



HIGH COURT BULLETIN

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

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SUMMARY OF NEW ENTRIES

1: Cases Handed Down

Case	Title
<i>New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act</i>	Aboriginal and Torres Strait Islander Peoples
<i>Simic & Ors v NSW Land and Housing Corporation & Ors</i>	Contract Law
<i>The Queen v Kilic</i>	Criminal Law
<i>RP v The Queen</i>	Criminal Law
<i>Southern Han Breakfast Point Pty Ltd (In Liquidation) v Lewence Construction Pty Ltd & Ors</i>	Statutory Construction
<i>Australian Competition & Consumer Commission v Flight Centre Travel Group Limited</i>	Trade Practices

<u><i>Elecnet (Aust) Pty Ltd (as Trustee for the Electrical Industry Severance Scheme) v Commissioner of Taxation of the Commonwealth of Australia</i></u>	Taxation
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2: Cases Reserved

Case	Title
<u><i>Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd</i></u>	Contract Law
<u><i>Prior v Mole</i></u>	Criminal Law
<u><i>Bondelmonte v Bondelmonte & Anor</i></u>	Family Law
<u><i>Minister for Immigration and Border Protection v Kumar & Ors</i></u>	Migration

3: Original Jurisdiction

Case	Title
<u><i>Brown & Anor v The State of Tasmania</i></u>	Constitutional Law
<u><i>Plaintiff S195/2016 v Minister for Immigration and Border Protection & Ors</i></u>	Migration

Court of Disputed Returns

Case	Title
<u><i>Re Culleton</i></u>	Judgment reserved

4: Special Leave Granted

Case	Title
<u><i>Director of Public Prosecutions v Dalglish</i></u>	Criminal Law
<u><i>GAX v The Queen</i></u>	Criminal Law
<u><i>Esso Australia Pty Ltd v Australian Workers' Union</i></u>	Industrial Law
<u><i>Australian Workers' Union v Esso Australia Pty Ltd</i></u>	Industrial Law

5: Cases Not Proceeding or Vacated

Case	Title
<u><i>Tangilanu v Minister for Immigration and Border Protection</i></u>	Migration

1: CASES HANDED DOWN

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

Aboriginal and Torres Strait Islander Peoples

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

S168/2016: [\[2016\] HCA 50](#)

Judgment delivered: 14 December 2016

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

Catchwords:

Aboriginal and Torres Strait Islander peoples – Land rights – Claimable Crown lands – Crown land dedicated for public purposes – Where State recorded as registered proprietor – Where Crown land dedicated for gaol purposes – Where Crown land proclaimed as correctional complex and correctional centre – Where gaol closed but dedications continued in force – Where proclamations revoked – Where Crown land held pending decision as to future use – Where activities on Crown land not inconsistent with dedications – Whether land "lawfully used or occupied" under s 36(1)(b) of Aboriginal Land Rights Act 1983 (NSW).

Constitutional law (NSW) – Executive power – Power over Crown lands – Whether executive power abrogated by s 2 of New South Wales Constitution Act 1855 (Imp) – Whether statutory authorisation required for lawful occupation of Crown lands.

Words and phrases – "actual occupation", "beneficial and remedial legislation", "beneficial construction", "claimable Crown lands", "Crown lands", "dedication", "lawfully used or occupied", "lawful occupation", "the Crown".

Aboriginal Land Rights Act 1983 (NSW) – s 36.

New South Wales Constitution Act 1855 (Imp) (18 & 19 Vict c 54) – s 2.

Real Property Act 1900 (NSW) – ss 13D, 13J.

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

Held: Appeal dismissed with costs.

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Contract Law

Simic & Ors v NSW Land and Housing Corporation & Ors

S136/2016: [\[2016\] HCA 47](#)

Judgment delivered: 7 December 2016

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

Catchwords:

Contract – Construction of terms – Performance bonds – Where unconditional undertakings by financial institution to pay on demand ("Undertakings") required as security under construction contract – Where Undertakings and underlying finance applications erroneously referred to non-existent entity as payee because incorrect information provided by applicant for security – Principle of autonomy – Principle of strict compliance – Whether possible to construe references to non-existent entity in Undertakings and applications as references to counterparty to construction contract.

Contract – Rectification – Actual or true common intention of parties – Where references to non-existent entity in Undertakings and applications result of common mistake – Whether rectification available to correct references to non-existent entity.

Words and phrases – "actual or true common intention", "bank guarantee", "common mistake", "letter of credit", "performance bond", "principle of autonomy", "principle of strict compliance", "rectification", "subjective intention of the parties".

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

Held: Appeal allowed; cross appeals allowed.

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Criminal Law

The Queen v Kilic

M105/2016: [\[2016\] HCA 48](#)

Judgment delivered: 7 December 2016

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

Catchwords:

Criminal law – Sentencing – Intentionally causing serious injury – Where respondent and victim in domestic relationship – Where victim 12 weeks pregnant with respondent's child – Where respondent caused serious injury to victim by dousing her with petrol and setting her alight – Where instant offence at upper end of range of seriousness for offence of intentionally causing serious injury – Whether Court of Appeal erred in use of expression "worst category" of offence – Whether Court of Appeal erred in consideration of current sentencing practices – Whether sentence imposed by sentencing judge manifestly excessive.

Words and phrases – "comparable case", "current sentencing practices", "maximum prescribed penalty", "spectrum of seriousness", "upper end of the range of seriousness", "worst category", "yardstick".

Crimes Act 1958 (Vic) – s 16.

Sentencing Act 1991 (Vic) – ss 1(a), 5(2)(b).

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

Held: Appeal allowed.

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RP v The Queen

S193/2016: [\[2016\] HCA 53](#)

Judgment delivered: 21 December 2016

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

Catchwords

Criminal law – Criminal liability and capacity – Doli incapax – Where appellant convicted of two counts of sexual intercourse with child under 10 years – Where appellant approximately 11 years and six months at time of offending – Where appellant found to be of very low intelligence – Whether presumption of doli incapax rebutted.

Words and phrases – "doli incapax", "knowledge of the moral wrongness of the act", "merely naughty or mischievous", "morally wrong", "seriously wrong".

Children (Criminal Proceedings) Act 1987 (NSW) – s 5.

Crimes Act 1900 (NSW) – s 66A(1).

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

Held: Appeal allowed.

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Statutory Construction

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

S199/2016: [\[2016\] HCA 52](#)

Judgment delivered: 21 December 2016

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

Catchwords:

Statutory Construction – Building and Construction Industry Security of Payment Act 1999 (NSW), s 13(1) – Whether existence of reference date under construction contract precondition to making of valid payment claim.

Contract – Construction of terms – Where construction contract made provision for contractor to "claim payment progressively" by making a "progress claim" – Whether it was the parties' intention that the contractor's right to make a progress claim under construction contract was to survive termination.

Words and phrases – "payment claim", "progress claim", "progress payment", "reference date".

Building and Construction Industry Security of Payment Act 1999 (NSW) – ss 8, 13.

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

Held: Appeal allowed with costs.

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Trade Practices

Australian Competition & Consumer Commission v Flight Centre Travel Group Limited

B15/2016: [\[2016\] HCA 49](#)

Judgment delivered: 14 December 2016

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

Catchwords:

Trade practices – Restrictive trade practices – Substantially lessening competition – Price fixing – Where travel agent sold international airline tickets on behalf of airlines – Where travel agent attempted to induce airlines to agree not to discount price at which international airline tickets offered directly to customers – Whether travel agent acting as agent for airlines – Whether travel agent and airlines "in competition" notwithstanding travel agent supplied as agent for airlines – Trade Practices Act 1974 (Cth), ss 45(2)(a)(ii), 45(3), 45A.

Trade practices – Restrictive trade practices – Market definition – Relevance of "functional approach" to market definition.

Words and phrases – "agency agreement", "agent", "competition", "functional approach to market definition", "international air carriage", "market", "price fixing", "substantially lessening competition".

Trade Practices Act 1974 (Cth) – ss 4E, 45, 45A.

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

Held: Appeal allowed.

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Taxation

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

M104/2016: [\[2016\] HCA 51](#)

Judgment delivered: 21 December 2016

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

Catchwords:

Taxation – Unit trusts – Public trading trust – Where trust settled by deed – Where employers become members of industry severance scheme created by trust – Where members of scheme obliged to make payments to trustee – Where trustee credits payments to accounts in name of individual employees – Where trustee makes payment to employee upon termination of employment – Whether unit trust within meaning of Div 6C of Pt III of the Income Tax Assessment Act 1936 (Cth).

Words and phrases – "beneficial interest", "ordinary acceptance", "prescribed trust estate", "public trading trust", "unit", "unit trust".

Income Tax Assessment Act 1936 (Cth) – ss 102M, 102P, 102R, 102S, 102T.

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

Held: Appeal dismissed with costs.

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2: CASES RESERVED

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

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

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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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* (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 appellant’s apprehension was lawful.

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

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

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

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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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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 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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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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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

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

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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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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Plaintiff S195/2016 v Minister for Immigration and Border Protection & Ors
[S195/2016](#): Special Case

Catchwords:

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 Rimbak Pato, Minister for Foreign Affairs & Immigrations SCA NO 84 of 2013 ("Namah Decision") – Whether designation of Papua New Guinea as a regional processing country is beyond power of s 198AB(1) of *Migration Act* by reason of *Namah Decision* – Was taking of the plaintiff to Papua New Guinea beyond power of s 198AD of *Migration Act* by reason of *Namah Decision*.

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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: [\[2016\] HCATrans 296](#)

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

Date heard: 7 December 2016

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

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.

Judgment reserved.

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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

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 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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Criminal Law

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

S274/2016: [\[2016\] 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 principal 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

S270/2016: [\[2016\] 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

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 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

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 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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Director of Public Prosecutions v Dalgliesh
M99/2016: [\[2016\] 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.

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

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GAX v The Queen
B46/2016: [\[2016\] HCATrans 304](#)

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

Catchwords:

Criminal law – Where appellant was convicted of one count of indecently dealing with a child under the age of 16 years who was his lineal descendant – Where the 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 the complainant’s mother and sister also gave evidence of finding the appellant in bed with the complaint – Where there was some inconsistencies between the accounts of the complainant, the mother and the sister – Where majority of the Court of Appeal dismissed appeal – Whether majority of the Court of Appeal failed to make an independent assessment of the sufficiency and quality of the evidence.

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

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Industrial Law

Esso Australia Pty Ltd v Australian Workers’ Union
M81/2016: [\[2016\] HCATrans 311](#)

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

Catchwords:

Industrial Law – *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 under s 413(5) the contravention must be at the relevant time – Whether under s 413(5) the order must be operative.

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

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Australian Workers’ Union v Esso Australia Pty Ltd

M82/2016: [\[2016\] HCATrans 311](#)

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

Catchwords:

Industrial Law – *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 sections require knowledge that action was unlawful.

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 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 of 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 s 15(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

S275/2016: [\[2016\] 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

Migration

Tangilanu v Minister for Immigration and Border Protection

M92/2016: [\[2016\] HCATrans 309](#)

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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6: SPECIAL LEAVE REFUSED

Publication of Reasons: 7 December 2016

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Giza	Waybecca Pty Ltd (M114/2016)	Supreme Court of Victoria (Court of Appeal) [2016] VSCA 184	Application dismissed [2016] HCASL 314
2.	Dhindsa & Ors	Minister for Immigration and Border Protection & Anor (M137/2016)	Federal Court of Australia [2016] FCA 1075	Application dismissed [2016] HCASL 315
3.	Sullivan	Tyler & Anor (S167/2016)	Full Court of the Family Court of Australia	Application dismissed with costs [2016] HCASL 316
4.	Sullivan	Tyler & Anor (S234/2016)	Full Court of the Family Court of Australia	Application dismissed [2016] HCASL 317
5.	SZVSO	Minister for Immigration and Border Protection & Anor (S238/2016)	Federal Court of Australia [2016] FCA 1040	Application dismissed [2016] HCASL 318

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Publication of Reasons: 13 December 2016

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Lawrie	Lawler (D6/2016)	Supreme Court of the Northern Territory (Court of Appeal) [2016] NTCA 03	Application dismissed with costs [2016] HCASL 319
2.	Winky Pop Pty Ltd & Anor	Mobil Refining Australia Pty Ltd & Anor (M122/2016)	Supreme Court of Victoria (Court of Appeal) [2016] VSCA 187	Application dismissed with costs [2016] HCASL 320
3.	AXQ15	Minister for Immigration and Border Protection & Anor (S173/2016)	Full Court of the Federal Court of Australia [2016] FCAFC 73	Application dismissed with costs [2016] HCASL 321
4.	Gorzynski	Bendigo and Adelaide Bank Limited (S231/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 170	Application dismissed with costs [2016] HCASL 322
5.	Moore	The Queen (S225/2016)	Supreme Court of New South Wales (Court of Criminal Appeal) [2016] NSWCCA 185	Application dismissed [2016] HCASL 323

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Publication of Reasons: 14 December 2016

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Forster	Forster (A38/2016)	Full Court of the Family Court of Australia	Application dismissed [2016] HCASL 324
2.	Karam	Palmone Shoes Pty Ltd (M129/2016)	Supreme Court of Victoria (Court of Appeal) [2016] VSCA 208	Application dismissed [2016] HCASL 325
3.	MZABP	Minister for Immigration and Border Protection & Ors (M131/2016)	Full Court of the Federal Court of Australia [2016] FCAFC 110	Application dismissed [2016] HCASL 326
4.	MZAJG & Ors	Minister for Immigration and Border Protection & Anor (M132/2016)	Federal Court of Australia [2016] FCA 1045	Application dismissed [2016] HCASL 327
5.	Plaintiff M80/2016	Minister for Immigration and Border Protection & Anor (M136/2016)	High Court of Australia [2016] HCATrans 204	Application dismissed [2016] HCASL 328
6.	SZUCJ & Ors	Minister for Immigration and Border Protection & Anor (S140/2016)	Federal Court of Australia [2016] FCA 471	Application dismissed [2016] HCASL 329
7.	Griffin	Council of the Law Society of NSW (S227/2016)	Application for removal	Application dismissed with costs [2016] HCASL 330
8.	Palmer	State of Queensland (B48/2016)	Supreme Court of Queensland (Court of Appeal) [2016] QCA 191	Application dismissed with costs [2016] HCASL 331
9.	Harris	State of Queensland (B49/2016)	Supreme Court of Queensland (Court of Appeal) [2016] QCA 191	Application dismissed with costs [2016] HCASL 332
10.	Hayes	State of Queensland (B50/2016)	Supreme Court of Queensland (Court of Appeal) [2016] QCA 191	Application dismissed with costs [2016] HCASL 333
11.	Greenhalgh	State of Queensland (B51/2016)	Supreme Court of Queensland (Court of Appeal) [2016] QCA 191	Application dismissed with costs [2016] HCASL 334
12.	Palkovich	Palkovich (S202/2016)	Full Court of the Family Court of Australia	Application dismissed with costs [2016] HCASL 335
13.	Johnson	Athalie Calvo as executrix of the estate of the late Peter Calvo & Ors (S215/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 136 [2016] NSWCA 197	Application dismissed with costs [2016] HCASL 336
14.	Otsuka Pharmaceutical Ltd & Anor	Generic Health Pty Ltd Co., (S230/2016)	Full Court of the Federal Court of Australia [2016] FCAFC 111	Application dismissed with costs [2016] HCASL 337

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
15.	Gertos & Anor	Inner West Council (S233/2016)	Supreme Court of New South Wales (Court of Criminal Appeal) [2016] NSWCCA 186	Application dismissed [2016] HCASL 338
16.	Smits	Lillas & Loel Lawyers & Anor (B53/2016)	Full Court of the Federal Court of Australia [2016] FCAFC 143	Application dismissed [2016] HCASL 339
17.	Maddax (2 applications)	Danner (B59/2016 & B60/2016)	Full Court of the Family Court of Australia	Applications dismissed [2016] HCASL 340
18.	Marijancevic	Roads Corporation of Victoria (M117/2016)	Supreme Court of Victoria (Court of Appeal) [2016] VSCA 181	Application dismissed [2016] HCASL 341
19.	Lei & Anor	Lei & Ors (M120/2016)	Supreme Court of Victoria [2016] VSC 336	Application dismissed [2016] HCASL 342
20.	Djime	Le (M125/2016)	Supreme Court of Victoria (Court of Appeal) [2016] VSCA 202	Application dismissed [2016] HCASL 343
21.	Singh	Minister for Immigration and Border Protection & Anor (M134/2016)	Federal Court of Australia [2016] FCA 1066	Application dismissed [2016] HCASL 344
22.	Ahmed	Minister for Immigration and Border Protection & Anor (S232/2016)	Federal Court of Australia [2016] FCA 1029	Application dismissed [2016] HCASL 345
23.	Sun & Ors	Minister for Immigration and Border Protection & Anor (B25/2016)	Full Court of the Federal Court of Australia [2016] FCAFC 52	Application dismissed with costs [2016] HCASL 346
24.	Quaid	The State of Western Australia (P33/2016)	Supreme Court of Western Australia (Court of Appeal) [2016] WASCA 91	Application dismissed [2016] HCASL 347
25.	Zanon (2 applications)	The State of Western Australia (P52/2016 & P53/2016)	Supreme Court of Western Australia (Court of Appeal) [2016] WASCA 91	Applications dismissed [2016] HCASL 347
26.	Donnelly	Australia and New Zealand Banking Group Limited & Anor (S192/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 167	Application dismissed with costs [2016] HCASL 348
27.	Muliri	The Queen (S211/2016)	Supreme Court of New South Wales (Court of Criminal Appeal) [2016] NSWCCA 129	Application dismissed [2016] HCASL 349

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16 December : Sydney

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	The Age Company Pty Ltd & Ors	Liu (S160/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 115	Application dismissed with costs [2016] HCATrans 306
2.	Dickson	The Queen (S171/2016)	Supreme Court of New South Wales (Court of Criminal Appeal)	Application dismissed [2016] HCATrans 307
3.	Anglo Coal (Drayton Management) Pty Ltd	Construction, Forestry, Mining and Energy Union (S175/2016)	Federal Court of Australia [2016] FCA 689	Application dismissed with costs [2016] HCATrans 308
4.	Duncan	Independent Commission Against Corruption (S182/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 143	Application dismissed with costs [2016] HCATrans 305
	Poole & Anor	Independent Commission Against Corruption (S183/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 143	Application dismissed with costs [2016] HCATrans 305
	Atkinson	Independent Commission Against Corruption (S184/2016)	Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 143	Application dismissed with costs [2016] HCATrans 305

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16 December 2016: Canberra

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	DWN042	Republic of Nauru (M79/2016)	Supreme Court of Nauru [2016] NRSC 6	Application dismissed [2016] HCATrans 310
2.	Save Beelihar Wetlands (Inc)	The Hon Albert Jacob MLA & Ors (P38/2016)	Supreme Court of Western Australia (Court of Appeal) [2016] WASCA 126	Application dismissed [2016] HCATrans 311

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