



# HIGH COURT BULLETIN

Produced by the Legal Research Officer,  
High Court of Australia Library  
[2014] HCAB 09 (24 November 2014)

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

1: Cases Handed Down .....	3
2: Cases Reserved .....	7
3: Original Jurisdiction .....	14
4: Special Leave Granted.....	17
5: Cases Not Proceeding or Vacated.....	23
6: Special Leave Refused.....	24

---

---

## SUMMARY OF NEW ENTRIES

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

<b>Case</b>	<b>Title</b>
<a href="#">Kuczborski v The State of Queensland</a>	Constitutional Law
<a href="#">Wellington Capital Limited v Australian Securities and Investments Commission &amp; Anor</a>	Corporations
<a href="#">Alphapharm Pty Ltd v H Lundbeck A/S &amp; Ors</a>	Intellectual Property
<a href="#">Minister for Immigration and Border Protection v SZSCA &amp; Anor</a>	Migration
<a href="#">Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon &amp; Anor</a>	Negligence

## 2: Cases Reserved

<b>Case</b>	<b>Title</b>
<a href="#">Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd</a>	Administrative Law
<a href="#">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) &amp; Ors; JP Morgan Chase Bank National Association &amp; Anor v William John Fletcher and Katherine Elizabeth Barnet as Liquidators of Octaviar Limited (Receivers and Managers Appointed) (In Liquidation) &amp; Ors</a>	Corporations
<a href="#">Korda &amp; Ors v Australian Executor Trustees (SA) Limited</a>	
<a href="#">Cassegrain v Gerard Cassegrain &amp; Co Pty Ltd</a>	Property Law
<a href="#">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</a>	Stamp Duty
<a href="#">Commissioner of Taxation v MBI Properties Pty Ltd</a>	Taxation

## 3: Original Jurisdiction

No new entries for November 2014.

## 4: Special Leave Granted

<b>Case</b>	<b>Title</b>
<a href="#">Selig &amp; Selig v Wealthsure Pty Ltd &amp; Ors</a>	Corporations
<a href="#">Lindsay v The Queen</a>	Criminal Law
<a href="#">King v Philcox</a>	Tort Law

# 1: CASES HANDED DOWN

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

---

## Constitutional Law

*Kuczborski v The State of Queensland*

**B14/2014:** [\[2014\] HCA 46](#).

**Judgment delivered:** 14 November 2014.

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

### Catchwords:

Constitutional law (Cth) – Standing – Plaintiff sought declaration that Vicious Lawless Association Disestablishment Act 2013 (Q) and provisions of the Criminal Code (Q), *Bail Act* 1980 (Q) and *Liquor Act* 1992 (Q) were invalid – Where certain provisions only operated where offence committed against existing unchallenged laws – Whether plaintiff had sufficient interest to bring action.

Constitutional law (Cth) – Constitution, Ch III – Institutional integrity of State courts – Where ss 60A, 60B(1), 60B(2) and 60C of Criminal Code created offences elements of which involved being a "participant" in a "criminal organisation" – Where ss 173EB, 173EC and 173ED of *Liquor Act* created offences elements of which involved wearing symbols of membership of a "declared criminal organisation" – Where power, by regulation, to declare organisation a "criminal organisation" – Whether impugned provisions offended principle in *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 – Whether Court enlisted to implement legislative or executive policy – Whether task given to Court incompatible with institutional integrity.

Words and phrases – "association", "criminal organisation", "institutional integrity", "Kable principle", "participant", "standing", "sufficient interest".

**Held:** Questions answered.

[Return to Top](#)

---

## Corporations

*Wellington Capital Limited v Australian Securities and Investments Commission & Anor*

**S275/2013:** [\[2014\] HCA 43](#).

**Judgment delivered:** 5 November 2014.

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

**Catchwords:**

Corporations – Managed investment schemes – Role of responsible entity under Ch 5C of *Corporations Act* 2001 (Cth) – Construction of scheme constitution – Where responsible entity granted all powers "legally possible" for person or corporation to have – Where responsible entity made *in specie* distribution of scheme property to unit holders – Whether distribution beyond responsible entity's powers under scheme constitution.

Trusts – Managed investment schemes – Responsible entity as statutory trustee – Whether general principles of law relating to trusts apply to responsible entity's functions under scheme constitution.

Practice and procedure – Federal Court of Australia – Where Federal Court made declaration that responsible entity had no power under scheme constitution to distribute scheme property to unit holders – Where unit holders not represented in appeal – Whether Federal Court erred in exercising discretion to make declaration.

Words and phrases – "*in specie* distribution", "managed investment scheme", "responsible entity", "return of capital".

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

**Held:** Appeal dismissed.

[Return to Top](#)

---

---

## Intellectual Property

*Alphapharm Pty Ltd v H Lundbeck A/S & Ors*

**S97/2014:** [\[2014\] HCA 42](#).

**Judgment delivered:** 5 November 2014.

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

**Catchwords:**

Intellectual property – Patents – Extension of term – Application to extend time for applying for extension of term of patent – Section 71(2) of *Patents Act* 1990 (Cth) required application for extension of term of patent to be made during term of patent and within six months after latest of three specified dates – First respondent made application for extension of term of patent during term of patent but more than six months after latest of three specified dates – Whether Commissioner of Patents had power to grant extension of time.

Words and phrases – "filing, during the term of a standard patent", "prescribed action", "relevant act".

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

**Held:** Appeal dismissed.

[Return to Top](#)

---

## Migration

*Minister for Immigration and Border Protection v SZSCA & Anor*  
**S109/2014:** [\[2014\] HCA 45](#).

**Judgment delivered:** 12 November 2014.

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

### Catchwords:

Migration – Refugees – Application for protection visa – Where applicant threatened by Taliban – Where Refugee Review Tribunal affirmed decision not to grant protection visa because risk of persecution would only arise on roads outside Kabul, which applicant could avoid – Whether Refugee Review Tribunal fell into error identified in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71 – Whether Refugee Review Tribunal failed to address whether it would be reasonable to expect applicant to remain in Kabul.

Words and phrases – "internal relocation principle", "live discreetly", "real chance of persecution", "reasonable to expect", "well-founded fear of persecution".

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

**Held:** Appeal dismissed.

[Return to Top](#)

---

## Negligence

*Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon & Anor*  
**[S142; S143/2014](#)**: [\[2014\] HCA 44](#).

**Judgment delivered:** 12 November 2014.

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

### Catchwords:

Negligence – Duty of care – Statutory duties – *Mental Health Act* 1990 (NSW) provided for admission and detention of mentally ill persons in hospital – Act prohibited detention or continuation of detention of mentally ill person in hospital unless medical superintendent formed opinion that no other care of less restrictive kind appropriate and reasonably available – Alleged negligence of hospital and medical staff in discharging mentally ill person – Whether hospital and medical staff owed common law duty of care to protect other persons against harm caused by mentally ill person upon discharge – Whether duties under Act inconsistent with common law duty of care.

Words and phrases – "duty of care", "inconsistent duties", "mentally ill person".

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

**Held:** Appeal allowed.

[Return to Top](#)

---

---

## Practice and Procedure

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

[Return to Top](#)

---

---

## Trusts

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

[Return to Top](#)

---

---

## 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.](#)

[Return to Top](#)

---

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

**S225/2014:** [\[2014\] HCATrans 246.](#)

**Date heard:** 11 November 2014.

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

**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](#).

[Return to Top](#)

---

---

## Constitutional Law

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

[Return to Top](#)

---

See also [Migration](#): *CPCF v Minister for Immigration and Border Protection and Anor*

[Return to Top](#)

---

---

## Corporations

*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:** [\[2014\] HCATrans 248](#).

**Date heard:** 12 November 2014.

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

**Catchwords:**



Corporations – 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](#).

[Return to Top](#)

---

---

## 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):** [\[2013\] QCA 82](#).

[Return to Top](#)

---

---

## Equity

*Korda & Ors v Australian Executor Trustees (SA) Limited*

**[M82/2014](#)**: [\[2014\] HCATrans 244](#).

**Date heard:** 6 November 2014.

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

**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](#).

[Return to Top](#)

---

---

## Migration

*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.

[Return to Top](#)

---

## Property Law

*Cassegrain v Gerard Cassegrain & Co Pty Ltd*

**S141/2014:** [\[2014\] HCATrans 249](#).

**Date heard:** 13 November 2014.

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

### 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](#).

[Return to Top](#)

---

## 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 242](#); [\[2014\] HCATrans 243](#).

**Date heard:** 4 and 5 November 2014.

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

**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](#).

[Return to Top](#)

---

## Taxation

*Commissioner of Taxation v MBI Properties Pty Ltd*

**[S90/2014](#)**: [\[2014\] HCATrans 200](#); [\[2014\] HCATrans 241](#).

**Date heard:** 11 September and 4 November 2014.

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

**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](#).

[Return to Top](#)

---

## 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](#).

[Return to Top](#)

---

## 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.

**Listed:** 3 and 4 February 2015.

[Return to Top](#)

---

*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.

**Listed:** 5 and 6 February 2015.

[Return to Top](#)

---

*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).

**Listed:** 10, 11 and 12 February 2015.

[Return to Top](#)

---

---

## 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.

[Return to Top](#)

---

---



## 4: SPECIAL LEAVE GRANTED

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

---

### Corporations

*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*  
**S276/2014:** [\[2014\] HCATrans 233](#).

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

**Catchwords:**

Corporations – 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.

[Return to Top](#)

---

*Selig & Selig v Wealthsure Pty Ltd & Ors*  
**A11/2014:** [\[2014\] HCATrans 251](#).

**Date heard:** 14 November 2014 – *Special leave granted on limited grounds*.

**Catchwords:**

Corporations – Provision of financial advice – Contravention of *Corporations Act 2001* (Cth) (Act) – First and second respondents were appellants’ financial advisors – First and second respondents recommended financial product and provided appellants with disclosure document that did not comply with s 953A of Act – Financial product was insolvent and appellants lost their investment – First and second respondents argued that loss was apportionable and that promoters of financial product should bear majority of claim – Whether claim for damages for misleading financial advice pursuant to ss 769C, 945A, 945B and/or 1041E of Act apportionable under ss 1041H-1041S of Act – Whether claims should be reduced by reference to contributory conduct under s 1041I(1B) of Act.

**Appealed from FCA (FC):** [\[2014\] FCAFC 64](#).

[Return to Top](#)

---

---

## 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.

[Return to Top](#)

---

*Lindsay v The Queen*

**A15/2014:** [\[2014\] HCATrans 252](#).

**Date heard:** 14 November 2014 – *Special leave granted*.

**Catchwords:**

Criminal law – Defences – Provocation – Appellant convicted of murder – Circumstances of offence included two incidents where victim had made homosexual advances – Court of Criminal Appeal found errors in directions of trial judge as to provocation – Court of Criminal Appeal applied proviso without positive submission by prosecution and held that partial defence of provocation should not have been left to jury – Court of Criminal Appeal relied on academic literature on contemporary attitudes to homosexual behaviour to support conclusion – Whether appropriate for Court of Criminal Appeal to initiate consideration of and then apply proviso – Whether academic literature is relevant in consideration of objective limb of provocation – Whether it is permissible for Court of Criminal Appeal to rely on academic literature without affording parties opportunity to make submissions.

**Appealed from SASC (CCA):** [\[2014\] SASCF 56](#).

[Return to Top](#)

---

---

## Equity

*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.

[Return to Top](#)

---

## Migration

*Uelese v Minister for Immigration and Border Protection*  
**S277/2014:** [\[2014\] 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](#).

[Return to Top](#)

---

## 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.

[Return to Top](#)

---

## Proceeds of Crime

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

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

**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.

[Return to Top](#)

---

---

## Tort Law

*King v Philcox*

**A12/2014:** [\[2014\] HCATrans 253](#).

**Date heard:** 14 November 2014 – *Special leave granted*.

### Catchwords:

Tort law – Negligence – Duty of care – Mental harm – Respondent’s brother (victim) was passenger in car driven by appellant which was involved in collision killing victim – Respondent drove past the accident scene five times, each time unaware that victim was his brother – Respondent later developed psychiatric illness upon realising scene of accident was where victim died – Whether appellant owes duty of care to sibling of victim to avoid causing mental harm caused by learning about death of victim in motor accident – Whether existence of duty of care determined solely by reference to s 33(1), *Civil Liability Act 1936* (SA) (“CLA”) – Whether respondent’s psychiatric illness reasonably foreseeable – Whether respondent was “present at the scene of the accident when the accident occurred” as required by s 51(1)(a) of CLA.

**Appealed from SASC (FC):** [\[2014\] SASCF 38](#).

[Return to Top](#)

---

---

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

---

---

# 6: SPECIAL LEAVE REFUSED

## Canberra: 14 November 2014

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	Kupsch	Zanker (A10/2014)	Full Court of the Supreme Court of South Australia [2014] SASCFC 13	Special leave refused <a href="#">[2014]</a> <a href="#">HCATrans 250</a>
2.	State of South Australia	Milisits (A16/2014)	Supreme Court of South Australia (Court of Criminal Appeal) [2014] SASCFC 67	Special leave refused with costs <a href="#">[2014] HCATrans</a> <a href="#">254</a>
3.	Midstyle Nominees Pty Ltd	Barker & Anor (P20/2014)	Supreme Court of Western Australia (Court of Appeal) [2014] WASCA 75	Special leave refused with costs <a href="#">[2014] HCATrans</a> <a href="#">257</a>
4.	Midstyle Nominees Pty Ltd	Jordon (P21/2014)	Supreme Court of Western Australia (Court of Appeal) [2014] WASCA 75	Special leave refused with costs <a href="#">[2014] HCATrans</a> <a href="#">257</a>
5.	Dodd	The State of Western Australia (P24/2014)	Supreme Court of Western Australia (Court of Appeal) [2014] WASCA 13	Special leave refused <a href="#">[2014]</a> <a href="#">HCATrans 256</a>
6.	MetLife Insurance Limited	Ward (P25/2014)	Supreme Court of Western Australia (Court of Appeal) [2014] WASCA 119	Special leave refused with costs <a href="#">[2014] HCATrans</a> <a href="#">255</a>

[Return to Top](#)



## Sydney: 14 November 2014

No.	Applicant	Respondent	Court appealed from	Results
1.	Hardie & Anor	Milling (S131/2014)	Supreme Court of New South Wales (Court of Appeal) [2014] NSWCA 163	Special leave refused with costs <a href="#">[2014]</a> <a href="#">HCATrans 260</a>
2.	Jackson	McDonald's Australia Limited & Anor (S135/2014)	Supreme Court of New South Wales (Court of Appeal) [2014] NSWCA 162	Special leave refused with costs <a href="#">[2014]</a> <a href="#">HCATrans 262</a>
3.	Tolson & Anor	Road and Maritime Services (S136/2014)	Supreme Court of New South Wales (Court of Appeal) [2014] NSWCA 161	Special leave refused with costs <a href="#">[2014]</a> <a href="#">HCATrans 263</a>
4.	Opes Prime Stockbroking Ltd (In Liquidation) (Scheme Administrators Appointed) & Anor	Smith & Ors (S137/2014)	Supreme Court of New South Wales [2014] NSWSC 659	Special leave refused with costs <a href="#">[2014]</a> <a href="#">HCATrans 259</a>
5.	Quickfund (Australia) Pty Ltd	Airmark Consolidators Pty Ltd & Anor (S196/2014; S197/2014)	Full Court of the Federal Court of Australia [2014] FCAFC 70	Special leave refused with costs <a href="#">[2014]</a> <a href="#">HCATrans 264</a>
6.	Enterprise Finance Solutions Pty Ltd & Anor	Austec.Net Pty Ltd & Ors (S198/2014)	Full Court of the Federal Court of Australia [2014] FCAFC 70	Special leave refused with costs <a href="#">[2014]</a> <a href="#">HCATrans 264</a>
7.	Generic Health Pty Ltd & Anor	Bayer Pharma Aktiengesellschaft & Anor (S201/2014)	Full Court of the Federal Court of Australia [2014] FCAFC 73	Special leave refused with costs <a href="#">[2014]</a> <a href="#">HCATrans 261</a>
8.	Apotex Pty Ltd	Bayer Pharma Aktiengesellschaft & Anor (S202/2014)	Full Court of the Federal Court of Australia [2014] FCAFC 73	Special leave refused with costs <a href="#">[2014]</a> <a href="#">HCATrans 261</a>

[Return to Top](#)