



# HIGH COURT BULLETIN

Produced by the Legal Research Officer,  
High Court of Australia Library  
[2012] HCAB 01 (20 February 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
<a href="#">Bui v Director of Public Prosecutions (Cth)</a>	Criminal Law
<a href="#">Roadshow Films Pty Ltd &amp; Ors v iiNet Limited</a>	High Court of Australia

### 2: Cases Reserved

Case	Title
<a href="#">Plaintiff S10/2011 v Minister for Immigration and Citizenship &amp; Anor; Kaur v Minister for Immigration and Citizenship &amp; Anor; Plaintiff S49/2011 v Minister for Immigration and Citizenship &amp; Anor; Plaintiff S51/2011 v Minister for Immigration and Citizenship &amp; Anor</a>	Citizenship and Migration
<a href="#">ALH Group Holdings Pty Ltd v Chief Commissioner of State Revenue</a>	Contracts
<a href="#">Baiada Poultry Pty Ltd v The Queen</a>	Criminal Law

<i>Harbour Radio Pty Limited v Trad (part heard)</i>	Defamation
<i>Australian Education Union v General Manager of Fair work Australia &amp; Ors</i>	Industrial Law
<i>The Commissioner of Taxation of the Commonwealth of Australia v Bargwanna &amp; Bargwanna (as trustees of the Kalos Metron Charitable Trust)</i>	Taxation and Duties

### 3: Original Jurisdiction

<b>Case</b>	<b>Title</b>
There are no new matters ready for hearing in the original jurisdiction of the High Court.	

### 4: Special Leave Granted

<b>Case</b>	<b>Title</b>
<i>Commonwealth of Australia v Kutlu &amp; Ors;</i> <i>Commonwealth of Australia v Clarke &amp; Ors;</i> <i>Commonwealth of Australia v Lee &amp; Ors;</i> <i>Commonwealth Minister of State for Health v Condoleon &amp; Ors</i>	Administrative Law
<i>Beck v Weinstock &amp; Ors</i>	Corporations Law
<i>Burns v The Queen</i>	Criminal Law
<i>Patel v The Queen</i>	Criminal Law
<i>Commissioner of Taxation v Qantas Airways Ltd</i>	Taxation

# 1: CASES HANDED DOWN

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

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## Criminal Law

*Bui v Director of Public Prosecutions (Cth)*

**M127/2011:** [\[2012\] HCA 1](#).

**Judgment delivered:** 9 February 2012.

### Catchwords:

Criminal law — Appeal — Appeal against sentence — Prosecution appeal — Double jeopardy — Appellant pleaded guilty to importation of a marketable quantity of a border controlled drug contrary to s 307.2(1) of *Criminal Code* (Cth) — Appellant sentenced to three years' imprisonment to be released forthwith upon giving security to comply with a condition that appellant be of good behaviour for three years — Respondent appealed against sentence — Sections 289(2) and 290(3) of *Criminal Procedure Act* 2009 (Vic) ("Victorian provisions") provided that double jeopardy not to be taken into account in allowing appeal against sentence or imposing sentence — Whether ss 68(1) or 79(1) of *Judiciary Act* 1903 (Cth) ("Judiciary Act") rendered Victorian provisions applicable to prosecution appeal against sentence instituted by respondent — Whether a "common law principle against double jeopardy" picked up by s 80 of *Judiciary Act* — Whether ss 16A(1) — (2) of *Crimes Act* 1914 (Cth) required or permitted court determining sentence for federal offence to take into account double jeopardy.

Words and phrases — "double jeopardy".

*Crimes Act* 1914 (Cth), ss 16A(1)-(2).

*Judiciary Act* 1903 (Cth), ss 68(1)-(2), 79(1), 80.

*Criminal Procedure Act* 2009 (Vic), ss 289(2), 290(3).

**Appealed from Vic SC (CA):** [2011] VSCA 61.

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## High Court of Australia

*Roadshow Films Pty Ltd & Ors v iiNet Limited*

**S288/2011:** [\[2011\] HCA 54](#).

**Judgment delivered:** 30 November 2011.

**Catchwords:**

High Court of Australia — Appellate jurisdiction — Procedure —  
Intervenors and amicus curiae — Whether leave should be granted.

Words and phrases — "Court significantly assisted", "interests  
directly affected".

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

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## 2: CASES RESERVED

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

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### Administrative Law

*Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia & Anor*  
**A7/2011:** [\[2011\] HCATrans 322](#).

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

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

**Catchwords:**

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

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

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

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

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See also [Citizenship and Migration](#): *Plaintiff S10/2011 v Minister for Immigration and Citizenship & Anor*; *Kaur v Minister for Immigration and Citizenship & Anor*; *Plaintiff S49/2011 v Minister for Immigration and Citizenship & Anor*; *Plaintiff S51/2011 v Minister for Immigration and Citizenship & Anor*

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## Citizenship and Migration

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

**S51/2011:** [\[2012\] HCATrans 16](#); [\[2012\] HCATrans 17](#); [\[2012\] HCATrans 18](#).

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

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

### Catchwords:

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

accord procedural fairness to plaintiff in the s 417 decision by denying plaintiff opportunity to address criterion used in the s 195A decision — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 417 decision and the s 48B decision by denying plaintiff opportunity to address adverse material.

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

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

**S10/2011:** [\[2012\] HCATrans 16](#); [\[2012\] HCATrans 17](#); [\[2012\] HCATrans 18](#).

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

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

**Catchwords:**

Citizenship and migration — Migration — Ministerial discretion — Non-compellable powers — Procedural fairness — Section 417 of *Migration Act 1958* (Cth) ("the Act") empowers first defendant ("Minister") to substitute decision of Refugee Review Tribunal ("RRT") made under s 415 of the Act with another decision more favourable to an applicant, if Minister thinks "in the public interest to do so" — Section 48B of the Act empowers Minister to determine that s 48A of the Act does not apply to prevent application for protection visa made by non-citizen, if Minister thinks "in the public interest to do so" — Plaintiff applied for Ministerial intervention pursuant to ss 48B and 417 of the Act — In October 2010, Minister's delegate informed plaintiff that Minister had decided not to exercise power under s 417 of the Act ("the s 417 decision"), and plaintiff's s 48B application had been assessed against Minister's Guidelines but was not referred to Minister ("the s 48B decision") — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 48B decision and the s 417 decision by taking into consideration certain matters without providing plaintiff with opportunity to know about or comment on those matters — Whether plaintiff had legitimate expectation that information provided by him in respect of his applications would be considered in assessing whether he fell within Guidelines — Whether Minister and/or second defendant through his officers failed to apply Minister's Guidelines correctly by taking into account irrelevant considerations or failing to take into account relevant considerations — Whether jurisdictional error occurred irrespective of privative clause in s 474(2) of the Act.

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

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

**S49/2011:** [\[2012\] HCATrans 16](#); [\[2012\] HCATrans 17](#); [\[2012\] HCATrans 18](#).

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

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

**Catchwords:**

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

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

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*Kaur v Minister for Immigration and Citizenship & Anor*



**S43/2011:** [\[2012\] HCATrans 16](#); [\[2012\] HCATrans 17](#); [\[2012\] HCATrans 18](#).

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

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

**Catchwords:**

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

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

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# Constitutional Law

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

**S118/2011; S116/2011:** [\[2011\] HCATrans 230](#); [\[2011\] HCATrans 231](#); [\[2011\] HCATrans 232](#).

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

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

## Catchwords:

Constitutional law (Cth) — Freedom of interstate trade, commerce and intercourse — Appellant Sportsbet Pty Ltd ("Sportsbet") a licensed wagering operator in Northern Territory ("NT") — Section 33 of *Racing Administration Act* 1998 (NSW) ("Racing Act") prohibited use of race field information by wagering operators unless operator authorised by approval and complied with conditions of approval — Section 33A(2)(a) of Racing Act and reg 16 of Racing Administration Regulations 2005 (NSW) ("Regulations") gave racing control bodies, including second and third respondents, power to grant approvals and impose conditions including imposition of race field fee of up to 1.5 per cent of wagering turnover — Fees imposed on all wagering operators irrespective of whether in NSW — NSW racing control bodies set thresholds for payment of fees, and arranged reduction in pre-existing fees, such that NSW on-course bookmakers largely unaffected — Sportsbet required to pay fees without regard to fees paid as conditions for licence in NT — TAB Limited ("TAB"), dominant wagering operator in NSW, received sums of money by second and third respondents equal to fees paid by it to those bodies — Whether intended and practical effect of ss 33 and 33A of Racing Act and Pt III of Regulations ("Scheme") was to impose discriminatory burden of protectionist nature on Sportsbet and other interstate wagering operators by prohibiting use of essential element of interstate trade and commerce subject to discretion of racing control bodies — Whether purpose and effect of Scheme was imposition of economic impost on interstate traders which would not be borne by intrastate traders — Whether validity of Scheme to be determined by comparing interstate and intrastate traders' positions — Whether practical effect of Scheme determinable without consideration of offsetting reductions in existing fees payable by intrastate traders — Whether fee conditions imposed by racing control bodies inconsistent with freedom of interstate trade, commerce and intercourse — Whether necessary for Sportsbet to demonstrate that it had a competitive advantage derived from its place of origin, or that the Scheme sought to erode its competitive

advantage — Whether arrangements amongst NSW wagering operators and TAB were private contractual arrangements falling outside the purview of s 49 of *Northern Territory (Self Government) Act 1978* (Cth) — Whether Scheme appropriate and adapted to legitimate non-protectionist objective — Whether fee conditions, approvals or Scheme invalid — Whether Scheme can be read consistently with freedom of interstate trade, commerce and intercourse pursuant to s 31 of *Interpretation Act 1987* (NSW) ("Interpretation Act") — *Commonwealth Constitution*, ss 92 and 109.

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

Constitutional law (Cth) — Freedom of interstate trade, commerce and intercourse — Appellant Betfair Pty Limited ("Betfair") a licensed betting exchange domiciled in Tasmania — Section 33 of Racing Act prohibited use of race field information by wagering operators unless operator authorised by approval and complied with conditions of approval — Section 33A(2)(a) of Racing Act and reg 16 of Regulations gave racing control bodies, including first and second respondents, power to grant approvals and impose conditions including imposition of race field fee of 1.5 per cent of wagering turnover — Wagering turnover defined as revenue from wagers that an event will occur ("back bets") — Fees imposed on all wagering operators irrespective of whether in NSW — Betfair generates revenue from back bets and bets that an event will not occur — Fees constituted greater proportion of Betfair's gross revenue than that of TAB and other wagering operators with different commission structures — Whether fee conditions imposed by first and second respondents pursuant to s 33 of Racing Act inconsistent with freedom of interstate trade, commerce and intercourse — Whether sufficient for Betfair to show that fee conditions imposed and were intended to impose significantly greater business costs on Betfair than on TAB — Whether Betfair required to demonstrate that practical effect or likely practical effect of fee conditions was to cause it to suffer loss of market share or profitability because fee conditions facially neutral — Whether Scheme appropriate and adapted to legitimate non-protectionist objective — Whether fee conditions, approvals or Scheme invalid — Whether Scheme can be read consistently with freedom of interstate trade, commerce and intercourse pursuant to s 31 of Interpretation Act — *Commonwealth Constitution*, s 92.

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

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*Williams v The Commonwealth*

**S307/2010:** [\[2011\] HCATrans 198](#); [\[2011\] HCATrans 199](#); [\[2011\] HCATrans 200](#).

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

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

**Catchwords:**

Constitutional law (Cth) — Executive — Plaintiff the parent of children enrolled at Darling Heights State Primary School ("School") — Commonwealth implemented National School Chaplaincy Programme ("NSCP") in 2007 — Commonwealth entered into funding agreement with Scripture Union Queensland ("SUQ") for provision of funding to School under NSCP ("Funding Agreement") — From 2007, chaplaincy services provided to School by SUQ for reward using NSCP funding — Whether Funding Agreement invalid by reason of being beyond executive power of Commonwealth — Whether executive power of Commonwealth includes power to enter into, and make payments pursuant to, contracts in respect of matters other than those in respect of which the *Constitution* confers legislative power — Whether executive power of Commonwealth includes power to enter into, and make payments pursuant to, contracts in respect of which the *Constitution* confers legislative power — Whether executive power of Commonwealth includes power to enter into, and make payments pursuant to, contracts with respect to the provision of benefits to students within meaning of s 51(xxiiiA) of *Constitution* — Whether executive power of Commonwealth includes power to enter into contracts with trading corporations within meaning of s 51(xx) of *Constitution* — Whether payments to SUQ under Funding Agreement provide "benefits to students" — Whether SUQ a trading corporation — *Commonwealth Constitution*, ss 51(xx), 51(xxiiiA), 61.

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

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

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

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

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

*Wotton v The State of Queensland & Anor*

**S314/2010:** [\[2011\] HCATrans 191](#).

**Date heard:** 3 August 2011 — *Judgment reserved*.

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

**Catchwords:**

Constitutional law (Cth) — Implied freedom of communication about government or political matters — Section 132(1)(a) of *Corrective Services Act 2006 (Q)* ("Act") prohibits person from interviewing prisoners or obtaining written or recorded statements from prisoners, including persons on parole — Section 200(2) of Act allows parole board to impose conditions on grant of parole order — Plaintiff convicted of offence of rioting causing destruction and sentenced to imprisonment — Plaintiff granted parole subject to conditions prohibiting, inter alia, attendance at public meetings on Palm Island without prior approval of corrective services officer, and receipt of direct or indirect payments from the media ("Conditions") — Plaintiff sought approval to attend public meeting on Palm Island concerning youth crime and juvenile justice — Plaintiff's request denied by parole officer of second defendant, Central and Northern Queensland Regional Parole Board — Whether s 132(1)(a) of Act contrary to *Commonwealth Constitution* by impermissibly burdening implied freedom — Whether s 132(1)(a) of Act to be construed so as not to apply to a prisoner on parole — Whether s 200(2) of Act invalid to extent it authorises imposition of Conditions — Whether Conditions invalid as infringing implied freedom if s 200(2) of Act construed in conformity with implied freedom.

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

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

**S23/2010:** [\[2011\] HCATrans 117](#); [\[2011\] HCATrans 118](#); [\[2011\] HCATrans 119](#).

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

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

**Catchwords:**

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

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

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See also [Administrative Law](#): *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia & Anor*

See also [Industrial Law](#): *Australian Education Union v General Manager of Fair Work Australia & Ors*.

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## Contracts

*ALH Group Property Holdings Pty Limited v Chief Commissioner of State Revenue*

**S285/2011:** [\[2012\] HCATrans 8](#).

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

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

**Catchwords:**

Stamp duty — Refund of duty — *Duties Act 1997* (NSW) s 50 — "Agreement for the sale or transfer of dutiable property" — Contract

for sale of land dated June 2003 ("2003 Contract") between Oakland Glen Pty Ltd ("Vendor") and Permanent Trustee Company Limited as trustee of ALE Direct Property Trust ("Purchaser") not completed — Deed of Consent and Assignment ("Deed") dated June 2008 between Vendor, Purchaser and appellant assigned Purchaser's rights and entitlements under 2003 Contract to appellant — Commissioner assessed Deed to ad valorem duty under *Duties Act* s 8(1)(a) as transfer of dutiable property — Deed of Termination dated October 2008 between Vendor and appellant cancelled sale of land — Vendor and appellant entered new contract for sale of land — Whether appellant entitled under *Duties Act* s 50 to refund of duty paid on Deed — Whether Deed an "agreement for the sale or transfer of dutiable property" — Whether Deed rescinded 2003 Contract — Whether Vendor's obligation to transfer land sourced in Deed or 2003 Contract.

*Duties Act* 1997 (NSW) ss 8(1)(a), 8(1)(b), 11(1), 22(2), 50.

Words and phrases — "agreement for the sale or transfer of dutiable property".

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

## Corporations Law

*Australian Securities and Investments Commission v Shafron*;  
*Australian Securities and Investments Commission v Terry*;  
*Australian Securities and Investments Commission v Hellicar*;  
*Australian Securities and Investments Commission v Brown*;  
*Australian Securities and Investments Commission v Gillfillan*;  
*Australian Securities and Investments Commission v Koffel*;  
*Australian Securities and Investments Commission v O'Brien*;  
*Australian Securities and Investments Commission v Willcox*;  
*Shafron v Australian Securities and Investments Commission*  
**S174/2011—S181/2011; S173/2011:** [\[2011\] HCATrans 293](#); [\[2011\] HCATrans 294](#); [\[2011\] HCATrans 295](#).

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

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

### Catchwords:

Corporations — Management and administration — Civil penalties — Evidence — Misleading announcement describing corporate restructuring proposal issued by board of James Hardie Industries Limited ("JHIL") to Australian Stock Exchange ("ASX") — At trial,

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

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

Words and phrases — "obligation of fairness".

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

## Criminal Law

*Baiada Poultry Pty Ltd v The Queen*

**M126/2011:** [\[2012\] HCATrans 15](#).



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

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

**Catchwords:**

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

*Crimes Act 1958* (Vic) – s 568(1).

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

Words and phrases — "reasonably practicable".

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

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*King v The Queen*

**M129/2011:** [\[2011\] HCATrans 327](#).

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

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

**Catchwords:**

Criminal law — Dangerous driving causing death — Direction to jury — Appellant found guilty of two counts of culpable driving causing death contrary to s 318 of *Crimes Act 1958* (Vic) ("Act") — Primary judge left to jury alternative charge of dangerous driving causing death contrary to s 319(1) of Act — Whether primary judge erred in directing jury that, in relation to dangerous driving charge, driving need only have significantly increased risk, or created real risk, of

hurting or harming others, and that driving need not be deserving of criminal punishment — Whether a substantial miscarriage of justice in terms of s 568(1) of Act — *R v De Montero* (2009) 25 VR 694.

Words and phrases — "substantial miscarriage of justice".

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

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*PGA v The Queen*

**A15/2011:** [\[2011\] HCATrans 267](#).

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

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

**Catchwords:**

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

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

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*BBH v The Queen*

**B76/2010:** [\[2011\] HCATrans 254](#).

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

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

**Catchwords:**

Criminal law — Appeal and new trial — Evidence — Applicant found guilty by jury of maintaining indecent relationship with child under 16, indecent treatment of child under 16 and sodomy of a person under 18 — Complainant was applicant's daughter — Complainant's brother gave evidence of incident involving applicant and complainant which was said to be capable of establishing the applicant's sexual interest in the complainant — Whether evidence of discreditable conduct admissible in a criminal trial when a reasonable view of that evidence is consistent with innocence— Whether evidence of complainant's brother admissible at applicant's trial — Whether test for admissibility in *Pfennig v The Queen* (1995) 182 CLR 461 applies to evidence of discreditable conduct.

Words and phrases — "discreditable conduct".

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

## Defamation

*Harbour Radio Pty Limited v Trad*

**S318/2011:** [\[2012\] HCATrans 9](#).

**Date heard:** 3 February 2012 — *Matter relisted (part heard)*

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

### Catchwords:

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

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

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## Evidence

*Aytugrul v The Queen*

**S315/2011:** [\[2011\] HCATrans 329](#).

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

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

### Catchwords:

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

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

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## High Court of Australia

See also [Constitutional Law](#): *Williams v The Commonwealth*

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## Industrial Law

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

**M8/2011:** [\[2012\] HCATrans 5](#).

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

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

**Catchwords:**

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

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

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

## Intellectual Property

*Roadshow Films Pty Ltd & Ors v iiNet Limited*

**S288/2011:** [\[2011\] HCATrans 323](#); [\[2011\] HCATrans 324](#); [\[2011\] HCATrans 325](#).

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

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

**Catchwords:**

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

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

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

## Mortgages

*Waller v Hargraves Secured Investments Limited*  
**S223/2011:** [\[2011\] HCATrans 278](#).

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

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

### Catchwords:

Mortgages — Primary industry — Farm debt mediation — Mortgagee's remedies — Possession — Section 8(1) of *Farm Debt Mediation Act 1994* (NSW) ("Act") provides that creditor to whom farm debt is owed under farm mortgage must not take enforcement action against farmer until notice given of availability of mediation

("Notice") — Where Rural Assistance Authority ("Authority") may issue certificate that Act does not apply to farm mortgage in prescribed circumstances — Where s 8(1) of Act inapplicable where certificate issued by Authority in force "in respect of the farm mortgage concerned" — Where enforcement action taken by creditor other than in compliance with Act is void — Respondent loaned money to appellant secured by statutory charge over appellant's farm under *Real Property Act* 1900 (NSW) — Appellant breached terms of loan agreement and respondent gave Notice — Parties engaged in mediation under Act and entered into deed of settlement and second loan agreement — Appellant defaulted under second loan agreement — Parties entered into third loan agreement, under which appellant also defaulted — Respondent did not give Notice and applied for certificate from Authority — Authority issued certificate referring to appellant's indebtedness under first loan agreement — Respondent commenced proceedings for possession of property and money judgment — Whether extinguishment of first and second farm debts and creation of new farm debts by second and third loan agreements created new farm mortgages — Whether certificate issued by Authority void or issued in respect of previous farm mortgage — Whether respondent failed to comply with s 8(1) of Act by not giving Notice to appellant in respect of farm mortgage sought to be enforced — Whether respondent's non-compliance with Act requires setting aside of grant of possession and money judgment in amount owing under mortgage — Act, ss 4, 6, 8 and 11.

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

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

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## Restitution

*Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Haxton; Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Bassat; Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Cunningham's Warehouse Sales Pty Ltd*  
**M128/2010; M129/2010; M130/2010—M132/2010:**  
[\[2011\] HCATrans 50](#); [\[2011\] HCATrans 51](#).

**Dates heard:** 9 & 10 March 2011 — *Judgment reserved*.

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

**Catchwords:**

Restitution — Restitution resulting from unenforceable, incomplete, illegal or void contracts — Recovery of money paid or property transferred — Respondents investors in tax driven blueberry farming schemes — Funds for farm management fees lent to investors by Rural Finance Ltd ("Rural") — Appellant lent money to Rural — Rural subsequently wound up — Loan contracts between respondents and Rural assigned to applicant — Appellant's enforcement of contractual debts statute-barred — Where parties agreed in court below loan contracts illegal and unenforceable — Whether total failure of consideration — Whether respondents' retention of loan funds "unjust".

Restitution — Assignment of rights of restitution — Where Deed of Assignment assigning Rural's loans to appellant included assignment of "legal right to such debts ... and all legal and other remedies" — Whether rights of restitution able to be assigned — Whether rights of restitution assigned in this case.

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

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## Statutes

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

**A4/2011:** [[2011](#)] HCATrans 269.

**Date heard:** 28 September 2011 — *Judgment reserved.*

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

### Catchwords:

Statutes — Acts of Parliament — Interpretation — Statutory powers and duties — Conferral and extent of power — General matters constrained by specific — Applicants teachers appointed under s 9(4) of *Education Act 1972* (SA) ("Act") — Where s 15 of Act enabled Minister to appoint teachers "officers of the teaching service" — Where s 9(4) of Act enabled Minister to appoint officers and employees "in addition to" officers of teaching service — Meaning of "in addition to" — Whether general power in s 9(4) constrained by specific power in s 15 — Whether within Minister's power to appoint teachers under s 9(4) of Act or whether s 15 sole source of Executive power.

Words and phrases — "in addition to".

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

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# Taxation and Duties

*The Commissioner of Taxation of the Commonwealth of Australia v Bargwanna & Bargwanna (as trustees of the Kalos Metron Charitable Trust)*

**S284/2011:** [\[2011\] HCATrans 6](#).

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

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

## Catchwords:

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

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

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

# Torts

*Strong v Woolworths Limited t/as Big W & Anor*  
**S172/2011:** [\[2011\] HCATrans 194](#).

**Date heard:** 13 May 2011 — *Judgment reserved*.

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

**Catchwords:**

Torts — Negligence — Causation — Appellant slipped on chip and fell in area of shopping centre where respondent had exclusive right to conduct sidewalk sales — Whether causation established — Whether s 5D(1) of *Civil Liability Act 2002* (NSW) excludes consideration of material contribution to harm and increase in risk — Whether appellant demonstrated lack of adequate cleaning system responsible for debris on centre floor.

Words and phrases — "necessary condition".

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

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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

*Crump v State of New South Wales*

**S165/2011**

**Catchwords:**

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

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

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## 4: SPECIAL LEAVE GRANTED

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

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### Administrative Law

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

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

**Catchwords:**

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

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

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## Competition Law

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

**M42/2011—M44/2011; M45/2011; M46/2011:** [\[2011\] HCATrans 300](#).

**Date heard:** 28 October 2011 — *Special leave granted in matters M42/2011 — M44/2011. Matters M45/2011 and M46/2011 referred to an enlarged Court.*

### Catchwords:

Competition law — Declared services — Rio Tinto Ltd and associated entities ("Rio") operate Hamersley and Robe railway lines in Pilbara region — The Pilbara Infrastructure Pty Ltd ("TPI") applied for declarations to allow third party trains and rolling stock to move along Hamersley and Robe lines — Commonwealth Treasurer declared Hamersley and Robe lines for period of 20 years pursuant to s 44H of *Trade Practices Act 1974* (Cth) (now *Competition and Consumer Act 2010* (Cth)) ("Act") — Australian Competition Tribunal ("Tribunal") made determination, pursuant to s 44K(7) of Act, setting aside Hamersley declaration and varying Robe declaration to ten year period — Tribunal found, inter alia, that Hamersley and Robe lines are natural monopolies, but access would be, by reason of putative benefits associated with construction of alternate railway lines and cost to Rio and therefore national economy, contrary to public interest — Full Court of Federal Court upheld Tribunal's decision in respect of Hamersley line and set aside limited declaration in respect of Robe line — Whether criterion for declaration of service specified in s 44H(4)(b) of Act imposes test of private profitability or test applying economic principles taking into account natural monopoly characteristics — Whether public interest criterion in s 44H(4)(f) of Act requires or permits inquiry into likely net balance of social costs and benefits if declaration made — Whether s 44H of Act confers broad discretion on Minister to conduct social cost-benefit analysis if prescribed matters in s 44H point in favour of declaration being made — Whether Minister's discretion confined to matters within purpose and object of s 44H — Whether open to National Competition Council to recommend Hamersley and Robe line services be subject of declaration under s 44H of Act.

Words and phrases — "uneconomical for anyone to develop another facility to provide the service".

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

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## Contracts

See [Corporations Law](#): *Fortescue Metals Group Ltd v Australian Securities and Investments Commission & Anor*; *Forrest v Australian Securities and Investments Commission & Anor*

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## Corporations Law

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

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

### Catchwords:

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

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

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

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

### Catchwords:

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

Words and Phrases — "information".

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

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*International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers & Managers Appointed) & Ors*  
**S232/2011:** [\[2011\] HCATrans 296](#).

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

**Catchwords:**

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

product pursuant to s 763E of Act — If Funding Deed a statutory financial product, whether a credit facility within meaning of s 765A(h)(i) of Act and regs 7.1.06(1) and (3) of Corporations Regulations 2001 (Cth) and consequently excluded from being a financial product — Whether litigation funder required to comply with provisions of Act engaged by issuing of financial product, including requirement to obtain AFSL pursuant to s 911A of Act — Whether Funding Deed validly rescinded by CHM pursuant to s 925A(1) of Act.

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

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

**P6/2011; P7/2011:** [\[2011\] HCATrans 271](#).

**Date heard:** 29 September 2011 — *Special leave granted*.

**Catchwords:**

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



Contracts — Agreements contemplating existence of fuller contracts — Certainty — Whether framework agreements contained binding core obligations on Chinese entities in respect of Pilbara project — Whether framework agreements uncertain as to subject matter — Whether inclusion of terms making price determinable by third party rendered framework agreements uncertain.

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

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## Costs

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

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

### Catchwords:

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

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

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

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

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

### Catchwords:

Costs — Recoverable costs — Limitations — Personal injury damages — Respondent sought damages from applicant for trespass to person constituting battery and false imprisonment — Judgment for respondent entered by consent without admission as to liability — Respondent sought declaration that costs of proceeding not regulated by s 338 of *Legal Profession Act 2004* (NSW) — Whether respondent's claim a claim for personal injury damages — Whether deprivation of liberty and loss of dignity capable of being personal injury or "impairment of a person's physical or mental condition" for purpose of *Civil Liability Act 2002* (NSW), s 11 — Whether claim for damages that includes claims based on false imprisonment and assault, which are not severable, a claim for personal injury damages — Whether claim for damages for false imprisonment severable from claim for damages for assault — Whether New South Wales Court of Appeal bound by decision in *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136.

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

## Criminal Law

*Baker v The Queen*

**M67/2011:** [\[2011\] HCATrans 304](#).

**Date heard:** 28 October 2011 — *Special leave granted*.

### Catchwords:

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

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

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*Burns v The Queen*

**S339/2011:** [\[2012\] HCATrans 32](#).

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

**Catchwords:**

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

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

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*Patel v The Queen*

**B25/2011:** [\[2012\] HCATrans 19](#).

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

**Catchwords:**

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

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

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*R v Khazaal*

**S236/2011:** [\[2011\] HCATrans 279](#).

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

**Catchwords:**

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

Words and phrases — "assistance in a terrorist act", "connected with", "evidential burden".

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

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*R v Getachew*

**M58/2011:** [\[2011\] HCATrans 275](#).

**Date heard:** 29 September 2011 — *Special leave granted*.

**Catchwords:**

Criminal law — Rape — Mens rea — Trial judge directed jury that mens rea established if accused ("respondent") aware that complainant might be asleep — Respondent led no evidence of his mental state at trial — Court of Appeal held direction precluded consideration by jury of possibility that respondent believed complainant was consenting to anal intercourse while asleep — Whether sufficient evidence before jury to require direction that respondent may have believed complainant consenting while asleep — Whether incumbent upon respondent's counsel to raise respondent's awareness of complainant's lack of consent — Appropriate test to be applied in determining sufficiency of evidence

for purpose of giving direction — Whether respondent able to hold belief that complainant gave consent where jury found beyond reasonable doubt that respondent knew or believed complainant asleep at time of penetration — *Crimes Act 1958 (Vic)*, ss 36, 37, 37AA, 37AAA, 38 — *Pemble v The Queen* (1971) 124 CLR 107.

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

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## Defamation

*Papaconstuntinos v Holmes a Court*

**S142/2011:** [\[2011\] HCATrans 235](#).

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

### Catchwords:

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

Words and phrases — "pressing need".

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

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## Extradition

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

**P39/2011:** [\[2011\] HCATrans 339](#).

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

**Catchwords:**

Extradition — Permissible circumstances for surrender — Hungarian Military Judge issued warrant for arrest of first respondent — Warrant alleged that during World War II first respondent committed war crime contrary to s 165 of *Criminal Code of Hungary* — Australian magistrate determined first respondent eligible for extradition — Federal Court affirmed magistrate's decision and Full Federal Court dismissed appeal — Whether extradition pursuant to Treaty on Extradition Between Australia and the Republic of Hungary ("Treaty") permitted only where actual offence for which extradition sought an offence in requesting state at time conduct constituting offence took place — Whether extradition under Treaty permitted where conduct constituting offence for which extradition sought an offence in requesting state at time conduct took place — Treaty, art 2(5)(a) — *Extradition Act 1988* (Cth), s 22(3)(e)(i) and (iii).

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

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## Industrial Law

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

**M18/2011:** [\[2011\] HCATrans 243](#).

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

**Catchwords:**

Industrial law — Adverse action — General protection — First respondent ("Barclay") an employee of applicant ("Institute") and Sub-Branch President at Institute of second respondent ("AEU") — Barclay sent email to AEU members employed at Institute noting reports of serious misconduct by unnamed persons at Institute — Barclay did not advise managers of details of alleged misconduct — Chief Executive Officer ("CEO") of Institute wrote to Barclay requiring him to show cause why he should not be disciplined for failing to report alleged misconduct — Barclay suspended on full

pay — Respondents alleged action taken by CEO of Institute constituted adverse action under s 342 of *Fair Work Act* 2009 (Cth) ("Act") — Trial judge found adverse action taken by CEO on basis of breach of Institute's code of conduct rather than Barclay's union activity — Full Court of Federal Court held that sending of email was part of Barclay's functions as AEU officer and therefore adverse action had been taken within meaning of Act — Whether evidence that adverse action taken for innocent and non-proscribed reason sufficient to establish defence to cause of action under Pt 3.1 of Act ("general protections provisions") — Whether a decision-maker who is not conscious of a proscribed reason able to be found to have engaged in adverse action contrary to general protection provisions — Whether a distinction exists between the cause of conduct said to constitute adverse action and the reason a person took adverse action — Act, ss 341, 342, 346, 360, 361 — *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605; *Purvis v State of New South Wales* (2003) 217 CLR 92.

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

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## Property Law

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

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

### **Catchwords:**

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

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

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## Public International Law

*PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission*

**S166/2011:** [\[2011\] HCATrans 280](#).

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

### Catchwords:

Public international law — Jurisdiction — Sovereign immunity — Section 11(1) of *Foreign States Immunities Act* 1985 (Cth) ("Act") provides that a foreign State is not immune in a proceeding that concerns a "commercial transaction" — Respondent commenced proceedings against applicant alleging anti-competitive conduct in relation to international air freight contrary to Pt IV of *Trade Practices Act* 1974 (Cth) — Applicant a "separate entity" of Republic of Indonesia, as defined in s 22 of Act — Respondent alleges applicant participated in conduct outside Australia amounting to arrangements or understandings with other carriers concerning fuel surcharges — Whether civil penalty proceeding brought by respondent against an entity otherwise entitled to sovereign immunity falls within "commercial transaction" exception in Act — Whether applicant immune under Act from exercise of jurisdiction.

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

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

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## Statutes

*Newcrest Mining Limited v Thornton*

**P24/2011:** [\[2011\] HCATrans 337](#).

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

### Catchwords:

Statutes — Construction — Contribution — Respondent injured in workplace accident — Settlement reached with employer and consent judgment entered — Respondent subsequently issued summons against applicant, owner of mine site at which respondent injured — Applicant sought and received summary judgment on ground that respondent already compensated for injury by employer and s 7(1)(b) of *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) ("Act") precluded recovery of additional damages — Whether s 7(1)(b) of Act applies



only to damages awarded following judicial assessment or also to judgments entered by consent — Whether Western Australia Court of Appeal ought to have followed decision of equivalent intermediate appellate court in respect of equivalent legislation — *Nau v Kemp & Associates* [2010] Aust Torts Reports 82-064.

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

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## Taxation

*Commissioner of Taxation v Qantas Airways Ltd*

**B25/2011:** [\[2012\] HCATrans 36](#).

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

**Catchwords:**

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

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

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## Torts

*Barclay v Penberthy & Ors*

**P25/2011:** [\[2011\] HCATrans 333](#).

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

**Catchwords:**

Torts — Negligence — Duty of care — Economic loss — Loss of services — First respondent piloted aircraft that crashed, killing two and injuring three employees of third respondents — Cause of crash determined to be failure of part designed by applicant — Court of Appeal held applicant and first respondent owed third respondents

duty of care, which they breached, causing economic loss to third respondents — Whether applicant owed third respondents duty of care in respect of economic loss claim — Whether existence of action for loss of services a relevant factor in determining whether applicant owed third respondents duty of care — Whether existence of action for loss of services requires imposition of common law duty of care.

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

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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 [2011] HCAB 10.

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## 6: SPECIAL LEAVE REFUSED

### Canberra: 9 February 2012

(Publication of reasons)

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Vaughan	The Queen (B51/2011)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 224	Application Dismissed <a href="#">[2012] HCASL 1</a>
Lu	Petrou & Ors (B52/2011; B53/2011; B54/2011)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 226	Application Dismissed <a href="#">[2012] HCASL 2</a>
Zeveering	Callaghan & Anor (B57/2011)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 180	Application Dismissed <a href="#">[2012] HCASL 3</a>
Bahonko	Moorfields Community & Ors (M134/2011)	Supreme Court of Victoria (Court of Appeal) [2011] VSCA 259	Application Dismissed <a href="#">[2012] HCASL 4</a>
Hettiarachchi	The Queen (M140/2011)	Supreme Court of Victoria (Court of Appeal) [2009] VSCA 270	Application Dismissed <a href="#">[2012] HCASL 5</a>
Koutroumanis	Mann & Ors (M143/2011)	Supreme Court of Victoria (Court of Appeal) (no media neutral citation)	Application Dismissed <a href="#">[2012] HCASL 6</a>
Cameron	Qantas Airways Ltd & Anor (S327/2011)	Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 258	Application Dismissed <a href="#">[2012] HCASL 7</a>
SZOHH	Minister for Immigration and Citizenship & Anor (S328/2011)	Federal Court of Australia [2011] FCA 1017	Application Dismissed <a href="#">[2012] HCASL 8</a>
SZOSV & Anor	Minister for Immigration and Citizenship & Anor (S331/2011)	Federal Court of Australia [2011] FCA 1016	Application Dismissed <a href="#">[2012] HCASL 9</a>
Wang & Anor	State of New South Wales (S351/2011)	Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 321	Application Dismissed <a href="#">[2012] HCASL 10</a>
LZYKZ	Minister for Immigration and Citizenship & Anor (H4/2011)	Federal Court of Australia [2011] FCA 1021	Application Dismissed <a href="#">[2012] HCASL 11</a>
SZOTG	Minister for Immigration and Citizenship & Anor	Federal Court of Australia [2011] FCA 559	Application Dismissed <a href="#">[2012] HCASL 12</a>

	(S209/2011)		
Fedorow	Fedorow & Ors (C5/2011)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2011] ACTCA 10	Application Dismissed <a href="#">[2012] HCASL 13</a>
Riera	The Queen (B22/2011)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 77	Application Dismissed <a href="#">[2012] HCASL 14</a>
Khoury & Anor	Sidhu & Ors (B34/2011)	Full Court of the Federal Court of Australia [2011] FCAFC 71	Application Dismissed with Costs <a href="#">[2012] HCASL 15</a>
Arndale	Kingley & Anor (B35/2011)	Full Court of the Family Court of Australia	Application Dismissed with Costs <a href="#">[2012] HCASL 16</a>
Aircraft Technicians of Australia Pty Ltd	St Clair & Ors (B44/2011)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 188	Application Dismissed with Costs <a href="#">[2012] HCASL 17</a>
Jovanovski	Billbergia Pty Limited (S231/2011)	Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 135	Application Dismissed with Costs <a href="#">[2012] HCASL 18</a>
Farag	Menzies Aviation Group (Ground Services) Australia Pty Ltd & Ors (S243/2011)	Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 172	Application Dismissed with Costs <a href="#">[2012] HCASL 19</a>
Farag	Thai Airways International Public Company Limited & Ors (S244/2011)	Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 172	Application Dismissed with Costs <a href="#">[2012] HCASL 19</a>
Mills	Bale & Anor (S303/2011)	Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 226	Application Dismissed with Costs <a href="#">[2012] HCASL 20</a>
Harmer	Hare (S304/2011)	Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 229	Application Dismissed with Costs <a href="#">[2012] HCASL 21</a>
SZOOK	Minister for Immigration and Citizenship & Anor (S87/2011)	Federal Court of Australia [2011] FCA 122	Application Dismissed with Costs <a href="#">[2012] HCASL 22</a>

**Canberra: 10 February 2012**

(Heard in Canberra by video link to Brisbane)

*Criminal*

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Jobling	The Queen (B32/2011)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 31	Special leave refused <a href="#">[2012] HCATrans 26</a>
Barden	The Queen (B33/2011)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 374	Special leave refused <a href="#">[2012] HCATrans 27</a>
Kissier	The Queen (B49/2011)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 223	Special leave refused <a href="#">[2012] HCATrans 28</a>

*Civil*

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Russell	Commissioner of Taxation of Commonwealth of Australia (B20/2011)	Full Court of the Federal Court of Australia [2011] FCAFC 10	Special leave refused with costs <a href="#">[2012] HCATrans 21</a>
Dodrill & Anor	Bank of Queensland Limited & Ors (B38/2011)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 130	Special leave refused with costs <a href="#">[2012] HCATrans 22</a>
Richard Bass Pty Ltd & Anor	Seafood Innovations Pty Ltd (B40/2011)	Full Court of the Federal Court of Australia [2011] FCAFC 83	Special leave refused with costs <a href="#">[2012] HCATrans 24</a>
ACN 096 278 483 Pty Ltd as Trustee For The Williams Family Trust	Vercorp Pty Ltd & Anor (B43/2011)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 189	Special leave refused with costs <a href="#">[2012] HCATrans 20</a>
Mirvac Queensland Pty Limited	Dunworth (B45/2011)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 200	Special leave refused with costs <a href="#">[2012] HCATrans 23</a>
Allen & Anor as Trustees for the Allen's Asphalt Staff Superannuation Fund	Commissioner of Taxation (B50/2011)	Full Court of the Federal Court of Australia [2011] FCAFC 118	Special leave refused with costs <a href="#">[2012] HCATrans 25</a>

**Sydney: 10 February 2012***Civil*

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Barnet & Ors	Fortress Credit Corporation (Australia) II Pty Limited (S270/2011)	Full Court of the Federal Court of Australia [2011] FCAFC 89	Special leave refused with costs <a href="#">[2012] HCATrans 33</a>
Fletcher & Ors	Fortress Credit Corporation (Australia) II Pty Ltd (S271/2011)	Full Court of the Federal Court of Australia [2011] FCAFC 89	Special leave refused with costs <a href="#">[2012] HCATrans 33</a>
Pilbara Iron Company (Services) Pty Ltd	Construction, Forestry, Mining and Energy Union (S273/2011)	Full Court of the Federal Court of Australia [2011] FCAFC 91	Special leave refused <a href="#">[2012] HCATrans 37</a>
Springvale Coal Pty Ltd	Industrial Relations Commission of New South Wales & Anor (S289/2011)	Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 206	Special leave refused with costs <a href="#">[2012] HCATrans 30</a>
Commissioner of Taxation	RCI Pty Limited (S324/2011)	Full Court of the Federal Court of Australia [2011] FCAFC 104	Special leave refused with costs <a href="#">[2012] HCATrans 29</a>
Chevalley & Anor	Inspector Rodney Morrison & Ors (S414/2011)	Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 357	Special leave refused <a href="#">[2012] HCATrans 31</a>