



# HIGH COURT BULLETIN

Produced by the Legal Research Officer,  
High Court of Australia Library  
[2015] HCAB 6 (25 August 2015)

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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# 1: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the August 2015 sittings.

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## Criminal Law

*Police v Dunstall*

**A5/2015:** [\[2015\] HCA 26.](#)

**Judgment delivered:** 5 August 2015.

**Coram:** French CJ, Kiefel, Bell, Gageler, Keane and Nettle JJ.

### Catchwords:

Criminal law – Evidence – Judicial discretion to admit or exclude evidence – Section 47B(1)(a) of *Road Traffic Act 1961* (SA) created offence for person to drive motor vehicle while prescribed concentration of alcohol present in blood – Section 47K(1) of Act created presumption that breath analysis reading corresponded to blood alcohol level at time of analysis – Section 47K(1a) of Act provided presumption could only be rebutted if defendant arranged for blood sample to be taken in accordance with prescribed procedures and adduced evidence that analysis of blood demonstrates that breath analysis reading instrument gave exaggerated reading – Where respondent charged with offence against s 47B(1)(a) and pleaded not guilty – Where breath analysis reading indicated blood alcohol level above prescribed concentration – Where respondent arranged for blood sample to be taken but sample unable to be analysed through no fault of appellant or respondent – Where appellant sought to tender evidence of breath analysis reading – Whether there exists residual common law discretion to exclude lawfully obtained, probative, non-confessional evidence unaffected by impropriety or risk of prejudicial misuse where admission would render trial of accused unfair – Whether respondent's trial unfair in relevant sense if evidence of breath analysis reading admitted.

Words and phrases – "Bunning v Cross discretion", "Christie discretion", "forensic unfairness", "general unfairness discretion", "Lee discretion", "unfair trial".

**Held:** Appeal allowed.

**Appealed from SASC (FC):** (2014) 120 SASR 88; [\[2014\] SASFC 85.](#)

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*Smith v The Queen*

**[B18/2015](#)**: [\[2015\] HCA 27](#).

**Judgment delivered:** 5 August 2015.

**Coram:** French CJ, Kiefel, Bell, Gageler and Gordon JJ.

**Catchwords:**

Criminal law – Appeal – Appeal against conviction – Fair trial – Procedural fairness – Jury disclosed interim votes and interim voting patterns to judge – Judge did not disclose jury's interim votes or voting patterns to counsel – Judge's obligation to inform counsel of precise terms of jury's questions – Whether appellant denied procedural fairness by non-disclosure of jury's interim votes and voting patterns – Whether jury's interim votes and voting patterns relevant consideration to issue before court – Whether jury's interim votes and voting patterns relevant to discretion to permit majority verdict or discharge jury – Whether disclosure of jury's interim votes and voting patterns necessary for proper performance of jury's functions.

Criminal law – Confidentiality of jury deliberations – Directions to jury – Directions not to communicate or reveal interim votes or interim voting patterns to court – Whether appropriate for trial judge to inquire of jury as to interim votes or voting patterns.

Words and phrases – "capacity to influence the trial judge's exercise of discretion", "confidentiality of jury deliberations", "interim votes", "interim voting patterns", "necessary for the proper performance of the jury's functions", "procedural fairness".

**Held:** Appeal dismissed.

**Appealed from QSC (CA):** [\[2014\] QCA 277](#).

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*Filippou v The Queen*

**[S59/2015](#)**: [\[2015\] HCA 29](#).

**Judgment delivered:** 12 August 2015.

**Coram:** French CJ, Bell, Gageler, Keane and Nettle JJ.

**Catchwords:**

Criminal law – Appeal – Appeal against conviction – Trial by judge alone – Application of Criminal Appeal Act 1912 (NSW), s 6(1) in appeal from trial by judge alone – Application of "proviso".

Criminal law – Appeal – Appeal against sentence – Aggravating and mitigating circumstances – Onus and standard of proof – Where not proved beyond reasonable doubt that appellant brought murder weapon to scene and not proved on balance of probabilities that deceased brought murder weapon to scene – Whether sentencing judge bound to take view of facts most favourable to offender.

Words and phrases – "miscarriage of justice", "substantial miscarriage of justice".

**Held:** Appeal dismissed.

**Appealed from NSWSC (CCA):** [\[2013\] NSWCCA 92](#).

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## Estoppel

*Tomlinson v Ramsey Food Processing Pty Limited*  
**S7/2015:** [\[2015\] HCA 28](#).

**Judgment delivered:** 10 April 2015.

**Coram:** French CJ, Bell, Gageler, Keane and Nettle JJ.

### **Catchwords:**

Estoppel – Issue estoppel – Appellant employed at abattoir operated by respondent – Appellant subsequently employed by third party providing labour services to respondent – Appellant complained to Fair Work Ombudsman that entitlements not paid upon termination of employment – Fair Work Ombudsman commenced proceedings in Federal Court of Australia against respondent – Federal Court determined respondent, not third party, was appellant's employer – Appellant commenced proceedings claiming damages from respondent for personal injury sustained at abattoir – Appellant argued third party, not respondent, was his employer – Respondent argued appellant was issue estopped by reason of Federal Court proceedings from denying that respondent was appellant's employer – Whether appellant was issue estopped by reason of declarations and orders made in Federal Court proceedings – Whether appellant was privy in interest with Fair Work Ombudsman in Federal Court proceedings.

Words and phrases – "claim under or through", "estoppel", "issue estoppel", "on behalf of", "privity of interest", "privy in interest".

**Held:** Appeal allowed.

**Appealed from NSWSC (CA):** [\[2014\] NSWCA 237](#).

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## Taxation

*Ausnet Transmission Group Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia*

**M139/2014:** [\[2015\] HCA 25](#).

**Judgment delivered:** 5 August 2015.

**Coram:** French CJ, Kiefel, Bell, Gageler and Nettle JJ.

### Catchwords:

Taxation – Income tax – Allowable deductions – Charges were imposed on holder of electricity transmission licence pursuant to State regulatory framework – Taxpayer purchased assets of electricity transmission business including electricity transmission licence – Taxpayer required to pay charges to State of Victoria under asset sale agreement – Whether payments of charges were outgoings "of capital, or of a capital nature" and therefore not tax deductible.

Words and phrases – "capital", "capital account", "of a capital nature", "revenue account".

**Held (4:1):** Appeal dismissed.

**Appealed from FCA (FC):** (2014) 220 FCR 355; [\[2014\] FCAFC 36](#).

**Note:** *Ausnet Transmission Group Pty Ltd* formally *SPI Powernet Pty Ltd*.

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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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### Constitutional Law

*McCloy & Ors v State of New South Wales & Anor*

**S211/2014:** [\[2015\] HCATrans 141](#); [\[2015\] HCATrans 142](#).

**Date heard:** 10 June 2015; 11 June 2015.

**Coram:** French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

**Catchwords:**

Constitutional Law – Operation and effect of Commonwealth Constitution – Restrictions on Commonwealth and State legislation – Rights and freedoms implied in Commonwealth Constitution – Freedom of political communication – Whether Divs 2A and 4A of Pt 6, and s 96E in Div 4 of Pt 6 of the *Funding Expenditure and Disclosure Act* 1981 (NSW) infringe the implied freedom of communication regarding political or governmental matters.

Statutes – Acts of Parliament – Validity of legislation – *Election Funding Expenditure and Disclosure Act* 1981 (NSW) – Where the first plaintiff was subjected to compulsory examination pursuant to s 30 of the *Independent Commission Against Corruption Act* 1988 (NSW) by the second defendant concerning the circumstances of a donation made for the benefit of persons including a candidate in connection with the 2011 New South Wales election in breach of the *Funding Expenditure and Disclosure Act* 1981 (NSW) – Where the plaintiffs claim the provisions that they purportedly breached, Divs 2A and 4A of Pt 6, and s 96E in Div 4 of Pt 6 of the Act infringe the implied freedom of communication regarding political or governmental matters.

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### Contracts

*Wright Prospecting Pty Limited v Mount Bruce Mining Pty Limited & Anor; Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited & Anor*

**S102/2015; S99/2015:** [\[2015\] HCATrans 188](#); [\[2015\] HCATrans 189](#).

**Dates heard:** 12 August 2015; 13 August 2015.

**Coram:** French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

**Catchwords:**

Contracts – General contractual principles – Construction and interpretation of contracts – Where appellant and respondents entered into written agreements which allowed for rights to particular reserves to be divided – Whether Mount Bruce Mining Pty Limited was required to pay royalties that were payable on mining activities undertaken in the Channar region – Whether a strict and narrow construction of language in a commercial agreement can account for the purposes or objects of the agreement.

**Appealed from NSWSC (CA):** [\[2014\] NSWCA 323](#).

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## Patents

*AstraZeneca AB & Anor v Apotex Pty Ltd; AstraZeneca AB & Anor v Watson Pharma Pty Ltd; AstraZeneca AB & Anor v Ascent Pharma Pty Ltd*

[S54/2015](#); [S55/2015](#); [S56/2015](#): [\[2015\] HCATrans 106](#); [\[2015\] HCATrans 107](#).

**Date heard:** 13 May 2015; 14 May 2015.

**Coram:** French CJ, Kiefel, Gageler, Keane and Nettle JJ.

**Catchwords:**

Intellectual property – Patents – Requirements for a valid patent – Novelty – Prior art information – Inventive step – Common general knowledge – ss 7(2), 7(3), 22A and 138(3)(a) of the *Patents Act* 1990 (Cth) (“Act”) – Where applicants are the patentees and exclusive licensees of Australian Patent No 051 which relates to a method of treating high cholesterol – Whether the patent was successfully assigned to appellants – Where there was an order for the revocation of the patent on the basis that the claimed invention lacked an inventive step pursuant to ss 7(2) and 7(3) as the invention was obvious in light of common general knowledge and available prior art information – Whether prior art information and common general knowledge can be considered together pursuant to s 7(3) of the Act – Whether when assessing whether an invention is obvious in light of common general knowledge and any s 7(3) information, can sources of prior art information that teach towards an invention as the only avenues available to a skilled person be considered in disregard of any consideration of alternative sources – Whether there can be an order for revocation pursuant to s



138(3)(a) of the Act – Whether s 22A of the Act was applicable in the current case.

**Appealed from FCA (FC):** (2014) 312 ALR 1; (2014) 107 IPR 177; [\[2014\] FCAFC 99](#).

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*D’Arcy v Myriad Genetics & Anor*

**S28/2015:** [\[2015\] HCATrans 146](#); [\[2015\] HCATrans 147](#).

**Date Heard:** 16 June 2015; 17 June 2015.

**Coram:** French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

**Catchwords:**

Intellectual property – Patents – Requirements for a valid patent – Human beings and their biological processes – s 18(1)(a) of the *Patents Act* 1990 (Cth) – Where appellant submitted that the Full Court of the Federal Court erred in holding that each of claims 1 - 3 of Australian Patent No 686004 claimed a patentable invention being a manner of manufacture – Australian Patent No 686004 is described as the identification of “a human breast and ovarian cancer disposing gene (BRCA1)” – Whether claims 1 – 3, which relate to isolated nucleic acid, are claims for a manner of manufacture for the purposes of s 18(1)(a) of the *Patents Act* 1990 (Cth).

**Appealed from FCA (FC):** (2014) 224 FCR 479; (2014) 313 ALR 627; (2014) 107 IPR 478; [\[2014\] FCAFC 115](#).

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## Procedure

*PT Bayan Resources TBK v BCBC Singapore Pte Ltd & Ors*

**P14/2015:** [\[2015\] HCATrans 181](#); [\[2015\] HCATrans 184](#).

**Date heard:** 10 August 2015; 11 August 2015.

**Coram:** French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

**Catchwords:**

Procedure – Judgments and orders – Freezing orders – Jurisdiction of the Supreme Court to make freezing orders – Order 52A *Rules of the Supreme Court of Western Australia* 1971 (WA) (“Rules”) –

Where first respondent commenced proceedings against appellant in the High Court of Singapore – Where no decision has been handed down by the High Court of Singapore in respect of the matter – Where first respondent commenced proceedings in Western Australia against appellant for an order to freeze the appellant’s assets in Western Australia – Where no other proceedings aside from the application for freezing orders have been commenced or will be commenced unless first respondent is successful in its action in the High Court of Singapore – Whether order 52A of the Rules is inconsistent with Pt 2 of the *Foreign Judgments Act 1991 (Cth)* (“Act”) for the purpose of s 109 of the *Constitution* in circumstances where no substantive proceedings apart from the application for the freezing order have been or are to be commenced – Whether order 52A is *ultra vires* pursuant to s 17 of the Act – Whether freezing orders with respect to a prospective foreign judgment are within the inherent or implied jurisdiction of Australian superior courts.

**Appealed from WASC (CA):** (2014) 288 FLR 299; [\[2014\] WASCA 178](#).

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## Statutes

*Duncan v Independent Commission Against Corruption*  
**S101/2015:** [\[2015\] HCATrans 170](#).

**Procedure in the High Court:** *Orders made on 25 May 2015 removing matter into the High Court under section 40 of the Judiciary Act 1903 (Cth).*

**Date heard:** 5 August 2015.

**Coram:** French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

### Catchwords:

Statutes – *Independent Commission Against Corruption Act 1988 (NSW)* (“Act”) Pt 13 of Sch 4 – Where Pt 13 of the Act allows for the Independent Commission Against Corruption (“ICAC”) to act on the assumption that the definition of “corrupt conduct” in s 8(2) of the Act extends to conduct that adversely affects or could adversely affect the efficacy of the exercise of official function – Whether Pt 13 ousts the power of the Supreme Court of New South Wales to grant relief for a specific category of jurisdictional error of respondent – Whether Pt 13 is an impermissible command or direction by the Parliament of New South Wales to the Courts of New South Wales and any other Courts empowered to hear appeals.

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## Torts

*Correy Fuller-Lyons by his tutor Nita Lyons v State of New South Wales*

**S81/2015:** [\[2015\] HCATrans 148.](#)

**Date Heard:** 18 June 2015.

**Coram:** French CJ, Bell, Gageler, Keane and Nettle JJ.

**Catchwords:**

Torts - Negligence – Where appellant was injured after falling from a moving train which was operated by respondent – Where trial judge found that appellant had fallen from the doors of the train as a consequence of respondent’s negligence – Where the Court of Appeal reversed this finding based on the possibility of other hypothetical occurrences – Whether the Court of Appeal was entitled reject the findings of the trial judge based on these other possibilities.

**Appealed from NSWSC (CA):** [\[2014\] NSWCA 424.](#)

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*Alcan Gove Pty Ltd v Zabic*

**D5/2015:** [\[2015\] HCATrans 169.](#)

**Date heard:** 4 August 2015.

**Orders pronounced:** 12 August 2015 – *Appeal dismissed with costs.*

**Coram:** French CJ, Kiefel, Bell, Keane and Nettle JJ.

**Catchwords:**

Torts – Negligence – Essentials of action for negligence – Damage – *Return to Work Act* 1986 (NT) (“Act”) ss 52, 189(1)- Where respondent was employed by appellant between 1974 – 1977 and regularly removed and replaced insulation products which contained asbestos – Where between November 2013 and January 2014 respondent began to experience chest pains and breathlessness which were found to be symptoms of malignant mesothelioma – Where respondent brought an action for common law damages

arising out of appellant's negligence – Where s 52 of the Act abolished common law damages claims against employers for injuries or diseases arising after 1 January 1987 – When dealing with an injury or a disease of insidious onset, when has sufficient damage been suffered to give rise to a cause of action – Whether liability for negligently-inflicted mesothelioma arise at the time the asbestos was inhaled or does it arise when the symptoms become apparent.

**Appealed from NTSC (CA): [\[2015\] NTCA 2](#).**

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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

*M68/15 v Minister for Immigration and Border Protection & Ors*  
**M68/2015:** *Special case.*

#### Catchwords

Constitutional law – Where plaintiff was an “unauthorised maritime arrival” pursuant to s 5AA of the *Migration Act 1958* (Cth) (“Act”) – Where plaintiff was taken to Nauru Regional Processing Centre (“RPC”) pursuant to s 198AD(2) of the Act – Where plaintiff was granted an RPC visa by the Nauru government which had certain restrictions and specifications - Whether plaintiff has standing to challenge whether the Commonwealth or the Minister was authorised in the past to engage in the activities relating to the creation and operation of the RPC – Whether Commonwealth or Minister were authorised to engage in acts relating to the creation and operation of the RPC pursuant to s 61 of the *Constitution*, s 198AHA of the Act, and s 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth) read together with reg 16 and items 417.021, 417.027, 417.029 and 417.042 of Sch 1AA *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) – Whether the restrictions imposed on the plaintiff and the specifications of her RPC visa are contrary to Article 5(1) of the *Constitution of Nauru* – Whether the statutory provisions relied upon by the Commonwealth are invalid because they are not supported by any head of Commonwealth legislative power or are contrary to Ch III of the *Constitution*.

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See also [Criminal Law](#): *North Australian Aboriginal Justice Agency Limited & Anor v Northern Territory of Australia*

See also [Native Title](#): *Quandamooka Yoolooburrabee Aboriginal Corporation RNTBC v State of Queensland*

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## Criminal Law

### *North Australian Aboriginal Justice Agency Limited v Northern Territory of Australia*

**[M45/2015](#)**: *Special case.*

#### **Catchwords:**

Criminal procedure – Arrest and detention – Effecting arrest – *Police Administration Act* (NT) (“Act”) Div 4AA of Pt VII– Where Div 4AA of the Act allows for a member of the Police Force to take a person into custody for a period of up to four hours for an infringement notice offence – Where the offence in respect of which a person can be taken into custody can be an offence for which the maximum penalty is not imprisonment – Where the Act does not require a person to be brought before a justice of the peace or a Court – Whether Div 4AA is beyond the powers of the Northern Territory Assembly pursuant to s 122 of the *Constitution* and the *Northern Territory (Self-Government) Act* – Whether Div 4AA confers on the executive a power of detention which is penal or punitive in character.

**Listed:** 1 September 2015.

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## Native Title

### *Quandamooka Yoolooburrabee Aboriginal Corporation RNTBC v State of Queensland*

**[B26/2014](#)**: *Special case.*

#### **Catchwords:**

Native title – Indigenous Land Use Agreement (“ILUA”) – *North Stradbroke Island Protection and Sustainability Act 2011* (Qld) (“Principal Act”) – *North Stradbroke Island Protection and Sustainability and Another Act Amendment Act 2013* (Qld) (“Amendment Act”) – Amendment Act allowed for renewal of four mining leases for periods longer than those provided in Principal Act – Amendment Act replaced environmental authority provisions in Principal Act with new s 17 which no longer applied conditions to two mining leases – ILUA registered as area agreement under ss 24CA to 24CL of *Native Title Act 1993* (Cth) (“NTA”) – Whether ILUA binds defendant not to enact ss 9 and 12 of Amendment Act.

Constitutional law – Inconsistency – Commonwealth Constitution, s 109 – Whether Amendment Act is invalid under s 109 of

Constitution by reason of inconsistency between Amendment Act and ss 24EA and 87 of NTA.

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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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### Contracts

See also **Statutes**: *State of Victoria v Tatts Group Limited* and *Tabcorp Holdings Ltd v State of Victoria*

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### Criminal Law

*The Queen v Beckett*

**S94/2015**: [\[2015\] HCATrans 113](#).

**Date heard**: 15 May 2015 – *Special leave granted*.

**Catchwords:**

Criminal law – Particular offences – Offences relating to the administration of justice – Perverting the course of justice – *Crimes Act 1900* (NSW) s 319 - Where respondent was questioned about a property transfer she had stamped without receiving the duty – Where respondent obtained two bank cheques for the property and altered photocopies so that the cheques appeared to pre-date the transfer – Where respondent gave false evidence under oath – Where respondent was charged with perverting the course of justice – Whether offence only applies to conduct committed after judicial proceedings have commenced – Whether “course of justice” within the meaning of s 319 requires that the jurisdiction of a court or competent judicial tribunal has been invoked.

**Appealed from NSWSC (CCA)**: [\[2014\] NSWCCA 305](#).

**Listed**: 4 September 2015.

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*The Queen v Pham*

**M82/2015**: [\[2015\] HCATrans 121](#).

**Date heard**: 15 May 2015 – *Special leave granted*.

**Catchwords:**



Criminal law – Sentence - Sentencing procedure – Sentencing statistics, schedules, tariffs, comparisons, etc. – Consistency for federal offences – Where respondent brought 577 grams of heroin into Australia and pleaded guilty to one charge of importing a marketable quantity of a border controlled drug – Where respondent was originally sentenced to eight years and six months imprisonment with a non-parole period of six years – Where sentence was reduced on appeal to six years imprisonment with a non-parole period of four years – Whether federal offenders should be sentenced in accordance with “current sentencing practices” of a particular State or Territory to the exclusion of sentencing practices in other jurisdictions – Whether it is permissible to determine objective seriousness of the offending by reference to a statistical analysis of comparable cases which grades those cases by the weight of the drugs expressed as a percentage of the statutory threshold for a more serious offence.

**Appealed from VSC (CA):** [\[2014\] VSCA 204](#).

**Listed:** 9 September 2015.

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*O’Rafferty v The Queen*

**C2/2015:** [\[2015\] HCASL 134](#).

**Judgment delivered:** 13 August 2015.

**Coram:** Kiefel, Bell and Gageler JJ.

**Catchwords:**

Criminal law – Appeal of conviction - Where appellant convicted of one count of sexual intercourse without consent – Where Court of Appeal quashed conviction and ordered a new trial by determining one ground of the appeal but did not consider other grounds – Whether Court of Appeal can re-open the appeal to consider the other appeal ground.

**Appeal from ACTSC (CA):** [\[2014\] ACTCA 35](#).

**Held:** Special leave granted, appeal instituted and heard *instanter*, matter remitted to the Court of Appeal of the Supreme Court of the Australian Capital Territory.

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## Employment Law

*Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*  
**P16/2015:** [\[2015\] HCATrans 193](#).

**Date heard:** 14 August 2015 – *Special leave granted*.

**Catchwords:**

Employment law – Employment relationship – Nature of – *Fair Work Act 2009* (Cth) s 357 - Where first respondent operated a business providing serviced apartments – Where first respondent employed two housekeepers purportedly through a contract hire company – Whether relationship was an employment relationship – Whether an employer can avoid the sham contracting provision of the *Fair Work Act* by interposing a third party into its contractual arrangements between employer and the other person.

**Appealed from FCA (FC):** [\[2015\] FCAFC 37](#).

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## Foreign Judgments

*Firebird Global Master Fund II Ltd v Republic of Nauru & Anor*  
**S29/2015:** [\[2015\] HCATrans 15](#).

**Date heard:** 13 February 2015 - Special leave granted.

**Catchwords:**

Recognition, effect and enforcement of foreign judgments – Enforcement of foreign judgments – Foreign States immunity – Where appellant is the holder of bonds issued by an entity which was guaranteed by the government of Nauru – Where the bond issuer and guarantor defaulted – Where appellant recovered a judgment in Japan equivalent to 31 million Australian dollars – Whether s 9 of the Foreign States Immunities Act 1985 (Cth) renders first respondent immune to an application to the Court for an order for the registration of the foreign judgment under s 6 of the Foreign Judgments Act 1991 (Cth).

**Appealed from NSWSC (CA):** (2014) 316 ALR 497; (2014) 289 FLR 398; [\[2014\] NSWCA 360](#).

**Listed:** 2 September 2015.

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## Migration

*Minister for Immigration and Border Protection v WZARH & Anor*  
**S85/2015**: [\[2015\] HCA Trans 92](#).

**Date Heard:** 15 April 2015 – *Special leave granted*.

**Catchwords:**

Migration – Refugee and humanitarian visas – Procedural fairness – Where a department officer determined that respondent was not a refugee – Where respondent sought a review of this decision – Where respondent was interviewed by merits reviewer – Where merits reviewer told respondent that they would be the person to determine the application – Where merits reviewer was unable to conclude the review and the review was concluded by another reviewer – Whether there is a breach of procedural fairness where alternate reviewer makes a decision based on the documentary materials, submissions and an audio recording of the interview but does not inform applicant of the change in decision-making, ask for submissions on how to proceed, or allow for an additional face-to-face interview.

**Appealed from FCA (FC):** (2014) 142 ALD 490; (2014) 316 ALR 389; [\[2014\] FCAFC 137](#).

**Listed:** 10 September 2015.

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See also **Torts**: *Fernando by his tutor Ley v Commonwealth of Australia & Anor*

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## Procedure

*Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate & Ors*  
**B36/2015**: [\[2015\] HCATrans 149](#).

**Date decided:** 18 June 2015 - *Special leave granted on the papers*.

**Catchwords:**

Procedure – Civil penalty provisions – Where, in proceedings between respondent and the Construction, Forestry, Mining and Energy Union (“CFMEU”) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (“CEPU”), respondent alleged that the CFMEU and CEPU contravened the *Building and Construction Industry Improvement Act 2005* (Cth) – Where respondent sought pecuniary penalties and associated declaratory relief against the CFMEU and CEPU – Whether the High Court of Australia’s decision in *Barbaro v The Queen* affects submissions made regarding civil penalties.

**Appealed from FCA(FC):** [\[2015\] FCAFC 59](#).

**Listed:** 13 October 2015 and 14 October 2015.

This matter is to be heard with *Construction, Forestry, Mining and Energy Union & Anor v Director, Fair Work Building Industry Inspectorate & Anor*.

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*Construction, Forestry, Mining and Energy Union & Anor v Director, Fair Work Building Industry Inspectorate & Anor*  
**B45/2015:** [\[2015\] HCATrans 171](#).

**Date heard:** 6 August 2015 – *Special leave granted on the papers*.

**Catchwords:**

Procedure – Civil penalty provisions – Where respondent alleged that the appellants contravened the *Building and Construction Industry Improvement Act 2005* (Cth) – Where respondent sought pecuniary penalties and associated declaratory relief against the appellants– Whether the High Court of Australia’s decision in *Barbaro v The Queen* affects submissions made regarding civil penalties.

**Appealed from FCA(FC):** [\[2015\] FCAFC 59](#).

**Listed:** 13 October 2015 and 14 October 2015.

This matter is to be heard with *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate & Anor*.

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## Statutes

### *State of Victoria v Tatts Group Limited*

**M83/2015:** [\[2015\] HCA Trans 117](#).

**Date heard:** 15 May 2015 – *Special leave granted*.

#### **Catchwords:**

Statutory interpretation – *Gambling Regulation Act 2003* (Vic) ss 1.3, 3.4.33 and Pt 4 of Ch 3– Gaming operator licences – Where the regime changed and the ability to issue gaming operator’s licences was abolished – Where respondent’s licence expired – Whether respondent entitled to a terminal payment on the grant of gaming operator’s licence to person other than former licensee or a related entity – Whether when construing a contractual promise in an agreement between a government and private party which expressly requires the subsequent enactment of that promise in legislation can this agreement to afford the promise statutory force be relevant to ascertaining the intentions of the parties with respect to the meaning of the promise – Whether the contractual promise survives the agreed enactment of legislation embodying the same – Whether the contractual promise continues to have operation after the enactment of the statutory right if that statutory right is legislatively nullified – Whether a prior contractual promise can survive the enactment of legislation which has the purpose and effect of nullifying the parallel statutory right.

**Appealed from VSC (CA):** [\[2014\] VSCA 311](#).

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### *Tabcorp Holdings Limited v State of Victoria*

**M81/2015:** [\[2015\] HCA Trans 117](#).

**Date heard:** 15 May 2015 – *Special leave granted*.

#### **Catchwords:**

Statutory interpretation – *Gambling Regulation Act 2003* (Vic) s 4.3.21 – Gaming operator licences – Where the regime changed and the ability to issue gaming operator’s licences was abolished – Where appellant’s licence expired – Whether appellant is entitled to a terminal payment on the grant of gaming operator’s licence to person other than former licensee or a related entity – Whether words “new licences” in s 4.3.12(1) of the *Gambling Regulation Act 2003* should be construed to have their ordinary meaning.

Contracts – General contractual principles – Whether respondent’s failure to seek to secure appellant’s right to repayment of a breach of the duty of good faith and reasonable dealing.

**Appealed from VSC (CA):** [\[2014\] VSCA 312](#).

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## Taxation

*Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liq); Commissioner of Taxation v Muller & Anor as Liquidators of Australian Building Systems Pty Ltd (In Liq)*

**B19/2015:** [\[2015\] HCATrans 82](#).

**Date Heard:** 17 April 2015 – *Special leave granted*.

### Catchwords:

Taxes and duties – Income tax and related legislation – *Income Tax Assessment Act 1936* (Cth) ss 6 and 254 – Where administrators were appointed to Australia Building Systems under Pt 5.3A of the *Corporations Act 2001* (Cth) – Where it was resolved that Australian Building Systems would be wound up and the respondents in B49/2014 were appointed liquidators – Where the liquidators caused Australian Building Systems to enter into a contract for sale of a property which gave rise to a capital gains tax event pursuant to s 104-10 of the *Income Tax Assessment Act 1997* (Cth) – Whether under the 1936 Act a trustee is subject to the requirements and authorisations in s 254 only in relation to income, profits or gains for which they are assessable to tax under Part III Div 6 of the 1936 Act – Whether a trustee is subject to authorisations and requirements in s 254 of the 1936 Act only in relation to income, profits or gains for which they have liability to tax under some other provision of the Act or whether ancillary liabilities are created by s 254 – Whether, following the receipt of money in a representative capacity by a trustee but prior to an assessment for tax, the retention authorisation and requirement in s 254(1)(d) of the 1936 Act requires the trustee to retain out of moneys then in or coming to them in their representative capacity so much as is significant to pay the tax of the income, profits or gains or whether it only authorises and requires a trustee to retain such moneys after an assessment is made for tax on the income, profits or gains.

**Appealed from FCA (FC):** [\[2014\] FCAFC 133](#).

**Listed:** 8 September 2015.

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*Macoun v Commissioner of Taxation*

**S100/2015:** [\[2015\] HCATrans 112](#).

**Date heard:** 15 May 2015 – *Special leave granted*.

**Catchwords:**

Income Tax – Appeal from the Administrative Appeals Tribunal – *Specialised Agencies (Privileges and Immunities) Regulations 1986* (Cth) cl 8 - *International Organisations (Privileges and Immunities) Act 1963* (Cth) Sch 4 Pt 1 – *Income Tax Assessment Act 1997* (Cth) s 6-20 - Where the appellant received pension payments from a foreign retirement plan – Where appellant was no longer employed by a Specialised Agency exempt from income tax pursuant to cl 8 of the *Specialised Agencies (Privileges and Immunities) Regulations 1986* (Cth) – Whether appellant’s pension payments are exempt from income tax.

**Appealed from FCA (FC):** [\[2014\] FCAFC 162](#).

**Listed:** 9 October 2015.

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## Torts

*Allen v Chadwick*

**A14/2015:** [\[2015\] HCATrans 154](#).

**Date heard:** 19 June 2015 – *Special leave granted*.

**Catchwords:**

Torts – Negligence – Contributory negligence – *Civil Liability Act 1936* (SA) ss 47 and 49 – Where respondent was injured in a car accident after appellant lost control of the vehicle – Where appellant was intoxicated – Where respondent was not wearing a seatbelt – Whether a reasonable person in the position of respondent would or ought to have known that appellant was intoxicated and would have relied on appellant to drive – Whether respondent had an opportunity to fasten the seatbelt – Whether damages should include or exclude GST.

**Appealed from SASC (FC):** [\[2014\] SASFC 100](#).

**Listed:** 15 October 2015.

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*Attwells & Anor v Jackson Lalic Lawyers Pty Limited*  
**S57/2015:** [\[2015\] HCATrans 176](#).

**Date heard:** 7 August 2015 – *Special leave granted*

**Catchwords:**

Torts – Negligence – Defences – Advocates’ immunity – Scope – Where respondent gave advice to appellants to agree to a terms of settlement – Where the terms of settlement caused the appellants to accept liability significant higher than they would have otherwise been liable for if they had not defended the proceedings– Whether advocates’ immunity applies – Whether the advice falls with the boundaries of advocates’ immunity – Whether immunity is attracted in respect of final outcomes not the subject of a judicial determination on the merits.

**Appeal from NSWSC (CA):** [\[2014\] NSWCA 335](#).

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*Fernando by his tutor Ley v Commonwealth of Australian & Anor*  
**P22/2015:** [\[2015\] HCATrans 190](#).

**Date heard:** 14 August 2015 – *Special leave granted*.

**Catchwords:**

Torts – False imprisonment – Where appellant’s visa was cancelled by Acting Minister – Where appellant was held in immigration detention for 1203 days – Where consent orders were made to quash decision of Acting Minister to cancel the visa – Whether a tortfeasor is permitted to escape liability to pay more than nominal damages if a lawful means could have been chosen by the tortfeasor to inflict the same loss and damage on the victim – Whether, after a determination of liability, an intermediate court of appeal remits a matter for assessment of damages whether the remittee court is bound in reaching its determination by the reasons as well as the orders of the remitting court.

**Appeal from FCA (FC):** [\[2014\] FCAFC 181](#).

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# **5: CASES NOT PROCEEDING OR VACATED**

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## 6: SPECIAL LEAVE REFUSED

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### Publication of Reasons: 4 August 2015

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<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Leon Nikolaidis as executor of the estate of Doreen Philomene Nikolaidis & Anor	Saturis & Ors (S13/2015)	Supreme Court of New South Wales (Court of Appeal) [2014] NSWCA 448	Application dismissed with costs <a href="#">[2015] HCASL 117</a>

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## 7 August 2015: Sydney

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Lowe & Anor	Sze Tu & Ors (S16/2015)	Supreme Court of New South Wales (Court of Appeal) [2014] NSWCA 462	Application dismissed with costs <a href="#">[2015] HCATrans 179</a>
2.	Lowe & Anor	Sze Tu & Ors (S17/2015)	Supreme Court of New South Wales (Court of Appeal) [2014] NSWCA 462	Application dismissed with costs <a href="#">[2015] HCATrans 179</a>
3.	Lowe & Anor	Sze Tu & Ors (S18/2015)	Supreme Court of New South Wales (Court of Appeal) [2014] NSWCA 462	Application dismissed with costs <a href="#">[2015] HCATrans 179</a>
4.	Tomanovic	One Australia Pty Limited & Anor (S39/2015)	Supreme Court of New South Wales (Court of Appeal) [2015] NSWCA 11	Application dismissed with costs <a href="#">[2015] HCATrans 173</a>
5.	ML	The Queen (S50/2015)	Supreme Court of New South Wales (Court of Criminal Appeal) [2015] NSWCCA 27	Application dismissed <a href="#">[2015] HCATrans 177</a>
6.	Saoud	The Queen (S51/2015)	Supreme Court of New South Wales (Court of Criminal Appeal) [2014] NSWCCA 136	Application dismissed <a href="#">[2015] HCATrans 178</a>
7.	Griffin Energy Group Pty Limited (Subject to a deed of company arrangement) & Anor	ICICI Bank Limited (Singapore Branch) & Ors (S52/2015)	Supreme Court of New South Wales (Court of Appeal) [2015] NSWCA 29	Application dismissed with costs <a href="#">[2015] HCATrans 174</a>
8.	Kaizen Hospitals (Essendon) Pty Ltd & Ors	Australian Nursing and Midwifery Federation & Ors (S60/2015)	Full Court of the Federal Court of Australia [2015] FCAFC 23	Application dismissed with costs <a href="#">[2015] HCATrans 180</a>
9.	McCarthy	The Queen (S96/2015)	Supreme Court of New South Wales (Court of Criminal Appeal) [2015] NSWCCA 76	Application dismissed <a href="#">[2015] HCATrans 175</a>
10.	Seller	The Queen (S103/2015)	Supreme Court of New South Wales (Court of Criminal Appeal) [2015] NSWCCA 76	Application dismissed <a href="#">[2015] HCATrans 175</a>

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## Publication of reasons: 13 August 2015

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	McDonald & Anor	State of South Australia (A4/2015)	Full Court of the Supreme Court of South Australia [2015] SASCFC 15	Application dismissed <a href="#">[2015] HCASL 118</a>
2.	Kowalski	R J Cole and Partners (A9/2015)	Full Court of the Supreme Court of South Australia [2015] SASCFC 35	Application dismissed <a href="#">[2015] HCASL 119</a>
3.	Gardner & Anor	Mattila (D2/2015)	Supreme Court of the Northern Territory (Court of Appeal) [2015] NTCA 1	Application dismissed <a href="#">[2015] HCASL 120</a>
4.	Singh	Minister for Immigration and Border Protection & Anor (D3/2015)	High Court of Australia [2015] HCATrans 069	Application dismissed <a href="#">[2015] HCASL 121</a>
5.	Slaveska	Elencevski (M11/2015)	Supreme Court of Victoria (Court of Appeal) No MNC	Application dismissed <a href="#">[2015] HCASL 122</a>
6.	Slaveska	Elencevski (M12/2015)	Supreme Court of Victoria (Court of Appeal) No MNC	Application dismissed <a href="#">[2015] HCASL 122</a>
7.	Krpina	Arrow Sun Australia Pty Ltd (CAN 136 865 408) & Ors (M34/2015)	Federal Court of Australia [2014] FCA 63	Application dismissed <a href="#">[2015] HCASL 123</a>
8.	Donohue	Victorian Electoral Commission (M54/2015)	Supreme Court of Victoria [2015] VSC 98	Application dismissed <a href="#">[2015] HCASL 124</a>
9.	Re Agapis	(P13/2015)	Supreme Court of Western Australia (Court of Appeal) [2014] WASCA 197	Application dismissed <a href="#">[2015] HCASL 125</a>
10.	Rahman	Commonwealth of Australia as represented by the Australian Taxation Office (S23/2015)	Federal Court of Australia [2014] FCA 1356	Application dismissed <a href="#">[2015] HCASL 126</a>
11.	Tyneside Property Management Pty Limited & Ors	Hammersmith Management Pty Limited & Anor (S30/2015)	Supreme Court of New South Wales (Court of Appeal) [2014] NSWCA 417	Application dismissed <a href="#">[2015] HCASL 127</a>
12.	SZTIV	Minister for Immigration and Border Protection & Anor (S48/2015)	Federal Court of Australia [2015] FCA 108	Application dismissed <a href="#">[2015] HCASL 128</a>

## 6: Special Leave Refused

13.	Patel & Ors	Minister for Immigration and Border Protection & Anor (S62/2015)	Full Court of the Federal Court of Australia [2015] FCAFC 22	Application dismissed <a href="#">[2015] HCASL 129</a>
14.	SZTRU	Minister for Immigration and Border Protection & Anor (S63/2015)	Federal Court of Australia [2015] FCA 170	Application dismissed <a href="#">[2015] HCASL 130</a>
15.	Quach	New South Wales Civil and Administrative Tribunal & Anor (S71/2015)	Supreme Court of New South Wales (Court of Appeal) [2015] NSWCA 63	Application dismissed <a href="#">[2015] HCASL 131</a>
16.	Quach	Health Care Complaints Commission (S72/2015)	Supreme Court of New South Wales (Court of Appeal) [2015] NSWCA 63	Application dismissed <a href="#">[2015] HCASL 131</a>
17.	Collier	State of New South Wales (S80/2015)	Supreme Court of New South Wales (Court of Appeal) [2015] NSWCA 78	Application dismissed <a href="#">[2015] HCASL 132</a>
18.	Hala	Minister for Justice (P11/2015)	Full Court of the Federal Court of Australia [2015] FCAFC 13	Application dismissed <a href="#">[2015] HCASL 133</a>

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**14 August 2015: Perth**

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	HGJ	The Queen (A6/2015)	Supreme Court of South Australia (Court of Criminal Appeal) [2014] SASCFC 102	Application dismissed <a href="#">[2015] HCATrans 197</a>
2.	Sands	State of South Australia (A10/2015)	Supreme Court of South Australia [2015] SASCFC 36	Application dismissed with costs <a href="#">[2015] HCATrans 196</a>
3.	Pearce	The State of Western Australia (P37/2014)	Supreme Court of Western Australia (Court of Appeal) [2014] WASCA 156	Application dismissed <a href="#">[2015] HCATrans 192</a>
4.	Singerson	Joans (P1/2015)	Full Court of the Family Court of Australia [2015] FCAFC 37	Application dismissed with costs <a href="#">[2015] HCATrans 195</a>
5.	Baker	His Honour Judge Stone of the District Court of WA & Anor (P18/2015)	Supreme Court of Western Australia (Court of Appeal) [2015] WASCA 56	Application dismissed <a href="#">[2015] HCATrans 194</a>
6.	AME Hospitals Pty Ltd	Dixon (P19/2015)	Supreme Court of Western Australia (Court of Appeal) [2015] WASCA 63	Application dismissed with costs <a href="#">[2015] HCATrans 191</a>
7.	Clarke	Dixon (P20/2015)	Supreme Court of Western Australia (Court of Appeal) [2015] WASCA 63	Application dismissed with costs <a href="#">[2015] HCATrans 191</a>

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