



HIGH COURT BULLETIN

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[2017] HCAB 2 (16 March 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

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3: Cases Reserved

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| <i>Thorne v Kennedy</i> | Family Law |
| <i>Aldi Foods Pty Limited v Shop, Distributive & Allied Employees Association & Anor</i> | Industrial Law |

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

2: CASES HANDED DOWN

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

Criminal Law

Prior v Mole

D5/2016: [\[2017\] HCA 10](#)

Judgment delivered: 8 March 2017

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

Catchwords:

Criminal law – Procedure – Apprehension and detention – Reasonable grounds – Where appellant drinking alcohol in public place near shops selling alcohol – Where appellant intoxicated and behaving belligerently towards police – Where appellant apprehended on basis of police officer's belief that appellant would commit offence of drinking liquor in regulated place – Whether belief held on reasonable grounds – Whether policing experience valid basis for reasonable grounds for forming belief.

Criminal law – Procedure – Apprehension and detention – Statutory powers of apprehension – Where appellant apprehended on basis of police officer's belief that appellant would commit offence of drinking liquor in regulated place – Where maximum penalty for offence forfeiture of liquor and issue of contravention notice – Whether decision to apprehend exceeded limits of apprehension power.

Words and phrases – "likely to commit an offence", "policing experience", "reasonable grounds".

Liquor Act (NT) – s 101U(1).

Police Administration Act (NT) – s 128(1).

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

Held: Appeal dismissed.

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Perara-Cathcart v The Queen

A39/2016: [\[2017\] HCA 9](#)

Judgment delivered: 1 March 2017

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

Catchwords:

Criminal law – Appeal against conviction – Directions to jury – Where discreditable conduct evidence admitted under s 34P of *Evidence Act 1929 (SA)* – Relevance of discreditable conduct evidence – Whether trial judge adequately directed jury as to permissible and impermissible uses of discreditable conduct evidence in accordance with s 34R.

Criminal law – Appeal against conviction – Application of proviso – *Criminal Law Consolidation Act 1935 (SA)*, s 353(1) – Where majority of Full Court found miscarriage of justice occasioned by misdirection to jury – Where majority of Full Court divided as to whether misdirection occasioned substantial miscarriage of justice for purposes of applying proviso – Whether appeal could be dismissed pursuant to proviso.

Words and phrases – "discreditable conduct evidence", "error of law", "opinion of majority", "permissible and impermissible use", "proviso", "substantial miscarriage of justice", "sufficiency of direction".

Criminal Law Consolidation Act 1935 (SA) – ss 349, 353(1).

Evidence Act 1929 (SA) – ss 34P, 34R.

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

Held: Appeal dismissed.

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Family Law

Bondelmonte v Bondelmonte & Anor
S247/2016: [\[2017\] HCA 8](#)

Judgment delivered: 1 March 2017

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

Catchwords:

Family law – *Family Law Act 1975 (Cth)* – Parenting orders – Where children taken overseas by father – Where children stayed with

father overseas in breach of parenting orders – Where mother applied for order for return of children – Where children expressed preference to stay with father overseas – Where primary judge made interim orders for return of children to Australia and for living arrangements upon return – Whether erroneous to discount weight given to views expressed by children – Whether father's breach of parenting orders relevant to children's best interests – Whether necessary to ascertain children's views as to living arrangements – Whether parenting orders could be made in favour of strangers to proceedings.

Words and phrases – "best interests of the child", "judicial discretion", "parenting orders", "views expressed by the child".

Family Law Act 1975 (Cth) – ss 60CA, 60CC, 60CD, 60CE, 64C, 65C, 65D, 68L, 68LA.

Appealed from FamFC (FC): [\[2016\] FamCAFC 48](#); (2016) 55 Fam LR 65

Held: Appeals dismissed with costs.

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Migration

Minister for Immigration and Border Protection v Kumar & Ors
P49/2016: [\[2017\] HCA 11](#)

Judgment delivered: 8 March 2017

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

Catchwords:

Statutes – Interpretation – *Acts Interpretation Act 1901* (Cth), s 36(2) – Where first respondent's application for visa received and taken to be made on Monday 13 January – Where first respondent able to meet visa criteria in *Migration Regulations 1994* (Cth) if first respondent held valid second visa at time of application – Where first respondent's second visa expired on Sunday 12 January – Whether s 36(2) of *Acts Interpretation Act* allowed application to be assessed as if it had been made before expiry of first respondent's second visa.

Words and phrases – "an Act requires or allows", "last day", "prescribed or allowed by an Act", "state of affairs", "thing to be done", "time of application".

Acts Interpretation Act 1901 (Cth) – s 36(2).

Migration Act 1958 (Cth) – ss 31, 45, 46, 47, 65.

Migration Regulations 1994 (Cth) – Sched 2, cl 572. 211.

Appealed from FCA: [\[2016\] FCA 177](#); (2016) 243 FCR 146

Held: Appeal allowed.

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3: CASES RESERVED

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

Competition Law

Air New Zealand Ltd v Australian Competition and Consumer Commission; PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission

[S245/2016](#), [S248/2016](#): [\[2017\] HCATrans 44](#), [\[2017\] HCATrans 46](#)

Date heard: 2 and 3 March 2017

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

Catchwords:

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

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

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Constitutional Law

Rizeq v The State of Western Australia

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

Date heard: 1 and 2 February 2017

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

Catchwords:

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

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

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Contract Law

Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd
M143/2016: [\[2016\] HCATrans 300](#)

Date heard: 14 December 2016

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

Catchwords:

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

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

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Court of Disputed Returns

Re Day

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

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

Date Heard: 7 February 2017

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

Questions:

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

Judgment reserved.

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Criminal Law

Aubrey (MA) v The Queen

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

Date heard: 3 February 2017

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

Catchwords:

Criminal law – Statutory construction – *Crimes Act* 1900 (NSW) s 35 – Where appellant alleged to have transmitted Human

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

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

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Hughes v The Queen

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

Date heard: 8 February 2017

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

Catchwords:

Criminal law – Tendency evidence – Where appellant found guilty on 10 of 11 charges of having sexual intercourse with, and committing acts of indecency on, girls under the age of sixteen – Where tendency evidence admitted to prove that the appellant had a tendency to have a sexual interest in, and engage in sexual conduct with, female children under sixteen – *Evidence Act* 1995 (NSW) s 97 – Whether tendency evidence had “significant probative value” – Whether an “underlying unity” or “pattern of conduct” required to establish significant probative value – Whether evidence of tendency was sufficiently specific to reach threshold of significant probative value – Whether Court of Criminal Appeal erred in rejecting approach taken to tendency evidence in *Velkoski v R* [2014] VSCA 121.

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

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Smith v The Queen; The Queen v Afford

S249/2016, M144/2016: [\[2017\] HCATrans 40](#)

Date heard: 28 February 2017

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

Catchwords:

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

Appealed from NSWSC (CCA): [\[2016\] NSWCCA 93](#); (2016) 309 FLR 258; **Appealed from VSC (CA):** [\[2016\] VSCA 56](#); (2016) 308 FLR 1

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Pickering v The Queen

B68/2016: [\[2017\] HCATrans 50](#)

Date heard: 9 March 2017

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

Catchwords:

Criminal law – *Criminal Code* (Qld) – Where jury acquitted appellant of murder and found appellant guilty of manslaughter – Where appellant killed deceased whilst allegedly trying to avoid him – Whether application of s 31(1)(c) *Criminal Code* (Qld) excluded by s 31(2) – Meaning of “would constitute”.

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

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Migration

Plaintiff M96A/2016 & Anor v Commonwealth of Australia & Anor

M96/2016: [\[2017\] HCATrans 49](#)

Date heard: 8 March 2017

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

Catchwords:

Constitutional law – Migration – Where plaintiffs arrived in Australia at Christmas Island as “unauthorised maritime arrivals” – Where plaintiffs detained under s 189(3) *Migration Act* 1958 (Cth) – Where plaintiffs taken to Republic of Nauru under s 198AD(2) – Where plaintiffs subsequently brought to Australia under s 198B for “temporary purpose” of medical treatment – Where plaintiffs are detained in detention centre in Australia – Whether detention under

ss 189 or 196 beyond power conferred in Constitution s 51(xix) – Whether detention of plaintiffs incompatible with Ch III of Constitution.

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Negligence

Kendirjian v Lepore & Anor

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

Date heard: 9 February 2017

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

Catchwords:

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

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

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Procedure

Talacko v Bennett & Ors

M154/2016: [\[2017\] HCATrans 47](#)

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

Date heard: 7 March 2017

Catchwords:

Procedure – Foreign judgments – Where money judgment in Australian court – Where judgment creditors wish to enforce judgment in foreign country – Where two certificates issued under s 15(1) *Foreign Judgments Act* 1991 (Cth) – Where judgment debtor

bankrupt when certificates granted – Where judgment amounted to “provable debt” – Whether applications precluded by s 15(2) *Foreign Judgments Act* 1991 (Cth) on basis that s 58(3) *Bankruptcy Act* 1966 (Cth) operated as stay of enforcement of judgment debt – Whether judgment creditor can enforce judgment in foreign country under s 15(1) where it is not competent for creditor to enforce any remedy against debtor by reason of s 58(3).

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

4: ORIGINAL JURISDICTION

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

Constitutional Law

Knight v State of Victoria & Anor

[M251/2015](#): *Special Case*

Catchwords:

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

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Brown & Anor v The State of Tasmania

[H3/2016](#): *Special Case*

Catchwords:

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

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Migration

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

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

Catchwords:

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

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

[S195/2016](#): *Special Case*

Catchwords:

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

conferred by s 198AHA dependent on those arrangements being lawful under law of Papua New Guinea.

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5: SPECIAL LEAVE GRANTED

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

Bankruptcy

Ramsay Health Care Australia Pty Limited v Compton

S216/2016: [\[2017\] HCATrans 55](#)

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

Catchwords:

Bankruptcy – *Bankruptcy Act* 1966 (Cth) s 52 – Application to “go behind” judgment debt – Principle of finality – Whether Full Federal Court applied wrong test for “going behind” judgment – Whether court may go behind judgment in any circumstance where debtor adduces evidence which shows “substantial reason to believe” debt not owed.

Appealed from FCA (FC): [\[2016\] FCAFC 106](#)

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Compensation

Transport Accident Commission v Katanas

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

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

Catchwords:

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

Appealed from VSC (CA): [\[2016\] VSCA 140](#); (2016) 76 MVR 161

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Criminal Law

IL v The Queen

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

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

Catchwords:

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

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

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The Queen v Dickman

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

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

Catchwords:

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

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

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The Queen v Dookheea

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

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

Catchwords:

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

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

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Director of Public Prosecutions v Dalgliesh (A Pseudonym)

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

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

Catchwords:

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

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

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GAX v The Queen

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

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

Catchwords:

Criminal law – Unreasonable verdict – Where appellant was convicted of one count of aggravated indecent dealing with child under age of 16 years who was his lineal descendant – Where complainant gave evidence that the appellant, her father, lay in bed with her and that his fingers were down near where her underwear

was supposed to be – Where complainant’s mother and sister gave evidence of finding appellant in bed with complainant – Where there were inconsistencies between accounts of complainant, mother and sister – Where majority of the Court of Appeal dismissed appeal – Whether majority failed to make independent assessment of the sufficiency and quality of the evidence in determining reasonableness of verdict.

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

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Chiro v The Queen

A9/2017: [\[2017\] HCATrans 20](#)

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

Catchwords:

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

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

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Van Beelen v The Queen

A8/2017: [\[2017\] HCATrans 19](#)

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

Catchwords:

Criminal law – *Criminal Law Consolidation Act 1935 (SA)* s 353A – Second or subsequent appeal where Court satisfied fresh and compelling evidence that should in interests of justice be considered

– Where appellant seeks to appeal against conviction of murder on basis that new evidence shows expert evidence as to time of victim’s death flawed – Whether “fresh” and “compelling” evidence – Whether majority erred in holding further attack on expert evidence precluded because expert evidence contested at trial – Whether evidence could have been adduced at original trial – Whether majority erred in finding principle of finality relevant to s 353A appeal – Whether evidence is “substantial” – Whether in the “interests of justice” to allow appeal.

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

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The Queen v Holliday

C3/2017: [\[2017\] HCATrans 21](#)

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

Catchwords:

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

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

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Family Law

Thorne v Kennedy

B62/2016: [\[2017\] HCATrans 54](#)

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

Catchwords:

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

Court declared second financial agreement binding – Whether financial agreements should be set aside on grounds of duress, undue influence or unconscionable conduct – Whether Full Court erred in finding trial judge failed to provide adequate reasons.

Appealed from FamFC (FC): [\[2016\] FamCAFC 189](#)

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Industrial Law

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

M173/2016: [\[2017\] HCATrans 48](#)

Date determined: 8 March 2017 – *Special leave granted.*

Catchwords:

Industrial law – Jurisdictional error – *Fair Work Act 2009* (Cth) – Approval of enterprise agreements – Whether Fair Work Commission fell into jurisdictional error in exercising functions under s 186 – Whether within Fair Work Commission’s jurisdiction to determine whether group of employees who voted on single enterprise agreement within coverage of agreement – Whether Fair Work Commission fell into jurisdictional error in determining agreement satisfied “better off overall test” under s 193 – Unreasonableness in jurisdictional sense.

Appealed from FCA (FC): [\[2016\] FCAFC 161](#)

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Esso Australia Pty Ltd v Australian Workers’ Union

M185/2016: [\[2016\] HCATrans 311](#)

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

Catchwords:

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

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

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Australian Workers' Union v Esso Australia Pty Ltd

M187/2016: [\[2016\] HCATrans 311](#)

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

Catchwords:

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

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

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Migration

SZTAL v Minister for Immigration and Border Protection & Anor;
SZTGM v Minister for Immigration and Border Protection & Anor

S272/2016; S273/2016: [\[2016\] HCATrans 276](#)

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

Catchwords:

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

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

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Mining

Forrest & Forrest Pty Ltd v Wilson & Ors

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

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

Catchwords:

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

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

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Negligence

State of New South Wales v DC & Anor

S35/2017: [\[2017\] HCATrans 22](#)

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

Catchwords:

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

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

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Taxation

Commissioner of Taxation v Jayasinghe

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

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

Catchwords:

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

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

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6: CASES NOT PROCEEDING OR VACATED

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7: SPECIAL LEAVE REFUSED

Publication of Reasons: 1 March 2017

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Result</i> |
|------------|-------------------------------|--|---|--|
| 1. | Mark Davis (a pseudonym) | The Queen (M169/2016) | Supreme Court of Victoria (Court of Appeal) [2016] VSCA 272 | Application dismissed [2017] HCASL 26 |
| 2. | Young | Hones & Ors (S246/2016) | Supreme Court of New South Wales (Court of Appeal) [2014] NSWCA 337 | Application dismissed with costs [2017] HCASL 27 |
| 3. | Young | King & Anor (S260/2016) | Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 282 | Application dismissed with costs [2017] HCASL 28 |
| 4. | Sayde Developments Pty Ltd | Arab Bank of Australia Limited (S301/2016) | Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 328 | Application dismissed with costs [2017] HCASL 29 |

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Publication of Reasons: 2 March 2017

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Result</i> |
|------------|------------------|---|---|---|
| 1. | Fard | Secretary, Department of Immigration and Border Protection (C17/2016) | Full Court of the Federal Court of Australia [2016] FCAFC 155 | Application dismissed [2017] HCASL 30 |
| 2. | Macatangay | State of New South Wales (S286/2016) | Federal Court of Australia [2016] FCA 1390 | Application dismissed [2017] HCASL 31 |
| 3. | Tanious | South Eastern Sydney Local Health District & Anor (S287/2016) | Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 326 | Application dismissed [2017] HCASL 32 |
| 4. | SZUXO | Minister for Immigration and Border Protection & Anor (S288/2016) | Federal Court of Australia [2016] FCA 1399 | Application dismissed [2017] HCASL 33 |
| 5. | Ortleib | Lloyd (S293/2016) | Family Court of Australia | Application dismissed [2017] HCASL 34 |
| 6. | Charan & Anor | Secretary, Department of Social Services (S9/2017) | Full Court of the Federal Court of Australia [2016] FCAFC 175 | Application dismissed [2017] HCASL 35 |
| 7. | APS16 | Minister for Immigration and Border Protection & Anor (S10/2017) | Federal Court of Australia [2016] FCA 1422 | Application dismissed [2017] HCASL 36 |

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Publication of Reasons: 7 March 2017

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Result</i> |
|------------|------------------------|---|---|--|
| 1. | Kaur | Minister for Immigration and Border Protection & Anor (M164/2016) | Federal Court of Australia [2016] FCA 1340 | Application dismissed [2017] HCASL 37 |
| 2. | MZAPH | Minister for Immigration and Border Protection & Anor (M180/2016) | Federal Court of Australia [2016] FCA 1527 | Application dismissed [2017] HCASL 38 |
| 3. | Spencer | Spencer & Anor (P61/2016) | Full Court of the Family Court of Australia | Application dismissed [2017] HCASL 39 |
| 4. | Frigger & Anor | Lean (P2/2017) | Supreme Court of Western Australia (Court of Appeal) [2016] WASCA 212 | Application dismissed [2017] HCASL 40 |
| 5. | SZUGM & Anor | Minister for Immigration and Border Protection & Anor (S283/2016) | Federal Court of Australia [2016] FCA 1384 | Application dismissed [2017] HCASL 41 |
| 6. | SZUFU | Minister for Immigration and Border Protection & Anor (S294/2016) | Federal Court of Australia [2016] FCA 1388 | Application dismissed [2017] HCASL 42 |
| 7. | Zepinic & Anor | Chateau Constructions (Aust) Limited (S295/2016) | Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 361 | Application dismissed [2017] HCASL 43 |
| 8. | Zepinic | Chateau Constructions (Aust) Limited (S296/2016) | Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 361 | Application dismissed [2017] HCASL 44 |
| 9. | Re Van Gorp (S11/2017) | | High Court of Australia | Application dismissed [2017] HCASL 45 |

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Publication of Reasons: 8 March 2017

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Result</i> |
|------------|--------------------------------------|---|---|--|
| 1. | Hudson | Commissioner of Taxation (A49/2016) | Full Court of the Supreme Court of South Australia [2016] SASCFC 122 | Application dismissed [2017] HCASL 46 |
| 2. | BVU15 | Minister for Immigration and Border Protection & Anor (B70/2016) | Federal Court of Australia [2016] FCA 1446 | Application dismissed [2017] HCASL 47 |
| 3. | MH | Australian Capital Territory & Ors (C18/2016) | Federal Court of Australia [2016] FCA 1355 | Application dismissed [2017] HCASL 48 |
| 4. | Gupta | Minister for Immigration and Border Protection & Anor (M157/2016) | High Court of Australia [2016] HCATrans 260 | Application dismissed [2017] HCASL 49 |
| 5. | MZALO | Minister for Immigration and Border Protection & Anor (M161/2016) | Federal Court of Australia [2016] FCA 1339 | Application dismissed [2017] HCASL 50 |
| 6. | Dhungana | Minister for Immigration and Border Protection & Anor (M171/2016) | Federal Court of Australia [2016] FCA 1141 | Application dismissed [2017] HCASL 51 |
| 7. | Kostov | Zhang & Ors (S17/2017) | Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 262 | Application dismissed [2017] HCASL 52 |
| 8. | Jeremiah | Lawrie & Anor (D7/2016) | Supreme Court of the Northern Territory (Court of Appeal) [2016] NTCA 06 | Application dismissed with costs [2017] HCASL 54 |
| 9. | Spotless Management Services Pty Ltd | Stevens (M183/2016) | Supreme Court of Victoria (Court of Appeal) [2016] VSCA 299 | Application dismissed with costs [2017] HCASL 55 |
| 10. | Plaintiff S243A/2016 & Ors | Minister for Immigration and Border Protection & Anor (S243/2016) | High Court of Australia [2016] HCATrans 219 | Application dismissed with costs [2017] HCASL 56 |
| 11. | Lowe | The Queen (A47/2016) | Supreme Court of South Australia (Court of Criminal Appeal) [2016] SASCFC 118 | Application dismissed [2017] HCASL 57 |
| 12. | Nikolic | Chief Commissioner of Police (M149/2016) | Supreme Court of Victoria (Court of Appeal) [2016] VSCA 248 | Application dismissed with costs [2017] HCASL 58 |

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Result</i> |
|------------|--|--|--|--|
| 13. | Mercanti | Mercanti & Ors (P63/2016) | Supreme Court of Western Australia (Court of Appeal) [2016] WASCA 206 | Application dismissed with costs [2017] HCASL 59 |
| 14. | Hoxton Park Residents Action Group Inc. & Anor | Liverpool City Council & Ors (S194/2016) | Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 157 | Application dismissed with costs [2017] HCASL 60 |
| 15. | Plaintiff S244/2012 & Anor | Minister for Immigration and Border Protection & Anor (S257/2016) | Federal Court of Australia [2016] FCA 1227 | Application dismissed with costs [2017] HCASL 61 |
| 16. | Hetherington | The Queen (S261/2016) | Supreme Court of New South Wales (Court of Criminal Appeal) [2016] NSWCCA 165 | Application dismissed [2017] HCASL 62 |
| 17. | George 218 Pty Ltd & Ors | Bank of Queensland Limited (P60/2016) | Supreme Court of Western Australia (Court of Appeal) [2016] WASCA 182 | Application dismissed with costs [2017] HCASL 63 |

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10 March 2017: Sydney

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Results</i> |
|------------|-----------------------------|--|---|--|
| 1. | Beck | Commonwealth Bank Officers Superannuation Corporations Pty Limited & Ors (S228/2016) | Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 218 | Application dismissed with costs [2017] HCATrans 56 |
| 2. | Lambert Leasing, Inc & Anor | QBE Insurance Australia Ltd & Ors (S240/2016) | Supreme Court of New South Wales (Court of Appeal) [2016] NSWCA 254 | Application dismissed with costs [2017] HCATrans 57 |
| 3. | Tech Mahindra Limited | Commissioner of Taxation (S244/2016) | Full Court of the Federal Court of Australia [2016] FCAFC 130 | Application dismissed with costs [2017] HCATrans 58 |

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10 March 2017: Brisbane

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Results</i> |
|------------|------------------|---|--|---|
| 1. | Nugent | Ian Stewart (Commissioner of Police) & Anor (B58/2016) | Supreme Court of Queensland (Court of Appeal) [2016] QCA 223 | Application dismissed with costs [2017] HCATrans 53 |

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