



HIGH COURT BULLETIN

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[2015] HCAB 8 (27 October 2015)

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>McCloy & Ors v State of New South Wales & Anor</u>	Constitutional Law
<u>Mount Bruce Mining Pty Limited v Wright Prospecting Pty Ltd & Anor; Wright Prospecting Pty Limited v Mount Bruce Mining Pty Limited & Anor</u>	Contract
<u>Alcan Gove Pty Ltd v Zabic</u>	Limitation of Actions
<u>D'Arcy v Myriad Genetics & Anor</u>	Patents
<u>PT Bayan Resources TBK v BCBC Singapore Pte Ltd & Ors</u>	Procedure

2: Cases Reserved

Case	Title
Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors	Constitutional Law
Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate & Ors	Procedure
Construction, Forestry, Mining and Energy Union & Anor v Director, Fair Work Building Industry Inspectorate & Anor	Procedure
Macoun v Commissioner of Taxation	Taxation
Allen v Chadwick	Torts

3: Original Jurisdiction

No new entries for October 2015.

4: Special Leave Granted

Case	Title
The Queen v GW	Criminal Law
Murdoch v The Queen	Criminal Law
Fischer & Ors v Nemeske Pty Ltd & Ors	Equity
Badenach & Anor v Calvert	Professions and Trades
Moreton Bay Regional Council v Mekpine Pty Ltd	Property Law
Robinson Helicopter Company Incorporated v McDermott & Ors	Torts

1: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the October 2015 sittings.

Constitutional Law

McCloy & Ors v State of New South Wales & Anor
S211/2014: [\[2015\] HCA 34](#).

Judgment delivered: 7 October 2015.

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

Catchwords:

Constitutional law – Implied freedom of communication on governmental and political matters – Provisions of *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) impose cap on political donations, prohibit property developers from making such donations, and restrict indirect campaign contributions – Whether provisions impermissibly burden implied freedom of political communication.

Words and phrases – "appropriate and adapted", "deference", "implied freedom of communication on governmental and political matters", "margin of appreciation", "proportionality".

Held: Questions answered.

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Contract

Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited & Anor; Wright Prospecting Pty Limited v Mount Bruce Mining Pty Limited & Anor
S102/2015; S99/2015: [\[2015\] HCA 37](#).

Judgment delivered: 14 October 2015.

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

Catchwords:

Contract – Construction of terms – Where contract concerned acquisition of rights in relation to temporary reserves and payment of royalties in respect of iron ore mined – Where royalty payable in respect of iron ore mined from "MBM area" – Whether "MBM area" refers to physical area of land or rights in relation to that land – Meaning of phrase "deriving title through or under".

Contract – Construction of terms – Recourse to background or surrounding circumstances.

High Court – Appellate jurisdiction of High Court – Precedential value of special leave reasons.

Words and phrases – "commercial purpose", "deriving title through or under", "MBM area", "surrounding circumstances", "temporary reserves".

Appealed from NSWSC (CA): [\[2014\] NSWCA 323](#).

Held in S102/2015: Appeal and cross-appeal allowed.

Held in S99/2015: Appeal dismissed.

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Criminal Law

The Queen v Beckett

S94/2015: [\[2015\] HCA 38](#).

Judgment delivered: 23 October 2015.

Coram: French CJ, Kiefel, Bell, Keane, Nettle JJ.

Catchwords:

Criminal law – Attempt to pervert the course of justice – Where respondent questioned in compelled interview about property transfer she stamped for which no duty paid – Where respondent allegedly altered photocopies of cheques – Where respondent allegedly gave false evidence under oath – Where respondent charged with perverting the course of justice under s 319 of *Crimes Act 1900* (NSW) – Whether offence of perverting the course of justice only applies to conduct committed after judicial proceedings commence – Whether "course of justice" within meaning of s 319 requires jurisdiction of court or competent judicial tribunal to have been invoked.

Words and phrases – "contemplated proceedings", "course of

justice", "intention", "judicial proceedings", "pervert the course of justice", "tendency".

Appealed from NSWSC (CCA): [\[2014\] NSWCCA 305](#).

Held: Appeal allowed.

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High Court

See also **Contract:** *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited*.

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Limitation of Actions

Alcan Gove Pty Ltd v Zabic

D5/2015: [\[2015\] HCA 33](#).

Orders pronounced: 12 August 2015 – *Appeal dismissed with costs*.

Reasons given: 7 October 2015.

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

Catchwords:

Limitation of actions – When cause of action accrues – Negligence – Damage – Statute abolished cause of action unless accrued before 1 January 1987 – Whether compensable damage suffered upon changes to mesothelial cells following exposure to asbestos – Whether mesothelioma inevitable – Relevance of hindsight – Whether "trigger" for development of disease endogenous or exogenous.

Torts – Negligence – Damage – Dust diseases – Mesothelioma – Whether changes to mesothelial cells compensable damage.

Words and phrases – "compensable damage", "endogenous", "exogenous", "hindsight", "mesothelial cell changes", "trigger".

Appealed from NTSC (CA): [\[2015\] NTCA 2](#).

Held: Appeal dismissed.

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Patents

D'Arcy v Myriad Genetics Inc & Anor
S28/2015: [\[2015\] HCA 35](#).

Judgment delivered: 7 October 2015.

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

Catchwords:

Intellectual property – Patents – *Patents Act* 1990 (Cth) – Patentable subject matter – Patent claimed isolated nucleic acid coding for BRCA1 protein with specified mutations or polymorphisms indicative of susceptibility to cancer – Whether invention claimed is a patentable invention under s 18(1)(a) of *Patents Act* 1990 (Cth) – Whether invention claimed is a "manner of manufacture" within meaning of s 6 of *Statute of Monopolies* – Whether sufficient that invention claimed is artificially created state of affairs of economic significance – Utility of "artificially created state of affairs" criterion – Factors relevant to whether new class of claim falls within concept of manner of manufacture.

Words and phrases – "artificially created state of affairs", "isolated nucleic acid", "manner of manufacture", "naturally occurring", "patentable invention", "product of nature".

Appealed from FCA (FC): (2014) 224 FCR 479; (2014) 313 ALR 627; (2014) 107 IPR 478; [\[2014\] FCAFC 115](#).

Held: Appeal allowed.

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Procedure

PT Bayan Resources TBK v BCBC Singapore Pte Ltd & Ors
P14/2015: [\[2015\] HCA 36](#).

Judgment delivered: 14 October 2015.

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

Catchwords:

Procedure – Freezing orders – Power of Supreme Court of Western Australia to make freezing order in relation to prospective judgment of foreign court which would be registrable under *Foreign Judgments Act* 1991 (Cth) – First respondent commenced proceeding against appellant in High Court of Singapore – Proceeding remains pending – First respondent applied to Supreme Court for freezing order under O 52A of Rules of the Supreme Court 1971 (WA) against appellant's assets – Freezing order made – Whether freezing order in relation to prospective foreign judgment within inherent power of Supreme Court.

Words and phrases – "federal jurisdiction", "freezing order", "inherent jurisdiction", "inherent power", "prospective enforcement".

Appealed from WASC (CA): (2014) 288 FLR 299; [\[2014\] WASCA 178](#).

Held: Appeal dismissed.

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Torts

See also [Limitation of Actions](#): *Alcan Gove Pty Ltd v Zabic*.

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2: CASES RESERVED

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

Constitutional Law

Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors

M68/2015: [\[2015\] HCATrans 255](#); [\[2015\] HCATrans 256](#).

Dates heard: 7 October 2015; 8 October 2015.

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

Catchwords

Constitutional law – Where plaintiff was an “unauthorised maritime arrival” pursuant to s 5AA of the *Migration Act* 1958 (Cth) (“Act”) – Where plaintiff was taken to Nauru Regional Processing Centre (“RPC”) pursuant to s 198AD(2) of the Act – Where plaintiff was granted an RPC visa by the Nauru government which had certain restrictions and specifications – Whether plaintiff has standing to challenge whether the Commonwealth or the Minister was authorised in the past to engage in the activities relating to the creation and operation of the RPC – Whether Commonwealth or Minister were authorised to engage in acts relating to the creation and operation of the RPC pursuant to s 61 of the *Constitution*, s 198AHA of the Act, and s 32B of the *Financial Framework (Supplementary Powers) Act* 1997 (Cth) read together with reg 16 and items 417.021, 417.027, 417.029 and 417.042 of Sch 1AA *Financial Framework (Supplementary Powers) Regulations* 1997 (Cth) – Whether the restrictions imposed on the plaintiff and the specifications of her RPC visa are contrary to Article 5(1) of the *Constitution of Nauru* – Whether the statutory provisions relied upon by the Commonwealth are invalid because they are not supported by any head of Commonwealth legislative power or are contrary to Ch III of the *Constitution*.

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See also [Criminal Law](#): *North Australian Aboriginal Justice Agency Limited & Anor v Northern Territory of Australia*.

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Criminal Law

North Australian Aboriginal Justice Agency Limited & Anor v Northern Territory of Australia

M45/2015: [\[2015\] HCATrans 211](#); [\[2015\] HCATrans 213](#).

Date heard: 1 September 2015; 2 September 2015.

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

Catchwords:

Criminal procedure – Arrest and detention – Effecting arrest – *Police Administration Act* (NT) (“Act”) Div 4AA of Pt VII– Where Div 4AA of the Act allows for a member of the Police Force to take a person into custody for a period of up to four hours for an infringement notice offence – Where the offence in respect of which a person can be taken into custody can be an offence for which the maximum penalty is not imprisonment – Where the Act does not require a person to be brought before a justice of the peace or a Court – Whether Div 4AA is beyond the powers of the Northern Territory Assembly pursuant to s 122 of the *Constitution* and the *Northern Territory (Self-Government) Act* – Whether Div 4AA confers on the executive a power of detention which is penal or punitive in character.

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The Queen v Pham

M82/2015: [\[2015\] HCATrans 218](#).

Date heard: 9 September 2015.

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

Catchwords:

Criminal law – Sentence – Sentencing procedure – Sentencing statistics, schedules, tariffs, comparisons, etc. – Consistency for federal offences – Where respondent brought 577 grams of heroin into Australia and pleaded guilty to one charge of importing a marketable quantity of a border controlled drug – Where respondent was originally sentenced to eight years and six months imprisonment with a non-parole period of six years – Where sentence was reduced on appeal to six years imprisonment with a non-parole period of four years – Whether federal offenders should be sentenced in accordance with “current sentencing practices” of a particular State or Territory to the exclusion of sentencing practices

in other jurisdictions – Whether it is permissible to determine objective seriousness of the offending by reference to a statistical analysis of comparable cases which grades those cases by the weight of the drugs expressed as a percentage of the statutory threshold for a more serious offence.

Appealed from VSC (CA): [\[2014\] VSCA 204](#).

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Foreign Judgments

Firebird Global Master Fund II Ltd v Republic of Nauru & Anor
S29/2015: [\[2015\] HCATrans 214](#); [\[2015\] HCATrans 215](#).

Date heard: 2 September 2015; 3 September 2015.

Coram: French CJ, Kiefel, Gageler, Nettle and Gordon JJ.

Catchwords:

Foreign judgments - Recognition, effect and enforcement of foreign judgments – Enforcement of foreign judgments – Foreign States immunity – Where appellant is the holder of bonds issued by an entity which was guaranteed by the government of Nauru – Where the bond issuer and guarantor defaulted – Where appellant recovered a judgment in Japan equivalent to 31 million Australian dollars – Whether s 9 of the *Foreign States Immunities Act* 1985 (Cth) renders first respondent immune to an application to the Court for an order for the registration of the foreign judgment under s 6 of the *Foreign Judgments Act* 1991 (Cth).

Appealed from NSWSC (CA): (2014) 316 ALR 497; (2014) 289 FLR 398; [\[2014\] NSWCA 360](#).

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Migration

Minister for Immigration and Border Protection v WZARH & Anor
S85/2015: [\[2015\] HCATrans 219](#).

Date Heard: 10 September 2015.

Coram: Kiefel, Bell, Gageler, Keane and Gordon JJ.

Catchwords:

Migration – Refugee and humanitarian visas – Procedural fairness – Where a department officer determined that respondent was not a refugee – Where respondent sought a review of this decision – Where respondent was interviewed by merits reviewer – Where merits reviewer told respondent that they would be the person to determine the application – Where merits reviewer was unable to conclude the review and the review was concluded by another reviewer – Whether there is a breach of procedural fairness where alternate reviewer makes a decision based on the documentary materials, submissions and an audio recording of the interview but does not inform applicant of the change in decision-making, ask for submissions on how to proceed, or allow for an additional face-to-face interview.

Appealed from FCA (FC): (2014) 142 ALD 490; (2014) 316 ALR 389; [\[2014\] FCAFC 137](#).

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Procedure

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate & Ors

B36/2015: [\[2015\] HCATrans 259](#).

Date heard: 13 October 2015.

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

Catchwords:

Procedure – Civil penalty provisions – Where, in proceedings between respondent and the Construction, Forestry, Mining and Energy Union (“CFMEU”) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (“CEPU”), respondent alleged that the CFMEU and CEPU contravened the *Building and Construction Industry Improvement Act 2005* (Cth) – Where respondent sought pecuniary penalties and associated declaratory relief against the CFMEU and CEPU – Whether the High Court of Australia’s decision in *Barbaro v The Queen* affects submissions made regarding civil penalties.

Appealed from FCA(FC): [\[2015\] FCAFC 59](#).

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Construction, Forestry, Mining and Energy Union & Anor v Director, Fair Work Building Industry Inspectorate & Anor

B45/2015: [\[2015\] HCATrans 259.](#)

Date heard: 13 October 2015.

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

Catchwords:

Procedure – Civil penalty provisions – Where respondent alleged that appellants contravened the *Building and Construction Industry Improvement Act 2005* (Cth) – Where respondent sought pecuniary penalties and associated declaratory relief against the appellants– Whether the High Court of Australia’s decision in *Barbaro v The Queen* affects submissions made regarding civil penalties.

Appealed from FCA(FC): [\[2015\] FCAFC 59.](#)

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Taxation

Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liq); Commissioner of Taxation v Muller & Anor as Liquidators of Australian Building Systems Pty Ltd (In Liq)

B19/2015; B20/2015: [\[2015\] HCATrans 217.](#)

Date Heard: 8 September 2015.

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

Catchwords:

Taxes and duties – Income tax and related legislation – *Income Tax Assessment Act 1936* (Cth) ss 6 and 254 – Where administrators were appointed to Australia Building Systems under Pt 5.3A of the *Corporations Act 2001* (Cth) – Where it was resolved that Australian Building Systems would be wound up and the respondents in B49/2014 were appointed liquidators – Where the liquidators caused Australian Building Systems to enter into a contract for sale of a property which gave rise to a capital gains tax event pursuant to s 104-10 of the *Income Tax Assessment Act 1997* (Cth) – Whether under the 1936 Act a trustee is subject to the requirements and authorisations in s 254 only in relation to income, profits or gains for which they are assessable to tax under Part III Div 6 of the 1936 Act – Whether a trustee is subject to authorisations and requirements in s 254 of the 1936 Act only in relation to income, profits or gains for which they have liability to

tax under some other provision of the Act or whether ancillary liabilities are created by s 254 – Whether, following the receipt of money in a representative capacity by a trustee but prior to an assessment for tax, the retention authorisation and requirement in s 254(1)(d) of the 1936 Act requires the trustee to retain out of moneys then in or coming to them in their representative capacity so much as is significant to pay the tax of the income, profits or gains or whether it only authorises and requires a trustee to retain such moneys after an assessment is made for tax on the income, profits or gains.

Appealed from FCA (FC): [\[2014\] FCAFC 133](#).

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Macoun v Commissioner of Taxation

S100/2015: [\[2015\] HCATrans 257](#).

Date heard: 9 October 2015.

Coram: French CJ, Bell, Gageler, Nettle and Gordon JJ.

Catchwords:

Income Tax – Appeal from the Administrative Appeals Tribunal – *Specialised Agencies (Privileges and Immunities) Regulations 1986* (Cth) cl 8 – *International Organisations (Privileges and Immunities) Act 1963* (Cth) Sch 4 Pt 1 – *Income Tax Assessment Act 1997* (Cth) s 6-20 – Where the appellant received pension payments from a foreign retirement plan – Where appellant was no longer employed by a Specialised Agency exempt from income tax pursuant to cl 8 of the *Specialised Agencies (Privileges and Immunities) Regulations 1986* (Cth) – Whether appellant’s pension payments are exempt from income tax.

Appealed from FCA (FC): [\[2014\] FCAFC 162](#).

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Torts

Allen v Chadwick

A14/2015: [\[2015\] HCATrans 260](#).

Date heard: 15 October 2015.

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

Catchwords:

Torts – Negligence – Contributory negligence – *Civil Liability Act* 1936 (SA) ss 47 and 49 – Where respondent was injured in a car accident after appellant lost control of the vehicle – Where appellant was intoxicated – Where respondent was not wearing a seatbelt – Whether a reasonable person in the position of respondent would or ought to have known that appellant was intoxicated and would have relied on appellant to drive – Whether respondent had an opportunity to fasten the seatbelt.

Appealed from SASC (FC): [\[2014\] SASCF 100](#).

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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

See also [Native Title](#): *Quandamooka Yoolooburrabee Aboriginal Corporation RNTBC v State of Queensland*

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Migration

Wei v Minister for Immigration and Border Protection

S9/2015: *Application to show cause.*

Catchwords:

Migration – Visa cancellation – Where plaintiff is a Chinese national who arrived on a student visa in September 2008 – Where plaintiff commenced and completed a “Foundation Program” at Macquarie University (“University”) – Where university failed to issue a Confirmation of Enrolment – Where the failure to issue the confirmation lead to the appearance that plaintiff breached the terms of visa – Where defendant’s delegate cancelled plaintiff’s visa on 20 March 2014 on this basis - Whether plaintiff should have been granted an extension of time for making application – Whether decision of defendant’s delegate to cancel plaintiff’s visa was vitiated by jurisdictional error or breach of requirements of procedural fairness.

Listed: 12 November 2015.

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Plaintiff M64/2015 v Minister for Immigration and Border Protection

M64/2015: *Special case*

Catchwords:

Migration – Grant or refusal of visas – *Migration Act* 1958 (Cth) - *Migration Regulations* 1994 (Cth) - Where plaintiff is an Australian permanent resident – Where plaintiff applied for a subclass 866 (Protection) visa for his immediate family – Where delegate of defendant refused the Visa Application for plaintiff’s mother

because plaintiff's mother did not satisfy cl 202.222(2) ("clause") – Whether defendant's delegate erred by construing the clause to require him to consider Australia's capacity to take all refugee applicants without considering whether or not there were compelling reasons for giving special consideration to the visa applicants – Whether the delegate erred by having regard to irrelevant considerations – Whether delegate applied policy inconsistent with the Act and the Regulations.

Listed: 6 November 2015.

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Native Title

Quandamooka Yoolooburrabee Aboriginal Corporation RNTBC v State of Queensland

[B26/2014](#): *Special case.*

Catchwords:

Native title – Indigenous Land Use Agreement ("ILUA") – *North Stradbroke Island Protection and Sustainability Act 2011* (Qld) ("Principal Act") – *North Stradbroke Island Protection and Sustainability and Another Act Amendment Act 2013* (Qld) ("Amendment Act") – Amendment Act allowed for renewal of four mining leases for periods longer than those provided in Principal Act – Amendment Act replaced environmental authority provisions in Principal Act with new s 17 which no longer applied conditions to two mining leases – ILUA registered as area agreement under ss 24CA to 24CL of *Native Title Act 1993* (Cth) ("NTA") – Whether ILUA binds defendant not to enact ss 9 and 12 of Amendment Act.

Constitutional law – Inconsistency – Commonwealth Constitution, s 109 – Whether Amendment Act is invalid under s 109 of Constitution by reason of inconsistency between Amendment Act and ss 24EA and 87 of NTA.

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4: SPECIAL LEAVE GRANTED

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

Banking

Paciocco & Anor v Australia and New Zealand Banking Group Limited

M219/2015; M220/2015: [\[2015\] HCATrans 229](#).

Date heard: 11 September 2015 – *Special leave granted*.

Catchwords:

Banking and financial institutions – Consumer protection – *Australian Securities and Investments Commission Act 2001* (Cth) s 12CB – *National Consumer Credit Protection Act 2009* (Cth) s 76 and *Fair Trading Act 1999* (Vic) s 8 – Where first appellant was charged 26 late payment fees on two credit card accounts held with respondent – Where there was a disparity between the fee charged and the loss accrued as a consequence of late payment - Whether the terms “unconscionable”, “unfair” and “unjust”, as used in the statutory causes of action available, are intended to extend the common law in respect of standard form consumer contracts – Whether disproportion between the quantum of late payment fees and cost to respondent associated with late payment gives rise to statutory unconscionability, unjustness or unfairness if the fees were not exorbitant from respondent’s perspective.

Appealed from FCA (FC): [\[2015\] FCAFC 50](#).

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Contracts

See also **Statutes:** *State of Victoria v Tatts Group Limited* and *Tabcorp Holdings Ltd v State of Victoria*.

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Criminal Law

The Queen v GW
C4/2015: [\[2015\] HCATrans 267](#).

Date heard: 16 October 2015 – *Special leave granted.*

Catchwords:

Criminal law – Evidence – Unsworn statements – Where respondent was found guilty of committing acts of indecency upon or in the presence of children “R” and “H” contrary to s 61(1) of the *Crimes Act 1900* (ACT) – Where R gave evidence at a pre-trial hearing but was unable to give sworn evidence due to her age – Where she gave unsworn evidence pursuant to s 13 of the *Evidence Act 2011* (ACT) – Where evidence was admitted without a warning – Where the Court of Appeal overturned the conviction on the basis that the unsworn evidence of R should not have been admitted and the trial judge failed to direct the jury regarding the unsworn evidence of R – Whether, where witnesses give unsworn evidence pursuant to s 13 of the Evidence Act, there should be a requirement that the jury be warned that there is a difference between sworn and unsworn evidence – Whether a finding by a judge that a witness is not competent to give sworn evidence pursuant to s 13(3) of the Evidence Act requires a particular formulation of the warning.

Appealed from ACTSC (CA): [2015] ACTCA 15.

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Murdoch v The Queen

D1/2015: [\[2015\] HCATrans 266.](#)

Date heard: 16 October 2015 – *Special leave granted.*

Catchwords:

Criminal law – Evidence – Tendency evidence – *Evidence (National Uniform Legislation) Act* (NT) s 97 – Where applicant was found guilty of three of four offences committed against his step grandchild – Where Complainant made a complaint to family members – Where evidence was given of an incident which was not charged and occurred after the time period of the offences charged – Where several people give evidence of the complaints – Whether trial judge is required to assume that the jury will accept the evidence where considering the probative value of the tendency evidence pursuant to s 97(1)(b) of the Uniform Evidence Law – Whether hearsay evidence of a complaint, involving general allegations of sexual misconduct not linked to any particular charge is admissible as evidence of guilt of the offences charged under the Uniform Evidence Law – Whether the correct approach to assessment of “probative value” for the purposes of s 137 of the Uniform Evidence Law.

Appealed from NTSC (CCA): [\[2014\] NTCCA 20](#).

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Damages

See also **Torts:** *Fernando by his tutor Ley v Commonwealth of Australia & Anor*

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Employment Law

Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors

P38/2015: [\[2015\] HCATrans 193](#).

Date heard: 14 August 2015 – *Special leave granted*.

Catchwords:

Employment law – Employment relationship – Nature of – *Fair Work Act 2009* (Cth) s 357 - Where first respondent operated a business providing serviced apartments – Where first respondent employed two housekeepers purportedly through a contract hire company – Whether relationship was an employment relationship – Whether an employer can avoid the sham contracting provision of the *Fair Work Act* by interposing a third party into its contractual arrangements between employer and the other person.

Appealed from FCA (FC): [\[2015\] FCAFC 37](#).

Listed: 4 November 2015.

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Equity

Fischer & Ors v Nemeske Pty Ltd & Ors

S38/2015: [\[2015\] HCATrans 262](#).

Date heard: 16 October 2015 – *Special leave granted*.

Catchwords:

Equity – Trusts and trustees – Power of Trustees – Maintenance and Advancement – Where first respondent is the trustee of the Nemes Family Trust and applicants are the “Specified Beneficiaries” – Where in July 1994 the trust recorded an “asset revaluation reserve” in the accounts of the trust in the amount of \$3,904,300 – Where first respondent determined to make a distribution to Mr and Mrs Nemes but no money was paid out – Where, in 1995, first respondent executed a Deed of Charge in favour of the Nemes which recorded that trust was indebted to the Nemes to the sum of \$3,904,300 – Whether a trustee of an express trust validly exercise a power to “advance” or “apply” the capital or income of that trust by resolving to pay or credit an amount of money to a beneficiary of the trust, notwithstanding that the trust assets do not include, and have never included, any money – Whether an action for money had received maintainable against a trustee upon the trustee stating an account to the relevant beneficiary, notwithstanding that the trustee continued to have ongoing active duties as trustee in respect of all of the trust assets from which any liability to the relevant beneficiary would be realised.

Appealed from NSWSC (CA): [\[2015\] NSWCA 6](#).

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Migration

See also **Torts**: *Fernando by his tutor Ley v Commonwealth of Australia & Anor*

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Professions and Trades

See also **Torts**: *Attwells & Anor v Jackson Lalic Lawyers Pty Limited*.

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Badenach & Anor v Calvert

H9/2015: [\[2015\] HCATrans 279](#).

Date heard: 26 October 2015 – *Special leave granted*.

Catchwords:

Professions and trades – Lawyers – Duties and liabilities – Solicitors’ duties to other persons – Beneficiaries – Where first appellant acted for a testator who had terminal cancer in the preparation of a will – Where respondent was regarded as a son by testator – Where testator had an estranged daughter – Where testator did not disclose existence of estranged daughter and first appellant did not make any inquiries in this respect and did not give any advice as to the effect of the *Testator’s Family Maintenance Act 1912* (Tas) on this arrangement – Whether a solicitor retained to draw a will owes a testator a duty of care which extends to inquiries as to the existence of estranged children and advice pursuant to the effect of the Act.

Torts – Negligence – Duty of care – *Civil Liability Act 2002* (Tas) – Whether solicitor owed a duty of care to a non-client beneficiary – Whether damages for loss of opportunity can be awarded where opportunity is hypothetical and dependent on acts of third parties.

Appealed from TASC (FC): [\[2015\] TASFC 8](#).

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Procedure

CGU Insurance Limited v Blakely & Ors
M221/2015: [\[2015\] HCATrans 232](#).

Date heard: 11 September 2015 – *Special leave granted*.

Catchwords:

Procedure – Joinder of third parties – Where declaratory relief was sought by first respondent against appellant – Where first respondent was stranger to insurance contract between appellant and second to fifth respondents – Whether Court has jurisdiction to declare the rights and obligations of parties under a contract of insurance where declaration is sought by a third party and the parties to the contract do not intend to pursue any claim relating to their rights or obligations under the contract – Whether such a declaration would bind parties to the contract as a matter of *res judicata* or finally determine their rights and obligations pursuant to the contract – Whether Court has jurisdiction to make a declaration about the meaning of a contract at the suit of a third party on the grounds of “practical utility”.

Appealed from VSC (CA): [\[2015\] VSCA 153](#).

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Property

Coverdale v West Coast Council

H10/2015: [\[2015\] HCATrans 228](#).

Date heard: 11 September 2015 – *Special leave granted*.

Catchwords:

Real Property – Rates and charges – Where the Valuer-General is required by the *Valuation of Land Act 2001* (Tas) (“VLA”) to make valuations of all lands within a valuation district including any Crown lands that are liable to be rated – Where Macquarie Harbour is Crown land within the respondent’s municipality – Whether the sea or seabed is land which the Valuer-General is required to value.

Appealed from TASC (FC): [\[2015\] TASFC 1](#).

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Moreton Bay Regional Council v Mekpine Pty Ltd

B55/2014: [\[2015\] HCATrans 270](#).

Date heard: 16 October 2015 – *Special leave granted*.

Catchwords:

Property law – Crown Lands – Where respondent entered into a retail shop lease within the meaning of the *Retail Shop Leases Act 1994* (Qld) in respect of Lot 6 on RP 809722 (‘Lot 6’) – Where the Retail Shopping Centre that Lot 6 was part of expanded to include Lot 1 on RP 847798 (‘Old Lot 1’) and this Lot was amalgamated by registration of a plan of survey and existing interests under the *Land Title Act 1994* (Qld) to create a new Lot 1 – Where applicant resumed part of the new Lot 1 under the provision of the *Acquisition of Land Act 1967* (Qld) – Where respondent brought a claim for compensation pursuant to the ALA on the basis that, at the date of resumption, respondent had an interest in the resumed land for the purposes of section 12(5) of the ALA – Whether the creation of a new lot has the effect of varying a lease over just one of the existing allotments – Whether the provisions of the Retail Shop Leases Act which include a definition of “common areas” of a retail shopping centre, operate to vary a retail shop lease to include areas defined by the Retail Shop Leases Act as “common areas” or otherwise create an interest in the “common areas” defined by the Retail Shop Leases Act.

Appealed from QSC (CA): [\[2014\] QCA 317](#).

Statutes

State of Victoria v Tatts Group Limited

M83/2015: [\[2015\] HCA Trans 117](#).

Date heard: 15 May 2015 – *Special leave granted*.

Catchwords:

Statutory interpretation – *Gambling Regulation Act 2003* (Vic) ss 1.3, 3.4.33 and Pt 4 of Ch 3– Gaming operator licences – Where the regime changed and the ability to issue gaming operator’s licences was abolished – Where respondent’s licence expired – Whether respondent entitled to a terminal payment on the grant of gaming operator’s licence to person other than former licensee or a related entity – Whether when construing a contractual promise in an agreement between a government and private party which expressly requires the subsequent enactment of that promise in legislation can this agreement to afford the promise statutory force be relevant to ascertaining the intentions of the parties with respect to the meaning of the promise – Whether the contractual promise survives the agreed enactment of legislation embodying the same – Whether the contractual promise continues to have operation after the enactment of the statutory right if that statutory right is legislatively nullified – Whether a prior contractual promise can survive the enactment of legislation which has the purpose and effect of nullifying the parallel statutory right.

Appealed from VSC (CA): [\[2014\] VSCA 311](#).

Listed: 10 November 2015 and 11 November 2015.

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Tabcorp Holdings Limited v State of Victoria

M81/2015: [\[2015\] HCATrans 117](#).

Date heard: 15 May 2015 – *Special leave granted*.

Catchwords:

Statutory interpretation – *Gambling Regulation Act 2003* (Vic) s 4.3.21 – Gaming operator licences – Where the regime changed and the ability to issue gaming operator’s licences was abolished – Where appellant’s licence expired – Whether appellant is entitled to a terminal payment on the grant of gaming operator’s licence to person other than former licensee or a related entity – Whether

words “new licences” in s 4.3.12(1) of the *Gambling Regulation Act 2003* should be construed to have their ordinary meaning.

Contracts – General contractual principles – Whether respondent’s failure to seek to secure appellant’s right to repayment of a breach of the duty of good faith and reasonable dealing.

Appealed from VSC (CA): [\[2014\] VSCA 312](#).

Listed: 10 November 2015 and 11 November 2015.

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Torts

Attwells & Anor v Jackson Lalic Lawyers Pty Limited
S161/2015: [\[2015\] HCATrans 176](#).

Date heard: 7 August 2015 – *Special leave granted*

Catchwords:

Torts – Negligence – Defences – Advocates’ immunity – Scope – Where respondent gave advice to appellants to agree to a terms of settlement – Where the terms of settlement caused the appellants to accept liability significant higher than they would have otherwise been liable for if they had not defended the proceedings– Whether advocates’ immunity applies – Whether the advice falls with the boundaries of advocates’ immunity – Whether immunity is attracted in respect of final outcomes not the subject of a judicial determination on the merits.

Appealed from NSWSC (CA): [\[2014\] NSWCA 335](#).

Listed: 3 November 2015.

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Fernando by his tutor Ley v Commonwealth of Australia & Anor
P37/2015: [\[2015\] HCATrans 190](#).

Date heard: 14 August 2015 – *Special leave granted*.

Catchwords:

Torts – False imprisonment – Where appellant’s visa was cancelled by Acting Minister – Where appellant was held in immigration detention for 1203 days – Where consent orders were made to

quash decision of Acting Minister to cancel the visa – Whether a tortfeasor is permitted to escape liability to pay more than nominal damages if a lawful means could have been chosen by the tortfeasor to inflict the same loss and damage on the victim – Whether, after a determination of liability, an intermediate court of appeal remits a matter for assessment of damages whether the remittee court is bound in reaching its determination by the reasons as well as the orders of the remitting court.

Appealed from FCA (FC): [\[2014\] FCAFC 181.](#)

Listed: 5 November 2015.

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Stewart & Ors v Ackland

C12/2015: [\[2015\] HCATrans 226.](#)

Date heard: 11 September 2015 – *Special leave granted.*

Catchwords:

Torts – Negligence – Personal injury – *Civil Liability Act 2002* (NSW) ('Act') ss 5L and 5F - Where respondent was injured while attempting to perform a backward somersault on a jumping pillow at an amusement park operated by appellant – Where there was no signs prohibiting backward somersaults or other inverted manoeuvres – Whether s 5L of the Act requires that the extent of the harm suffered by the plaintiff to be objectively obvious to a reasonable person in the position of the plaintiff – Whether and to what extent the principle of personal autonomy applies so as to limit the scope of an occupier's duty of care in respect of recreation activities.

Appealed from ACTSC (CA): [\[2015\] ACTCA 1.](#)

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Robinson Helicopter Company Incorporated v McDermott & Ors

B4/2015: [\[2015\] HCATrans 274.](#)

Date heard: 16 October 2015 – *Special leave granted.*

Catchwords:

Torts – Negligence – Where first respondent was a passenger in a Robinson R 22 helicopter which was manufactured by the appellant– Where helicopter crashed, killing the pilot and seriously injuring first respondent – Where it was a failure in the forward

flexplate of the helicopter which caused it to crash – Whether appellant is liable for the failures of the helicopter – Whether a manufacturer of goods is to be held liable under ss 75AD and AE of the *Trade Practices Act 1974* (Cth) or in negligence by reason of the maintenance manual calling for a technician to verify the parts without specifying the particular method to do so – Whether appellant should have been held liable without consideration of whether the negligence or breach of the Trade Practices Act was causative of any loss.

Appealed from QSC (CA): [\[2014\] QCA 357](#).

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See also [Professions and Trades](#): *Badenach & Anor v Calvert*

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5: CASES NOT PROCEEDING OR VACATED

Migration

Kaur v Minister for Immigration and Border Protection

P6/2015: [\[2015\] HCATrans 254](#).

Consent orders made: 7 October 2015.

Catchwords:

Migration – Grant or refusal of visas – Where plaintiff applied for a visa on the basis of a de facto relationship - Where plaintiff’s visa application was refused – Where plaintiff contends that defendant’s delegate failed to exercise jurisdiction by making an incorrect finding on a critical fact in finding that in the 12 months prior to the application the parties to the relationship did not have a mutual commitment to a shared life together – Whether defendant’s delegate failed to provide procedural fairness to plaintiff by failing to identify to plaintiff the specific issues of fact which delegate regarded as critical to the decision and provide an opportunity to plaintiff provide relevant evidence – Whether defendant’s delegate made a jurisdictional error by failing to comply with s 57(2) of *Migration Act 1958* (Cth).

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6: SPECIAL LEAVE REFUSED

Publication of Reasons: 15 October 2015

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	BZAHP	Minister for Immigration and Border Protection & Anor (B28/2015)	Federal Court of Australia [2015] FCA 488	Application dismissed [2015] HCASL 155
2.	Davies	The Queen (M56/2015 & M57/2015)	Supreme Court of Victoria (Court of Appeal) [2014] VSCA 284	Applications dismissed [2015] HCASL 156
3.	Miao	Owners Corporation SP3135U (M76/2015)	Federal Court of Australia [2015] FCA 352	Application dismissed [2015] HCASL 157
4.	Haque	State of Victoria (M76/2015)	Supreme Court of Victoria (Court of Appeal) [2015] VSCA 83	Application dismissed [2015] HCASL 158
5.	Mohammed	Minister for Immigration and Border Protection & Anor (M79/2015)	Federal Court of Australia [2015] FCA 438	Application dismissed [2015] HCASL 159
6.	Singh	Minister for Immigration and Border Protection & Anor (M85/2015)	Federal Court of Australia [2015] FCA 439	Application dismissed [2015] HCASL 160
7.	MZZZX & Anor	Minister for Immigration and Border Protection & Anor (M87/2015)	Federal Court of Australia [2015] FCA 455	Application dismissed [2015] HCASL 161
8.	Sohal	Minister for Immigration and Border Protection & Anor (M107/2015)	High Court of Australia [2015] HCATrans 129	Application dismissed [2015] HCASL 162
9.	Nayyar	Minister for Immigration and Border Protection & Anor (M109/2015)	High Court of Australia [2015] HCATrans 128	Application dismissed [2015] HCASL 163
10.	Lance	Weston (P8/2015)	Supreme Court of Western Australia (Court of Appeal) [2014] WASCA 62	Application dismissed [2015] HCASL 164
11.	Kwon	Cha (S98/2015)	Supreme Court of New South Wales (Court of Appeal) [2015] NSWCA 111	Application dismissed [2015] HCASL 165
12.	Baghti	Baghti & Ors (S115/2015)	Full Court of the Family Court of Australia	Application dismissed [2015] HCASL 166

6: Special Leave Refused

13.	SZTXE	Minister for Immigration and Border Protection & Anor (S118/2015)	Federal Court of Australia [2015] FCA 493	Application dismissed [2015] HCASL 167
14.	SZUUZ	Minister for Immigration and Border Protection & Anor (S122/2015)	Federal Court of Australia [2015] FCA 624	Application dismissed [2015] HCASL 168
15.	SZTLA & Ors	Minister for Immigration and Border Protection & Anor (S123/2015)	Federal Court of Australia [2015] FCA 515	Application dismissed [2015] HCASL 169
16.	SZTGH	Minister for Immigration and Border Protection & Anor (S125/2015)	Federal Court of Australia [2015] FCA 512	Application dismissed [2015] HCASL 170
17.	Tanious	Australian Medical Council Limited (AMC) & Anor (S142/2015)	Supreme Court of New South Wales (Court of Appeal) [2015] NSWCA 189	Application dismissed [2015] HCASL 171
18.	Sheraz Pty Ltd (CAN 009 134 016) as Trustee for the Terranora Family Trust	Vegas Enterprises Pty Ltd (ACN 009 074 148) (P7/2015)	Supreme Court of Western Australia (Court of Appeal) [2015] WASCA 4	Application dismissed with costs [2015] HCASL 172
19.	Smith	Lewis Blyth & Hooper (P17/2015)	Supreme Court of Western Australia (Court of Appeal) [2015] WASCA 47	Application dismissed with costs [2015] HCASL 173
20.	Sokmas	Howard (P49/2014)	Supreme Court of Western Australia (Court of Appeal) [2014] WASCA 181	Application dismissed [2015] HCASL 174

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16 October 2015: Sydney

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Khazaal	The Queen (S75/2015)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCCA 140	Application dismissed [2015] HCATrans 261
2.	Cartwright	Bluescope Steel Limited & Anor (S78/2015)	Supreme Court of New South Wales (Court of Appeal) [2015] NSWCA 96	Application dismissed with costs [2015] HCATrans 268
3.	Workplace Safety Australia Pty Limited	Simple OHS Solutions Pty Limited & Anor (S86/2015)	Supreme Court of New South Wales (Court of Appeal) [2015] NSWCA 84	Application dismissed with costs [2015] HCATrans 264
4.	Nair-Smith	Perisher Blue Pty Limited (S89/2015)	Supreme Court of New South Wales (Court of Appeal) [2015] NSWCA 90	Application dismissed with costs [2015] HCATrans 269
5.	Vella	Minister for Immigration and Border Protection (S91/2015)	Full Court of the Federal Court of Australia [2015] FCAFC 53	Application dismissed with costs [2015] HCATrans 263
6.	Abbott	The Queen (S93/2015)	Supreme Court of New South Wales (Court of Criminal Appeal) [2015] NSWCCA 7	Application dismissed [2015] HCATrans 265.

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16 October 2015: Brisbane

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Gundy	Eatts (B54/2014)	Supreme Court of Queensland (Court of Appeal) [2014] QCA 309	Application dismissed with costs [2015] HCATrans 275
2.	Hamdan	Callanan (B2/2015)	Supreme Court of Queensland (Court of Appeal) [2014] QCA 304	Application dismissed [2015] HCATrans 271
3.	Younan	Callanan (B3/2015)	Supreme Court of Queensland (Court of Appeal) [2014] QCA 304	Application dismissed [2015] HCATrans 271
4.	Martin	The Queen (B5/2015)	Supreme Court of Queensland (Court of Appeal) [2015] QCA 2	Application dismissed [2015] HCATrans 273
5.	Ferguson	Mules (B7/2015)	Supreme Court of Queensland (Court of Appeal) [2015] QCA 5	Application dismissed with costs [2015] HCATrans 272
6.	Teys Australia Beenleigh Pty Ltd	Australasian Meat Industry Employees Union & Anor (B9/2015)	Full Court of the Federal Court of Australia [2015] FCAFC 11 (Discontinued)	Discontinued
7.	Teys Australia Beenleigh Pty Ltd	Australasian Meat Industry Employees Union & Anor (B10/2015)	Full Court of the Federal Court of Australia [2015] FCAFC 11 (Discontinued)	Discontinued
8.	Martin	The Queen (B14/2015)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 342	Application dismissed [2015] HCATrans 273
9.	Foster	The Queen (B26/2015)	Supreme Court of Queensland (Court of Appeal) [2014] QCA 226	Application dismissed [2015] HCATrans 276

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