



# HIGH COURT BULLETIN

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High Court of Australia Library  
[2013] HCAB 08 (18 October 2013)

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

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## SUMMARY OF NEW ENTRIES

### [1: Cases Handed Down](#)

Case	Title
<u><a href="#">Magaming v The Queen</a></u>	Constitutional Law
<u><a href="#">Lee &amp; Anor v New South Wales Crime Commission</a></u>	Criminal Law
<u><a href="#">Bugmy v The Queen</a></u>	Criminal Law
<u><a href="#">Munda v The State of Western Australia</a></u>	Criminal Law

### [2: Cases Reserved](#)

Case	Title
<u><a href="#">Expense Reduction Analysts Group Pty Ltd &amp; Ors v Armstrong Strategic Management and Marketing Pty Limited &amp; Ors</a></u>	Civil Procedure

<a href="#">BCM v The Queen</a>	Criminal Law
<a href="#">Karpany &amp; Anor v Dietman</a>	Native Title
<a href="#">Daly v Thiering &amp; Ors</a>	Statutes

### 3: Original Jurisdiction

Case	Title
There are no new matters ready for hearing in the original jurisdiction of the High Court.	

### 4: Special Leave Granted

Case	Title
<a href="#">Attorney-General for the Northern Territory &amp; Anor v Emmerson &amp; Anor</a>	Constitutional Law
<a href="#">ADCO Constructions Pty Ltd v Goudappel &amp; Anor</a>	Statutes
<a href="#">Thiess v Collector of Customs &amp; Ors</a>	Statutes
<a href="#">Moseley v Director of Public Prosecutions</a>	Supreme Court Practice

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# 1: CASES HANDED DOWN

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

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## Constitutional Law

*Magaming v The Queen*  
S58/2013: [\[2013\] HCA 40](#).

**Judgment delivered:** 11 October 2013.

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

**Catchwords:**

Constitutional law – Judicial power of the Commonwealth – Constitution, Ch III – Appellant crew member of boat carrying passengers with no lawful right to come to Australia – Appellant convicted of aggravated offence of smuggling group of at least five non-citizens reckless as to whether they had lawful right to enter Australia under s 233C(1) of *Migration Act 1958* ("Act") – Section 236B of Act prescribed mandatory minimum sentence for offence under s 233C(1) of five years' imprisonment with minimum non-parole period of three years – Whether ss 233A(1) and 233C(1) coextensive – Whether prescription of mandatory minimum sentence for offence under s 233C(1) conferred judicial power to determine punishment on prosecuting authorities – Whether s 236B incompatible with institutional integrity of courts – Whether s 236B required court to impose arbitrary and non-judicial sentence.

Words and phrases – "aggravated offence", "institutional integrity", "judicial power", "mandatory minimum penalty", "prosecutorial discretion".

**Appealed from NSWSC (CCA):** [\[2013\] NSWCCA 23](#).

**Held:** (6-1) Appeal dismissed.

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## Criminal Law

*Bugmy v The Queen*  
S16/2013: [\[2013\] HCA 37](#).

**Judgment delivered:** 2 October 2013.

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

**Catchwords:**

Criminal law – Appeal – Prosecution appeal against sentence – Where sole ground of appeal manifest inadequacy – Where appellate court increased offender's sentence – Whether finding of manifest inadequacy required before discretion to vary sentence enlivened.

Criminal law – Sentence – Principles – Relevance of deprived background of Aboriginal offender – Application of *Fernando* (1992) 76 A Crim R 58 – Whether effect of social deprivation diminishes with time and repeat offending – Whether social deprivation has same mitigatory effect for all purposes of punishment – Whether courts should take into account unique circumstances of Aboriginal offenders and high rate of incarceration of Aboriginal Australians when sentencing Aboriginal offender – Whether approach to sentencing Aboriginal offenders in *R v Gladue* [1999] 1 SCR 688 and *R v Ipeelee* [2012] 1 SCR 433 should be followed.

Words and phrases – "deprived background", "*Fernando* considerations", "manifestly inadequate", "residual discretion".

**Appealed from NSW CCA:** [\[2012\] NSWCCA 223](#).

**Held:** (7-0) Appeal allowed.

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*Munda v The State of Western Australia*

**P28/2012:** [\[2013\] HCA 38](#).

**Judgment delivered:** 2 October 2013.

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

**Catchwords:**

Criminal law – Appeal – Prosecution appeal against sentence – Where appellant pleaded guilty to manslaughter of de facto spouse – Where appellate court resented appellant on ground that original sentence manifestly inadequate – Whether appellate court failed to correctly apply principles attending disposition of prosecution appeal against sentence on ground of manifest inadequacy – Whether finding of manifest inadequacy open if similar sentences imposed for comparable offences – Whether appellate court erred in failing to exercise residual discretion.

Criminal law – Sentence – Principles – Relevance of deprived background of Aboriginal offender – Whether appellate court gave appropriate regard to appellant's antecedents and personal circumstances.

Words and phrases – "aggravating factors", "antecedents and personal circumstances", "manifestly inadequate", "mitigating factors", "residual discretion", "social disadvantage".

**Appealed from WASC (CA):** [\[2012\] WASCA 164](#).

**Held:** (6-1) Appeal dismissed.

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## Statutes

*Lee & Anor v New South Wales Crime Commission*  
**S292/2012:** [\[2013\] HCA 39](#).

**Judgment delivered:** 9 October 2013.

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

**Catchwords:**

Statutes – Interpretation – Recovery of proceeds of crime – Examination orders – Appellants charged with offences – New South Wales Crime Commission applied for orders that appellants be examined on oath pursuant to s 31D of the *Criminal Assets Recovery Act* 1990 (NSW) – Subject matter of examination would have overlapped with subject matter of criminal proceedings – Whether s 31D empowered examination of person charged with offences where subject matter of examination would overlap with subject matter of offences charged.

Words and phrases – "accusatorial system of criminal justice", "derivative use immunity", "direct use immunity", "examination", "fair trial", "principle of legality", "privilege against self-incrimination", "real risk of interference with the administration of justice", "right to silence", "serious crime related activity".

**Appealed from NSW (CA):** [\[2012\] NSWCA 276](#).

**Held:** (4-3) Appeal dismissed.

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## Words and Phrases

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See also [Constitutional Law](#): *Magaming v The Queen*

See also [Criminal Law](#): *Bugmy v The Queen*

See also [Criminal Law](#): *Munda v The State of Western Australia*

See also [Statutes](#): *Lee & Anor v New South Wales Crime Commission*

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## 2: CASES RESERVED

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

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### Administrative Law

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See also [Statutes](#): *Wingfoot Australia Partners Pty Ltd & Anor v Kocak & Ors*

See also [Constitutional Law](#): *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship and Ors*

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### Citizenship and Migration

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See also [Constitutional Law](#): *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship and Ors*

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### Civil Procedure

*Clark v Macourt*  
S9/2013: [\[2013\] HCATrans 174](#).

**Date heard:** 13 August 2013.

**Coram:** Hayne, Crennan, Bell, Gageler and Keane JJ.

**Catchwords:**

Civil Procedure – Damages – Assisted reproductive technology practice – Damages for breach of various warranties contained in the Deed relating to donor sperm – Proper categorisation of the contract – Whether the trial judge erred in not concluding that the respondent had fully mitigated her loss – Whether the respondent avoided the loss she otherwise would have sustained by having to replace the non-compliant sperm by charging her patients for the cost of replacement sperm.

Civil Procedure – Costs – Whether the respondent would have been entitled to indemnity costs if the award of damages was upheld in her favour.

**Appealed from NSW (CA):** [\[2011\] NSWSC 1276](#); [\[2012\] NSWCA 367](#).

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*Expense Reduction Analysts Group Pty Ltd & Ors v Armstrong Strategic Management and Marketing Pty Limited & Ors*  
S12/2013: [\[2013\] HCATrans 233](#).

**Date heard:** 4 October 2013.

**Coram:** French CJ, Kiefel, Bell, Gageler and Keane JJ.

**Catchwords:**

Civil procedure – Discovery – Privilege – Documents upon which legal professional or client legal privilege attached inadvertently disclosed to the other side – Whether such inadvertent disclosure has the effect of waiving privilege.

Civil procedure – Discovery – Confidential information – Whether the only basis on which the respondents could be prohibited from using the documents, or required to return the documents, was dependent on whether the circumstances on which they were communicated to or obtained by the respondents were such as to impose an obligation of conscience on the respondents – Whether an obligation of conscience could be imposed on the respondents in the circumstances.

**Appealed from NSWSC (CA):** [\[2012\] NSWSC 393](#); [\[2012\] NSWCA 430](#).

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## Constitutional Law

*Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship and Ors*  
M76/2013: [\[2013\] HCATrans 201](#).

**Date heard:** 4 September 2013.

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

**Catchwords:**



Constitutional law – Chapter III – *Migration Act 1958* (Cth) (“the Act”) – Plaintiff found to be a refugee but refused protection visa and subsequently detained at Sydney Immigration Residential Housing – Whether detention is authorised by ss 189 and 196 of the Act – Whether ss 189 and 196 are beyond the legislative power of the Commonwealth as inconsistent with Ch III of the Constitution.

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

Administrative law – Error of law – Minister may only grant protection visa under s 46A(2) of the Act – Officer of the Commonwealth failed to refer Plaintiff’s case to the Minister for determination under s 46A(2) because of adverse security assessment – Whether failure to do so constitutes an error of law.

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

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## Corporations Law

*Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In Liquidation) & Ors*  
M99/2012: [\[2013\] HCATrans 171](#).

**Date heard:** 9 August 2013.

**Coram:** French CJ, Hayne, Kiefel, Gageler and Keane JJ.

**Catchwords:**

Corporations law – Liquidation – Liquidator of lessor disclaims lease agreement under s 568(1) of *Corporations Act 2001* (Cth) – Whether disclaimer extinguishes leasehold interest – Whether leasehold interest survives termination of the lease agreement.

**Appealed from VSC (CA):** [\[2012\] VSC 29](#); [\[2012\] VSCA 202](#).

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## Criminal Law

*Diehm & Anor v Director of Public Prosecutions Nauru*  
B15/2013: [\[2013\] HCATrans 170](#).

**Date heard:** 8 August 2013.

**Coram:** French CJ, Kiefel and Bell JJ.

**Catchwords:**

Criminal law – Rape – Prosecutor’s duty of fairness – Failure to call material witnesses – Whether failure by prosecution to call material witnesses amounts to an unfair trial and a miscarriage of justice – Whether Chief Justice had a statutory duty to call material witnesses on own motion – Whether failure to do so amounts to a miscarriage of justice – Where Chief Justice referred to material not in evidence – Whether reference to material not in evidence amounted to a denial of procedural fairness – Whether in all of the circumstances a reasonable tribunal of fact could have concluded beyond reasonable doubt that the Appellants were guilty of rape.

**Appealed from Supreme Court of Nauru:** [2011] NRSC 24.

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## *BCM v The Queen*

B9/2013: [\[2013\] HCATrans 231](#).

**Date heard:** 2 October 2013.

**Coram:** Hayne, Crennan, Kiefel, Bell and Keane JJ.

**Catchwords:**

Criminal law – Sufficiency of reasons – Verdict unreasonable or not supported by evidence – Appellant convicted of two counts of unlawfully and indecently dealing with a child under 12 years old and in his care – Appellant appealed from conviction on basis that verdict was unreasonable or not supported by evidence – Whether Court of Appeal is required to provide detailed reasons for its conclusion that verdict was not unreasonable or was supported by evidence – Whether Court of Appeal must undertake an independent assessment of the evidence in determining such question.

**Appealed from QCA (CA):** [\[2012\] QCA 333](#).

On 19 September 2013, Hayne ACJ ordered by consent that the name of the appeal be amended to *BCM v The Queen*.

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## Industrial Law

*Comcare v PVYW*

**S8/2013:** [\[2013\] HCATrans 169](#).

**Date heard:** 7 August 2013.

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

**Catchwords:**

Industrial law – Workers' compensation – Interpretation of the principle in *Hatzimanolis v ANI Corporation Limited* – Employee injured while having sex during overnight stay at motel room booked by employer – Injuries sustained during an interval or interlude within an overall period of work – Whether injuries arose "in the course of" her employment – Whether sufficient connection between the suffering of the injury and the employment – Whether sufficient that injuries sustained at a place employer induced or encouraged employee to be – Whether activity employee undertaking and other factors surrounding the injury relevant to the inquiry.

**Appealed from FCA (FC):** (2012) 291 ALR 302; [\[2012\] FCA 395](#); [\[2012\] FCAFC 181](#).

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## Intellectual Property

*Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd & Ors*

**S1/2013:** [\[2013\] HCATrans 123](#); [\[2013\] HCATrans 124](#).

**Date heard:** 28 & 29 May 2013.

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

**Catchwords:**

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

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

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

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## Native Title

*Karpany & Anor v Dietman*  
A18/2012: [\[2013\] HCATrans 236](#).

**Date heard:** 9 October 2013.

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

**Catchwords:**

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

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

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## Statutes

*Wingfoot Australia Partners Pty Ltd & Anor v Kocak & Ors*  
M107/2012: [\[2013\] HCATrans 175](#).

**Date heard:** 14 August 2013.

**Coram:** French CJ, Crennan, Bell, Gageler and Keane JJ.

**Catchwords:**

Statutes – Whether by virtue of s 68(4) of the *Accident Compensation Act 1985* (“ACA”) a court is bound to accept medical panel opinions – Whether function exercised by medical panel under s 68 ACA is quasi-adjudicative/investigative – Appropriate content of right to reasons under s 68(2).

Administrative Law – Judicial review – Certiorari – Error of law on face of record – Whether failure to give adequate reasons constituted an error of law on the face of the record.

**Appealed from VSC (CA):** [\[2011\] VSC 285](#); [\[2012\] VSCA 259](#).

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*Daly v Thiering & Ors*  
S38/2013: [\[2013\] HCATrans 232](#).

**Date heard:** 3 October 2013.

**Catchwords:**

Statutes – Statutory construction – Whether the Court of Appeal erred in its construction of s 130A of the *Motor Accidents Compensation Act 1999* (NSW) (“the MAC Act”) and s 6(1) of the *Lifetime Care and Support Act 2006* (NSW) (“the LCS Act”) – Whether s 130A of the MAC Act provides that the Lifetime Care and Support Scheme is responsible for the provision of all reasonable and necessary treatment and care required by participants – Or whether s 130A of the MAC Act provides that compulsory third party insurers are required to pay damages for voluntarily provided care.

**Appealed from NSWSC (CA):** [\[2013\] NSWCA 25](#); [\[2011\] NSWSC 1345](#); [\[2011\] NSWSC 1585](#).

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## 3: ORIGINAL JURISDICTION

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

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### Constitutional Law

*Unions NSW and Ors v State of New South Wales*

**S70/2013:** *Special Case.*

**Catchwords:**

Constitutional law – Limitation on State legislative power – Implied freedom of political communication on governmental and political matters – *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (“the EFED Act”) – s 96D of the EFED Act prohibits political donations other than by individuals on the electoral roll – Whether s 96D of the Act impermissibly burdens the implied freedom and is therefore invalid – Whether ss 95F, 95G(6) and 95I of the EFED Act impermissibly burden the implied freedom and are therefore invalid.

Constitutional law – Limitation on State legislative power – Implied freedom of association – Whether s 96D of the EFED Act impermissibly burdens a freedom of association provided for in the Commonwealth Constitution.

Constitutional law – State constitutions – *Constitution Act 1902* (NSW) (“the Constitution Act”) – Whether ss 7A and 7B of the Constitution Act give rise to an entrenched protection of freedom of communication on New South Wales State government and political matters – If so, whether s 96D or ss 95F, 95G(6) and 95I of the EFED Act impermissibly burden the implied freedom and are therefore invalid.

Constitutional law – Inconsistency – s 109 of the Commonwealth Constitution – *Commonwealth Electoral Act 1918* (Cth) (“the CEA Act”) – Whether s 96D is invalid under s 109 of the Commonwealth Constitution because it is inconsistent with ss 327 or Part XX of the CEA Act.

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

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## 4: SPECIAL LEAVE GRANTED

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

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### Admiralty Law

*The Ship Go Star v Daebo International Shipping Co Ltd*  
P39/2012: [\[2013\] HCATrans 212](#).

**Date heard:** 11 September 2013 – *Special leave granted*.

**Catchwords:**

Admiralty law – Choice of law – Tort – Proper *lex loci delicti* in action *in rem* against ship and action *in personam* against owners for inducing breach of contract – Trial judge found Chinese law applied and dismissed claim on basis that no such tort exists in China – Full Federal Court found Singaporean law applied – In absence of evidence as to Singaporean law applied Australian law and found tortious interference – Whether the proper *lex loci delicti* is the place of the inducement or the place of the breach.

**Appealed from FCA (FC):** [\[2011\] FCA 1015](#); [\[2012\] FCAFC 156](#); [\[2012\] FCAFC 175](#).

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### Administrative Law

*Kline v Official Secretary to the Governor General & Anor*  
B10/2013: [\[2013\] HCATrans 180](#).

**Date heard:** 16 August 2013 – *Special leave granted*.

**Catchwords:**

Administrative law – Freedom of Information – *Freedom of Information Act 1982* (Cth) (“the Act”) – Request for access to documents – Documents concerning appointments to the Order of Australia – Under s 6A documents that relate to matters of an administrative nature are exempt from the Act – Whether documents that relate to powers and functions of Governor General in administering the Order of Australia relate to matters of an administrative nature – Meaning of “administrative nature”.

Words and phrases – “of an administrative nature” – “substantive power or function”.

**Appealed from FCA (FC):** [\[2012\] FCAFC 184](#); (2012) 127 ALD 639; [\(2012\) AATA 247](#).

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*Honourable Brendan O'Connor, Commonwealth Minister for Home Affairs and Justice v Adamas & Anor*

**P12/2013:** [\[2013\] HCATrans 220](#).

**Date heard:** 12 September 2013 – *Special leave granted*.

**Catchwords:**

Administrative law – Jurisdictional error – Failure to take into account a relevant consideration or taking into account an irrelevant consideration – *Extradition Act 1998* (Cth) (the “Act”) – The Minister ordered the extradition of the respondent to the Republic of Indonesia – Whether the Minister was required to undergo a staged process of consideration under Article 9(2)(b) of the Extradition Treaty between Indonesia and Australia – Whether failure to do so constitutes jurisdictional error.

Extradition – *Extradition Act 1998* (Cth) (the “Act”) – Extradition Treaty between Indonesia and Australia (the “Treaty”) – Whether Art 9(2)(b) of the Treaty requires the Minister to determine whether the circumstances of the first respondent’s conviction in absentia, right to appeal or review, and sentence imposed are “unjust, oppressive or incompatible with humanitarian considerations” before considering the other facts – Whether “unjust” under Art 9(2)(b) of the Treaty is assessed against Australian law.

**Appealed from FCA (FC):** [\[2013\] FCAFC 14](#).

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## Competition Law

*Australian Competition and Consumer Commission v TPG Internet Pty Ltd*

**M10/2013:** [\[2013\] HCATrans 177](#).

**Date heard:** 16 August 2013 – *Special leave granted*.

**Catchwords:**



Competition law – Restrictive trade practices – Misleading or deceptive conduct – False or misleading statements – *Trade Practice Act 1974* (Cth) (“TPA”) and *Australian Consumer Law, Schedule 2 to the Competition and Consumer Act 2010* (Cth) (“CCA”) – Full Federal Court overturned in part decision of trial judge that TPG had breached the TPA and CCA – Advertisements represented that internet service could be acquired for \$29.99 a month with no additional service or monthly charge and no set up fee – Service was only available in conjunction with a home telephone line that cost an additional \$30 a month (the 'bundling condition'), as well as upfront charges and a deposit (the 'setup fee condition') – Whether ordinary and reasonable consumer would have starting assumption that an advertised internet service was bundled with telephony services – Whether consumers must consider whole of an advertisement (including small print or quickly spoken detail) in order to correct what would otherwise be misleading headline representations.

Competition law – Penalties – Pecuniary penalties – Full Court reduced pecuniary penalty from \$2,000,000 to \$500,000 – Whether Full Court failed to adequately consider specific and general deterrence in imposing reduced pecuniary penalty – Whether reduced pecuniary penalty manifestly inadequate.

**Appealed from FCA (FC):** [\[2012\] FCAFC 190](#); [\[2013\] FCAFC 37](#); [\[2011\] FCA 1254](#); [\[2012\] FCA 629](#).

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## Constitutional Law

*Attorney-General for the Northern Territory & Anor v Emmerson & Anor*

**D3/2013:** [\[2013\] HCATrans 244](#).

**Date heard:** 11 October 2013 – *Special leave granted*.

### Catchwords:

Constitutional law – Judicial power – Institutional integrity – *Kable* principle – Criminal Property Forfeiture Act (NT) (“CPFA”), s 94(1) and Misuse of Drugs Act (NT) (“MDA”), s 36A(3) operate to forfeit certain property of a person declared to be a drug trafficker – Respondent convicted of various possession and supply offences – DPP obtained restraining order over all property owned or controlled by respondent under CPFA ss 41 and 44 on basis that conviction could lead to him being declared a drug trafficker under s 36A(3) MDA – Only a small component of that property was derived from crime – Whether the CPFA and MDA impermissibly conscript

the Supreme Court to the implementation of a legislative or executive purpose – Whether CPFA and MDA undermine institutional integrity of NTSC in a degree incompatible with its role as a repository of federal jurisdiction.

**Appealed from NTSC (CA):** (2012) 32 NTLR 180; [\[2013\] NTCA 04](#).

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## Contract Law

*Woodside Energy Ltd & Ors v Electricity Generation Corporation t/as Verve Energy; Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd & Ors*  
**P15, P16/2013:** [\[2013\] HCATrans 224](#).

**Date heard:** 12 September 2013 – *Special leave granted*.

### Catchwords:

Contract law – Proper construction of contractual terms – Breach of obligation under contract – Economic duress – Voidable contracts – Verve is a statutory corporation which supplies electricity to South Western Australia – Verve obtained gas from Woodside and third party pursuant to Gas Supply Agreement (the “Agreement”) – Clause 3.3 of the Agreement obliged Woodside to use reasonable endeavours to supply supplemental gas having regard to all relevant commercial, economic and operational matters – Third party’s plant shut down following fire – Woodside declined to supply supplemental gas but offered to supply same gas under separate short term agreement at higher price – Whether Woodside in breach of clause 3.3 of the Agreement – Whether short term agreement voidable for economic duress.

Contract law – Voidable contract – Unjust enrichment – Restitution – Whether restitution available where short term agreement not rescinded.

**Appealed from WASC (CA):** [2011] WASC 268; [\[2013\] WASCA 36](#).

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## Criminal Law

*Reeves v The Queen*  
**S58/2013:** [\[2013\] HCATrans 143](#).

**Date heard:** 6 June 2013 – *Referred to Full Court.*

**Catchwords:**

Criminal law – Surgical procedure – Informed consent – Appellant conducted a “simple vulvectomy” on a patient – Surgery unnecessary and appellant later convicted of grievous bodily harm with intent – Whether a surgeon must inform a patient of the “nature and extent” of an operation or simply the “nature” of the operation in order to meet the standard of informed consent – Whether Court of Appeal erred in relying on the proviso in s 6(1) of the *Criminal Appeal Act 1912* (NSW)

**Appealed from NSWSC (CCA):** [\[2013\] NSWCCA 34](#).

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*Li v Chief of Army*

**S47/2013:** [\[2013\] HCATrans 188](#).

**Date heard:** 16 August 2013 – *Special leave granted.*

**Catchwords:**

Criminal law – *Defence Force Discipline Act 1982* (Cth) (“the Act”) – Restricted Court Martial – Appellant convicted of creating a disturbance under s 33(b) of the Act – Proper construction of s 33(b) – Whether offence under s 33(b) requires proof that the accused intended to create a disturbance – Whether Chapter 2 of the *Criminal Code* (Cth) permits fault element of an offence to be framed by reference to terms and particulars of charge rather than terms of section creating offence – Whether offence under s 33(b) requires an element of actual violence.

Words and phrases – “Creates a disturbance”.

**Appealed from FCA (FC):** [\[2013\] FCAFC 20](#); [\(2012\) 261 FLR 226](#).

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*Zirilli; & Barbaro v The Queen*

**M1, M3/2013:** [\[2013\] HCATrans 184](#).

**Date heard:** 16 August 2013 – *Referred to enlarged bench.*

**Catchwords:**

Criminal law – Sentencing – Crown submission on sentencing range – Appellants convicted of conspiracy to traffic in commercial

quantity of controlled drug and sentenced to 26 years imprisonment – Trial judge refused to hear prosecution’s submission on appropriate sentencing range and imposed sentences higher than the range the prosecutor would have proposed – Whether trial judge erred in refusing to hear the prosecution’s submission on sentencing range – Whether refusal to hear prosecutions’ submission on sentencing range constitutes a denial of procedural fairness – Whether prosecution’s submission on sentencing range was a relevant consideration in sentencing – Whether *R v MacNeil-Brown* (2008) 20 VR 677 is good law.

**Appealed from VSC (CA):** [\[2012\] VSCA 288](#); [\[2012\] VSC 47](#).

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*James v The Queen*

**M35/2013:** [\[2013\] HCATrans 183](#).

**Date heard:** 16 August 2013 – *Special leave granted*.

**Catchwords:**

Criminal law – Alternative verdicts – Appellant convicted of intentionally causing serious injury – On Appeal appellant contended that trial judge’s failure to leave to jury possible alternative verdict of intentionally causing injury (as opposed to serious injury) constituted miscarriage of justice – Court of Appeal rejected contention – Defence counsel had chosen not to leave alternative verdict open for forensic reasons – Whether Court of Appeal erred in holding that trial judge not bound to leave the alternative verdict open for consideration by jury – Whether Court of Appeal erred in holding that trial judge’s duty to leave to jury for its consideration lesser alternative verdicts, that are realistically, or fairly and practically open, does not transcend forensic decision of trial counsel.

**Appealed from VSC (CA):** [\[2013\] VSCA 55](#); [\[2011\] VSC 596](#).

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*Smith v The State of Western Australia*

**P8/2013:** [\[2013\] HCATrans 225](#).

**Date heard:** 12 September 2013 – *Special leave granted*.

**Catchwords:**

Criminal law – Jury deliberations – Exclusionary rule – Applicant convicted on two counts of indecent dealing with a girl under 13

years – Envelope found in jury room indicating that at least one juror had been physically coerced by another juror into joining in the guilty verdict – Whether juror’s note fell outside, or within an exception to, the exclusionary rule – Whether exclusionary rule extends to prohibiting inquiry into criminal activity – Whether juror’s note, or failure by trial judge to conduct contemporaneous inquiry into its contents, gives rise to a real and sensible risk to the safety of jury’s verdict to constitute a miscarriage of justice.

**Appealed from WASC (CCA):** [2013] WASCA 7.

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## Equity

*Australian Financial Services and Leasing Pty Limited v Hills Industries Limited & Anor*

**S359/2012:** [\[2013\] HCATrans 191](#).

**Date heard:** 16 August 2013 – *Special leave granted*.

### Catchwords:

Equity – Restitution – “Change of position” defence – AFSL paid money to Hills and another company to enable a third party to purchase certain equipment from Hills and the other company and then lease that equipment to the third party – The third party fabricated documents and contrary to AFSL’s belief no equipment was acquired – AFSL commenced proceedings in restitution against Hills and the other company – Trial Judge found for AFSL on basis that Hills gave no consideration for monies received from AFSL and Hills had not suffered detriment arising out of a speculative change of its position after receiving those monies – Decision reversed on appeal – Court of Appeal held that by discharging debts owed to Hills by the third party Hills had given up opportunity to enforce payment of those debts – Whether defence of “change of position” in claims for money paid to third party by financier under mistake of fact extends to this situation – Whether in order to make out defence of change of position defendant is required to point to specific and quantifiable expenditure or financial loss because of mistaken payment.

**Appealed from NSWSC (CA):** [\[2011\] NSWSC 267](#); [\[2012\] NSWCA 380](#).

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## Native Title

*The State of Western Australia v Brown & Ors*  
P37/2012: [\[2013\] HCATrans 223](#).

**Date heard:** 12 September 2013 – *Special leave granted*.

**Catchwords:**

Native title – Extinguishment – Mining leases – Respondents hold non-exclusive native title rights in relation to areas subject of mining leases – Whether those leases confer a right of exclusive possession extinguishing native title rights – Whether the exercise of the rights under the leases prevent the exercise of native title rights.

**Appealed from FCA (FC):** [\[2010\] FCA 498](#); [\[2012\] FCAFC 154](#); [\[2013\] FCAFC 18](#).

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## Statutes

*Taylor v The Owners – Strata Plan No 11564 & Ors*  
S73/2013: [\[2013\] HCATrans 206](#).

**Date heard:** 6 September 2013 – *Special leave granted*.

**Catchwords:**

Statutes – Interpretation – *Civil Liability Act 2002* (NSW) (“the CLA Act”) – Appellant brought claim under the *Compensation to Relatives Act 1897* (NSW) for compensation for accidental death of her husband – Section 12(2) of the CLA Act directs the court to disregard “excess” earnings of a high-earning “claimant” but does not refer to earnings of the “deceased” – Late husband had earned substantially in excess of three times average weekly earnings – Whether a reference to “a deceased person’s” earnings can be read into section 12(2) of the CLA Act so as to disregard the deceased person’s earnings above the statutory formula – Whether additional words can be read into a statute where ordinary meaning of the text is not unreasonable or absurd.

**Appealed from NSWSC (CA):** [\[2012\] NSWSC 842](#); [\[2013\] NSWCA 55](#).

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*ADCO Constructions Pty Ltd v Goudappel & Anor*  
S96/2013: [\[2013\] HCATrans 250](#).

**Date heard:** 11 October 2013 – *Special leave granted*.

**Catchwords:**

Statutes – Interpretation – *Workers Compensation Act 1987* (NSW) (“WCA”), s 66 – First respondent suffered injury in course of employment – Assessed as having a degree of whole person impairment of 6% – *Workers Compensation Legislation Amendment Act 2012* (NSW), Schedule 2 amended WCA s 66 – New s 66 provided that no compensation payable unless impairment was greater than 10% – Schedule 12 inserted Pt 19H into Schedule 6 WCA which provided that amendments extend to claims for compensation made before commencement of the amendment – Whether first respondent entitled to compensation.

**Appealed from NSWSC (CA):** [\[2013\] NSWCA 94](#).

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*Thiess v Collector of Customs & Ors*  
B20/2013: [\[2013\] HCATrans 239](#).

**Date heard:** 11 October 2013 – *Special leave granted*.

**Catchwords:**

Statutes – Interpretation – *Customs Act 1901* (Cth) (“the Act”) s 167 – Appellant’s customs broker paid customs duty and GST on imported yacht – Customs broker input incorrect import duty into self-assessment system as result of mistaken belief about weight of yacht – Appellant later became aware of mistake and commenced proceedings to recover monies paid – Whether s 167(4) of the Act prevents action for recovery of customs duty paid due to mistake of fact where no protest under s 167(1).

**Appealed from QSC (CA):** [\[2013\] QCA 54](#).

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## Supreme Court Practice

*Moseley v Director of Public Prosecutions*  
D1/2013: [\[2013\] HCATrans 237](#).

**Date heard:** 11 October 2013 – *Special leave granted*.

**Catchwords:**

Supreme Court – Jurisdiction – Appellant convicted of aggravated robbery in company of a second person – After sentencing, third person signed statutory declaration confessing that he was the person who accompanied the second person, not the appellant – Court of Criminal Appeal subsequently quashed appellant’s conviction and ordered a retrial – Third person then recanted confession and alleged that the appellant induced him to make a false confession – Supreme Court ruled it had equitable jurisdiction to set aside decision of the Court of Criminal Appeal where fraud established – Whether the Supreme Court has jurisdiction – Whether, notwithstanding, the Supreme Court should decline to exercise jurisdiction.

**Appealed from NTSC:** [\[2013\] NTSC 8](#).

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## Words and Phrases

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See also [Administrative Law](#): *Kline v Official Secretary to the Governor General & Anor*

See also [Criminal Law](#): *Li v Chief of Army*

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## **5: CASES NOT PROCEEDING OR VACATED**

The following cases in the High Court of Australia are not proceeding or have been vacated since *High Court Bulletin 7* [2013] HCAB 07 (18 September 2013).

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## 6: SPECIAL LEAVE REFUSED

### Canberra: 9 October 2013

(Publication of Reasons)

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Haque	The Queen (M43/2013)	Supreme Court of Victoria (Court of Appeal) (No MNC)	Application Dismissed <a href="#">[2013] HCASL 156.</a>
Anderson	Senior (M47/2013)	Full Court of the Family Court of Australia	Application Dismissed <a href="#">[2013] HCASL 157.</a>
Armour	The Queen (M48/2013)	Supreme Court of Victoria (Court of Appeal) [2012] VSCA 188	Application Dismissed <a href="#">[2013] HCASL 158.</a>
Muto	Secretary to the Department of Planning and Community Development (M50/2013)	Supreme Court of Victoria (Court of Appeal) [2013] VSCA 85	Application Dismissed <a href="#">[2013] HCASL 159.</a>
Palankay	The Queen (M54/2013)	Supreme Court of Victoria (Court of Appeal) [2013] VSCA 97	Application Dismissed <a href="#">[2013] HCASL 160.</a>
MZYWO & Anor	Minister for Immigration and Citizenship & Anor (M56/2013)	Federal Court of Australia [2013] FCA 470	Application Dismissed <a href="#">[2013] HCASL 161.</a>
MZYYW & Anor	Minister for Immigration and Citizenship & Anor (M57/2013)	Federal Court of Australia [2013] FCA 476	Application Dismissed <a href="#">[2013] HCASL 162.</a>
MZYYP	Minister for Immigration and Citizenship & Anor (M58/2013)	Federal Court of Australia [2013] FCA 449	Application Dismissed <a href="#">[2013] HCASL 163.</a>
MZYXV & Anor	Minister for Immigration and Citizenship & Anor (M59/2013)	Federal Court of Australia [2013] FCA 123	Application Dismissed <a href="#">[2013] HCASL 164.</a>
WZARE	Minister for Immigration and Citizenship & Anor (P29/2013)	Federal Court of Australia [2013] FCA 122	Application Dismissed <a href="#">[2013] HCASL 165.</a>
JS	The State of Western Australia (P32/2013)	Supreme Court of Western Australia (Court of Appeal) [2012] WASCA 198	Application Dismissed <a href="#">[2013] HCASL 166.</a>
Franks	Franks (S85/2013)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCA 60	Application Dismissed <a href="#">[2013] HCASL 167.</a>
SZRHA	Minister for Immigration and Citizenship & Anor	Federal Court of Australia [2013] FCA 531	Application Dismissed <a href="#">[2013] HCASL 168.</a>

	(S107/2013)		
SZRAX	Minister for Immigration and Citizenship & Anor (S112/2013)	Federal Court of Australia [2013] FCA 493	Application Dismissed [2013] HCASL 169.
Bainbridge	James & Ors (M17/2013)	Supreme Court of Victoria (Court of Appeal) [2013] VSCA 12	Application Dismissed with Costs [2013] HCASL 170.
Victorian Education Foundation Ltd	A.C. Hall Airconditioning Contracting Pty Ltd (M21/2013)	Supreme Court of Victoria (Court of Appeal) [2013] VSCA 32	Application Dismissed with Costs [2013] HCASL 171.
Waters	Commonwealth of Australia (Australian Taxation Office) (S33/2013)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCA 5	Application Dismissed with Costs [2013] HCASL 172.
Withyman	State of New South Wales & Anor (S42/2013)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCA 10	Application Dismissed with Costs [2013] HCASL 173.
Baranski	Comcare (S64/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 31	Application Dismissed with Costs [2013] HCASL 174.
Selen	Selen & Anor (S81/2013)	Full Court of the Family Court of Australia	Application Dismissed with Costs [2013] HCASL 175.

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## Canberra: 11 October 2013 (by video link to Sydney and Brisbane)

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Patel	Minister for Immigration and Citizenship & Anor (B52/2012)	Federal Court of Australia [2012] FCA 958	Application Dismissed with costs [2013] HCATrans 240.
Nona & Anor	Barnes & Anor (B76/2012)	Supreme Court of Queensland (Court of Appeal) [2012] QCA 346	Application Dismissed with costs [2013] HCATrans 242.
Wirkus & Anor	Wilson Lawyers (B19/2013)	Supreme Court of Queensland (Court of Appeal) [2012] QCA 261	Application Dismissed with costs [2013] HCATrans 243.
Henderson	The Queen & Anor (B21/2013)	Supreme Court of Queensland (Court of Appeal) [2013] QCA 63	Application Dismissed [2013] HCATrans 241.
SBX	The Queen (B26/2013)	Supreme Court of Queensland (Court of Appeal) [2013] QCA 45	Application Dismissed [2013] HCATrans 238.

Massey	The Queen (C4/2013)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2013] ACTCA 5	Application Dismissed <a href="#">[2013] HCATrans 245.</a>
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## Sydney: 11 October 2013

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Tory	Megna & Ors (S48/2013)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCA 30	Application Dismissed with costs <a href="#">[2013]</a> <a href="#">HCATrans 246.</a>
Marshall	Megna & Ors (S49/2013)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCA 30	Application Dismissed with costs <a href="#">[2013]</a> <a href="#">HCATrans 246.</a>
Perisher Blue Pty Limited	Harris & Anor (S54/2013)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCA 38	Application Dismissed with costs <a href="#">[2013]</a> <a href="#">HCATrans 252.</a>
Minister for Immigration and Citizenship	SZRKT (S88/2013)	Federal Court of Australia [2013] FCA 317	Application Dismissed with costs <a href="#">[2013]</a> <a href="#">HCATrans 251.</a>
SZRKY	Minister for Immigration and Citizenship & Anor (S94/2013)	Federal Court of Australia [2013] FCA 352	Special leave refused with costs <a href="#">[2013]</a> <a href="#">HCATrans 249.</a>
CTC Group Pty Ltd	Perpetual Trustee Company Limited (S79/2013)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCA 58	Application Dismissed with costs <a href="#">[2013]</a> <a href="#">HCATrans 248.</a>
Williams	The Queen (S130/2013)	Supreme Court of New South Wales (Court of Criminal Appeal) [2012] NSWCCA 286	Application Dismissed <a href="#">[2013] HCATrans 247.</a>

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