



HIGH COURT BULLETIN

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[2017] HCAB 1 (15 February 2017)

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

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1: SUMMARY OF NEW ENTRIES

2: Cases Handed Down

Case	Title
<i>Palmer v Marcus William Ayres, Stephen James Parbery and Michael Andrew Owen in their capacities as liquidators of Queensland Nickel Pty Ltd (in liq) & Ors; Ferguson v Marcus William Ayres, Stephen James Parbery and Michael Andrew Owen in their capacities as liquidators of Queensland Nickel Pty Ltd (in liq)</i>	Constitutional Law
<i>Re Culleton (No 2)</i>	Court of Disputed Returns
<i>Commissioner of State Revenue v ACN 005 057 349 Pty Ltd</i>	Taxation
<i>Western Australian Planning Commission v Leith; Western Australian Planning Commission v Southregal Pty Ltd & Anor</i>	Town Planning

3: Cases Reserved

Case	Title
<i>Rizeq v The State of Western Australia</i>	Constitutional Law
<i>Re Day</i>	Court of Disputed Returns
<i>Aubrey (MA) v The Queen</i>	Criminal Law
<i>Hughes v The Queen</i>	Criminal Law
<i>Kendirjian v Lepore & Anor</i>	Negligence

4: Original Jurisdiction5: Special Leave Granted

Case	Title
<i>Chiro v The Queen</i>	Criminal Law
<i>Van Beelen v The Queen</i>	Criminal Law
<i>The Queen v Holliday</i>	Criminal Law
<i>State of New South Wales v DC & Anor</i>	Negligence

6: Cases Not Proceeding or Vacated

Case	Title
<i>ResourceCo Material Solutions Pty Ltd & Anor v State of Victoria & Anor</i>	Constitutional Law
<i>Plaintiff A33/2016 v Minister for Immigration and Border Protection</i>	Migration

2: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the February 2017 sittings.

Constitutional Law

Palmer v Marcus William Ayres, Stephen James Parbery and Michael Andrew Owen in their capacities as liquidators of Queensland Nickel Pty Ltd (in liq) & Ors; Ferguson v Marcus William Ayres, Stephen James Parbery and Michael Andrew Owen in their capacities as liquidators of Queensland Nickel Pty Ltd (in liq)

[B52/2016](#); [B55/2016](#): [\[2017\] HCA 5](#)

Orders pronounced: 10 November 2016

Reasons published: 8 February 2017

Coram: Kiefel, Gageler, Keane, Nettle and Gordon JJ

Catchwords:

Constitutional law (Cth) – Judicial power – Mandatory examination of persons about corporation's examinable affairs – Where plaintiffs former directors of corporation in voluntary liquidation – Where liquidators applied for and obtained order for issue of summons under s 596A of *Corporations Act* 2001 (Cth) requiring plaintiffs to attend for examination about corporation's examinable affairs – Whether s 596A invalid as contrary to Ch III of Constitution – Whether s 596A gives rise to "matter" that engages judicial power of Commonwealth – Whether power conferred by s 596A incompatible with or outside judicial power of Commonwealth.

Words and phrases – "examinable affairs", "federal jurisdiction", "judicial power", "matter".

Constitution – Ch III.

Corporations Act 2001 (Cth) – ss 596A, 597.

Held: Question answered.

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Court of Disputed Returns

Re Culleton (No 2)

[C15/2016](#); **[\[2017\] HCA 4](#)**

Judgment delivered: 3 February 2017

Coram: Kiefel, Bell, Gageler, Keane and Nettle JJ

Catchwords:

Parliamentary elections (Cth) – Senate – Reference to Court of Disputed Returns – Where at date of nomination person convicted of offence punishable by term of imprisonment for one year or longer – Where person liable to be sentenced – Where person elected as Senator – Where conviction subsequently annulled – Whether annulment of conviction of retrospective effect – Whether person incapable of being chosen as Senator under s 44(ii) of Constitution – Whether vacancy should be filled by special count of ballot papers.

Words and phrases – "annulment", "convicted and is under sentence, or subject to be sentenced", "incapable of being chosen", "retrospective effect", "special count", "void ab initio".

Constitution – s 44(ii).

Commonwealth Electoral Act 1918 (Cth) – ss 364, 376.

Crimes Act 1900 (NSW) – s 117.

Crimes (Appeal and Review) Act 2001 (NSW) – ss 4, 8, 9, 10.

Crimes (Sentencing Procedure) Act 1999 (NSW) – ss 10, 25.

Held: Questions answered.

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Taxation

Commissioner of State Revenue v ACN 005 057 349 Pty Ltd

[M88/2016](#); **[M89/2016](#)**: **[\[2017\] HCA 6](#)**

Judgment delivered: 8 February 2017

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

Catchwords:

Taxation – Land tax – Where land tax assessments were paid – Where Commissioner did not amend assessments after error detected – Whether Commissioner under duty compellable by mandamus to amend and refund excess land tax – Whether Commissioner's refusal to amend amounted to conscious maladministration – Whether amended assessment had effect that excess tax was never land tax – Whether proceedings were barred under *Land Tax Act 1958* (Vic).

Words and phrases – "amended assessment", "charged, levied and collected", "completeness and accuracy", "conscious maladministration", "land tax", "tax paid under, or purportedly paid under".

Land Tax Act 1958 (Vic) – ss 19, 90AA, 92A.

Appealed from the VSC (CA): [\[2015\] VSCA 332](#)

Held: Appeals allowed.

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Town Planning

Western Australian Planning Commission v Southregal Pty Ltd & Anor; Western Australian Planning Commission v Leith
[P47/2016](#); [P48/2016](#): [\[2017\] HCA 7](#)

Judgment delivered: 8 February 2017

Coram: Kiefel, Bell, Gageler, Keane and Nettle JJ

Catchwords:

Town planning (WA) – Compensation – Where land reserved for public purpose under planning scheme – Where s 173 of *Planning and Development Act 2005* (WA) makes provision for landowner to be compensated where land injuriously affected by making or amendment of planning scheme – Where, under s 177, compensation not payable until land first sold after reservation or responsible authority refuses development application or grants application on unacceptable conditions – Where landowners purchased land affected by planning scheme after date of reservation – Where purchasers applied to develop land and were refused – Whether purchasers entitled to compensation.

Words and phrases – "compensation", "injuriously affection", "planning scheme", "reservation".

Metropolitan Region Town Planning Scheme Act 1959 (WA) – s 36.

Planning and Development Act 2005 (WA) – ss 171, 173, 174, 176, 177.

Town Planning and Development Act 1928 (WA) – ss 11, 12.

Appealed from WASC (CA): [\[2016\] WASCA 53](#); (2016) 49 WAR 487

Held: Appeals allowed.

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3: CASES RESERVED

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

Constitutional Law

Rizeq v The State of Western Australia

P55/2016: [\[2017\] HCATrans 11](#); [\[2017\] HCATrans12](#)

Date heard: 1-2 February 2017

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

Catchwords:

Constitutional law – s 80 of the Constitution – Where appellant was a resident of New South Wales – Where appellant was found guilty of possession of drugs with of intent to sell or supply under *Misuse of Drugs Act 1981 (WA) s 6(1)(a)* – Where appellant was convicted by majority pursuant to *Criminal Procedure Act 2004 (WA) s 114(2)* – Whether *Misuse of Drugs Act 1981 (WA) s 6(1)(a)* applied directly or was “picked up” by *Judiciary Act 1903 (Cth) s 79(1)* – Whether *Misuse of Drugs Act 1981 (WA) s 6(1)(a)* was an offence against a “law of the Commonwealth” where the District Court was exercising federal diversity jurisdiction – Whether *Criminal Procedure Act 2004 (WA) s 114(2)* did not apply to the appellant’s trial because s 80 of the Constitution required the appellant to be convicted by unanimous verdict.

Appealed from WASC (CA): [\[2015\] WASCA 165](#)

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Contract Law

Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd

M143/2016: [\[2016\] HCATrans 300](#)

Date heard: 14 December 2016

Coram: Kiefel, Bell, Gageler, Nettle and Gordon JJ

Catchwords:

Contract law – Construction of contract – Long term farm lease – Where planning scheme restrictions prevented freehold sale – Where parties entered into 99 year lease for total rental of \$70,000 paid in full at commencement of lease – Where clause 13 referred to intention of lessor to sell and lessee to purchase freehold for consideration of \$70,000 – Where clause 4 provided that lessee to pay “all rates taxes assessments and outgoings whatsoever ~~excepting land tax~~ ... payable by the ~~Landholder or tenant~~” – Whether the Court should consider parties’ mutual subjective intention when constructing a contract.

Appealed from VSC (CA): [\[2016\] VSCA 23](#)

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Court of Disputed Returns

Re Day

C14/2016: [\[2017\] HCATrans 15](#)

Questions referred to the Court of Disputed Returns pursuant to section 376 of the *Commonwealth Electoral Act 1918* (Cth).

Date Heard: 7 February 2017

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

Questions:

- (a) Whether, by reason of s 44(v) of the Constitution, or for any other reason, there is a vacancy in the representation of South Australia in the Senate for the place for which Robert John Day was returned;
- (b) If the answer to Question (a) is “yes”, by what means and in what manner that vacancy should be filled;
- (c) Whether, by reason of s 44(v) of the Constitution, or for any other reason, Mr Day was at any time incapable of sitting as a Senator prior to the dissolution of the 44th Parliament and, if so, on what date he became so incapable;
- (d) What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and
- (e) What, if any, orders should be made as to the costs of these proceedings.

Judgment reserved.

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Criminal Law

Perara-Cathcart v The Queen
A39/2016: [\[2016\] HCATrans 269](#)

Date heard: 11 November 2016

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

Catchwords:

Criminal law – Directions to jury – Proviso – Application of proviso – Where evidence was led at trial about the appellant’s drug possession – Where Court of Criminal Appeal held that evidence of the appellant’s drug possession was relevant and correctly admitted – Where a majority of the Court of Criminal Appeal held that the trial Judge failed to provide satisfactory directions regarding the permissible use of the evidence of the appellant’s drug possession – Whether the Court of Criminal Appeal correctly applied the proviso.

Appealed from SASC (CCA): [\[2015\] SASCF 103](#)

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Prior v Mole
D5/2016: [\[2016\] HCATrans 294](#)

Date heard: 6 December 2016

Coram: Kiefel, Bell, Gageler, Nettle and Gordon JJ

Catchwords:

Criminal law – Where appellant was taken into “protective custody” under the *Police Administration Act* 1979 (NT) s 128 – Where appellant spat on police officer – Where appellant was convicted of assault – Construction of s 128(1) of the *Police Administration Act* 1979 (NT) – Exercise of power under s 128(1) – Whether power conditioned on both formation of belief based on reasonable grounds that person likely to commit offence because of intoxication and existence of facts sufficient to induce that state of mind in reasonable police officer – Whether the appellant’s apprehension was lawful.

Appealed from NTSC (CA): [\[2016\] NTCA 2](#); (2016) 304 FLR 418

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Aubrey (MA) v The Queen

S274/2016: [\[2017\] HCATrans 13](#)

Date heard: 3 February 2017

Coram: Kiefel CJ, Bell, Keane, Nettle and Edelman JJ

Catchwords:

Criminal law – Statutory construction – *Crimes Act 1900* (NSW) s 35 – Where appellant alleged to have transmitted Human Immunodeficiency Virus (HIV) to complainant – Where appellant had tested positive for HIV but told complainant that he did not have HIV – Where appellant convicted of maliciously inflicting grievous bodily harm under s 35(1)(b) *Crimes Act 1900* (NSW) – Whether recklessness under s 5 *Crimes Act 1900* (NSW) requires foresight of the probability of harm rather than mere advertence to a possibility – Whether offence under s 35(1)(b) requires direct force applied violently to body of victim.

Appealed from NSWSC (CCA): [\[2015\] NSWCCA 323](#)

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Hughes v The Queen

S226/2016: [\[2017\] HCATrans 16](#)

Date heard: 8 February 2017

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

Catchwords:

Criminal law – Tendency evidence – Where appellant found guilty on 10 of 11 charges of having sexual intercourse with, and committing acts of indecency on, girls under the age of sixteen – Where tendency evidence admitted to prove that the appellant had a tendency to have a sexual interest in, and engage in sexual conduct with, female children under sixteen – *Evidence Act 1995* (NSW) s 97 – Whether tendency evidence had “significant probative value” – Whether an “underlying unity” or “pattern of conduct” required to establish significant probative value – Whether evidence of tendency was sufficiently specific to reach threshold of significant probative value – Whether Court of Criminal Appeal erred in

rejecting approach taken to tendency evidence in *Velkoski v R* [2014] VSCA 121.

Appealed from NSWSC (CCA): [\[2015\] NSWCCA 330](#)

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Family Law

Bondelmonte v Bondelmonte & Anor
S247/2016: [\[2016\] HCATrans 299](#)

Date heard: 13 December 2016

Coram: Kiefel, Bell, Keane, Nettle and Gordon JJ

Catchwords:

Family law – Children – Parenting orders – *Family Law Act* 1975 (Cth) – Where children retained in United States after travelling there for a holiday – Where retention in breach of order for equal shared parental responsibility – Where the father appeals against interim orders which require him to return the children to Sydney pending determination of whether the children are permitted to relocate to the United States – Where children, aged almost 15 and almost 17, express desire to stay in the United States – Whether the trial judge failed to consider and evaluate the relevant statutory considerations – Whether the trial judge gave adequate weight to the views expressed by the children – Consideration of living arrangements on the children’s return – Whether the orders made by the primary judge were in the best interests of the children – Whether trial judge was required to make further findings before issuing parenting order.

Appealed from FamFC (FC): [\[2016\] FamCAFC 48](#)

Orders made on 13 December 2016 dismissing the appeal with costs. Written reasons of the Court to be published at a future date.

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Migration

Minister for Immigration and Border Protection v Kumar & Ors
P49/2016: [\[2016\] HCATrans 297](#)

Date heard: 9 December 2016

Coram: Bell, Gageler, Keane, Nettle and Gordon JJ

Catchwords:

Migration – Requirement that visa applicant holds a certain visa at the time of application – Where visa application lodged on the Monday immediately following expiry on Sunday of the previously held visa – Whether legislative provisions governing subclass 572 visa prescribe “last day” for application to be made – If no, whether s 36(2) *Acts Interpretation Act* 1901 (Cth) applies.

Appealed from FCA: [\[2016\] FCA 177](#)

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Negligence

Kendirjian v Lepore & Anor

S170/2016: [\[2017\] HCATrans 17](#)

Date heard: 9 February 2017

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

Catchwords:

Negligence – Professional negligence – Advocate’s immunity – Where offer to settle proceedings made on first day of hearing – Where respondents rejected settlement offer on appellant’s behalf without seeking instructions – Whether alleged negligence protected by advocate’s immunity – Whether Court of Appeal misapplied immunity principle stated in *D’Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 223 CLR 1 – Finality principle – Whether in light of decision in *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16; (2016) 90 ALJR 572, Court of Appeal decision should be overturned.

Appealed from NSWSC (CA): [\[2015\] NSWCA 132](#)

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4: ORIGINAL JURISDICTION

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

Constitutional Law

Knight v State of Victoria & Anor

M251/2015: *Special Case*

Catchwords:

Constitutional law – Chapter III of the Constitution – Where plaintiff pleaded guilty to seven counts of murder and 46 counts of attempted murder in Supreme Court of Victoria – Where plaintiff was sentenced to life imprisonment in respect of each of the seven counts of murder with minimum term of 27 years – Where minimum term has expired – Where in 2014 the Victorian Parliament passed the *Corrections Amendment (Parole) Act 2014* which inserted section 74AA into the *Corrections Act 1986* – Where section 74AA requires Adult Parole Board to not release plaintiff unless plaintiff is in imminent danger of dying or seriously incapacitated which as result of, denies plaintiff of the capacity to cause physical harm – Whether s 74AA is contrary to Chapter III of the Constitution.

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Brown & Anor v The State of Tasmania

H3/2016: *Special Case*

Catchwords:

Constitutional Law – Implied freedom of political communication – *Workplaces (Protection from Protesters) Act 2014* (Tas) (“Act”) – Where Forestry Tasmania was authorised to undertake forestry operations in the Lapoinya Forest – Where plaintiffs protested forestry operations in vicinity of the operations – Where plaintiffs were charged on separate occasions for breaching s 8 of the Act – Where charges were dismissed against both plaintiffs – Whether plaintiffs have standing – Whether Act impermissibly burdens the implied freedom of political communication.

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Migration

Te Puia v Minister for Immigration and Border Protection; Graham v Minister for Immigration and Border Protection

[P58/2016](#); [M97/2016](#): *Special Cases*

Catchwords:

Constitutional law – Migration – Where plaintiffs are citizens of New Zealand – Where plaintiffs were granted a class TY subclass 444 Special Category (Temporary) visa when they each respectively last entered Australia – Where defendant cancelled plaintiffs’ visas under s 501(3) of the *Migration Act* 1958 (Cth) – Where defendant received information in accordance with s 503A(1) of the *Migration Act* 1958 (Cth) – Where s 503A(2) prevents defendant from disclosing confidential information to the Court – Whether ss 501(3) and 503A(2) invalid as requiring a Federal court to exercise judicial power in a manner inconsistent with the essential character of a court – Whether invalid as limiting ability of affected person to seek relief under s 75(v) of Constitution – Whether Minister exercising power under s 501(3) can be satisfied cancellation of visa in national interest under s 501(6)(b) without making findings as to plaintiff’s knowledge of, opinion of, support for or participation in suspected criminal conduct of group/organisation and how cancellation would “disrupt and disable” such groups.

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Plaintiff M96A/2016 & Anor v The Officer in Charge, Melbourne Immigration Transit Accommodation & Anor

[M96/2016](#): *Demurrer*

Catchwords:

Constitutional law – Migration – Where plaintiffs arrived in Australia at Christmas Island as “unauthorised maritime arrivals” – Where plaintiffs were detained under s 189(3) of the *Migration Act* 1958 (Cth) – Where plaintiffs were taken to the Republic of Nauru under s 198AD(2) – Where plaintiffs were then subsequently brought to Australia under s 198B for medical treatment – Where plaintiffs are detained in a detention centre in Australia – Whether plaintiffs’ detention under ss 189 or 196 beyond power conferred in Constitution s 51(xix) – Whether detention of plaintiffs incompatible with Ch III of Constitution.

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Plaintiff S195/2016 v Minister for Immigration and Border Protection & Ors

S195/2016: *Special Case*

Catchwords:

Constitutional law – Migration – Where plaintiff is citizen of Iran – Where plaintiff was an “unauthorised maritime arrival” – Where plaintiff is unwilling to return to Iran - Where plaintiff was sent to Papua New Guinea under regional processing arrangements – Where Papua New Guinea Supreme Court handed down *Belden Norman Namah, MP Leader of the Opposition v Hon Rimbank Pato, Minister for Foreign Affairs & Immigrations SCA NO 84 of 2013* (“*Namah Decision*”) – Whether designation of Papua New Guinea as a regional processing country beyond power of s 198AB(1) of *Migration Act 1958* (Cth) by reason of *Namah Decision* – Was taking of the plaintiff to Papua New Guinea beyond power of s 198AD by reason of *Namah Decision* – Whether entry into re-settlement arrangements beyond power conferred by Constitution s 61 – Whether authority of Commonwealth to undertake conduct in respect of regional processing arrangements in Papua New Guinea conferred by s 198AHA dependent on those arrangements being lawful under law of Papua New Guinea.

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5: SPECIAL LEAVE GRANTED

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

Compensation

Transport Accident Commission v Katanas

M160/2016: [\[2016\] HCATrans 286](#)

Date heard: 18 November 2016 – *Special leave granted.*

Catchwords:

Compensation – Transport accident – *Transport Accident Act 1986* (Vic) – Meaning of “serious injury” – Test for establishing whether an injury is a “serious injury” within meaning of s 93 of the *Transport Accident Act 1986* (Vic) – Application of *Humphries v Poljak* [1992] 2 VR 129 – Whether Court of Appeal applied correct test.

Appealed from VSC (CA): [\[2016\] VSCA 140](#)

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Competition Law

Air New Zealand Ltd v Australian Competition and Consumer Commission

S245/2016: [\[2016\] HCATrans 245](#)

Date heard: 14 October 2016 – *Special leave granted.*

Catchwords:

Competition – *Trade Practices Act 1974* (Cth) – Price fixing – s 4E of the *Trade Practices Act 1974* (Cth) – Meaning of a market “in Australia” – Whether “market” defined by questions of substitutability or other considerations – Whether each uni-directional route specific markets for supply of air cargo services alleged by respondent for routes between airports of Hong Kong/Singapore and airports in Australia “markets” within meaning of s 4E.

Appealed from FCA (FC): [\[2016\] FCAFC 42](#); (2016) 330 ALR 230

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PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission

S248/2016: [\[2016\] HCATrans 245](#)

Date heard: 14 October 2016 – *Special leave granted.*

Catchwords:

Competition – *Trade Practices Act* 1974 (Cth) – Price fixing – s 4E of the *Trade Practices Act* 1974 (Cth) – Meaning of a market “in Australia” – Whether “market” defined by questions of substitutability or other considerations – Whether markets for carriage of cargo by air from airports in Indonesia/Hong Kong to Australia were not “in Australia” for purposes of ss 45(3) and 4E – Inconsistency – Whether ss 12 and 13 *Air Navigation Act* 1920 (Cth) inconsistent with ss 45 and 45A *Trade Practices Act* 1974 (Cth) such that latter did not apply to contravening conduct – Whether conduct compelled by law/administrative practice of foreign state whether person acting in accordance with such law/practice makes “contract or arrangement” or arrives at an “understanding” for purpose of s 45(2).

Appealed from FCA (FC): [\[2016\] FCAFC 42](#); (2016) 330 ALR 230

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Criminal Law

The Queen v Afford

M144/2016: [\[2016\] HCATrans 248](#)

Date determined: 14 October 2016 – *Special leave granted.*

Catchwords:

Criminal law – *Criminal Code* (Cth) s 307.1 – Intention – Factual inferential reasoning – Application of *Kural v The Queen* (1987) 162 CLR 502 – Whether “awareness of the likelihood” can be used to establish intention under Ch 2 of *Criminal Code* (Cth) – Whether majority erred in concluding conviction unsafe.

Appealed from VSC (CA): [\[2016\] VSCA 56](#); (2016) 308 FLR 1

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Smith v The Queen

S249/2016: [\[2016\] HCATrans 247](#)

Date determined: 14 October 2016 – *Special leave granted.*

Catchwords:

Criminal law – *Criminal Code* (Cth) s 307.1 – Intention – Factual inferential reasoning – Application of *Kural v The Queen* (1987) 162 CLR 502 – Whether “awareness of the likelihood” can be used to establish intention under Ch 2 of *Criminal Code* (Cth).

Appealed from NSWSC (CCA): [\[2016\] NSWCCA 93](#); (2016) 309 FLR 258

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IL v The Queen

S270/2016: [\[2016\] HCATrans 279](#)

Date heard: 16 November 2016 – *Special leave granted on limited grounds.*

Catchwords:

Criminal law – Constructive murder – Joint criminal enterprise – Where death caused by ignition of ring burner by deceased – Where evidence showed deceased and appellant had been involved in the production of prohibited drugs – Whether ignition of ring burner within criminal enterprise – Whether subjective foresight of risk of death required for charge of constructive murder where act causing death must be malicious – Whether malice established by recklessness – Proper approach to requirement in *Crimes Act* 1900 (NSW) that act or omission be malicious.

Appealed from NSWSC (CCA): [\[2016\] NSWCCA 51](#)

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Pickering v The Queen

B68/2016: [\[2016\] HCATrans 280](#)

Date heard: 16 November 2016 – *Special leave granted on limited grounds.*

Catchwords:

Criminal law – *Criminal Code* (Qld) – Where jury found appellant guilty of manslaughter – Where appellant killed deceased whilst

allegedly trying to avoid him – Whether application of s 31(1)(c) of the *Criminal Code* (Qld) was excluded by s 31(2).

Appealed from QSC (CA): [\[2016\] QCA 124](#)

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The Queen v Dickman

M162/2016: [\[2016\] HCATrans 283](#)

Date heard: 18 November 2016 – *Special leave granted.*

Catchwords:

Criminal law – Evidence – Identification Evidence – Where respondent identified using photoboard – *Evidence Act 2008* (Vic) – Where Court of Appeal by majority quashed conviction and ordered a new trial – Whether Court of Appeal erred in holding that trial judge erred in failing to exercise discretion to exclude identification evidence – Whether reliability relevant factor in determining probative value of evidence under s 137.

Appealed from VSC (CA): [\[2015\] VSCA 311](#)

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The Queen v Dookheea

M159/2016: [\[2016\] HCATrans 284](#)

Date heard: 18 November 2016 – *Special leave granted.*

Catchwords:

Criminal law – Jury directions – Where respondent was convicted of murder – Where trial judge explained to jury “beyond reasonable doubt” – Where Court of Appeal allowed appeal and ordered re-trial – Whether Court of Appeal erred in finding trial judge impermissibly explained meaning of “beyond reasonable doubt” – Whether direction which includes instruction that prosecution does not have to prove case beyond doubt but beyond reasonable doubt constitutes misdirection – Whether substantial miscarriage of justice.

Appealed from VSC (CA): [\[2016\] VSCA 67](#)

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Director of Public Prosecutions v Dalgliesh (A Pseudonym)

M1/2017: [\[2016\] HCATrans 312](#)

Date heard: 16 December 2016 – *Special leave granted.*

Catchwords:

Criminal law – Sentencing – Where respondent convicted on several counts of incest and sexual penetration of a child under 16 – Where offending against daughters of de facto partner – Where 13-year-old victim fell pregnant – Where pregnancy subsequently terminated – Where total effective sentence 5y 6m – Where sentence 3y 6m on charge involving pregnancy – Whether sentence manifestly inadequate on current sentencing principles – Whether s 5(2)(b) *Sentencing Act* 1991 (Vic) alters common law principle of “instinctive synthesis” in sentencing.

Appealed from VSC (CA): [\[2016\] VSCA 148](#)

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GAX v The Queen

B72/2016: [\[2016\] HCATrans 304](#)

Date heard: 16 December 2016 – *Special leave granted.*

Catchwords:

Criminal law – Unreasonable verdict – Where appellant was convicted of one count of aggravated indecent dealing with child under age of 16 years who was his lineal descendant – Where complainant gave evidence that the appellant, her father, lay in bed with her and that his fingers were down near where her underwear was supposed to be – Where complainant’s mother and sister gave evidence of finding appellant in bed with complainant – Where there were inconsistencies between accounts of complainant, mother and sister – Where majority of the Court of Appeal dismissed appeal – Whether majority failed to make independent assessment of the sufficiency and quality of the evidence in determining reasonableness of verdict.

Appealed from QSC (CA): [\[2016\] QCA 189](#)

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Chiro v The Queen

A36/2016: [\[2017\] HCATrans 20](#)

Date heard: 10 February 2017 – *Special leave granted on limited grounds.*

Catchwords:

Criminal law – Sentencing – Where appellant convicted by jury of “persistent sexual exploitation of a child” pursuant to *Criminal Law Consolidation Act 1935 (SA)* s 50 – Where complainant gave evidence of sexual exploitation that ranged in seriousness – Where trial judge directed jury they may convict if unanimously satisfied that appellant kissed complainant in circumstances amounting to indecent assault on two occasions – Whether Court of Criminal Appeal erred in failing to hold trial judge erred in failing to ask jury which sexual offences subject of unanimous guilty verdict for purposes of sentencing – Whether in absence of such answer it was open to sentencing jury to sentence on basis that appellant guilty of all alleged sexual offending.

Appealed from SASC (CCA): [\[2015\] SASCFC 142](#); (2015) 123 SASR 583

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Van Beelen v The Queen

A35/2016: [\[2017\] HCATrans 19](#)

Date heard: 10 February 2017 – *Special leave granted on limited grounds.*

Catchwords:

Criminal law – *Criminal Law Consolidation Act 1935 (SA)* s 353A – Second or subsequent appeal where Court satisfied fresh and compelling evidence that should in interests of justice be considered – Where appellant seeks to appeal against conviction of murder on basis that new evidence shows expert evidence as to time of victim’s death flawed – Whether “fresh” and “compelling” evidence – Whether majority erred in holding further attack on expert evidence precluded because expert evidence contested at trial – Whether evidence could have been adduced at original trial – Whether majority erred in finding principle of finality relevant to s 353A appeal – Whether evidence is “substantial” – Whether in the “interests of justice” to allow appeal.

Appealed from SASC (CCA): [\[2016\] SASCFC 71](#); (2016) 125 SASR 253

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The Queen v Holliday
C13/2016: [\[2017\] HCATrans 21](#)

Date heard: 10 February 2017 – *Special leave granted.*

Catchwords:

Criminal law – Where respondent alleged to have incited the procurement of another person to commit the offence of kidnapping – Whether offence of incitement under *Criminal Code* 2002 (ACT) s 47 can be committed by inciting another person to procure a third person to commit an offence – Whether offence of incitement complete at the point of the urging – Whether *Criminal Code* 2002 (ACT) ss 45(2)(a) and 45(3) constitute a “limitation or qualifying provision” for purposes of s 47(5) such that offence of incitement not complete until offence of kidnapping committed.

Appealed from ACTSC (CA): [\[2016\] ACTCA 42](#); (2016) 312 FLR 77

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Industrial Law

Esso Australia Pty Ltd v Australian Workers' Union
M185/2016: [\[2016\] HCATrans 311](#)

Date heard: 16 December 2016 – *Special leave granted on limited grounds.*

Catchwords:

Industrial Law – Industrial action – *Fair Work Act* 2009 (Cth) – Construction of s 413(5) – Where s 413(5) requires that certain persons “must not have contravened any orders that apply to them” for industrial action to be protected – Whether Full Federal Court erred in finding s 413(5) operated with respect to industrial action itself in contravention of an order of a kind referred to in that section and where order still operative.

Appealed from FCA (FC): [\[2016\] FCAFC 72](#)

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Australian Workers' Union v Esso Australia Pty Ltd
M187/2016: [\[2016\] HCATrans 311](#)

Date heard: 16 December 2016 – *Special leave granted on limited grounds.*

Catchwords:

Industrial Law – Industrial action – *Fair Work Act* 2009 (Cth) – Construction of ss 343 and 348 – Where sections prevent actions being taken against another person “with intent to coerce” the other person to take or not take industrial action – Whether subjective intent to take action which is unlawful, illegitimate or unconscionable in order to overbear will or negate choice of another required – Whether Full Federal Court erred in failing to consider appellant’s actual intent.

Appealed from FCA (FC): [\[2016\] FCAFC 72](#)

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Migration

SZTAL v Minister for Immigration and Border Protection & Anor;
SZTGM v Minister for Immigration and Border Protection & Anor
[S272/2016](#); [S273/2016](#): [\[2016\] HCATrans 276](#)

Date heard: 16 November 2016 – *Special leave granted.*

Catchwords:

Migration – Statutory interpretation – *Migration Act* 1958 (Cth) – s 36(2)(aa), complementary protection criteria – Where appellants are nationals of Sri Lanka – Where appellants left Sri Lanka illegally – Where Tribunal accepted that it was likely that appellants would be jailed upon return to Sri Lanka – Whether Full Court of the Federal Court erred in holding that requirement of intentional infliction of “cruel and inhuman treatment or punishment” or “degrading treatment or punishment” requires proof of subjective intention.

Appealed from FCA (FC): [\[2016\] FCAFC 69](#)

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Mining

Forrest & Forrest Pty Ltd v Wilson & Ors
[P59/2016](#): [\[2016\] HCATrans 264](#)

Date determined: 10 November 2016 – *Special leave granted.*

Catchwords:

Mining – Statutory Construction – *Mining Act* 1978 (WA) – Meaning of “accompanied by” in s 74(1) – Whether lodgement of documents specified in s 74(1)(ca)(ii) a jurisdictional fact or a condition of validity – Whether lodgement of mineralisation report jurisdictional fact to be satisfied to enliven jurisdiction of Director, Geological Survey to report as to as to mineralisation in, on or under land to which application for mining lease relates – Whether lodgement jurisdictional fact to be satisfied to enliven jurisdiction of warden to hear application for mining lease under s 75(4) and make recommendation to Minister under s 75(5).

Appealed from WASC (CA): [\[2016\] WASCA 116](#)

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Negligence

State of New South Wales v DC & Anor

S214/2016: [\[2017\] HCATrans 22](#)

Date heard: 10 February 2017 – *Special leave granted on limited grounds.*

Catchwords:

Negligence – Duty of care – Vicarious liability – Where stepfather sexually abused respondents – Where Department removed respondents after receiving complaint from one of the respondents – Where stepfather continued to have contact with respondents – *Children Welfare Act* 1939 (NSW) s 148B – Whether appellant owed duty of care to respondents that extended to reporting allegations against stepfather to police – Whether Court of Appeal erred in failing to identify basis upon which appellant liable directly or vicariously in circumstances where no finding that any officer negligent.

Appealed from NSWSC (CA): [\[2016\] NSWCA 198](#)

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Procedure

Talacko v Bennett & Ors

M154/2016: [\[2016\] HCATrans 263](#)

Date determined: 10 November 2016 – *Special leave granted.*

Catchwords:

Procedure – Foreign judgments – Where money judgment in Australian Court – Where judgment creditors wish to enforce judgment in foreign country – Where two certificates issued under s 15(1) *Foreign Judgments Act* 1991 (Cth) – Where judgment debtor bankrupt at time certificates granted – Where judgment amounted a “provable debt” – Whether applications precluded by s 15(2) *Foreign Judgments Act* 1991 (Cth) on basis of s 58(3) of *Bankruptcy Act* 1966 (Cth) operated as a stay of enforcement of judgment debt for purposes of s 15(2) – Whether judgment creditor can enforce judgment in foreign country under s 15(1) where it is not competent for creditor to enforce any remedy against debtor by reason of s 58(3).

Appealed from VSC (CA): [\[2016\] VSCA 179](#); (2016) 312 FLR 159

Taxation

Commissioner of Taxation v Jayasinghe

S275/2016: [\[2016\] HCATrans 275](#)

Date heard: 16 November 2016 – *Special leave granted.*

Catchwords:

Taxation – *International Organisations (Privileges and Immunities) Act* 1963 (Cth) s 6(1)(d)(i) – Where respondent was civil engineer engaged by United Nations under “Individual Contractor Agreement” – Where under the Act and Regulations made under the Act a person who “holds an office in an international organisation” engages taxation exemptions - Whether respondent is person who “holds and office in an international organisation” under the Act and Regulations made under the Act – Proper test for determining meaning of “holds an office in an international organisation” – Whether common law concept of “office” applied or whether to be determined by whether organisation established and designated office.

Appealed from FCA(FC): [\[2016\] FCAFC 79](#)

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6: CASES NOT PROCEEDING OR VACATED

Constitutional Law

ResourceCo Material Solutions Pty Ltd & Anor v State of Victoria & Anor

[M32/2016](#): *Demurrer*

Catchwords:

Constitutional law – Section 92 – Trade within the Commonwealth to be free – *Environment Protection Act 1970 (Vic)* – *Environment Protection (Industrial Waste Resource) Regulations 2009 (Vic)* – Where plaintiffs operate in national waste collection, recycling and disposal industry - Contract to dispose of contaminated soil in Victoria by transporting to and disposing of in South Australia - 2nd plaintiff obtained approval from Environment Protection Authority South Australia for treatment of soil in South Australia - 1st plaintiff sought approval from Environment Protection Victoria for transport of waste from Victoria to South Australia – Where approval refused - EPA Vic not satisfied waste would be deposited at facility in SA with better environmental performance standards than in Vic - Whether reg 26 or 26(3) *Environment Protection (Industrial Waste Resource) Regulations 2009 (Vic)* contrary to s 92 Commonwealth Constitution and therefore invalid - Whether refusal decision contrary to s 92 Commonwealth Constitution and therefore invalid or ultra vires the Regulations.

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Migration

Plaintiff A33/2016 v Minister for Immigration and Border Protection

[A33/2016](#): *Application to Show Cause*

Catchwords:

Migration – Procedural fairness – Where plaintiff is citizen of Pakistan – Where delegate of defendant refused to grant plaintiff a Protection (Class XA) visa – Where officer of defendant's department interviewed plaintiff – Where plaintiff was informed that the officer that interviewed plaintiff would make decision about plaintiff's Protection visa – Where officer who did not interview plaintiff made decision to refuse to grant plaintiff visa - Where

plaintiff declared in a statutory declaration the Taliban had killed his father – Where plaintiff subsequently provided death certificate of father – Whether delegate of defendant appropriately considered death of father.

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7: SPECIAL LEAVE REFUSED

Publication of Reasons: 2 February 2017

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	McDonald & Anor	The State of South Australia (A23/2016)	Full Court of the Supreme Court of South Australia [2016] SASCFC 39	Application dismissed [2017] HCASL 1
2.	McDonald & Ors	Minister for Education and Child Development & Ors (A32/2016)	Full Court of the Supreme Court of South Australia [2016] SASCFC 39	Application dismissed [2017] HCASL 1
3.	Legal Practitioner	The Council of the ACT Law Society (C16/2016)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2016] ACTCA 46	Application dismissed [2017] HCASL 2
4.	Haque	Migration Agents Registration Authority (M147/2016)	Federal Court of Australia [2016] FCA 1249	Application dismissed [2017] HCASL 3
5.	SZVID	Minister for Immigration and Border Protection & Anor (S269/2016)	Federal Court of Australia [2016] FCA 1383	Application dismissed [2017] HCASL 4
6.	Mueller	Smartcard Financial Services Pty Ltd & Anor (P51/2016)	Supreme Court of Western Australia (Court of Appeal) [2016] WASCA 157	Application dismissed [2017] HCASL 5

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Publication of Reasons: 8 February 2017

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Billy Wade (a pseudonym)	The Queen (M142/2016)	Supreme Court of Victoria (Court of Appeal) [2016] VSCA 226R	Application dismissed [2017] HCASL 6
2.	Smith	The State of Western Australia (P46/2016)	Supreme Court of Western Australia (Court of Appeal) [2016] WASCA 136	Application dismissed [2017] HCASL 7
3.	SZUXN	Minister for Immigration and Border Protection & Anor (S151/2016)	Federal Court of Australia [2016] FCA 516	Application dismissed with costs [2017] HCASL 8
4.	AZU15	Minister for Immigration and Border Protection & Anor (S185/2016)	Full Court of the Federal Court of Australia [2016] FCAFC 74	Application dismissed with costs [2017] HCASL 9

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Publication of Reasons: 9 February 2017

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Viscariello	The Legal Practitioners Disciplinary Tribunal & Anor (A43/2016)	Full Court of the Supreme Court of South Australia [2016] SASCFC 107	Application dismissed [2017] HCASL 10
2.	Hoy	The Queen (M139/2016)	Supreme Court of Victoria (Court of Appeal) [2016] VSCA 75	Application dismissed [2017] HCASL 11
3.	AEC15	Minister for Immigration and Border Protection & Anor (S252/2016)	Federal Court of Australia [2016] FCA 1182	Application dismissed [2017] HCASL 12
4.	SZTJY	Minister for Immigration and Border Protection & Anor (S253/2016)	Federal Court of Australia [2016] FCA 1173	Application dismissed [2017] HCASL 13
5.	AIG15 & Anor	Minister for Immigration and Border Protection & Anor (S258/2016)	Federal Court of Australia [2016] FCA 1257	Application dismissed [2017] HCASL 14
6.	Feast	Dietman (A42/2016)	Full Court of the Supreme Court of South Australia [2016] SASCFC 108	Application dismissed [2017] HCASL 15
7.	Fleming	Advertiser News Weekend Publishing Company Pty Ltd & Anor (A44/2016)	Full Court of the Supreme Court of South Australia [2016] SASCFC 109	Application dismissed with costs [2017] HCASL 16
8.	SCN	Director of Public Prosecutions (Qld) & Anor (B61/2016)	Supreme Court of Queensland (Court of Appeal) [2016] QCA 237	Application dismissed [2017] HCASL 17
9.	Abou-Lokmeh	Harbour Radio Pty Limited & Ors (S235/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 228	Application dismissed with costs [2017] HCASL 18
10.	Pham	Victorian Legal Services Commissioner (M146/2016)	Supreme Court of Victoria (Court of Appeal) [2016] VSCA 256	Application dismissed [2017] HCASL 19
11.	SZVCR & Ors	Minister for Immigration and Border Protection & Anor (S267/2016)	Federal Court of Australia [2016] FCA 1283	Application dismissed [2017] HCASL 20
12.	SZVRS	Minister for Immigration and Border Protection & Anor (S271/2016)	Federal Court of Australia [2016] FCA 1292	Application dismissed [2017] HCASL 21
13.	Gjergji	The Queen (A40/2016)	Full Court of the Supreme Court of South Australia (Court of Criminal Appeal) [2016] SASCFC 101	Application dismissed [2017] HCASL 22

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
14.	Wash Investments Pty Ltd & Ors	SCK Properties Pty Ltd & Ors (B63/2016)	Supreme Court of Queensland (Court of Appeal) [2016] QCA 258	Application dismissed with costs [2017] HCASL 23
15.	ACC15	Minister for Immigration and Border Protection & Anor (S59/2016)	Federal Court of Australia [2016] FCA 97	Application dismissed with costs [2017] HCASL 24
16.	Melenewycz	Whitfield & Anor (S237/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 235	Application dismissed with costs [2017] HCASL 25

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10 February 2017: Canberra

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	The Legal Practitioner	Council of the Law Society of the ACT (C10/2016)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2016] ACTCA 35	Application dismissed with costs [2017] HCATrans 18
2.	Vaughan	Ross (S223/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 188	Application dismissed with costs [2017] HCATrans 23
3.	Commissioner of Taxation	Seven Network Limited (S164/2016)	Full Court of the Federal Court of Australia [2016] FCAFC 70	Application dismissed with costs [2017] HCATrans 24

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