



HIGH COURT BULLETIN

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High Court of Australia Library
[2011] HCAB 04 (19 May 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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SUMMARY OF NEW ENTRIES

[1: Cases Handed Down](#)

Case	Title
<i>Braysich v The Queen</i>	Criminal Law
<i>Roach v The Queen</i>	Criminal Law
<i>SKA v The Queen</i>	Criminal Law
<i>Springfield Land Corporation (No 2) Pty Ltd & Anor v State of Queensland & Anor</i>	Real Property
<i>Kuhl v Zurich Financial Services Australia Ltd & Anor</i>	Torts
<i>Insight Vacations Pty Ltd t/as Insight Vacations v Young</i>	Trade and Commerce

[2: Cases Reserved](#)

Case	Title
<i>Phonographic Performance Company of Australia Limited & Ors v The Commonwealth & Ors</i>	Constitutional Law
<i>Maurice Blackburn Cashman v Brown</i>	Damages

<i>Lithgow City Council v Jackson</i>	Evidence
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3: Original Jurisdiction

Case	Title
<i>Williams v The Commonwealth & Ors</i>	High Court of Australia
<i>Wotton v State of Queensland & Anor</i>	Constitutional Law

4: Special Leave Granted

Case	Title
<i>Stoten v The Queen; Hargraves v The Queen</i>	Constitutional Law
<i>Handlen v The Queen; Paddison v The Queen</i>	Constitutional Law
<i>Australian Securities and Investments Commission v Shafron; Australian Securities and Investments Commission v Terry; Australian Securities and Investments Commission v Hellicar; Australian Securities and Investments Commission v Brown; Australian Securities and Investments Commission v Gillfillan; Australian Securities and Investments Commission v Koffel; Australian Securities and Investments Commission v O'Brien; Australian Securities and Investments Commission v Willcox; Shafron v Australian Securities and Investments Commission</i>	Corporations
<i>BBH v The Queen</i>	Criminal Law
<i>Strong v Woolworths Limited t/as Big W & Anor</i>	Torts

1: CASES HANDED DOWN

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

Contracts

See **Trade and Commerce**: *Insight Vacations Pty Ltd t/as Insight Vacations v Young*

Corporations

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

Criminal Law

Braysich v The Queen

P32/2010: [\[2011\] HCA 14](#).

Judgment delivered: 11 May 2011.

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

Catchwords:

Criminal law — Evidence — Burden of proof — Defences — Directions to jury — Appellant charged with creating a false or misleading appearance of active trading in securities — Appellant deemed to have created false or misleading appearance of active trading if proved to have caused a sale of securities where, to his knowledge, there was no change in beneficial ownership of securities — Section creating offence included a defence to prove that the purpose or purposes of the trades was not or did not include purpose of creating a false or misleading appearance of active trading ("proscribed purpose") — Where appellant did not give direct evidence of whether subjective purpose or purposes included proscribed purpose — Trial judge ruled defence not raised and withheld defence from jury — Whether character evidence as to honesty and other evidence in defence case sufficient to require defence to be left to jury — Whether, taking evidence at its highest, jury could conclude on balance of probabilities that appellant lacked proscribed purpose.

Corporations — Financial services and markets — Market misconduct and other prohibited conduct — False trading and market rigging.

Words and phrases — "balance of probabilities", "evidential burden", "false or misleading appearance of active trading", "legal burden".

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

Roach v The Queen

B41/2010: [\[2011\] HCA 12](#).

Judgment delivered: 4 May 2011.

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

Catchwords:

Criminal law — Evidence — Propensity evidence — Admissibility and relevance — Where appellant charged with assault occasioning bodily harm — Where trial judge admitted evidence of other assaults by appellant upon complainant during their relationship pursuant to s 132B of *Evidence Act 1977* (Q) ("Act") making admissible relevant evidence of history of domestic relationship — Where s 130 of Act preserved trial judge's discretion to exclude evidence where admission would be unfair to accused — Whether rule in *Pfennig v The Queen* (1995) 182 CLR 461 to be applied in determining admissibility under s 132B or exercising discretion under s 130 — If evidence admitted, whether jury ought to have been directed they could not rely upon evidence unless satisfied of its truth beyond reasonable doubt.

Words and phrases — "domestic violence", "prejudicial", "probative", "propensity", "relationship evidence", "unfairness".

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

SKA v The Queen

S100/2010: [\[2011\] HCA 13](#).

Judgment delivered: 4 May 2011.

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

Catchwords:

Criminal law — Appeal — Appeal on ground jury verdict unreasonable, or cannot be supported, having regard to the

evidence — Application of test in *M v The Queen* (1994) 181 CLR 487 — Whether Court of Criminal Appeal made independent assessment of evidence.

Criminal law — Appeal — Video evidence — Where Court of Criminal Appeal relied on transcript of evidence — Whether sufficient to rely on transcript of evidence.

Criminal law — Appeal — Trial judge's opinion — Where trial judge considered a jury acting reasonably could not have been satisfied beyond reasonable doubt of accused's guilt — Whether regard should be had to trial judge's opinion.

Words and phrases — "unreasonable, or cannot be supported", "unsafe or unsatisfactory".

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

Evidence

See Torts: *Kuhl v Zurich Financial Services Australia Ltd & Anor*

Real Property

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

B39/2010: [\[2011\] HCA 15](#).

Judgment delivered: 11 May 2011.

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

Catchwords:

Real property — Compulsory acquisition — Compensation — Assessment — Section 25(2) of *Transport Planning and Coordination Act* 1994 (Q) empowered Chief Executive of Department of Main Roads ("Department") to acquire property "for the purposes of transport" — Section 20(3) of *Acquisition of Land Act* 1967 (Q) ("Acquisition Act") required that, in assessing compensation for acquisition, there be considered any enhancement of value of land adjoining acquired land "by the carrying out of the works or purpose for which the land is taken" — Appellants entered agreement to transfer certain land ("Transfer Land") to respondents for amalgamation with land held by Department in return for payment of compensation set in accordance with Acquisition Act — Nature of purpose for which land is acquired — Whether purpose for

which Transfer Land was acquired would enhance value of appellants' adjoining land.

Words and phrases — "purpose for which the land is taken".

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

Statutes

See ***Trade and Commerce***: *Insight Vacations Pty Ltd t/as Insight Vacations v Young*

Torts

Kuhl v Zurich Financial Services Australia Ltd & Anor
P31/2010: [\[2011\] HCA 11](#).

Judgment delivered: 4 May 2011.

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

Catchwords:

Torts — Negligence — Duty of care — Appellant injured while using high-pressure vacuum hose — Injury occurred after hose passed to appellant — Supplier of hose also directed and supervised appellant — Concession by first respondent of duty of care made in court below — Whether duty of care was dependent on increased risk.

Torts — Negligence — Breach — Supplier of hose failed to install break box and failed to issue instructions not to pass hose while power was on — Relevance of subsequent changes to safety systems — Whether changes inordinately expensive or disadvantageous.

Torts — Negligence — Causation — Whether evidence as to precisely how injury occurred is necessary before causation can be found — Relevance of ordinary human experience — Relevance of agreement on quantum of damages.

Evidence — Implied admission or circumstantial evidence permitting adverse inference — Trial judge concluded that appellant had withheld evidence in examination-in-chief — Whether trial judge erred in failing to provide reasons for that conclusion — Whether trial judge erred in failing to provide appellant with opportunity to respond to criticism.

Appealed from WA SC (CA): (2010) 194 IR 74.

See also **Trade and Commerce:** *Insight Vacations Pty Ltd t/as Insight Vacations v Young*

Trade and Commerce

Insight Vacations Pty Ltd t/as Insight Vacations v Young
S273/2010: [\[2011\] HCA 16](#).

Judgment delivered: 11 May 2011.

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

Catchwords:

Trade practices — Conditions and warranties in consumer transactions — Implied warranties — Limitation or preclusion of liability for breach of implied warranty — Section 74(1) of *Trade Practices Act 1974* (Cth) ("TPA") provided that in every contract for supply by corporation of services there was an implied warranty that services will be rendered with due care and skill — Section 74(2A) of TPA provided that, where implied warranty breached and law of State was proper law of contract, that State law applied to limit or preclude liability for breach of implied warranty in same way as for breach of another term of contract — Section 5N(1) of *Civil Liability Act 2002* (NSW) ("Civil Liability Act") provided that term of contract for supply of recreation services may exclude, restrict or modify liability for breach of implied warranty — Appellant and respondent entered contract for supply by appellant to respondent of tourism services in Europe — Proper law of contract was law of New South Wales — Contract contained clause exempting appellant from liability for claims arising from accident where passenger occupied motor coach seat fitted with safety belt if safety belt not being worn — While travelling by coach respondent left seat to retrieve item from overhead shelf — Coach braked suddenly causing injury to respondent — Respondent claimed damages for breach of implied warranty by appellant — Whether s 74(2A) of TPA picked up and applied State laws as surrogate federal laws — Whether s 74(2A) of TPA picked up and applied s 5N of Civil Liability Act — Whether s 5N a law that applies to limit or preclude liability for breach of contract.

Negligence — Civil Liability Act — Whether provision of transport services in the course of tourism constitutes "recreation services" for purposes of s 5N.

Statutes — Acts of parliament — Interpretation — Geographical limitation on legislative power of State parliament — Whether s 5N of Civil Liability Act subject to geographical limitation — Whether, if picked up by s 74(2A), s 5N applied to contract for supply of recreation services where supply occurred wholly outside New South Wales.

Contracts — General contractual principles — Construction and interpretation of particular contracts — Exemption from liability — Whether appellant could rely on exemption clause in contract as answer to respondent's claim.

Words and phrases — "applies to limit or preclude liability", "contract for the supply of recreation services", "geographical limitation", "recreational activity".

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.

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) (“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 Act.

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

Phonographic Performance Company of Australia Limited & Ors v The Commonwealth & Ors
S307/2010: [\[2011\] HCATrans 117](#); [\[2011\] HCATrans 118](#); [\[2011\] HCATrans 119](#).

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

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

Catchwords:

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

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

Roy Morgan Research Pty Ltd v Commissioner of Taxation
M177/2010: [\[2011\] HCATrans 78](#).

Date heard: 30 March 2011 — *Judgment reserved*.

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

Catchwords:

Constitutional law — Powers of Commonwealth Parliament — Taxation — 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 — *Commonwealth Constitution*, s 51 (ii) — *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.

Nicholas v The Commonwealth & Anor
S183/2010: [\[2011\] HCATrans 77](#).

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

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

Catchwords:

Constitutional law — Operation and effect of *Commonwealth Constitution* — Chapter III — Plaintiff convicted by Australian

Military Court ("AMC") of offences under *Defence Force Discipline Act* 1982 (Cth) ("Act") on 25 August 2008 and sentenced accordingly — High Court of Australia declared provisions of the Act establishing AMC 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 force — Part 2 of Sch 1 to Interim Measures Act applies to punishments purportedly imposed by AMC prior to *Lane v Morrison* — Item 5 of Sch 1 to Interim Measures Act declares rights and liabilities of plaintiff to be, and always to have been, same as if punishments purportedly imposed by AMC 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 of Sch 1 to Interim Measures Act valid law of Commonwealth or operates to usurp judicial power — Whether Interim Measures Act a Bill of Pains and Penalties — Whether Interim Measures Act consistent with *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 factum and consequence model of legislating and therefore valid — *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: [\[2011\] HCATrans 77](#).

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

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

Catchwords:

Constitutional law — Operation and effect of *Commonwealth Constitution* — Chapter III — Plaintiff convicted by Australian Military Court ("AMC") of offences under *Defence Force Discipline Act* 1982 (Cth) ("Act") on 11 December 2008 and sentenced accordingly — High Court of Australia declared provisions of Act establishing AMC 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 force — Part 2 of Sch 1 to Interim Measures Act applies to punishments purportedly imposed by AMC prior to *Lane v Morrison* — Item 5 of Sch 1 to Interim Measures Act declares rights and liabilities of plaintiff to be, and always to have been, same as if punishments purportedly imposed by AMC 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 or operate to usurp judicial power — Whether Interim Measures Act a Bill of Pains and Penalties — Whether Interim Measures Act consistent with *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 factum and consequence model of legislating and therefore valid — *Military Justice (Interim Measures) Act (No 2)* 2009 (Cth), Sch 1, items 3, 4 and 5.

Constitutional law — Acquisition of property on just terms — Whether Interim Measures Act effects an acquisition of the plaintiff's asserted common law cause of action, arising out of the plaintiff's wrongful imprisonment, without providing just terms — Whether Interim Measures Act a law with respect to the acquisition of property — Whether action for wrongful imprisonment is maintainable by the plaintiff against the Commonwealth — *Commonwealth Constitution*, s 51(xxxi).

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

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 — *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) (“Act”) provided for any judge of Supreme Court of NSW to be declared, with consent, “eligible Judge” for purposes of Act — Commissioner of Police applied to eligible judge for declaration under Act in respect of Hells Angels — Where some evidence classified “criminal intelligence” under Act and withheld from legal representatives of Hells Angels — Where ex parte hearing held under 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 Act or any provision thereof undermines institutional integrity of Supreme Court of NSW — Whether Act or any provision thereof outside legislative powers of Parliament of NSW — Whether eligible judge acts *persona designata* in exercising functions under Act — *Crimes (Criminal Organisations Control) Act 2009* (NSW).

Constitutional law — Operation and effect of *Commonwealth Constitution* — Implied freedom of political communication — Section 26 of Act creates offence of associating with person the subject of control order made under Act — Where associating defined to include any communication — Whether Act burdens political communication and, if so, whether 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 — *Part-heard (this appeal is listed for further argument on 7 June 2011)*.

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) (“Act”) s 5 — Whether s 5 of 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 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* — 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 Act inconsistent with ss 13.1, 13.2 and 302.4 of *Criminal Code* 1995 (Cth) ("Code").

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

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 *Commonwealth Constitution* to grant relief sought.

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

Damages

Maurice Blackburn Cashman v Brown

M176/2010: [\[2011\] HCATrans 113](#).

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

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

Catchwords:

Damages — Statutory constraint on action for damages — Respondent former employee of applicant — Respondent made claim pursuant to *Accident Compensation Act 1985 (Vic)* (“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 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 precluded or estopped from making assertion inconsistent with Medical Panel opinion — Whether Medical Panel opinion operates to restrict appellant from putting certain matters in issue in defence to common law damages claim subject to Act — Whether Medical Panel 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: [\[2011\] HCATrans 82](#).

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

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

Catchwords:

Defamation — Defences — Qualified privilege — Boland and respondent directors and Cush general manager of Border Rivers-Gwydir Catchment Management Authority (“CMA”) — Respondent told chairman of CMA that “[i]t is common knowledge among people in the CMA that [the appellants] are having an affair” — Common ground at trial that appellants not having affair and that respondent did not believe appellants having affair when comment made — Respondent denied making comment — Jury found respondent made comment — Respondent advanced defence of qualified privilege founded on perceived need to inform chairman of CMA of “the rumour and the accusation” of affair — Whether publication of imputations of affair between director and General Manager of statutory body published by another director to chairman on occasion of qualified privilege — Relevance of duty respondent owed to CMA to occasion 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: [\[2011\] HCATrans 80](#).

Date heard: 5 April 2011 — *Judgment reserved*.

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

Catchwords:

Energy and resources — Compensation for subsidence caused by mining — Appellant 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 — Appellant 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 s 12A(1)(b) of *Mine Subsidence Compensation Act 1961* (NSW) 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.

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.

Evidence

Lithgow City Council v Jackson

S158/2010: [\[2011\] HCATrans 115](#).

Date heard: 5 May 2011 — *Judgment reserved*.

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

Catchwords:

Evidence — Admissibility and relevance — Respondent found unconscious and injured in parklands during early hours of morning — Respondent had no memory of events leading to his injuries — Ambulance officers who attended scene recorded, inter alia, "Fall from 1.5 metres onto concrete" ("Ambulance Record") — Whether Ambulance Record an opinion that respondent fell in to drain or record of fact that such a fall possible — If Ambulance Record a record of fact, whether it should have been excluded under s 136 of *Evidence Act 1995* (NSW) ("Act") — If Ambulance Record an opinion, whether it should have been excluded under s 76 of Act — Whether Ambulance Record a lay opinion and admissible under s 78 of Act — Whether opinion of underlying matter or event includes perceptions of aftermath of matter or event.

Words and phrases — "necessary".

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

Dasreef Pty Limited v Hawchar
S313/2010: [\[2011\] HCATrans 81](#).

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

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

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 had specialised knowledge enabling determination of respirable fraction of silica in dust clouds from observation alone — 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 specialised knowledge 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.

High Court of Australia

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 s 18B of *Insurance Act* 1902 (NSW) (“Act”) 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 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 Act — Whether s 18B(1) of Act applied to contracts — *Commercial Arbitration Act* 1984 (NSW), ss 38(5)(b)(i), 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.

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.

3: ORIGINAL JURISDICTION

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

Constitutional Law

Wotton v State of Queensland & Anor
S314/2010

Catchwords:

Constitutional law — Restrictions on State legislation — Rights and freedoms implied in *Commonwealth Constitution* — Freedom of political communication — Plaintiff convicted of offence of rioting causing destruction and sentenced to imprisonment — Plaintiff granted parole subject to conditions that, inter alia: he attend no public meetings on Palm Island without prior approval of his corrective services officer; he be prohibited from speaking to and having any interaction with the media; and he receive no direct or indirect payment from the media ("Conditions") — Plaintiff sought approval to attend public meeting on Palm Island concerning youth crime and juvenile justice — Plaintiff's request denied by parole officer of second defendant, the Central and Northern Queensland Regional Parole Board — Whether s 132 of *Corrective Services Act* 2006 (Q) ("Act"), which prohibits interviewing and photographing of prisoners including persons on parole, contrary to *Commonwealth Constitution* by impermissibly burdening implied freedom of political communication — Whether Conditions contrary to *Commonwealth Constitution* by impermissibly burdening implied freedom of political communication — Whether s 200(2) of Act invalid to the extent it authorises imposition of Conditions.

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

High Court of Australia

Williams v The Commonwealth
S307/2010

Catchwords:

High Court of Australia — Original jurisdiction — Practice and procedure — Parties — Standing — Plaintiff the parent of children enrolled at Darling Heights State Primary School ("School") — Commonwealth implemented National School Chaplaincy

Programme ("NSCP") in 2006 — Commonwealth, represented by Department of Education, Science and Training, entered into funding agreement with Scripture Union Queensland ("SUQ") for provision of funding to School under NSCP ("Funding Agreement") — From 2007, chaplaincy services provided to School by SUQ for reward using NSCP funding — Whether plaintiff has standing to challenge validity of Funding Agreement — Whether plaintiff has standing to challenge drawing of money from Consolidated Revenue Fund ("CRF") for purpose of making payments pursuant to Funding Agreement — Whether plaintiff has standing to challenge Commonwealth payments to SUQ pursuant to Funding Agreement.

Constitutional law — Executive — Whether Funding Agreement invalid by reason of s 61 of *Commonwealth Constitution* — Whether making of payments by Commonwealth to SUQ pursuant to Funding Agreement unlawful by reason of s 61 of *Commonwealth Constitution*.

Constitutional law — Restrictions on Commonwealth legislation — Laws relating to religion — Whether Funding Agreement invalid by reason of s 116 of *Commonwealth Constitution* — Whether making of payments by Commonwealth to SUQ pursuant to Funding Agreement unlawful by reason of s 116 of *Commonwealth Constitution*.

Constitutional law — Revenue and appropriation — Payments under Funding Agreement drawn from CRF by Appropriation Acts — Whether drawing of money from CRF for purpose of making payments under Funding Agreement authorised by Appropriation Acts.

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

Handlen v The Queen; Paddison v The Queen
B5/2010; B7/2011: [\[2011\] HCATrans 120](#).

Date heard: 13 May 2011 — *Special leave granted*.

Catchwords:

Constitutional law — Trial by jury — Section 668E(1A) of *Criminal Code* (Q) ("proviso") allows court to dismiss appeal where points raised by appellant might be decided in appellant's favour if court considers no substantial miscarriage of justice has occurred — Applicants found guilty by jury of drug offences in contravention of *Criminal Code* (Cth) ("Code") — Court of Appeal found case put to jury "in terms alien to the forms of criminal responsibility" recognised by Code and applicants only criminally responsible as aiders under s 11.2 of Code — Court of Appeal applied proviso — Whether failure to put case against applicants to jury on correct basis of criminal liability a substantial miscarriage of justice — Whether s 80 of *Commonwealth Constitution* precluded application of proviso.

Criminal law — Appeal and new trial — Miscarriage of justice — Whether failure to put case against applicants to jury on correct basis of criminal liability a substantial miscarriage of justice — Whether s 80 of *Commonwealth Constitution* precluded application of proviso.

Words and phrases — "substantial miscarriage of justice".

Appealed from Qld SC (CA): (2010) 247 FLR 261; [2010] QCA 371.

Stoten v The Queen; Hargraves v The Queen
B72/2010; B73/2010: [\[2011\] HCATrans 120](#).

Date heard: 13 May 2010 — *Special leave granted on limited grounds*.

Catchwords:

Constitutional law — Trial by jury — Section 668E(1A) of *Criminal Code* (Q) ("proviso") allows court to dismiss appeal where points

raised by appellant might be decided in appellant's favour if court considers no substantial miscarriage of justice has occurred — Applicants found guilty by jury of conspiracy to defraud Commonwealth — Court of Appeal found errors in directions given to jury but applied proviso and dismissed appeal — Whether application of proviso inconsistent with s 80 of *Commonwealth Constitution* — *Weiss v The Queen* (2005) 224 CLR 300.

Criminal law — Appeal and new trial — Procedural fairness — Whether directions at trial constituted denial of procedural fairness — Whether Court of Appeal failed to take into account direction concerning applicants' interests in subject matter of evidence in applying proviso — *Weiss v The Queen* (2005) 224 CLR 300.

Words and phrases — "procedural fairness".

Appealed from Qld SC (CA): [2010] QCA 328.

Queanbeyan City Council v ACTEW Corporation Ltd & Anor
C6/2010; C7/2010: [\[2011\] HCATrans 83](#).

Date heard: 8 April 2011 — *Special leave granted*.

Catchwords:

Constitutional law — Duties of excise — Water abstraction charge ("WAC") imposed by Ministerial determination — WAC calculated by reference to quantum abstracted — Whether discernible relationship to value of acquisition necessary for governmental levy for access to and acquisition of natural resource to escape characterisation as a tax — If discernible relationship required, whether requirement satisfied where government charges any rate borne by market, including monopoly rent — Evidence required to establish absence of discernible relationship between charge and value of acquired resource — *Water Resources Act 2007 (ACT)*.

Constitutional law — Duties of excise — Utilities Network Facilities Tax ("UNFT") imposed on owners of network facilities — UNFT calculated by reference to "route length" of network facility — Whether fee said to be for exercise of legislative power authorising utilities to trespass on land a fee for service and therefore not a tax — Whether following factors sufficient to establish that a levy on network facilities not an excise: UNFT payable by owner, rather than operator, of network; UNFT imposed by reference to conferral of right to use and occupy land on which facility located; quantum of tax referable to length land occupied; quantum of UNFT not explicable only on basis of quantity and value of water supplied by respondent; payment of fee not a condition on transportation of water; UNFT does not select water network for discrimination so as

to warrant conclusion that tax upon water carried in network — *Utilities (Network Facilities Tax) Act 2006* (ACT).

Practice and procedure — Precedents — Decisions of High Court of Australia ("HCA") — Binding effect on other courts — Whether intermediate appellate court may depart from dicta of justices of HCA, subsequently approved by other justices of HCA, where no decision of HCA has disagreed with those dicta.

Appealed from FCA FC: [2010] FCAFC 124.

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 on limited grounds.*

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 — *Commonwealth 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 — *Commonwealth 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) 189 FCR 448; (2010) 274 ALR 12; [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 — *Commonwealth 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 — *Commonwealth Constitution, s 92 — Racing Administration Act 1998 (NSW), s 33(1).*

Appealed from FCA FC: (2010) 189 FCR 356; (2010) 273 ALR 664; [2010] FCAFC 133.

Contracts

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

Corporations

Australian Securities and Investments Commission v Shafron;
Australian Securities and Investments Commission v Terry;
Australian Securities and Investments Commission v Hellicar;
Australian Securities and Investments Commission v Brown;
Australian Securities and Investments Commission v Gillfillan;
Australian Securities and Investments Commission v Koffel;
Australian Securities and Investments Commission v O'Brien;
Australian Securities and Investments Commission v Willcox;
Shafron v Australian Securities and Investments Commission
S29/2011; S30/2011; S31/2011; S32/2011; S33/2011;
S34/2011; S35/2011; S36/2011; S37/2011: [\[2011\] HCATrans 128](#).

Date heard: 13 May 2011 — *Special leave granted.*

Catchwords:

Corporations — Management and administration — Evidence — Misleading announcement sent to Australian Stock Exchange ("ASX") — At trial, Australian Securities and Investments Commission ("ASIC") failed to call solicitor ("Mr Robb") advising James Hardie Industries Ltd ("JHIL") who attended meeting of Board of Directors — Trial judge made adverse findings and declarations of contravention against first to eighth respondents — Whether ASIC obliged to call particular witnesses pursuant to obligation of fairness — Whether ASIC failed to discharge burden of proving that JHIL Board passed Draft ASX Announcement resolution — Whether ASIC obliged to call Mr Robb to give evidence of firm's receipt of Draft ASX Announcement — Whether ASIC's failure to comply with obligations, if extant, had negative evidentiary impact on ASIC's case — Whether certain oral evidence of respondents Brown and Koffel ought to have been accepted as correlating with terms of Draft ASX Announcement — Whether ASIC failed to prove that JHIL Board passed resolution approving tabled ASX Announcement — Whether of evidentiary significance that company associated with respondent O'Brien produced to ASIC identical version of Draft ASX Announcement — Whether evidence of JHIL company secretary that practice of retaining versions of announcements approved for market release did not relate to

period of release of misleading announcement — Whether reliability and weight to be attributed to Board minutes open to question — Whether declarations of contravention made in respect of first to eighth respondents should be set aside — Whether, in respect of Shafron cross-appeal: Shafron was an officer of JHIL who participated in decisions affecting the business of JHIL; Shafron's responsibilities as company secretary and general counsel fell within scope of duty of care and diligence imposed on him as an "officer" by s 180(1) of *Corporations Law* and *Corporations Act 2001* (Cth) ("Acts"); Shafron's conduct was in his capacity as JHIL company secretary; Shafron breached s 180(1) of the Acts.

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

Criminal Law

BBH v The Queen

B76/2010: [\[2011\] HCATrans 121](#).

Date heard: 13 May 2011 — *Referred to an enlarged Court.*

Catchwords:

Criminal law — Appeal and new trial — Evidence — Applicant found guilty by jury of maintaining indecent relationship with child under 16, indecent treatment of child under 16 and sodomy of a person under 18 — Complainant was applicant's daughter — Whether evidence of complainant's brother, who provided innocent explanation for an event held to be evidence of discreditable conduct, properly put before jury in circumstances where complainant gave no evidence about the event — Whether test for admissibility in *Pfennig v The Queen* (1995) 182 CLR 461 applies to evidence of discreditable conduct — If so, whether admissibility test applicable.

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

Green v The Queen; Quinn v The Queen

S18/2010; S61/2010: [\[2011\] HCATrans 100](#).

Date heard: 8 April 2011 — *Special leave granted on limited grounds.*

Catchwords:

Criminal law — Sentencing — Applicants pleaded guilty to cultivation of large commercial quantity of cannabis — Crown appealed against inadequacy of applicants' sentences — Where no

appeal instituted against sentence of another participant who pleaded guilty to taking part in supply of commercial quantity of cannabis — Where NSW Court of Criminal Appeal increased applicants' sentences — Whether sentence which at first instance achieves parity with sentence imposed on co-offender can be regarded as manifestly inadequate — Whether open to intermediate appellate court to increase sentence when increase will engender sentencing disparity — *Drug Misuse and Trafficking Act 1985* (NSW), s23(2)(a); *Criminal Appeal Act 1912* (NSW), s 5D; *Crimes (Sentencing Procedure) Act 1999* (NSW), Div 1A.

Appealed from NSW SC (CA): [2010] NSWCCA 313.

Moti v The Queen

B47/2010: [\[2011\] HCATrans 96](#).

Date heard: 8 April 2011 — *Special leave granted on limited grounds.*

Catchwords:

Criminal law — Procedure — Stay of proceedings — Abuse of process — Indictment charging applicant with seven counts of engaging in sexual intercourse with person under 16 whilst outside Australia stayed by primary judge — Where primary judge found financial support given to witnesses by Australian Federal Police an abuse of process — Whether open to conclude that prosecution based on evidence of witnesses paid by Australian Executive, in amounts alleged to exceed expenses of giving evidence and in response to alleged threats to withdraw from prosecution, an abuse of process — Whether stay of proceedings should be set aside.

Criminal law — Procedure — Stay of proceedings — Abuse of process — Where applicant deported from Solomon Islands to Australia without extradition proceedings and allegedly with "knowledge and connivance or involvement" of Australian Executive — Where applicant previously charged with similar offences in Vanuatu but discharged — Where applicant contended removal from Solomon Islands a disguised extradition and criminal investigation politically motivated — Whether principle in *R v Horseferry Magistrates' Court; Ex Parte Bennett (No 1)* [1994] 1 AC 42 should be applied in Australia — Whether discretion to stay proceedings as abuse of process in light of facts and applicant's allegations ought to be exercised.

Appealed from Qld SC (CA): [2010] QCA 178.

Muldock 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 NSW SC (CCA): [2010] NSWCCA 106.

See also **Constitutional Law:** *Handlen v The Queen; Paddison v The Queen; Stoten v The Queen; Hargraves v The Queen*

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)* ("Act"), that accords with s 28(2) of Act — Whether s 28(3) of Act required approval of Governor to effect change of zoning under LEP 194 — Whether s 28(3) of 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 — Scaffolder 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.

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 Supreme Court of NSW ("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 ("Award") — Respondents not party to Award — Whether abuse of process for applicant to seek to enforce judgment in NSWSC in face of 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 NSW Court of Appeal on trial judge's apprehensible bias justified on facts.

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

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

See also **Constitutional Law:** *Queanbeyan City Council v ACTEW Corporation Ltd & Anor*

Statutes

AB v State of Western Australia & Anor; AH v State of Western Australia & Anor

P36/2010; P37/2010: [\[2011\] HCATrans 87](#).

Date heard: 8 April 2011 — *Special leave granted*.

Catchwords:

Statutes — Acts of Parliament — Interpretation — Gender reassignment — Applicants born female — Applicants gender dysphoric and diagnosed as having gender identity disorder — Applicants commenced and continue to undergo testosterone therapy, rendering each currently infertile — Applicants underwent bilateral mastectomies but not hysterectomies — Applicants have not undergone phalloplasty due to associated risks — Gender Reassignment Board refused applicants' applications for certificates recognising reassignment of their gender from female to male — Whether *Gender Reassignment Act 2000* (WA) ("Act") remedial or beneficial legislation requiring liberal interpretation — Whether each applicant has "the physical characteristics by virtue of which a person is identified as male" to be determined by reference to general community standards and expectations or from perspective of reasonable member of community informed of facts and circumstances, including remedial purpose of Act — Whether decision to issue gender reassignment certificate to be made having regard solely to applicants' external physical characteristics or also by reference to applicants' internal physical characteristics — Whether female-to-male re-assignee with internal and external female genitals must undertake surgery to remove internal female genitals and construct external male genitals in order to have "the physical characteristics by virtue of which a person is identified as male" — *Gender Reassignment Act 2000* (WA), ss 3, 14, 15.

Words and phrases — "the physical characteristics by virtue of which a person is identified as male", "gender characteristics", "reassignment procedure".

Appealed from WA SC (CA): [2010] WASCA 172.

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

Words and phrases — "in addition to".

Appealed from SA SC (FC): [2010] 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 s 88E(1)(f) of *Workers Rehabilitation Compensation Act* 1986 (SA) ("Act") authorised President of Workers Compensation Tribunal to make Rules regulating "costs" — Where s 88G of Act regulated recovery of costs by worker's representative — Where r 31(2) of *Workers Compensation Tribunal Rules* 2009 restricted recovery of costs by worker's representative — Whether "costs" in s 88E(1)(f) of Act includes solicitor-client costs or only party-party costs — Whether power conferred by s 88E(1)(f) limited by s 88G of Act — Whether s 88G invalidates r 31(2).

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

Torts

Strong v Woolworths Limited t/as Big W & Anor
S268/2010: [\[2011\] HCATrans 131](#).

Date heard: 13 May 2011 — *Special leave granted*.

Catchwords:

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

Appealed from SC NSW (CA): [201] NSWCA 282.

Trade and Commerce

See **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 03 [2011] HCAB 03.

6: SPECIAL LEAVE REFUSED

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 114](#).

Date heard: 4 May 2011 — *Referred to an enlarged Court on 11 February 2011. Special leave refused by French CJ, Gummow, Hayne, Heydon and Kiefel JJ following hearing on 4 May 2011.*

Catchwords:

Taxation and duties — Goods and services tax — Applicants providers of charge cards and credit cards — Whether payments (liquidated damages and late payment fees) received by applicants from cardholders ("Default Fees") revenue from or consideration for a "financial supply" within meaning of Div 40 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth) 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 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.

Canberra: 13 May 2011

(Heard in Canberra by video link to Brisbane)

Civil

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
400 George Street (QLD) Pty	BG International Limited & Ors	Supreme Court of Queensland (Court of Appeal)	Special leave refused with costs

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Limited & Anor	(B63/2010)	[2010] QCA 245	[2011] HCATrans 122
Mullins	Kelly-Corbett (B1/2011)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 354	Special leave refused with costs [2011] HCATrans 123
Triple C Furniture and Electrical Pty Ltd	Rural & General Insurance Limited & Anor (B67/2010)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 282	Special leave refused with costs [2011] HCATrans 125

Criminal

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Walsh	The Queen (B54/2010)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 193	Special leave refused [2011] HCATrans 124
Lester	The Queen (B74/2010)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 152	Special leave refused [2011] HCATrans 126
The Queen	Garget-Bennett (B61/2010)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 231	Special leave refused [2011] HCATrans 127

Sydney: 13 May 2011

Civil

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Morley	Australian Securities and Investments Commission (S41/2010)	Supreme Court of New South Wales (Court of Appeal)	Special leave refused [2011] HCATrans 128
Minister for Immigration and Citizenship & Anor	SZNC & Anor (S20/2010)	Full Court of the Federal Court of Australia [2010] FCAFC 157	Special leave refused with costs [2011] HCATrans 130
Phonographic Performance Company of Australia Ltd	Fitness Australia Incorporated & Anor (S19/2010)	Full Court of the Federal Court of Australia [2010] FCAFC 148	Special leave refused with costs [2011] HCATrans 132
Tryon & Anor	Clutterbuck & Ors (S288/2010)	Full Court of the Family Court of Australia (no media neutral citation)	Special leave refused with costs [2011] HCATrans 133
Zhang	Zemin & Ors (S253/2010)	Supreme Court of New South Wales (Court of Appeal) [2010] NSWCA 255	Special leave refused [2011] HCATrans 134
SZNPNG	Minister for Immigration and	Full Court of the Federal Court of Australia	Special leave refused with costs

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
	Citizenship & Anor (S156/2010)	[2010] FCAFC 51	[2011] HCATrans 135
