



HIGH COURT BULLETIN

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[2011] HCAB 02 (18 March 2011)

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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A: SUMMARY OF NEW ENTRIES

[1: Cases Handed Down](#)

Case	Title
<i>Hogan v Hinch</i>	Constitutional Law
<i>Marcolongo v Chen</i>	Conveyancing

[2: Cases Reserved](#)

Case	Title
<i>Australian Crime Commission v Stoddart & Anor</i>	Administrative Law
<i>Jemena Asset Management (3) Pty Ltd & Ors v Coinvest Limited</i>	Constitutional Law
<i>Commonwealth Director of Public Prosecutions v Poniatowska</i>	Criminal Law
<i>White v Director of Public Prosecutions for Western Australia</i>	Criminal Law
<i>Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd</i>	Corporations
<i>Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Haxton; Equuscorp Pty Ltd</i>	Restitution

<i>(formerly Equus Financial Services Ltd) v Bassat; Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Cunningham's Warehouse Sales Pty Ltd</i>	
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3: Original Jurisdiction

Case	Title
<i>Phonographic Performance Company of Australia Limited v EMI Music Australia Pty Limited & Ors</i>	Constitutional Law

4: Special Leave Granted

Case	Title
<i>Sportsbet Pty Ltd v State of New South Wales & Ors</i>	Constitutional Law
<i>Betfair Pty Limited v Racing New South Wales & Ors</i>	Constitutional Law
<i>Muldock v The Queen</i>	Criminal Law
<i>Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd & Ors</i>	Environment and Planning
<i>HIH Claims Support Limited v Insurance Australia Limited</i>	Equity
<i>Wynton Stone Australia Pty Ltd (in liq) v MWH Australia Pty Ltd (formerly Montgomery Watson Australia Pty Ltd)</i>	Practice and Procedure

1: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the March 2011 sittings.

Constitutional Law

Hogan v Hinch

M105/2010: [\[2011\] HCA 4](#).

Judgment delivered: 10 March 2011.

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

Catchwords:

Constitutional law — Judicial power of Commonwealth — Constitution, Ch III — Institutional integrity of State courts vested with federal jurisdiction — Section 42(1) of *Serious Sex Offenders Monitoring Act 2005* (Vic) ("Act") allowed court to make "suppression order" preventing publication of evidence given, contents of documents adduced or information that might enable identification of offender in proceedings under Act, if court satisfied it is "in the public interest" to make order — Section 42(3) made publishing material in contravention of suppression order an offence — Defendant charged with publishing material identifying offenders in proceedings subject to suppression orders — Whether power conferred by s 42(1) impermissibly diminishes institutional integrity of State courts — Whether and to what extent there exists implication derived from Ch III that State and federal courts must be open to public and carry out activities in public.

Constitutional law — Implied freedom of political communication — Whether s 42 of Act impermissibly burdens implied freedom of political communication — Whether communication by defendant was communication about government or political matters — Whether implied freedom limited to communications about government or political matters at Commonwealth level — Whether s 42 reasonably appropriate and adapted to serve legitimate end in manner compatible with maintenance of representative and responsible government.

Statutory interpretation — Principle of legality — *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("Charter") — Interpretation of s 42 of Act in manner compatible with civil and political rights in Charter.

Words and phrases — "open justice", "political communication".

Removed from Melbourne Magistrates Court: X02916632.

Conveyancing

Marcolongo v Chen

S114/2010: [\[2011\] HCA 3](#).

Judgment delivered: 9 March 2011.

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

Catchwords:

Real property — Conveyancing — *Conveyancing Act* 1919 (NSW), s 37A — Voluntary alienation to defraud creditors — Appellant sought to set aside registered transfer of land from second respondent to first respondent — Whether intent to defraud creditors satisfied by proof of "actual" or "predominantly" fraudulent intent — Whether satisfied by proof that transfer would "delay, hinder or defraud" creditors — Whether intent may be inferred where transfer is voluntary.

Words and phrases — "delay, hinder or defraud".

Appealed from NSW SC (CA): (2009) 260 ALR 353; [2009] NSWCA 326; (2009) 14 BPR 27,153.

2: CASES RESERVED

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

Administrative Law

Australian Crime Commission v Stoddart & Anor
B71/2010: [\[2011\] HCATrans 44](#).

Date heard: 1 March 2011 — *Judgment reserved*.

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

Catchwords:

Administrative law — First respondent summoned under s 28 of *Australian Crime Commission Act 2002* (Cth) (“the Act”) — First respondent declined to answer questions in relation to husband’s activities on basis of common law privilege against spousal incrimination — Whether distinct common law privilege against spousal incrimination exists — Whether privilege abrogated by s 30 of the Act — *Australian Crime Commission Act 2002* (Cth), ss 28, 30.

Appealed from FCA FC: (2010) 185 FCR 409; (2010) 271 ALR 53; [2010] FCAFC 89; [2010] ALMD 6989.

Arbitration

See Insurance: *Westport Insurance Corporation & Ors v Gordian Runoff Limited*

Constitutional Law

Jemena Asset Management (3) Pty Ltd & Ors v Coinvest Limited
M127/2010: [\[2011\] HCATrans 45](#).

Date heard: 2 March 2011 — *Judgment reserved*.

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

Catchwords:

Constitutional law — Operation and effect of Commonwealth Constitution — Inconsistency of laws under s 109 of Commonwealth Constitution — Commonwealth legislative scheme imposing obligation upon employers to pay for long service leave — State law imposing obligation upon employers in construction industry to contribute to fund for portable long service leave entitlements — Whether inconsistency between State and federal legislative schemes — Commonwealth Constitution s 109 — *Construction Industry Long Service Leave Act 1997 (Vic)*.

Appealed from FCA FC: (2009) 180 FCR 576; (2009) 263 ALR 374; [2009] FCAFC 176; (2009) 191 IR 236; [2010] ALMD 2942.

Wainohu v The State of New South Wales

S164/2010: [\[2010\] HCATrans 319](#).

Date heard: 2 December 2010 — *Judgment reserved*.

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

Catchwords:

Constitutional law — Operation and effect of Commonwealth Constitution — Chapter III — Institutional integrity of State courts — Plaintiff member of Hells Angels Motorcycle Club (“Hells Angels”) — *Crimes (Criminal Organisations Control) Act 2009 (NSW)* (“the Act”) provided for any judge of Supreme Court of NSW to be declared, with consent, “eligible Judge” for purposes of the Act — Commissioner of Police applied to eligible judge for declaration under the Act in respect of Hells Angels — Where some evidence classified “criminal intelligence” under the Act and withheld from legal representatives of Hells Angels — Where ex parte hearing held under the Act to allow eligible judge to determine whether certain evidence “properly classified” by Commissioner of Police — Where eligible judge under no obligation to give reasons — Whether the Act or any provision thereof undermines institutional integrity of Supreme Court of NSW — Whether the Act or any provision thereof outside legislative powers of Parliament of NSW — Whether eligible judge acts *persona designata* in exercising functions under the Act — *Crimes (Criminal Organisations Control) Act 2009 (NSW)*.

Constitutional law — Operation and effect of Commonwealth Constitution — Implied freedom of political communication — Section 26 of the Act created offence of associating with person the subject of control order made under the Act — Where associating defined to include any communication — Whether the Act burdens political communication and, if so, whether the Act reasonably appropriate and adapted to serve a purpose compatible with representative and responsible government.

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

See also **Criminal Law**: *Momcilovic v The Queen*

Contracts

Shoalhaven City Council v Firedam Civil Engineering Pty Limited
S216/2010: [\[2011\] HCATrans 11](#); [\[2011\] HCATrans 14](#).

Date heard: 2 & 4 February 2011 — *Judgment reserved*.

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

Catchwords:

Contracts — Building, engineering and related contracts — Settlement of disputes — Expert determination — Where express contractual obligation to give reasons in expert determination — Nature and extent of contractual obligation to give reasons — Whether expert determination contained inconsistency in reasons — Whether inconsistency in reasons means expert did not give reasons for determination as a whole — Whether inconsistency in reasons means contractual obligation not fulfilled and determination not binding on parties.

Appealed from NSW SC (CA): [2010] NSWCA 59.

Corporations

Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (Receivers and Managers Appointed)
P43/2010: [\[2011\] HCATrans 49](#).

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

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

Catchwords:

Corporations — Winding up — Winding up in insolvency — Where respondent presumed to be insolvent once receiver was appointed: *Corporations Act* 2001 (Cth) s 459C — Where respondent required to rebut presumption in an application for winding up in insolvency — Respondent disputed extent of indebtedness — Whether company should be wound-up on basis of disputed debt — Whether

court may determine merits of disputed debt in course of winding up proceeding.

Appealed from FCA FC: (2010) 78 ACSR 487; (2010) 28 ACLC 10-035; [2010] FCAFC 49.

Criminal Law

Commonwealth Director of Public Prosecutions v Poniatowska
A20/2010: [\[2011\] HCATrans 46](#).

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

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

Catchwords:

Criminal law — Offences — Respondent failed to declare \$71,000 in commission payments while receiving parenting benefit from Centrelink — Whether omitting to perform act a physical element of offence — Whether existence of legal duty or obligation to perform act, imposed by offence provision or other Commonwealth statute, determinative of question about physical element — *Criminal Code* 1995 (Cth) ss 4.3 and 135.2.

Words and phrases — “engages in conduct”.

Appealed from SA SC (FC): (2010) SASR 578; (2010) 240 FLR 466; (2010) 271 FLR 610; [2010] SASCFC 19; [2010] ALMD 7469.

White v Director of Public Prosecutions for Western Australia
P44/2010: [\[2011\] HCATrans 47](#).

Date heard: 4 March 2011 — *Judgment reserved*.

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

Catchwords:

Criminal law — Procedure — Confiscation of proceeds of crime and related matters — Restraining or freezing order — Where appellant did not own and have effective control of property where offences committed — Where freezing orders made over appellant's property in place of property where offences took place — Whether property where offences took place was “crime-used” property — Scope of court's power to set aside a freezing order — *Criminal Property Confiscation Act* 2000 (WA) ss 22, 82, 146.

Words and phrases — “crime-used”, “criminal use”.

Appealed from WA SC (CA): (2010) 199 A Crim R 448; [2010] WASCA 47.

Momcilovic v The Queen

M134/2010: [\[2011\] HCATrans 15](#); [\[2011\] HCATrans 16](#); [\[2011\] HCATrans 17](#).

Date heard: 8, 9 & 10 February 2011 — *Judgment reserved*.

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

Catchwords:

Criminal law — Particular offences — Drug offences — Possession — Where person deemed to be in possession of drugs “upon any land or premises” occupied by person, unless person satisfies court to the contrary: *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (“the Act”) s 5 — Whether s 5 of the Act creates legal onus on accused to disprove possession on balance of probabilities or evidential onus of adducing or pointing to evidence capable of raising a reasonable doubt about possession.

Criminal law — Appeal — Grounds of appeal — Conduct of trial judge — Misdirection or non-direction — Where drugs found in appellant’s home — Where appellant and her partner gave evidence that drugs were her partner’s and that appellant had no knowledge of them — Whether trial judge should have directed jury that prosecution must prove appellant’s knowledge of drugs in order to prove possession.

Human rights — Presumption of innocence — Statutory reversal of burden of proof of possession of drugs — Where *Charter of Human Rights and Responsibilities Act 2006* (Vic) (“Charter”) s 32 provides “[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights” — Whether s 5 of the Act construed in light of s 37 of Charter is compatible with right to presumption of innocence — Charter ss 7(2), 25(1), 32(1).

Statutes — Acts of Parliament — Interpretation — Whether necessary to construe statutory provision without regard to s 32 of Charter to achieve “ordinary” construction of provision — Whether s 32 of Charter to be applied after a statutory provision is measured against s 7(2) of Charter — Whether s 32 of Charter a “cardinal principle” of statutory construction or a measure of last resort.

Constitutional law — Operation and effect of Commonwealth Constitution — Commonwealth Constitution, Chapter III — Federal jurisdiction of State courts — Local limitations of State court — Whether s 32 of Charter confers a legislative function on State

courts — Whether institutional integrity of State courts impaired — *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

Constitutional law — Operation and effect of Commonwealth Constitution — Inconsistency under s 109 of Commonwealth Constitution — Whether ss 5 and/or 71AC of the Act inconsistent with ss 13.1, 13.2 and 302.4 of the *Criminal Code* 1995 (Cth) ("the Code").

Constitutional law — Operation and effect of Commonwealth Constitution — Inconsistency under s 109 of Commonwealth Constitution — Whether s 300.4 of the Code evinces clear legislative intent not to cover the field — Whether Part 9.1 of the Code intended to exclude or limit concurrent operation of cognate State or Territory laws — *Dickson v The Queen* (2010) 270 ALR 1.

High Court and Federal Court — High Court of Australia — Appellate jurisdiction — Where relief sought includes order setting aside declaration of inconsistent interpretation under s 36 of Charter made by intermediate appellate court — Whether High Court has jurisdiction under s 73 of Constitution to grant relief sought.

Appealed from Vic SC (CA): (2010) 265 ALR 751; [2010] VSCA 50; [2010] ALMD 4185.

Lacey v Attorney-General of the State of Queensland
B40/2010: [\[2010\] HCATrans 317](#).

Date heard: 30 November 2010 — *Judgment reserved*.

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

Catchwords:

Criminal law — Appeal and new trial — Appeal against sentence — Appeals by Crown — Principles applied by appellate court to Crown appeals — Rule in *House v The King* (1936) 55 CLR 499 — Whether s 669A of the *Criminal Code* 1899 (Qld) requires error on the part of the sentencing court before appellate jurisdiction enlivened — Whether inclusion of the words "unfettered discretion" in s 669A removes the requirement for error on the part of the sentencing court before appellate court can substitute an alternative sentence.

Appealed from Qld SC (CA): (2009) 197 A Crim R 399; [2009] QCA 274.

SKA v The Queen
S100/2010: [\[2010\] HCATrans 290](#).

Date heard: 9 November 2010 — *Judgment reserved*.

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

Catchwords:

Criminal law — Appeal and new trial — Verdict unreasonable or insupportable having regard to evidence — Test to be applied — Where appellate court had available to it videotape of interview of complainant played at trial — Where appellate court did not view videotaped evidence — Whether appellate court erred in application of test by not viewing videotaped evidence — *M v The Queen* (1994) 181 CLR 487.

Criminal law — Appeal and new trial — Verdict unreasonable or insupportable having regard to evidence — Opinion of trial judge — Where inconsistencies in complainant's evidence — Where trial judge said "impossible to see how any jury acting reasonably could be satisfied beyond reasonable doubt" — Where appellate court made no reference to opinion of trial judge — Whether appellate court erred in not advertng to opinion of trial judge.

Appealed from NSW SC (CCA): [2009] NSWCCA 186.

Roach v The Queen

B41/2010: [\[2010\] HCATrans 288](#).

Date heard: 5 November 2010 — *Judgment reserved*.

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

Catchwords:

Criminal law — Evidence — Propensity, tendency and co-incidence — Admissibility and relevancy — Propensity evidence — Evidence of uncharged acts — Appellant convicted of one count of assault occasioning bodily harm — "Relationship evidence" — Principles from *Pfennig v The Queen* (1995) 182 CLR 461 ("*Pfennig*") — History of violence and of domestic relationship between appellant and complainant — Whether s 132B of *Evidence Act* 1977 (Qld) ("the Act") allows admission of evidence of relevant history without application of *Pfennig* test — Whether requirement of fairness in admission of evidence in s 130 of the Act mandates application of *Pfennig* test to admission of relationship evidence — Whether unfair to admit evidence unless, as stated in *Phillips v The Queen* (2006) 225 CLR 303 at 308, when "viewed in the context of the prosecution case, there is no reasonable view of the [relationship] evidence consistent with the innocence of the accused".

Appealed from Qld SC (CA): [2009] QCA 360.

Stubley v State of Western Australia

P29/2010: [\[2010\] HCATrans 269](#).

Date heard: 20 October 2010 — *Orders made on 20 October 2010.*

Written reasons of the Court to be published at a future date.

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

Catchwords:

Criminal law — Evidence — Admissibility and relevancy — Propensity evidence — Evidence of uncharged acts — Appellant former psychiatrist charged with offences relating to sexual activity with two former patients — Evidence of sexual activity with three further former patients adduced at trial — Whether trial judge erred in ruling evidence had significant probative value — *Evidence Act 1906 (WA) s 31A.*

Appealed from WA SC (CA): [2010] WASCA 36.

Braysich v The Queen

P32/2010: [\[2010\] HCATrans 268](#).

Date heard: 19 October 2010 — *Judgment reserved.*

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

Catchwords:

Criminal law — Particular offences — Financial transaction offences — Creating false or misleading appearance of active trading in securities — *Corporations Act 2001 (Cth), s 998(1)* — Where “deeming” provision relied on by Crown — Where appellant deemed to have created false or misleading appearance of active trading by virtue of entering into or carrying out share transaction not involving change in beneficial ownership: s 998(5) — Where defence available if proved that purpose of transaction was not or did not include creating false or misleading appearance of active trading: s 998(6) — Where appellant did not expressly state in examination-in-chief that purpose was not to create false or misleading appearance of active trading — Where trial judge directed jury defence not available — Whether sufficient evidence to support defence — Whether direction to jury that defence unavailable correct.

Criminal law — Evidence — Where Crown adduced expert evidence to show that share trading transactions were likely to create a false or misleading appearance of active trading in order to rebut any defence appellant might raise — Where appellant sought to adduce expert evidence to refute Crown evidence — Where trial judge ruled

defence not available — Whether appellant's expert evidence admissible.

Appealed from WA SC (CCA): (2009) 260 ALR 719; (2009) 238 FLR 1; (2009) 74 ACSR 387; (2010) 27 ACLC 1678; [2009] WASCA 178.

Equity

Byrnes & Anor v Kendle

A23/2010: [\[2010\] HCATrans 322](#).

Date heard: 8 December 2010 — *Judgment reserved*.

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

Catchwords:

Equity — Trusts and trustees — Powers, duties, rights and liabilities of trustees — Purchase or lease of trust property — Respondent husband held legal title to property but held half-share on trust for wife, the second appellant — Respondent leased property to his son but failed to collect rent — Where second appellant aware of failure to collect rent and did not object — Whether respondent had a duty as trustee of the property to collect rent — Whether second appellant was able to, and in fact did, consent to respondent's actions.

Appealed from SA SC (FC): [2009] SASC 385.

High Court and Federal Court

See **Criminal Law:** *Momcilovic v The Queen*

Human Rights

See **Criminal Law:** *Momcilovic v The Queen*

Insurance

Westport Insurance Corporation & Ors v Gordian Runoff Limited

S219/2010: [\[2011\] HCATrans 12](#); [\[2011\] HCATrans 13](#).

Date heard: 3 & 4 February 2011 — *Judgment reserved*.

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

Catchwords:

Insurance — Reinsurance — Application of *Insurance Act* 1902 (NSW) ("the Act") s 18B to reinsurance contracts.

Arbitration — The award — Appeal or judicial review — Grounds for remitting or setting aside — Error of law — Where arbitrators found s 18B(1) of the Act required appellant reinsurers to indemnify respondent reinsured in respect of certain claims made under insurance policy issued by respondent — Whether error of law to conclude that respondent's loss not caused by existence of relevant "circumstances" under s 18B(1) of the Act — Whether s 18B(1) of the Act applied to contracts — *Commercial Arbitration Act* 1984 (NSW) ss 38(5)(b)(i) and 38(5)(b)(ii).

Arbitration — The award — Appeal or judicial review — Grounds for remitting or setting aside — Whether arbitrators gave adequate reasons for making the award — *Commercial Arbitration Act* 1984 (NSW) s 29(1).

Appealed from NSW SC (CA): (2010) 267 ALR 74; (2010) 16 ANZ Insurance Cases 61-840; [2010] NSWCA 57.

Native Title

Edwards & Ors v Santos Ltd & Ors

S153/2010: [\[2010\] HCATrans 318](#).

Date heard: 1 December 2010 — *Judgment reserved*.

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

Catchwords:

Native title — Permissible future acts — Where parties negotiating an indigenous land use agreement — Where defendants asserted during course of negotiations that grant of petroleum lease under *Petroleum Act* 1923 (Qld) is a "future act" within meaning of *Native Title Act* 1993 (Cth) ("the Act") and so not subject to right to negotiate provisions of the Act and should not be part of indigenous land use agreement negotiations — Where plaintiffs disagreed and sought declaratory and injunctive relief in Federal Court of Australia — Whether plaintiffs required to prove native title in order to obtain such relief — Whether plaintiffs' claim was one to enforce procedural rights under Pt 2 Div 3 of the Act or whether claim was to have Federal Court of Australia resolve dispute between parties

to indigenous land use agreement — Application of *The Lardil Peoples v State of Queensland* (2001) 108 FCR 453.

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

Real Property

Springfield Land Corporation (No 2) Pty Ltd & Anor v State of Queensland & Anor

B39/2010: [\[2010\] HCATrans 291](#).

Date heard: 10 November 2010 — *Judgment reserved*.

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

Catchwords:

Real property — Compulsory acquisition of land — Compensation — Assessment — Adjoining land — Where parties agreed compensation would be determined using *Acquisition of Land Act* 1963 (Qld) (“Act”) — Where disagreement as to compensation referred to arbitrator — Whether s 20(3) of the Act requires causal connection between enhancement in value and carrying out of purpose for which land was acquired — Whether characterisation of purpose for which land was acquired should be broad or narrow — Whether characterisation of purpose for which land was acquired a question of fact — Whether enhancement of value of land adjoining land compulsorily acquired which arose prior to and independently of expansion of purpose for which land was acquired can be set off against assessed compensation under s 20(3) of the Act — *Acquisition of Land Act* 1963 (Qld).

Appealed from Qld SC (CA): (2009) 171 LGERA 38; [2010] ALMD 5984; [2009] QCA 381.

Restitution

Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Haxton; Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Bassat; Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Cunningham's Warehouse Sales Pty Ltd

M128/2010; M129/2010; M130/2010—M132/2010: [\[2011\] HCATrans 50](#); [\[2011\] HCATrans 51](#).

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

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

Catchwords:

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

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

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

Statutes

See **Criminal Law:** *Momcilovic v The Queen*

Taxation and Duties

Commissioner of Taxation v BHP Billiton Limited; Commissioner of Taxation v BHP Billiton Petroleum (North West Shelf) Pty Ltd; Commissioner of Taxation v The Broken Hill Proprietary Company Pty Ltd; Commissioner of Taxation v BHP Billiton Minerals Pty Ltd M117/2010—M120/2010; M121/2010 and M123 2010; M122/2010; M124/2010 and M125/2010: [\[2010\] HCATrans 320](#); [\[2010\] HCATrans 321](#).

Date heard: 7 & 8 December 2010 — *Judgment reserved*.

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

Catchwords:

Taxation and duties — Income tax and related legislation — Deductions — BHP Billiton Finance Limited (“BHP Finance”) and BHP Billiton Direct Reduced Iron Pty Ltd (“BHP Direct”) wholly owned

subsidiaries of BHP Billiton Limited — BHP Direct partly financed capital expenditure on processing plant with funds borrowed from BHP Finance — BHP Finance classified large portion of loans to BHP Direct as irrecoverable after carrying value of BHP Direct's assets written down — BHP Direct able to claim capital allowance tax deductions for expenditure incurred on processing plant — Capital allowance deductions reduced by appellant applying *Income Tax Assessment Act 1997* (Cth), Div 243 — Div 243 applies where "limited recourse debt" used to finance expenditure, debt not paid in full at time of discharge and debtor can deduct amount as capital allowance for year in which discharge occurs, or has done so for earlier year: s 243-15 — "Limited recourse debt" is debt where creditor's rights of recovery against debtor limited to property purchased using borrowed funds or where creditors rights are capable of being so limited: s 243-20 — Whether loans from BHP Finance to BHP Direct were "limited recourse debts" by virtue of being capable of being so limited — *Income Tax Assessment Act 1997* (Cth), s 243-20(2).

Appealed from FCA FC: (2010) 182 FCR 526; (2010) 76 ATR 472; (2010) ATC 20-169; [2010] ALMD 5417; [2010] FCAFC 25.

Torts

Miller v Miller

P25/2010: [\[2010\] HCATrans 286](#).

Date heard: 4 November 2010 — *Judgment reserved*.

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

Catchwords:

Torts — Negligence — Defences to negligence — Duty of care — Duty of care in joint criminal exercise — Duty of care arising between driver and passenger — Motor vehicle accident — Unlawful use of motor vehicle — Appellant and two others stole car in which motor vehicle accident later occurred — Respondent not involved in theft of motor vehicle, but was driving vehicle at time of accident — Respondent pleaded guilty to dangerous driving causing death, dangerous driving causing grievous bodily harm and driving under influence of alcohol — Whether Court of Appeal erred in finding that respondent owed no duty of care to applicant as passenger where appellant was participant in theft of vehicle — Whether Court of Appeal erred in its application of *Gala v Preston* (1991) 172 CLR 243 which was distinguished by trial judge on its facts — Whether doctrine of joint illegal enterprise as defence to negligence requires restatement — *Imbree v McNeilly* (2008) 236 CLR 510 — *Cook v Cook* (1986) 162 CLR 376.

Appealed from WA SC (CA): [2009] Aust Torts Reports 82-040; [2009] WASCA 199; (2009) 54 MVR 367.

Kuhl v Zurich Financial Services & Anor
P31/2010: [\[2010\] HCATrans 267](#).

Date heard: 19 October 2010 — *Judgment reserved*.

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

Catchwords:

Torts — Negligence — Essentials of action for negligence — Duty of care — Reasonable foreseeability of damage — Where appellant injured while operating high-pressure vacuum hose — Where company insured by first respondent provided vacuum hose — Where appellant not employee of company — Whether duty of care owed by company to appellant — Whether risk of injury reasonably foreseeable — Whether any duty of care owed was breached — Where modifications made to hose system following injury to appellant — Whether subsequent changes to work system relevant to analysis of whether any duty of care breached — Where speculation as to precise mechanism whereby appellant injured — Whether evidence as to how, precisely, accident occurred necessary before causation can be found — *Nelson v John Lysaght (Australia) Ltd* (1975) 132 CLR 201.

Appealed from WA SC (CA): [2010] Aust Torts Reports 82-053; [2010] WASCA 50; (2010) 194 IR 74.

3: ORIGINAL JURISDICTION

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

Constitutional Law

Phonographic Performance Company of Australia Limited & Ors v The Commonwealth & Ors

S307/2010

Catchwords:

Constitutional law — Operation and effect of Commonwealth Constitution — Powers with respect to property — Power to acquire property on just terms — Whether some or all of provisions in ss 109 and 152 of *Copyright Act 1986* (Cth) beyond legislative competence of Parliament by reason of s 51(xxxi) of Constitution — If so, whether such provisions should be read down or severed and, if so, how — Constitution, s 51(xxxi) — *Copyright Act 1986* (Cth), ss 109 and 152.

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

Nicholas v The Commonwealth & Anor

S183/2010

Catchwords:

Constitutional law — Operation and effect of Commonwealth Constitution — Plaintiff convicted by Australian Military Court of offences under *Defence Force Discipline Act 1982* (Cth) ("the Act") on 25 August 2008 and sentenced accordingly — High Court of Australia declared provisions of the Act establishing Australian Military Court invalid on 26 August 2009: *Lane v Morrison* (2009) 239 CLR 230 — On 22 September 2009 *Military Justice (Interim Measures) Act (No 2) 2009* (Cth) ("Interim Measures Act") came into operation — Part 2 of Sch 1 to Interim Measures Act applies to punishments purportedly imposed by Australian Military Court prior to High Court decision — Pursuant to item 5, Sch 1 to Interim Measures Act rights and liabilities of plaintiff declared to be, and always to have been, same as if punishments purportedly imposed by Australian Military Court had been properly imposed by general court martial and certain other conditions satisfied — Rights and liabilities declared to be subject to any review provided for by Sch 1, Pt 7 — No review sought by plaintiff — Whether item 5, Sch 1 to

Interim Measures Act valid law of Commonwealth — *Military Justice (Interim Measures) Act (No 2) 2009* (Cth) Sch 1, item 5.

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

Haskins v The Commonwealth
S8/2011

Catchwords:

Constitutional law — Operation and effect of Commonwealth Constitution — Plaintiff convicted by Australian Military Court of offences under *Defence Force Discipline Act 1982* (Cth) (“the Act”) on 11 December 2008 and sentenced accordingly — High Court of Australia declared provisions of the Act establishing Australian Military Court invalid on 26 August 2009: *Lane v Morrison* (2009) 239 CLR 230 — On 22 September 2009 *Military Justice (Interim Measures) Act (No 2) 2009* (Cth) (“Interim Measures Act”) came into operation — Part 2 of Sch 1 to Interim Measures Act applies to punishments purportedly imposed by Australian Military Court prior to High Court decision — Pursuant to item 5, Sch 1 to Interim Measures Act rights and liabilities of plaintiff declared to be, and always to have been, same as if punishments purportedly imposed by Australian Military Court had been properly imposed by general court martial and certain other conditions satisfied — Rights and liabilities declared to be subject to any review provided for by Sch 1, Pt 7 — No review sought by plaintiff — Whether Interim Measures Act provides lawful authority justifying detention of plaintiff — If so, whether items 3, 4, and 5 of Sch 1 to Interim Measures Act valid laws of Commonwealth — *Military Justice (Interim Measures) Act (No 2) 2009* (Cth) Sch 1, items 3, 4 and 5.

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

4: SPECIAL LEAVE GRANTED

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

Constitutional Law

Sportsbet Pty Ltd v State of New South Wales & Ors
S290/2010; S291/2010: [\[2011\] HCATrans 52](#).

Date heard: 11 March 2011 — *Special leave granted*.

Catchwords:

Constitutional law — Freedom of interstate trade — Applicant a licensed bookmaker domiciled in Northern Territory — NSW legislative scheme prohibited use of race field information without approval and authorised imposition of fee as condition for approval ("Scheme") — Fee imposed on all wagering operators irrespective of whether domiciled in NSW — NSW racing control bodies subsidised NSW wagering operators — Whether practical effect of fee was to impose discriminatory burden of protectionist nature on interstate trade — Whether Scheme inconsistent with freedom of interstate trade, commerce and intercourse — Constitution, ss 92, 109 — *Northern Territory (Self Government) Act 1978* (Cth), s 49 — *Racing Administration Act 1998* (NSW), s 33(1).

Constitutional law — Freedom of interstate trade — Whether Scheme inconsistent with freedom of interstate trade, commerce and intercourse — Whether practical effect of Scheme determinable without consideration of offsetting reductions in existing fees payable by intrastate traders — Whether necessary for interstate trader to show that interstate trader's competitive advantage derived from place of origin in another State or Territory and Scheme imposed discriminatory burden affecting that advantage — Whether Scheme protectionist if imposed with intention of protecting intrastate traders and fee not reasonably appropriate or adapted to non-protectionist objective — Whether validity of statutory prohibition, combined with administrative discretion to relax prohibition, to be determined by comparing interstate and intrastate traders' positions — Whether relevant or determinative that State and administrative bodies intend discretion over prohibition to be exercised to protect intrastate traders — Constitution, ss 92, 109 — *Northern Territory (Self Government) Act 1978* (Cth), s 49 — *Racing Administration Act 1998* (NSW), s 33(1).

Appealed from FCA FC: [2010] FCAFC 132.

Betfair Pty Limited v Racing New South Wales & Ors
S294/2010: [\[2011\] HCATrans 53](#).

Date heard: 11 March 2011 — *Special leave granted*.

Catchwords:

Constitutional law — Freedom of interstate trade — Applicant a licensed betting exchange domiciled in Tasmania — NSW legislative scheme prohibited use of race field information without approval and authorised imposition of fee as condition for approval ("Scheme") — Fee imposed on all wagering operators irrespective of whether domiciled in NSW — Where imposition of fee allegedly reduce applicant's commission by disproportionate amount compared to NSW operators — Whether practical effect of fee was to impose discriminatory burden of protectionist nature on interstate trade — Whether Scheme inconsistent with freedom of interstate trade, commerce and intercourse — Constitution, s 92 — *Racing Administration Act 1998 (NSW)*, s 33(1).

Constitutional law — Freedom of interstate trade — Whether Scheme inconsistent with freedom of interstate trade, commerce and intercourse — Whether insufficient for interstate trader to show fees imposed greater business costs on interstate traders than intrastate traders — Whether necessary for interstate trader to show that interstate trader's competitive advantage derived from place of origin in another State or Territory and Scheme imposed discriminatory burden affecting that advantage — Whether Scheme protectionist if imposed with intention of protecting intrastate traders and fee not reasonably appropriate or adapted to non-protectionist objective — Whether validity of statutory prohibition, combined with administrative discretion to relax prohibition, to be determined by comparing interstate and intrastate traders' positions — Whether relevant or determinative that State and administrative bodies intend discretion over prohibition to be exercised to protect intrastate traders — Constitution, s 92 — *Racing Administration Act 1998 (NSW)*, s 33(1).

Appealed from FCA FC: [2010] FCAFC 133.

Roy Morgan Research Pty Ltd v Commissioner of Taxation
M177/2010: [\[2010\] HCATrans 323](#).

Date heard: 10 December 2010 — *Special leave granted*.

Catchwords:

Constitutional law — Operation and effect of Commonwealth Constitution — Power with respect to taxation (Constitution, s 51(ii)) — Commonwealth legislative scheme imposing obligation upon employers to pay superannuation guarantee charge — Whether charge a tax — Whether charge imposed for public purposes — *Luton v Lessels* (2002) 210 CLR 333; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 — *Superannuation Guarantee Charge Act 1992* (Cth); *Superannuation Guarantee (Administration) Act 1992* (Cth).

Appealed from FCA FC: (2010) 184 FCR 448; (2010) 268 ALR 232; [2010] FCAFC 52; (2010) 76 ATR 264; (2010) ATC 20-184.

Contracts

See Practice and Procedure: *Wynton Stone Australia Pty Ltd (in liq) v MWH Australia Pty Ltd (formerly Montgomery Watson Australia Pty Ltd)*

Criminal Law

Muldrock v The Queen

S231/2010: [\[2011\] HCATrans 55](#).

Date heard: 11 March 2011 — *Special leave granted*.

Catchwords:

Criminal law — Sentence — Applicant pleaded guilty to charge of sexual intercourse with child under age of 10 years — Further offence of aggravated indecent assault taken into account in sentencing — Applicant intellectually disabled — Applicant previously convicted of similar offence — Relevance of standard non-parole period in cases of less than mid-range seriousness — Whether applicant "significantly intellectually disabled" such that deterrence objective inappropriate — Whether full-time custody an exceptional penalty for intellectually disabled offenders — Relevance of rehabilitation and community protection to sentencing of intellectually disabled offenders — Whether applicant a person with "special circumstances" — *Crimes Act 1900* (NSW), ss 61M(1), 66A — *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 3A, 54A, 54B.

Words and phrases — "significantly intellectually disabled", "special circumstances".

Appealed from NSWCCA: [2010] NSWCCA 106.

Damages

Maurice Blackburn Cashman v Brown

M176/2010: [\[2010\] HCATrans 331](#).

Date heard: 10 December 2010 — *Special leave granted*.

Catchwords:

Damages — Statutory constraint on action for damages — Respondent former employee of applicant — Respondent made claim pursuant to *Accident Compensation Act 1985* (Vic) (“the Act”) for statutory compensation for non-economic loss arising from psychological injury suffered as result of actions of fellow employee — Victorian WorkCover Authority (“WorkCover”) accepted respondent had psychological injury arising out of employment with applicant — WorkCover referred medical questions to Medical Panel for opinion under s 67 of the Act — Medical Panel certified respondent had 30% permanent psychiatric impairment resulting from accepted injury — Respondent deemed by Act to have suffered “serious injury” and permitted to commence common law proceedings for damages as result — Proceedings commenced in County Court of Victoria — Applicant’s pleadings in defence contested causation and injury — Respondent pleaded in reply that applicant estopped from making assertion inconsistent with Medical Panel opinion — Whether defendant’s right to contest common law damages claims subject to the Act compromised by Medical Board opinion — Whether Medical Board opinion gives rise to issue estoppel for purposes of common law damages proceeding.

Appealed from Vic SC (CA): [2010] VSCA 206.

Defamation

Boland v Dillon; Cush v Dillon

S310/2010; S309/2010: [\[2010\] HCATrans 333](#).

Date heard: 10 December 2010 — *Special leave granted*.

Catchwords:

Defamation — Defences — Qualified privilege — Boland and respondent directors and Cush General Manager of Borders River-Gwydir Catchment Management Authority (“the CMA”) — Respondent told chairman of CMA that “[i]t is common knowledge among people in the CMA that [the applicants] are having an affair”

— Common ground at trial that applicants not having affair and that respondent did not believe applicants having affair when comment made — Respondent denied making comment — Jury found respondent made defamatory comment — Respondent advanced defence of qualified privilege founded on perceived need to inform chairman of “the rumour and the accusation” of affair — Whether common law defence of qualified privilege available to publisher of defamatory statement who denies making statement — Whether publication of imputations of affair between director and General Manager of body, rather than rumour of possible affair, can be published by another director to chairman on occasion of qualified privilege — Whether voluntary nature of defamatory imputations decisive against defence of qualified privilege.

Appealed from NSW SC (CA): [2010] NSWCA 165.

Energy and Resources

Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board
S312/2010: [\[2010\] HCATrans 332](#).

Date heard: 10 December 2010 — *Special leave granted*.

Catchwords:

Energy and resources — Compensation for subsidence caused by mining — Applicant owned and operated gas pipeline — Coal mining in vicinity of pipeline caused subsidence — Subsidence insufficient to damage pipeline, but future mining expected to cause cumulative level of subsidence sufficient to damage pipeline — Applicant engaged in preventive and mitigation works to protect pipeline — Works concluded prior to commencement of mining expected to cause damaging subsidence — Claim for compensation for costs of works rejected by respondent — Whether compensation payable for costs incurred with respect to anticipated subsidence — Whether requirement of causation in *Mine Subsidence Compensation Act 1961* (NSW) s 12A(1)(b) determined by reference to single mining event or by reference to ongoing extraction in accordance with mining plan — *Mine Subsidence Board v Wambo Coal Pty Ltd* (2007) 54 LGERA 60 — *Mine Subsidence Compensation Act 1961* (NSW) s 12A(1)(b).

Appealed from NSW SC (CA): (2010) 175 LGERA 16; [2010] NSWCA 146; [2010] ALMD 7059.

Environment and Planning

Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd & Ors
S227/2010: [\[2011\] HCATrans 56](#).

Date heard: 11 March 2011 — *Special leave granted*.

Catchwords:

Environment and planning — Building control — Planning instruments — Interpretation — Ku-ring-gai Local Environment Plan 194 ("LEP 194") rezoned applicant's land — Whether LEP 194 a "provision", for purpose of s 28(3) of *Environmental Planning and Assessment Act 1979* (NSW) ("the Act"), that accords with s 28(2) of the Act — Whether s 28(3) of the Act required approval of Governor to effect change of zoning under LEP 194 — Whether s 28(3) of the Act engaged if LEP 194 contains no express provision identifying regulatory instrument which shall not apply to any particular development.

Words and phrases — "provide", "provision".

Appealed from NSW SC (CA): [2010] NSWCA 214; (2010) 175 LGERA 433; [2011] ALMD 220.

Equity

HIH Claims Support Limited v Insurance Australia Limited
M147/2010: [\[2011\] HCATrans 60](#).

Date heard: 11 March 2011 — *Special leave granted*.

Catchwords:

Equity — Contribution — Equal and coordinate liability — Scaffolders Steele sub-contracted to Australian Grand Prix Corporation ("AGPC") — Steele held insurance policy with company in HIH group which, but for HIH collapse, responded to Steele's liability to AGPC — Applicant administrator of HIH Claim Support Scheme — AGPC held insurance policy with State Government Insurance Corporation ("SGIC") which extended to sub-contractors — SGIC's rights, liabilities and obligations vested in respondent — Whether applicant entitled to contribution from respondent — Whether liabilities of applicant and Steele and respondent and Steele equal and coordinate — Whether indemnities not coordinate because applicant may recover from liquidation of HIH — Whether equitable doctrine of contribution sufficiently flexible to do "practical justice" — Whether characterisation of separate contracts of insurance as

"primary" and "secondary" prevents contribution — Whether relevant date for determining right to contribution is date of indemnity payment or date of casualty.

Appealed from Vic SC (CA): [2010] VSCA 255; (2010) 16 ANZ Insurance Cases 61-863.

Evidence

Dasreef Pty Limited v Nawaf Hawchar
S313/2010: [\[2010\] HCATrans 339](#).

Date heard: 10 December 2010 — *Special leave granted*.

Catchwords:

Evidence — Admissibility and relevance — Opinion evidence — Expert opinion — Expert with experience relevant to general topic of industrial dust gave opinion evidence to Dust Diseases Tribunal on concentration of silica in air — Whether expert disclosed facts, assumptions and reasoning in manner sufficient to make it plain to trial judge that expert opinion wholly or substantially based on expert's expertise in area of contention — Whether such disclosure necessary in order for evidence to be admissible — *Evidence Act 1995 (NSW)* s 79.

Appealed from NSW SC (CA): [2010] NSWCA 154.

Lithgow City Council v Jackson
S158/2010: [\[2010\] HCATrans 27](#).

Date heard: 11 February 2011 — *Special leave granted*.

Catchwords:

Evidence — Admissibility and relevance — Notes of ambulance officers ("Notes") — Whether Notes an opinion and inadmissible under s 76 of *Evidence Act 1995 (NSW)* ("the Act") — Whether Notes a lay opinion and admissible under s 78 of the Act — Whether opinion of underlying matter or event includes perceptions of aftermath of matter or event — Meaning of "necessary" in s 78(b) of the Act — *Evidence Act 1995 (NSW)*, ss 76, 78.

Appealed from NSW SC (CA): [2010] NSWCA 136.

Immigration

SZNX v Minister for Immigration and Citizenship & Anor; SZKW v Minister for Immigration and Citizenship & Anor
S321/2010; S322/2010: [\[2010\] HCATrans 335](#).

Date heard: 10 December 2010 — *Special leave granted*.

Catchwords:

Immigration — Refugees — Review by Refugee Review Tribunal (“RRT”) — Applicants claimed to be homosexual couple — RRT received anonymous facsimile stating SZKNW’s claim to be homosexual “totally bogus” — Applicants advised of letter, but not given copy, at separate hearings before RRT — Letter included material particular to SZKNW, including passport number and departmental file number — Where applicants allege letter provided by disgruntled former migration agent — Whether RRT failed to comply with statutory requirement in s 424A of the *Migration Act* 1958 (Cth) (“the Act”) to provide clear particulars of letter by not providing copy of letter and failing to advise letter contained departmental file number — Whether s 424AA of the Act engaged — *Migration Act* 1958 (Cth) ss 424AA, 424A.

Appealed from FCA: [2009] FCA 1407; [2010] FCA 55.

Practice and Procedure

Wynton Stone Australia Pty Ltd (in liq) v MWH Australia Pty Ltd (formerly Montgomery Watson Australia Pty Ltd)
M158/2010; M159/2010: [\[2011\] HCATrans 61](#).

Date heard: 11 March 2011 — *Referred to an enlarged Court*.

Catchwords:

Practice and procedure — Pleadings — Trial judge stated, without objection, that pleaded issues would be treated as abandoned if not run in final submissions — Whether respondent abandoned breach of warranty claim.

Trade and commerce — Misleading and deceptive conduct — Warranty — Whether statement of fact in warranty constituted misleading and deceptive conduct — Causation — Reliance — Inferred reliance — Whether causation able to be inferred in absence of direct evidence of reliance — *Gould v Vaggelas* (1985) 157 CLR 215; *Campbell v Backoffice Investments Pty Ltd* [2010] VSCA 245.

Contracts — Construction and interpretation — Intention of parties — Deed of Novation — Whether release of "all claims and demands whatsoever in respect of the contract" intended to cover breaches of contract occurring before date of Deed — Application of "business commonsense point of view" where language not ambiguous on its face.

Appealed from Vic SC (CA): [2010] VSCA 245.

Michael Wilson & Partners Limited v Nicholls & Ors
S236/2010: [\[2011\] HCATrans 28](#).

Date heard: 11 February 2011 — *Special leave granted*.

Catchwords:

Practice and procedure — Supreme Court procedure — Abuse of process — Applicant obtained judgment against respondents in New South Wales Supreme Court ("NSWSC") for knowing participation in breach of fiduciary duty by a non-party — London arbitrators subsequently issued interim award upholding breach of duties by non-party but denying compensation to applicant ("the Award") — Respondents not party to the Award — Whether abuse of process for applicant to seek to enforce judgment in NSWSC in face of the Award.

Practice and procedure — Courts and judges — Disqualification of judges for interest or bias — Apprehended bias — Application of lay observer test in *Johnson v Johnson* (2000) 201 CLR 488 — Whether lay observer test "unnecessary" and "wholly artificial" where judge personally apprehends bias — Whether conclusion of New South Wales Court of Appeal on trial judge's apprehensible bias justified on facts.

Practice and procedure — Waiver — Trial judge refused to recuse himself ("the recusal decision") and invited respondents to appeal the recusal decision — Respondents did not appeal the recusal decision until after trial and judgment adverse to respondents delivered — Whether the recusal decision an order or judgment — Whether the recusal decision amenable to appeal — Whether respondents waived right to appeal the recusal decision by proceeding with trial.

Appealed from NSW SC (CA): (2010) 243 FLR 177; [2010] NSWCA 222.

See also **Taxation and Duties**: *American Express Wholesale Currency Services Pty Ltd v Commissioner of Taxation*; *American Express International Inc v Commissioner of Taxation*

Statutes

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

A12/2010: [\[2011\] HCATrans 22](#).

Date heard: 11 February 2011 — *Special leave granted*.

Catchwords:

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

Appealed from SASC (FC): [2010] SASC 161.

Peter Nicholas Moloney t/a Moloney & Partners v Workers Compensation Tribunal

A22/2010: [\[2011\] HCATrans 25](#).

Date heard: 11 February 2011 — *Special leave granted*.

Catchwords:

Statutes — Subordinate legislation — Validity — Where *Workers Rehabilitation Compensation Act 1986* (SA) ("the Act") s 88E(1)(f) authorised President of Workers Compensation Tribunal to make Rules regulating "costs" — Where s 88G of the Act regulated recovery of costs by worker's representative — Where *Workers Compensation Tribunal Rules 2009* r 31(2) restricted recovery of costs by worker's representative — Whether "costs" in s 88E(1)(f) of the Act includes solicitor-client costs or only party-party costs — Whether power conferred by s 88E(1)(f) limited by s 88G of the Act — Whether s 88G invalidates r 31(2) — *Workers Rehabilitation*

Compensation Act 1986 (SA) ss 88E(1)(f), 88G — Workers Compensation Tribunal Rules 2009 r 31(2).

Appealed from SASC (FC): (2010) 108 SASR 1; [2010] SASCFC 17.

Taxation and Duties

American Express Wholesale Currency Services Pty Ltd v Commissioner of Taxation; American Express International Inc v Commissioner of Taxation

S238/2010; S239/2010: [\[2011\] HCATrans 26](#).

Date heard: 11 February 2011 — *Referred to an enlarged Court.*

Catchwords:

Taxation and duties — Goods and services tax — Applicants providers of charge cards and credit cards — Whether payments received by applicants from cardholders (liquidated damages and late payment fees) ("Default Fees") revenue from or consideration for a "financial supply" within meaning of *A New Tax System (Goods and Services Tax) Act 1999* (Cth) Div 40 and *A New Tax System (Goods and Services Tax) Regulations 1999* (Cth) ("Regulations") — Whether Default Fees revenue from provision, acquisition or disposal of an interest in or under "a debt, credit arrangement or right to credit, including a letter of credit": Item 2 of table to r 40-5.09(3) of Regulations — Whether Default Fees revenue from supply of or interest in or under "a payment system": Item 4 of the table to r 40-5.12 of Regulations.

Taxation and duties — Goods and services tax — Whether right to present a card as payment for goods and services and incur a corresponding obligation to pay at a later date an "interest" within meaning of r 40-5.09 of Regulations — Whether Default Fees paid for that "interest".

Practice and procedure — Appeals — Amendment — Respondent granted leave to amend Notices of Appeal — Whether Full Court of Federal Court of Australia erred in granting leave.

Appealed from FCA FC: (2010) 187 FCR 398; (2010) 77 ATR 12; (2010) ATC 20-212; [2010] FCAFC 122.

Trade and Commerce

Insight Vacations Pty Ltd t/as Insight Vacations v Young
S273/2010: [\[2010\] HCATrans 305](#).

Date heard: 12 November 2010 — *Special leave granted*.

Catchwords:

Trade and commerce — *Trade Practices Act 1974* (Cth) ("TPA") and related legislation — Consumer protection — Conditions and warranties in consumer transactions — Warranties — Whether s 74(2A) of TPA applies to State law authorising contractual provision limiting or precluding liability for breach of implied warranty of due care and skill in s 74(1) of TPA — Whether s 74(2A) of TPA only applies to State laws which limit or preclude liability for breach of implied warranty in s 74(1) of TPA by their own terms — Whether s 74(2A) of TPA picks up and applies s 5N(1) of *Civil Liability Act 2002* (NSW) ("CLA") — Whether exclusion clause authorised by s 5N of CLA is contract term purporting to exclude, restrict or modify application of s 74(1) of TPA, within meaning of s 68 of TPA — *Trade Practices Act 1974* (Cth) ss 68, 74(2A) — *Civil Liability Act 2002* (NSW) s 5N.

Appealed from NSW SC (CA): (2010) 241 FLR 125; (2010) 268 ALR 570; [2010] Aust Torts Reports 82-061; [2010] ASAL 55-209; [2010] NSWCA 137; [2010] ALMD 6898; [2010] ALMD 7034.

See also **Practice and Procedure:** *Wynton Stone Australia Pty Ltd (in liq) v MWH Australia Pty Ltd (formerly Montgomery Watson Australia Pty Ltd)*

5: CASES NOT PROCEEDING OR VACATED

There are no cases in the High Court of Australia that are not proceeding or have been vacated since High Court Bulletin 01 [2011] HCAB 01.

6: SPECIAL LEAVE REFUSED

Canberra: 9 March 2011

(Publication of reasons)

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Kruck	Southern Queensland Regional Parole Board (B69/2010)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 290	Application dismissed [2011] HCASL 19
Amos	Wiltshire (B70/2010)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 294	Application dismissed [2011] HCASL 20
Bunning	The Queen (M138/2010)	Supreme Court of Victoria (Court of Appeal) [2007] VSCA 205	Application dismissed [2011] HCASL 21
MH	ZH (M142/2010)	Family Court of Australia	Application dismissed [2011] HCASL 22
MH	ZH (M157/2010)	Family Court of Australia	Application dismissed [2011] HCASL 23
Kabir	Minister for Immigration and Citizenship & Anor (P48/2010)	Federal Court of Australia [2010] FCA 1164	Application dismissed [2011] HCASL 24
Chin	Thies & Anor (P50/2010)	Supreme Court of Western Australia (Court of Appeal) [2010] WASCA 230	Application dismissed [2011] HCASL 25
SZNVW	Minister for Immigration and Citizenship & Anor (S137/2010)	Full Court of the Federal Court of Australia [2010] FCAFC 41	Application dismissed [2011] HCASL 26
SZNTL	Minister for Immigration and Citizenship & Anor (S240/2010)	Federal Court of Australia [2010] FCA 1040	Application dismissed [2011] HCASL 27
SZOEV	Minister for Immigration and Citizenship & Anor (S241/2010)	Federal Court of Australia [2010] FCA 1045	Application dismissed [2011] HCASL 28
SZOLA & Anor	Minister for Immigration and Citizenship & Anor (S257/2010)	Federal Court of Australia [2010] FCA 1104	Application dismissed [2011] HCASL 29
SZOIC	Minister for Immigration and Citizenship & Anor	Federal Court of Australia [2010] FCA 1182	Application dismissed [2011] HCASL 30

	(S265/2010)		
SZOKK	Minister for Immigration and Citizenship & Anor (S266/2010)	Federal Court of Australia [2010] FCA 1198	Application dismissed [2011] HCASL 31
SZOJB	Minister for Immigration and Citizenship & Anor (S269/2010)	Federal Court of Australia [2010] FCA 1252	Application dismissed [2011] HCASL 32
SZOCA	Minister for Immigration and Citizenship & Anor (S270/2010)	Federal Court of Australia [2010] FCA 1237	Application dismissed [2011] HCASL 33
SZOHC & Anor	Minister for Immigration and Citizenship & Anor (S272/2010)	Federal Court of Australia [2010] FCA 1213	Application dismissed [2011] HCASL 34
SZOJH	Minister for Immigration and Citizenship & Anor (S267/2010)	Federal Court of Australia [2010] FCA 1235	Application dismissed [2011] HCASL 35
SZOJT	Minister for Immigration and Citizenship & Anor (S271/2010)	Federal Court of Australia [2010] FCA 1205	Application dismissed [2011] HCASL 36
NTI Limited	Michelin Australia Pty Ltd (S224/2010)	Supreme Court of New South Wales (Court of Appeal) [2010] NSWCA 223	Application dismissed with costs [2011] HCASL 37
Wakim	Coleman & Ors (S225/2010)	Supreme Court of New South Wales (Court of Appeal) [2010] NSWCA 221	Application dismissed with costs [2011] HCASL 38

Sydney: 11 March 2011

Civil

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Downey	Acting District Court Judge Boulton & Ors (S243/2010)	Supreme Court of New South Wales (Court of Appeal) [2010] NSWCA 240	Special leave refused [2011] HCATrans 54
Northey	Juul & Ors (S215/2010)	Supreme Court of New South Wales (Court of Appeal) [2010] NSWCA 211	Special leave refused with costs [2011] HCATrans 57
SZNPG	Minister for Immigration and Citizenship & Anor (S156/2010)	Full Court of the Federal Court of Australia [2010] FCAFC 51	Adjourned [2011] HCATrans 58

Melbourne: 11 March 2011*Civil*

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Commissioner of Taxation	AXA Asia Pacific Holdings Ltd (M165/2010)	Full Court of the Federal Court of Australia [2010] FCAFC 134	Special leave refused with costs [2011] HCATrans 63
Hanna	Hanna (M152/2010)	Supreme Court of Victoria (Court of Appeal) [2010] VSCA 268	Special leave refused with costs [2011] HCATrans 67
Maher	Commonwealth Bank of Australia & Ors (M153/2010)	Federal Court of Australia [2010] FCA 1178	Discontinued on 9 March 2011

Criminal

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
The Queen	Diver (M145/2010)	Supreme Court of Victoria (Court of Appeal) [2010] VSCA 254	Special leave refused [2011] HCATrans 59
Ferguson	The Queen (M103/2009)	Supreme Court of Victoria (Court of Appeal) [2009] VSCA 198	Adjourned [2011] HCATrans 62
Ellis	The Queen (M160/2010)	Supreme Court of Victoria (Court of Appeal) [2010] VSCA 302	Special leave refused [2011] HCATrans 64
Cox	The Queen (M89/2009)	Supreme Court of Victoria (Court of Appeal) [2009] VSCA 198	Special leave refused [2011] HCATrans 65
Gojanovic	The Queen (M84/2010)	Supreme Court of Victoria (Court of Appeal) [2007] VSCA 153	Special leave refused [2011] HCATrans 66