



HIGH COURT BULLETIN

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[2013] HCAB 01 (22 February 2013)

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
Google Inc v Australian Competition and Consumer Commission	Consumer Law
Commissioner of Police v Eaton and Anor	Jurisdiction

[2: Cases Reserved](#)

Case	Title
Plaintiff M79 v Minister for Immigration and Citizenship	Citizenship and Migration
Minister for Immigration and Citizenship v Li and Anor	Citizenship and Migration
Yates v The Queen	Criminal Law
Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth	Native Title

of Australia & Ors	
Castle Constructions Pty Limited v Sahab Holdings Pty Ltd & Anor	Property
Beckett v The State of New South Wales	Torts

3: Original Jurisdiction

Case	Title
Plaintiff S138 v Director-General of Security	Citizenship and Migration/Administrative Law

4: Special Leave Granted

Case	Title
Agius v The Queen	Criminal Law
Jason Lee (aka Do Young Lee) & Anor v New South Wales Crime Commission	Criminal Law/Constitutional Law
Dunrobin v The Queen	Criminal Law

1: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the February 2013 sittings.

Consumer Law

Google Inc v Australian Competition and Consumer Commission
S175/2012: [\[2013\] HCA 1](#).

Date heard: 11 September 2012.

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

Catchwords:

Trade practices – Misleading or deceptive conduct – Search engine operator displayed "sponsored links" on search results page – Sponsored links created by or at direction of advertisers – Sponsored links comprised advertising text which directed users to web sites of advertisers' choosing – Whether search engine operator engaged in misleading or deceptive conduct by publishing or displaying sponsored links which contained misleading representations made by advertisers – Whether search engine operator adopted or endorsed misleading representations.

Words and phrases – "adoption", "endorsement", "intermediary", "misleading or deceptive conduct", "misleading representation".

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

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Jurisdiction

Commissioner of Police v Eaton and Anor
S230/2012: [\[2013\] HCA 2](#).

Date heard: 11 October 2012.

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

Catchwords:

Jurisdiction – Subject matter jurisdiction – Industrial Relations Commission of New South Wales ("IR Commission") – Probationary police officer dismissed by Commissioner of Police under s 80(3) of the *Police Act 1990* (NSW) – Probationary police officer applied to

IR Commission under s 84(1) of the *Industrial Relations Act 1996* (NSW) claiming dismissal was harsh, unreasonable or unjust – Whether IR Commission has jurisdiction under Pt 6 of Ch 2 of the *Industrial Relations Act* to determine unfair dismissal claim regarding dismissal under s 80(3) of the *Police Act*.

Statutes – Statutory interpretation – Implied repeal – Pt 6 of Ch 2 of the *Industrial Relations Act 1996* (NSW) allows public sector employees to challenge dismissal as harsh, unreasonable or unjust – Section 80(3) of the *Police Act 1990* (NSW) permits Commissioner of Police to dismiss probationary police officers from the New South Wales Police Force at any time and without reason – Inconsistency and incoherence between provisions of the *Industrial Relations Act* and the *Police Act* – Whether Parliament intended the general provisions of the *Industrial Relations Act* to affect the operation of the earlier specific provisions of the *Police Act*.

Words and phrases – "generalia specialibus non derogant", "harsh, unreasonable or unjust", "implied repeal", "legislative intention", "probationary police officer", "unfair dismissal".

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

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Statutes

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

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Words and Phrases

See also [Consumer Law](#): *Google Inc v Australian Competition and Consumer Commission*

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

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2: CASES RESERVED

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

Administrative Law

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

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Constitutional Law

See also [Statutes](#): *Maloney v The Queen*

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

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

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

Dates heard: 2 & 3 October 2012.

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

Catchwords:

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

adapted to serve legitimate end in manner compatible with maintenance of representative and responsible government – Whether potential that by-law may be erroneously administered relevant to validity.

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

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Monis v The Queen & Anor; Droudīs v The Queen & Anor
S172/2012;S179/2012: [\[2012\] HCATrans 238](#); [\[2012\] HCATrans 241](#).

Dates heard: 3 & 4 October 2012.

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

Catchwords:

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

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

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Assistant Commissioner Michael James Condon v Pompano Pty Ltd & Anor
B59/2012: [\[2012\] HCATrans 332](#); [\[2012\] HCATrans 333](#).

Dates heard: 4 & 5 December 2012.

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

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

S178/2012: [\[2012\] HCATrans 277](#).

Date heard: 6 November 2012.

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

Catchwords:

Constitutional law – Judicial power of the Commonwealth – Constitution, Ch III – Following an arbitral hearing conducted in Australia in accordance with an agreement between the parties, the second defendant was awarded damages and costs – Proceedings commenced in the Federal Court of Australia seeking enforcement of arbitral awards – Plaintiff resisted enforcement proceedings – Whether *International Arbitration Act 1974* (Cth) ("the Act"), including by its application of the UNCITRAL Model Law on International Commercial Arbitration, substantially impairs the institutional integrity of the Federal Court of Australia – Whether the Act impermissibly vests Commonwealth judicial power on arbitral tribunals.

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

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Citizenship and Migration

Plaintiff M79 v Minister for Immigration and Citizenship

M79/2012: [\[2013\] HCATrans 7](#).

Date heard: 8 February 2013.

Catchwords:

Citizenship and Migration – Refugees – Plaintiff 'offshore entry person' – Plaintiff made a request for a refugee status assessment – Delegate determined that Plaintiff did not meet the definition of 'refugee' in Art 1A of the Refugees Convention – Plaintiff applied for independent merits review and subsequently judicial review – Judicial review decision remains reserved – Minister intervened under s 195A of the *Migration Act* 1958 (Cth) and granted the Plaintiff a temporary safe haven visa permitting a stay of seven days and a bridging E visa permitting a stay of six months – Grant of temporary safe haven visa bars plaintiff's application for protection visa under s 91L of the *Migration Act* – Whether temporary safe haven visa validly granted – Whether plaintiff's application for a protection visa valid.

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

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Minister for Immigration and Citizenship v Li and Anor

B68/2012: [\[2013\] HCATrans 6](#).

Date heard: 7 February 2013.

Catchwords:

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

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

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

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Corporations Law

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

Dates heard: 14 & 15 November 2012.

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

Catchwords:

Corporations law – Redeemable preference shares – Validity of issue – Rights attaching to shares – Eight C class shares were allotted in the third respondent ("the Company") – No other shares in the Company over which the C class shares conferred any priority or preference were ever issued – Directors of the Company resolved to redeem the eight C class shares for a nominal amount – Whether other shares, over which preference is enjoyed, must exist for redeemable preference shares to be valid – Whether eight C class shares in the Company were redeemable preference shares for the purposes of the *Corporations Act* 2001 (Cth) notwithstanding that there were never any other shares issued in the Company by reference to which the C class shares conferred preference.

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

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

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Criminal Law

Huynh v The Queen; Duong v The Queen; Sem v The Queen
A30/2012; A31/2012; A32/2012: [\[2012\] HCATrans 334](#); [\[2012\] HCATrans 335](#).

Dates heard: 5 & 6 December 2012.

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

Catchwords:

Criminal law – Appeal – Jury misdirection – Appellant and two co-accused convicted of murder after trial before jury – Trial judge gave oral summing relating facts in narrative form - Trial judge also provided written directions on request from jury – Trial judge’s directions omitted element of 'participation' from joint enterprise liability - Whether directions flawed for failure to identify 'participation' as an element of joint enterprise liability - Whether oral summing up and written redirection flawed on account of failure to apply legal directions to case against each individual co-accused.

Practice and procedure - Application for special leave to appeal - Application for special leave brought by two co-accused.

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

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Yates v The Queen
P21/2012: [\[2013\] HCATrans 16](#).

Date heard: 13 February 2013.

Catchwords:

Criminal law – Sentencing – Detained during the Governor's pleasure – In 1987 Applicant was found guilty of one count of deprivation of liberty and one count of aggravated sexual assault upon a child under the age of 13 years – Applicant sentenced to seven years imprisonment on each count, to be served concurrently, followed by an indeterminate sentence imposed under s 662 of the *Criminal Code* (WA) – Section 662 of the *Criminal Code* (WA) empowered a court in certain circumstances to sentence a person to be detained during the Governor's pleasure – Whether it was open to sentence the applicant for an indeterminate period having regard to the applicant's antecedents, health and mental condition – Whether s 662 of the *Criminal Code* can be used for the purpose of manipulating the period of time which an offender must serve on parole following the expiration of a future term.

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

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Native Title

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

B58/2012: [\[2013\] HCATrans 15](#).

Date heard: 12 February 2013.

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 prohibited, 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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Negligence

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd & Ors

S270/2012: [\[2012\] HCATrans 344](#).

Date heard: 12 December 2012.

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

Catchwords:

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 appellant') 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 appellant – 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.

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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Practice and Procedure

See also [Criminal Law](#): *Huynh v The Queen*; *Duong v The Queen*; *Sem v The Queen*

Property

Castle Constructions Pty Limited v Sahab Holdings Pty Ltd & Anor S263/2012 [\[2013\] HCA Trans 5](#).

Date heard: 6 February 2013.

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

B57/2012: [\[2012\] HCATrans 342](#); [\[2012\] HCATrans 343](#).

Dates heard: 11 & 12 December 2012.

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

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) – Appellant 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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X7 v Australian Crime Commission and Anor

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

Date heard: 7 November 2012.

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

Catchwords:

Statutes – *Australian Crime Commission Act* 2002 (Cth) ('ACC Act') – ACC examiner required plaintiff to attend before examiner to give

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

Constitutional law – Judicial power of Commonwealth – Constitution, Ch III – Whether Div 2 of Pt II of the ACC Act invalid to the extent that it is contrary to Ch III of the Constitution.

This writ of summons was filed in the original jurisdiction of the High Court of Australia.

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Torts

Beckett v The State of New South Wales
S144/2012: [\[2013\] HCATrans 4](#).

Date heard: 5 February 2013.

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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3: ORIGINAL JURISDICTION

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

Administrative Law

See also [Citizenship and Migration: Plaintiff S138 v Director-General of Security and Ors](#)

Citizenship and Migration

Plaintiff S138 v Director-General of Security and Ors
S138/2012: *Special case.*

Catchwords:

Citizenship and migration – Migration – Refugees – Protection visas – Plaintiff found to be a refugee but refused protection visa due to adverse security assessment by Australian Security Intelligence Organisation – Department relied on public interest criterion 4002 which requires that applicant not be assessed by ASIO to be a risk to security – In Plaintiff M47 v Director-General of Security public interest criterion 4002 found to be beyond power conferred by s 31(3) of the Migration Act 1958 (Cth) – Whether the Secretary made an error of law by relying on public interest criterion 4002

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

Administrative law – Procedural fairness – Adverse security assessment – ASIO interviewed plaintiff – Plaintiff did not meet requirements for protection visa – Plaintiff never informed of the reasons why or nature of apparent risk he poses to security – Whether Director-General failed to accord plaintiff procedural fairness

Constitutional law – Whether ss 189, 196 and 198 of Act are beyond the legislative power of the Commonwealth

This special case was filed in the original jurisdiction of the High Court of Australia.

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Constitutional Law

See also [Citizenship and Migration: Plaintiff S138 v Director-General of Security and Ors](#)

Fortescue Metals Group Limited and Ors v The Commonwealth of Australia

S163/2012: *Writ of summons.*

Catchwords:

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

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

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

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

This writ of summons was filed in the original jurisdiction of the High Court of Australia.

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4: SPECIAL LEAVE GRANTED

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

Administrative Law

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

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

Catchwords:

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

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

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Constitutional Law

See also [Criminal Law](#): *Jason Lee (aka Do Young Lee) & Anor v New South Wales Crime Commission*

Keating v Director of Public Prosecutions (Cth)
M74/2012: [\[2012\] HCATrans 346](#).

Date heard: 14 December 2012 – *Matter removed from the Magistrates' Court of Victoria*.

Catchwords:

Constitutional law – Powers of the Commonwealth Parliament – Social Security Legislation – Retrospective application of offence – Section 66A of the *Social Security (Administration) Act* 1999 (Cth) ('the Administration Act') retrospectively creates duty for applicant to inform Centrelink of income increases – Applicant charged with three counts of obtaining financial advantage contrary to s 135(1) for failing to report increases in her income to Centrelink – Whether s 66A of the Administration Act invalid in so far as it operates retrospectively – Whether the sending or deemed receipt of a notice under s 68 of the Administration Act is sufficient to give rise to a duty under law to perform an action for the purposes of s 4.3(b) of the *Criminal Code* (Cth).

Removed from Magistrates' Court of Victoria.

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State of NSW v Kable

S233/2012: [\[2012\] HCATrans 356](#).

Date heard: 14 December 2012 – *Special leave granted*.

Catchwords:

Constitutional law – Judicial power – Respondent detained pursuant to order of Supreme Court on application of Director of Public proceedings pursuant to purported State legislation – Legislation subsequently held invalid – Respondent sought damages from the appellant for false imprisonment – Whether orders of Supreme Court valid until set aside – Whether the orders of a State Supreme Court exercising federal jurisdiction in resolving the constitutionality of a State Act and exercising powers pursuant to that Act are deprived of the character of judicial orders by reason of the subsequent invalidity of the State Act.

Torts – False imprisonment – Defences – Lawful authority – Respondent held under order of Supreme Court that was subsequently set aside – Whether persons acting to obey orders of a State Supreme Court, which were valid on their face, have defence of lawful authority to tortious liability at common law.

Appealed from NSW (CA): [2012] NSWCA 243.

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Criminal Law

Agius v The Queen

S254/2012: [\[2013\] HCATrans 30](#).

Date heard: 15 February 2013 – *Special leave granted*.

Catchwords:

Criminal law – Conspiracy – In 2001 the *Crimes Act 1914* (NSW) s 29D dealing with the offence of conspiracy was repealed and replaced with the *Criminal Code Act 1995* (Cth) s 135 – Whether proof of conspiracy under the *Criminal Code Act 1995* (Cth) requires evidence of an agreement entered into after the Code began operation on 24 May 2001 – Whether the *Criminal Code Act 1995* (Cth) can apply retrospectively to an agreement entered into before 24 May 2001 – Whether physical element of conduct constituted by a conspiracy can be “a state of affairs”

Appealed from NSW (CA): [2011] NSWCCA 119.

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Jason Lee (aka Do Young Lee) & Anor v New South Wales Crime Commission

S292/2012: [\[2013\] HCATrans 27](#).

Date heard: 15 February 2013 – *Special leave granted*.

Catchwords:

Criminal law – Recovery of proceeds of crime – Examination orders – Whether examination would interfere with the administration of justice in criminal proceedings – Whether examination order may be made where criminal charges pending against examinee – Whether procedural protections available to prevent abuse of power – *Criminal Assets Recovery Act 1990* (NSW), ss 13A, 31D, 63

Constitutional law – Ch III of the Constitution – Separation of judicial powers – Functions incompatible with institutional integrity of State Supreme Court – Validity of s 31D of *Criminal Assets Recovery Act 1990* (NSW) – Whether requiring a State Supreme Court to make an examination order without regard to the capacity of that order to prejudice the fair trial of the person is incompatible with Ch III

Statutes – *Criminal Assets Recovery Act 1990* (NSW) ss 13A, 31D, 63 – Examination orders – Whether power to order examination limited by general law principles relating to a fair trial

Appealed from NSW (CA): [2012] NSWCA 276

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Director of Public Prosecutions (Cth) v JM
M73/2012: [\[2012\] HCATrans 347](#).

Date heard: 14 December 2012 – *Referred to Full Court*

Catchwords:

Criminal law – Market manipulation – *Corporations Act* 2001 (Cth), s 1041A – Transaction alleged to have or likely to have effect of creating artificial price for shares on ASX – Meaning of 'artificial price' in s 1041 of the *Corporations Act* – Whether meaning of 'artificial price' informed by equivalent US jurisprudential conceptions of 'cornering' and 'squeezing'.

Appealed from Vic SC (CA): (2012) 90 ACSR 96; [2012] VSCA 21.

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Dunrobin v The Queen

B64/2012: [\[2013\] HCATrans 23](#)

Date heard: 15 February 2013 – *Special leave granted; Appeal instituted, heard instanter and allowed. Matter remitted to the Court of Appeal of the Supreme Court of Queensland.*

Catchwords:

Criminal law – Verdict unreasonable or insupportable having regard to evidence – Failure of Court of Appeal to make an independent assessment of the evidence – Whether similar fact evidence can be used to prove lack of consent in cases of sexual offence – failure to warn against propensity reasoning

Appealed from QSC (CA): [2012] QCA 209

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Evidence

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

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

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

Catchwords:

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

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

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

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Equity

Kakavas v Crown Melbourne Limited & Ors
M53/2012: [\[2012\] HCATrans 348](#).

Date heard: 14 December 2012 – *Special leave granted*.

Catchwords:

Equity – Unconscionable dealing – Appellant gambled at respondent's casino over extended period of time – Appellant alleged to suffer from psychiatric condition known as "pathological gambling" – Appellant also subject to "interstate exclusion order" for purposes of *Casino Control Act 1991* (Vic) at all relevant times – Whether series of gambling transactions between appellant and respondent affected by unconscionable dealing – Whether respondent liable for unconscionable dealing in circumstances where its officers did not bring to mind matters known to them which placed the appellant at a special disadvantage – What constitutes constructive notice of a special disadvantage in a claim of unconscionable dealing against a corporate person – Whether 'equality of bargaining position' test for determining whether person under 'special disadvantage'.

Trade practices – Unconscionable conduct – Gambling transactions – Section 51AA for the *Trade Practices Act 1974* (Cth) – Whether

gambling transactions involved a contravention of s 51AA of the *Trade Practices Act*.

Appealed from Vic SC (CA): [\[2012\] VSCA 95](#).

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Intellectual Property

See also **Evidence:** *Aristocrat Technologies Australia Pty Ltd and Ors v Global Gaming Supplies Pty Ltd and Ors*

Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd & Ors
S219/2012: [\[2012\] HCATrans 357](#).

Date heard: 14 December 2012 – *Special leave granted*.

Catchwords:

Intellectual Property – Patents – Patent claimed administration of pharmaceutical drug as method of preventing or treating particular condition – Administration of drug for different purpose than that specified in patent had effect of preventing or treating condition referred to in patent – Whether methods of treating human body patentable inventions within the meaning of s 18(1)(a) of the *Patents Act* 1900 (Cth) – Whether second or subsequent medical uses of previously known products patentable inventions.

Intellectual Property – Patents – Infringement – Patent claims use of compound for treatment of a specified disease – Whether a person who supplies the compound and indicates its use for treatment of a different disease infringes the patent under s 177(1) of the *Patents Act* 1990 (Cth).

Appealed from FCA (FC): (2012) 204 FCR 494; (2012) 290 ALR 1; (2012) 96 IPR 185; [2012] FCAFC 102

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Native Title

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

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

Catchwords:

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

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

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Taxation

Commissioner of Taxation v Unit Trend Services Pty Ltd
B61/2012: [\[2012\] HCATrans 361](#).

Date heard: 14 December 2012 – *Referred to Full Court*.

Catchwords:

Taxation – Goods and services tax – Anti-avoidance – Anti-avoidance provisions in Div 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) enable Commissioner of Taxation to negate GST benefit derived from a scheme – Provisions do not apply if GST benefit attributable to the making of a "choice, election, application or agreement expressly provided for by the GST law" – Where property development scheme involved a combination of several choices provided for by GST law – Whether GST benefit attributable to choice or to scheme – Meaning of s 165-5(1)(b) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Appealed from FCA (FC): (2012) 205 FCR 29; [2012] ATC 20-342; [2012] FCAFC 112.

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Torts

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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Trade Practices

See also **Equity:** *Aristocrat Technologies Australia Pty Ltd and Ors v Global Gaming Supplies Pty Ltd and Ors*

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* 12 [2012] HCAB 12.

6: SPECIAL LEAVE REFUSED

Sydney: 15 February 2013

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Rose	Meriton Apartments Pty Limited (S253/2012)	Federal Court of Australia [2012] FCA 844	Special leave refused with costs [2013] HCATrans 29.
Pacific Tug (Australia) Pty Ltd	Hingston (S259/2012)	Full Court of the Federal Court of Australia [2012] FCAFC 119	Special leave refused with costs [2013] HCATrans 26.
Pacific Tug (Australia) Pty Ltd	Hingston (S260/2012)	Full Court of the Federal Court of Australia [2012] FCAFC 119	Special leave refused with costs [2013] HCATrans 26.
Upper Lachlan Shire Council	Rodgers (S264/2012)	Supreme Court of New South Wales (Court of Appeal) [2012] NSWCA 259	Special leave refused with costs [2013] HCATrans 31.
Binetter	Deputy Commissioner of Taxation (S269/2012)	Full Court of the Federal Court of Australia [2012] FCAFC 126	Special leave refused with costs
JB	The Queen (S304/2012)	Supreme Court of New South Wales (Court of Criminal Appeal) [2012] NSWCCA 12	Special leave refused [2013] HCATrans 28.

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Canberra (by video link to Brisbane): 15 February 2013

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Michaelides	The Queen (B42/2012)	Supreme Court of Queensland (Court of Appeal) [2012] QCA 166	Special leave refused [2013] HCATrans 22.

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Owen	Menzies & Ors (B43/2012)	Supreme Court of Queensland (Court of Appeal) [2012] QCA 170	Special leave refused with costs [2013] HCATrans 18.
GBRH Holdings Pty Ltd	Helicopter Services Cairns Pty Ltd (B45/2012)	Supreme Court of Queensland (Court of Appeal) [2012] QCA 198	Special leave refused with costs [2013] HCATrans 19.
GAP	The Queen (B46/2012)	Supreme Court of Queensland (Court of Appeal) [2012] QCA 193	Special leave refused [2013] HCATrans 24.
Pollock	The Queen (B50/2012)	Supreme Court of Queensland (Court of Appeal) [2012] QCA 231	Special leave refused [2013] HCATrans 21.
Razak	The Queen (B55/2012)	Supreme Court of Queensland (Court of Appeal) [2012] QCA 244	Special leave refused [2013] HCATrans 20.
Dale	The Queen (B71/2012)	Supreme Court of Queensland (Court of Appeal) [2012] QCA 303	Special leave refused [2013] HCATrans 25.
Kelly	Crosby & Ors (C4/2012)	Full Court of the Federal Court of Australia [2012] FCAFC 96	Special leave refused with costs [2013] HCATrans 17.

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