



HIGH COURT BULLETIN

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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

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Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales	Constitutional Law
Kentwell v The Queen	Criminal Law
O'Grady v The Queen	Criminal Law
Gray v Richards	Damages
Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd	Industrial Law
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288	Negligence

2: Cases Reserved

Case	Title
Argos Pty Ltd and Ors v Simon Corbell, Minister for the Environment and Sustainable Development & Ors	Administrative Law
Henderson v State of Queensland	Criminal Law
Minister for Immigration and Border Protection v SZSCA & Anor	Migration
CPCF v Minister for Immigration and Border Protection & Anor	Migration
Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon & Anor	Tort Law

3: Original Jurisdiction

Case	Title
Duncan v The State of New South Wales; NuCoal Resources Ltd v State of New South Wales; Cascade Coal Pty Ltd & Ors v The State of New South Wales	Constitutional Law
Plaintiff S297/2013 v Minister for Immigration and Border Protection & Anor	Constitutional Law

4: Special Leave Granted

Case	Title
Fortress Credit Corporation (Australia) II & Anor v William John Fletcher and Katherine Elizabeth Barnet as Liquidators of Octaviar Limited (Receivers and Managers Appointed) (In Liquidation) and Octaviar Administration Pty Ltd & Ors	Corporations Law
Uelese v Minister for Immigration and Border Protection & Anor	Migration

1: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the October 2014 sittings.

Constitutional Law

Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales

[S36; S37; S38/2014](#): [\[2014\] HCA 35](#).

Judgment delivered: 8 October 2014.

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

Catchwords:

Constitutional law – Implied freedom of political communication – Section 93X of *Crimes Act* 1900 (NSW) made it offence habitually to consort with convicted offenders after receiving official warning in relation to each convicted offender – Plaintiffs charged with offence against s 93X – Whether s 93X infringes implied freedom of political communication.

Constitutional law – Implied freedom of association – Whether Constitution contains an implied freedom of association independent of implied freedom of political communication.

Constitutional law – Powers of State Parliaments – Provisions of international convention ratified by Australia but not incorporated by statute in Australian domestic law – Whether capable of limiting power of State Parliaments to enact inconsistent legislation.

Words and phrases – "effectively burden", "habitually consort", "proportionality", "reasonably appropriate and adapted".

Held: Questions answered.

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Criminal Law

Kentwell v The Queen

[S113/2014](#): [\[2014\] HCA 37](#).

Judgment delivered: 9 October 2014.

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

Catchwords:

Criminal law – Appeal – Application to extend time within which to apply for leave to appeal against sentence – Principles to be applied in determining whether extension of time should be granted – Whether applicant required to demonstrate that refusal of application would occasion substantial injustice – Relevance of principle of finality – Relevance of prospect of success should extension be granted – Whether extension of time should be granted.

Criminal law – Appeal – Appeal against sentence – Appellate court's power to re-exercise sentencing discretion – Where error of the kind identified in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 established – Whether appellate court must form positive opinion that some other sentence is warranted in law before intervening.

Words and phrases – "*Abdul* test", "principle of finality", "substantial injustice", "warranted in law".

Appealed from NSW (CCA): [\[2013\] NSWCCA 266](#).

Held: Appeal allowed.

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O'Grady v The Queen

S114/2014: [\[2014\] HCA 38](#).

Judgment delivered: 9 October 2014.

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

Catchwords:

Criminal law – Appeal – Application to extend time within which to apply for leave to appeal against sentence – Principles to be applied in determining whether extension of time should be granted – Whether applicant required to demonstrate that refusal of application would occasion substantial injustice – Relevance of principle of finality – Relevance of prospect of success should extension be granted – Whether extension of time should be granted.

Words and phrases – "*Abdul* test", "principle of finality", "substantial injustice".

Appealed from NSW (CCA): [\[2013\] NSWCCA 281](#).

Held: Appeal allowed.

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Damages

Rhiannon Gray by her tutor Kathleen Anne Gray v Richards
[S111/2014](#): [\[2014\] HCA 40](#).

Judgment delivered: 15 October 2014.

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

Catchwords:

Damages – Measure of damages in actions for tort – Appellant suffered brain damage as a result of respondent's negligence – Appellant incapable of managing own financial affairs – Administrator appointed to manage appellant's estate – Where requirement for management of funds arose as a direct result of respondent's negligence – Where administrator charged fees on all funds under management – Whether appellant entitled to recover costs associated with management of damages awarded for purpose of managing funds under management – Whether appellant entitled to recover costs associated with managing predicted future income of managed fund.

Words and phrases – "damages", "discount rate", "fund management".

Appealed from NSWSC (CA): [\[2013\] NSWCA 402](#).

Held: Appeal allowed in part.

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Industrial Law

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd
[B23/2014](#): [\[2014\] HCA 41](#).

Judgment delivered: 8 October 2014.

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

Catchwords:

Industrial law (Cth) – General protections – Adverse action – Section 346(b) of *Fair Work Act* 2009 (Cth) prohibits employer from taking

adverse action against employee because employee engages in industrial activity or has engaged in industrial activity – Where appellant was industrial association – Where member of appellant engaged in industrial activity – Where officer of respondent employer took adverse action against member – Where officer gave evidence at trial that adverse action not taken for prohibited reasons – Whether adverse action taken for prohibited reason.

Words and phrases – "because", "engages in industrial activity", "prohibited reason".

Appealed from FCA (FC): [\[2013\] FCAFC 132](#).

Held: Appeal dismissed.

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Negligence

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 and Anor

S66/2014: [\[2014\] HCA 36](#).

Judgment delivered: 8 October 2014.

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

Catchwords:

Negligence – Duty of care – Pure economic loss – Strata-titled apartment complex constructed pursuant to contract between builder and developer – Apartments sold pursuant to standard form contract of sale – Contracts conferred rights to have defects remedied – Latent defects in common property – Owners corporation for strata scheme claimed damages from builder for pure economic loss – Whether builder owed owners corporation a duty of care – Relevance of inquiry into whether builder owed anterior duty of care to developer.

Words and phrases – "assumption of responsibility", "common property", "disconformity of obligations", "proximity", "pure economic loss", "reliance", "vulnerability".

Appealed from NSWSC (CA): [\[2013\] NSWCA 317](#).

Held: Appeal allowed.

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2: CASES RESERVED

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

Administrative Law

Argos Pty Ltd & Ors v Simon Corbell, Minister for the Environment and Sustainable Development & Ors

C3/2014: [\[2014\] HCATrans 224.](#)

Date heard: 10 October 2014.

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

Catchwords:

Administrative law – *Administrative Decisions (Judicial Review) Act 1989* (Cth) (“Act”), s 5(1) – Application made to review decision of Minister to approve development application – Appellants adduced evidence to effect that approval would cause loss of trade – Whether corporate appellants have standing to bring application – Whether economic interests will suffice to establish that party is “person aggrieved” for purposes of s 5(1) of Act.

Appealed from ACTSC (CA): [\[2013\] ACTCA 51.](#)

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Constitutional Law

Kuczborski v The State of Queensland

B14/2014: [\[2014\] HCATrans 187;](#) [\[2014\] HCATrans 188.](#)

Date heard: 2 and 3 September 2014.

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

Catchwords:

Constitutional law – Limitation on State legislative power – *Vicious Lawless Association Disestablishment Act 2013* (Qld), s 7 – *Criminal Code* (Qld), ss 60A, 60B(1) and 60C – *Bail Act 1980* (Qld), s 16(3A) – Whether provisions are invalid on ground that they infringe *Kable* principle.

Standing – Whether plaintiff has standing to seek declaration that provisions are invalid.

Relief – Declaration – Whether relief sought by plaintiff is hypothetical.

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See also **Migration**: *CPCF v Minister for Immigration and Border Protection and Anor*

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Corporations Law

Wellington Capital Limited v Australian Securities and Investments Commission & Anor

S275/2013: [\[2014\] HCATrans 198](#).

Date heard: 9 September 2014.

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

Catchwords:

Corporations law – *Corporations Act 2001* (Cth) (“Act”) – Appellant responsible entity of registered scheme sold portion of managed investment scheme to listed company in return for entire issued share capital of that company – Appellant then distributed *in specie* to unit holders of fund in proportion to their holdings – Whether appellant was permitted to make an *in specie* distribution of shares to unit holders – Whether appellant’s power to make distributions of income or capital in cash only limited general trustee powers outlined in Fund’s constitution – Whether question must be approached through prism of trust law.

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

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

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

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Criminal Law

Henderson v State of Queensland

B22/2014: [\[2014\] HCATrans 229](#).

Date heard: 16 October 2014.

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

Catchwords:

Criminal law – Procedure – Confiscation of proceeds of crime – *Criminal Proceeds Confiscation Act 2002* (Qld) ("Act"), Part VI – Police seized sum of money over which appellant claimed ownership – Police applied for forfeiture order and appellant applied for exclusion order – Whether prosecuting authority succeeds in circumstances where possessor of property cannot prove title of those who previously possessed item – Whether common law applies in determination of title under Act.

Appealed from SCQ (CA): [\[2013\] OCA 82](#).

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Equity

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

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Migration

Minister for Immigration and Border Protection v SZSCA & Anor

S109/2014: [\[2014\] HCATrans 219](#).

Date heard: 9 October 2014.

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

Catchwords:

Migration – Respondent applied for protection visa – Taliban threatened respondent because of imputed political support for foreign organisations and Afghan government – Imputation based

upon respondent's occupation transporting building materials – Whether a person may be found not to meet the definition of “refugee” in circumstances where that person could avoid persecution by changing occupation – Whether reasonable for person to change occupation.

Appealed from FCA (FC): [\[2013\] FCAFC 155](#).

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CPCF v Minister for Immigration and Border Protection & Anor
S169/2014: [\[2014\] HCATrans 227](#); [\[2014\] HCATrans 228](#).

Date heard: 14 and 15 October 2014.

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

Catchwords:

Migration – Power to detain – *Maritime Powers Act 2013* (Cth) (“Act”) – Plaintiff, along with 156 other persons, was passenger on Indian vessel bound for Christmas Island – Plaintiff claimed refugee status within meaning of Art 1 of Convention relating to the Status of Refugees and that he was person in respect of whom Australia owed non-refoulement obligations – Indian vessel was intercepted in Australia’s contiguous zone – Maritime officers implemented decision of National Security Committee of Cabinet to return Indian vessel to India – Whether s 72(4) of Act authorised maritime officers to prevent plaintiff from entering Australia or detain plaintiff for purpose of taking him to India – Whether power under Act was subject to obligation to give plaintiff opportunity to be heard about the exercise of power – Whether obligation breached.

Constitutional law – Executive power – Whether non-statutory executive power of Commonwealth authorised Commonwealth officers to prevent plaintiff from entering Australia or detain plaintiff for purposes of taking him to India – Whether non-statutory executive power was subject to obligation to give plaintiff opportunity to be heard about the exercise of power – Whether obligation breached.

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Patents

Alphapharm Pty Ltd v H Lundbeck A/S & Ors
S97/2014: [\[2014\] HCATrans 160](#).

Date heard: 8 August 2014.

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

Catchwords:

Patents – *Patents Act 1990* (Cth) (“Act”), s 223(2)(a) – First respondent patentee applied to Commissioner of Patents to extend term of its patent under s 70(1) of Act – Commissioner of Patents granted extension of term – Extension of term later revoked and removed from Register according to orders of Full Federal Court – First respondent applied to Commissioner of Patents for extension of time within which to file second application to extend term of patent – Commissioner of Patents granted extension of time – Decision appealed to Administrative Appeals Tribunal (“AAT”) which affirmed Commissioner’s decision to grant extension of time – Whether s 223(2)(a) of Act conferred power on Commissioner of Patents to extend time for seeking an extension of term of patent under s 70(1) of Act – Whether exercise of discretion to extend time was manifestly unreasonable in circumstances where the applicant for extension failed to apply promptly for extension – Whether appellant had to demonstrate significant and specific prejudice or hardship to disentitle first respondent to extension – Whether AAT failed to take into account relevant considerations and took into account irrelevant considerations.

Appealed from FCA (FC): [\[2013\] FCAFC 129](#).

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Tort Law

Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon & Anor
[S142; S143/2014](#): [\[2014\] HCATrans 218](#).

Date heard: 8 October 2014.

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

Catchwords:

Tort law – Negligence – *Civil Liability Act 2002* (NSW) (“CLA”), ss 5B, 5D(1), 5O(1), 43(1) and 43A – Person detained as mentally ill person under *Mental Health Act 1990* (NSW) and discharged next day into care of friend – Person had psychotic episode and killed friend – Family of deceased claimed damages for mental harm due to shock of learning of death – Whether health authorities owe a duty of care to third parties in exercise of statutory powers to detain and

discharge mentally ill patients – Whether it is appropriate for health authority’s scope of liability to extend to patient’s unlawful action in killing the respondents’ relative – Whether professional service provided must have conformed to “a practice” that was in existence at time it was provided – Whether a finding of common law negligence can give rise to liability that is “based on a breach of statutory duty” – Whether s 43A of CLA provides a defence to health authority.

Appealed from NSWSC (CA): [\[2013\] NSWCA 476](#).

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Trade Marks

Cantarella Bros Pty Limited v Modena Trading Pty Ltd
S67/2014: [\[2014\] HCATrans 157](#).

Date heard: 5 August 2014.

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

Catchwords:

Trade marks – *Trade Marks Act 1995* (Cth) s 41(3) – Trade marks registered in relation to coffee products – Whether Italian words “oro” and “cinque stelle” inherently adapted to distinguish the goods of the registered owner – Whether “signification which they ordinarily possess” references ordinary signification as understood by members of public or, alternatively, references ordinary signification as understood by traders – Whether the principle is applied differently to foreign language words that do not have commonly understood meaning in Australia.

Appealed from FCA (FC): [\[2013\] FCAFC 110](#).

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3: ORIGINAL JURISDICTION

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

Constitutional Law

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors v Queensland Rail & Anor

[B63/2013](#): *Special case*.

Catchwords:

Constitutional law – Commonwealth Constitution, ss 51(xx) and 109 – Employees who are members of ten unions previously employed by Queensland Rail Limited were transferred to Queensland Rail – Queensland Government intended to implement New Generation Rolling Stock project (“NGR project”) – Unions informed Queensland Rail of their concerns for potential impact of NGR project and sought discussions pursuant to cl 22 of Rollingstock Agreement – Queensland Rail did not consider itself bound by *Fair Work Act 2009* (Cth) (“FW Act”) but instead bound by *Industrial Relations Act 1999* (Qld) (“IR Act”) and by reason of s 691C of IR Act, considered Rollingstock Agreement of no effect – Unions informed Queensland Rail of desire to pursue negotiations for new enterprise agreement to replace Traincrew Agreement in accordance with FW Act – New enterprise agreement certified pursuant to IR Act – Whether Queensland Rail is corporation within meaning of s 51(xx) of Constitution – Whether Queensland Rail is trading corporation within meaning of s 51(xx) of Constitution – Whether FW Act applies to Queensland Rail and its employees by operation of s 109 of Constitution to exclusion of *Queensland Rail Transit Authority Act 2013* (Qld) or IR Act or both.

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Queensland Nickel Pty Limited v Commonwealth of Australia

[B25/2013](#): *Special case*.

Catchwords:

Constitutional law – Preference between States – Commonwealth Constitution, s 99 – *Clean Energy Act 2011* (Cth) (“Act”) – *Clean Energy Regulations 2011* (Cth) (“Regulations”) – Plaintiff operates nickel and cobalt refinery in Queensland and was “liable entity” for

purposes of s 20(3) of Act – Despite repeal of Act, its operation was preserved insofar as it related to liability of liable entities to pay unit shortfall charges for years beginning on 1 July 2012 and 1 July 2013 by items 323(1) and 324(3) of Schedule 1, Part 3 of *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth) – In carrying out operational activities, there are differences with respect to level of covered emissions per unit of production produced by plaintiff and other similar refineries in Western Australia – Whether Divisions 48 of Part 3 of Schedule 1 to Regulations invalid in its application to plaintiff on ground that it gave preference to one State over another contrary to s 99 of Constitution – Whether impugned provisions should be read down so as to avoid contravening s 99 of Constitution – Whether, upon their proper construction, impugned provisions imposed upon plaintiff any liability for any “unit shortfall charge” in respect of production of nickel.

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Duncan v The State of New South Wales; NuCoal Resources Ltd v State of New South Wales; Cascade Coal Pty Ltd & Ors v The State of New South Wales

[S119/2014](#); [S138/2014](#); [S206/2014](#): *Special case.*

Catchwords:

Constitutional law – Chapter III – Judicial power – Independent Commission Against Corruption (ICAC) commenced public inquiry styled “Operation Acacia” investigating the application and allocation of mining lease – ICAC commenced second public inquiry styled “Operation Jasper” investigating, amongst other things, decision of Minister for Mineral Resources to open mining area for coal exploration and award mining licences – Both inquiries produced reports which recommended Parliament pass special legislation to expunge or cancel authorities granted under *Mining Act 1992* (NSW) (“Mining Act”) – *Mining Amendment (Operations Jasper and Acacia) Act 2014* (NSW) inserted Sch 6A into Mining Act – Whether cl 1 to 13 of Sch 6A of Act are invalid because they constitute exercise of judicial power and Parliament of NSW may not exercise judicial power.

Constitutional law – Commonwealth Constitution, s 109 – Inconsistency between Commonwealth law and State law – Cl 11 of Sch 6A of Mining Act authorises appropriate official to publish or reproduce literary or artistic works in which plaintiffs hold copyright – Whether cl 11 of Sch 6A of Mining Act inconsistent with *Copyright Act 1968* (Cth).

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Migration

Plaintiff S297/2013 v Minister for Immigration and Border Protection & Anor

[S297/2013](#): *Special case.*

Catchwords:

Migration – Refugees – Protection visas – Minister directed by writ of mandamus to consider and determine plaintiff's application for Protection (Class XA) visa according to law – Minister decided to refuse to grant protection visa to plaintiff – Decision to refuse was only made because Minister was not satisfied that criterion prescribed by cl 866.226 of Sch 2 to Migration Regulations was satisfied – Whether cl 866.226 invalid – Whether decision made by Minister to refuse to grant protection visa to plaintiff made according to law.

Listed: 9 December 2014.

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4: SPECIAL LEAVE GRANTED

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

Administrative Law

Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd

[S225/2014](#): [\[2014\] HCATrans 170](#).

Date heard: 15 August 2014 – *Special leave granted*.

Catchwords:

Administrative law – Powers of Australian Communications and Media Authority (“ACMA”) – Respondent held commercial radio broadcasting licence under *Broadcasting Services Act 1992* (Cth) (“BSA”) – Respondent recorded and broadcast conversation for radio segment – ACMA investigated segment under s 170 of BSA – Investigation concerned whether respondent breached licence condition contained in cl 8(1)(g), Sch 2 of BSA which is engaged where offence is committed against another law – ACMA’s preliminary investigation report found that respondent contravened s 11(1) of *Surveillance Devices Act 2007* (NSW) – Whether ACMA can only make administrative finding of commission of offence once conviction is recorded by criminal court – Whether ACMA is required to defer enforcement action until after criminal process has concluded – Whether ACMA is bound conclusively in its administrative findings by the outcome of such criminal process.

Constitutional law – Judicial power – Whether ACMA’s conclusion of breach of licence condition involves exercise of judicial power reserved to Ch III courts.

Appealed from FCA (FC): [\[2014\] FCAFC 22](#).

Listed: 11 November 2014.

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Constitutional Law

See also [Administrative Law](#): *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*

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Corporations Law

Grant Samuel Corporate Finance Pty Limited v William John Fletcher and Katherine Elizabeth Barnet as Liquidators of Octaviar Limited (Receivers and Managers Appointed) (In Liquidation) & Ors; JP Morgan Chase Bank National Association & Anor v William John Fletcher and Katherine Elizabeth Barnet as Liquidators of Octaviar Limited (Receivers and Managers Appointed) (In Liquidation) & Ors
S228/2014: [\[2014\] HCA Trans 167](#).

Date heard: 15 August 2014 – *Special leave granted*.

Catchwords:

Corporations law – Insolvency – Voidable transactions – *Corporations Act 2001* (Cth) (“Act”), s 588FF(3) – Under s 588FF(3)(b), court made order extending time for first respondent to bring proceedings under s 588(1) of Act against second respondent – After expiry of period within which any application under 588FF(3)(b) was able to be made, further court order was made under r 36.16(2)(b) of *Uniform Civil Procedure Rules 2005* (NSW) (“UCPR”) varying original extension order – Effect of variation order was to extend period within which any s 588(1) application had to be brought by further six months – Whether r 36.16(2)(b) of UCPR permits further extension of three year period specified in s 588FF(3)(a) of Act by order varying earlier valid extension in circumstances where the application for such variation is made on a date after the expiry of original three year period.

Appealed from NSWSC (CA): [\[2014\] NSWCA 31](#).

Listed: 12 November 2014.

Fortress Credit Corporation (Australia) II & Anor v William John Fletcher and Katherine Elizabeth Barnet as Liquidators of Octaviar Limited (Receivers and Managers Appointed) (In Liquidation) and Octaviar Administration Pty Ltd & Ors
S130/2014: [\[2014\] HCA Trans 233](#).

Date heard: 17 October 2014 – *Special leave granted*.

Catchwords:

Corporations law – Insolvency – Voidable transactions – Extension of time – *Corporations Act 2001* (Cth) (“Act”) – First respondents were appointed liquidators of second and third respondents – Liquidators granted extension under s 588FF(3)(b) to make applications under s 588FF(1) (“shelf order”) – Liquidators brought proceedings seeking relief under s 588FF(1) against appellants with respect to certain transactions between appellants and second and third respondents – Liquidators sought to have shelf order reheard as against appellants and varied so extension of time for bringing claims applied to appellants – Appellants sought to have themselves excluded from operation of shelf order – Whether Court had power under s 588FF(3)(b) of Act to make order extending time for liquidator to make application under s 588FF(1), by reference to, or capable of comprehending, transactions that are neither known nor identified as possible subject of an application under s 588FF(1).

Appealed from NSWSC (CA): [\[2014\] NSWCA 148](#).

Listed: 11 December 2014.

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Criminal Law

CMB v Attorney General for New South Wales
S257/2014: [\[2014\] HCATrans 206](#).

Date heard: 12 September 2014 – *Special leave granted*.

Catchwords:

Criminal law – Sentencing – Appeal against sentence – *Criminal Appeal Act 1912* (NSW) (“CAA”), s 5D – *Crimes (Sentencing Procedure) Act 1999* (NSW) (“CSPA”), s 23 – Appellant sexually assaulted daughter and charged – Director of Public Prosecutions (DPP) successfully applied to have charges remitted to Local Court for referral to pre-trial diversion program – During program appellant revealed other offences committed against daughter – Appellant charged with further counts of aggravated sexual and indecent assault – At hearing appellant pleaded guilty to four counts of aggravated sexual assault and one count of aggravated indecent assault – Appellant sentenced to good behaviour bonds with requirement that appellant complete program – Attorney-General for New South Wales filed notice of appeal pursuant to s 5D of CAA – Court of Criminal Appeal allowed appeal and re-sentenced appellant to five years and six months’ imprisonment – Whether Court of Criminal Appeal erred in not exercising its residual discretion to decline to interfere under s 5D of CAA – Whether Court of Criminal Appeal erred in holding that the onus lay upon appellant contrary to

authority and limited purpose of Crown appeals – Whether Court of Criminal Appeal erred in its application of both s 23 of CSPA and principle in *R v Ellis* in determining what leniency should be afforded to appellant.

Appealed from NSWSC (CCA): [\[2014\] NSWCCA 5](#).

Listed: 5 December 2014.

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Equity

Korda & Ors v Australian Executor Trustees (SA) Limited

M82/2014: [\[2014\] HCATrans 175](#).

Date heard: 15 August 2014 – *Special leave granted*.

Catchwords:

Equity – Trusts – Investment scheme – Investors invited to invest in timber plantation – Different operating companies undertook cultivation, milling and sale of timber – According to Trust Deed, trustee was to hold proceeds of timber sales for investors – Operating companies were liquidated before sale proceeds were paid to trustee – Whether commercial necessity mandated imputation of unstated trust over timber proceeds before payment to trustee.

Appealed from VSC (CA): [\[2014\] VSCA 65](#).

Listed: 6 and 7 November 2014.

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Lavin & Anor v Toppi & Ors

S258/2014: [\[2014\] HCATrans 207](#).

Date heard: 12 September 2014 – *Special leave granted*.

Catchwords:

Equity – Contribution between co-sureties – Appellants paid lesser amount, pursuant to guarantee, than respondents who were co-sureties – Creditor Bank granted appellants covenant not to sue – NSW Court of Appeal held that contribution in equity was available to respondents – Whether creditor's covenant not to sue has effect upon rights of contribution which arise between co-sureties – Whether co-surety, having obtained covenant not to sue, shares with

other co-sureties co-ordinate liabilities of the same nature and extent so as to give rise to right to contribution as between co-sureties.

Appealed from NSWSC (CA): [\[2014\] NSWCA 160](#).

Listed: 10 December 2014.

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Migration

Uelese v Minister for Immigration and Border Protection

S160/2013: [\[2014\] HCATrans 239](#).

Date heard: 17 October 2014 – *Special leave granted*.

Catchwords:

Migration – Application of s 500(6H) of *Migration Act 1958* (Cth) (“Act”) – Appellant’s visa was cancelled – In deciding whether to affirm Minister’s decision, Administrative Affairs Tribunal (AAT) was required to take into account best interests of minor children in Australia – AAT declined to consider or make determination as to best interests of two of appellant’s children – Information as to those children was not adduced by appellant but was apparent from documents tendered by first respondent – Whether Full Court erred in failing to find jurisdictional error in decision of AAT holding that s 500(6H) of Act prohibited AAT from having regard to information concerning two of appellant’s children unless appellant had set out information in written statement to first respondent at least two days before hearing – Whether Full Court erred in failing to find jurisdictional error in AAT holding that date upon which AAT “holds a hearing” for purposes of ss 500(6H) and 500(6I) of Act is first day of any such hearing, and does not include date upon which adjourned hearing is resumed.

Appealed from FCA (FC): [\[2013\] FCAFC 86](#).

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Native Title

The State of Queensland v Tom Congoo, Layne Malthouse and John Watson on behalf of the Bar-Barrum people #4 & Ors

B39/2014: [\[2014\] HCATrans 190](#).

Date heard: 4 September 2014 – *Special leave granted*.

Catchwords:

Native title – Extinguishment – *National Security Act 1939* (Cth) (“NSA”), s 5(1) – *National Security (General) Regulations*, reg 54 – NSA enacted shortly after Australia’s entry into World War II authorising Governor-General to make regulations for securing public safety and defence of Commonwealth – Between 1943 and 1945 five orders were made under reg 54 over land over which native title determination sought – Whether orders made under reg 54 have effect of extinguishing all native title rights and interests on land – Whether reg 54 enabled Commonwealth to take possession of land simply by making orders purporting to take possession of land.

Appealed from FCA (FC): [\[2014\] FCAFC 9](#).

Listed: 2 and 3 December 2014.

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Proceeds of Crime

Commissioner of the Australian Federal Police v Zhao & Anor
M92/2014: [\[2014\] HCATrans 202](#).

Date heard: 12 September 2014.

Catchwords:

Proceeds of crime – Practice and procedure – Application for stay of civil forfeiture proceedings under *Proceeds of Crime Act 2002* (Cth) (“POCA”) – Second respondent, who was charged with offence yet to be heard and determined, and first respondent, his wife, were granted stay of forfeiture proceedings against their restrained property by the Victorian Court of Appeal (“VCA”) – Whether VCA erred by not applying test of whether there was a real risk to administration of justice – Whether principles in *Lee v The NSW Crime Commission* and *Lee v The Queen* required VCA to take particular approach to stay of *in rem* civil forfeiture proceedings – Whether VCA failed to pay regard to distinction between compulsory examination under POCA of person charged with offence and nature of *in rem* civil forfeiture trial when it attached determinative significance to POCA’s abrogation of privilege against self-incrimination in respect of former but not latter – Whether VCA erred by granting a stay for forfeiture of property owned solely by first respondent to first respondent who had not been charged with offence on basis that any evidence she gave could expose risk of her evidence being used against second respondent in criminal proceedings.

Appealed from VSC (CA): [\[2014\] VSCA 137](#).

Listed: 4 December 2014.

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Property Law

Cassegrain v Gerard Cassegrain & Co Pty Ltd

S141/2014: [\[2014\] HCATrans 138](#).

Date heard: 20 June 2014 – *Special leave granted*.

Catchwords:

Property law – Indefeasibility of title – Fraud exception – *Real Property Act 1900* (NSW) (“Act”), ss 42 and 118 – Appellant’s husband (Mr Cassegrain) was director of respondent company and acted fraudulently by utilising credit balance in company loan account to purchase property – Property was transferred from respondent company to Mr Cassegrain and appellant – Mr Cassegrain later transferred his interest in property to appellant for nominal consideration – Whether Mr Cassegrain was appellant’s agent in relation to giving instructions for execution of Real Property Act transfers and lodgement of registration of transfers – Whether the appellant’s title was defeasible because Mr Cassegrain acted as the appellant’s agent – Whether appellant’s title was defeasible because Mr Cassegrain and the appellant were joint tenants – Whether because of Mr Cassegrain’s conduct, the appellant’s interest as sole registered proprietor of land was defeasible pursuant to section 118(1)(d) of Act.

Appealed from NSWSC (CA): [\[2013\] NSWCA 453](#).

Listed: 13 November 2014.

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Stamp Duty

Commissioner of State Revenue v Lend Lease Development Pty Ltd; Commissioner of State Revenue v Lend Lease Real Estate Investments Limited; Commissioner of State Revenue v Lend Lease IMT 2 (HP) Pty Ltd

M74/2014 – M81/2014: [\[2014\] HCATrans 185](#).

Date heard: 15 August 2014 – *Special leave granted.*

Catchwords:

Stamp duty – Consideration for dutiable transaction – Identification of consideration for dutiable transactions in circumstances where purchaser of dutiable property promises to make series of different payments at different times and where promises are contained in multiple instruments – Seven parcels of land were transferred according to multiple instruments – Whether consideration for dutiable transaction should be identified by instruments which effect dutiable transaction and consideration expressed in each instrument and/or by asking whether given instrument is correct instrument – Whether s 20 of *Duties Act 2000* (Vic) should be construed as limited to promises if and insofar as they moved transfer of dutiable property in condition it was at time of transfer.

Appealed from VSC (CA): [\[2013\] VSCA 207](#).

Listed: 4 and 5 November 2014.

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Taxation

Commissioner of Taxation v MBI Properties Pty Ltd
S90/2014: [\[2014\] HCATrans 200](#).

Date heard: 11 September 2014 (part heard) – *Hearing adjourned to a date to be fixed.*

Catchwords:

Taxation – *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (“Act”), s 135-5 – Third party owner of estate in fee simple granted lease to tenant for ten year term – Third party sold reversion to respondent who received rent after sale – Declaration made by Full Federal Court that there was no supply by respondent to tenant – Commissioner of Taxation assessed respondent on basis that s 135-5 applied – Respondent objected on ground that there was no supply – Whether there was “continuing supply” after sale of reversion of lease to respondent – Whether respondent had “increasing adjustment” under s 135-5 of Act.

Appealed from FCA (FC): [\[2103\] FCAFC 112](#).

Listed: 4 November 2014.

5: CASES NOT PROCEEDING OR VACATED

6: SPECIAL LEAVE REFUSED

Publication of Reasons: 15 October 2014

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Marks	Australia and New Zealand Banking Group Ltd (B25/2014)	Supreme Court of Queensland (Court of Appeal) [2014] QCA 102	Application Dismissed [2014] HCASL 179
2.	Sandhu	Minister for Immigration and Border Protection & Anor (C4/2014)	Federal Court of Australia [2014] FCA 548	Application Dismissed [2014] HCASL 180
3.	Mansell	The State of Western Australia (P33/2013)	Supreme Court of Western Australia (Court of Appeal) [2013] WASCA 120	Application Dismissed [2014] HCASL 181
4.	Mansell	His Honour Magistrate G Mignacca-Randazzo (P6/2014)	Supreme Court of Western Australia (Court of Appeal) [2013] WASCA 262	Application Dismissed [2014] HCASL 182
5.	Kumar & Anor	Bathini & Anor (M32/2014)	Supreme Court of Victoria (Court of Appeal) [2014] VSCA 77	Application Dismissed [2014] HCASL 183
6.	Sandri	O'Driscoll & Anor (M45/2014)	Supreme Court of Victoria (Court of Appeal) [2014] VSCA 88	Application Dismissed [2014] HCASL 184
7.	Finlayson	Indigenous Business Australia (M50/2014)	Supreme Court of Victoria (Court of Appeal) [2014] VSCA 95	Application Dismissed [2014] HCASL 185
8.	Perumal	Minister for Immigration and Border Protection & Anor (M54/2014)	Federal Court of Australia [2014] FCA 555	Application Dismissed [2014] HCASL 186
9.	Zammit	Deputy Commissioner of Taxation (S103/2014)	Supreme Court of New South Wales (Court of Appeal) [2014] NSWCA 104	Application Dismissed [2014] HCASL 187
10.	SZTCH	Minister for Immigration and Border Protection & Anor (S110/2014)	Federal Court of Australia [2014] FCA 536	Application Dismissed [2014] HCASL 188

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
11.	Dimitrovski	Australian Executor Trustees Limited & Anor (S112/2014)	Supreme Court of New South Wales (Court of Appeal) [2014] NSWCA 68	Application Dismissed [2014] HCASL 189
12.	Thompson	Berg (S117/2014)	Full Court of the Family Court of Australia	Application Dismissed [2014] HCASL 190
13.	SZSHO	Minister for Immigration and Border Protection & Anor (S118/2014)	Federal Court of Australia [2014] FCA 535	Application Dismissed [2014] HCASL 191
14.	Visser & Anor	New South Wales Crime Commission & Anor (S120/2014)	Supreme Court of New South Wales (Court of Appeal) [2013] NSWCA 467	Application Dismissed [2014] HCASL 192
15.	SZSRG	Minister for Immigration, Multicultural Affairs and Citizenship & Anor (S134/2014)	Federal Court of Australia [2014] FCA 550	Application Dismissed [2014] HCASL 193
16.	SZSUE	Minister for Immigration, Multicultural Affairs and Citizenship & Anor (S199/2014)	Federal Court of Australia [2014] FCA 639	Application Dismissed [2014] HCASL 194
17.	O'Connell	Barnett (M63/2014)	Supreme Court of Victoria (Court of Appeal) [2014] VSCA 125	Application Dismissed With Costs [2014] HCASL 195
18.	Odisho	Bonazzi (M20/2014)	Supreme Court of Victoria (Court of Appeal) [2014] VSCA 11	Application Dismissed With Costs [2014] HCASL 196
19.	Batra	Minister for Immigration and Border Protection & Anor (M29/2014)	Federal Court of Australia [2013] FCA 274	Application Dismissed With Costs [2014] HCASL 197
20.	Power	Deputy Commissioner of Taxation (S104/2014)	Supreme Court of New South Wales (Court of Appeal) [2014] NSWCA 77	Application Dismissed With Costs [2014] HCASL 198

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Sydney: 17 October 2014

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Murphy	State of Victoria & Anor	Supreme Court of Victoria (Court of Appeal) [2014] VSCA 236	Special leave refused with costs [2014] HCATrans 230
2.	ATS Pacific Pty Ltd	Commissioner of Taxation (S95/2014)	Full Court of the Federal Court of Australia [2014] FCAFC 33	Special leave refused with costs [2014] HCATrans 237
3.	Stella Travel Services (Australia) Pty Ltd	Deputy Commissioner of Taxation (S96/2014)	Full Court of the Federal Court of Australia [2014] FCAFC 33	Special leave refused with costs [2014] HCATrans 237
4.	Col	The Queen (S102/2014)	Supreme Court of New South Wales (Court of Criminal Appeal) [2013] NSWCCA 302	Special leave refused [2014] HCATrans 236
5.	McHugh	Australian Jockey Club Limited & Ors (S107/2014)	Full Court of the Federal Court of Australia [2014] FCAFC 45	Special leave refused with costs [2014] HCATrans 238
6.	Resource Capital Fund III LP	Commissioner of Taxation (S116/2014)	Full Court of the Federal Court of Australia [2014] FCAFC 37	Special leave refused with costs [2014] HCATrans 235
7.	Hoblos	The Queen (S124/2014)	Supreme Court of New South Wales (Court of Criminal Appeal) [2014] NSWCCA 20	Special leave refused [2014] HCATrans 234
8.	O'Flaherty	City of Sydney Council & Anor (S125/2014)	Full Court of the Federal Court of Australia [2014] FCAFC 56	Special leave refused with costs [2014] HCATrans 232
9.	Akers & Ors	Deputy Commissioner of Taxation (S129/2014)	Full Court of the Federal Court of Australia [2014] FCAFC 57	Special leave refused with costs [2014] HCATrans 231

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