued by legal personal representative is law with respect to marriage under s 51(xxi) or matrimonial causes under s 51(xxii).

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

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Taxation

Mills v Commissioner of Taxation

S225/2012: [\[2012\] HCA 51](#).

Judgment delivered: 14 November 2012.

Coram: French CJ, Hayne, Kiefel, Bell and Gageler JJ.

Catchwords:

Taxation – Income tax – Equity interests – Imputation system – Schemes to reduce income tax – Power of Commissioner under *Income Tax Assessment Act* 1936 (Cth), s 177EA to make determination that no imputation benefit to arise – Whether "having regard to the relevant circumstances" scheme entered into or carried out for purpose of enabling taxpayer to obtain imputation benefit – Whether purpose an "incidental purpose" – Relevance of distribution being traceable to source not taxed in Australia – Relevance of scheme resulting in reduced cost of capital to whether scheme results in "change" in financial position.

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

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2: CASES RESERVED

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

Constitutional Law

See also [Statutes](#): *X7 v Australian Crime Commission and Anor*

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

A16/2012: [\[2012\] HCATrans 233](#); [\[2012\] HCATrans 236](#).

Dates heard: 2 & 3 October 2012.

Coram: French CJ, 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 – 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") – 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] SASCFC 84.

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Monis v The Queen & Anor; Droudīs v The Queen & Anor

S172/2012;S179/2012: [\[2012\] HCATrans 238](#); [\[2012\] HCATrans 241](#).

Dates heard: 3 & 4 October 2012.

Coram: French CJ, 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 – Charges laid 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 is invalid to the extent it imposes criminal sanction for "offensive" use of a postal or similar service 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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TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia and Anor
S178/2012: [\[2012\] HCATrans 277](#).

Date heard: 6 November 2012.

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

Catchwords:

Constitutional law – Judicial power of the 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 – Proceedings commenced in the Federal Court of Australia seeking enforcement of arbitral awards – Plaintiff resisted enforcement proceedings – Whether *International Arbitration Act* 1974 (Cth) ("the Act"), including by its application of the UNCITRAL Model Law on International Commercial Arbitration, substantially impairs the institutional integrity of the Federal Court of Australia – Whether the Act impermissibly vests Commonwealth judicial power on arbitral tribunals.

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

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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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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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Corporations Law

Beck v Weinstock & Ors; Weinstock & Anor v Beck & Anor
S56/2012;S266/2012: [\[2012\] HCATrans 283](#); [\[2012\] HCATrans 284](#);
[\[2012\] HCATrans 285](#).

Dates heard: 14 & 15 November 2012.

Coram: French CJ, Hayne, Crennan, Kiefel and Gageler JJ.

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 2001* (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.

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

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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

Baini v The Queen

M87/2011: [\[2012\] HCATrans 281](#).

Date heard: 8 November 2012.

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

Catchwords:

Criminal law – Appeal – Application of s 276 of the *Criminal Procedure Act 2009* (Vic) – Criminal charges improperly joined – Appellant charged with 68 counts of blackmail – Most counts referable to one complainant – Trial judge refused appellant's application to sever a single count ("count 50") relating to a second complainant – Evidence admitted in proof of count 50 said to be prejudicial and not relevant to remaining counts – Appellant convicted on 35 counts – Court of Appeal ordered retrial with respect to count 50, but not the other 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 there was a substantial miscarriage of justice for the purposes of s 276 of the *Criminal Procedure Act* – Whether *Weiss v The Queen* (2005) 224 CLR 300 applicable.

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

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Defamation

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.

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Jurisdiction

Commissioner of Police v Eaton and Anor

S86/2012: [\[2012\] HCATrans 260](#).

Date heard: 11 October 2012.

Coram: Heydon, Crennan, Kiefel, Bell and Gageler JJ.

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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Statutes

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

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

X7 v Australian Crime Commission and Anor

S100/2012: [\[2012\] HCATrans 280](#).

Date heard: 7 November 2012.

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

Catchwords:

Statutes – *Australian Crime Commission Act* 2002 (Cth) ('ACC Act')

– ACC examiner required plaintiff to attend before examiner to give evidence – Before examination, plaintiff charged with offences – Plaintiff subsequently interviewed by ACC examiner – Whether authorisation of examination by ACCC Board authorised questioning of plaintiff on the subject of charged offences – Whether Div 2 of Pt II of the ACC Act empowers ACC examiner to examination of person charged where examination concerns the subject matter of the offence.

Constitutional law – Judicial power of Commonwealth – Constitution, Ch III – 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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Taxation

Commissioner of Taxation v Consolidated Media Holdings Ltd
S228/2012 [\[2012\] HCATrans 282](#).

Date heard: 13 November 2012.

Coram: French CJ, Hayne, Crennan Bell and Gageler JJ.

Catchwords:

Taxation – Income tax – Company share buy-back – Off-market purchase – Respondent held 100% of issued shares in Crown Melbourne Ltd ('Crown') – Crown resolved to undertake partial share buy-back – Off-market share buy-back agreement entered – Transfer of shares in Crown executed for consideration of \$1 billion – Whether consideration constituted 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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Torts

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.

Citizenship and Migration

Tahiri v Minister for Immigration and Citizenship
M77/2012

Catchwords:

Citizenship and Migration – Refugees – Family unit – Plaintiff an Afghani citizen – Plaintiff granted protection visa – Plaintiff's mother applied for a refugee and humanitarian visa – Mother's other children included in application – Visa refused due to failure to satisfy, inter alia, public interest criterion 4015 and clause 202.228 of sched 2 to Migration Regulations 1994 (Cth) – Public interest criterion 4015 requires, inter alia, an assessment that the law of an additional applicant's home country permits their removal and that each person who can lawfully determine where the additional applicant is to live consents to the grant of visa – Father missing for extended period of time – Delegate not satisfied that father was deceased and that certain Afghani court documents were genuine – Proper construction of public interest criterion 4015 – Whether the mother sole person who could lawfully determine where the children should live – Whether there was a breach of the rules of natural justice.

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

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Plaintiff M79 v Minister for Immigration and Citizenship
M79/2012

Catchwords:

Citizenship and Migration – Refugees – Plaintiff 'offshore entry person' – Plaintiff made a request for a refugee status assessment – Delegate determined that Plaintiff did not meet the definition of 'refugee' in Art 1A of the Refugees Convention – Plaintiff applied for independent merits review and subsequently judicial review – Judicial review decision remains reserved – Minister intervened under s 195A of the *Migration Act* 1958 (Cth) and granted the Plaintiff a temporary safe haven visa permitting a stay of seven

days and a bridging E visa permitting a stay of six months – Grant of temporary safe haven visa bars plaintiff's application for protection visa under s 91L of the *Migration Act* – Whether temporary safe heaven visa validly granted – Whether plaintiff's application for a protection visa valid.

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

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Constitutional Law

Fortescue Metals Group Limited and Ors v The Commonwealth of Australia

S163/2012

Catchwords:

Constitutional law (Cth) – Powers of the Commonwealth Parliament – Constitution, s 51(ii) – Taxation – Commonwealth Parliament passed several Acts establishing a 'minerals resource rent tax' – Whether any or all of *Minerals Resource Rent Tax (Imposition-Customs) Act 2012 (Cth) s 3*, *Minerals Resources Rent Tax (Imposition-Excise) Act 2012 (Cth) s 3*, *Minerals Resource Rent Tax (Imposition-General) Act 2012 (Cth) s 3* (collectively 'the Acts') are invalid to the extent that they discriminate between the States contrary to s 51(ii) of the Constitution.

Constitutional law (Cth) – Constitution, s 99 – Prohibition on Commonwealth preference in trade, commerce or revenue – Whether any or all of the Acts give preference to one State over another.

Constitutional law (Cth) – *Melbourne Corporation* doctrine – Whether any or all of the Acts discriminate against or place a particular burden upon the operations or activities of the States, as to be beyond the legislative power of the Commonwealth.

Constitutional law (Cth) – Constitution, s 91 – Section 91 provides, inter alia, that '[n]othing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals' – Whether any or all of the Acts contravene s 91.

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.

Administrative Law

See also [Citizenship and Migration](#): *Minister for Immigration and Citizenship v Li and Anor*

Citizenship and Migration

Minister for Immigration and Citizenship v Li and Anor
B34/2012: [\[2012\] HCATrans 295](#).

Date heard: 16 November 2012 – *Special leave granted*.

Catchwords:

Citizenship and Migration – Immigration – Migration Review Tribunal ('MRT') – Procedural fairness – Right to be heard – Hearings – Respondent unsuccessfully applied for a 'Skilled Independent Overseas Student (Residence) (Class DD) Visa' – Respondent requested MRT to forbear from making review decision until final outcome of a second skills assessment by Trades Recognition Australia – Respondent sought to address procedural errors by Trades Recognition Australia – MRT made decision without second assessment – Whether MRT's refusal to adjourn denied applicant procedural fairness – Whether application doomed to failure – Whether ss 353 and 357A(3) of the *Migration Act* 1958 (Cth) impose requirements capable of supporting substantive grounds of review for jurisdictional error – *Migration Act* 1958 (Cth), ss 348, 353, 357A, 360.

Administrative law – *Wednesbury unreasonableness* – Proper test for unreasonableness in relation to adjournment – Whether failure to adjourn unreasonable.

Appealed from FCA (FC): (2012) 202 FCR 387; (2012) 127 ALD 238; (2012) 289 ALR 210; [2012] FCAFC 74.

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SZOQQ v Minister for Immigration and Citizenship and Anor
S97/2012: [\[2012\] HCATrans 292](#).

Date heard: 16 November 2012 – *Special leave granted*.

Catchwords:

Citizenship and Migration – Refugees – Refoulement – Applicant an Indonesian national convicted of serious criminal offences in Australia – Applicant found to have real chance of being persecuted if returned – Applicant was excluded by Art 33(2) of the Refugees Convention because of serious criminal convictions and threat posed to Australian community – Whether Minister required to take into account the likely consequence of returning a non-citizen to his or her home country when determining if Article 33(2) of the Refugees Convention applies to deny the benefit of non-refoulement – Convention Relating to the Status of Refugees 1951, Arts 33(1), 33(2) – *Migration Act* 1958 (Cth), ss 36 & 65.

Appealed from FCA (FC): (2012) 202 FCR 387; (2012) 127 ALD 238; (2012) 289 ALR 210; [2012] FCAFC 74.

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Constitutional Law

See also **Statutes:** *Maloney v The Queen*

Pompano Pty Ltd and Finks Motorcycle Club, Gold Coast Chapter v Assistant Commissioner Michael James Condon
B44/2012: [\[2012\] HCATrans 242](#).

Date heard: 5 October 2012 - *Cause Removed from the Supreme Court of Queensland*.

Catchwords:

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III – Vesting of federal jurisdiction in State courts – *Criminal Organisation Act* 2009 (Q) ('the Act') – The Act creates a scheme whereby the Commissioner of the Police Service ('the Commissioner') may apply to the Supreme Court for a declaration that an organisation is a 'criminal organisation' – The Act

contemplates, inter alia, that in any substantive application under the Act that the Commissioner may rely on 'criminal intelligence' which cannot be disclosed to the respondent or the respondent's legal representative – Whether requirements, taken individually or in their cumulative operation, placed on Supreme Court in deciding if an organisation should be declared, repugnant to, or incompatible with, institutional integrity.

Removed from Qld SC.

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Criminal Law

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] SASFC 100.

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Yates v The Queen

P21/2012: [\[2012\] HCATrans 286.](#)

Date heard: 16 November 2012 – *Referred to Full Court*

Catchwords:

Criminal law – Sentencing – Detained during the Governor's pleasure – In 1987 Applicant was found guilty of one count of deprivation of liberty and one count of aggravated sexual assault upon a child under the age of 13 years – Applicant sentenced to seven years imprisonment on each count, to be served concurrently, followed by an indeterminate sentence imposed under s 662 of the *Criminal Code* (WA) – Section 662 of the *Criminal Code*

(WA) empowered a court in certain circumstances to sentence a person to be detained during the Governor's pleasure – Whether it was open to sentence the applicant for an indeterminate period having regard to the applicant's antecedents, health and mental condition – Whether s 662 of the *Criminal Code* can be used for the purpose of manipulating the period of time which an offender must serve on parole following the expiration of a future term.

Appealed from WA SC (CCA): (1987) 25 A Crim R 361.

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Evidence

Aristocrat Technologies Australia Pty Ltd and Ors v Global Gaming Supplies Pty Ltd and Ors

S168/2012: [\[2012\] HCATrans 296](#).

Date heard: 16 November 2012 – *Referred to Full Court*

Catchwords:

Evidence – Tendency evidence – *Evidence Act* 1995 (Cth), s 97 – Applicants engaged in business of manufacturing and selling electronic gaming machines – Applicants alleged that the respondents infringed copyright under s 38 of the *Copyright Act* 1968 (Cth) by selling counterfeited gaming machines – Infringement of copyright in circumstances where respondent 'knew, or ought reasonably to have known, the making of the article constituted an infringement of copyright' – Email chain that demonstrated that the respondents had a tendency to engage in infringing transactions – Whether emails inadmissible tendency evidence – Whether the limitation on tendency evidence in s 97 of the *Evidence Act* 1995 applies to evidence of a person's awareness or state of mind about that person's own prior activities where the issue is the person's knowledge or reasons to believe under s 38 of the *Copyright Act* 1968 (Cth).

Intellectual Property – Copyright – *Copyright Act* 1968 (Cth), s 38 – Infringement – Infringement by dealing – Whether respondents infringed applicants' copyright.

Appealed from FCA (FC): (2012) 95 IPR 242; [2012] FCAFC 34.

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Intellectual Property

See also [Evidence](#): *Aristocrat Technologies Australia Pty Ltd and Ors v Global Gaming Supplies Pty Ltd and Ors*

Native Title

Akiba and Mye on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia & Ors
B19/2012: [\[2012\] HCATrans 245](#).

Date heard: 5 October 2012 – *Special leave granted*.

Catchwords:

Native title – Preservation of native title rights – Prior extinguishment – Native title claim over maritime area – Native title right to take fish and other aquatic life for commercial purposes – Whether native title rights extinguished by fisheries legislation prohibiting, in the absence of a licence, taking of such resources for commercial purposes – Whether rights to take resources from an area constitute native title rights or interests within the meaning of s 223(1) of the *Native Title Act 1993* (Cth) where those rights are held under traditional laws and customs on the basis of a 'reciprocal relationship' with a holder of 'occupation based' native title rights.

Appealed from FCA (FC): (2012) 289 ALR 400, [2012] FCAFC 25.

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

Date heard: 7 September 2012 – *Referred to Full Court*

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

Maloney v The Queen
B27/2012: [\[2012\] HCATrans 243](#).

Date heard: 5 October 2012 – *Special leave granted*.

Catchwords:

Statutes – Interpretation – Racial discrimination – The community area of the Palm Island Shire Council declared a 'restricted area' pursuant to s 147G of the *Liquor Act* 1992 (Q) – Applicant convicted of possessing liquor in the Palm Island restricted area pursuant to s 168B(1) of the *Liquor Act* – Whether liquor restrictions contravene s 10 of the *Racial Discrimination Act* 1975 (Cth) – Whether liquor restrictions valid as special measure within the meaning of s 8 of the *Racial Discrimination Act*.

Constitutional law (Cth) – Inconsistency between Commonwealth and State laws – Whether State law inconsistent with Commonwealth law and invalid to extent of inconsistency.

Appealed from Qld SC (CA): (2012) 262 FLR 172; [2012] QCA 105.

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Torts

Beckett v The State of New South Wales

S144/2012: [\[2012\] HCATrans 252](#).

Date heard: 5 October 2012 – *Application referred to Full Court.*

Catchwords:

Torts – Malicious Prosecution – Elements of action – Applicant convicted of multiple charges – Applicant subsequently acquitted of one charge and remaining convictions quashed and new trial ordered – Prosecution decided not to proceed with outstanding charges – Applicant brought action for malicious prosecution – Whether plaintiff must prove innocence – Whether *nolle prosequi* filed with court or whether alternative characterisation appropriate – Whether *Davis v Gell* (1924) 35 CLR 275 should be overruled.

Appealed from NSW SC (CA): [2012] NSWCA 114.

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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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Wallace v Kam

S122/2012: [\[2012\] HCATrans 251](#).

Date heard: 5 October 2012 – *Special leave granted*.

Catchwords:

Torts – Negligence – Causation – Medical practitioner – Failure to warn – Duty to warn patient of material risks inherent in applicant's proposed back surgery – Multiple material risks – Applicant suffered nerve damage on account of one of several risks materialising – Applicant argued that he would not have undergone surgery if told of all risks – Whether failure to warn of material risks that did not eventuate causally connected to damage – *Civil Liability Act 2002* (NSW), s 5D.

Appealed from NSW SC (CA): [2012] Aust Torts Reports 82-101, [2012] AMLC 30-032, [2012] NSWCA 82.

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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* 10 [2012] HCAB 10.

6: SPECIAL LEAVE REFUSED

Canberra: 13 November 2012

(Publication of reasons)

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Hill	Lang (A12/2012)	Federal Court of Australia [2012] FCA 349	Application Dismissed [2012] HCASL 139
Russell	Polites Investments Pty Ltd (A15/2012)	Federal Court of Australia [2012] FCA 11	Application Dismissed [2012] HCASL 140
Ashton	Dorante & Anor (B40/2012)	Supreme Court of Queensland (Court of Appeal) [2012] QCA 175	Application Dismissed [2012] HCASL 141
Slaveski	Smith & Anor (M29/2012)	Supreme Court of Victoria (Court of Appeal) [2012] VSCA 25	Application Dismissed [2012] HCASL 142
Segar	The Queen (M39/2012)	Supreme Court of Victoria (Court of Appeal) (no media neutral citation)	Application Dismissed [2012] HCASL 143
Slaveski	The Queen (on the Application of the Prothonotary of the Supreme Court of Victoria) & Anor (M42/2012)	Supreme Court of Victoria (Court of Appeal) [2012] VSCA 48	Application Dismissed [2012] HCASL 144
De van der Schueren	Perpetual Trustee Company Ltd (M51/2012)	Supreme Court of Victoria (Court of Appeal) [2012] VSCA 86	Application Dismissed [2012] HCASL 145
SZQLR	Minister for Immigration and Citizenship & Anor (M52/2012)	Federal Court of Australia [2012] FCA 541	Application Dismissed [2012] HCASL 146
Karam	Lennon Mazzeo (M60/2012)	Supreme Court of Victoria (Court of Appeal) [2012] VSCA 98	Application Dismissed [2012] HCASL 147
Karam	Palmone Shoes Pty Ltd & Anor (M61/2012)	Supreme Court of Victoria (Court of Appeal) [2012] VSCA 97	Application Dismissed [2012] HCASL 148

6: Special Leave Refused

Patel & Anor	Minister for Immigration and Citizenship & Anor (P14/2012)	Federal Court of Australia [2012] FCA 376	Application Dismissed [2012] HCASL 149
SZQIJ	Minister for Immigration and Citizenship & Anor (S140/2012)	Federal Court of Australia [2012] FCA 429	Application Dismissed [2012] HCASL 150
SZQUM	Minister for Immigration and Citizenship & Anor (S156/2012)	Federal Court of Australia [2012] FCA 493	Application Dismissed [2012] HCASL 151
SZQPB	Minister for Immigration and Citizenship & Anor (S164/2012)	Federal Court of Australia [2012] FCA 539	Application Dismissed [2012] HCASL 152
SZQBM	Minister for Immigration and Citizenship & Anor (S177/2012)	Federal Court of Australia [2012] FCA 551	Application Dismissed [2012] HCASL 153
Valder	Wolak & Anor (S180/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 189	Application Dismissed [2012] HCASL 154
Sydney Markets Ltd	Wilson (S272/2011)	Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 201	Application Dismissed with costs [2012] HCASL 155
H.M. Australia Holdings Pty Ltd	Edelbrand Pty Ltd t/as Domus Homes (S91/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 31	Application Dismissed with costs [2012] HCASL 156
De Bortoli Wines Pty Limited	HIH Insurance Limited (In Liquidation) & Ors (S94/2012)	Federal Court of Australia [2012] FCAFC 28	Application Dismissed with costs [2012] HCASL 157
Sherrard	The Queen (B12/2012)	Supreme Court of Queensland (Court of Appeal) [2004] QCA 425	Application Dismissed [2012] HCASL 158

Sydney: 16 November 2012

Civil

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Verey	Andy's Earthworks Pty Ltd (S90/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 32	Special leave refused with costs [2012] HCATrans 297
SZQGJ	Minister for Immigration and Citizenship & Anor (S143/2012)	Federal Court of Australia [2012] FCA 434	Special leave refused with costs
Tasty Chicks Pty Limited & Ors	Chief Commissioner of State Revenue (S192/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 181	Special leave refused with costs [2012] HCATrans 293
Hammond	JP Morgan Trust Australia Limited & Anor (S298/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 295	Special leave refused with costs [2012] HCATrans 299
Hammond	JP Morgan Trust Australia Limited & Anor (S306/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 295	Special leave refused with costs [2012] HCATrans 299

Criminal

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Krecichwost	The Queen (S167/2012)	Supreme Court of New South Wales (Court of Criminal Appeal) [2012] NSWCCA 101	Special leave refused [2012] HCATrans 294

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Canberra (by video link to Perth): 16 November 2012

Civil

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Wyatt	MR & RC Smith Pty Ltd t/as Ultra Tune (Osborne Park) (P20/2012)	Supreme Court of Western Australia (Court of Appeal) [2012] WASCA 110	Special leave refused with costs [2012] HCATrans 291

Criminal

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
MAS	The State of Western Australia (P6/2012)	Supreme Court of Western Australia (Court of Appeal) [2012] WASCA 36	Special leave refused [2012] HCATrans 290
Bennett	The State of Western Australia (P9/2012)	Supreme Court of Western Australia (Court of Appeal) [2012] WASCA 70	Special leave refused [2012] HCATrans 289
Burke	Corruption and Crime Commission (P7/2012)	Supreme Court of Western Australia (Court of Appeal) [2012] WASCA 49	Special leave refused [2012] HCATrans 288
Australian Crime Commission	Wallace & Anor (P17/2012)	Supreme Court of Western Australia (Court of Appeal) [2012] WASCA 103	Special leave refused with costs [2012] HCATrans 287
Australian Crime Commission	Fagan & Anor (P18/2012)	Supreme Court of Western Australia (Court of Appeal) [2012] WASCA 103	Special leave refused with costs [2012] HCATrans 287
Australian Crime Commission	Marrapodi & Anor (P19/2012)	Supreme Court of Western Australia (Court of Appeal) [2012] WASCA 103	Special leave refused with costs [2012] HCATrans 287

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