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# JUSTICES OF THE HIGH COURT OF AUSTRALIA

DURING THE CURRENCY OF THIS VOLUME

THE HONOURABLE SIR FRANCIS GERARD BRENNAN, AC, KBE  
CHIEF JUSTICE

THE HONOURABLE SIR DARYL MICHAEL DAWSON, AC, KBE,  
CB (resigned 15 August 1997)

THE HONOURABLE JOHN LESLIE TOOHEY, AC

THE HONOURABLE MARY GENEVIEVE GAUDRON

THE HONOURABLE MICHAEL HUDSON MCHUGH, AC

THE HONOURABLE WILLIAM MONTAGUE CHARLES GUMMOW,  
AC

THE HONOURABLE MICHAEL DONALD KIRBY, AC, CMG

ATTORNEY-GENERAL

THE HONOURABLE DARYL ROBERT WILLIAMS, AM, QC, MP

## MEMORANDA

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- 1997
- January 26 — THE HONOURABLE WILLIAM CHARLES MONTAGUE GUMMOW, a Justice of the High Court of Australia, was appointed a Companion of the Order of Australia.
- July 13 — Death of THE RIGHT HONOURABLE SIR GARFIELD EDWARD JOHN BARWICK, AK, GCMG, who resigned as Chief Justice of the High Court of Australia on 11 February 1981.
- August 15 — Resignation of THE HONOURABLE SIR DARYL MICHAEL DAWSON, AC, KBE, CB, from the office of a Justice of the High Court of Australia.

## THE LATE SIR GARFIELD BARWICK

On 5 August 1997, at a ceremonial sitting of the Full High Court at Canberra, BRENNAN CJ said:

GARFIELD EDWARD JOHN BARWICK was born on 22 June 1903 and died on 13 July 1997. It was a life full of achievement in a number of fields. Today the Court is assembled to remember his contribution as the Court's longest-serving Chief Justice. Joining us on the Bench is Sir Ronald Wilson, who served as a Justice during SIR GARFIELD's term of office, and Justice Jeffrey Miles, the Chief Justice of the Australian Capital Territory. Unable to be with us today but desiring to be associated with our tribute to SIR GARFIELD are his successors in the office of Chief Justice, the Rt Hon Sir Harry Gibbs and the Hon Sir Anthony Mason. The Chief Justice of New Zealand, the Rt Hon Sir Thomas Eichelbaum, also wishes to be associated with this remembrance of SIR GARFIELD's work. We note the presence of others at this morning's proceedings: the Hon Daryl Williams, Attorney-General for the Commonwealth, the Hon Justice Higgins of the Supreme Court of the Australian Capital Territory, the Hon Kevin O'Leary (sometime Chief Justice of the Northern Territory), the Solicitors-General for the Commonwealth, for Tasmania and for Western Australia, representatives of the Law Council of Australia, the Australian Bar Association, the Bar Associations of New South Wales, Victoria, Queensland and Tasmania, the Law Society of New South Wales, the Queensland Law Society, the Law Association of Tasmania and the Law Society of the Australian Capital Territory.

SIR GARFIELD came to the office of Chief Justice after a career distinguished by its brilliance. Called to the Bar in 1927, appointed Queens Counsel in 1941, he bestrode the profession of advocacy like a colossus. His reputation as an advocate, already well established in this country, was made in England by an outstanding argument in the *Banking Case* in 1949, delivered over six days before the Privy Council. In later life, he enjoyed recounting his early life at the Bar when he was learning the art of judicial persuasion of which he became a master. His genius lay in that lucidity of presentation which requires complete familiarity with the subject and incisiveness of mind. Some indication of his practice in this Court may be gleaned from appearances reported between volumes 51 and 104 of the Commonwealth Law Reports — between April 1934 and April 1961. During his life at the Bar, he was President of the New South Wales Bar Association, an Executive Member of the Law Council of Australia and one of the chief promoters of the building in Phillip Street Sydney in which the New South Wales Bar found a permanent home.

He entered the federal Parliament as the Member for Parramatta in 1958. He was appointed Attorney-General and later Minister for

External Affairs in the Menzies administration. He was appointed Chief Justice on 27 April 1964 and took the oaths of allegiance and office on 1 May following. He presided over the Court with considerable vigour, testing the propositions advanced and apparently enjoying the dialectic between Bench and Bar. Some barristers found difficulty with his interventions; others delighted in the opportunity to debate concepts with a mind that was both agile and informed.

The judgments which he wrote — sometimes drafted while argument was continuing — can be found in over 40 volumes of the Commonwealth Law Reports. They cover a wide spectrum of the law. His judgments, which illuminated issues of great significance and difficulty, include *Mutual Life & Citizens' Assurance Co Ltd v Evatt*; *Strickland v Rocla Concrete Pipes Ltd*, *Breskvar v Wall*, the *Seas and Submerged Lands Case*, *R v O'Connor* — to name a few. Inevitably the judgments which he wrote have affected the development of the law. Sometimes they settled the law for the future, sometimes they formed part of that great reservoir of ideas on which the courts draw, day by day, in the refining and evolution of legal principles. That is the nature of our system. It is true to say that the contemporary jurisprudence of this country owes much to SIR GARFIELD'S judicial writing.

If his term of office had a theme, it was the importance to the nation of judicial independence, especially the independence of the High Court. He expressed the theme in his book, "A Radical Tory", published at the age of ninety-two. He wrote:

"The important thing is that liberty is not necessarily secured by verbal formulae, as in a Bill of Rights, however precise in their expression. Rather, it is an independent judiciary, by developing and applying the principles of the common law with its emphasis on the essential importance of the individual and the citizen's duty to his neighbours, its insistence on the observance of natural justice where the citizen is likely to be affected in person or property and the use of habeas corpus in relation to physical restraint, and requiring the executive and legislative arms under their allotted limits, which will ensure that tyranny does not gain sway."

Conscious as he was of the responsibilities of the several branches of government, he was insistent upon the independence of the judicial branch from the legislative and executive branches. When he led the Justices into the Senate Chamber, wigged and gowned and carrying the tricorne hat, he placed the hat on the table of the Senate as a gesture of the independence of the Judiciary from the Legislature. And he secured the passage of *The High Court of Australia Act 1979* which gave the Court administrative independence from the Department of the Attorney-General and provided for the Court itself to administer its affairs and to control the precinct on which this building stands.

Although he accepted appointment to the Privy Council, as was the practice at the time, he was instrumental in obtaining the passage of the Acts which terminated appeals to the Privy Council from this Court and from any Australian Court in matters of federal jurisdiction. And so he was able to say in *Viro v The Queen*:

“I am of opinion that this Court is no longer bound by decisions of the Privy Council whether or not they were given before or after the date when the *Privy Council (Appeals from the High Court) Act 1975* (Cth) became effective.”

The abolition of appeals from this Court to the Privy Council cast on this Court a responsibility for declaring the law for Australia freed from the binding effect of English precedent but free to draw on the enlightenment which they offered. Even before the passage of the 1975 Act, he stated the function of this Court in his judgment in *Mutual Life & Citizens' Assurance Co Ltd v Evatt*:

“The Court’s task ... is to declare the common law ... for Australia ... to express what is the law ... as appropriate to current times in Australia. This will not necessarily be identical with the common law of England ... where no authority binds or current of acceptable decision compels, it is not enough, nor indeed apposite, to say that the function of the Court in general is to declare what the law is and not to decide what it ought to be ... But, of course, the Court is not to depart from what it realises the common law would provide in order to arrive at some idiosyncratic solution. So to do is to attempt to legislate and to tread forbidden ground.”

After the abolition of appeals from this Court to the Privy Council in 1975, he restated the position in *R v O'Connor*:

“the Court has a very heavy responsibility. It would be easy simply to accept the declarations of common law which have heretofore been made by any of the courts of the United Kingdom, particularly if they are of long standing ... But it seems to me quite inadequate in the performance of its high obligation for the Court merely to accept without its own close, critical and independent examination those declarations of the common law which heretofore have been made ... The Court must, in my opinion, decide for itself upon principle what is the common law. It must make its declaration of principle in the sense of the common law as it understands it to be and to have been.”

His conception of the Court’s function was translated into practical form in the location, design and construction of this building which is the permanent seat of the Court. It is situated in the Parliamentary triangle, manifesting the Court’s character as one of the branches of Government; its location is so sited as to stand independently of all other buildings and at a height that reflects the supremacy of the law.

He saw the law not as a sword but as a shield for individual rights, and the symbol of that view can be seen in the shield motif of the door of entry into the main Courtroom. He secured the weaving of the tapestry — heraldically correct though without supporters — hanging on the Courtroom wall demonstrating the unity of the law which welds the States into the federal Commonwealth. Perhaps most importantly he saw this Court as a Court for the Australian people who should be free to come and go within this building and to witness here the impartial and open administration of justice according to law. It is an enduring monument to his vision, his administrative ability and, indeed, to his architectural discernment. His supervision of the project was as detailed as might have been expected of a clerk of works.

The Justices, the Court staff and the profession who work here owe him a debt of gratitude for the foresight which make it an accessible and efficient place of research, of oral argument and of judgment preparation. He was the designing force of the libraries, of the courtrooms and of the recording and transcribing systems. The mechanics of judicial work may not have been the most newsworthy of SIR GARFIELD's activities, but he saw them to be vital to efficient judicial work.

It seems that the most newsworthy event in his varied career was the tendering of advice to Sir John Kerr in November 1975, a course for which he could find precedent in the tendering of advice by some of his predecessors in office. It was, and remains, a controversial matter but, if only on that account, will not happen again. It can now be seen as a subject of academic interest, not the defining event in a life of other achievement.

I cannot conclude this tribute to SIR GARFIELD without reference to Lady Barwick who, with his children Mr Ross Barwick and Mrs Diane Roberts and their families, survive him. Lady Barwick has been the constant and much appreciated companion in all that SIR GARFIELD achieved. Well and affectionately known to the Australian legal profession, she has been a gracious figure in the social life of the Court and of the Australian judiciary. To her, to their children and to their children's children, the Court extends its sympathy. They may be comforted by the knowledge that SIR GARFIELD BARWICK, Knight of the Order of Australia, Knight Grand Cross of the Most Distinguished Order of St Michael and St George, gave great service to the Legislature, the Executive and the Judiciary of the Commonwealth, and especially to this Court.



The mode of citation of this volume of  
the Commonwealth Law Reports will be as follows:  
187 CLR

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**TABLE OF CASES REPORTED  
IN THIS VOLUME**

Australian Heritage Commission v Mount Isa Mines Ltd .....	297
Bankstown Football Club Ltd; CIC Insurance Ltd v .....	384
CIC Insurance Ltd v Bankstown Football Club Ltd .....	384
Commonwealth; Leask v .....	579
Commonwealth; Victoria v .....	416
De L v Director-General, New South Wales Department of Community Services .....	640
Director-General, New South Wales Department of Community Services; De L v .....	640
Kars v Kars .....	354
Leask v Commonwealth .....	579
MGH Plastic Industries Pty Ltd; Zickar v .....	310
Mount Isa Mines Ltd; Australian Heritage Commission v .....	297
Queensland; Wik Peoples v .....	1
Rowe; Federal Commissioner of Taxation v .....	266
Taxation, Federal Commissioner of v Rowe .....	266
Victoria v Commonwealth .....	416
Wik Peoples v Queensland .....	1
Zickar v MGH Plastic Industries Pty Ltd .....	310



## TABLE OF CASES JUDICIALLY CONSIDERED IN CASES REPORTED IN THIS VOLUME

<i>Aboriginal and Islanders Advancement, Corporation of Directorof v Peinkinna</i> (1978) 52 ALJR 286 at 291; 17 ALR 129 at 138	
Applied. Wik Peoples v Queensland .....	1
<i>Accident Compensation Commission v McIntosh</i> [1991] 2 VR 253 at 262	
Approved. Zickar v MGH Plastic Industries Pty Ltd .....	310
<i>Actors and Announcers' Equity Association v Fontana Films Pty Ltd</i> (1982) 150 CLR 169	
Applied. Victoria v Commonwealth .....	416
<i>Airlines of NSW Pty Ltd v New South Wales [No 2]</i> (1965) 113 CLR 54 at 136	
Applied. Victoria v Commonwealth .....	416
<i>Australian Education Union, Re; Ex parte Victoria</i> (1995) 184CLR 188 at 231	
Applied. Victoria v Commonwealth .....	416
<i>Australian Heritage Commission v Mount Isa Mines Ltd</i> (1995) 60 FCR 456	
Reversed. Australian Heritage Commission v Mount Isa Mines Ltd .....	297
 <i>British Railways Board v Pickin</i> [1974] AC 765 at 791	
Applied. Wik Peoples v Queensland .....	1
 <i>CIC Insurance Ltd v Bankstown Football Club Ltd</i> (1994) 8 ANZ Insurance Cases 61-232	
Reversed. CIC Insurance Ltd v Bankstown Football Club Ltd .....	384
<i>Clarke v Carson</i> [1996] 1 NZLR 349 at 351	
Followed. De L v Director-General, New South Wales Department of Community Services .....	640
<i>Commonwealth v Tasmania</i> (the <i>Tasmanian Dam Case</i> ) (1983) 158 CLR 1	
Applied. Victoria v Commonwealth .....	416
<i>Community Services, Director-General, NSW Department of v De L</i> [1996] FLC 92-674	
Reversed. De L v Director-General, New South Wales Department of Community Services .....	640
<i>Cunliffe v Commonwealth</i> (1994) 182 CLR 272	
Applied. Victoria v Commonwealth .....	416
Referred to. Leask v Commonwealth .....	579
 <i>Georgiadis v Australian and Overseas Telecommunications Commission</i> (1994) 179 CLR 297	
Referred to. Victoria v Commonwealth .....	416
<i>Government Insurance Office of NSW v Atkinson-Leighton Joint Venture</i> (1981) 146 CLR 206	
Distinguished. CIC Insurance Ltd v Bankstown Football Club Ltd .....	384
<i>Gowling v Mercantile Mutual Insurance Co Ltd</i> (1980) 24 SASR 321	
Overruled. Kars v Kars .....	354
<i>Griffiths v Kerkemeyer</i> (1977) 139 CLR 161	
Applied. Kars v Kars .....	354
Approved. Kars v Kars .....	354
<i>Gutkin v Gutkin</i> [1983] 2 Qd R 764	
Overruled. Kars v Kars .....	354
 <i>H R Sinclair &amp; Son Pty Ltd v Federal Commissioner of Taxation</i> (1966) 114 CLR 537 at 542-543, 545	
Approved. Federal Commissioner of Taxation v Rowe .....	266

<i>Hoani Te Heuheu Tukino v Aotea District Maori Land Board</i> [1941] AC 308 at 322 Applied. <i>Wik Peoples v Queensland</i> .....	1
<i>Hockey v Yelland</i> (1984) 157 CLR 124 at 132 Considered. <i>Zickar v MGH Plastic Industries Pty Ltd</i> .....	310
<i>Hunt v Severs</i> [1994] 2 AC 350 at 363 Not followed. <i>Kars v Kars</i> .....	354
<i>J C Williamson Ltd v Musicians' Union of Australia</i> (1912) 15 CLR 636 at 643-644 Considered. <i>Victoria v Commonwealth</i> .....	416
<i>Kars v Kars</i> [1995] Aust Torts Reports 81-369 Affirmed. <i>Kars v Kars</i> .....	354
<i>Koowarta v Bjelke-Petersen</i> (1982) 153 CLR 168 at 216-217 Disapproved. <i>Victoria v Commonwealth</i> .....	416
<i>Labrador Co v The Queen</i> [1893] AC 104 at 123 Applied. <i>Wik Peoples v Queensland</i> .....	1
<i>Lumley General Insurance Ltd v Vintix Pty Ltd</i> (1991) 24 NSWLR 652 Distinguished. <i>CIC Insurance Ltd v Bankstown Football Club Ltd</i> .....	384
<i>Lynch v Lynch</i> (1991) 25 NSWLR 411 Considered. <i>Kars v Kars</i> .....	354
<i>MGH Plastic Industries Pty Ltd v Zickar</i> (1994) 34 NSWLR 617 Reversed. <i>Zickar v MGH Plastic Industries Pty Ltd</i> .....	310
<i>Maan v Westbrook</i> [1993] 2 Qd R 267 Overruled. <i>Kars v Kars</i> .....	354
<i>Mabo v Queensland [No 2]</i> (1992) 175 CLR 1 Considered. <i>Wik Peoples v Queensland</i> .....	1
<i>Mersey Docks and Harbour Board Trustees v Gibbs</i> (1866) LR 1 HC 93 at 112 Applied. <i>Wik Peoples v Queensland</i> .....	1
<i>Motor Accidents Insurance Board v Pulford</i> [1993] Aust Torts Reports 81-235 Overruled. <i>Kars v Kars</i> .....	354
<i>Mutual Pools &amp; Staff Pty Ltd v Commonwealth</i> (1994) 179 CLR 155 Referred to. <i>Victoria v Commonwealth</i> .....	416
<i>North Ganalanja Aboriginal Corporation v Queensland</i> (1995) 61 FCR 1 at 14, 55-56 Disapproved. <i>Wik Peoples v Queensland</i> .....	1
<i>O'Keefe v Williams</i> (1910) 11 CLR 171 Considered. <i>Wik Peoples v Queensland</i> .....	1
<i>Pidoto v Victoria</i> (1943) 68 CLR 87 at 109 Applied. <i>Victoria v Commonwealth</i> .....	416
<i>Polyukhovich v Commonwealth (the War Crimes Act Case)</i> (1991) 172 CLR 501 Applied. <i>Victoria v Commonwealth</i> .....	416
<i>R v Burgess; Ex p Henry</i> (1936) 55 CLR 608 at 687 Approved. <i>Victoria v Commonwealth</i> .....	416
Disapproved. <i>Victoria v Commonwealth</i> .....	416
<i>R (A Minor: Abduction), Re</i> [1992] 1 FLR 105 at 108 Not followed. <i>De L v Director-General, New South Wales</i> Department of Community Services .....	640
<i>Richardson v Forestry Commission</i> (1988) 164 CLR 261 Applied. <i>Victoria v Commonwealth</i> .....	416

<i>Rosecrance v Rosecrance</i> (1995) 105 NTR 1; 129 FLR 310 Considered. <i>Kars v Kars</i> .....	354
<i>S v S (Child Abduction) (Child's Views)</i> [1993] Fam 242 at250 Followed. <i>De L v Director-General, New South Wales Department of Community Services</i> .....	640
<i>Smith v Colonial Mutual Fire Insurance Co Ltd</i> (1880) 6 VLR 200 Distinguished. <i>CIC Insurance Ltd v Bankstown Football Club Ltd</i> .....	384
<i>Snape v Reid</i> [1984] Aust Torts Reports 80-620 Overruled. <i>Kars v Kars</i> .....	354
<i>Squatting Investment Co Ltd v Federal Commissioner of Taxation</i> (1953) 86 CLR 570 at 627-628 Considered. <i>Federal Commissioner of Taxation v Rowe</i> .....	266
<i>Strickland v Rocla Concrete Pipes Ltd</i> (1971) 124 CLR 468 at518-519 Applied. <i>Victoria v Commonwealth</i> .....	416
<i>Taxation, Federal Commissioner of v Rowe</i> (1995) 60 FCR 99 Affirmed. <i>Federal Commissioner of Taxation v Rowe</i> .....	266
<i>Urness v Minto</i> [1994] SLT 988 at 993, 998 Followed. <i>De L v Director-General, New South Wales Department of Community Services</i> .....	640
<i>Van Gervan v Fenton</i> (1992) 175 CLR 327 Applied. <i>Kars v Kars</i> .....	354
<i>Victoria v Commonwealth (the Industrial Relations Act Case)</i> (1996) 187 CLR 416, 485-489, 566-568, 571-572 Applied. <i>De L v Director-General, New South Wales Department of Community Services</i> .....	640
<i>Wik Peoples v Queensland</i> (1996) 63 FCR 450 Varied. <i>Wik Peoples v Queensland</i> .....	1



# STATUTES, RULES, ETC JUDICIALLY CONSIDERED

## IMPERIAL

<b>Constitution (63 &amp; 64 Vict c 12)</b>	
s 51(ii), (xii): <i>Leask v Commonwealth</i> .....	579
s 51(xxix): <i>Victoria v Commonwealth</i> .....	416
s 51(xxix): <i>De L v Director-General, New South Wales Department of     Community Services</i> .....	640

## COMMONWEALTH

<b>Administrative Decisions (Judicial Review) Act 1977</b>	
s 5(1)(c), (d), (f): <i>Australian Heritage Commission v Mount Isa Mines Ltd</i> ..	297
<b>Australian Heritage Commission Act 1975</b>	
ss 4, 22, 23(1): <i>Australian Heritage Commission v Mount Isa Mines Ltd</i> .....	297
<b>Family Law Act 1975</b>	
ss 62A(1), 64(1)(a), 111B, 125: <i>De L v Director-General, New South     Wales Department of Community Services</i> .....	640
<b>Family Law (Child Abduction Convention) Regulations 1986</b>	
reg 16(3)(c): <i>De L v Director-General, New South Wales Department     of Community Services</i> .....	640
<b>Financial Transaction Reports Act 1988</b>	
ss 3(1) "currency", 4, 7, 16(1), 31(1): <i>Leask v Commonwealth</i> .....	579
<b>Income Tax Assessment Act 1936</b>	
s 25(1): <i>Federal Commissioner of Taxation v Rowe</i> .....	266
<b>Industrial Relations Act 1988</b>	
Pt VIA, Divs 1, 2, 3, 5, Pt VIB, Div 2, ss 3(g), 4(1), 6, 150A, 152, 162- 164, 166, 166A, 170DE(2), 170EDA(1)(b), 170DF(1)(f), 170DF(1)(f), 170MD(5), 170ND(10), 170PG(3), 334A: <i>Victoria v Commonwealth</i> .....	416
<b>Insurance Contracts Act 1984</b>	
ss 58, 59, 60: <i>CIC Insurance Ltd v Bankstown Football Club Ltd</i> .....	384

## NEW SOUTH WALES

<b>Workers Compensation Act 1987</b>	
s 4 "injury" pars (a), (b)(ii): <i>Zickar v MGH Plastic Industries Pty Ltd</i> .....	310

## QUEENSLAND

<b>Aurukun Associates Agreement Act 1975</b>	
<i>Wik Peoples v Queensland</i> .....	1
<b>Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957</b>	
<i>Wik Peoples v Queensland</i> .....	1
<b>Land Act 1910</b>	
s 6(1), Pt III: <i>Wik Peoples v Queensland</i> .....	1

**QUEENSLAND** — *continued***Land Act 1962**s 6(1), Pt VI: Wik Peoples v Queensland ..... 1

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**CORRIGENDA**

**185 CLR 307, headnote, line 18:** Omit “or ought to know”.

**186 CLR 312, line 37:** For “No” read “Yes”.

**186 CLR 622, headnote, line 5:** For “Court of Justice” read “Court or Justice”.

**186 CLR 623, line 8:** Omit “The following written judgment was delivered: --”.



## TABLE OF CASES CITED IN THE JUDGMENTS

**Note: The page numbers are those where the case is cited in each judgment in a report.**

A (A Minor) (Abduction), Re (1988) .....	661
A (Minors) (Abduction: Custody Rights), Re (1992) .....	656, 684
AGC (Advances) Ltd v Federal Commissioner of Taxation (1975) .....	285
Abeysekera v Jayatillaka (1932) .....	236
Aboriginal and Islanders Advancement, Corporation of Director of v Peinkinna (1978) .....	99, 100, 255, 258, 260
Accident Compensation Commission v McIntosh (1991) .....	335, 344, 346, 252
Accident Compensation Tribunal, Registrar of v Federal Commissioner of Taxation (1993) .....	197
Actors and Announcers Equity Association v Fontana Films Pty Ltd (1982) .....	556, 557, 558, 590, 622, 633
Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) .....	212
Adams v Wigfield (1994) .....	684
Adelaide Co of Jehovah's Witnesses Inc v Commonwealth (1943) .....	599
Adelaide Corporation v Australasian Performing Right Association Ltd (1928) ....	257
Air Canada v Secretary of State for Trade (1983) .....	183, 184
Airlines of NSW Pty Ltd v New South Wales [No 2] (1965) .....	487
Aisbett v City of Camberwell (1933) .....	87, 185
Aldam's Settled Estate, In re (1902) .....	117
Alexander v Ajax Insurance Co Ltd (1956) .....	402
Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth (1987) .....	549
Alice Phelan Sullivan Corporation v United States (1967) .....	288
Allsop v Federal Commissioner of Taxation (1965) .....	275, 281, 283
American Dairy Queen (Q'ld) Pty Ltd v Blue Rio Pty Ltd (1981) .....	77, 78, 118, 151, 203, 239
Amodu Tijani v Secretary, Southern Nigeria (1921) .....	127, 215, 235
Andersen v Central Authority for New Zealand (1996) .....	656, 684
Anderson v Commercial Union Assurance Co (1885) .....	396
Andrews v Hogan (1952) .....	196
Anonymous (1722) .....	181
Apsassin v The Queen (1995) .....	206
Architects Registration Board (Vict) v Hutchison (1925) .....	302, 306
Armco (Australia) Pty Ltd v Federal Commissioner of Taxation (1948) .....	290
Army, Minister for v Dalziel (1944) .....	559
Arnold v Mann (1957) .....	196
Arthur v Bokenham (1708) .....	248
Asylum Case (1950) .....	545
Atalanta Amsterdam BV v Produktschap voor Vee en Vlees (1979) .....	606
Attorney-General v Prince Ernest Augustus of Hanover (1957) .....	171, 408
Attorney-General (Canada) v Attorney-General (Ontario) (1937) .....	569
Attorney-General (Cth) v Schmidt (1961) .....	566
Attorney-General (NSW) v Brewery Employees' Union (NSW) (1908) .....	76
Attorney-General (NSW) v Brown (1847) .....	109, 172, 205
Attorney-General (NSW) v Trethowan (1931) .....	257
Attorney-General (Quebec) v Attorney-General (Canada) (1921) .....	235
Attorney-General (Vict) v Ettershank (1875) .....	77, 79, 81, 198
Attorney-General (WA) v Australian National Airlines Commission (1976) .....	549
Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia (1913) .....	538
Australian Alliance Assurance Co Ltd v Goodwyn (Insurance Commissioner) (1916) .....	174
Australian Boot Trade Employees' Federation v Whybrow & Co (1910) .....	497

Australian Broadcasting Tribunal v Bond (1990) .....	303
Australian Capital Television Pty Ltd v Commonwealth (1992) .....	594, 595, 605, 606
Australian Coastal Shipping Commission v O'Reilly (1962) .....	540
Australian Communist Party v Commonwealth (1951) .....	567, 624, 634
Australian Education Union, Re; Ex p Victoria (1995) .....	98, 500, 501, 518, 519, 520, 521
Australian Heritage Commission v Mount Isa Mines Ltd (1995) .....	302, 304
Australian Insurance Staffs' Federation v Atlas Assurance Co Ltd (1931) .....	528, 536
Australian Tape Manufacturers Association Ltd v Commonwealth (1993) .....	559
Avco Financial Services Ltd v Federal Commissioner of Taxation (1982) .....	290
Babaniaris v Lutony Fashions Pty Ltd (1987) .....	230
Baker Lake, Hamlet of v Minister of Indian Affairs (1979) .....	123
Bank Nationalization Case (Bank of NSW v Commonwealth) (1948) ....	498, 502, 559, 590, 602
Bank of NSW v Commonwealth (the Bank Nationalization Case) (1948) .....	498, 502, 559, 590, 602
Barker v The Queen (1983) .....	76
Barry v Australian Mutual Provident Society (1920) .....	408
Barton v Commonwealth (1974) .....	478, 481
Beck v Farrelly (1975) .....	360
Berkheiser v Berkheiser (1957) .....	245
Bignold v Dickson (1991) .....	257
Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg Aktiengesellschaft (1975) .....	408
Blackwood v London Chartered Bank of Australia (1874) .....	173, 174
Blueberry River Indian Band v Canada (1995) .....	96
Blundell v Musgrave (1956) .....	358, 359, 365, 368, 369
Bolton, Re; Ex p Beane (1987) .....	169, 634
Botany Municipal Council v Federal Airports Authority (1992) .....	540
Bourrie v US Fidelity and Guaranty Insurance Co (1985) .....	397
Bradburn v Great Western Railway Co (1874) .....	362, 363
Bradley v Commonwealth (1973) .....	481
Brady, In re (1947) .....	79
Breen v Williams (1996) .....	95
Brennan v Comcare (1994) .....	169
Breskvar v Wall (1971) .....	174
Brinsmead v Harrison (1871) .....	179
British Medical Association v Commonwealth (1949) .....	549, 633
British Railways Board v Pickin (1974) .....	256
British Traders' Insurance Co Ltd v Monson (1964) .....	395
Bromley London Borough Council v Greater London Council (1983) .....	247
Bropho v Western Australia (1990) .....	230, 248
Brown v Heffer (1967) .....	198
Brown v Lizars (1905) .....	481
Buck v Bavone (1976) .....	301, 303
Buitoni v FORMA (1979) .....	606
Burnie Port Authority v General Jones Pty Ltd (1994) .....	180
Burton v Honan (1952) .....	602, 616, 624, 633
Butts v O'Dwyer (1952) .....	198
C v C (Minor: Abduction: Rights of Custody Abroad) (1989) .....	661, 662
CIC Insurance Ltd v Bankstown Football Club Ltd (1994) .....	389, 390, 391, 393, 406
Caledonian Railway Co v Greenock & Wemyss Bay Railway Co (1874) .....	256
Caltex Ltd v Federal Commissioner of Taxation (1960) .....	290
Cam & Sons Pty Ltd v Chief Secretary of New South Wales (1951) .....	502
Cameron v Holt (1980) .....	598
Carapark Holdings Ltd v Federal Commissioner of Taxation (1967) .....	276, 290, 291
Carlyle v Elite Insurance Co (1984) .....	396, 397

Castlemaine Tooheys Ltd v South Australia (1990) .....	594
Catherine's Milling & Lumber Co v The Queen (1888) .....	235
Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd (1919) .....	155
Chalkley v Chalkley (1994) .....	684
Chalmers v Pardoe (1963) .....	197
Chan v Cresdon Pty Ltd (1989) .....	180, 195
Chan v Zacharia (1984) .....	96
Charles Moore & Co (WA) Pty Ltd v Federal Commissioner of Taxation (1956) .....	285
Chelsea Investments Pty Ltd v Federal Commissioner of Taxation (1966) .....	76, 196, 229
Cherokee Nation v Georgia (1831) .....	206, 214
Chow Hung Ching v The King (1948) .....	481
Chu Kheng Lim v Minister for Immigration (1992) .....	488
City Realities (Holdings) Ltd v National Insurance Co of NZ Ltd (1985) .....	397, 398
Clarke v Carson (1996) .....	656, 660
Claude Neon Ltd v Melbourne and Metropolitan Board of Works (1969) .....	152
Clissold v Perry (1904) .....	155
Clover, Clayton & Co Ltd v Hughes (1910) .....	315, 347
Clyne v Deputy Commissioner of Taxation (1981) .....	194
Cobb & Co Ltd v Kropp (1967) .....	254
Coe v Commonwealth (1993) .....	83, 214
Cole v Whitfield (1988) .....	593
Coleman v Thompson (1991) .....	569
Collins v Charles Marshall Pty Ltd (1955) .....	540
Commonwealth v Anderson (1960) .....	191
Commonwealth v District Court of Metropolitan District (1954) .....	308
Commonwealth v Hazeldell Ltd (1918) .....	155, 249
Commonwealth v Hornsby (1960) .....	318, 322, 331, 338, 345
Commonwealth v Ockenden (1958) .....	316, 317
Commonwealth v Tasmania (the Tasmanian Dam Case) (1983) .....	475, 484, 485, 486, 487, 488, 509, 566, 570, 571, 572, 591, 601, 604, 605, 614, 634
Commonwealth Aluminium Corporation Ltd v Attorney-General (Q) (1976) .....	99, 254, 255
Community Services, Director General, NSW Department of v De L (1996) .....	646, 663, 669
Cook v Cook (1986) .....	376
Cooper v Commissioner of Income Tax (Q) (1907) .....	173
Cooper v Stuart (1889) .....	139, 181
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) .....	408
Copeland v Stephens (1818) .....	83
Corporate Affairs Commission (NSW) v Yuill (1991) .....	248
Cotogno v Lamb [No 3] (1986) .....	382
Cotterill v Penn (1936) .....	194
Country Magazine Pty Ltd v Federal Commissioner of Taxation (1968) .....	292
Croudace v Zobel (1899) .....	75
Cudgen Rutile (No 2) Pty Ltd v Chalk (1975) .....	77, 91, 174, 255
Cunliffe v Commonwealth (1994) .....	487, 591, 593, 594, 595, 600, 602, 603, 604, 605, 606, 613, 614, 615, 621, 624, 628, 633, 634, 635, 636
Cunningham v Harrison (1973) .....	359, 360, 370
D'Aloia v Colonial Mutual Insurance Co Ltd (1987) .....	398
Darling Island Stevedoring & Lighterage Co Ltd v Hankinson (1967) .....	335, 345
Darling Island Stevedoring & Lighterage Co Ltd v Hussey (1959) .....	320, 321, 323, 325, 334, 336, 338, 341, 346
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) .....	180
Davidson v Guardian Royal Exchange Assurance (1979) .....	397
Davies v Borough of Tenby (1974) .....	369

Davies v Littlejohn (1923) .....	78, 79, 149, 190, 196, 198
Davis v Commonwealth (1988) .....	594
de Britt v Carr (1911) .....	77
De L v Director-General, NSW Department of Community Services (1996) .....	647, 653, 654, 657, 666, 667, 669, 687
Delgamuukw v British Columbia (1993) .....	125, 126, 206, 210, 215, 248
Delohery v Permanent Trustee Co (NSW) (1904) .....	90
Dietrich v The Queen (1992) .....	615
Dilworth v Commissioner of Stamps (1899) .....	330
Dingjan, Re; Ex p Wagner (1995) .....	502, 558, 601, 609, 621, 633, 634
Donnelly v Joyce (1974) .....	358, 360, 369, 370, 371, 380
Duncan v Queensland (1916) .....	174
E (A Minor) v Dorset County Council (1995) .....	212
E (A Minor) (Abduction), Re (1989) .....	668
Earl of Wilton's Settled Estates, In re (1907) .....	259
Eastgate v Rozzoli (1990) .....	257
Ebbels v Rewell (1908) .....	75
Evda Nominees Pty Ltd v Victoria (1984) .....	572
F, Re; Ex p F (1986) .....	502, 622, 624
Fairfax v Federal Commissioner of Taxation (1965) .....	567, 591, 634, 635
Falcon v Famous Players Film Co (1926) .....	257
Falkland Islands Co v The Queen (1863) .....	81, 82, 176
Family and Community Services, Director-General of v Davis (1990) .....	687
Favelle Mort Ltd v Murray (1976) .....	322, 323, 326, 330, 334, 337, 342, 347, 350
Fayed v United Kingdom (1994) .....	615
Federal Coke Co Pty Ltd v Federal Commissioner of Taxation (1977) ...	279, 292, 295
Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd [No 3] (1913) .....	536
Federated Iron Workers' Association of Australia v Commonwealth (1951) .....	548
Federated Storemen and Packers Union of Australia, Re; Ex p Wooldumpers (Vic) Ltd (1989) .....	497, 527
Fenton v Thorley & Co Ltd (1903) .....	315
Ffrost v Stevenson (1937) .....	477
Fife Coal Co v William Young (1940) .....	315
Fisher v Hebburn Ltd (1960) .....	559
Flaherty v Girgis (1987) .....	329
Foley, Re; Channell v Foley (1952) .....	647
Fouche v Superannuation Fund Board (1952) .....	197
Frazers Creek Mining Co Pty Ltd v Schieb (1971) .....	75
Freeman v Fairlie (1828) .....	181
Friedrich v Friedrich (1993) .....	684
GP International Pipecoaters Pty Ltd v Federal Commissioner of Taxation (1990) .....	276, 279, 292
GRE Insurance Ltd v QBE Insurance Ltd (1985) .....	397
Gammon Ltd v Attorney-General (Hong Kong) (1985) .....	598
Geelong Harbour Trust Commissioners v Gibbs Bright & Co (1974) .....	329
General Motors-Holden's Pty Ltd v Staska (1969) .....	559
Georgiadis v Australian and Overseas Telecommunications Corporation (1994) .....	219, 559
Gibbons v Ogden (1824) .....	568
Gillard v Cheshire Lines Committee (1884) .....	83
Glenwood Lumber Co Ltd v Phillips (1904) .....	74, 118, 240, 245
Goldsworthy Mining Ltd v Federal Commissioner of Taxation (1973) .....	74, 78, 117, 152, 196, 240
Goodwin v Phillips (1908) .....	185, 249

Government House Case (Williams v Attorney-General (NSW)) (1913) .....	86, 140, 205, 206
Government Insurance Office of NSW v Atkinson-Leighton Joint Venture (1981) .....	395, 397, 398, 399
Gowan v Christie (1873) .....	117
Gowling v Mercantile Mutual Insurance Co Ltd (1980) .....	358, 375
Graham v Baker (1961) .....	368
Grannall v Marrickville Margarine Pty Ltd (1955) .....	609
Greville v Williams (1906) .....	249
Griffiths v Kerkemeyer (1977) .....	358, 359, 360, 365, 371, 379
Grollo v Palmer (1995) .....	615
Guerin v The Queen (1984) .....	96, 206, 248
Gutkin v Gutkin (1983) .....	358, 368, 375
H R Sinclair & Son Pty Ltd v Federal Commissioner of Taxation (1966) .....	274, 275, 281, 284
Hall v Ewin (1887) .....	94
Hallett's Estate, In re (1880) .....	179
Hamilton v Oades (1989) .....	247
Hamlet of Baker Lake v Minister of Indian Affairs (1979) .....	87
Hanbury-Brown, In Marriage of (1996) .....	675
Handyside v United Kingdom (1976) .....	615
Hayes v Federal Commissioner of Taxation (1956) .....	282
Health and Community Services, Secretary, Department of v JWB and SMB (Marion's Case) (1992) .....	683
Hegarty v Ellis (1908) .....	174
He Kaw Teh v The Queen (1985) .....	592, 598, 625
Henderson v Merrett Syndicates Ltd (1995) .....	95
Heness v Bell (1906) .....	230
Herald & Weekly Times Ltd v Commonwealth (1966) .....	601, 602, 636
Hillsboro National Bank v Commissioner of Internal Revenue (1983) ...	286, 288, 289
Hoani Te Heuheu Tukino v Aotea District Maori Land Board (1941) .....	256
Hobartville Stud Pty Ltd v Union Insurance Co Ltd (1991) .....	411
Hockey v Yelland (1984) .....	324, 325, 332, 333, 334, 335, 336, 341, 343, 346, 349, 538
Hocking v Western Australian Bank (1909) .....	249
Hodgson v Trapp (1989) .....	368
Hope v Bathurst City Council (1980) .....	282
Hospital Products Ltd v United States Surgical Corporation (1984) .....	96
House v The King (1936) .....	212
Howes v Gosford Shire Council (1962) .....	295
Hume Steel Ltd v Peart (1947) .....	332, 339, 340, 341
Hungerfords v Walker (1989) .....	411
Hunt v Severs (1993) .....	368, 372
Hunt v Severs (1994) .....	359, 360, 367, 369, 371, 375, 380
ICI Alkali (Australia) Pty Ltd v Federal Commissioner of Taxation (1978) .....	77
Ilich v The Queen (1987) .....	595
Immigration and Ethnic Affairs, Minister for v Teoh (1995) .....	481, 682
Immigration and Ethnic Affairs, Minister for v Wu Shan Liang (1996) .....	303
Incorporation Case (New South Wales v Commonwealth) (1990) .....	566
Industrial Relations Act Case (Victoria v Commonwealth) (1996) .....	604, 605, 606, 614, 615, 650, 668
Internal Revenue, Commissioner of v Glenshaw Glass Co (1955) .....	286
International Nickel Australia Ltd v Federal Commissioner of Taxation (1977) ....	290
Isherwood v Butler Pollnow Pty Ltd (1986) .....	408
J v Lieschke (1987) .....	683
J C Williamson Ltd v Musicians' Union of Australia (1912) .....	536
James Patrick & Co Proprietary Ltd v Sharpe (1955) .....	347

Javad v Aqil (1991) .....	94
John v Federal Commissioner of Taxation (1989) .....	348, 349
Johnson v McIntosh (1823) .....	123
Johnson, Ex p; Re MacMillan (1946) .....	257
Joint Tribal Council of Passamaquoddy Tribe v Morton (1975) .....	96
Jolley v Mainka (1933) .....	477, 622
Jones v Commonwealth (1987) .....	349
Jones v Jones (1982) .....	358
Joyner v Weeks (1891) .....	153
Julius v Lord Bishop of Oxford (1880) .....	258
Jumbunna Coal Mine NL v Victorian Coal Miners' Association (1908) .....	485, 549, 566, 621
K, Re (1994) .....	660
K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) .....	171, 408
Kars v Kars (1995) .....	365, 367
Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission (1977) .....	307
Kavanagh v Commonwealth (1960) .....	316, 317, 318, 330, 331, 347
Kavanaugh v Cohoes Power & Light Corporation (1921) .....	178
Kellaway v Broken Hill South Ltd (1944) .....	320, 321, 343
Koowarta v Bjelke-Petersen (1982) .....	476, 483, 484, 567, 568, 570
L ((Child Abduction) (Psychological Harm)), Re (1993) .....	661
Labrador Co v The Queen (1893) .....	256
Lamb v Cotogno (1987) .....	382
Landale v Menzies (1909) .....	201, 229, 239
Lands and Forests, Minister for v McPherson (1991) .....	80, 81, 149, 198, 239, 245
Lands, Minister for v Priestley (1911) .....	76, 81
Lee, Re; Ex p Harper (1986) .....	498
Le Mesurier v Connor (1929) .....	308
Leppard v Excess Insurance Co Ltd (1979) .....	397
Levesque v Levesque (1993) .....	654, 687
Lewis v Bell (1985) .....	116
Lewisham, Metropolitan Borough and Town Clerk of v Roberts (1949) .....	94
Lim Chin Aik v The Queen (1963) .....	579
Lister v Romford Ice & Cold Storage Co Ltd (1957) .....	179
Lord Llangattock v Watney Combe Reid & Co Ltd (1910) .....	199
Lucas v New Zealand Insurance Co Ltd (1983) .....	397
Lumley General Insurance Ltd v Vintix Pty Ltd (1991) .....	395, 399
Lutwich v Mitton (1620) .....	199
Lynch v Lynch (1991) .....	358, 367, 368, 373, 376, 378
Lyons v Smart (1908) .....	193, 194
M and M (1996) .....	684
MDP v SMB (1995) .....	661
Maan v Westbrook (1993) .....	358, 368, 375, 378
Mabo v Queensland [No 1] (1988) .....	85, 100, 123, 147, 168, 247
Mabo v Queensland [No 2] (1992) .....	71, 84, 85, 86, 87, 88, 90, 91, 92, 100, 101, 107, 121, 123, 124, 126, 127, 128, 129, 135, 146, 147, 155, 168, 169, 170, 174, 175, 177, 181, 183, 186, 187, 188, 191, 197, 205, 206, 207, 208, 213, 215, 218, 220, 222, 223, 225, 234, 235, 237, 238, 239, 247, 248, 249, 250
McCall v State Central Authority (1994) .....	668, 684
McCarrick v Liverpool Corporation (1947) .....	349
McCulloch v Maryland (1819) .....	599
Macdonald v Tully (1870) .....	81, 120, 150, 192, 239
McGavin v McMaster (1869) .....	73
McGraw-Hinds (Aust) Pty Ltd v Smith (1979) .....	194
McKee v McKee (1951) .....	677

McKelvey v Meagher (1906) .....	482
McPherson v Minister for Natural Resources (1990) .....	198
McWilliam v McWilliams Wines Pty Ltd (1964) .....	198
Maharaj v Chand (1986) .....	197
Mann Crossman & Paulin v Land Registry (Registrar) (1918) .....	199, 242
Marcus Clark & Co Ltd v Commonwealth (1952) .....	634
Marshall v Smith (1907) .....	248
Mason v Clarke (1955) .....	176, 247
Mathieu-Mohin and Clerfayt v Belgium (1987) .....	615
Maxwell v Murphy (1957) .....	559, 662
Melbourne Corporation v Barry (1922) .....	249, 329
Melbourne Corporation v Commonwealth (1947) .....	498, 501, 602, 621
Menominee Tribe of Indians v United States (1968) .....	206
Mercer, In re (1880) .....	91
Mersey Docks and Harbour Board Trustees v Gibbs (1866) .....	258
Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union (1983) .....	540
Milicevic v Campbell (1975) .....	611, 625, 626, 636
Milirrpum v Nabalco Pty Ltd (1971) .....	206
Modern Permanent Building & Investment Society (In liq) v Federal Commissioner of Taxation (1958) .....	285
Moore v Western Australia (1907) .....	81
Morris v Pugh (1761) .....	187
Moss v Sun Alliance Australia Ltd (1990) .....	411
Motor Accidents Insurance Board v Pulford (1993) .....	358, 368, 373, 375, 376
Mount Isa Mines Ltd v Australian Heritage Commission (1995) .....	300, 301, 302
Mulcahy v Ministry of Defence (1996) .....	212
Murphy v Farmer (1988) .....	194
Murphyores Inc Pty Ltd v Commonwealth (1976) .....	624
Murray v Director, Family Services (ACT) (1993) .....	682
Muschinski v Dodds (1985) .....	97
Mutual Pools & Staff Pty Ltd v Commonwealth (1994) .....	219, 559, 573
NRMA Insurance Ltd v Tatt (1989) .....	411
Nabob of the Carnatic v East India Co (1791) .....	476
National Insurance Co of New Zealand Ltd v Espagne (1961) .....	361, 362, 363
National Provincial Bank Ltd v Ainsworth (1965) .....	196
Nationwide News Pty Ltd v Wills (1992) ....	537, 549, 605, 608, 613, 614, 615, 617, 616, 624, 628, 633, 634, 638
Native Title Act Case (Western Australia v Commonwealth) (1995) ...	84, 85, 92, 100, 120, 124, 126, 147, 168, 169, 171, 176, 186, 207, 234, 247, 248, 540
Natural Resources (Saskatchewan), In re (1932) .....	172
Nelson v Nelson (1995) .....	184
New South Wales v Commonwealth (the Incorporation Case) (1990) .....	566
New South Wales v Commonwealth (the Seas and Submerged Lands Act Case) (1975) .....	206, 478, 482
New South Wales v Macquarie Bank Ltd (1992) .....	635
Nguyen v Nguyen (1990) .....	358, 365, 370, 379
Ninety-Mile Beach, In re (1963) .....	206
Nolan v Willimbong Shire Council (1939) .....	201
Northern Suburbs General Cemetery Reserve Trust v Commonwealth (1993) .....	610
Northern Territory v Mengel (1995) .....	348
North Ganalanja Aboriginal Corporation v Queensland (1995) .....	104, 130, 208, 211, 215, 222, 223, 225, 226, 242
North Ganalanja Aboriginal Corporation v Queensland (1996) .....	208, 211
North Sea Continental Shelf Cases (1969) .....	545
Oceanic Sun Line Special Shipping Co Inc v Fay (1988) .....	219, 365
O'Keefe v Malone Ltd (1903) .....	75, 117, 150, 174, 239, 245
O'Keefe v Williams (1907) .....	79, 80

O'Keefe v Williams (1910) .....	75, 78, 81, 149, 150, 197, 203, 242
O'Neill v Lumbey (1987) .....	335, 338, 344, 345, 352
Orr v Ford (1989) .....	184, 197
O'Toole v Charles David Pty Ltd (1991) .....	572
Owens v Collector of Customs (NSW) (1940) .....	193
P v P (Minors) (Child Abduction) (1992) .....	661, 669
Paff v Speed (1961) .....	361
Parisienne Basket Shoes Pty Ltd v Whyte (1938) .....	303
Parry v Cleaver (1970) .....	364
Parsley v Day (1842) .....	83
Passamaquoddy Tribe v Morton (1975) .....	97, 123, 206
Paul v Canadian Pacific Ltd (1988) .....	215
Pavey & Matthews Pty Ltd v Paul (1987) .....	180
Payne v Tennessee (1991) .....	484
Payroll Tax Case (Victoria v Commonwealth) (1971) .....	498
Penny v Penny (1965) .....	249
Pepper v Hart (1993) .....	184, 408
Pidoto v Victoria (1943) .....	502
Plimmer v Mayor & c of Wellington (1884) .....	185
Police Commissioner (SA) v Temple (1993) .....	687
Polyukhovich v Commonwealth (the War Crimes Act Case) (1991) .....	485, 545, 566, 570, 614
Possfund Custodian Trustee Ltd v Diamond (1996) .....	212
Potter v Minahan (1908) .....	247, 248
Professional Engineers' Association, Ex p (1959) .....	179
Proudman v Dayman (1941) .....	598
Prudential Assurance Co Ltd v London Residuary Body (1992) .....	201
Public Prosecutions, Director of, Re; Ex p Lawler (1994) .....	614, 628, 635, 636
Public Service Association v Industrial Commission (1985) .....	351
Pyneboard Pty Ltd v Trade Practices Commission (1983) .....	247
Pyx Granite Co Ltd v Ministry of Housing and Local Government (1960) .....	259
Queensland v Litz (1993) .....	198
Queensland Electricity Commission v Commonwealth (1985) .....	498, 500
R v Adams (1996) .....	182
R v Bain; Ex p Cadbury Schweppes Australia Ltd (1984) .....	536
R v Bowen; Ex p Amalgamated Metal Workers & Shipwrights' Union (1980) .....	548
R v Burgess; Ex p Henry (1936) .....	478, 482, 483, 488, 604
R v Clarkson; Ex p General Motors-Holden's Pty Ltd (1976) .....	528
R v Coldham; Ex p Australian Social Welfare Union (1983) .....	485
R v Commonwealth Court of Conciliation and Arbitration; Ex p Ozone Theatres (Aust) Ltd (1949) .....	497
R v Commonwealth Court of Conciliation and Arbitration; Ex p Whybrow & Co (1910) .....	502
R v Cot (1996) .....	182
R v Credit Tribunal; Ex p General Motors Acceptance Corporation, (1977) .....	540
R v Federal Court of Australia; Ex p WA National Football League (1979) .....	557
R v Gaudron; Ex p Uniroyal Pty Ltd (1978) .....	537
R v Holmes; Ex p Victorian Employers' Federation (1980) .....	528
R v Home Secretary; Ex p Brind (1991) .....	635
R v Kelly; Ex p Australian Railways Union (1953) .....	528
R v Kirby; Ex p Boilermakers' Society of Australia (1956) .....	568
R v Metal Trades Employers Association; Ex p Amalgamated Engineering Union (1949) .....	528
R v Minister for Agriculture, Fisheries and Food; Ex p FEDESA (1990) .....	601
R v Murrell (1836) .....	181
R v Poole; Ex p Henry [No 2] (1939) .....	502



R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex p Australian National Airways Pty Ltd (1964)	621
R v Reynhoudt (1962)	329, 351
R v Sharkey (1949)	482
R v Slator (1881)	76
R v Sparrow (1990)	168, 215
R v Sweeney, Ex p Northwest Exports Pty Ltd (1981)	549
R v Tomkins (1919)	81, 230, 239
R v Toohey, Ex p Meneling Station Pty Ltd (1982)	81, 112, 149, 196, 245
R v Van der Peet (1996)	124, 126, 168, 182, 183, 184, 206, 210, 215, 248
R (A Minor: Abduction), Re (1992)	654, 686, 687
Radaich v Smith (1959)	73, 116, 152, 195, 229, 239, 245
Railways and Tramways, Chief Commissioner for (NSW) v Attorney-General (NSW) (1909)	185, 249
Rajaratnam v Rajaratnam-Hertig (1988)	668, 686, 687
Randwick Corporation v Rutledge (1959)	86, 109, 171, 206
Ratzlaf v United States (1994)	598, 610, 619, 631, 637
Redding v Lee (1983)	362, 363, 364
Reid v Moreland Timber Co Pty Ltd (1946)	247
Resources, Minister for v Dover Fisheries Pty Ltd (1993)	600, 615, 628
Reynolds v Phoenix Assurance Co Ltd (1978)	396
Richardson v Forestry Commission (1988)	487, 566, 572, 606, 634
Roberts v Hopwood (1925)	247
Roberts v Roberts (1978)	374, 378
Rogers v The Queen (1995)	612, 619, 632, 634, 637
Rose v Federal Commissioner of Taxation (1951)	285
Rosecrance v Rosecrance (1995)	358, 373, 376, 381, 382
Ryan v Clark (1849)	83
Rydder v Rydder (1995)	684
S v S (Child Abduction) (Child's Views) (1993)	655, 656, 667, 687
SS Pharmaceutical Co Ltd v Qantas Airways Ltd (1991)	676
St Catherine's Milling & Lumber Co v The Queen (1888)	123
Scott v Federal Commissioner of Taxation (1966)	279
Seas and Submerged Lands Act Case (New South Wales v Commonwealth) (1975)	206, 478, 482
Seminole Tribe of Florida v Florida (1996)	484
Sevenoaks Maidstone & Tunbridge Railway Co v London Chatham & Dover Railway Co (1879)	153, 174
Shamsi v Heijkensköld-Shamsie (1990)	686
Sharman v Evans (1977)	368
Sherras v De Rutzen (1895)	598
Shipping Corporation of India Ltd v Gamlen Chemical Co A/asia Pty Ltd (1980)	675
Simsek v Macphee (1982)	481
Sinclair (HR) & Son Pty Ltd v Federal Commissioner of Taxation (1966)	274, 275, 281, 284
Skyring's Application [No 2], Re (1985)	618
Slazengers (Australia) Pty Ltd v Burnett (1951)	320, 334, 336, 338, 341
Smith v Colonial Mutual Fire Insurance Co Ltd (1880)	396, 399
Snape v Reid (1984)	358, 374, 375
Soering v United Kingdom (1989)	615
Sorby v Commonwealth (1983)	247
Soucic v Soucic (1995)	668, 669, 684
Southern Rhodesia, In re (1919)	236, 237
Sparrow v The Queen (1990)	206
Squatting Investment Co Ltd v Federal Commissioner of Taxation (1953)	277, 278, 292
Staska v General Motors-Holden's Pty Ltd (1972)	559
State Government Insurance Commission v Trigwell (1979)	180

State Public Services Federation, Re; Ex p Attorney-General (WA) (1993) .....	498, 528
Stenhouse v Coleman (1944) .....	624
Stewart v Williams (1914) .....	110, 174
Stewart v Wilsons & Clyde Coal Co Ltd (1902) .....	315
Strathblaine Estates Ltd, In re (1948) .....	91
Street v Mountford (1985) .....	75, 80, 116, 195
Strickland v Rocla Concrete Pipes Ltd (1971) .....	502, 558
Sullivan v Casino Municipal Council (1973) .....	294
Superannuation Fund Investment Trust v Commissioner of Stamps (SA) (1979) ..	197
Sweet v Parsley (1970) .....	598
Tahan v Duquette (1992) .....	688
Tasmanian Dam Case (Commonwealth v Tasmania) (1983) ...	475, 484, 485, 486, 487, 488, 509, 566, 570, 571, 572, 591, 601, 604, 605, 614, 634
Taxation, Federal Commissioner of v Cooper (1991) .....	282
Taxation, Federal Commissioner of v Dixon (1952) .....	276, 285, 290, 292, 295
Taxation, Federal Commissioner of v Inkster (1989) .....	282
Taxation, Federal Commissioner of v Levy (1961) .....	285
Taxation, Federal Commissioner of v Myer Emporium Ltd (1987) .....	276
Taxation, Federal Commissioner of v Raymor (NSW) Pty Ltd (1990) .....	285, 290
Taxation, Federal Commissioner of v Rowe (1995) .....	273, 278, 279, 280, 292
Taxation, Federal Commissioner of v Wade (1951) .....	279
Taxation, Federal Commissioner of v Westfield Ltd (1991) .....	275
Tee-Hit-Ton Indians v United States (1955) .....	123
Theophanous v Herald & Weekly Times Ltd (1994) .....	615
Thiel v Federal Commissioner of Taxation (1990) .....	546
Thompson v Australian Capital Television Pty Ltd (1996) .....	179
Thomson v Thomson (1994) .....	661, 676, 683
Times Fire Assurance Co v Hawke (1859) .....	396
Tindal v Federal Commissioner of Taxation (1946) .....	282
Tournai v Mechoulam (1992) .....	687
Tracey, Re; Ex p Ryan (1989) .....	502
Trade Practices Commission v Tooth & Co Ltd (1979) .....	558
Turner v Turner (1988) .....	685
Tyler, Re; Ex p Foley (1994) .....	484
United Dominions Corporation Ltd v Brian Pty Ltd (1985) .....	96
United States v Anzalone (1985) .....	611
United States v Dann (1983) .....	210
United States v Dann (1985) .....	210
United States v Dann (1989) .....	210
United States v Lopez (1995) .....	568, 569
United States v Mitchell (1983) .....	96
United States v Sante Fe Pacific Railroad Co (1941) .....	123
United States v Thompson (1979) .....	611
United States v Tobon-Builes (1983) .....	611
United States v University of New Mexico (1984) .....	97
United States v Varbel (1986) .....	611
University of New South Wales v Moorhouse (1975) .....	257
Urness v Minto (1994) .....	655, 656, 686
Vacuum Oil Co Pty Ltd v Queensland [No 2] (1935) .....	502
Van Gervan v Fenton (1992) .....	359, 360, 365, 367, 370, 374, 379
Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (1982) .....	498
Victoria v Commonwealth (the Industrial Relations Act Case) (1996) ..	604, 605, 606, 614, 615, 650, 668
Victoria v Commonwealth (the Payroll Tax Case) (1971) .....	498

Victrawl Pty Ltd v Telstra Corporation Ltd (1995) .....	675, 676
Voli v Inglewood Shire Council (1963) .....	195
Waanyi People's Application, Re (1995) .....	87
Wacando v Commonwealth (1981) .....	175, 408
Wadda v Ireland (1994) .....	684
Wade v New South Wales Rutile Mining Co Pty Ltd (1969) .....	75, 117, 151, 174, 201
Walker v Baird (1892) .....	480, 481
Walker v New South Wales (1994) .....	214
Walsh v Lonsdale (1882) .....	195
War Crimes Act Case (Polyukhovich v Commonwealth) (1991) .....	485, 545, 566, 570, 614
Warner v Metropolitan Police Commissioner (1969) .....	598
Warner Music Australia Pty Ltd v Federal Commissioner of Taxation (1996) .....	277
Water Conservation and Irrigation Commission (NSW) v Browning (1947) .....	247, 661, 662
Waterford v Commonwealth (1987) .....	303
Watson v Lee (1979) .....	595, 608, 610, 622, 639
Wenn v Attorney-General (Vict) (1948) .....	540
Western Australia v Commonwealth (the Native Title Act Case) (1995) .....	84, 85, 92, 100, 120, 124, 126, 147, 168, 169, 171, 176, 186, 207, 234, 247, 248, 540
Western Suburbs Hospital v Currie (1987) .....	382
Westropp v Elligott (1884) .....	201
Wickham v Hawker (1840) .....	176
Wigan v Edwards (1973) .....	392
Wik Peoples v Queensland (1994) .....	210, 211
Wik Peoples v Queensland (1996) .....	65, 101, 103, 104, 106, 107, 134, 137, 138, 139, 140, 144, 157, 169, 208, 211, 222, 255, 304
Wildash v Brosnan (1870) .....	81, 120, 150, 172, 230, 239
Williams v Attorney-General (NSW) (the Government House Case) (1913) .....	86, 140, 205, 206
Williams v Bosanquet (1819) .....	83
Williams v Dunn's Assignee (1908) .....	329
Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd (1986) .....	212
Williamson v Ah On (1926) .....	636
Willis v Moulded Products (Australia) Ltd (1951) .....	347
Wilner v Osswald (1995) .....	684
Wilton (Earl), Settled Estates, In re (1907) .....	259
Worcester v Georgia (1832) .....	206, 214
Workers Rehabilitation and Compensation Corporation v Ascione (1989) .....	344, 352
Worthing v Rowell & Muston Pty Ltd (1970) .....	633
X (Minors) v Bedfordshire County Council (1995) .....	212, 258
XCO Pty Ltd v Federal Commissioner of Taxation (1971) .....	282
XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) .....	179
YZ Finance Co Pty Ltd v Cummings (1964) .....	330
Yandama Pastoral Co v Mundi Mundi Pastoral Co Ltd (1925) .....	74, 81, 121, 226
Yarmouth Corporation v Simmons (1878) .....	87, 185, 186, 249
ZP v PS (1994) .....	657, 658, 683