HIGH COURT BULLETIN

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[2011] HCAB 10 (19 December 2011)

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

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SUMMARY OF NEW ENTRIES

1: Cases Handed Down

Case	Title
Moti v The Queen	Abuse of Process
Shahi v Minister for Immigration and Citizenship	Citizenship and Migration
Michael Wilson & Partners Limited v Nicholls	Courts and Judges
Green v The Queen; Quinn v The Queen	Criminal Law
Handlen v The Queen; Paddison v The Queen	Criminal Law
Amaca Pty Limited (Under NSW Administered Winding Up) v Booth; Amaba Pty Limited (Under NSW Administered Winding Up) v Booth	Evidence
Australian Crime Commission v Stoddart	Evidence

2: Cases Reserved

Case	Title

Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia & Anor	Administrative Law
Aytugrul v The Queen	Criminal Law
Bui v Director of Public Prosecutions (Cth)	Criminal Law
King v The Queen	Criminal Law
Roadshow Films Pty Ltd & Ors v iiNet Limited	Intellectual Property

3: Original Jurisdiction

Case	**Title**
Plaintiff S51/2011 v Minister for Immigration and Citizenship & Anor	Citizenship and Migration
Crump v State of New South Wales	Constitutional Law

4: Special Leave Granted

Case	**Title**
Kizon v The Queen; Mansfield v The Queen	Corporations Law
State of New South Wales v Williamson	Costs
Certain Lloyds Underwriters Subscribing to Contract No IHOOAAQS v Cross; Certain Lloyds Underwriters Subscribing to Contract No IHOOAAQS v Thelander; Certain Lloyds Underwriters Subscribing to Contract No IHOOAAQS v Thelander	Costs
The Hon Brendan O'Connor, Commonwealth Minister for Home Affairs v Zentai	Extradition
Newcrest Mining Limited v Thornton	Statutes
Barclay v Penberthy	Torts

1: Cases Handed Down

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

Abuse of Process

Moti v The Queen
B19/2011: [2011] HCA 50.

Judgment delivered: 7 December 2011.

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

Catchwords:

Abuse of process — Criminal proceedings — Appellant was citizen of Australia suspected of child sex offences against Australian law committed overseas — Appellant deported from Solomon Islands to Australia by Solomon Islands Government contrary to Solomon Islands law — Australian Government representatives in Solomon Islands aware, and informed superiors in Canberra, of illegality — Australian Government issued travel document for appellant and visas to Solomon Islands officials, which facilitated deportation — Appellant charged and prosecuted on arrival in Australia — Whether circumstances of appellant's removal from Solomon Islands required permanent stay of his prosecution.

Abuse of process — Criminal proceedings — Complainant and certain family members made statements about appellant's conduct to Australian Federal Police ("AFP") — Complainant and family later refused to participate in prosecution as witnesses unless given "financial protection" — AFP made significant payments to complainant and family — Payments exceeded AFP guidelines but not unlawful — Whether payments to witnesses required permanent stay of appellant's prosecution.

Private international law — Act of State — Act of foreign State — Appellant prosecuted in Australia for offences against Australian law committed overseas — Appellant asserted illegality of Solomon Islands Government's actions under Solomon Islands law in application for permanent stay of prosecution — Whether Australian court can examine, as preliminary to ultimate decision under Australian law, legality of foreign government's actions under foreign law.

Words and phrases — "abuse of process", "act of foreign State", "act of State", "deportation", "disguised extradition", "foreign law", "payment to witness", "preliminary".

Appealed from Qld SC (CA): (2010) 240 FLR 218; [2010] QCA 178; [2011] ALMD 677.

Citizenship and Migration

Shahi v Minister for Immigration and Citizenship
M10/2011: [2011] HCA 52.

Judgment delivered: 14 December 2011.

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

Catchwords:

Immigration — Visa — Refugee and Humanitarian (Class XB) visa — Subclass 202 Global Special Humanitarian — Plaintiff Australian permanent resident, eligible proposer for and held Subclass 202 visa — Plaintiff's mother applied for Subclass 202 visa — Primary criteria for grant of visa in cl 202.211 of Sched 2 to Migration Regulations 1994 (Cth) included that applicant "member of the immediate family of the proposer" on date proposer's visa granted and that applicant "continues to be a member of the immediate family of the proposer" at time of applicant's application for visa — Applicant must continue "to satisfy the criterion in clause 202.211" at time of decision for applicant's visa — Mother "member of the immediate family" of proposer only until proposer 18 years old — Plaintiff proposed mother for visa before turned 18 but Minister's delegate's decision not made until after plaintiff turned 18 — Minister's delegate decided that mother ceasing to be member of plaintiff's "immediate family" after date of application but before date of decision required refusal of mother's application — Whether "continues to be a member of the immediate family of the proposer" is criterion to be determined at time of application or time of decision — Whether jurisdictional error.

Words and phrases — "continues to be a member of the immediate family", "continues to satisfy the criterion", "criteria to be satisfied at time of decision".

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

Courts and Judges

Michael Wilson & Partners Limited v Nicholls

S67/2011: [2011] HCA 48.

Judgment delivered: 1 December 2011.

Coram: Gummow ACJ, Hayne, Heydon, Crennan and Bell JJ.

Catchwords:

Courts and judges — Bias — Apprehended bias — Appellant successfully applied ex parte to use respondents' affidavits for foreign proceedings and criminal investigations on several occasions — Judge relied on appellant's unchallenged affidavit evidence — Applications heard in closed court and orders made preventing respondents knowing about applications — Whether fair-minded lay observer might reasonably apprehend judge might not bring impartial and unprejudiced mind to resolution of issues at trial of action.

Practice and procedure — Appeal — Trial judge refused respondents' pre-trial disqualification applications — Trial judge offered to make orders facilitating urgent appeal — Whether order on disqualification application capable of appeal — Respondents did not seek leave to appeal — Whether respondents permitted to raise disqualification on appeal from final judgment.

Abuse of process — Multiple proceedings — Appellant commenced arbitration proceeding against solicitor in London for breach of fiduciary duty then proceeding against respondents in Supreme Court of New South Wales for knowingly assisting solicitor's breach and in tort — Loss from substantially same breaches of fiduciary duty alleged in both proceedings — Proceedings could not be brought in one venue — Supreme Court delivered judgment before arbitrators delivered award on liability — Findings about appellant's loss differed — Whether Supreme Court proceeding abuse of process.

Equity — Remedies — Solicitor liable to appellant for breach of fiduciary duty — Respondents liable to appellant for knowingly assisting solicitor's breach — Whether respondents' liability ancillary to, coordinate with or necessarily limited by solicitor's liability — Equity against double recovery — Whether respondents have equity to prevent appellant enforcing Supreme Court judgment against them where particular loss satisfied pursuant to arbitral award against solicitor.

Words and phrases — "abuse of process", "appeal", "apprehended bias", "arbitration", "disqualification", "double recovery", "ex parte application", "multiple proceedings", "order".

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

Criminal Law

Handlen v The Queen; Paddison v The Queen
B26/2011; B27/2011: [2011] HCATrans 51.

Judgment delivered: 8 December 2011.

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

Catchwords:

Criminal law — Appeal — Jury misdirection — Application of proviso — Appellants in joint trial each convicted of multiple drug-related offences under *Criminal Code* (Cth) ("Code"), including two counts of importing commercial quantity of border controlled drugs into Australia contrary to s 307.1 of Code ("importation offences") — Trial conducted on mistaken assumption that guilt of importation offences could be established by proof that appellants parties to joint criminal enterprise — Whether prosecution upon basis not known to law denied application of proviso under s 668E(1A) of *Criminal Code* (Q) — Whether directions to jury on "group exercise" distracted from real issues in trial of each count in indictment.

Words and phrases — "aids, abets, counsels or procures", "joint criminal enterprise", "proper conduct of trial", "proviso".

Appealed from Qld SC (CA): (2010) 207 A Crim R 50; (2010) 247 FLR 261; [2010] QCA 371.

Green v The Queen; Quinn v The Queen
S146/2011; S143/2011: [2011] HCA 49.

Publication of reasons: 6 December 2011. Orders made on 3 August 2011.

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

Catchwords:

Criminal law — Appeal — Appeal against sentence — Appeal by Crown — Parity principle — Where primary judge imposed sentence having regard to parity principle as between appellants and other co-offender — Where s 5D of *Criminal Appeal Act* 1912 (NSW) provided that primary purpose of appeals against sentences by the Crown is "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons" — Where appellate court increased each appellant's sentence — Whether appellate court erred in allowing Crown appeal and thereby creating disparity between sentences of appellants and other co-offender —

Whether appellate court erred in finding, absent any submission from Crown, that sentence imposed on other co-offender manifestly inadequate.

Words and phrases — "appeal", "Crown appeal", "parity principle", "sentencing".

Appealed from NSW SC (CCA): (2010) 207 A Crim R 148; [2010] NSWCCA 313.

Evidence

Amaca Pty Limited (Under NSW Administered Winding Up) v Booth & Anor; Amaba Pty Limited (Under NSW Administered Winding Up) v Booth & Anor

S219/2011; S220/2011: [2011] HCA 53.

Judgment delivered: 14 December 2011.

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

Catchwords:

Evidence — Expert evidence — First respondent sued appellants in Dust Diseases Tribunal of New South Wales — First respondent claimed exposure to asbestos fibres in breach of each appellant's duty of care caused his mesothelioma — First respondent's expert evidence that cumulative exposure to asbestos contributed to mesothelioma accepted at trial — Appellants led epidemiological evidence disputing link between exposure to asbestos of members of first respondent's profession and risk of mesothelioma — Whether inference of fact concerning contraction of disease reasonably open on evidence.

Negligence — Causation — Whether more probable than not that appellants' negligence was a cause of first respondent's disease — Whether issues of causation lie within common knowledge and experience — Role of expert medical evidence.

Practice and procedure — Appeal — No evidence — Appeal from Dust Diseases Tribunal of New South Wales to Supreme Court of New South Wales — Section 32 of *Dust Diseases Tribunal Act* 1989 (NSW) confers a right of appeal to Supreme Court against decision of Tribunal "in point of law" — Whether Tribunal erred in point of law when deciding that appellants' negligence more probably than not a cause of first respondent's disease.

Words and phrases — "causation", "cause and consequence", "epidemiological evidence", "manifest error", "mesothelioma".

Appealed from SC NSW (CA): [2010] Aust Torts Reports 82-079; [2010] NSWCA 344.

Australian Crime Commission v Stoddart

B71/2010: [2011] HCA 47.

Judgment delivered: 30 November 2011.

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

Catchwords:

Evidence — Privilege — Spousal privilege — Witness summonsed pursuant to s 28(1) of *Australian Crime Commission Act* 2002 (Cth) ("Act") to give evidence regarding "federally relevant criminal activity" involving her husband — Witness declined to answer examiner's questions by claiming spousal privilege — Whether spousal privilege exists at common law and, if so, whether spousal privilege extends to non-curial proceedings — If spousal privilege exists at common law, whether Act restricts or abrogates spousal privilege.

Words and phrases — "compellability", "competence", "spousal privilege".

Appealed from FCA FC: (2010) 185 FCR 409; (2010) 79 ATR 611; (2010) 271 ALR 53; [2010] FCAFC 89; [2010] ALMD 6989.

2: CASES RESERVED

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

Administrative Law

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

A7/2011: [2011] HCATrans 322.

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

Catchwords:

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

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

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

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

Constitutional Law

Sportsbet Pty Ltd v The State of New South Wales & Ors; Betfair Pty Limited v Racing New South Wales & Ors

S118/2011; S116/2011: [2011] HCATrans 230; [2011] HCATrans 231; [2011] HCATrans 232.

Dates heard: 30 & 31 August 2011, 1 September 2011 — *Judgment reserved.*

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

Catchwords:

Constitutional law (Cth) — Freedom of interstate trade, commerce and intercourse — Appellant Sportsbet Pty Ltd ("Sportsbet") a licensed wagering operator in Northern Territory ("NT") — Section 33 of *Racing Administration Act* 1998 (NSW) ("Racing Act") prohibited use of race field information by wagering operators unless operator authorised by approval and complied with conditions of approval — Section 33A(2)(a) of Racing Act and reg 16 of Racing Administration Regulations 2005 (NSW) ("Regulations") gave racing control bodies, including second and third respondents, power to grant approvals and impose conditions including imposition of race field fee of up to 1.5 per cent of wagering turnover — Fees imposed on all wagering operators irrespective of whether in NSW — NSW racing control bodies set thresholds for payment of fees, and arranged reduction in pre-existing fees, such that NSW on-course bookmakers largely unaffected — Sportsbet required to pay fees without regard to fees paid as conditions for licence in NT — TAB Limited ("TAB"), dominant wagering operator in NSW, received sums of money by second and third respondents equal to fees paid by it to those bodies — Whether intended and practical effect of ss 33 and 33A of Racing Act and Pt III of Regulations ("Scheme") was to impose discriminatory burden of protectionist nature on Sportsbet and other interstate wagering operators by prohibiting use of essential element of interstate trade and commerce subject to discretion of racing control bodies — Whether purpose and effect of Scheme was imposition of economic impost on interstate traders which would not be borne by intrastate traders — Whether validity of Scheme to be determined by comparing interstate and intrastate traders' positions — Whether practical effect of Scheme determinable without consideration of offsetting reductions in existing fees payable by intrastate traders — Whether fee conditions imposed by racing control bodies inconsistent with freedom of interstate trade, commerce and intercourse — Whether necessary for Sportsbet to demonstrate that it had a competitive advantage derived from its place of origin, or that the Scheme sought to erode its competitive

advantage — Whether arrangements amongst NSW wagering operators and TAB were private contractual arrangements falling outside the purview of s 49 of *Northern Territory (Self Government) Act* 1978 (Cth) — Whether Scheme appropriate and adapted to legitimate non-protectionist objective — Whether fee conditions, approvals or Scheme invalid — Whether Scheme can be read consistently with freedom of interstate trade, commerce and intercourse pursuant to s 31 of *Interpretation Act* 1987 (NSW) ("Interpretation Act") — *Commonwealth Constitution*, ss 92 and 109.

S118/2011 appealed from FCA FC: (2010) 189 FCR 448; (2010) 274 ALR 12; [2010] FCAFC 132.

Constitutional law (Cth) — Freedom of interstate trade, commerce and intercourse — Appellant Betfair Pty Limited ("Betfair") a licensed betting exchange domiciled in Tasmania — Section 33 of Racing Act prohibited use of race field information by wagering operators unless operator authorised by approval and complied with conditions of approval — Section 33A(2)(a) of Racing Act and reg 16 of Regulations gave racing control bodies, including first and second respondents, power to grant approvals and impose conditions including imposition of race field fee of 1.5 per cent of wagering turnover — Wagering turnover defined as revenue from wagers that an event will occur ("back bets") — Fees imposed on all wagering operators irrespective of whether in NSW — Betfair generates revenue from back bets and bets that an event will not occur — Fees constituted greater proportion of Betfair's gross revenue than that of TAB and other wagering operators with different commission structures — Whether fee conditions imposed by first and second respondents pursuant to s 33 of Racing Act inconsistent with freedom of interstate trade, commerce and intercourse — Whether sufficient for Betfair to show that fee conditions imposed and were intended to impose significantly greater business costs on Betfair than on TAB — Whether Betfair required to demonstrate that practical effect or likely practical effect of fee conditions was to cause it to suffer loss of market share or profitability because fee conditions facially neutral — Whether Scheme appropriate and adapted to legitimate non-protectionist objective — Whether fee conditions, approvals or Scheme invalid — Whether Scheme can be read consistently with freedom of interstate trade, commerce and intercourse pursuant to s 31 of Interpretation Act — *Commonwealth Constitution*, s 92.

S116/2011 appealed from FCA FC: (2010) 189 FCR 356; (2010) 273 ALR 664; [2010] FCAFC 133.

Williams v The Commonwealth

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

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

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

Catchwords:

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

Constitutional law (Cth) — Revenue and appropriation — Payments under Funding Agreement drawn from Consolidated Revenue Fund ("CRF") by Appropriation Acts — Whether drawing of money from CRF for purpose of making payments under Funding Agreement authorised by Appropriation Acts — Whether Appropriation Acts authorised expenditure only for "ordinary annual services of government" — Whether permitted and appropriate to have regard to practices of Parliament to determine "ordinary annual services of the Government" — Whether payments to SUQ under Funding Agreement were "ordinary annual services of government" — *Commonwealth Constitution*, ss 54, 56, 81, 83.

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

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

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

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

Wotton v The State of Queensland & Anor

S314/2010: [2011] HCATrans 191.

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

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

Catchwords:

Constitutional law (Cth) — Implied freedom of communication about government or political matters — Section 132(1)(a) of *Corrective Services Act* 2006 (Q) ("Act") prohibits person from interviewing prisoners or obtaining written or recorded statements from prisoners, including persons on parole — Section 200(2) of Act allows parole board to impose conditions on grant of parole order — Plaintiff convicted of offence of rioting causing destruction and sentenced to imprisonment — Plaintiff granted parole subject to conditions prohibiting, inter alia, attendance at public meetings on Palm Island without prior approval of corrective services officer, and receipt of direct or indirect payments from the media ("Conditions") — Plaintiff sought approval to attend public meeting on Palm Island concerning youth crime and juvenile justice — Plaintiff's request denied by parole officer of second defendant, Central and Northern Queensland Regional Parole Board — Whether s 132(1)(a) of Act contrary to *Commonwealth Constitution* by impermissibly burdening implied freedom — Whether s 132(1)(a) of Act to be construed so as not to apply to a prisoner on parole — Whether s 200(2) of Act invalid to extent it authorises imposition of Conditions — Whether Conditions invalid as infringing implied freedom if s 200(2) of Act construed in conformity with implied freedom.

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

Phonographic Performance Company of Australia Limited & Ors v The Commonwealth & Ors

S23/2010: [2011] HCATrans 117; [2011] HCATrans 118; [2011] HCATrans 119.

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

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

Catchwords:

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

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

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

Corporations Law

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

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

Catchwords:

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

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

Words and phrases — "obligation of fairness".

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

Criminal Law

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

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

Catchwords:

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

Words and phrases — "substantial miscarriage of justice".

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

Bui v Director of Public Prosecutions (Cth)
M127/2011: [2011] HCATrans 328.

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

Catchwords:

Criminal law — Sentencing — Application of State legislation in Crown appeal against sentence instituted by respondent — Applicant pleaded guilty to importation of marketable quantity of heroin contrary to s 307.2(1) of *Criminal Code* (Cth) — Applicant sentenced to three years imprisonment to be released forthwith upon provision of security and good behaviour undertaking — In mitigation, applicant relied on exceptional hardship to infant daughters and undertaking to cooperate with future investigations — Respondent appealed on basis that sentence manifestly inadequate and that sentencing judge erred in finding exceptional circumstances or in weight afforded to exceptional circumstances — Sections 289 and 290 of *Criminal Procedure Act* 2009 (Vic) ("Act") provide that double jeopardy not to be taken into account in determining Crown appeal and sentence — Whether ss 289(2) and 290(3) of Act picked up and applied pursuant to *Judiciary Act* 1903 (Cth), ss 68, 72 or 80, in Crown appeal against sentence instituted by respondent — Whether ss 289(2) and 290(3) of Act inconsistent with s 16A(1) or (2) of *Crimes Act* 1914 (Cth).

Words and phrases — "double jeopardy".

Appealed from Vic SC (CA): [2011] VSCA 61.

PGA v The Queen

A15/2011: [2011] HCATrans 267.

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

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

Catchwords:

Criminal law — Rape and sexual assault — Consent — Existence of common law presumption of marital consent — Appellant charged in 2010 with two counts of rape, allegedly committed in 1963, against then wife — In 1963, s 48 of *Criminal Law Consolidation Act* 1935 (SA) ("Act") made person convicted of rape guilty of felony — Where elements of offence of rape in South Australia in 1963 supplied by common law — Act amended in 1976 to remove presumption of marital consent to sexual intercourse in certain circumstances — Whether common law of Australia in 1963 permitted husband to be found guilty of rape of his wife — Whether common law recognises retrospective imposition of criminal liability absent statutory requirement — Whether appellant liable to be found guilty of offence of rape of his wife allegedly committed in 1963 — Effect of *R v L* (1991) 174 CLR 379 — Whether enactment of *Criminal Law Consolidation Act Amendment Act* 1976 (SA) precluded subsequent amendment of common law position prevailing in 1963 — Act, ss 48 and 73 — *Acts Interpretation Act* 1915 (SA), s 16.

Appealed from SA SC (CCA): [2010] SASCFC 81.

BBH v The Queen

B76/2010: [2011] HCATrans 254.

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

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

Catchwords:

Criminal law — Appeal and new trial — Evidence — Applicant found guilty by jury of maintaining indecent relationship with child under 16, indecent treatment of child under 16 and sodomy of a person under 18 — Complainant was applicant's daughter — Complainant's brother gave evidence of incident involving applicant and complainant which was said to be capable of establishing the

applicant's sexual interest in the complainant — Whether evidence of discreditable conduct admissible in a criminal trial when a reasonable view of that evidence is consistent with innocence— Whether evidence of complainant's brother admissible at applicant's trial — Whether test for admissibility in *Pfennig v The Queen* (1995) 182 CLR 461 applies to evidence of discreditable conduct.

Words and phrases — "discreditable conduct".

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

Evidence

Aytugrul v The Queen
S315/2011: [2011] HCATrans 329.

Date heard: 8 December 2011 — *Judgment reserved.*

Catchwords:

Evidence — Admissibility — Expert evidence — Identification evidence — DNA evidence — Appellant convicted of murder of former partner — Evidence led by prosecution at trial that a hair found on deceased's thumbnail consistent with appellant's mitochondrial DNA profile — Expert witness for prosecution gave evidence that one in 1600 people could be expected to share mito-type of the hair ("frequency estimate"), meaning 99.9 per cent of people in general population would not have a profile matching the hair ("exclusion percentage") — Whether trial judge ought to have applied s 137 (or, alternatively, s 135) of *Evidence Act* 1995 (NSW) ("Act") to exclude reference to exclusion percentage — Whether risk of unfair prejudice to appellant outweighed probative value of reference to exclusion percentage — Whether permissible for Court to determine s 137 question by reference to academic literature not in evidence at trial.

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

High Court of Australia

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

Intellectual Property

Roadshow Films Pty Ltd & Ors v iiNet Limited

S288/2011: [2011] HCATrans 323; [2011] HCATrans 324; [2011] HCATrans 325.

Date heard: 30 November 2011, 1 & 2 December 2011 — *Judgment reserved*.

Catchwords:

Intellectual property — Copyright — Infringement — Authorisation — Appellants owners and exclusive licensees of copyright in commercially-released cinematograph films — Respondent an internet service provider whose agreements with customers contained terms requiring customers to comply with all laws and reasonable directions by respondent as well as obligation not to use service to infringe copyright — Respondent had legal and technical capacity to issue warnings to customers whose services were being used to infringe copyright — Australian Federation Against Copyright Theft, on behalf of appellants, served copyright infringement notices on respondent, alleging users of respondent's network infringing appellants' copyright in cinematographic films by making them available online — Respondent took no steps to notify customers that services being used to infringe copyright — Whether, and if so from what date, respondent authorised infringements of appellants' copyright by users of respondent's internet services ("infringing acts") — Whether respondent had sufficient knowledge of infringing acts to support finding of authorisation — Whether appellants required to present respondent with "unequivocal and cogent evidence" of infringing acts and provide undertaking to reimburse and indemnify respondent for reasonable cost of verifying infringing acts — Whether respondent's conduct constituted "countenancing" of infringing acts — *Copyright Act* 1968 (Cth), ss 36 and 101 — *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

Words and phrases — "authorise", "cinematograph films", "copyright", "countenance", "infringe", "unequivocal and cogent evidence".

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

Mortgages

Waller v Hargraves Secured Investments Limited

S223/2011: [2011] HCATrans 278.

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

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

Catchwords:

Mortgages — Primary industry — Farm debt mediation — Mortgagee's remedies — Possession — Section 8(1) of *Farm Debt Mediation Act* 1994 (NSW) ("Act") provides that creditor to whom farm debt is owed under farm mortgage must not take enforcement action against farmer until notice given of availability of mediation ("Notice") — Where Rural Assistance Authority ("Authority") may issue certificate that Act does not apply to farm mortgage in prescribed circumstances — Where s 8(1) of Act inapplicable where certificate issued by Authority in force "in respect of the farm mortgage concerned" — Where enforcement action taken by creditor other than in compliance with Act is void — Respondent loaned money to appellant secured by statutory charge over appellant's farm under *Real Property Act* 1900 (NSW) — Appellant breached terms of loan agreement and respondent gave Notice — Parties engaged in mediation under Act and entered into deed of settlement and second loan agreement — Appellant defaulted under second loan agreement — Parties entered into third loan agreement, under which appellant also defaulted — Respondent did not give Notice and applied for certificate from Authority — Authority issued certificate referring to appellant's indebtedness under first loan agreement — Respondent commenced proceedings for possession of property and money judgment — Whether extinguishment of first and second farm debts and creation of new farm debts by second and third loan agreements created new farm mortgages — Whether certificate issued by Authority void or issued in respect of previous farm mortgage — Whether respondent failed to comply with s 8(1) of Act by not giving Notice to appellant in respect of farm mortgage sought to be enforced — Whether respondent's non-compliance with Act requires setting aside of grant of possession and money judgment in amount owing under mortgage — Act, ss 4, 6, 8 and 11.

Words and phrases — "enforcement action", "farm debt", "farm mortgage", "in respect of the farm mortgage concerned".

Appealed from NSW SC (CA): [2010] NSWCA 300.

Restitution

Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Haxton; Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Bassat; Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Cunningham's Warehouse Sales Pty Ltd
M128/2010; M129/2010; M130/2010—M132/2010:
[2011] HCATrans 50; [2011] HCATrans 51.

Dates heard: 9 & 10 March 2011 — *Judgment reserved.*

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

Catchwords:

Restitution — Restitution resulting from unenforceable, incomplete, illegal or void contracts — Recovery of money paid or property transferred — Respondents investors in tax driven blueberry farming schemes — Funds for farm management fees lent to investors by Rural Finance Ltd ("Rural") — Appellant lent money to Rural — Rural subsequently wound up — Loan contracts between respondents and Rural assigned to applicant — Appellant's enforcement of contractual debts statute-barred — Where parties agreed in court below loan contracts illegal and unenforceable — Whether total failure of consideration — Whether respondents' retention of loan funds "unjust".

Restitution — Assignment of rights of restitution — Where Deed of Assignment assigning Rural's loans to appellant included assignment of "legal right to such debts … and all legal and other remedies" — Whether rights of restitution able to be assigned — Whether rights of restitution assigned in this case.

Appealed from Vic SC (CA): (2010) 265 ALR 336; [2010] VSCA 1.

Statutes

Australian Education Union v Department of Education and Children's Services

A4/2011: [2011] HCATrans 269.

Date heard: 28 September 2011 — *Judgment reserved*.

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

Catchwords:

Statutes — Acts of Parliament — Interpretation — Statutory powers and duties — Conferral and extent of power — General matters constrained by specific — Applicants teachers appointed under s 9(4) of *Education Act* 1972 (SA) ("Act") — Where s 15 of Act enabled Minister to appoint teachers "officers of the teaching service" — Where s 9(4) of Act enabled Minister to appoint officers and employees "in addition to" officers of teaching service — Meaning of "in addition to" — Whether general power in s 9(4) constrained by specific power in s 15 — Whether within Minister's

power to appoint teachers under s 9(4) of Act or whether s 15 sole source of Executive power.

Words and phrases — "in addition to".

Appealed from SA SC (FC): [2010] SASC 161.

Torts

Strong v Woolworths Limited t/as Big W & Anor

S172/2011: [2011] HCATrans 194.

Date heard: 13 May 2011 — *Judgment reserved*.

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

Catchwords:

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

Words and phrases — "necessary condition".

Appealed from SC NSW (CA): [2010] NSWCA 282.

3: ORIGINAL JURISDICTION

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

Citizenship and Migration

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

Catchwords:

Citizenship and migration — Migration — Ministerial discretion — Procedural fairness — Section 195A of *Migration Act* 1958 (Cth) ("Act") empowers first defendant ("Minister") to grant visa to person in immigration detention pursuant to s 189 of Act, if Minister thinks "in the public interest to do so" — Minister not obliged to consider whether to exercise power to grant visa — Section 417 Act of empowers Minister to substitute decision of Refugee Review Tribunal ("RRT") made under s 415 of Act with another decision more favourable to an applicant, if Minister thinks "in the public interest to do so" — Section 48B of Act empowers Minister to determine that s 48A of Act does not apply to prevent application for protection visa made by non-citizen, if Minister thinks "in the public interest to do so" — In December 2009, favourable assessment made under Minister's Guidelines for s 195A in respect of plaintiff, though matter not referred to Minister ("the s 195A decision") — Plaintiff applied for Ministerial intervention pursuant to ss 48B and 417 of Act — In December 2010, Minister's delegate informed plaintiff that Minister had decided not to exercise power under s 417 of Act ("the s 417 decision), and plaintiff's s 48B application had been assessed against Minister's Guidelines but was not referred to Minister ("the s 48B decision") — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 195A decision by denying plaintiff opportunity to make submissions addressing matters in s 195A and Department's adverse summary of initial departmental processes — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 417 decision by denying plaintiff opportunity to address criterion used in the s 195A decision — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 417 decision and the s 48B decision by denying plaintiff opportunity to address adverse material.

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

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

S10/2011

Catchwords:

Citizenship and migration — Migration — Ministerial discretion — Procedural fairness — Section 417 of *Migration Act* 1958 (Cth) ("Act") empowers first defendant ("Minister") to substitute decision of Refugee Review Tribunal ("RRT") made under s 415 of Act with another decision more favourable to an applicant, if Minister thinks "in the public interest to do so" — Section 48B of Act empowers Minister to determine that s 48A of Act does not apply to prevent application for protection visa made by non-citizen, if Minister thinks "in the public interest to do so" — Plaintiff applied for Ministerial intervention pursuant to ss 48B and 417 of Act — In October 2010, Minister's delegate informed plaintiff that Minister had decided not to exercise power under s 417 of Act ("the s 417 decision), and plaintiff's s 48B application had been assessed against Minister's Guidelines but was not referred to Minister ("the s 48B decision") — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff in the s 48B decision and the s 417 decision by taking into consideration certain matters without providing plaintiff with opportunity to know about or comment on those matters — Whether plaintiff had legitimate expectation that information provided by him in respect of his applications would be considered in assessing whether he fell within Guidelines — Whether Minister and/or second defendant through his officers failed to apply Minister's Guidelines correctly by taking into account irrelevant considerations or failing to take into account relevant considerations — Whether jurisdictional error occurred irrespective of privative clause in s 474(2) of Act.

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

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

S49/2011

Catchwords:

Citizenship and migration — Migration — Ministerial discretion — Procedural fairness — Section 417 of *Migration Act* 1958 (Cth)

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

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

Kaur v Minister for Immigration and Citizenship & Anor
S43/2011

Catchwords:

Citizenship and migration — Migration — Ministerial discretion — Procedural fairness — Section 351 of *Migration Act* 1958 (Cth) ("Act") empowers first defendant ("Minister") to substitute decision of Migration Review Tribunal ("MRT") made under s 349 of Act with another decision more favourable to an applicant, if Minister thinks "in the public interest to do so" — Plaintiff granted Subclass 573 Higher Education Sector student visa in September 2005, expiring in August 2008 — In June 2006, Minister's delegate notified plaintiff by letter that she had been granted Subclass 573 Higher Education Sector student visa with permission to change education provider — Letter stated plaintiff's visa valid until June 2008 — Plaintiff applied for Subclass 572 Vocational Education and Training Sector visa in September 2008 — Applications for Subclass 572 visas must be made within 28 days after day when last substantive visa ceased to

be in effect: Migration Regulations 1994 (Cth), Sched 2, sub-item 572.211(3)(c)(i) — Minister's delegate refused plaintiff's application for Subclass 572 visa because application filed out of time — MRT rejected plaintiff's application for review of delegate's decision — Plaintiff unsuccessfully applied for Ministerial intervention under s 351 of Act — Federal Court of Australia rejected plaintiff's application for review of decision of MRT — Plaintiff again sought Ministerial intervention under s 351 of Act — In January 2011, Minister's delegate informed plaintiff that second Ministerial intervention application would not be forwarded to Minister — Whether Minister and/or second defendant through his officers failed to accord procedural fairness to plaintiff by considering information or matters adverse to plaintiff without providing plaintiff with opportunity to know about or comment on those matters — Whether second defendant through his officers denied plaintiff procedural fairness by failing to apply Minister's Guidelines correctly — Whether jurisdictional error occurred irrespective of privative clause in s 474(2) of Act.

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

Constitutional Law

Crump v State of New South Wales
S165/2011

Catchwords:

Constitutional law (Cth) — Chapter III — State Supreme Courts — Variation or alteration of judgment, decree, order or sentence by Parliament — Plaintiff convicted of murder and conspiracy to murder and sentenced to life imprisonment on both counts — Sentencing judge expressed view that plaintiff should never be released — Pursuant to s 13A of *Sentencing Act* 1989 (NSW), Supreme Court of New South Wales subsequently fixed dates on which plaintiff eligible for release on parole — Section 154A of *Crimes (Administration of Sentences) Act* 1999 (NSW) ("Administration Act") provides that Parole Authority may make order directing release of person subject to non-release recommendation only in prescribed circumstances — Parole Board determined plaintiff ineligible for parole pursuant to s 154A of Administration Act — Whether s 154A of Administration Act invalid because it has effect of varying or otherwise altering a judgment, decree, order or sentence of Supreme Court of New South Wales in a matter within meaning of s 73 of *Commonwealth Constitution*.

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

4: SPECIAL LEAVE GRANTED

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

Competition Law

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

M42/2011—M44/2011; M45/2011; M46/2011: [2011] HCATrans 300.

Date heard: 28 October 2011 — *Special leave granted in matters M42/2011 — M44/2011. Matters M45/2011 and M46/2011 referred to an enlarged Court.*

Catchwords:

Competition law — Declared services — Rio Tinto Ltd and associated entities ("Rio") operate Hamersley and Robe railway lines in Pilbara region — The Pilbara Infrastructure Pty Ltd ("TPI") applied for declarations to allow third party trains and rolling stock to move along Hamersley and Robe lines — Commonwealth Treasurer declared Hamersley and Robe lines for period of 20 years pursuant to s 44H of *Trade Practices Act* 1974 (Cth) (now *Competition and Consumer Act* 2010 (Cth)) ("Act") — Australian Competition Tribunal ("Tribunal") made determination, pursuant to s 44K(7) of Act, setting aside Hamersley declaration and varying Robe declaration to ten year period — Tribunal found, inter alia, that Hamersley and Robe lines are natural monopolies, but access would be, by reason of putative benefits associated with construction of alternate railway lines and cost to Rio and therefore national economy, contrary to public interest — Full Court of Federal Court upheld Tribunal's decision in respect of Hamersley line and set aside limited declaration in respect of Robe line — Whether criterion for declaration of service specified in s 44H(4)(b) of Act imposes test of private profitability or test applying economic principles taking into account natural monopoly characteristics — Whether public interest criterion in s 44H(4)(f) of Act requires or permits inquiry into likely net balance of social costs and benefits if declaration made — Whether s 44H of Act confers broad discretion on Minister to conduct social cost-benefit analysis if prescribed matters in s 44H point in favour of declaration being made — Whether Minister's discretion confined to matters within purpose and object of s 44H — Whether open to National Competition

Council to recommend Hamersley and Robe line services be subject of declaration under s 44H of Act.

Words and phrases — "uneconomical for anyone to develop another facility to provide the service".

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

Contracts

ALH Group Property Holdings Pty Limited v Chief Commissioner of State Revenue

S128/2011: [2011] HCATrans 215.

Date heard: 12 August 2011 — *Special leave granted on limited grounds.*

Catchwords:

Contracts — Discharge by agreement — Novation — Contract for sale of land ("Parkway Hotel") between Oakland Glen Pty Ltd ("Vendor") and Permanent Trustee Company Limited as trustee of ALE Direct Property Trust ("Purchaser") executed in 2003 ("2003 Contract") — Deed of Consent and Assignment between Vendor, Purchaser and applicant, executed in 2008, assigned rights and entitlements of Purchaser under 2003 Contract to applicant ("Deed") — Commissioner assessed Deed to ad valorem duty under s 22(2) of *Duties Act* 1997 (NSW) ("Duties Act") as transfer of dutiable property — By Deed of Termination, Vendor and applicant rescinded Deed and 2003 Contract and entered new contract for sale of Parkway Hotel on which ad valorem duty paid — Applicant claimed Deed of Termination avoided liability of Deed for ad valorem duty and conferred right to refund under s 50 of Duties Act — Whether Deed effected novation of 2003 Contract — Whether Deed rescinded 2003 Contract and substituted for it a new contract for sale of Parkway Hotel between Vendor and applicant on terms of 2003 Contract as varied by Deed — Whether Deed a "hybrid tripartite contract" wherein Vendor's obligations flowed from assignment and applicant's obligations flowed from Deed — Duties Act ss 8(1)(a), 22(2), 50.

Words and phrases — "hybrid tripartite contract".

Appealed from NSW SC (CA): [2011] NSWCA 32.

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

Corporations Law

Kizon v The Queen; Mansfield v The Queen

P28/2011; P29/2011: [2011] HCATrans 331.

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

Catchwords:

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

Words and Phrases — "information".

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

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

S232/2011: [2011] HCATrans 296.

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

Catchwords:

Corporations law — Financial products — Litigation funding — Parties entered into funding deed under which applicant ("ILP") was to fund proceedings brought by first respondent ("CHM") ("Funding Deed") — Clause 4 of Funding Deed provided for early termination fee in event of change of control of CHM — CHM granted fixed and floating charge in favour of ILP as security for payment of moneys owed ("Charge") — CHM entered agreement with second respondent, Cape Lambert Resources Ltd ("CLR"), under which CLR

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

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

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

P6/2011; P7/2011: [2011] HCATrans 271.

Date heard: 29 September 2011 — *Special leave granted*.

Catchwords:

Corporations law — Continuous disclosure — Misleading and deceptive conduct — Fortescue Metals Group Ltd ("FMG") entered into framework agreements with three Chinese entities — Forrest the Chairman and CEO of FMG — FMG made public announcements that FMG and Chinese entities had executed binding agreements to build, finance and transfer infrastructure for mining project in Pilbara region — Whether, in making announcements, FMG contravened ss 674(2) and 1041H of *Corporations Act* 2001 (Cth) ("Act"), and Forrest contravened ss 180(1) and 674(2) of Act — Whether announcements made by FMG misleading or deceptive or likely to be misleading or deceptive in contravention of s 1041H of Act or s 52 of *Trade Practices Act* 1974 (Cth) — Whether announcements would have been understood by reasonable person

as statement of FMG's honest, or honest and reasonable, belief as to terms and effect of framework agreements rather than statements that warranted or guaranteed their truth — Whether FMG and Forrest honestly, or honestly and reasonably, believed framework agreements effective as binding contracts — Whether FMG and Forrest contravened s 674(2) of Act because neither had "information" that framework agreements unenforceable at law — Whether, if announcements by FMG misleading or deceptive or likely to be misleading or deceptive, Forrest contravened s 180(1) of Act — Whether s 180(1) of Act provides for civil liability of directors for contraventions of other provisions of Act — Whether s 180(2) of Act available as defence to alleged contravention of s 180(1) if proceedings based on contravention of provisions containing exculpatory provisions — Whether s 180(2) of Act applies to decisions concerning compliance with Act.

Contracts — Agreements contemplating existence of fuller contracts — Certainty — Whether framework agreements contained binding core obligations on Chinese entities in respect of Pilbara project — Whether framework agreements uncertain as to subject matter — Whether inclusion of terms making price determinable by third party rendered framework agreements uncertain.

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

Costs

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

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

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

Catchwords:

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

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

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

State of New South Wales v Williamson
S259/2011: [2011] HCATrans 340.

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

Catchwords:

Costs — Recoverable costs — Limitations — Personal injury damages — Respondent sought damages from applicant for trespass to person constituting battery and false imprisonment — Judgment for respondent entered by consent without admission as to liability — Respondent sought declaration that costs of proceeding not regulated by s 338 of *Legal Profession Act* 2004 (NSW) — Whether respondent's claim a claim for personal injury damages — Whether deprivation of liberty and loss of dignity capable of being personal injury or "impairment of a person's physical or mental condition" for purpose of *Civil Liability Act* 2002 (NSW), s 11 — Whether claim for damages that includes claims based on false imprisonment and assault, which are not severable, a claim for personal injury damages — Whether claim for damages for false imprisonment severable from claim for damages for assault — Whether New South Wales Court of Appeal bound by decision in *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136.

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

Criminal Law

Baker v The Queen
M67/2011: [2011] HCATrans 304.

Date heard: 28 October 2011 — *Special leave granted.*

Catchwords:

Criminal law — Evidence — Hearsay — Admissions — Applicant, along with co-accused at trial, LM, involved in altercation following which one Mr Snowball fell through glass window to street below and died — Applicant found guilty of murder of Mr Snowball — LM acquitted — Witnesses gave competing versions of events leading to death of Mr Snowball — Version implicating applicant as person who pushed or punched Mr Snowball in manner resulting in his fall

was preferred by jury — In case against LM, Crown relied on evidence of admissions made by LM that suggested he was responsible for Mr Snowball's fall — Trial judge directed jury that case against each accused was to be assessed only in light of evidence applicable to each accused, meaning evidence of LM's admissions not evidence in case against applicant — Whether evidence of LM's admissions was admissible in exculpation of applicant — Whether potential exception to hearsay considered in *Bannon v The Queen* (1995) 185 CLR 1 ought to be recognised and whether LM's admissions within scope of any such exception — Whether applicant's trial miscarried and jury's verdict unsafe or unsatisfactory by reason of exclusion of LM's admissions.

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

R v Khazaal

S236/2011: [2011] HCATrans 279.

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

Catchwords:

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

Words and phrases — "assistance in a terrorist act", "connected with", "evidential burden".

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

R v Getachew

M58/2011: [2011] HCATrans 275.

Date heard: 29 September 2011 — *Special leave granted.*

Catchwords:

Criminal law — Rape — Mens rea — Trial judge directed jury that mens rea established if accused ("respondent") aware that complainant might be asleep — Respondent led no evidence of his mental state at trial — Court of Appeal held direction precluded consideration by jury of possibility that respondent believed complainant was consenting to anal intercourse while asleep — Whether sufficient evidence before jury to require direction that respondent may have believed complainant consenting while asleep — Whether incumbent upon respondent's counsel to raise respondent's awareness of complainant's lack of consent — Appropriate test to be applied in determining sufficiency of evidence for purpose of giving direction — Whether respondent able to hold belief that complainant gave consent where jury found beyond reasonable doubt that respondent knew or believed complainant asleep at time of penetration — *Crimes Act* 1958 (Vic), ss 36, 37, 37AA, 37AAA, 38 — *Pemble v The Queen* (1971) 124 CLR 107.

Appealed from Vic SC (CA): [2011] VSCA 164.

Baiada Poultry Pty Ltd v The Queen

M20/2011: [2011] HCATrans 251.

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

Catchwords:

Criminal law — Occupational health and safety — Duties of employer — Control — Applicant convicted of breaching s 21(1) of *Occupational Health and Safety Act* 2004 (Vic) ("Act") following death of driver ("decedent") engaged as independent contractor by applicant — Decedent struck by crate being moved by forklift operated by unlicensed driver employed by third party company engaged as independent contractor by applicant — Court of Appeal held trial judge's directions to jury inadequate on basis that jury ought to have been directed that, if satisfied that control on the part of the applicant was established, they were bound to consider whether they were satisfied beyond reasonable doubt that the applicant's engagement of independent contractors was not sufficient to discharge obligations — Court of Appeal held no substantial miscarriage of justice occasioned by misdirection and applied s 568(1) of *Crimes Act* 1958 (Vic) ("proviso") to dismiss appeal — Whether Court of Appeal erred in application of proviso by finding it had discretion to apply proviso and in circumstances where applicant was denied jury's consideration of one of its principal defences.

Appealed from Vic SC (CA): (2011) 203 IR 396; [2011] VSCA 23.

Defamation

Harbour Radio Pty Limited v Trad
S141/2011: [2011] HCATrans 234.

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

Catchwords:

Defamation — Defence of substantial truth — Application of defence — Respondent engaged in public speech concerning activities of Radio 2GB, a station owned and operated by the applicant — Radio 2GB broadcast response to respondent's speech consisting of a presenter monologue, audio recording of part of respondent's speech and talkback calls — Respondent brought proceedings for defamation — Jury found certain defamatory imputations arose from broadcast — Applicant relied on, inter alia, defence of substantial truth — Trial judge found certain imputations were matters of substantial truth and applicant not actuated by malice — Court of Appeal overturned trial judge's findings with respect to defence of truth on the basis that while the correct test had been identified, it was not applied, and therefore could not be sustained — Whether trial judge failed to apply relevant test for defence of truth — *Defamation Act* 1974 (NSW), s 15.

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

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

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

Catchwords:

Defamation — Defence of qualified privilege — Respondent involved in bid to invest funds in South Sydney District Rugby League Football Club ("Club") in exchange for controlling interest — Applicant, employee of Construction, Forestry, Mining and Energy Union ("CFMEU"), opposed respondent's bid — Prior to Extraordinary General Meeting at which bid was to be put to Club members, respondent sent letter of complaint to State Secretary of CFMEU, copied to former Chairman of Club, which also came to attention of applicant's immediate supervisor — Trial judge found letter conveyed three defamatory imputations and rejected, inter

alia, respondent's plea of common law qualified privilege on the basis that there was no "pressing need" for the respondent to protect his interests by volunteering the defamatory information — Court of Appeal held defence of qualified privilege established since respondent had a legitimate interest in publishing the defamatory letter, and that the trial judge erred in applying the test of "pressing need" to establish qualified privilege — Whether defence of qualified privilege at common law requires evidence of "pressing need" to communicate defamatory matter — Whether absence of "pressing need" decisive — Whether requisite reciprocity of interest existed on occasion of communication of defamatory matter — Whether respondent's communication of suspicion of applicant's criminality fairly warranted to protect of further respondent's interests.

Words and phrases — "pressing need".

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

Extradition

The Hon Brendan O'Connor, Commonwealth Minister for Home Affairs v Zentai

P39/2011: [2011] HCATrans 339.

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

Catchwords:

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

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

Industrial Law

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

M8/2011: [2011] HCATrans 245.

Date heard: 2 September 2011 — *Referred to an enlarged Court.*

Catchwords:

Industrial law — Registered organisations — Interpretation of *Fair Work (Registered Organisations) Act* 2009 (Cth) ("Act") — Third respondent applied to Australian Industrial Relations Commission ("AIRC") for registration and organisation under *Workplace Relations Act* 1996 (Cth) — Applicant objected to registration — AIRC granted application for registration — Full Court of Federal Court ("FCAFC") quashed decision of AIRC and third respondent's registration because its rules did not contain "purging rule" — Third respondent applied to AIRC for leave to change its rules — Applicant objected to application and FCAFC reserved decision — On 1 July 2009, s 26A of the Act, which provides that registration of an organisation which would have been valid but for the absence of a purging rule is taken to be valid and always have been valid, came into effect — First respondent informed applicant and third respondent that Fair Work Australia regarded itself as obliged by s 26A of the Act to treat third respondent as registered organisation — Third respondent withdrew application to AIRC to alter rules — Whether s 26A of the Act validates registration of third respondent when such registration previously quashed by FCAFC prior to commencement of s 26A — Whether s 26A invalid as impermissible usurpation of, or interference with, judicial power of Commonwealth.

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

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

M18/2011: [2011] HCATrans 243.

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

Catchwords:

Industrial law — Adverse action — General protection — First respondent ("Barclay") an employee of applicant ("Institute") and Sub-Branch President at Institute of second respondent ("AEU") — Barclay sent email to AEU members employed at Institute noting

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

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

Property Law

Clodumar v Nauru Lands Committee
M37/2011

Appeal as of right pursuant to s 5(1) of Nauru (High Court Appeals) Act *1976 (Cth).*

Catchwords:

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

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

Public International Law

PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission

S166/2011: [2011] HCATrans 280.

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

Catchwords:

Public international law — Jurisdiction — Sovereign immunity — Section 11(1) of *Foreign States Immunities Act* 1985 (Cth) ("Act") provides that a foreign State is not immune in a proceeding that concerns a "commercial transaction" — Respondent commenced proceedings against applicant alleging anti-competitive conduct in relation to international air freight contrary to Pt IV of *Trade Practices Act* 1974 (Cth) — Applicant a "separate entity" of Republic of Indonesia, as defined in s 22 of Act — Respondent alleges applicant participated in conduct outside Australia amounting to arrangements or understandings with other carriers concerning fuel surcharges — Whether civil penalty proceeding brought by respondent against an entity otherwise entitled to sovereign immunity falls within "commercial transaction" exception in Act — Whether applicant immune under Act from exercise of jurisdiction.

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

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

Statutes

Newcrest Mining Limited v Thornton

P24/2011: [2011] HCATrans 337.

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

Catchwords:

Statutes — Construction — Contribution — Respondent injured in workplace accident — Settlement reached with employer and consent judgment entered — Respondent subsequently issued summons against applicant, owner of mine site at which respondent injured — Applicant sought and received summary judgment on ground that respondent already compensated for injury by

employer and s 7(1)(b) of *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA) ("Act") precluded recovery of additional damages — Whether s 7(1)(b) of Act applies only to damages awarded following judicial assessment or also to judgments entered by consent — Whether Western Australia Court of Appeal ought to have followed decision of equivalent intermediate appellate court in respect of equivalent legislation — *Nau v Kemp & Associates* [2010] Aust Torts Reports 82-064.

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

Taxation and Duties

The Commissioner of Taxation of the Commonwealth of Australia v Bargwanna & Anor

S104/2011: [2011] HCATrans 211.

Date heard: 12 August 2011 — *Special leave granted.*

Catchwords:

Taxation and duties — Income tax — Non-assessable income — Exempt entities — Funds established for public charitable purposes by instrument of trust — Section 50-105 of *Income Tax Assessment Act* 1997 (Cth) ("ITAA") requires Commissioner to endorse entity as exempt from income tax in certain circumstances — Section 50-60 of ITAA provides that funds established in Australia for public charitable purposes by will or instrument of trust are not exempt from income tax unless, inter alia, "the fund is applied for the purposes for which it was established" — Respondents constituted by deed the Kalos Metron Charitable Trust ("Fund") for public charitable purposes — Fund administered by accountant and held in accountant's trust account — Interest from Fund applied to pay accountant's fees — Respondents obtained housing loan with provision of mortgage security — Loan arrangements involved Fund depositing $210,000 into interest-offset account with lender — Respondents deposited other funds into account and withdrew funds in excess of deposits — Applicant refused Fund's application for endorsement under s 50-105 of ITAA — Whether application of part of Fund for purposes other than public charitable purposes meant criteria in s 50-60 of ITAA not satisfied — Whether misapplication of Fund moneys must be deliberate or intentional for conclusion that "is applied" criterion in s 50-60 not satisfied — Whether relevant inquiry is to application of Fund as a whole rather than individual transactions.

Words and phrases — "deliberate", "the fund is applied for the purposes for which it was established".

Appealed from FCA FC: (2010) 191 FCR 184; (2011) ATC 20-244; [2010] FCAFC 126.

Torts

Barclay v Penberthy & Ors
P25/2011: [2011] HCATrans 333.

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

Catchwords:

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

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

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* 09 [2011] HCAB 09.

Clodumar v Nauru Lands Committee
M37/2011

Appeal as of right pursuant to s 5(1) of Nauru (High Court Appeals) Act *1976 (Cth) – Full Court hearing date vacated on 22 November 2011.*

6: SPECIAL LEAVE REFUSED

Canberra: 1 December 2011

(Publication of reasons)

Applicant	*Respondent*	*Court appealed from*	*Result*
Hammerton	Gleeson & Anor (A20/2011)	Full Court of the Supreme Court of South Australia [2009] SASC 283	Application dismissed [2011] HCASL 189
Mowen	Queensland State Government (B41/2011)	Supreme Court of Queensland (Court of Appeal) [2011] QCA 137	Application dismissed [2011] HCASL 190
Kyprianou	The Queen (B55/2011)	Supreme Court of Queensland (Court of Appeal) [2008] QCA 149	Application dismissed [2011] HCASL 191
Bahonko	Attorney-General for the State of Victoria (M112/2011)	Supreme Court of Victoria (Court of Appeal) [2011] VSCA 208	Application dismissed [2011] HCASL 192
Shaw	Rigby Cooke Lawyers (M113/2011; M114/2011)	Supreme Court of Victoria (Court of Appeal) (no media neutral citation)	Application dismissed [2011] HCASL 193
SZOWU	Minister for Immigration and Citizenship & Anor (S275/2011)	Federal Court of Australia [2011] FCA 860	Application dismissed [2011] HCASL 194
SZOXP	Minister for Immigration and Citizenship & Anor (S276/2011)	Federal Court of Australia [2011] FCA 923	Application dismissed [2011] HCASL 195
SZOQA & Anor	Minister for Immigration and Citizenship & Anor (S277/2011)	Federal Court of Australia [2011] FCA 907	Application dismissed [2011] HCASL 196
SZOXY	Minister for Immigration and Citizenship & Anor (S295/2011)	Federal Court of Australia [2011] FCA 904	Application dismissed [2011] HCASL 197
SZOPV	Minister for Immigration and Citizenship & Anor (S296/2011)	Federal Court of Australia [2011] FCA 913	Application dismissed [2011] HCASL 198
SZOWQ	Minister for Immigration and Citizenship & Anor (S302/2011)	Federal Court of Australia [2011] FCA 924	Application dismissed [2011] HCASL 199

Islam	Minister for Immigration and Citizenship & Anor (S305/2011)	Federal Court of Australia [2011] FCA 933	Application dismissed [2011] HCASL 200
SZOYF & Anor	Minister for Immigration and Citizenship & Anor (S312/2011)	Federal Court of Australia [2011] FCA 962	Application dismissed [2011] HCASL 201
SZOUL & Anor	Minister for Immigration and Citizenship & Anor (S316/2011)	Federal Court of Australia [2011] FCA 945	Application dismissed [2011] HCASL 202
SZOWX	Minister for Immigration and Citizenship & Anor (S274/2011)	Federal Court of Australia [2011] FCA 871	Application dismissed [2011] HCASL 203
SZQAO	Minister for Immigration and Citizenship & Anor (S292/2011)	Federal Court of Australia [2011] FCA 874	Application dismissed [2011] HCASL 204
SZOZO	Minister for Immigration and Citizenship & Anor (S307/2011)	Federal Court of Australia [2011] FCA 944	Application dismissed [2011] HCASL 205
SZOZN	Minister for Immigration and Citizenship & Anor (S308/2011)	Federal Court of Australia [2011] FCA 959	Application dismissed [2011] HCASL 206
SZOZD	Minister for Immigration and Citizenship & Anor (S309/2011)	Federal Court of Australia [2011] FCA 946	Application dismissed [2011] HCASL 207
Castel Electronics Pty Ltd	Toshiba Singapore Pte Ltd (M49/2011)	Full Court of the Federal Court of Australia [2011] FCAFC 55	Application dismissed [2011] HCASL 208

Canberra: 9 December 2011

(Publication of reasons)

Criminal

Applicant	*Respondent*	*Court appealed from*	*Result*
Ljuboja	The Queen (P32/2011)	Supreme Court of Western Australia (Court of Appeal) [2011] WASCA 143	Application dismissed [2011] HCASL 209

Canberra: 9 December 2011

(Heard in Canberra by video link to Perth)

Civil

Applicant	*Respondent*	*Court appealed from*	*Result*
Western Areas Exploration Pty Ltd	Streeter & Ors (P4/2011)	Supreme Court of Western Australia (Court of Appeal) [2011] WASCA 17	Special leave refused with costs [2011] HCATrans 330
Kitching & Anor	Phillips & Ors	Supreme Court of Western Australia (Court of Appeal) [2011] WASCA 19	Special leave refused with costs [2011] HCATrans 335

Criminal

Applicant	*Respondent*	*Court appealed from*	*Result*
Dale & Ors	State of Western Australia & Ors (P17/2011)	Full Court of the Federal Court of Australia [2011] FCAFC 46	Special leave refused [2011] HCATrans 332
Ryan	State of Western Australia (P11/2011)	Supreme Court of Western Australia (Court of Appeal) [2011] WASCA 7	Special leave refused [2011] HCATrans 334
Tema	State of Western Australia (P11/2011)	Supreme Court of Western Australia (Court of Appeal) [2011] WASCA 41	Special leave refused [2011] HCATrans 336
Pellew (3 applications)	State of Western Australia (P19/2011; P22/2011; P23/2011)	Supreme Court of Western Australia (Court of Appeal) [2011] WASCA 86	Special leave refused [2011] HCATrans 338
Hajinoor (2 applications)	State of Western Australia (P20/2011; P21/2011)	Supreme Court of Western Australia (Court of Appeal) [2011] WASCA 86	Special leave refused [2011] HCATrans 338

Sydney: 9 December 2011

Civil

Applicant	*Respondent*	*Court appealed from*	*Result*
Apple Inc & Anor	Samsung Electronics Co Limited & Anor (S392/2011)	Full Court of the Federal Court of Australia [2011] FCAFC 156	Special leave refused with costs [2011] HCATrans 341
Wagga Wagga Towing Pty Limited	O'Toole & Anor (S266/2011)	Supreme Court of New South Wales (Court of Criminal Appeal) [2011] NSWCA 191	Special leave refused with costs [2011] HCATrans 343
Commissioner of Taxation of the Commonwealth of Australia	Multiflex Pty Ltd (M159/2011)	Full Court of the Federal Court of Australia [2011] FCAFC 142	Special leave refused with costs [2011] HCATrans 344

Applicant	*Respondent*	*Court appealed from*	*Result*
Baguley	Kempsey Shire Council (S276/2010)	Supreme Court of New South Wales (Court of Appeal) [2010] NSWCA 284	Special leave refused with costs [2011] HCATrans 345
Harris	Bellemore (S268/2011)	Supreme Court of New South Wales (Court of Criminal Appeal) [2011] NSWCA196	Special leave refused with costs [2011] HCATrans 346
SZOBI	Minister for Immigration and Citizenship & Anor (S2/2011)	Full Court of the Federal Court of Australia [2010] FCAFC 151	Special leave refused with costs [2011] HCATrans 347

Criminal

Applicant	*Respondent*	*Court appealed from*	*Result*
El Zayet	The Queen (S163/2011)	Supreme Court of New South Wales (Court of Criminal Appeal) [2011] NSWCCA 62	Special leave refused [2011] HCATrans 342
Aouad	The Queen (S237/2011)	Supreme Court of New South Wales (Court of Criminal Appeal) [2011] NSWCCA 62	Special leave refused [2011] HCATrans 342
Darwiche	The Queen (S262/2011)	Supreme Court of New South Wales (Court of Criminal Appeal) [2011] NSWCCA 62	Special leave refused [2011] HCATrans 342
Osman	The Queen (S378/2011)	Supreme Court of New South Wales (Court of Criminal Appeal) [2011] NSWCCA 62	Special leave refused [2011] HCATrans 342