



HIGH COURT BULLETIN

Produced by the Legal Research Officer,
High Court of Australia Library
[2016] HCAB 9 (6 December 2016)

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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<i>Bywater Investments Limited & Ors v Commissioner of Taxation; Hua Wang Bank Berhad v Commissioner of Taxation</i>	Taxation
<i>Comcare v Martin</i>	Workers Compensation

2: Cases Reserved

Case	Title
<u>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</u>	Constitutional Law
<u>Ferguson v Marcus William Ayres, Stephen James Parbery and Michael Andrew Owen in their capacities as liquidators of Queensland Nickel Pty Ltd (in liq)</u>	Constitutional Law
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<u>Re Day</u>	Senate Referral
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4: Special Leave Granted

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<u><i>The Queen v Dookheea</i></u>	Criminal Law
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5: Cases Not Proceeding or Vacated

Case	Title
<u><i>AAR15 v Minister for Immigration and Border Protection</i></u>	Administrative Law
<u><i>Van Ryn v The Queen</i></u>	Criminal Law

1: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the November 2016 sittings.

Estoppel

Timbercorp Finance Pty Ltd (In Liquidation) v Collins & Anor;
Timbercorp Finance Pty Ltd (In Liquidation) v Tomes

[M98/2016](#); [M101/2016](#): [\[2016\] HCA 44](#)

Judgment delivered: 9 November 2016

Coram: French CJ, Kiefel, Keane, Nettle & Gordon JJ

Catchwords:

Estoppel – Anshun estoppel – Where appellant provided loans to investors to fund investments in managed investment schemes – Where appellant placed in liquidation – Where group proceeding against appellant under Pt 4A of Supreme Court Act 1986 (Vic) by lead plaintiff on behalf of himself and group members alleging misrepresentations and failure to disclose information about risks – Where respondents group members in group proceeding – Where group proceeding unsuccessful – Where subsequent proceedings by appellant against respondents seeking recovery of outstanding principal and interest – Where respondents pleaded number of defences in recovery proceedings – Whether lead plaintiff in group proceeding respondents' privy – Whether defences precluded by reason of estoppel which arises by reference to principle in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

Practice and procedure – Whether defences sought to be raised in recovery proceedings an abuse of process.

Words and phrases – "abuse of process", "Anshun estoppel", "control", "estoppel", "group member", "group proceeding", "lead plaintiff", "opt out notice", "privy", "unreasonable".

Supreme Court Act 1986 (Vic) – Pt 4A.

Appealed from VSC (CA): [\[2016\] VSCA 128](#)

Held: Appeals dismissed with costs.

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Criminal Law

Castle v The Queen; Bucca v The Queen
[A24/2016](#); [A26/2016](#): [\[2016\] HCA 46](#)

Judgment delivered: 16 November 2016

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

Catchwords:

Criminal law – Appeal against conviction – Application of proviso – Where appellants convicted of murder arising out of joint criminal enterprise – Where evidence of exculpatory statement by one appellant wrongly left to jury as evidence of admission – Where remaining evidence circumstantial – Whether no substantial miscarriage of justice occurred.

Criminal law – Summing-up – Where one appellant gave evidence – Where trial judge referred jury to aspects of appellant's evidence but did not summarise it – Whether appellant's case fairly left to jury.

Criminal law – Admissibility of evidence – Where evidence that one appellant possessed handguns months prior to shooting – Whether evidence "discreditable conduct evidence" within meaning of s 34P(1) of Evidence Act 1929 (SA) – Whether open to conclude probative value of evidence substantially outweighed prejudicial effect.

Words and phrases – "admissibility", "discreditable conduct evidence", "exculpatory assertion", "proviso", "substantial miscarriage of justice", "summing-up".

Criminal Law Consolidation Act 1935 (SA) – s 353(1).

Evidence Act 1929 (SA) – s 34P.

Appealed from SASC (CCA): [\[2015\] SASCF 180](#)

Held: Appeals allowed.

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Taxation

Blank v Commissioner of Taxation

[S144/2016](#); **[\[2016\] HCA 42](#)**

Judgment delivered: 9 November 2016

Coram: French CJ, Kiefel, Gageler, Keane, & Gordon JJ

Catchwords:

Income tax – Assessable income – Where taxpayer participated in employee incentive profit participation agreement – Taxpayer granted claim to deferred compensation calculated on basis of company profit – Amount payable under agreement to taxpayer on termination of employment and execution of declaration of assignment and release – Whether amount income according to ordinary concepts or capital gain.

Words and phrases – "deferred compensation", "Genussscheine", "incentive profit participation agreement", "ordinary income", "pecuniary account".

Income Tax Assessment Act 1936 (Cth) – s 26(e).

Income Tax Assessment Act 1997 (Cth) – s 6-5(1), (4).

Swiss Code of Obligations – Art 657.

Appeal from FCA (FC): **[\[2015\] FCAFC 154](#)**

Held: Appeal dismissed with costs.

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Bywater Investments Limited & Ors v Commissioner of Taxation;
Hua Wang Bank Berhad v Commissioner of Taxation

[S134/2016](#); **[S135/2016](#)**: **[\[2016\] HCA 45](#)**

Judgment delivered: 16 November 2016

Coram: French CJ, Kiefel, Bell, Nettle & Gordon JJ

Catchwords:

Taxation – Income tax – Residence of company – Income Tax Assessment Act 1936 (Cth), s 6(1) – Where directors of appellant companies resident abroad – Where meetings of directors of appellants ostensibly held abroad – Where directors acted at direction of Australian resident who controlled appellants and made

decisions then implemented by directors – Whether appellants residents of Australia for income tax purposes – Whether "central management and control" of appellants located abroad in place where boards of directors met – Whether, as question of fact and degree, real business and operations of appellants controlled and directed from Australia – Whether functions of appellants' boards of directors usurped – Effect of *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1972) 129 CLR 177.

Taxation – Income tax – Residence of company – Double taxation agreements – Tie-breaker provisions – Whether appellants entitled to protection from Australian income tax under relevant double taxation agreements – Whether "place of effective management" of appellant companies other than in Australia.

Words and phrases – "Australian resident", "central management and control", "company's constitutional organs", "corporate residence", "formal organs", "place of effective management", "real business", "residency", "rubber-stamp", "superior or directing authority", "usurp".

Income Tax Assessment Act 1936 (Cth) – ss 6(1), 25A, Pt X.

Income Tax Assessment Act 1997 (Cth) – ss 6-5, 995-1.

International Tax Agreements Act 1953 (Cth) – Scheds 1, 15.

Appealed from FCA (FC): [\[2015\] FCAFC 176](#)

Held: Appeals dismissed with costs.

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Workers Compensation

Comcare v Martin

S142/2016: [\[2016\] HCA 43](#)

Judgment delivered: 9 November 2016

Coram: French CJ, Bell, Gageler, Keane & Nettle JJ

Catchwords:

Workers compensation – Safety, Rehabilitation and Compensation Act 1988 (Cth), s 5A(1) – Meaning of injury – Where employee suffered aggravation of mental condition in reaction to perceived consequence of failure to obtain promotion – Whether aggravation suffered "as a result of" reasonable administrative action.

Words and phrases – "as a result of", "'common sense' approach to causation", "disease", "injury".

Safety – Rehabilitation and Compensation Act 1988 (Cth), ss 5A, 5B.

Appealed from FCA (FC): [\[2015\] FCAFC 169](#)

Held: Appeal allowed with costs.

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2: CASES RESERVED

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

Administrative Law

Southern Han Breakfast Point Pty Ltd (In Liquidation) v Lewence Construction Pty Ltd & Ors

S199/2016: [\[2016\] HCATrans 239](#)

Date heard: 12 October 2016

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

Catchwords:

Administrative law – Jurisdictional error – Reference date – Whether the existence of a reference date in s 8 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) to support a payment claim is a jurisdictional fact.

Appealed from NSWSC (CA): [\[2015\] NSWCA 288](#)

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Competition

Australian Competition & Consumer Commission v Flight Centre Travel Group Limited

B15/2016: [\[2016\] HCATrans 167](#)

Date heard: 27 July 2016

Coram: French CJ, Kiefel, Gageler, Nettle & Gordon JJ

Catchwords:

Competition – Whether appellant travel agent attempted to induce specific airlines to make a contract, arrangement or arrive at an understanding which had the purpose or effect of substantially lessening competition in a market – Consideration of relevant market – Characterisation of relevant services supplied by airlines and travel agents – Whether airlines and travel agents competed in a market for booking and distribution services, or whether the only relevant market was the market for international passenger air

travel services – Whether travel agents competed with airlines in that market given they were the agent of the airlines when supplying such services – Application of ss 45 and 45A of the *Trade Practices Act 1974* (Cth).

Appealed from FCA (FC): [\[2015\] FCAFC 104](#)

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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

B52/2016: [\[2016\] HCATrans 265](#)

Date heard: 10 November 2016

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

Catchwords:

Constitutional law – Validity of the *Corporations Act 2001* (Cth) – Where plaintiff had been a director of a company on a number of occasions – Where company was subsequently placed into administration – Where Federal Court issued summons, pursuant to s 596A of the *Corporations Act 2001* (Cth), to plaintiff requiring plaintiff's attendance to be examined and to produce documents – Whether s 596A is an exercise of judicial power.

Orders made on 10 November 2016 dismissing writ of summons. Written reasons of the Court to be published at a future date.

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

B55/2016: [\[2016\] HCATrans 265](#)

Date heard: 10 November 2016

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

Catchwords:

Constitutional law – Validity of the *Corporations Act 2001* (Cth) – Where plaintiff had been a director of a company – Where company was subsequently placed into administration – Where Federal Court issued summons, pursuant to s 596A of the *Corporations Act 2001* (Cth), to plaintiff requiring plaintiff's attendance to be examined and to produce documents – Whether s 596A is an exercise of judicial power.

Orders made on 10 November 2016 dismissing writ of summons. Written reasons of the Court to be published at a future date.

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Contract Law

Simic & Ors v NSW Land and Housing Corporation & Ors
[S136/2016](#): [\[2016\] HCATrans 160](#)

Date heard: 20 July 2016

Coram: French CJ, Kiefel, Gageler, Nettle and Gordon JJ

Catchwords:

Contract – Letters of credit – Whether a misdescription of the beneficiary of a bank guarantee entitled the bank to refuse to pay out the credit – Whether regard could be had to the underlying contract to confirm the correct description of the beneficiary – Autonomy principle – Principle of strict compliance

Appealed from NSWSC (CA): [\[2015\] NSWCA 413](#)

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Criminal Law

The Queen v Kilic
[M105/2016](#): [\[2016\] HCATrans 240](#)

Date heard: 13 October 2016

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

Catchwords:

Criminal law – Sentencing – Where respondent doused victim with petrol and set her alight – Where respondent pleaded guilty to

intentionally causing serious injury – Where offence carries a maximum of 20 years imprisonment – Where respondent was sentenced to 14 years for primary offence – Where Court of Appeal found that the sentence was manifestly excessive – Where Court of Appeal reduced sentence – Principles regarding the review of sentencing.

Appealed from VSC (CA): [\[2015\] VSCA 331](#)

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RP v The Queen

S193/2016: [\[2016\] HCATrans 261](#)

Date heard: 8 November 2016

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

Catchwords

Criminal law – Sexual intercourse with a child under 10 years – Where accused was aged between 11 and 13 years – *Doli incapax* – Whether presumption rebutted – Test for establishing whether *doli incapax* presumption rebutted.

Appealed from NSWSC (CCA): [\[2015\] NSWCCA 215](#)

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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 appellants 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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Land

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act

S168/2016: [\[2016\] HCATrans 228](#); [\[2016\] HCATrans 229](#)

Date heard: 4 October 2016; 5 October 2016

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

Catchwords:

Land – Aboriginal land rights – *Aboriginal Land Rights Act 1983* (NSW) – Claim to Crown Land – Where land had been dedicated to gaol – Where gaol decommissioned but dedications not revoked – Whether land was lawfully occupied within the meaning of s 36(1)(b) of Act.

Appealed from NSWSC (CA): [\[2015\] NSWCA 349](#)

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Planning

Western Australian Planning Commission v Leith; Western Australian Planning Commission v Southregal Pty Ltd & Anor

P47/2016; **P48/2016:** [\[2016\] HCATrans 262](#)

Date heard: 9 November 2016

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

Catchwords:

Planning – Statutory construction – *Planning and Development Act 2005* (WA), s 173, s 177 – Planning Scheme – Amendment to planning scheme – Injurious affection – Compensation – Whether compensation available to person who subsequently purchased property from owner at the time scheme came into effect.

Appealed from WASC (CA): [\[2016\] WASCA 53](#)

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Taxation

Commissioner of State Revenue v ACN 005 057 349 Pty Ltd
[M88/2016](#); [M89/2016](#): [\[2016\] HCATrans 230](#)

Date heard: 6 October 2016

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

Catchwords:

Taxation – Land tax – Where Commissioner of State Revenue raised a land tax liability under the *Land Tax Act 1958* (Vic) – Duplication error – Discretionary power of the Commissioner to amend assessments – Where the Commissioner refuses to amend assessments – Whether the issue of a tax assessment creates a tax debt.

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

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Elecnet (Aust) Pty Ltd (as Trustee for the Electrical Industry Severance Scheme) v Commissioner of Taxation of the Commonwealth of Australia

[M104/2016](#): [\[2016\] HCATrans 237](#)

Date heard: 11 October 2016

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

Catchwords:

Taxation – Statutory construction – “Unit trust” – Meaning of a “unit trust” within Division 6C of *Income Tax Assessment Act 1936* (Cth) – Whether definition of “unit for the purposes of a “prescribed trust estate” can inform the meaning of a “unit trust” – Whether Electrical Industry Severance Scheme is a unit trust.

Appealed from FCA (FC): [\[2015\] FCAFC 178](#)

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3: ORIGINAL JURISDICTION

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

Constitutional Law

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 s92 Commonwealth Constitution and therefore invalid - Whether refusal decision contrary to s92 Commonwealth Constitution and therefore invalid or ultra vires the Regulations.

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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 – Where plaintiff was sentenced to be imprisoned for 10 years for each of the 46 counts of attempted murder, to be served concurrently – Where sentencing judge set a minimum term of 27 years, pursuant to s 17 of the *Penalties and Sentences Act 1985* (Vic) – Where minimum term expired on or about 8 May 2014

– 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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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 – 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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Te Puia v Minister for Immigration and Border Protection; Graham v Minister for Immigration and Border Protection
[P58/2016](#); **[M97/2016](#)**: *Special Case*

Catchwords:

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 s 503A(2) is invalid because it requires a Federal court to exercise judicial power in a manner which is inconsistent with the essential character of a court.

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Tangilanu v Minister for Immigration and Border Protection

[M92/2016](#): *Application to show cause*

Catchwords:

Migration – Procedural fairness – Where plaintiff is a citizen of Tonga – Where plaintiff applied for a New Zealand Citizen (Family Relationship) (Temporary) (class UP) subclass 461 visa – Where at time of application plaintiff’s spouse had returned to New Zealand – Where delegate of the Minister refused visa – Whether delegate to the Minister observed procedural fairness.

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

[M96/2016](#): Demurrer

Catchwords:

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 – Where plaintiffs were then subsequently brought to Australia for medical treatment – Where plaintiffs are detained in a detention centre in Australia – Whether plaintiffs detention is beyond power.

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COURT OF DISPUTED RETURNS

The Senate has referred the following questions to the High Court of Australia sitting as the Court of Disputed Returns pursuant to section 376 of the *Commonwealth Electoral Act 1918* (Cth).

Re Day

C14/2016: Questions referred to the Court of Disputed Returns pursuant to section 376 of the *Commonwealth Electoral Act 1918* (Cth)

Questions:

- (a) Whether, by reason of s 44(v) of the Constitution 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, 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.

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Re Culleton

C15/2016: Questions referred to the Court of Disputed Returns pursuant to section 376 of the *Commonwealth Electoral Act 1918* (Cth)

Questions:

- (a) Whether, by reason of s 44(ii) of the Constitution there is a vacancy in the representation of Western Australia in the Senate for the place for which Senator Rodney Norman Culleton was returned;
- (b) If the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;

- (c) What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and
- (d) What, if any, orders should be made as to the costs of these proceedings.

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4: 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

M95/2016: [\[2016\] 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 the 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 markets for airborne cargo out of Hong Kong, Singapore and Indonesia to ports in Australia were markets ‘in Australia’.

Appealed from FCA (FC): [\[2016\] FCAFC 42](#)

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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 markets for airborne cargo out of Hong Kong, Singapore and Indonesia to ports in Australia were markets ‘in Australia’.

Appealed from FCA (FC): [\[2016\] FCAFC 42](#)

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Constitutional Law

Rizeq v State of Western Australia

P55/2016: [\[2016\] HCATrans 233](#)

Date heard: 7 October 2016 – *Special leave granted on limited grounds.*

Catchwords:

Constitutional law – s 80 of the Constitution – *Judiciary Act 1903* (Cth) – Where appellant was a resident of NSW – Where appellant was charged and convicted for drug offences in Western Australia under the *Misuse of Drugs Act 1981* (WA) – Where appellant was convicted by majority - Whether sections of the *Misuse of Drugs Act 1981* (WA) were picked up and applied as Commonwealth Law under s 79(1) of the *Judiciary Act 1903* (Cth) – Whether s 80 of the Constitution applied to the appellants trial.

Appealed from WASC (CA): [\[2015\] WASCA 164](#)

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Contract

Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd

M143/2016: [\[2016\] HCATrans 231](#)

Date heard: 7 October 2016 – *Special leave granted.*

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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Criminal Law

Prior v Mole

S226/2016: [\[2016\] HCATrans 192](#)

Date determined: 1 September 2016 – *Special leave granted on limited grounds.*

Catchwords:

Criminal law – Where appellant was taken into ‘protective custody’ under the *Police Administration Act* (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* (NT) – Exercise of power under s 128(1) – Whether the Police Officer had reasonable grounds to establish that the appellant was likely to commit another offence – Whether the appellants apprehension was lawful.

Appealed from NTSC (CA): [\[2016\] NTCA 2](#)

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Hughes v The Queen

S226/2016: [\[2016\] HCATrans 201](#)

Date heard: 2 September 2016 – *Special leave granted on limited grounds.*

Catchwords:

Criminal law – Tendency evidence – Significant probative value – Whether trial judge erred in admitting tendency evidence – Whether trial judge properly accounted for risk of contamination and concoction in assessing significant probative value – Evidence Act 1995 (NSW) s 97 – Prejudicial effect of tendency evidence – Evidence Act 1995 (NSW) s 101 – Whether directions to jury sufficient.

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

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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 the Criminal Code (Cth).

Appealed from VSC (CA): [\[2016\] VSCA 56](#)

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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 the Criminal Code (Cth).

Appealed from NSWSC (CCA): [\[2016\] NSWCCA 93](#)

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MA v The Queen

S85/2016: [\[2016\] HCATrans 277](#)

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

Catchwords:

Criminal law – Statutory construction – *Crimes Act 1900* (NSW) – Where it was alleged by prosecution that appellant transmitted HIV to complainant by consensual intercourse – Where appellant was convicted of maliciously inflicted grievous bodily harm, contrary to s 35(1)(b) of *Crimes Act 1990* (NSW) – Where jury acquitted appellant on principle count of maliciously causing the complainant to contract a grievous bodily disease with intent to cause that result, contrary to s 36 of *Crimes Act 1900* – Whether “intent” requires the application of force.

Appealed from NSWSC (CCA)

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IL v The Queen

S124/2016: [\[2016\] HCATrans 279](#)

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

Catchwords:

Criminal law – 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 act “malicious” as required for constructive or felony murder under *Crimes Act 1990* (NSW).

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

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Pickering v The Queen

B34/2016: [\[2016\] 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

M249/2015: [\[2016\] HCATrans 283](#)

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

Catchwords:

Criminal law – Evidence – Identification Evidence – Where respondent was identified using a photoboard – *Evidence Act 2008* (Vic) – Where respondent was convicted of intentionally causing serious injury and making a threat to kill – Where Court of Appeal by majority quashed conviction and ordered a new trial – Whether Court of Appeal erred in holding that the trial judge erred in failing to exercise discretion to exclude identification evidence.

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

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The Queen v Dookheea

M61/2016: [\[2016\] HCATrans 284](#)

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

Catchwords:

Criminal law – Jury directions – Where respondent was convicted of murder – Where respondent admitted to the unlawful killing of the victim – Where issue at trial was whether respondent had requisite intention – 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 allowing appeal

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

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Family Law

Bondelmonte v Bondelmonte & Anor

S247/2016: [\[2016\] HCATrans 243](#)

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

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](#)

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Migration

Minister for Immigration and Border Protection v Kumar & Ors

P49/2016: [\[2016\] HCATrans 197](#)

Date heard: 2 September 2016 – *Special leave granted.*

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 – Application of s 36(2) of the *Acts Interpretation Act 1901* (Cth).

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

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SZTAL v Minister for Immigration and Border Protection & Anor;
SZTGM v Minister for Immigration and Border Protection & Anor
S154/2016; S155/2016: [\[2016\] 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 the appellants would be jailed upon return to Sri Lanka – Whether the Full Court of the Federal Court erred in holding that the requirement of international infliction of “cruel and inhuman treatment or punishment” or “degrading treatment or punishment” requires proof of a subjective intention.

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

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Negligence

Kendirjian v Lepore & Anor

S170/2016: [\[2016\] HCATrans 141](#); [\[2016\] HCASL 140](#)

Date heard: 17 June 2016 – *Special leave granted.*

Catchwords:

Negligence – Professional negligence – Lawyers – Advocates immunity – Duties and liabilities – Settlement of proceedings – Whether alleged failure in advice in relation to settlement offer was a decision affecting the conduct of the case in Court – Application of test in *D’Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1.

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

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Procedure

Talacko v Bennett & Ors

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

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

Catchwords:

Procedure – Where money judgment in Australian Court – Where judgment creditor’s wish to enforce judgment in foreign country – Where two applications for certificate under s15(1) *Foreign Judgments Act 1991* (Cth) – Where certificates issued – Where judgment debtor bankrupt at time applications made – Where judgment amounted a ‘probable debt’ – Whether applications precluded by s 15(2) *Foreign Judgments Act 1991* (Cth) on basis of s 58(3) of *Bankruptcy Act 1966* (Cth).

Appealed from VSC (CA): [\[2016\] VSCA 179](#)

Statutory Construction

Forrest & Forrest Pty Ltd v Wilson & Ors

P59/2016: [\[2016\] HCATrans 264](#)

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

Catchwords:

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.

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

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Taxation

Commissioner of Taxation v Jayasinghe

S177/2016: [\[2016\] HCATrans 275](#)

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

Catchwords:

Taxation – *International Organisations (Privileges and Immunities) Act 1963* (Cth) – Where respondent is civil engineer engaged by the United Nations – 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 a person who “holds and office in an international organisation” under the Act and Regulations made under the Act.

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

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5: CASES NOT PROCEEDING OR VACATED

Administrative law

AAR15 v Minister for Immigration and Border Protection

P50/2016: [\[2016\] HCATrans 267](#)

Catchwords:

Administrative law – Jurisdictional error – Provision of reasons – Where Refugee Review Tribunal preferred one piece of evidence over another piece of contrary evidence closer in time to the decision being made – Where no reasons were provided for preference of one piece of evidence contrary to another – Where appellant court speculated as to why Tribunal made preference of one piece of evidence contrary to another.

Appealed from FCA: [\[2016\] FCA 150](#)

Consent orders were made on 11 November 2016.

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Criminal Law

Van Ryn v The Queen

S250/2016: [\[2016\] HCATrans 268](#)

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

Catchwords:

Criminal law – Sentencing – Where appellant pleaded guilty to multiple child sexual assault offences against nine victims – Where Court of Appeal erred in determining an aggregate sentence on the basis that Count 9 of the first indictment was an offence contrary to s 61M(2) of the *Crimes Act 1900* (NSW) – Where Count 9 was an offence under s 61M(1) – Where s 61M(1) and s 61M(2) have different maximum sentences.

Appealed from NSWSC (CCA): [\[2016\] NSWCCA 1](#)

Consent orders were made on 11 November 2016.

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6: SPECIAL LEAVE REFUSED

Publication of Reasons: 10 November 2016

No.	Applicant	Respondent	Court appealed from	Result
1.	Patsuris	Gippsland and Southern Rural Water Corporation (M75/2016)	Supreme Court of Victoria (Court of Appeal) [2016] VSCA 109	Application dismissed with costs [2016] HCASL 261
2.	MZAGE	Minister for Immigration and Border Protection & Anor (M84/2016)	Federal Court of Australia [2016] FCA 630	Application dismissed with costs [2016] HCASL 262
3.	Ulster	Viney (M109/2016)	Full Court of the Family Court of Australia	Application dismissed with costs [2016] HCASL 263
4.	Mammoth Investments Pty Ltd	Granite Hill Pty Ltd & Ors (P31/2016)	Supreme Court of Western Australia (Court of Appeal) [2016] WASCA 84	Application dismissed with costs [2016] HCASL 264
5.	Esperance Cattle Company Pty Ltd	Granite Hill Pty Ltd & Ors (P32/2016)	Supreme Court of Western Australia (Court of Appeal) [2016] WASCA 84	Application dismissed with costs [2016] HCASL 265
6.	Lobban	Minister for Justice (P42/2016)	Full Court of the Federal Court of Australia [2016] FCAFC 109	Application dismissed with costs [2016] HCASL 266
7.	Great Investments Ltd & Ors	Anthony John Warner & Steven Kugel in their Capacities as Joint & Several Liquidators of Bellpac Pty Ltd (Receivers & Managers Appointed) (in Liquidation) & Anor (S179/2016)	Full Court of the Federal Court of Australia [2016] FCAFC 85	Application dismissed with costs [2016] HCASL 267
8.	DB	Secretary, Department of Family and Community Services & Ors (S131/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 63	Application dismissed [2016] HCASL 268
9.	Chidiac	The Queen (S190/2016)	Supreme Court of New South Wales (Court of Criminal Appeal) [2016] NSWCCA 120	Application dismissed [2016] HCASL 269
10.	Kowalski	Stanley and Partners & Anor (A34/2016)	Full Court of the Supreme Court of South Australia [2016] SASCF 74	Application dismissed [2016] HCASL 270
11.	Dupois	Queensland Television & Ors (B43/2016)	Supreme Court of Queensland (Court of Appeal) [2016] QCA 182	Application dismissed [2016] HCASL 271

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
12.	Dunkerley	Comcare (C6/2016)	Federal Court of Australia [2015] FCA 1519	Application dismissed [2016] HCASL 272
13.	SZUZK & Anor	Minister for Immigration and Border Protection & Anor (S156/2016)	Federal Court of Australia [2016] FCA 498	Application dismissed [2016] HCASL 273
14.	SZVED	Minister for Immigration and Border Protection & Anor (S201/2016)	Federal Court of Australia [2016] FCA 907	Application dismissed [2016] HCASL 274
15.	Khan	Minister for Immigration and Border Protection & Anor (S203/2016)	Federal Court of Australia [2016] FCA 877	Application dismissed [2016] HCASL 275
16.	SZVRM	Minister for Immigration and Border Protection & Anor (S206/2016)	Federal Court of Australia [2016] FCA 919	Application dismissed [2016] HCASL 276
17.	SZVLY	Minister for Immigration and Border Protection & Anor (S212/2016)	Federal Court of Australia [2016] FCA 940	Application dismissed [2016] HCASL 277
18.	Gibson	Drumm (S221/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 206	Application dismissed [2016] HCASL 278
19.	BMU15	Minister for Immigration and Border Protection & Anor (S222/2016)	Federal Court of Australia [2016] FCA 964	Application dismissed [2016] HCASL 279
20.	CER15	Minister for Immigration and Border Protection & Anor (S224/2016)	Federal Court of Australia [2016] FCA 1057	Application dismissed [2016] HCASL 280

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Publication of Reasons: 11 November 2016

No.	Applicant	Respondent	Court appealed from	Result
1.	Mowen	Australian Electoral Commission (B47/2016)	Supreme Court of Queensland (Court of Appeal) [2016] QCA 152	Application dismissed [2016] HCASL 281
2.	Luck	Chief Executive Officer of Centrelink (Freedom of Information Principal Officer) (M216/2015)	Full Court of the Federal Court of Australia [2015] FCAFC 75	Application dismissed [2016] HCASL 282
3.	Luck	Chief Executive Officer of Centrelink (Freedom of Information Principal Officer) (M217/2015)	Full Court of the Federal Court of Australia [2015] FCAFC 112	Application dismissed [2016] HCASL 283
4.	In the matter of an application for leave to appeal by Michael Van Thanh Quach (C8/2016)		High Court of Australia [2016] HCATrans 104	Application dismissed [2016] HCASL 284
5.	In the matter of an application for leave to appeal by Michael Van Thanh Quach (C9/2016)		High Court of Australia [2016] HCATrans 104	Application dismissed [2016] HCASL 285
6.	Luck	University of Southern Queensland & Anor (M49/2015)	Application for removal	Application dismissed with costs [2016] HCASL 286
7.	Luck	University of Southern Queensland & Anor (M53/2015)	Application for removal	Application dismissed with costs [2016] HCASL 287
8.	Luck	Chief Executive Officer of Centrelink & Anor (M7/2016)	Application for removal	Application dismissed with costs [2016] HCASL 288
9.	Luck	Secretary of Department of Human Services & Ors (M123/2016)	Application for removal	Application dismissed with costs [2016] HCASL 289
10.	Spilios	The Queen (A10/2016)	Supreme Court of South Australia (Court of Criminal Appeal) [2016] SASCF 6	Application dismissed [2016] HCASL 290
11.	Warnakulasooriya & Anor	Minister for Immigration and Border Protection & Anor (M59/2016)	Federal Court of Australia [2016] FCA 341	Application dismissed with costs [2016] HCASL 291
12.	Gall	The Queen (S145/2016)	Supreme Court of New South Wales (Court of Criminal Appeal) [2016] NSWCCA 82	Application dismissed [2016] HCASL 292
13.	Millar & Anor	Commissioner of Taxation (S191/2016)	Full Court of the Federal Court of Australia [2016] FCAFC 94	Application dismissed with costs [2016] HCASL 293

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
14.	Taluja	Shree Shirdi Sai Sansthan Sydney Limited (S196/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 158	Application dismissed with costs [2016] HCASL 294

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Publication of Reasons: 16 November 2016

No.	Applicant	Respondents	Court appealed from	Result
1.	AYJ15	Minister for Immigration and Border Protection & Anor (B45/2016)	Federal Court of Australia [2016] FCA 863	Application dismissed [2016] HCASL 295
2.	Lindsey	Christie & Anor (C7/2016)	Full Court of the Family Court of Australia	Application dismissed [2016] HCASL 296
3.	CZBO	Minister for Immigration and Border Protection & Ors (C11/2016)	High Court of Australia [2016] HCATrans 112	Application dismissed [2016] HCASL 297
4.	MZAEU	Minister for Immigration and Border Protection & Anor (M118/2016)	Full Court of the Federal Court of Australia [2016] FCAFC 100	Application dismissed [2016] HCASL 298
5.	Quickley	Pelissier (P39/2016)	Full Court of the Family Court of Australia	Application dismissed [2016] HCASL 299
6.	Malone	The State of Western Australia (P40/2016)	Supreme Court of Western Australia (Court of Appeal) [2015] WASCA 188	Application dismissed [2016] HCASL 300
7.	Saunders	Public Trustee & Ors (P41/2016)	Supreme Court of Western Australia (Court of Appeal) [2015] WASCA 203	Application dismissed [2016] HCASL 301
8.	SZTAN	Minister for Immigration and Border Protection & Anor (S186/2016)	Federal Court of Australia [2016] FCA 705	Application dismissed [2016] HCASL 302
9.	SZUUG	Minister for Immigration and Border Protection & Anor (S210/2016)	Federal Court of Australia [2016] FCA 913	Application dismissed [2016] HCASL 303
10.	ACF16	Minister for Immigration and Border Protection & Anor (S217/2016)	Federal Court of Australia [2016] FCA 982	Application dismissed [2016] HCASL 304
11.	Kitoko	Mirvac Real Estate Pty Limited & Anor (S218/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 201	Application dismissed [2016] HCASL 305
12.	BAF15	Minister for Immigration and Border Protection & Anor (S219/2016)	Federal Court of Australia [2016] FCA 958	Application dismissed [2016] HCASL 306
13.	Prasad	Ingham's Pty Ltd (B44/2016)	Supreme Court of Queensland (Court of Appeal) [2016] QCA 147	Application dismissed with costs [2016] HCASL 307

6: Special Leave Refused

<i>No.</i>	<i>Applicant</i>	<i>Respondents</i>	<i>Court appealed from</i>	<i>Result</i>
14.	Dunstan	Higham & Ors (C5/2016)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2016] ACTCA 20	Application dismissed with costs [2016] HCASL 308
15.	MZAMH	Minister for Immigration and Border Protection & Anor (M72/2016)	Federal Court of Australia [2016] FCA 447	Application dismissed with costs [2016] HCASL 309
16.	Jones (a Pseudonym)	Smith (a Pseudonym) (M113/2016)	Supreme Court of Victoria (Court of Appeal) [2016] VSCA 178	Application dismissed with costs [2016] HCASL 310
17.	Martinaj	Minister for Immigration and Border Protection & Anor (M115/2016)	Federal Court of Australia [2016] FCA 868	Application dismissed with costs [2016] HCASL 311
18.	Campari America LLC	Lodestar Anstalt (S189/2016)	Full Court of the Federal Court of Australia [2016] FCAFC 92	Application dismissed with costs [2016] HCASL 312

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16 November: Sydney

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	Dean	The Queen (S118/2016)	Supreme Court of New South Wales (Court of Criminal Appeal) [2015] NSWCCA 307	Application dismissed [2016] HCATrans 278

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Publication of Reasons: 18 November 2016

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Duncan & Anor	Big Country Pty Limited (S200/2016)	Developments Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 163	Application dismissed with costs [2016] HCASL 313

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18 November 2016: Melbourne

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	Spence	The Queen (M78/2016)	Supreme Court of Victoria (Court of Appeal) [2016] VSCA 113	Application dismissed [2016] HCATrans 285
2.	Lang	Hawker Pacific Pty Limited (P3/2016)	Supreme Court of Western Australia (Court of Appeal) [2015] WASCA 256	Application dismissed with costs [2016] HCATrans 287

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