



HIGH COURT BULLETIN

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High Court of Australia Library
[2012] HCAB 10 (16 October 2012)

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

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SUMMARY OF NEW ENTRIES

1: Cases Handed Down

Case	Title
<i>Plaintiff M47/2012 v Director General of Security</i>	Citizenship and Migration
<i>JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & The Commonwealth</i>	Constitutional Law
<i>Forrest v Australian Securities and Investments Commission; Fortescue Metals Group Ltd v Australian Securities and Investments Commission</i>	Corporations Law
<i>International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)</i>	Corporations Law
<i>Harbour Radio Pty Limited v Trad</i>	Defamation
<i>Barclay v Penberthy</i>	Negligence
<i>Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 2]</i>	Procedure
<i>Commissioner of Taxation v Qantas Airways Ltd</i>	Taxation

2: Cases Reserved

Case	Title
<u>Attorney-General for the State of South Australia v Corporation of the City of Adelaide & Ors</u>	Constitutional Law
<u>Monis v The Queen & Anor; Droudis v The Queen & Anor</u>	Constitutional Law
<u>Commissioner of Police v Eaton and Anor</u>	Jurisdiction
<u>Mills v Commissioner of Taxation</u>	Taxation
<u>Montevento Holdings Pty Ltd & Anor v Scaffidi & Anor</u>	Trusts

3: Original Jurisdiction

Case	Title
There are no new matters ready for hearing in the original jurisdiction of the High Court since <i>High Court Bulletin 9</i> [2012] HCAB 09.	

4: Special Leave Granted

Case	Title
<u>Pompano Pty Ltd and Finks Motorcycle Club, Gold Coast Chapter v Assistant Commissioner Michael James Condon - Cause Removed</u>	Constitutional Law
<u>Akiba and Mye on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia & Ors</u>	Native Title
<u>Maloney v The Queen</u>	Statutes
<u>Beckett v The State of New South Wales</u>	Torts
<u>Wallace v Kam</u>	Torts

1: CASES HANDED DOWN

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

Citizenship and Migration

Plaintiff M47/2012 v Director General of Security & Ors

M47/2012: [\[2012\] HCA 46](#).

Judgment delivered: 5 October 2012.

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

Catchwords:

Citizenship and migration – Migration – Refugees – Protection visas – Inconsistency between *Migration Act* 1958 (Cth) and Migration Regulations 1994 (Cth) – Plaintiff found to be a refugee but refused protection visa due to adverse security assessment by Australian Security Intelligence Organisation – Clause 866.225(a) of Sched 2 to Regulations prescribes public interest criterion 4002 as criterion for grant of protection visa – Public interest criterion 4002 requires that applicant not be assessed by Australian Security Intelligence Organisation to be risk to security – Whether prescription of public interest criterion 4002 as criterion for grant of protection visa beyond power conferred by s 31(3) of Act.

Administrative law – Procedural fairness – ASIO interviewed plaintiff – ASIO issued adverse security assessment in relation to plaintiff – Plaintiff therefore did not meet requirements for protection visa – Whether ASIO denied plaintiff procedural fairness.

Citizenship and migration – Mandatory detention – Plaintiff held in detention as unlawful non-citizen – No third country currently available to receive plaintiff – Whether ss 189 and 196 of Act authorise plaintiff's detention.

Words and phrases – "character test", "decision ... relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2)", "inconsistent", "protection obligations", "security".

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

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Constitutional Law

JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & The Commonwealth

S389/2011; S409/2011: [[2012](#)] HCA 43.

Judgment delivered: 5 October 2012.

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

Catchwords:

Constitutional law (Cth) – Legislative power – Section 51(xxxi) – Acquisition of property on just terms – Plaintiffs hold registered and unregistered trade marks and other intellectual property rights in relation to tobacco product packaging – *Tobacco Plain Packaging Act 2011* (Cth) regulates appearance of tobacco product packaging and use of trade marks on such packaging – Whether plaintiffs' intellectual property rights, goodwill and rights to determine appearance of tobacco products constitute "property" for purposes of s 51(xxxi) – Whether Act effects an acquisition of plaintiffs' property otherwise than on just terms.

Words and phrases – "acquisition of property", "intellectual property", "just terms", "trade marks".

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

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Corporations Law

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

P44/2011; P45/2011: [[2012](#)] HCA 39.

Judgment delivered: 2 October 2012.

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

Catchwords:

Corporations law – Misleading or deceptive conduct – Fortescue made agreements with Chinese state-owned entities to build, transfer and finance mining infrastructure – Forrest and Fortescue made public statements that binding agreements entered into – Whether statements were of opinion or fact – Whether ordinary or reasonable member of audience would understand statements as

making representation about enforceability of agreements in Australian law – Whether statements misleading or deceptive or likely to mislead or deceive.

Corporations law – Continuous disclosure – Fortescue made statements to Australian Securities Exchange about agreements without publishing actual agreements – Whether obliged to disclose actual terms of agreements.

Practice and procedure – Pleadings – Statement of claim pleaded numerous allegations in alternative – Whether drafting of statement of claim in this manner desirable or appropriate.

Words and phrases – "binding contract", "extreme or fanciful", "misleading or deceptive", "opinion", "ordinary or reasonable member of audience".

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

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International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)

S362/2011: [\[2012\] HCA 45](#).

Judgment delivered: 5 October 2012.

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

Catchwords:

Corporations law – Credit facility – Derivative – Financial product – Financial service and markets – Financial service providers – Licensing and regulation – Where litigation funding agreement purportedly rescinded by reason of the lack of a financial services licence – Whether litigation funding agreement a financial product – Whether litigation funding agreement a credit facility.

Words and phrases – "credit facility", "financial product", "financial service", "litigation funding agreement".

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

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Defamation

Harbour Radio Pty Limited v Trad
S318/2011: [\[2012\] HCA 44](#).

Judgment delivered: 5 October 2012.

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

Catchwords:

Defamation – Defences – Qualified privilege – Contextual truth – Substantial truth – Reply to criticism – Malice – Where appellant made broadcast in response to statements made by respondent – Whether defence of qualified privilege applicable to statements – Whether broadcast sufficiently connected to criticism by respondent – Whether broadcast made *bona fide* to vindicate reputation of appellant – Whether broadcast actuated by malice – Whether community standard test of "right-thinking" person relevant to substantial or contextual truth defence – Whether audience composed of ordinary decent persons relevant to substantial truth or contextual truth defence.

Words and phrases – "contextual truth", "malice", "qualified privilege", "substantial truth".

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

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Negligence

Barclay v Penberthy & Ors
P55/2011; P57/2011: [\[2012\] HCA 40](#).

Judgment delivered: 2 October 2012.

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

Catchwords:

Negligence – Pure economic loss – Plane crash caused by engine failure and negligent response of pilot – Whether damages recoverable for pure economic loss suffered by employer due to injury to employees.

Tort – Action per quod servitium amisit – Whether absorbed into tort of negligence – Whether action per quod servitium amisit exists under common law of Australia.

Tort – Action per quod servitium amisit – Measure of damages – Remoteness – Whether damages recoverable calculated by price of substitute less wages no longer paid to injured employee.

Tort – Rule in Baker v Bolton – Whether employer can recover for death of employee.

Words and phrases – "per quod servitium amisit", "pure economic loss", "vulnerability".

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

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Procedure

Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 2]

M128: [\[2012\] HCA 42](#).

Judgment delivered: 2 October 2012.

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

Catchwords:

Procedure – Costs.

Costs issue arising from appeal in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [\[2012\] HCA 32](#).

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Taxation

Commissioner of Taxation v Qantas Airways Ltd

S47/2012: [\[2012\] HCA 41](#).

Judgment delivered: 2 October 2012.

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

Catchwords:

Goods and Services Tax – Taxable supply – Supply – Consideration – Overbooking – Attribution of tax period – Airfares that were non-refundable or refundable but unclaimed – Customer cancels or fails

to take purchased flight – Promise by airline to use best endeavours to carry passengers and baggage – Whether a taxable supply under *A New Tax System (Goods and Services Tax) Act 1999* (Cth), s 9-5 – Whether airline liable to remit to Commissioner GST on non-refundable or unclaimed refundable fares.

Words and phrases – "a supply for consideration", "consideration", "taxable supply".

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

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2: CASES RESERVED

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

Constitutional Law

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

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

Dates heard: 2 & 3 October 2012.

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

Catchwords:

Constitutional law (Cth) – Operation and effect of Constitution – Interpretation – Implied freedom of political communication about government or political matters – System of representative and responsible government – Local government – Clauses 2.3 and 2.8 of the Corporation of the City of Adelaide By-Law No 4 (Roads), inter alia, prohibited preaching, canvassing, haranguing, and distribution of printed matter without permission on roads ("by-law") – Whether by-law complies with limitations on legislative power delegated to local government under s 667(1)9(XVI) of the *Local Government Act 1934* (SA) – Whether impugned by-law effectively burdens freedom of communicating about government and political matters – Whether by-law reasonably appropriate and adapted to serve legitimate end in manner compatible with maintenance of representative and responsible government – Whether potential that by-law may be erroneously administered relevant to validity.

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

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

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

Date heard: 3 & 4 October 2012.

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

Catchwords:

Constitutional law (Cth) – Operation and effect of Constitution – Interpretation – Implied freedom of political communication about government or political matters – System of representative and responsible government – Charges laid under s 471.12 of the Criminal Code 1995 (Cth) ("the Code") which creates an offence of using a postal or similar service in a way that reasonable persons would consider menacing, harassing or offensive – Whether s 471.12 of the Code is invalid to the extent it imposes criminal sanction for "offensive" use of a postal or similar service because it infringes the implied freedom of political communication about government or political matters.

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

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The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment & Ors

S127/2012: [\[2012\] HCATrans 207](#).

Date heard: 5 September 2012.

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

Catchwords:

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

give effect to executive policy when sitting as the NSW Industrial Commission undermines institutional integrity of the Industrial Court.

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

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

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

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

Catchwords:

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

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

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

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

Consumer Law

Google Inc v Australian Competition and Consumer Commission

S175/2012: [\[2012\] HCATrans 224](#).

Date heard: 11 September 2012.

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

Catchwords:

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

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

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Corporations Law

Mansfield v The Queen; Kizon v The Queen

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

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

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

Catchwords:

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

(former) s 1002G and s 1042A of Act, must be, a factual reality and cannot include falsehoods or lies – Whether element of offence of insider trading that inside information possessed by accused corresponds with information possessed by entity entitled to have or use it.

Words and Phrases – “information”.

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

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Westfield Management Limited as Trustee for the Westart Trust v AMP Capital Property Nominees Limited as Nominee of Unisuper Limited in its Capacity as Trustee of the Complying Superannuation Fund Known as Unisuper & Anor
S181/2012: [\[2012\] HCATrans 208](#).

Date heard: 6 September 2012.

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

Catchwords:

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

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

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Costs

Certain Lloyds Underwriters Subscribing to Contract No IHOOAAQS v Cross; Certain Lloyds Underwriters Subscribing to Contract No IHOOAAQS v Thelander; Certain Lloyds Underwriters Subscribing to Contract No IHOOAAQS v Thelander
S418/2011; S419/2011: [\[2012\] HCATrans 182](#).

Date heard: 15 August 2012.

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

Catchwords:

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

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

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

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State of New South Wales v Williamson
S416/2011: [\[2012\] HCATrans 182](#).

Date heard: 15 August 2012.

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

Catchwords:

Costs – Recoverable costs – Limitations – Personal injury damages – Respondent sought damages from applicant for trespass to person constituting battery and false imprisonment – Judgment for respondent entered by consent without admission as to liability and undifferentiated sum paid in settlement of all claims – Respondent sought declaration that costs of proceeding not regulated by s 338 of *Legal Profession Act 2004* (NSW) – Whether respondent's claim a claim for personal injury damages – Whether deprivation of liberty and loss of dignity capable of being personal injury or "impairment of a person's physical or mental condition" for purpose of *Civil Liability Act 2002* (NSW), s 11 – Whether claim for damages that

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

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

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Criminal Law

Cooper v The Queen

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

Date heard: 9 August 2012.

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

Catchwords:

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

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

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Defamation

Papaconstuntinos v Holmes a Court

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

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

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

Catchwords:

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

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

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Family Law

Stanford v Stanford

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

Date heard: 4 September 2012.

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

Catchwords:

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

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

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

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Jurisdiction

Commissioner of Police v Eaton and Anor

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

Date heard: 11 October 2012.

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

Catchwords:

Jurisdiction – Subject matter jurisdiction – Industrial Relations Commission NSW ('IRC') – Probationary police officer employed and dismissed by Commissioner of Police ('Commissioner') under s 80(3) of the *Police Act* 1990 ('Police Act') – Probationary officer made an application to the IRC claiming dismissal was harsh, unreasonable or unjust under s 84(1) of the *Industrial Relations*

Act 1996 (NSW) ('IR Act') – Whether the Industrial Relations Commission of NSW has the jurisdiction to hear and determine a claim alleging unfair dismissal under Part 6 of Chapter 2 of the IR Act brought by a probationary police officer employed and dismissed under s 80(3) of the Police Act 1990 – Whether Police Act contains an exhaustive regime for the appointment and termination of probationary police officers.

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

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

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Statutes

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

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

Taxation

Mills v Commissioner of Taxation
S225/2012 [\[2012\] HCATrans 259](#).

Date heard: 10 October 2012.

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

Catchwords:

Taxation – Income tax – Anti-avoidance provisions – Imputation benefits – Scope of *Income Tax Assessment Act* 1936 (Cth), s 177EA – Bank issued securities ("PERLS V") in order to raise Tier 1 capital – Funds raised by issue of PERLS V were received by New Zealand branch of bank – Return on investment was tax-deductible under New Zealand law – Tier 1 capital is "equity" not "debt" for Australian income taxation purposes, entitling security-holders to "imputation benefits" in the form of franking credits – Subsequent determination by Commissioner of Taxation under s 177EA denying

franking credits to security-holders in respect of distributions – Whether bank entered into or carried out scheme for purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling security-holders to obtain imputation benefit.

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

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Torts

Newcrest Mining Limited v Thornton

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

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

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

Catchwords:

Torts – Joint or several tortfeasors – Contribution – Satisfaction – Double recovery – Statutory prohibition – Respondent injured in workplace accident – Settlement reached with employer and consent judgment entered – Respondent subsequently issued summons against appellant, owner of mine site at which respondent injured – Appellant sought and received summary judgment on ground that respondent already compensated for injury by employer and s 7(1)(b) of *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) ("Act") precluded recovery of additional damages – Whether s 7(1)(b) of Act applies only to damages awarded following judicial assessment or also to judgments entered by consent – *Nau v Kemp & Associates* (2010) 77 NSWLR 687.

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

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

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Trusts

Montevento Holdings Pty Ltd & Anor v Scaffidi & Anor

P22/2012: [\[2012\] HCATrans 261](#).

Date heard: 12 October 2012.

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

Catchwords:

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

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

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3: ORIGINAL JURISDICTION

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

Constitutional Law

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

Catchwords:

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

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

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X7 v Australian Crime Commission and Anor
S100/2012.

Catchwords:

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

offences under the *Criminal Code* (Cth) – Plaintiff subsequently interviewed by an ACC examiner – Whether Div 2 of Pt II of the ACC Act empowers an ACC examiner to conduct an examination of a person charged where that examination concerns the subject matter of the offence so charged – If so, whether Div 2 of Pt II of the ACC Act invalid to the extent that it is contrary to Ch III of the Constitution.

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

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4: SPECIAL LEAVE GRANTED

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

Constitutional Law

Pompano Pty Ltd and Finks Motorcycle Club, Gold Coast Chapter v Assistant Commissioner Michael James Condon

B44/2012: [\[2012\] HCATrans 242](#).

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

Catchwords:

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III – Vesting of federal jurisdiction in State courts – *Criminal Organisation Act 2009 (Q)* ('the Act') – The Act creates a scheme whereby the Commissioner of the Police Service ('the Commissioner') may apply to the Supreme Court for a declaration that an organisation is a 'criminal organisation' – The Act contemplates, inter alia, that in any substantive application under the Act that the Commissioner may rely on 'criminal intelligence' which cannot be disclosed to the respondent or the respondent's legal representative – Whether requirements, taken individually or in their cumulative operation, placed on Supreme Court in deciding if an organisation should be declared, repugnant to, or incompatible with, institutional integrity.

Removed from Qld SC.

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

Corporations Law

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

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

Catchwords:

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

Corporations law – Management and administration – Directors and other officers – Appointment removal and retirement of directors – Power of court to rectify corporate act which is taken in contravention of corporate constitution – Section 1322(4) of the *Corporations Act* 2001 (Cth) confers on a court power to make an order that any "act, matter or thing purporting to be have been done" either under the *Corporations Act*, or "in relation to a corporation" is not invalid by reason of any "contravention of a provision of [the *Corporations Act*] or a provision of the constitution of a corporation" – Whether purported act contravening constitution by person never validly appointed to office is a "contravention" that can be cured by s 1322(4) – Scope of power conferred by s 1322(4) of the *Corporations Act* 2001.

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

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Criminal Law

Baini v The Queen

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

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

Catchwords:

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

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

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Huynh v The Queen

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

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

Catchwords:

Criminal law – Appeal – Jury misdirection – Applicant and co-accused convicted of murder after trial before jury – Trial judge provided written directions on request from jury – Trial judge's directions omitted element of joint enterprise liability and failed to apply substituted legal directions to the evidence against the applicant – Whether appellate court able to conclude no substantial miscarriage of justice.

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

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Native Title

Akiba and Mye on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia & Ors

B19/2012: [\[2012\] HCATrans 245](#).

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

Catchwords:

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

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

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Karpany & Anor v Dietman

A18/2012: [\[2012\] HCATrans 210](#).

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

Catchwords:

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

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

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Property

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

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

Catchwords:

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

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

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Statutes

Maloney v The Queen

B27/2012: [\[2012\] HCATrans 243](#).

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

Catchwords:

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

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

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

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Taxation

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

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

Catchwords:

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

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

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Torts

Beckett v The State of New South Wales
S144/2012: [[2012](#)] [HCATrans 252](#).

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

Catchwords:

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

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

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

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

Catchwords:

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

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

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

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Wallace v Kam

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

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

Catchwords:

Torts – Negligence – Causation – Medical practitioner – Failure to warn – Duty to warn patient of material risks inherent in applicant's proposed back surgery – Multiple material risks – Applicant suffered nerve damage on account of one of several risks materialising – Applicant argued that he would not have undergone surgery if told of all risks – Whether failure to warn of material risks that did not

eventuate causally connected to damage – *Civil Liability Act 2002* (NSW), s 5D.

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

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5: CASES NOT PROCEEDING OR VACATED

The following cases in the High Court of Australia are not proceeding or have been vacated since *High Court Bulletin* 9 [2012] HCAB 09.

6: SPECIAL LEAVE REFUSED

Sydney: 5 October 2012

Civil

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Agricultural and Rural Finance Pty Limited	Wardel & Ors (S133/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 107	Application for special leave refused with costs [2012] HCATrans 256
Agricultural & Rural Finance Pty Ltd	Giannuzzi & Ors (S134/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 107	Application for special leave refused with costs [2012] HCATrans 256
David & Anor	Abdishou & Ors (S137/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 109	Application for special leave refused with costs [2012] HCATrans 253
Raulfs	Fishy Bite Pty Ltd & Ors (S153/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 135	Application for special leave refused with costs [2012] HCATrans 254
Waters and others named in schedule A	Mercedes Holdings Pty Limited and others named in schedule B (S162/2012)	Full Court of the Federal Court of Australia [2012] FCAFC 80	Application for special leave refused with costs [2012] HCATrans 255

Criminal

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
TWL	The Queen (S149/2012)	Supreme Court of New South Wales (Court of Criminal Appeal) [2012] NSWCCA 93, [2012] NSWCCA 57	Application for special leave refused [2012] HCATrans 257

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Canberra (by video link to Brisbane and Darwin): 5 October 2012

Civil

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Lawrence	Attorney-General of Queensland	Supreme Court of Queensland (Court of Appeal)	Special leave refused [2012] HCATrans 247

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
	(B29/2012)	[2011] QCA 347	

Criminal

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Lui	The Queen (B22/2012)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 284	Special leave refused [2012] HCATrans 246
CAZ	The Queen (B26/2012)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 231	Special leave refused [2012] HCATrans 244
Woods	The Queen (D4/2012)	Supreme Court of the Northern Territory (Court of Criminal Appeal) [2012] NTCCA 8	Special leave refused [2012] HCATrans 248
Mahendra	The Queen (D5/2012)	Supreme Court of the Northern Territory (Court of Criminal Appeal) (no media neutral citation)	Special leave refused [2012] HCATrans 249
Ahmad	The Queen (D6/2012)	Supreme Court of the Northern Territory (Court of Criminal Appeal) [2012] NTCCA 01	Special leave refused [2012] HCATrans 249

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