



HIGH COURT BULLETIN

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[2013] HCAB 09 (20 November 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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<u>Comcare v PVYW</u>	Industrial Law
<u>Karpany & Anor v Dietman</u>	Native Title
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<u>Expense Reduction Analysts Group Pty Ltd & Ors v Armstrong Strategic Management and Marketing Pty Limited & Ors</u>	Practice and Procedure
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2: Cases Reserved

Case	Title
Kline v Official Secretary to the Governor General & Anor	Administrative Law
Australian Competition and Consumer Commission v TPG Internet Pty Ltd	Competition Law
Unions NSW and Ors v State of New South Wales	Constitutional Law
Reeves v The Queen	Criminal Law
Li v Chief of Army	Criminal Law
James v The Queen	Criminal Law

3: Original Jurisdiction

Case	Title
Commonwealth v The Australian Capital Territory	Constitutional Law

4: Special Leave Granted

Case	Title
FTZK v Minister for Immigration and Citizenship & Anor	Administrative Law
Stewart & Anor v Atco Controls Pty Ltd (In Liquidation)	Corporations Law
Wellington Capital Limited v Australian Securities & Investments Commission & Anor	Corporations Law
Achurch v The Queen	Criminal Law
Gillard v The Queen	Criminal Law

Milne v The Queen	Criminal Law
Howard v Commissioner of Taxation	Equity
NSW Registrar of Births, Deaths and Marriages v Norrie	Statutes

1: CASES HANDED DOWN

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

Criminal Law

Diehm & Anor v Director of Public Prosecutions Nauru
[B15/2013](#): [\[2013\] HCA 42](#).

Judgment delivered: 30 October 2013.

Coram: French CJ, Kiefel and Bell JJ.

Catchwords:

Criminal law – Practice and procedure – Duties of prosecutor – Duty of prosecutor to call all material witnesses – Appellants convicted of rape – Only one of two police officers who attended scene called to give evidence – Whether failure of prosecutor to call second officer occasioned miscarriage of justice.

Criminal law – Practice and procedure – Statutory power and duty of trial judge to call witness of own motion – Scope of duty – Whether evidence of uncalled witness "essential to the just decision of the case".

Criminal law – Evidence – Depositions – Statement of uncalled witness not in evidence – Trial judge referred to statement to determine effect of failure to call witness – Whether reference to statement occasioned breach of natural justice.

Words and phrases – "essential to the just decision of the case", "fair trial", "material witness", "miscarriage of justice".

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

Held: Appeal dismissed.

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Client Legal Privilege

See also [Practice and Procedure](#): *Expense Reduction Analysts Group Pty Ltd & Ors v Armstrong Strategic Management and Marketing Pty Limited & Ors*

Confidential Information

See also [Practice and Procedure](#): *Expense Reduction Analysts Group Pty Ltd & Ors v Armstrong Strategic Management and Marketing Pty Limited & Ors*

Industrial Law

Comcare v PVYW
[S8/2013](#): [\[2013\] HCA 41](#).

Judgment delivered: 30 October 2013.

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

Catchwords:

Industrial law (Cth) – Workers' compensation – Employee injured during overnight stay at motel booked by employer – Employee injured whilst engaged in activity – Employee claimed compensation for injuries under *Safety, Rehabilitation and Compensation Act 1988* (Cth) – Whether employee's injuries arose in course of employment – Whether employee's injuries sustained during interval or interlude within overall period of work.

Words and phrases – "connection or association with employment", "injury ... at and by reference to a place", "in the course of employment", "interval or interlude within an overall period or episode of work".

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

Held: Appeal allowed.

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Native Title

Karpany & Anor v Dietman

[A18/2012](#): [\[2013\] HCA 47](#).

Judgment delivered: 6 November 2013.

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

Catchwords:

Native title – Native title right to take fish – *Fisheries Act 1971 (SA)* prohibited taking fish without licence or except as provided by the Act – *Fisheries Act* permitted taking fish by certain means without licence for non-commercial purposes – Whether statute inconsistent with continued existence of native title right to take fish – Whether native title right extinguished by pre-1975 State fisheries legislation.

Native title – Native title right to take fish – Native title holders charged with possessing undersize abalone contrary to s 72(2)(c) of *Fisheries Management Act 2007 (SA)* – Section 115 of *Fisheries Management Act* provided for ministerial exemption – Whether ministerial exemption "licence, permit or other instrument" for the purposes of s 211 of *Native Title Act 1993 (Cth)*.

Words and phrases – "extinguishment", "inconsistent with the continued existence of a native title right", "licence, permit or other instrument", "native title rights and interests".

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

Held: Appeal allowed.

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Practice and Procedure

Castle Constructions Pty Limited v Sahab Holdings Pty Ltd & Anor
[No 2]

[S263/2012](#): [\[2013\] HCA 44](#).

Judgment delivered: 30 October 2013.

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

Catchwords:

Practice and procedure – Judgments and orders – Power to vacate orders not yet entered – Whether Court should exercise power and withdraw published reasons.

Appealed from HCA: (2013) 247 CLR 149; [\[2013\] HCA 11](#).

Held: First respondent's application to reopen dismissed with costs.

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Expense Reduction Analysts Group Pty Ltd & Ors v Armstrong Strategic Management and Marketing Pty Limited & Ors

S118/2013: [\[2013\] HCA 46](#).

Judgment delivered: 6 November 2013.

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

Catchwords:

Practice and procedure – Discovery – Parties to commercial dispute ordered to give general discovery – Documents subject to client legal privilege mistakenly listed as non-privileged in appellants' Lists of Documents – Privileged documents inadvertently disclosed to respondents' solicitors – Whether Supreme Court had power to permit amendment of Lists of Documents – Whether Supreme Court had power to order respondents' solicitors to return documents.

Confidential information – Whether correct basis of jurisdiction for court to order return of inadvertently disclosed documents.

Client legal privilege – Whether privilege had been waived – Whether appellants' actions inconsistent with maintenance of claim to privilege.

Words and phrases – "case management", "client legal privilege", "discovery", "inadvertent disclosure", "waiver".

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

Held: Appeal allowed.

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Wingfoot Australia Partners Pty Ltd & Anor v Kocak & Ors

M52/2013: [\[2013\] HCA 43](#).

Judgment delivered: 30 October 2013.

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

Catchwords:

Administrative law – Availability of certiorari – Legal consequences of Medical Panel's opinion under *Accident Compensation Act* 1985 (Vic) – Where separate proceedings for common law damages and statutory compensation – Whether Medical Panel's opinion on medical questions referred to it in one proceeding required to be adopted and applied in other proceeding – Whether issue estoppel – Whether order in nature of certiorari available.

Administrative law – Statutory obligation to give written statement of reasons – Standard of reasons required – Whether error of law on the face of the record.

Words and phrases – "certiorari", "error of law", "for the purposes of determining any question or matter", "Medical Panel", "medical question", "reasons", "written statement of reasons".

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

Held: Appeal allowed.

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Daly v Thiering & Ors

S115/2013: [\[2013\] HCA 45](#).

Judgment delivered: 6 November 2013.

Catchwords:

Statutes – Statutory construction – Whether Court of Appeal erred in construction of s 130A of *Motor Accidents Compensation Act* 1999 (NSW) – Whether *Griffiths v Kerkemeyer* damages precluded by s 130A in respect of participants under Scheme in *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) – Whether "provided for or are to be provided for" in s 130A means "paid for or are to be paid for".

Words and phrases – "provided for or are to be provided for".

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

Held: Appeal allowed.

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Words and Phrases

See also [Criminal Law](#): *Diehm & Anor v Director of Public Prosecutions Nauru*

See also [Industrial Law](#): *Comcare v PVYW*

See also [Native Title](#): *Karpany & Anor v Dietman*

See also [Practice and Procedure](#): *Expense Reduction Analysts Group Pty Ltd & Ors v Armstrong Strategic Management and Marketing Pty Limited & Ors*

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

See also [Statutes](#): *Daly v Thiering & Ors*

2: CASES RESERVED

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

Administrative Law

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

Kline v Official Secretary to the Governor General & Anor
[B47/2013](#): [\[2013\] HCATrans 259](#).

Date heard: 30 October 2013.

Coram:

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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Citizenship and Migration

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

Competition Law

Australian Competition and Consumer Commission v TPG Internet Pty Ltd

M98/2013: [\[2013\] HCATrans 261](#).

Date heard: 1 November 2013.

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

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

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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Unions NSW and Ors v State of New South Wales

S70/2013: *Special Case:* [\[2013\] HCATrans 263](#); [\[2013\] HCATrans 264](#).

Date heard: 5 & 6 November 2013.

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

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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Corporations Law

Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In Liquidation) & Ors
M53/2013: [\[2013\] 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

BCM v The Queen

B31/2013: [\[2013\] 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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Reeves v The Queen

S44/2013: [\[2013\] HCATrans 258](#).

Date heard: 29 October 2013.

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

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

S162/2013: [\[2013\] HCATrans 260](#).

Date heard: 31 October 2013.

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

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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James v The Queen

M102/2013: [\[2013\] HCATrans 266](#).

Date heard: 7 November 2013.

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

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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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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Practice and Procedure

Clark v Macourt

S95/2013: [\[2013\] HCATrans 174](#).

Date heard: 13 August 2013.

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

Catchwords:

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

Practice and 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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3: ORIGINAL JURISDICTION

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

Constitutional Law

Commonwealth v The Australian Capital Territory

[C13/2013](#): *Questions reserved for determination by the Full Court*

Catchwords:

Constitutional law – Territory law – Inconsistency – *Marriage Equality (Same Sex) Act 2013* (ACT) (“ACT Act”) – Whether inconsistent with *Marriage Act 1961* (Cth) (“Cth Act”) and *Family Law Act 1975* (Cth) (“FLA Act”) – Whether ACT Act therefore of no effect by operation of s 28(1) of *Australian Capital Territory (Self-Government) Act 1988* (Cth) – Whether ACT Act repugnant to the Cth Act and FLA Act.

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

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4: SPECIAL LEAVE GRANTED

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

Admiralty Law

The Ship Go Star v Daebo International Shipping Co Ltd
P46/2013: [\[2013\] 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

Honourable Brendan O'Connor, Commonwealth Minister for Home Affairs and Justice v Adamas & Anor
P50/2013: [\[2013\] 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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FTZK v Minister for Immigration and Citizenship & Anor
M55/2013: [\[2013\] HCATrans 270](#).

Date heard: 8 November 2013 – *Special leave granted*.

Catchwords:

Administrative law – Jurisdictional error – Appellant asylum seeker accused of involvement in kidnapping-murder while in China – Appellant argued accusation motivated by appellant’s religious practices – Administrative Appeals Tribunal (“AAT”) found appellant’s account and conduct subsequent accusation constituted “serious reasons” for considering appellant had committed a serious political crime – AAT therefore found that Refugee Convention did not apply – Whether decision of AAT took into account irrelevant considerations – Whether decision affected by jurisdictional error.

Appealed from FCA (FC): [\[2013\] FCAFC 44](#).

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Constitutional Law

See also [Statutes](#): *NSW Registrar of Births, Deaths and Marriages v Norrie*

Attorney-General for the Northern Territory & Anor v Emmerson & Anor
D5/2013: [\[2013\] 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

P47, P48/2013: [\[2013\] 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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Corporations Law

Stewart & Anor v Atco Controls Pty Ltd (In Liquidation)

M81/2013: [\[2013\] HCATrans 267](#).

Date heard: 8 November 2013 – *Special leave granted*.

Catchwords:

Corporations law – Liquidation – Appellant brought action against secured creditor and receiver claiming equitable lien for remuneration, costs and expenses – Action settled with receiver and sum recovered in litigation – Whether liquidator entitled to priority over secured creditor.

Equity – Equitable lien – Whether unconscientious for secured creditor to assert priority.

Appealed from VSC (CA): [\[2013\] VSCA 132](#).

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Wellington Capital Limited v Australian Securities & Investments Commission & Anor

S122/2013: [\[2013\] HCATrans 281](#).

Date heard: 8 November 2013 – *Special leave granted on limited grounds*.

Catchwords:

Corporations Law – *Corporations Act 2001* (Cth) (“the Act”) – Appellant responsible entity of registered scheme sold portion of managed investment scheme to listed company in return for entire issued share capital of that company – Appellant then distributed *in specie* to unit holders of fund in proportion to their holdings – Whether appellant was permitted to make an *in specie* distribution of shares to unit holders – Whether appellant’s power to make distributions of income or capital in cash only limited general

trustee powers outlined in Fund's constitution – Whether question must be approached through prism of trust law.

Corporations law – Membership – Whether unit holders had consented to becoming members of relevant corporation pursuant to s 231 of the Act by virtue of shares being transferred to them.

Equity – Equitable remedies – Whether Full Court erred in exercising discretion to grant purely declaratory relief.

Appealed from FCA (FC): [\[2013\] FCAFC 52](#).

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Criminal Law

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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Smith v The State of Western Australia

P51/2013: [\[2013\] 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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Achurch v The Queen

S116/2013: [\[2013\] HCATrans 278](#).

Date heard: 8 November 2013 – *Special leave granted on limited grounds.*

Catchwords:

Criminal law – Sentencing – *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Act") – Appellant convicted of drugs offences in 2008 sentenced to non-parole period of 6 years – Crown appeal against sentence successful and non-parole period increased to 13 years – Court of Criminal Appeal held trial judge had erred in approach to sentencing – Court of Criminal Appeal issued new sentence in line with *R v Way*; *R v Sellars*; and *R v Knight* – Two months after successful crown appeal High Court handed down judgment holding that *Way*; *Sellars*; and *Knight* wrongly decided – Whether sentence imposed contrary to law per s 43(1)(a) of the Act – Whether appropriate that s 43(1)(a) be used as proxy for an appeal.

Appealed from NSWSC (CCA): [\[2011\] NSWCCA 186](#); [\[2013\] NSWCCA 117](#).

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Gillard v The Queen

C7/2013: [\[2013\] HCATrans 285](#).

Date heard: 8 November 2013 – *Special leave granted.*

Catchwords:

Criminal law – Offences against the person – Sexual offences – Consent – Appellant convicted of sexual intercourse without consent contrary to s 60 of the *Crimes Act 1900* (ACT) (“the Act”) – Absence of consent established through breach of trust per s 67(1)(h) of the Act – Whether, where absence of consent established through s 67(1)(h) mental element of offence is established through recklessness as to the circumstances – Whether knowledge required by operation of s 67(3) of the Act.

Appealed from ACTSC (CA): [\[2013\] ACTCA 17](#).

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Milne v The Queen

S127, S128/2013: [\[2013\] HCATrans 279](#).

Date heard: 8 November 2013 – *Special leave granted on limited grounds.*

Catchwords:

Criminal law – *Criminal Code* (Cth) (“the Code”) – Construction – Appellant dealt with shares through offshore entity to avoid Capital Gains Tax – Appellant convicted of money laundering contrary to s 400.3(1) and defrauding the Commonwealth contrary to s 135.1 of the Code – Section 400.3(1) required that appellant have intention that shares would be used in commission of offence under s 135.1(1) – Shares disposed of before offence committed – Whether shares are an instrument of crime for purpose of the Code.

Appealed from NSWSC (CCA): [\[2012\] NSWCCA 24](#).

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Equity

See also [Corporations Law](#): *Stewart & Anor v Atco Controls Pty Ltd (In Liquidation)*

See also [Corporations Law](#): *Wellington Capital Limited v Australian Securities & Investments Commission & Anor*

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

S163/2013: [\[2013\] 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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Howard v Commissioner of Taxation

M116/2012: [\[2013\] HCATrans 269](#).

Date heard: 8 November 2013 – *Special leave granted.*

Catchwords:

Equity – Fiduciary duties – Duty to account – Extinguishment of duty to account – Extent of duty to account – Whether fiduciary duty to account for gains is extinguished by circumstance that gain realised results from award to fiduciary of equitable compensation – Whether fiduciary’s duty extends to bringing proceedings to protect rights in respect of which duty subsists, and to accounting for proceeds of such proceedings.

Appealed from FCA (FC): [\[2011\] FCA 1421](#); [\[2012\] FCAFC 149](#).

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Native Title

The State of Western Australia v Brown & Ors

P49/2013: [\[2013\] 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

S179/2013: [\[2013\] 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
S201/2013: [\[2013\] 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
B57/2013: [\[2013\] 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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NSW Registrar of Births, Deaths and Marriages v Norrie
S126/2013: [\[2013\] HCATrans 283](#).

Date heard: 8 November 2013 – *Special leave granted*.

Catchwords:

Statutes – Interpretation – *Births, Deaths and Marriages Registration Act 1995* (NSW) (“the BDMR Act”) – Whether Pt 5A of BDMR Act includes category other than “male” and “female” – Respondent, born male and underwent sexual reassignment surgery, applied to register change of sex to “non-specific” – Application approved but later revoked – Court of Appeal allowed respondent’s appeal subject to evidence whether “non-specific” fell within meaning of “sex” – Whether “sex” has binary meaning – Extent to which Court may permissibly have regard to extrinsic materials.

Constitutional law – *Sex Discrimination Act 1984* (Cth) (“the SDA”) – Whether statutory construction favoured by the appellant would place the appellant in breach of s 22 of the SDA.

Appealed from NSWSC (CA): [\[2013\] NSWCCA 145](#).

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Words and Phrases

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

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

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* 8 [2013] HCAB 08 (18 October 2013).

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](#).

On Thursday, 7 November 2013 the appellant filed a notice of discontinuance in this appeal.

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6: SPECIAL LEAVE REFUSED

Melbourne: 8 November 2013

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Howard	Commissioner of Taxation (M115/2012)	Full Court of the Federal Court of Australia [2012] FCAFC 149	Application Dismissed with costs [2013] HCATrans 268.
Herald & Weekly Times Limited	Pattison (M68/2013)	Supreme Court of Victoria (Court of Appeal) [2013] VSCA 121	Application Dismissed with costs [2013] HCATrans 274.
Marku	Republic of Albania & Anor (M69/2013; M71/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 51	Application Dismissed [2013] HCATrans 275.
Marku	Republic of Albania (M70/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 51	Application Dismissed [2013] HCATrans 275.
Sanctuary Lakes Pty Ltd	Commissioner of Taxation of the Commonwealth of Australia (M75/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 50	Application Dismissed with costs [2013] HCATrans 273.
Baini	The Queen (M83/2013)	Supreme Court of Victoria (Court of Appeal) [2013] VSCA 157	Application Dismissed [2013] HCATrans 276.
RR	The Queen (M85/2013)	Supreme Court of Victoria (Court of Appeal) [2013] VSCA 147	Application Dismissed [2013] HCATrans 272.
Sea Shepherd Australia	Commissioner of Taxation of the Commonwealth of Australia & Anor (M87/2013)	Full Court of the Federal Court of Australia [2013] FCAFC 68	Application Dismissed with costs [2013] HCATrans 271.

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Sydney: 8 November 2013

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Smith	Professional Suites Community Title Scheme 14487 (B23/2013)	Supreme Court of Queensland (Court of Appeal) [2013] QCA 80	Application Dismissed with costs [2013] HCATrans 284.
CB	The Queen (S18/2012)	Supreme Court of New South Wales (Court of Criminal Appeal) [2011] NSWCCA 264	Application Dismissed [2013] HCATrans 277.

Severstal Export GmbH	Bhushan Steel Limited (S103/2013)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCA 102	Application Dismissed with costs [2013] HCATrans 282 .
Lowe	RG & KM Whitehead Pty Limited (S106/2013)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCA 117	Application Dismissed with costs [2013] HCATrans 286 .
Hung & Anor	Anthony John Warner and Steven Kugel in their Capacities as Joint & Several Liquidators of Bellpac Pty Ltd (Receivers & Managers Appointed) (In Liquidation) & Ors (S110/2013; S111/2013))	Full Court of the Federal Court of Australia [2013] FCAFC 48	Application Dismissed with costs [2013] HCATrans 280 .

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