



HIGH COURT BULLETIN

Produced by the Legal Research Officer,
High Court of Australia Library
[2017] HCAB 7 (26 September 2017)

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

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1: SUMMARY OF NEW ENTRIES

2: Cases Handed Down

| Case | Title |
|---|--------------------|
| <i>Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection</i> | Constitutional Law |
| <i>Chiro v The Queen</i> | Criminal Law |
| <i>Hamra v The Queen</i> | Criminal Law |
| <i>The Queen v Dookheea</i> | Criminal Law |
| <i>The Queen v Holliday</i> | Criminal Law |
| <i>SZTAL v Minister for Immigration and Border Protection & Anor; SZTGM v Minister for Immigration and Border Protection & Anor</i> | Migration |

3: Cases Reserved

| Case | Title |
|---|--------------------|
| <u><i>Australian Marriage Equality Ltd & Anor v Minister for Finance & Anor</i></u> | Constitutional Law |
| <u><i>Wilkie & Ors v The Commonwealth of Australia & Ors</i></u> | Constitutional Law |
| <u><i>Regional Express Holdings Limited v Australian Federation of Air Pilots</i></u> | Industrial Law |
| <u><i>BRF038 v The Republic of Nauru</i></u> | Migration |
| <u><i>HFM045 v The Republic of Nauru</i></u> | Migration |

4: Original Jurisdiction

5: Court of Disputed Returns

| Case | Title |
|---|---------------------------|
| <u><i>Re Nash</i></u> | Court of Disputed Returns |
| <u><i>Re Xenophon</i></u> | Court of Disputed Returns |

6: Special Leave Granted

| Case | Title |
|--|--------------|
| <u><i>Shrestha v Minister for Immigration and Border Protection & Anor; Ghimire v Minister for Immigration and Border Protection & Anor; Acharya v Minister for Immigration and Border Protection & Anor</i></u> | Migration |
| <u><i>Minister for Immigration and Border Protection v SZVFW & Ors</i></u> | Migration |
| <u><i>Govier v Unitingcare Community</i></u> | Negligence |
| <u><i>UBS AG v Scott Francis Tyne as Trustee of the Argot Trust & Anor</i></u> | Procedure |

[7: Cases Not Proceeding or Vacated](#)

| Case | Title |
|---|--------------|
| <u>MEG027 v The Republic of Nauru</u> | Migration |

2: CASES HANDED DOWN

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

Constitutional Law

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

[M97/2016](#); [P58/2016](#): [\[2017\] HCA 33](#)

Judgment delivered: 6 September 2017

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

Catchwords:

Constitutional law (Cth) – Legislative power of Commonwealth – Constitution, s 75(v) – Where s 503A of *Migration Act* 1958 (Cth) prevents Minister for Immigration and Border Protection from being required to divulge or communicate certain information to courts – Whether s 503A requires courts to exercise judicial power in manner inconsistent with essential function of courts to find facts relevant to determination of rights in issue – Whether ss 501(3) and 503A(2) inconsistent with s 75(v) of Constitution – Whether s 503A(2)(c) denies High Court and Federal Court ability to enforce legislated limits of power – Whether s 503A(2)(c) curtails capacity of court to discern and declare whether legal limits of power conferred on Minister observed.

Migration – Jurisdictional error – Power of Minister to cancel visa on character grounds under s 501(3) of *Migration Act* 1958 (Cth) – Where decisions to cancel visas took into account information purportedly protected from disclosure under s 503A – Where Minister's understanding of s 503A erroneous – Where error was as to whether Minister's decision would be shielded from review by court in so far as based on information protected from disclosure under s 503A – Whether decisions invalid as consequence of error.

Words and phrases – "authorised migration officer", "character test", "fact-finding", "gazetted agency", "judicial power", "national interest", "protected from disclosure", "protected information", "public interest immunity", "purported exercise of a power", "substantial criminal record".

Constitution – ss 75(v), 77(i), 77(iii).

Migration Act 1958 (Cth) – ss 476A, 501, 501A, 501B, 501C, 503A, 503B.

Held: Questions answered

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Criminal Law

Chiro v The Queen

A9/2017: [\[2017\] HCA 37](#)

Judgment delivered: 13 September 2017

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

Catchwords:

Criminal law – Offence of "[p]ersistent sexual exploitation of a child" – *Criminal Law Consolidation Act 1935 (SA)*, s 50 – Where offence comprised of two or more acts of sexual exploitation separated by not less than three days – Where jury required to be unanimous (or agreed by statutory majority) as to same two or more acts of sexual exploitation – Where alleged acts of sexual exploitation ranged from kissing in circumstances of indecency to inserting penis into complainant's mouth – Where jury returned general verdict of guilty by statutory majority – Where not known which alleged acts of sexual exploitation jury agreed had been proved by prosecution – Whether conviction uncertain – Whether judge should have requested special verdict – Whether, after general verdict returned, judge should have asked questions of jury to identify acts of sexual exploitation found to be proved – Whether appellant should have been sentenced on view of facts most favourable to appellant in circumstances where factual basis of jury's verdict unknown.

Words and phrases – "acts of sexual exploitation", "actus reus", "course of conduct offence", "extended unanimity", "general verdict", "jury directions", "persistent sexual exploitation of a child", "special questions", "special verdicts".

Criminal Law Consolidation Act 1935 (SA) – s 50.

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

Held: Appeal allowed in part

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Hamra v The Queen

[A14/2017](#): [\[2017\] HCA 38](#)

Judgment delivered: 13 September 2017

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

Catchwords:

Criminal law – Offence of "[p]ersistent sexual exploitation of a child" – *Criminal Law Consolidation Act 1935 (SA)*, s 50 – Where offence requires prosecution to prove two or more acts of sexual exploitation – Whether generalised nature of complainant's evidence meant that not possible to identify two or more acts of sexual exploitation – Whether no case to answer.

Criminal law – Permission to appeal – Where orders made included granting application for permission to appeal – Whether majority of Court of Criminal Appeal failed to consider question of permission to appeal.

Words and phrases – "acts of sexual exploitation", "distinct occasion", "distinct transaction", "double jeopardy", "extended unanimity", "no case to answer", "particularity", "particulars", "permission to appeal", "persistent sexual exploitation of a child".

Criminal Law Consolidation Act 1935 (SA) – s 50.

Appealed from SASC (CCA): [\[2016\] SASFCFC 130](#); (2016) 126 SASR 374

Held: Appeal dismissed

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The Queen v Dookheea

[M159/2016](#): [\[2017\] HCA 36](#)

Judgment delivered: 13 September 2017

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

Catchwords:

Criminal law – Criminal procedure – Jury directions – Standard of proof – Where jury directed that Crown required to prove accused's guilt not beyond any doubt but beyond reasonable doubt – Whether such direction error of law – Whether such direction productive of substantial miscarriage of justice.

Words and phrases – "any doubt", "beyond reasonable doubt", "fanciful doubt".

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

Held: Appeal allowed

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The Queen v Holliday

C3/2017: [\[2017\] HCA 35](#)

Judgment delivered: 6 September 2017

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

Catchwords:

Criminal law – Incitement – Aiding, abetting, counselling or procuring – *Criminal Code* 2002 (ACT), ss 45, 47 – Where respondent charged with offence of incitement – Where prosecution alleged that respondent intentionally urged another person to procure third person to commit offence of kidnapping – Where offence of kidnapping not committed – Whether respondent urged commission of offence – Whether offence of incitement to procure offence exists under Criminal Code – Whether aiding, abetting, counselling or procuring commission of principal offence a discrete offence.

Words and phrases – "discrete offence", "incitement", "incitement to incite", "incitement to procure", "principal offence", "substantive offence".

Criminal Code 2002 (ACT) – Pt 2. 4.

Criminal Code (Cth) – s 11. 4.

Crimes Act 1914 (Cth) – ss 5, 7A.

Appealed from ACTSC (CA): [\[2016\] ACTCA 42](#); (2016) 312 FLR 77; (2016) 12 ACTLR 16

Held: Appeal dismissed

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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](#): [2017] HCA 34

Judgment delivered: 6 September 2017

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

Catchwords:

Migration – Protection visa – Complementary protection – Cruel or inhuman treatment or punishment – Meaning of "intentionally inflicted" – Degrading treatment or punishment – Meaning of "intended to cause" – Where Refugee Review Tribunal found appellants would likely be imprisoned for short period if returned to Sri Lanka – Where prison conditions in Sri Lanka may not meet international standards – Where definition of "cruel or inhuman treatment or punishment" in s 5(1) of *Migration Act* 1958 (Cth) requires intentional infliction of pain or suffering – Where definition of "degrading treatment or punishment" in s 5(1) of *Migration Act* requires intention to cause extreme humiliation – Whether Sri Lankan officials intend to inflict pain or suffering or cause extreme humiliation – Whether intention established by knowledge or foresight of pain or suffering or extreme humiliation.

Words and phrases – "complementary protection regime", "cruel or inhuman treatment or punishment", "degrading treatment or punishment", "foresight of result", "intended to cause", "intention", "intentionally inflicted", "oblique intention".

Migration Act 1958 (Cth) – ss 5(1), 36.

Criminal Code (Cth) – s 5. 2(3).

Appealed from FCA (FC): [\[2016\] FCAFC 69](#); (2016) 243 FCR 556

Held: Appeals dismissed

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3: CASES RESERVED

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

Constitutional Law

Australian Marriage Equality Ltd & Anor v Minister for Finance & Anor

M106/2017: [\[2017\] HCATrans 174](#); [\[2017\] HCATrans 175](#)

Date heard: 5 and 6 September 2017

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

Catchwords:

Constitutional law – Constitution ss 54, 75(v), 83 – Postal survey of opinions on same-sex marriage – Where Advance to the Finance Minister Determination (No 1 of 2017-2018) (“Determination”) increased departmental item for Australian Bureau of Statistics by \$122m to make funding available for “voluntary postal plebiscite” – Whether Determination invalid because *Appropriation Act (No 1) 2017-2018* (Cth) s 10 does not authorise Minister to make determination amending sch 1 of Act to appropriate funds for expenditure outside “ordinary annual services” of government – Whether Determination invalid because expenditure not “unforeseen” within meaning of s 10(1)(b) – Whether Determination invalid because any expenditure not because of “erroneous omission or understatement” within meaning of s 10(1)(a).

Questions answered on 7 September 2017.

Written reasons of the Court to be published at a future date.

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Wilkie & Ors v The Commonwealth of Australia & Ors

M105/2017: [\[2017\] HCATrans 174](#); [\[2017\] HCATrans 175](#)

Date heard: 5 and 6 September 2017

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

Catchwords:

Constitutional law – Constitution ss 51(xi), 61, 75(iii), 75(v) – Postal survey of opinions on same-sex marriage – Where Advance to the Finance Minister Determination (No 1 of 2017-2018) (“Determination”) increased departmental item for Australian Bureau of Statistics by \$122m to make funding available for “voluntary postal plebiscite” – Whether Determination invalid because Minister’s satisfaction “urgent need for expenditure” or expenditure “unforeseen” under *Appropriation Act (No 1) 2017-2018* (Cth) s 10(1) not reasonable or involved error of law – Whether s 10(1), (2) and (4) of Act invalid as impermissible exercise of legislative power to enact appropriation Acts or impermissible delegation of legislative power to Minister or not supported by any incidental power – Whether Census and Statistics (Statistical Information) Direction 2017 (“Direction”) invalid on basis opinions sought not “statistical information” within meaning of *Australian Bureau of Statistics Act 1975* (Cth) or *Census and Statistics Act 1905* (Cth) and not “statistics” within meaning of Constitution s 51(xi) – Whether Direction invalid because opinions sought not related to matters prescribed by *Census and Statistics Regulation 2016* (Cth) s 13 – Whether Electoral Commissioner not authorised by *Commonwealth Electoral Act 1918* (Cth) to conduct or participate in conduct of postal survey – Whether s 61 permits Australian Statistician to carry out postal survey without statutory authorisation.

Orders made on 7 September 2017 dismissing the application with costs. Written reasons of the Court to be published at a future date.

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Brown & Anor v The State of Tasmania

H3/2016: [\[2017\] HCATrans 93](#); [\[2017\] HCATrans 94](#)

Date heard: 2 and 3 May 2017

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

Catchwords:

Constitutional Law – Implied freedom of political communication – *Workplaces (Protection from Protesters) Act 2014* (Tas) – Where Forestry Tasmania was authorised to undertake forestry operations in the Lapoinya Forest – Where plaintiffs protested against 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 Act impermissibly burdens the implied freedom of political communication.

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Criminal Law

Commissioner of the Australian Federal Police v Hart & Ors; Commonwealth of Australia v Yak 3 Investments Pty Ltd as Trustee for Yak 3 Discretionary Trust & Ors; Commonwealth of Australia & Anor v Flying Fighters Pty Ltd & Ors

B21/2017; B22/2017; B23/2017: [\[2017\] HCATrans 153](#); [\[2017\] HCATrans 155](#); [\[2017\] HCATrans 156](#)

Date heard: 14, 15 and 17 August 2017

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

Catchwords:

Criminal law – Proceeds of crime – *Proceeds of Crime Act* 2002 (Cth) – Where Commonwealth obtained restraining order under s 17 of the Act over property under first respondent’s effective control – Where first respondent subsequently found guilty of nine offences of defrauding the Commonwealth – Where property forfeited to Commonwealth under s 92 – Where Commonwealth granted pecuniary penalty order (PPO) against first respondent under s 116 – Where Commonwealth sought declaration under s 141 that forfeited property available to satisfy PPO – Where primary judge dismissed application under s 141 on discretionary grounds – Where majority of Court of Appeal dismissed Commonwealth’s appeals on basis that s 141 did not apply to property the subject of a restraining order under s 17 – Whether majority of Court of Appeal erred in holding that s 141 does not apply to property subject to restraining orders under s 17 – Whether majority of Court of Appeal erred in construing date of effective control under s 141(1)(c) as date on which application is determined notwithstanding that property was subject of restraining orders under s 17 – Whether majority of Court of Appeal erred in construing words “not ... derived or realised ... by any person from any unlawful activity” in s 102(3)(a) as meaning wholly derived or wholly realised from unlawful activity.

Appealed from QSC (CA): [\[2016\] QCA 215](#); (2016) 336 ALR 492; (2016) 314 FLR 1 and [\[2016\] QCA 284](#)

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Director of Public Prosecutions v Dalgliesh (A Pseudonym)

M1/2017: [\[2016\] HCATrans 122](#)

Date heard: 14 June 2017

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

Catchwords:

Criminal law – Sentencing – *Sentencing Act* 1991 (Vic) s 5(2)(b) – Where respondent pleaded guilty to four sexual acts on two children under age of 16 – Where Charge 1 alleged respondent, contrary to *Crimes Act* 1958 (Vic) s 44 (“incest”), took part in act of sexual penetration of person under age of 18 years whom respondent knew was child of de facto wife – Where child, aged 13, fell pregnant – Where sentencing judge imposed sentence of 3 years 6 months imprisonment for Charge 1 and total effective sentence of 5 years 6 months for all counts – Where appellant appealed to Court of Appeal on grounds sentence imposed for Charge 1 and total effective sentence were manifestly inadequate – Where Court informed parties that Court would consider adequacy of “current sentencing practices” for incest – Where Court of Appeal dismissed appeal but stated current sentencing practices for incest inadequate – Whether Court of Appeal erred in failing to find sentence for Charge 1 manifestly inadequate – Whether s 5(2)(b) alters common law principle of “instinctive synthesis” in sentencing.

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

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Koani v The Queen

B20/2017: [\[2017\] HCATrans 157](#)

Date heard: 17 August 2017

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

Catchwords:

Criminal law – Murder – Criminal negligence – *Criminal Code* 1899 (Qld) ss 23(1)(a), 289 – Where appellant convicted of murdering de facto partner – Where there was evidence on which jury could find reasonable possibility appellant intended only to frighten deceased – Where trial judge directed jury that, if not satisfied discharge of gun resulted from willed act of appellant, jury could still convict for murder if discharge was consequence of omission to perform duty under s 289 to use reasonable care in control of shotgun and at time of discharge appellant intended to kill or cause grievous bodily harm – Where Court of Appeal by majority dismissed appeal – Whether majority of Court of Appeal erred in holding criminal negligence in breach of s 289 can found conviction for murder.

*Orders made on 17 August 2017 allowing appeal.
Written reasons of the Court to be published at a future date.*

Appealed from QSC (CA): [\[2016\] QCA 289](#); [2017] 1 Qd R 273

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Van Beelen v The Queen

A8/2017: [\[2017\] HCATrans 135](#); [\[2017\] HCATrans 137](#)

Date heard: 21 and 22 June 2017

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

Catchwords:

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

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

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Family Law

Thorne v Kennedy

B14/2017: [\[2017\] HCATrans 148](#)

Date heard: 8 August 2017

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

Catchwords:

Family law – *Family Law Act 1975 (Cth)* ss 90K, 90KA – Where husband and wife entered into financial agreements prior to and shortly after wedding – Where husband and wife subsequently separated – Where trial judge found wife signed agreements under

duress – Where Full Family Court declared second financial agreement binding – Whether Full Court erred in failing to find financial agreements not binding and should be set aside on grounds of duress, undue influence or unconscionable conduct.

Appealed from FamFC (FC): [\[2016\] FamCAFC 189](#); [2016] FLC 93-737

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Industrial Law

Aldi Foods Pty Limited v Shop, Distributive & Allied Employees Association & Anor

M33/2017: [\[2017\] HCATrans 149](#)

Date heard: 9 August 2017

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

Catchwords:

Industrial law – Jurisdictional error – *Fair Work Act 2009* (Cth) – Approval of enterprise agreements – Where enterprise agreement approved by Deputy President of Fair Work Commission – Where appeal dismissed by Full Bench of Fair Work Commission – Where majority of Federal Court held employees not “covered by the agreement” as required by Act – Where majority also held Full Bench erred in finding agreement satisfied “better off overall test” under s 193 – Whether majority erred in finding Fair Work Commission fell into jurisdictional error in exercising functions under s 186 – Whether majority erred in finding Fair Work Commission fell into jurisdictional error in determining agreement satisfied “better off overall test”.

Appealed from FCA (FC): [\[2016\] FCAFC 161](#); (2016) 245 FCR 155; (2016) 262 IR 329

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Esso Australia Pty Ltd v The Australian Workers’ Union; The Australian Workers’ Union v Esso Australia Pty Ltd

M185/2016; M187/2016: [\[2017\] HCATrans 150](#); [\[2017\] HCATrans 151](#)

Date heard: 10 August 2017

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

Catchwords:

Industrial Law – *Fair Work Act 2009* (Cth) s 413(5) – Where Australian Workers’ Union (“AWU”) organised industrial action against Esso Australia Pty Ltd (“Esso”) – Where AWU asserted industrial action “protected” under Act – Where Fair Work Commission made order under s 418 stopping disputed industrial action – Where AWU continued to organise industrial action in contravention of order – Where trial judge held that due to contraventions, all industrial action including forms notionally “protected” could not be “protected” because of operation of s 413(5) – Where trial judge rejected Esso’s claim for injunction restraining AWU from organising further industrial action – Where Full Court rejected appeal by Esso – Whether Full Court erred in concluding s 413(5) only operates where taking or organising industrial action was itself in contravention of order and order still operated and applied to contravention at time of action – Whether Full Court erred by failing to construe s 413(5) as limited in operation to contraventions where contravening conduct continuing or occurring at time of organising or taking industrial action.

Industrial Law – *Fair Work Act 2009* (Cth) ss 343, 348 – Where sections prevent actions being taken “with intent to coerce” other person to take or not take industrial action – Whether majority of Full Court erred in holding contravention of ss 343, 348 may be established without proof of intent to take action that was unlawful, illegitimate or unconscionable – Whether majority of Full Court erred by failing to consider actual intent to take protected industrial action.

Appealed from FCA (FC): [\[2016\] FCAFC 72](#); (2016) 245 FCR 39; (2016) 258 IR 396

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Regional Express Holdings Limited v Australian Federation of Air Pilots

M71/2017: [\[2017\] HCATrans 178](#)

Date heard: 12 September 2017

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

Catchwords:

Industrial law – *Fair Work Act 2009* (Cth) – *Fair Work (Registered Organisations) Act 2009* (Cth) – Standing – Where appellant sent letter to unidentified persons who applied for cadet employment program – Where respondent, a registered organisation, commenced proceedings in Federal Circuit Court seeking pecuniary penalty orders against appellant on basis letter contravened various

provisions of *Fair Work Act* – Where appellant sought orders dismissing or striking out application on basis respondent lacked standing – Whether respondent “entitled to represent the industrial interests” of letter recipients under s 540(6)(b)(ii) because recipients capable of becoming members of respondent despite not actually being members.

Appealed from FCA (FC): [\[2016\] FCAFC 147](#); (2016) 244 FCR 344; (2016) 264 IR 192

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Migration

BRF038 v The Republic of Nauru

M28/2017: [\[2017\] HCATrans 177](#)

Date heard: 8 September 2017

Coram: Keane, Nettle and Edelman JJ

Catchwords:

Migration – *Nauru (High Court Appeals) Act 1976 (Cth)* – *Refugees Convention Act 2012 (Nr)* – Where appellant applied to Nauru for refugee status determination under Act – Where Secretary of Nauru Department of Justice determined appellant not refugee and not entitled to complementary protection – Where Refugee Status Review Tribunal affirmed Secretary’s determination – Where Supreme Court of Nauru dismissed appeal – Whether Supreme Court erred in application of principles of procedural fairness in finding Tribunal not required to put to appellant material relating to tribal composition of Somali police force before making adverse finding – Whether Supreme Court erred in applying incorrect test for persecution.

Appealed from Supreme Court of Nauru: [\[2017\] NRSC 14](#)

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HFM045 v The Republic of Nauru

M27/2017: [\[2017\] HCATrans 180](#)

Date heard: 14 September 2017

Coram: Bell, Keane and Nettle JJ

Catchwords:

Migration – *Nauru (High Court Appeals) Act 1976 (Cth)* – *Refugees Convention Act 2012 (Nr)* – Where appellant applied to Nauru for refugee status determination under Act – Where Secretary of Nauru Department of Justice determined appellant not refugee and not entitled to complementary protection – Where Refugee Status Review Tribunal affirmed Secretary’s determination – Where Supreme Court of Nauru dismissed appeal – Whether primary judge failed to consider s 37 of *Refugees Convention Act 2012* – Whether Supreme Court erred in holding Tribunal did not deny appellant procedural fairness in relation to contrary information – Whether Supreme Court erred in holding Tribunal did not apply wrong test or misinterpret law in determining complementary protection claim.

Appealed from Supreme Court of Nauru: [\[2017\] NRSC 12](#)

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4: ORIGINAL JURISDICTION

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

Constitutional Law

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

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

Catchwords:

Constitutional law – Section 92 – *Environment Protection (Industrial Waste Resource) Regulations 2009 (Vic)* – Where reg 26(3) prohibits interstate transport of prescribed industrial waste for destruction/deposit unless interstate facility has better environmental performance standards – Contract to dispose of contaminated soil in Victoria by transporting to and disposing of in South Australia – Where second plaintiff obtained approval from South Australian Environment Protection Authority (“EPA”) for treatment of soil in South Australia – Where first plaintiff sought approval from EPA Victoria for transport of waste from Victoria to South Australia – Where approval refused because EPA Victoria not satisfied waste would be deposited at facility in South Australia with better environmental performance standards than in Victoria – Whether reg 26 or 26(3) *Environment Protection (Industrial Waste Resource) Regulations 2009 (Vic)* contrary to s 92 and therefore invalid – Whether protectionist effect of reg 26(3) can be inferred from discriminatory burden imposed on interstate trade – Whether objects of reg 26(3) must be actual motivating objects of the regulation.

Hearing vacated (1 February 2017).

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Migration

Plaintiff M174/2016 v Minister for Immigration and Border Protection

[M174/2016](#): *Special Case*

Catchwords:

Constitutional law – Migration – *Migration Act* 1958 (Cth) ss 57(2), 473CA, 473CC – Where plaintiff applied for Temporary Protection (Class XD) (Subclass 785) visa – Where delegate of Minister refused to grant visa – Whether delegate failed to comply with s 57(2) of Act – If so, whether failure to comply with s 57(2) had consequence that there was no decision capable of referral to Immigration Assessment Authority under s 473CA or essential precondition for valid exercise of power by Authority under s 473CC not satisfied – Whether Authority failed to conduct review in accordance with Pt 7AA by unreasonably failing to exercise statutory powers to obtain or consider new information.

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Falzon v Minister for Immigration and Border Protection

S31/2017: *Application to Show Cause*

Catchwords:

Constitutional law – Migration – Where plaintiff's visa cancelled pursuant to *Migration Act* 1958 (Cth) s 501(3A) – Where Minister decided not to revoke cancellation under s 501CA – Whether s 501(3A) is invalid because it purports to confer judicial power of Commonwealth on Minister.

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5: COURT OF DISPUTED RETURNS

The following questions have been referred 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 Canavan

C11/2017: 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(i) of the Constitution, there is a vacancy in the representation of Queensland in the Senate for the place for which Senator Matthew Canavan 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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Re Ludlam

C12/2017: 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(i) of the Constitution there is a vacancy in the representation of Western Australia in the Senate for the place for which Senator Ludlam was returned;
- (b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;
- (c) if the answer to Question (a) is "no", is there a causal vacancy in the representation of Western Australia in the Senate within the meaning of s 15 of the Constitution; and

- (d) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference.

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Re Waters

C13/2017: 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(i) of the Constitution there is a vacancy in the representation of Queensland in the Senate for the place for which Senator Waters was returned;
- (b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;
- (c) if the answer to Question (a) is "no", is there a causal vacancy in the representation of Queensland in the Senate within the meaning of s 15 of the Constitution; and
- (d) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference.

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Re Roberts

C14/2017: 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(i) of the Constitution there is a vacancy in the representation of Queensland in the Senate for the place for which Senator Roberts 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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Re Joyce

C15/2017: 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(i) of the Constitution, the place of the Member for New England (Mr Joyce) has become vacant;
- (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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Re Nash

C17/2017: 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(i) of the Constitution, there is a vacancy in the representation of New South Wales in the Senate for the place for which Senator Fiona Nash 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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Re Xenophon

C18/2017: 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(i) of the Constitution there is a vacancy in the representation of South Australia in the Senate for the place for which Senator Xenophon 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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6: SPECIAL LEAVE GRANTED

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

Administrative Law

Woollahra Municipal Council v Minister for Local Government & Ors

S141/2017: [\[2017\] HCATrans 108](#)

Date heard: 12 May 2017 – *Special leave granted.*

Catchwords:

Administrative law – *Local Government Act 1993* (NSW) – Where Minister made proposal under s 218E(1) for forced amalgamation of Woollahra, Waverley and Randwick local government areas – Where Government published document disclosing part of analysis by KPMG – Where Delegate heard evidence in secret from KPMG – Whether obligation to hold inquiry under s 263(2A) did not permit evidence to be heard in secret and not disclosed to public – Whether Court of Appeal erred in failing to find that no prescribed inquiry at which there was examination of required statutory factors had been held – Whether Court of Appeal erred in failing to find that requirement to inquire into financial advantages and disadvantages of proposed amalgamation not discharged without having regard to specific financial advantages and disadvantages to residents and ratepayers of each local government area.

Appealed from NSWSC (CA): [\[2016\] NSWCA 380](#); (2016) 219 LGERA 180

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Constitutional Law

Burns v Corbett & Ors; Burns v Gaynor & Ors; Attorney General for New South Wales v Burns & Ors; Attorney General for New South Wales v Burns & Ors; State of New South Wales v Burns & Ors

S183/2017; **S185/2017**; **S186/2017**; **S187/2017**; **S188/2017**:
[\[2017\] HCATrans 136](#)

Date determined: 22 June 2017 – *Special leave granted.*

Catchwords:

Constitutional law – Diversity jurisdiction – Where resident of New South Wales made complaints to Anti-Discrimination Board of NSW about statements made by Victorian resident and Queensland resident – Where Victorian resident ordered to make apologies by Administrative Decisions Tribunal of New South Wales (ADT) – Where complaints against Queensland resident referred to New South Wales Civil and Administrative Tribunal (NCAT) – Where Court of Appeal held ADT and NCAT lacked jurisdiction – Whether Court of Appeal erred in failing to find state diversity jurisdiction retained by state tribunals – Whether Court of Appeal erred in concluding state law purporting to confer jurisdiction upon state tribunal with respect to matters identified in ss 75 and 76 of Constitution inconsistent with s 39(2) of *Judiciary Act* within meaning of s 109 of Constitution – Whether a state can validly confer judicial power in any matters dealt with in ss 75, 76 of Constitution on person or body that is not a “court of a State” – Whether judicial power conferred upon NCAT to determine matters under *Anti-Discrimination Act 1977* (NSW) between residents of different states regarding conduct that occurs outside New South Wales.

Appealed from NSWSC (CA): [\[2017\] NSWCA 3](#); (2017) 316 FLR 448

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Contracts

Pipikos v Trayans

A30/2017: [\[2017\] HCATrans 164](#)

Date heard: 18 August 2017 – *Special leave granted.*

Catchwords:

Contracts – Enforceability – Past performance – *Law of Property Act 1936* (SA) s 26 – Memorandum or note of agreement – Part performance – Where appellant alleges parties entered into oral agreement that appellant would pay share of deposit on property in exchange for respondent selling interest in another property – Where trial judge held no oral agreement existed – Where Full Court held agreement existed but unenforceable – Whether Full Court erred in failing to find appellant’s payment of deposit amounted to part performance sufficient to entitle appellant to enforce agreement – Whether Full Court erred in holding handwritten note not sufficient “memorandum or note” of agreement for purposes of s 26 – Whether Full Court erred in

holding appellant not entitled to enforce agreement in circumstances where respondent acknowledged agreement – Whether Full Court erred in failing to consider concessions in handwritten note to identify acts of part performance.

Appealed from SASC (CA): [\[2016\] SASCFC 138](#); (2016) 126 SASR 436

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Criminal Law

Irwin v The Queen

B48/2017: [\[2017\] HCATrans 161](#)

Date heard: 18 August 2017 – *Special leave granted.*

Catchwords:

Criminal law – *Criminal Code* 1899 (Qld) s 23(1)(b) – Where appellant convicted of causing grievous bodily harm – Where appellant gave evidence of pushing complainant – Where Court of Appeal held complainant’s evidence could not rationally be accepted but dismissed appeal on basis it was open to jury to conclude ordinary person “could” reasonably have foreseen possibility of broken hip as result of push – Whether Court of Appeal erred in application of test under s 23(1)(b) by substituting “could” for “would” – Whether Court of Appeal erred in failing to find verdict unreasonable.

Appealed from QSC (CA): [\[2017\] QCA 2](#)

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Kalbasi v The State of Western Australia

P21/2017: [\[2017\] HCATrans 113](#)

Date heard: 12 May 2017 – *Special leave granted on limited grounds.*

Catchwords:

Criminal law – Appeal against conviction – *Criminal Appeals Act 2004* (WA) s 30(4) – Where appellant convicted of attempt to possess prohibited drug with intent to sell or supply contrary to *Misuse of Drugs Act* 1981 (WA) ss 6(1)(a), 33(1) – Where Court of Appeal concluded jury directions on intention erroneous as presumption of intent to sell or supply under s 11 of Act did not apply, but held no substantial miscarriage of justice – Whether Court of Appeal erred in finding no substantial miscarriage of justice

and applying proviso – Whether *Weiss v The Queen* (2005) 224 CLR 300 should be revisited and/or qualified and/or overruled.

Appealed from WASC (CA): [\[2016\] WASCA 144](#)

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Craig v The Queen

B24/2017: [\[2017\] HCATrans 73](#)

Date heard: 7 April 2017 – *Special leave granted.*

Catchwords:

Criminal law – Murder – *Criminal Code* 1899 (Qld) s 668E – Miscarriage of justice – Where appellant advised by trial counsel that if he gave evidence at trial, he would likely be cross-examined on prior convictions, including manslaughter conviction – Where appellant did not give evidence – Where proposed evidence would have been relevant to defence of provocation and would have raised self-defence – Where Court of Appeal held it was not likely that appellant would have been cross-examined on criminal history – Whether Court of Appeal erred in finding erroneous advice did not result in miscarriage of justice – Whether “alternative rational basis” for not giving evidence test appropriate where counsel gave erroneous advice – Whether denial of opportunity to make informed decision as to whether to give evidence amounts to “such a serious breach of the presuppositions of the trial” that the proviso cannot apply.

Appealed from QSC (CA): [\[2016\] QCA 166](#)

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Industrial Law

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union & Anor

M65/2017: [\[2017\] HCATrans 106](#)

Date heard: 12 May 2017 – *Special leave granted.*

Catchwords:

Industrial law – *Fair Work Act* 2009 (Cth) – Where respondents admitted contravention of s 348 of the Act – Where pecuniary penalties imposed on respondents – Where primary judge ordered first respondent not to indemnify second respondent against

penalties – Where Full Federal Court set aside order on basis that Court had no power to make such order – Whether Federal Court has power to order party not to indemnify another party in respect of pecuniary penalty order made under s 546.

Appealed from FCA (FC): [\[2016\] FCAFC 184](#); (2016) 247 FCR 339; (2016) 266 IR 151

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Judicial Review

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd & Anor

S145/2017: [\[2017\] HCATrans 112](#)

Date heard: 12 May 2017 – *Special leave granted.*

Catchwords:

Jurisdiction – Error of law on face of record – *Building and Construction Industry Security of Payment Act 1999* (NSW) – Where adjudicator made determination under s 22(1) that progress payment to be paid by appellant – Where primary judge made order in nature of certiorari under *Supreme Court Act 1970* (NSW) s 69 quashing determination for error of law on face of record – Where Court of Appeal held relief not available to quash determination under Act for error of law on face of record – Whether Court of Appeal erred in holding that Supreme Court’s power to make orders in nature of certiorari for error of law on face of record ousted in relation to determinations under Act.

Appealed from NSWSC (CA): [\[2016\] NSWCA 379](#)

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Maxcon Constructions Pty Ltd v Vadasz & Ors

A17/2017: [\[2017\] HCATrans 112](#)

Date heard: 12 May 2017 – *Special leave granted.*

Catchwords:

Jurisdiction – Error of law on face of record – *Building and Construction Industry Security of Payment Act 2009* (SA) – Where adjudicator made determination that amount be paid by appellant – Where appellant sought judicial review of determination – Where Full Court considered it was required by *Farah Constructions Pty Ltd*

v Say-Dee Pty Ltd (2007) 230 CLR 89 to follow *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 (“*Probuild*”) – Whether Full Court erred in following *Probuild* and concluding that Act excluded judicial review on ground of error of law on face of record – Whether Full Court erred in holding that error of law in application of s 12 did not amount to jurisdictional error – Whether Full Court erred in holding that, if error enlivened Court’s jurisdiction to grant certiorari, appropriate order would be to partially set aside but partially preserve determination.

Appealed from SASC (CA): [\[2017\] SASCF 2](#); (2017) 127 SASR 193

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Migration

Shrestha v Minister for Immigration and Border Protection & Anor;
Ghimire v Minister for Immigration and Border Protection & Anor;
Acharya v Minister for Immigration and Border Protection & Anor
M68/2017, M69/2017, M70/2017: [\[2017\] HCATrans 179](#)

Date determined: 14 September 2017 – *Special leave granted.*

Catchwords:

Migration – *Migration Act* 1958 (Cth) s 116(1)(a) – Visa cancellation – Where appellants granted Class TU subclass 573 Higher Education Sector visas based on enrolments in bachelor degree and diploma courses – Where appellants’ enrolment in diploma courses ceased after appellants failed subjects – Where appellants’ enrolment in bachelor degree courses subsequently cancelled – Where Administrative Appeals Tribunal cancelled appellants’ visas under s 116(1)(a) – Where majority of Federal Court found decision affected by jurisdictional error but refused relief on basis of futility – Whether Federal Court erred in exercising discretion not to issue writs of certiorari.

Appealed from FCA (FC): [\[2017\] FCAFC 69](#)

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Minister for Immigration and Border Protection v SZVFW & Ors
S71/2017: [\[2017\] HCATrans 191](#)

Date determined: 14 September 2017 – *Special leave granted.*

Catchwords:

Migration – *Migration Act* 1958 (Cth) s 426A(1) – Where first and second respondents applied for Protection (Class XA) visas – Where Department refused applications – Where respondents filed application for review by Refugee Review Tribunal – Where application form contained postal address, mobile phone number and email address – Where Tribunal by letter addressed to postal address invited first and second respondents to provide further information – Where first and second respondents did not respond – Where Tribunal by further letter invited first and second respondents to appear before it – Where first and second respondents did not attend – Where Tribunal exercised power under s 426A(1) to affirm decision without taking further action – Where Federal Circuit Court held Tribunal’s decision unreasonable – Where Full Court dismissed appeal – Whether Full Court erred by requiring Minister to establish *House v The King* (1936) 55 CLR 499 error – Whether Full Court erred by failing to find primary judge erred in concluding Tribunal’s decision unreasonable.

Appealed from FCA (FC): [\[2017\] FCAFC 33](#)

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Negligence

Govier v Unitingcare Community

B12/2017: [\[2017\] HCATrans 183](#)

Date heard: 15 September 2017 – *Special leave granted on limited grounds.*

Catchwords:

Negligence – Duty of care – Psychiatric injury – Where appellant employed by respondent – Where appellant attacked by co-worker – Where respondent informed appellant on day of attack that her conduct was under investigation – Where appellant too ill to attend investigative interviews – Where respondent asserted appellant refused to attend interviews and made preliminary findings against her – Where appellant’s employment subsequently terminated – Where appellant claimed damages for psychiatric injuries – Where trial judge held respondent owed no duty of care to appellant with respect to conduct of investigative process – Where Court of Appeal dismissed appeal – Whether Court of Appeal erred in concluding respondent did not owe appellant duty of care in respect of investigative process.

Appealed from QSC (CA): [\[2017\] QCA 12](#)

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Briggs v State of New South Wales

S144/2017: [\[2017\] HCATrans 109](#)

Date heard: 12 May 2017 – *Special leave granted.*

Catchwords:

Negligence – *Works Compensation Act 1987* (NSW) – Breach of duty – Where appellant suffered psychological injury due to exposure to traumatic events in course of duties as police officer – Where appellant told supervisor he was “struggling” and applied for “theoretical demotion” – Where appellant interviewed by Professional Standards Command while on sick leave – Whether Court of Appeal erred in finding respondent did not breach duty of care by failing to make enquiries as to appellant’s reasons for seeking demotion – Whether Court of Appeal erred in formulation of content of duty of care – Whether Court of Appeal erred in finding respondent did not breach duty of care in manner in which professional standards enquiry conducted while appellant was on sick leave.

Appealed from NSWSC (CA): [\[2016\] NSWCA 344](#); (2016) 264 IR 309; (2016) Aust Tort Reports 82-319

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Procedure

UBS AG v Scott Francis Tyne as Trustee of the Argot Trust & Anor

B7/2017: [\[2017\] HCATrans 184](#)

Date heard: 15 September 2017 – *Special leave granted on limited grounds.*

Catchwords:

Procedure – *Federal Court of Australia Act 1976* (Cth) s 37M – Abuse of process – Where appellant commenced proceedings in High Court of Singapore in 2010 against first respondent and another party – Where respondents and other party subsequently commenced proceedings in Supreme Court of New South Wales – Where Supreme Court proceedings permanently stayed in 2013 – Where respondents commenced proceedings in Federal Court in 2014 raising same factual matters – Where proceedings permanently stayed by primary judge as abuse of process – Whether majority of Full Federal Court erred in failing to take into account manifest unfairness to appellant and effect of proceedings

in bringing administration of justice into disrepute – Whether majority erred in failing to take into account Singapore proceedings in determining whether abuse of process.

Appealed from FCA (FC): [\[2017\] FCAFC 5](#); (2017) 341 ALR 415

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Rozenblit v Vainer & Anor

M114/2017: [\[2017\] HCATrans 167](#)

Date heard: 18 August 2017 – *Special leave granted on limited grounds.*

Catchwords:

Procedure – *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.03(3) – Access to courts – Impecuniosity – Where appellant made applications to file and serve amended statement of claim – Where applications refused with costs – Where appellant made further application for leave to cure drafting deficiencies – Where associate judge granted leave to file and serve amended statement of claim but ordered proceeding be stayed under r 63.03(3) until appellant paid interlocutory costs orders – Where Court of Appeal dismissed appeal – Whether in circumstances where appellant unable to meet interlocutory costs orders and no finding appellant conducted litigation in manner amounting to harassment or because of collateral purpose, Court of Appeal erred in failing to find not open to associate judge to make order under r 63.06(3) or exercise inherent jurisdiction to stay proceeding.

Appealed from VSC (CA): [\[2017\] VSCA 52](#)

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Clone Pty Ltd v Players Pty Ltd (In Liquidation) (Receivers & Managers Appointed) & Ors

A22/2017; A23/2017: [\[2017\] HCATrans 130](#)

Date heard: 16 June 2017 – *Special leave granted on limited grounds.*

Catchwords:

Procedure – Jurisdiction to set aside judgment – Whether power of Supreme Court to set aside perfected orders in its equitable jurisdiction extends to malpractice not amounting to fraud – Where document lodged by first respondent was contained in files of fifth respondent – Where primary judge found that appellant’s legal advisers engaged in “serious malpractice” by recklessly failing to discover document – Where primary judge found that first

respondent failed to exercise reasonable diligence in searching for document – Where primary judge ordered new trial on basis that there was “real possibility” that issue would have been decided differently – Whether Court of Appeal erred in formulation and application of principles that inform jurisdiction to set aside perfected judgment on ground of malpractice for failure to disclose document.

Appealed from SASC (CA): [\[2016\] SASCFC 134](#); (2016) 127 SASR 1

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Real Property

Pike & Anor v Tighe & Ors

B33/2017: [\[2017\] HCATrans 127](#)

Date heard: 16 June 2017 – *Special leave granted.*

Catchwords:

Real property – Statutory interpretation – *Sustainable Planning Act 2009* (Qld) – Where second respondent granted approval for reconfiguration of original lot into Lots 1 and 2 – Where approval subject to condition that easement for “pedestrian and vehicle access, on-site manoeuvring and connection of services and utilities” be registered for benefit of Lot 2 – Where registered easement does not permit “on-site manoeuvring and connection of services and utilities” – Where first respondents registered owners of Lot 1 and appellants registered owners of landlocked Lot 2 – Whether Court of Appeal erred in concluding that power to make enforcement order under s 604(1) arose only upon Planning and Environment Court being satisfied that first respondents committed development offence against s 580(1) – Whether Court of Appeal erred in failing to conclude that condition of development approval imposed continuing obligation despite reconfiguration approval by registration of survey plan.

Appealed from QSC (CA): [\[2016\] QCA 353](#)

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Torts

Trkulja v Google Inc

M88/2017: [\[2017\] HCATrans 129](#)

Date heard: 16 June 2017 – *Special leave granted.*

Catchwords:

Torts – Defamation – Publication – Respondent internet search engine – Search results – Images – Text – Autocomplete predictions – Whether respondent “published” matter relied on by applicant.

Practice and procedure – Service outside jurisdiction – *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.01(1)(i) and (j) – Where respondent served in United States – Where Court of Appeal held service should be set aside because no real prospect of success in providing that respondent was publisher – Whether Court of Appeal erred in confining case to primary publisher rather than secondary.

Appealed from VSC (CA): [\[2016\] VSCA 333](#); (2016) 342 ALR 504

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7: CASES NOT PROCEEDING OR VACATED

Migration

MEG027 v The Republic of Nauru

[M21/2017](#)

Catchwords:

Migration – *Nauru (High Court Appeals) Act 1976 (Cth)* – *Refugees Convention Act 2012 (Nr)* – Where appellants applied to Nauru for refugee status determination under Act – Where Secretary of Nauru Department of Justice determined appellants not refugees and not entitled to complementary protection – Where Refugee Status Review Tribunal affirmed Secretary’s determination – Where Supreme Court of Nauru dismissed appeal – Whether Tribunal erred in failing to implement Nauru’s international obligations under Convention on the Elimination of all Forms of Discrimination Against Women – Whether Tribunal erred in failing to consider second appellant’s claim that return to Iran would contravene obligations under Convention on the Rights of the Child – Whether Tribunal erred in failing to deal with submissions and country information relating to appellants’ claim they might face harm as failed asylum seekers if returned to Iran.

Appealed from Supreme Court of Nauru: [\[2017\] NRSC 5](#)

Hearing vacated (13 September 2017).

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8: SPECIAL LEAVE REFUSED

Publication of Reasons: 6 September 2017

| No. | Applicant | Respondent | Court appealed from | Result |
|-----|----------------|--|---|--|
| 1. | McFarlane | May (A18/2017) | Full Court of the Supreme Court of South Australia [2017] SASCFC 25 | Application dismissed [2017] HCASL 193 |
| 2. | Kowalski | Cole & Ors (A21/2017) | Full Court of the Supreme Court of South Australia [2017] SASCFC 45 | Application dismissed [2017] HCASL 194 |
| 3. | Nelson | Strover & Ors (M92/2017) | Federal Court of Australia [2016] FCA 1082 | Application dismissed [2017] HCASL 195 |
| 4. | Dandie | Perpetual Trustees Victoria Ltd (P19/2017) | Supreme Court of Western Australia (Court of Appeal) [2017] WASCA 74 | Application dismissed [2017] HCASL 196 |
| 5. | Tobin (Dandie) | Xplore Capital Ltd & Anor (P20/2017) | Supreme Court of Western Australia (Court of Appeal) [2017] WASCA 74 | Application dismissed [2017] HCASL 196 |
| 6. | Mekonen | Administrative Appeals Tribunal & Anor (S148/2017) | Federal Court of Australia [2017] FCA 309 | Application dismissed [2017] HCASL 197 |
| 7. | SZVJU & Anor | Minister for Immigration and Border Protection & Anor (S156/2017) | Federal Court of Australia [2017] FCA 489 | Application dismissed [2017] HCASL 198 |
| 8. | Jabbar | Gade & Anor (S167/2017, S168/2017, S169 /2017 & S170/2017) | Family Court of Australia | Applications dismissed [2017] HCASL 199 |
| 9. | SZUVM | Minister for Immigration and Border Protection & Anor (S172/2017) | Federal Court of Australia [2017] FCA 752 | Application dismissed [2017] HCASL 200 |
| 10. | AHL16 | Minister for Immigration and Border Protection & Anor (S173/2017) | Federal Court of Australia [2017] FCA 626 | Application dismissed [2017] HCASL 201 |
| 11. | Morgan | District Court of New South Wales & Anor (S193/2017) | Supreme Court of New South Wales (Court of Appeal) [2017] NSWCA 105 | Application dismissed [2017] HCASL 202 |
| 12. | AOJ15 & Anor | Minister for Immigration and Border Protection & Anor (S194/2017) | Federal Court of Australia [2017] FCA 675 | Application dismissed [2017] HCASL 203 |
| 13. | SZVYS & Anor | Minister for Immigration and Border Protection & Anor (S195/2017) | Federal Court of Australia [2017] FCA 667 | Application dismissed [2017] HCASL 204 |

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Result</i> |
|------------|------------------|--|--|--|
| 14. | Singh | Minister for Immigration and Border Protection & Anor (M67/2017) | Full Court of the Federal Court of Australia [2017] FCAFC 67 | Application dismissed with costs [2017] HCASL 205 |
| 15. | AVB16 | Minister for Immigration and Border Protection & Anor (S94/2017) | Federal Court of Australia [2017] FCA 241 | Application dismissed with costs [2017] HCASL 206 |

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Publication of Reasons: 12 September 2017

| No. | Applicant | Respondent | Court appealed from | Result |
|-----|---------------------|---|--|---|
| 1. | Singh | Minister for Immigration and Border Protection & Anor (A20/2017) | Federal Court of Australia [2017] FCA 525 | Application dismissed [2017] HCASL 207 |
| 2. | Keung | Abbott & Ors (A24/2017) | Full Court of the Supreme Court of South Australia [2017] SASCF 58 | Application dismissed [2017] HCASL 208 |
| 3. | Dhillon | Minister for Immigration and Border Protection & Anor (B31/2017) | Federal Court of Australia [2017] FCA 488 | Application dismissed [2017] HCASL 209 |
| 4. | Giles | Jeffrey & Anor (M62/2017 & M63/2017) | Supreme Court of Victoria (Court of Appeal) [2015] VSCA 70 | Applications dismissed [2017] HCASL 210 |
| 5. | Giles | Jeffrey & Anor (M64/2017) | Supreme Court of Victoria (Court of Appeal) [2016] VSCA 314 | Application dismissed [2017] HCASL 210a |
| 6. | Re Smart (M76/2017) | | High Court of Australia | Application dismissed [2017] HCASL 211 |
| 7. | Goldberg | Stocker & Anor (M86/2017) | Supreme Court of Victoria (Court of Appeal) [2017] VSCA126 | Application dismissed [2017] HCASL 212 |
| 8. | SZVLI | Minister for Immigration and Border Protection & Anor (S162/2017) | Federal Court of Australia [2017] FCA 531 | Application dismissed [2017] HCASL 213 |
| 9. | BXV16 & Ors | Minister for Immigration and Border Protection & Anor (S175/2017) | Federal Court of Australia [2017] FCA 743 | Application dismissed [2017] HCASL 214 |
| 10. | BRJ15 | Minister for Immigration and Border Protection & Anor (S176/2017) | Federal Court of Australia [2017] FCA 588 | Application dismissed [2017] HCASL 215 |
| 11. | ASL15 | Minister for Immigration and Border Protection & Anor (S197/2017) | Federal Court of Australia [2017] FCA 679 | Application dismissed [2017] HCASL 216 |

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Publication of Reasons: 14 September 2017

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Result</i> |
|------------|---|---|--|--|
| 1. | Singh | Minister for Immigration and Border Protection & Anor (M73/2017) | Federal Court of Australia [2017] FCA 475 | Application dismissed [2017] HCASL 217 |
| 2. | Cai | County Court of Victoria & Anor (M74/2017) | Supreme Court of Victoria (Court of Appeal) [2017] VSCA 109 | Application dismissed [2017] HCASL 218 |
| 3. | Shaw | Yarranova Pty Ltd & Anor (M77/2017) | Full Court of the Federal Court of Australia [2017] FCAFC 88 | Application dismissed [2017] HCASL 219 |
| 4. | Singh | Minister for Immigration and Border Protection & Ors (M80/2017) | Federal Court of Australia [2017] FCA 624 | Application dismissed [2017] HCASL 220 |
| 5. | Babar & Ors | Minister for Immigration and Border Protection & Anor (P29/2017) | Federal Court of Australia [2017] FCA 655 | Application dismissed [2017] HCASL 221 |
| 6. | Rilak | Tsocas & Anor (S146/2017) | Full Court of the Family Court of Australia | Application dismissed [2017] HCASL 222 |
| 7. | SZVCB | Minister for Immigration and Border Protection & Ors (S151/2017) | Federal Court of Australia [2017] FCA 479 | Application dismissed [2017] HCASL 223 |
| 8. | Whitby | Zeller & Anor (S165/2017) | Family Court of Australia | Application dismissed [2017] HCASL 224 |
| 9. | SCVG | KLD & Anor (S171/2017) | Full Court of the Family Court of Australia | Application dismissed [2017] HCASL 225 |
| 10. | SZVWD | Minister for Immigration and Border Protection & Anor (S179/2017) | Federal Court of Australia [2017] FCA 563 | Application dismissed [2017] HCASL 226 |
| 11. | Adelaide Resource Recovery Pty Ltd | Wood (A19/2017) | Full Court of the Supreme Court of South Australia [2017] SASFC 13 | Application dismissed with costs [2017] HCASL 227 |
| 12. | Daffy | MLC Nominees Pty Ltd & Anor (M75/2017) | Supreme Court of Victoria (Court of Appeal) [2017] VSCA 110 | Application dismissed with costs [2017] HCASL 228 |
| 13. | North East Solution Pty Ltd | Masters Home Improvement Pty Ltd (Formerly Shellbelt Pty Ltd) & Anor (M79/2017) | Supreme Court of Victoria (Court of Appeal) [2017] VSCA 113 | Application dismissed with costs [2017] HCASL 229 |
| 14. | SZTIM | Minister for Immigration and Border Protection & Anor (S114/2017) | Federal Court of Australia [2017] FCA 360 | Application dismissed with costs [2017] HCASL 230 |
| 15. | Cable & Wireless Australia & Pacific Holding BV | Commissioner of Taxation of the Commonwealth of Australia (S147/2017) | Full Court of the Federal Court of Australia [2017] FCAFC 71 | Application dismissed with costs [2017] HCASL 231 |

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Result</i> |
|------------|--|---|---|--|
| 16. | Trustees of the Bankrupt Estate of Needham | Needham (S174/2017) | Full Court of the Family Court of Australia | Application dismissed with costs [2017] HCASL 232 |
| 17. | Farrer | The Queen (A16/2017) | Full Court of the Supreme Court of South Australia (Court of Criminal Appeal) [2017] SASCF 27 | Application dismissed [2017] HCASL 233 |
| 18. | Eclipse Resources Pty Ltd | The State of Western Australia & Ors (P22/2017) | Supreme Court of Western Australia (Court of Appeal) [2017] WASCA 90 | Application dismissed with costs [2017] HCASL 234 |
| 19. | Calliden Insurance Limited | Stealth Enterprises Pty Ltd t/as The Gentlemens Club (S115/2017) | Supreme Court of New South Wales (Court of Appeal) [2017] NSWCA 71 | Application dismissed with costs [2017] HCASL 235 |
| 20. | Dial a Dump Industries Pty Ltd | Roads and Maritime Services (S122/2017) | Supreme Court of New South Wales (Court of Appeal) [2017] NSWCA 73 | Application dismissed with costs [2017] HCASL 236 |
| 21. | Issa & Anor | Australian Alliance Insurance Company Limited t/as Shannons Insurance (S149/2017) | Supreme Court of New South Wales (Court of Appeal) [2017] NSWCA 87 | Application dismissed with costs [2017] HCASL 237 |
| 22. | Panayi | Deputy Commissioner of Taxation (S152/2017) | Supreme Court of New South Wales (Court of Appeal) [2017] NSWCA 93 | Application dismissed with costs [2017] HCASL 238 |
| 23. | Sachin | Minister for Immigration and Border Protection & Anor (S163/2017) | Federal Court of Australia [2017] FCA 527 | Application dismissed with costs [2017] HCASL 239 |

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15 September 2017: Melbourne

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Results</i> |
|------------|---|--|---|---|
| 1. | Construction, Forestry, Mining and Energy Union & Ors | Australian Building and Construction Commissioner (P15/2017) | Full Court of the Federal Court of Australia [2017] FCAFC 53 | Application dismissed [2017] HCATrans 190 |
| 2. | Mineralogy Pty Ltd | Sino Iron Pty Ltd & Ors (P16/2017) | Full Court of the Federal Court of Australia [2017] FCAFC 55 | Application dismissed with costs [2017] HCATrans 189 |

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15 September 2017: Sydney

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Results</i> |
|------------|--|---|--|--|
| 1. | Aravena | The Queen (S241/2016) | Supreme Court of New South Wales (Court of Criminal Appeal) [2015] NSWCA 288 | Application dismissed [2017] HCATrans 185 |
| 2. | Daniel Terrence Serrao by his tutor Alicia Serrao | Cornelius (S89/2017) | Supreme Court of New South Wales (Court of Appeal) [2017] NSWCA 61 | Application dismissed with costs [2017] HCATrans 186 |
| 3. | Harradine | Toll Pty Limited (S120/2017) | Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 374 [2017] NSWCA 75 | Application dismissed with costs [2017] HCATrans 187 |
| 4. | Rirratjingu Aboriginal Corporation (ICN 305) & Ors | Northern Land Council & Ors (D1/2017) | Full Court of the Federal Court of Australia [2017] FCAFC 48 | Application dismissed with costs [2017] HCATrans 188 |

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