HIGH COURT BULLETIN

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[2012] HCAB 04 (26 April 2012)

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

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SUMMARY OF NEW ENTRIES

1: Cases Handed Down

Case	Title
Aytugrul v The Queen	Criminal Law
Roadshow Films Pty Ltd v iiNet Limited	Intellectual Property

2: Cases Reserved

Case	Title
J T International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v Commonwealth of Australia	Constitutional Law
Clodumar v Nauru Lands Committee	Property Law

3: Original Jurisdiction

Case	Title
There are no new matters ready for hearing in the original jurisdiction of the High Court since *High Court Bulletin* 3 [2012] HCAB 03.	

4: Special Leave Granted

Case	Title
No new matters were granted special leave since *High Court Bulletin* 3 [2012] HCAB 03.	

1: Cases Handed Down

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

Criminal Law

Aytugrul v The Queen
S315/2011: [2012] HCA 15.

Judgment delivered: 18 April 2012.

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

Catchwords:

Criminal law – Evidence – Admissibility of evidence about DNA analysis – Appellant convicted of murder – Expert gave evidence at trial about mitochondrial DNA testing of hair found on deceased's thumbnail – Expert's statistical evidence given in form of frequency ratio and exclusion percentage – Whether evidence of exclusion percentage relevant given evidence of frequency ratio – Whether probative value of evidence of exclusion percentage outweighed by danger of unfair prejudice to appellant – Whether evidence of exclusion percentage misleading or confusing.

Evidence – Judicial notice – Argument for general rule that evidence of exclusion percentage is always inadmissible due to danger of unfair prejudice – Facts underpinning adoption of general rule not proved – Whether judicial notice can be taken of psychological research said to support adoption of general rule.

Words and phrases – "evidence", "exclusion percentage", "frequency ratio", "judicial notice", "misleading or confusing", "unfair prejudice".

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

Intellectual Property

Roadshow Films Pty Ltd & Ors v iiNet Limited

S288/2011: [2012] HCA 16.

Judgment delivered: 20 April 2012.

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

Catchwords:

Intellectual property – Copyright – Infringement – Authorisation – Appellants owners and exclusive licensees of copyright in commercially released films and television programs ("appellants' films") – Respondent internet service provider supplied internet services under agreement requiring that services not be used to infringe others' rights or for illegal purposes – Users of respondent's internet services infringed copyright in appellants' films by making appellants' films available online using BitTorrent peer-to-peer file sharing system – Notices served on respondent alleging copyright infringement by users of respondent's internet services – Respondent took no action in response to notices – Whether respondent authorised infringement of copyright in appellants' films by users of respondent's internet services.

Words and phrases – "authorise".

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

2: CASES RESERVED

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

Administrative Law

Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia & Anor

A7/2011: [2011] HCATrans 322.

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

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

Catchwords:

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

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

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

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

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*See also **Citizenship and Migration**: Plaintiff S10/2011 v Minister for Immigration and Citizenship & Anor; Kaur v Minister for Immigration and Citizenship & Anor; Plaintiff S49/2011 v Minister for Immigration and Citizenship & Anor; Plaintiff S51/2011 v Minister for Immigration and Citizenship & Anor.*

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

Citizenship and Migration

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

S51/2011: [2012] HCATrans 16; [2012] HCATrans 17; [2012] HCATrans 18.

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

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

Catchwords:

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

48B decision") — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 195A decision by denying plaintiff opportunity to make submissions addressing matters in s 195A and Department's adverse summary of initial departmental processes — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 417 decision by denying plaintiff opportunity to address criterion used in the s 195A decision — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 417 decision and the s 48B decision by denying plaintiff opportunity to address adverse material.

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

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

S10/2011: [2012] HCATrans 16; [2012] HCATrans 17; [2012] HCATrans 18.

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

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

Catchwords:

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

and/or second defendant through his officers failed to apply Minister's Guidelines correctly by taking into account irrelevant considerations or failing to take into account relevant considerations — Whether jurisdictional error occurred irrespective of privative clause in s 474(2) of the Act.

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

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

S49/2011: [2012] HCATrans 16; [2012] HCATrans 17; [2012] HCATrans 18.

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

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

Catchwords:

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

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

Kaur v Minister for Immigration and Citizenship & Anor

S43/2011: [2012] HCATrans 16; [2012] HCATrans 17; [2012] HCATrans 18.

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

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

Catchwords:

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

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

Competition Law

The Pilbara Infrastructure Pty Ltd & Anor v Australian Competition Tribunal & Ors; The National Competition Council v Hamersley Iron Pty Ltd & Ors; The National Competition Council v Robe River Mining Co Pty Ltd & Ors
M45/2011; M46/2011; M155-157/2011: [2012] HCATrans 52; [2012] HCATrans 53; [2012] HCATrans 54.

Dates heard: 6, 7 & 8 March 2012 — *Judgment reserved*.

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

Catchwords:

Competition law — Declared services — Rio Tinto Ltd and associated entities ("Rio") operate Hamersley and Robe railway lines in Pilbara region — The Pilbara Infrastructure Pty Ltd ("TPI") applied to National Competition Council ("NCC") for a recommendation that the Minister declare the Hamerlsey and Robe lines 'essential facilities', pursuant to s 44F of Trade Practices Act 1974 (Cth) (now Competition and Consumer Act 2010 (Cth)) ("Act") — Declaration would allow third party trains and rolling stock to move along the lines — Commonwealth Minister declared Hamersley and Robe lines for period of 20 years pursuant to s 44H of Act — Rio applied to Australian Competition Tribunal ("Tribunal") for review of decision to declare — Tribunal made determination, pursuant to s 44K(7) of Act, setting aside Hamersley declaration and varying Robe declaration to ten year period — Section 44H(4) of Act required Minister to be satisfied of certain matters — Tribunal found, inter alia, that s 44H(4)(b) was satisfied because Hamersley and Robe lines were natural monopolies — Tribunal found that s 44H(4)(f) was not satisfied in respect of Hamersley line because access would be contrary to public interest, because putative benefits associated with construction of alternate railway lines outweighed costs of providing access to existing railway lines — Tribunal held that it would at any rate exercise its residual discretion not to declare — Full Court of Federal Court upheld Tribunal's decision in respect of Hamersley line and set aside declaration in respect of Robe line — Full Court found that neither s 44H(4)(b) nor s 44H(4)(f) were satisfied — Full Court held, however, that Tribunal had denied procedural fairness to TPI and Fortescue Metals Group Ltd (together, 'Fortescue') in respect of Hamersley line proceedings, because the Tribunal relied on material irregularly provided to it by Rio Tinto to support its conclusion that it was likely that Fortescue would, in the absence of declaration, construct an alternate railway line — Whether criterion for declaration of service specified in s 44H(4)(b) of Act imposes test of

private profitability or test applying economic principles taking into account natural monopoly characteristics — Whether public interest criterion in s 44H(4)(f) of Act requires or permits inquiry into likely net balance of social costs and benefits that would arise were a declaration to be made — Scope of the residual discretion conferred by s 44H(2) of Act — Whether there was a denial of procedural fairness in denying Fortescue the opportunity to comment on Rio's submissions as to the alternate line

Application for leave to amend notice of appeal — In proceedings before the High Court of Australia on 8 March 2012, Fortescue sought leave to file an amended notice of appeal raising a new ground of appeal, namely, that Tribunal misconceived the nature of its role under s 44K of Act — Whether Tribunal was required to reconsider afresh the application made to NCC — Whether Tribunal's role was confined to considering the correctness of the Minister's decision to declare in light of the NCC's recommendation — Whether Tribunal could consider any material the parties considered relevant

Words and phrases — "uneconomical for anyone to develop another facility to provide the service" — "would not be contrary to the public interest" — "review by the Tribunal is a re-consideration of the matter".

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

Constitutional Law

Crump v State of New South Wales
S165/2011: [2012] HCATrans 81.

Dates heard: 27 March 2012 — *Judgment reserved*.

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

Catchwords:

Constitutional law (Cth) — Commonwealth Constitution, Ch III — State Supreme Courts — Variation or alteration of judgment, decree, order or sentence by Parliament — Plaintiff convicted of murder and conspiracy to murder and sentenced to life imprisonment on both counts — Sentencing judge expressed view that plaintiff should never be released — Pursuant to s 13A of *Sentencing Act* 1989 (NSW), Supreme Court of New South Wales subsequently fixed dates on which plaintiff eligible for release on

parole — Section 154A of *Crimes (Administration of Sentences) Act* 1999 (NSW) ("Administration Act") provides that Parole Authority may make order directing release of person subject to non-release recommendation only in prescribed circumstances — Parole Board determined plaintiff ineligible for parole pursuant to s 154A of Administration Act — Whether s 154A of Administration Act invalid because it has effect of varying or otherwise altering a judgment, decree, order or sentence of Supreme Court of New South Wales in a matter within meaning of s 73 of *Commonwealth Constitution*.

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

J T International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v Commonwealth of Australia

S389/2011; S409/2011: [2012] HCATrans 91; [2012] HCATrans 92; [2012] HCATrans 93.

Dates heard: 17, 18 & 19 April 2012 — *Judgment reserved*.

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

Catchwords:

Constitutional law (Cth) — Legislative power — Acquisition of property on just terms — Plaintiffs hold registered and unregistered trade marks and other intellectual property rights in relation to tobacco products and packaging — Tobacco Plain Packaging Act 2011 (Cth) ("Packaging Act") regulates and standardises retail packaging and appearance of tobacco products — Packaging Act, s 15 provides, among other things, that Packaging Act "does not apply to the extent (if any) that its operation would result in an acquisition of property from a person otherwise than on just terms" — Whether Packaging Act would, but for s 15, result in acquisition of plaintiffs' property (including intellectual property rights, goodwill, and rights to determine appearance of tobacco products and packaging) otherwise than on just terms — Whether plaintiffs' rights constitute "property" for purposes of Constitution, s 51(xxxi) — Whether Commonwealth has acquired rights in plaintiffs' property for purposes of Constitution, s 51(xxxi) — Whether any acquisition of property effected by Packaging Act an "acquisition-on-just-terms" within meaning of compound expression in Constitution, s 51(xxxi) or Packaging Act a law with respect to alternative head of legislative power —Whether "just terms" provided for purposes of Constitution, s 51(xxxi) — Whether, by reason of s 15, operative provisions of Packaging Act have no operation with respect to plaintiff's property.

Constitutional law (Cth) — Judicial power — Constitution, Ch III — Implied limits on Commonwealth legislative power — Whether Packaging Act, s 15 impermissibly confers legislative power upon judiciary — Whether Packing Act, s 15 invalid.

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

Williams v The Commonwealth

S307/2010: [2011] HCATrans 198; [2011] HCATrans 199; [2011] HCATrans 200.

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

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

Catchwords:

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

Constitutional law (Cth) — Revenue and appropriation — Payments under Funding Agreement drawn from Consolidated Revenue Fund ("CRF") by Appropriation Acts — Whether drawing of money from CRF for purpose of making payments under Funding Agreement authorised by Appropriation Acts — Whether Appropriation Acts authorised expenditure only for "ordinary annual services of government" — Whether permitted and appropriate to have regard

to practices of Parliament to determine "ordinary annual services of the Government" — Whether payments to SUQ under Funding Agreement were "ordinary annual services of government" — *Commonwealth Constitution*, ss 54, 56, 81, 83.

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

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

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

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

See also **Administrative Law**: *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia & Anor*.

See also **Industrial Law**: *Australian Education Union v General Manager of Fair Work Australia & Ors*.

Contracts

See also **Corporations Law**: *Fortescue Metals Group Ltd v Australian Securities and Investments Commission & Anor; Forrest v Australian Securities and Investments Commission & Anor*.

Corporations Law

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

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

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

Catchwords:

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

draft ASX announcement — Whether declarations of contravention made in respect of first to eighth respondents should be set aside.

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

Words and phrases — "obligation of fairness".

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

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

P44/2011; P45/2011: [2012] HCATrans 48; [2012] HCATrans 49; [2012] HCATrans 84.

Dates heard: 29 February 2012, 1 March 2012 & 30 March 2012 — *Judgment reserved*.

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

Catchwords:

Corporations law — Continuous disclosure — Misleading and deceptive conduct — Fortescue Metals Group Ltd ("FMG") entered into framework agreements with three Chinese entities — Forrest Chairman and CEO of FMG — FMG made public announcements that FMG and Chinese entities had executed binding agreements to build, finance and transfer infrastructure for mining project in Pilbara region — Whether, in making announcements, FMG contravened ss 674(2) and 1041H of *Corporations Act* 2001 (Cth) ("Act"), and Forrest contravened ss 180(1) and 674(2A) of Act — Whether announcements made by FMG misleading or deceptive or likely to mislead or deceive in contravention of s 1041H of Act or s 52 of Trade Practices Act 1974 (Cth) — Whether announcements would have been understood by reasonable person as statement of FMG's honest, or honest and reasonable, belief as to legal effect of framework agreements rather than statements that warranted or guaranteed their truth — Whether FMG and Forrest honestly, or honestly and reasonably, believed framework agreements effective as binding contracts — Whether FMG contravened s 674(2) and Forrest contravened s 674(2A) of Act because neither had "information" that framework agreements unenforceable at law —

Whether Forrest could avail himself of the defence under s 674(2B) of Act — Whether, if announcements by FMG misleading or deceptive or likely to mislead or deceive, Forrest failed to act with due care and skill contrary to s 180(1) of Act — Whether s 180(1) of Act provides for civil liability of directors for contraventions of other provisions of Act — Whether business judgment rule under s 180(2) of Act available as defence to alleged contravention of s 180(1) if proceedings based on contravention of provisions containing exculpatory provisions — Whether s 180(2) of Act applies to decisions concerning compliance with Act.

Contracts — Agreements contemplating existence of fuller contracts — Certainty — Whether framework agreements obliged Chinese entities to build, finance and transfer infrastructure for Pilbara project — Whether FMG and Chinese entities intended to create legal relations — Whether framework agreements uncertain as to subject matter — Whether provision for third party determination of certain matters rendered framework agreements certain.

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

Criminal Law

Baker v The Queen

M154/2011: [2012] HCATrans 47.

Date heard: 28 February 2012 — *Judgment reserved.*

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

Catchwords:

Criminal law — Evidence — Hearsay — Admissions — Applicant, along with co-accused at trial, LM, involved in altercation following which one Mr Snowball fell through glass window to street below and died — Applicant found guilty of murder of Mr Snowball — LM acquitted — Witnesses gave competing versions of events leading to death of Mr Snowball — Version implicating applicant as person who pushed or punched Mr Snowball in manner resulting in his fall was preferred by jury — In case against LM, Crown relied on evidence of admissions made by LM that suggested he was responsible for Mr Snowball's fall — Trial judge directed jury that case against each accused was to be assessed only in light of evidence applicable to each accused, meaning evidence of LM's admissions not evidence in case against applicant — Whether evidence of LM's admissions was admissible in exculpation of

applicant — Whether potential exception to hearsay considered in *Bannon v The Queen* (1995) 185 CLR 1 ought to be recognised and whether LM's admissions within scope of any such exception — Whether applicant's trial miscarried and jury's verdict unsafe or unsatisfactory by reason of exclusion of LM's admissions.

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

King v The Queen
M129/2011: [2011] HCATrans 327.

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

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

Catchwords:

Criminal law — Dangerous driving causing death — Direction to jury — Appellant found guilty of two counts of culpable driving causing death contrary to s 318 of *Crimes Act* 1958 (Vic) ("Act") — Primary judge left to jury alternative charge of dangerous driving causing death contrary to s 319(1) of Act — Whether primary judge erred in directing jury that, in relation to dangerous driving charge, driving need only have significantly increased risk, or created real risk, of hurting or harming others, and that driving need not be deserving of criminal punishment — Whether a substantial miscarriage of justice in terms of s 568(1) of Act — *R v De Montero* (2009) 25 VR 694.

Words and phrases — "substantial miscarriage of justice".

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

PGA v The Queen
A15/2011: [2011] HCATrans 267.

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

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

Catchwords:

Criminal law — Rape and sexual assault — Consent — Existence of common law presumption of marital consent — Appellant charged in 2010 with two counts of rape, allegedly committed in 1963, against then wife — In 1963, s 48 of *Criminal Law Consolidation Act* 1935 (SA) ("Act") made person convicted of rape guilty of felony — Where elements of offence of rape in South Australia in 1963

supplied by common law — Act amended in 1976 to remove presumption of marital consent to sexual intercourse in certain circumstances — Whether common law of Australia in 1963 permitted husband to be found guilty of rape of his wife — Whether common law recognises retrospective imposition of criminal liability absent statutory requirement — Whether appellant liable to be found guilty of offence of rape of his wife allegedly committed in 1963 — Effect of *R v L* (1991) 174 CLR 379 — Whether enactment of *Criminal Law Consolidation Act Amendment Act* 1976 (SA) precluded subsequent amendment of common law position prevailing in 1963 — Act, ss 48 and 73 — *Acts Interpretation Act* 1915 (SA), s 16.

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

R v Khazaal

S344/2011: [2012] HCATrans 50.

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

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

Catchwords:

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

Words and phrases — "connected with", "evidential burden".

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

Defamation

Harbour Radio Pty Limited v Trad
S318/2011: [2012] HCATrans 9; [2012] HCATrans 51.

Dates heard: 3 February 2012 & 5 March 2012 — *Judgment reserved*.

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

Catchwords:

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

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

Extradition

Minister for Home Affairs of the Commonwealth & Ors v Zentai & Ors
P56/2011: [2012] HCATrans 82.

Date heard: 28 March 2012 — *Judgment reserved.*

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

Catchwords:

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

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

High Court of Australia

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

See also **Constitutional Law:** *Williams v The Commonwealth*

See also **Property Law:** *Clodumar v Nauru Lands Committee*

Industrial Law

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

M8/2011: [2012] HCATrans 5.

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

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

Catchwords:

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

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

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

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

M128/2011: [2012] HCATrans 83.

Date heard: 29 March 2012 — *Judgment reserved.*

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

Catchwords:

Industrial law — Adverse action — General protection — First respondent ("Barclay") an employee of appellant ("Institute") and Sub-Branch President at Institute of second respondent ("AEU") — Barclay sent email to AEU members employed at Institute noting reports of serious misconduct by unnamed persons at Institute — Barclay did not advise managers of details of alleged misconduct — Chief Executive Officer ("CEO") of Institute wrote to Barclay

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

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

Property Law

Clodumar v Nauru Lands Committee

M37/2011: [2012] HCATrans 94.

Date heard: 20 April 2012 — Appeal allowed, Court to publish reasons in due course.

Coram: French CJ, Gummow, Hayne, Heydon & Bell JJ.

Catchwords:

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

High Court of Australia — Original jurisdiction — *Nauru (High Court Appeals Act* 1976 (Cth) confers original jurisdiction on High Court to hear appeal from Supreme Court of Nauru — Whether fresh evidence may be admitted at hearing in original jurisdiction.

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

3: ORIGINAL JURISDICTION

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

There are no new matters ready for hearing 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.

Administrative Law

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

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

Catchwords:

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

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

Corporations Law

Beck v Weinstock & Ors
S311/2011: [2012] HCATrans 34.

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

Catchwords:

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

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

Kizon v The Queen; Mansfield v The Queen
P28/2011; P29/2011: [2011] HCATrans 331.

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

Catchwords:

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

grounds — Whether element of offence of insider trading that inside information possessed by accused corresponds with information possessed by entity entitled to have or use it.

Words and Phrases — "information".

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

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

S232/2011: [2011] HCATrans 296.

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

Catchwords:

Corporations law — Financial products — Litigation funding — Parties entered into funding deed under which applicant ("ILP") was to fund proceedings brought by first respondent ("CHM") ("Funding Deed") — Clause 4 of Funding Deed provided for early termination fee in event of change of control of CHM — CHM granted fixed and floating charge in favour of ILP as security for payment of moneys owed ("Charge") — CHM entered agreement with second respondent, Cape Lambert Resources Ltd ("CLR"), under which CLR provided standby facility to CHM in exchange for charge over CHM's assets — CHM notified ILP that it disputed ILP's entitlement to payment under funding deed on basis that ILP engaged in unlicensed financial services business in Australia and notified rescission of funding deed under s 925A of *Corporations Act* 2001 (Cth) ("Act) — ILP appointed receivers to CHM under Charge — Primary judge upheld ILP's entitlement to engage in litigation funding absent an Australian Financial Services License ("AFSL") and its right to early termination fee but dismissed claim to further payment — Whether Funding Deed a financial product within meaning of ss 762A-762C, 763A and 763C of Act as facility through which, or through acquisition of which, a person manages financial risk — If Funding Deed a statutory financial product, whether reasonable to assume that any financial product purpose of Funding Deed an incidental purpose such that Funding Deed not a financial product pursuant to s 763E of Act — If Funding Deed a statutory financial product, whether a credit facility within meaning of s 765A(h)(i) of Act and regs 7.1.06(1) and (3) of Corporations Regulations 2001 (Cth) and consequently excluded from being a financial product — Whether litigation funder required to comply with provisions of Act engaged by issuing of financial product, including requirement to obtain AFSL pursuant to s 911A of Act — Whether Funding Deed validly rescinded by CHM pursuant to s 925A(1) of Act.

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

Costs

Certain Lloyds Underwriters Subscribing to Contract No IHOOAAQS v Cross; Certain Lloyds Underwriters Subscribing to Contract No IHOOAAQS v Thelander; Certain Lloyds Underwriters Subscribing to Contract No IHOOAAQS v Thelander

S256/2011; S257/2011; S258/2011: [2011] HCATrans 340.

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

Catchwords:

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

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

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

State of New South Wales v Williamson

S259/2011: [2011] HCATrans 340.

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

Catchwords:

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

(NSW), s 11 — Whether claim for damages that includes claims based on false imprisonment and assault, which are not severable, a claim for personal injury damages — Whether claim for damages for false imprisonment severable from claim for damages for assault — Whether New South Wales Court of Appeal bound by decision in *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136.

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

Criminal Law

Burns v The Queen
S339/2011: [2012] HCATrans 32.

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

Catchwords:

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

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

Likiardopoulos v The Queen
M71/2011: [2012] HCATrans 67.

Date heard: 9 March 2012 — *Special leave granted.*

Catchwords:

Criminal law — Homicide — Murder — Joint criminal enterprise — Counselling and procuring — Deceased victim an intellectually disabled 22 year old — Victim was missing for several months before body found — Applicant and others were charged with

murder — Evidence demonstrated that applicant and co-accused engaged in sustained assault over the course of several days on the victim — Crown accepted pleas of lesser offences by applicant's co-accused namely manslaughter and being an accessory after the fact to manslaughter — Applicant found guilty of murder — Whether it is an abuse of process for the Crown to present a case based on the allegation that an accused has counselled or procured another or others to commit murder (a derivative form of liability) when none of the alleged principals had been convicted of murder — Whether the trial judge erred in leaving to the jury the accused's liability for counselling or procuring another or others to commit murder when none of the alleged principals had been convicted of murder.

Appealed from Vic SC (CA):(2010) 208 A Crim R 84; [2010] VSCA 344.

Patel v The Queen
B25/2011: [2012] HCATrans 19.

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

Catchwords:

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

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

Defamation

Papaconstuntinos v Holmes a Court
S142/2011: [2011] HCATrans 235.

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

Catchwords:

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

Words and phrases — "pressing need".

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

Public International Law

PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission

S166/2011: [2011] HCATrans 280.

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

Catchwords:

Public international law — Jurisdiction — Sovereign immunity — Section 11(1) of *Foreign States Immunities Act* 1985 (Cth) ("Act") provides that a foreign State is not immune in a proceeding that concerns a "commercial transaction" — Respondent commenced proceedings against applicant alleging anti-competitive conduct in relation to international air freight contrary to Pt IV of *Trade*

Practices Act 1974 (Cth) — Applicant a "separate entity" of Republic of Indonesia, as defined in s 22 of Act — Respondent alleges applicant participated in conduct outside Australia amounting to arrangements or understandings with other carriers concerning fuel surcharges — Whether civil penalty proceeding brought by respondent against an entity otherwise entitled to sovereign immunity falls within "commercial transaction" exception in Act — Whether applicant immune under Act from exercise of jurisdiction.

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

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

Statutes

Newcrest Mining Limited v Thornton
P24/2011: [2011] HCATrans 337.

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

Catchwords:

Statutes — Construction — Contribution — Respondent injured in workplace accident — Settlement reached with employer and consent judgment entered — Respondent subsequently issued summons against applicant, owner of mine site at which respondent injured — Applicant sought and received summary judgment on ground that respondent already compensated for injury by employer and s 7(1)(b) of *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) ("Act") precluded recovery of additional damages — Whether s 7(1)(b) of Act applies only to damages awarded following judicial assessment or also to judgments entered by consent — Whether Western Australia Court of Appeal ought to have followed decision of equivalent intermediate appellate court in respect of equivalent legislation — *Nau v Kemp & Associates* [2010] Aust Torts Reports 82-064.

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

Taxation

Commissioner of Taxation v Qantas Airways Ltd
B25/2011: [2012] HCATrans 36.

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

Catchwords:

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

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

Torts

Barclay v Penberthy & Ors

P25/2011: [2011] HCATrans 333.

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

Catchwords:

Torts — Negligence — Duty of care — Economic loss — Loss of services — First respondent piloted aircraft that crashed, killing two and injuring three employees of third respondents — Cause of crash determined to be failure of part designed by applicant — Court of Appeal held applicant and first respondent owed third respondents duty of care, which they breached, causing economic loss to third respondents — Whether applicant owed third respondents duty of care in respect of economic loss claim — Whether existence of action for loss of services a relevant factor in determining whether applicant owed third respondents duty of care — Whether existence of action for loss of services requires imposition of common law duty of care.

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

Madeleine Louise Sweeney bhnf Norma Bell v Thornton

S321/2011: [2012] HCATrans 58.

Date heard: 9 March 2012 — *Matter referred to Full Court*.

Catchwords:

Torts — Negligence — Motor vehicle accident — Duty of care — Applicant learner driver — Content of duty of care owed by voluntary supervisor to learner driver — Applicant suffered personal injury when she crashed a car when navigating a bend — Whether supervisor's failure to warn driver to reduce speed constituted breach of the duty of care — Whether the Court of Appeal erred as to the content of the respondent's duty of care — Whether the Court of Appeal erred in its findings on causation — Whether the Court of Appeal erred in its limitation of effect of the respondent's admission on the content of the duty of care — Whether the Court of Appeal erred with respect to various factual findings.

Appealed from NSW SC (CA): (2011) 59 MVR 155; [2011] NSWCA 244.

5: CASES NOT PROCEEDING OR VACATED

The following cases in the High Court of Australia are not proceeding or have been vacated since *High Court Bulletin* 3 [2012] HCAB 03.

6: SPECIAL LEAVE REFUSED

No new special leave applications have been heard since *High Court Bulletin* 3 [2012] HCAB 03