

# IN-HOUSE COUNSEL DAY

THURSDAY, 5 MARCH 2026



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LAWYERS



# Session 2

## ADMINISTRATIVE LAW – YEAR IN REVIEW

PRESENTED BY

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# Summary

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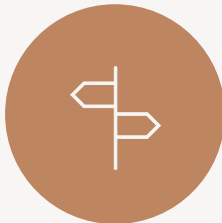
Introduction



High Court decisions of note: looking back at 2025



Pending High Court decisions for 2026: the year ahead



Generative AI and the Attorney General's Automated Decision-making reform (ADM)

# High Court decisions of note: looking back at 2025

# *Palmanova v Commonwealth* [2025] HCA 35

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## Section 14 of the *Protection of Movable Cultural Heritage Act 1986*

### Unlawful imports

(1) Where:

- (a) a protected object of a foreign country has been exported from that country;
- (b) the export was prohibited by a law of that country relating to cultural property; and
- (c) the object is imported;

the object is liable to forfeiture.

(2) Where a person imports an object, knowing that:

- (a) the object is a protected object of a foreign country that has been exported from that country; and
- (b) the export was prohibited by a law of that country relating to cultural property;

the person commits an offence.

# *Palmanova v Commonwealth* [2025] HCA 35

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On 3 September 2025, the High Court handed down its decision.

The issue before the Court was whether the prohibition on exportation in section 14 of the Act only applied to objects exported *after* the commencement of the Act or if the prohibition could also apply to objects exported *before* the commencement of the Act.

The High Court's preferred construction of section 14 was that it applied to objects exported from a foreign country *before* the commencement of the Act. The basis for this conclusion included:

- that the Act was giving effect, in domestic law, to the UNESCO Convention which was not limited in its operation, by the *timing* of the export of the protected foreign object;
- that the nation-state parties to the UNESCO Convention were not fettered from giving effect to agreements for the recovery and return of protected foreign objects;
- that section 41 of the Act did not limit the objects that could be the subject of a request for the return of a protected foreign object from a nation-state party to the UNESCO Convention.

Given the broad nature of the terms of the UNESCO Convention, the High Court considered that section 14 should similarly not be temporally limited or otherwise narrowly construed.

# *Forestry Corporation of New South Wales v South East Forest Rescue Incorporated [2025] HCA 15*

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On 9 April 2025, the High Court handed down its decision.

South East Forest Rescue Incorporated (the **Respondent**) sought an order in the NSW Land and Environment Court to enforce certain environmental obligations relating to the impact of logging operations of the Forestry Corporation of New South Wales (the **Appellant**).

The issue before the Court was whether the Respondent had common law standing to bring an action enforcing these environmental obligations where a statutory regime set out (in a more confined manner) who had standing to bring such actions.

The Court concluded that, in the absence of a 'clear and unmistakable' statutory intention, a statutory regime that sets out who has standing to seek certain remedies against a public body, will not oust the common law principles relating to standing.

# *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2025] HCA 33*

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On 3 September 2025, the High Court handed down its decision.

Mr Khalil first applied for a partner visa in April 2013 the refusal of which was affirmed by the Administrative Appeals Tribunal (the **Tribunal**). After a long procedural history, the Court on judicial review remitted the matter to the Tribunal and the Tribunal once again affirmed the delegate's decision.

The issue before the Court was whether the Tribunal should have assessed Mr Khalil's review application against Direction 65 (which was in force when Mr Khalil originally sought merits review of the delegate's decision) or Direction 90 (which had replaced Direction 65 by the time the matter was remitted to the Tribunal).

The Court found that the Ministerial Direction in force *at the time of a decision* of a merits review body will bind the decision-maker.

# *Minister for Immigration and Multicultural Affairs v MZAPC* [2025] HCA 5

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On 5 March 2025, the High Court handed down its decision.

The Appellant claimed that his ministerial intervention application was affected by the decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10. In light of his ongoing proceedings, the Federal Court granted the Appellant interlocutory relief restraining his removal from Australia.

The Court found that the inherent power of the Court to make an interlocutory order is not limited to the same relief sought in the final orders and section 198(6) of the *Migration Act 1958* is to be interpreted to accommodate interlocutory injunctions restraining officers from removing unlawful non-citizens.

# *State of New South Wales v Wojciechowska* [2025] HCA 27

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On 6 August 2025, the High Court handed down its decision.

Ms Wojciechowska, a resident of Tasmania, sought review of various administrative decisions of the Commissioner of Police and the Secretary of the Department of Communities and Justice in the New South Wales Civil and Administrative Tribunal (**NCAT**). NCAT awarded Ms Wojciechowska damages. The issue before the Court was whether in awarding damages, NCAT was exercising judicial power in contravention of Chapter III of the Constitution?

The Court found that a State tribunal does not impermissibly exercise judicial power by awarding damages where the final act giving effect to those orders is done by a competent court and that act is sufficiently separated from the tribunal proceedings.

# Pending High Court decisions for 2026: the year ahead

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# TCXM v Minister for Immigration and Citizenship & Anor

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Case No. S146/2025

Appeal from: *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540 per Moshinsky J

Issue for determination:

- ▶ Does an obligation to afford procedural fairness arise from the manner in which the Commonwealth applied for a visa for Nauru on behalf of the appellant?
- ▶ Did the Primary Judge err in finding that the lower standard of medical care meant that the appellant's removal to Nauru was not 'reasonable practicable' for the purposes of s 198 of the *Migration Act* (Cth)

# SunshineLoans Pty Ltd v Australian Securities and Investments Commission

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**Case No. B23/2025**

Appeal from: *SunshineLoans Pty Ltd v Australian Securities and Investments Commission* [2025] FCAFC 34 per Perram, Bromwich and Colvin JJ

Issue for determination:

- Did the Full Court err in the manner in which it applied the principles relating to the apprehension of bias as set out in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337

# Deripaska v Minister for Foreign Affairs

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## Case No. P34/2025

Appeal from: *Deripaska v Minister for Foreign Affairs* [2025] FCAFC 36 (Wigney, Stewart and Neskovic JJ)

**Issue for determination:** whether regs 14 and 15 of the *Autonomous Sanctions Regulations 2011* (Cth) can be 'read down' so as to not infringe on the operation of section 75(v) of the Constitution.

- ▶ Regulation 14: prohibits anyone from directly or indirectly making any asset available to, or for the benefit of, a designated person or entity
- ▶ Regulation 15: prohibits a designated person and any other person from using or dealing with a designated person's assets, and from allowing or facilitating such use or dealing.

# Generative AI and the Attorney General's Automated Decision- making reform (ADM)

# Use of Generative AI (Gen AI) tools in litigation

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“Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity”:

*Mata v Avianca Inc*, 678 F Supp 3d 443 (S.D.N.Y. 2023)

# Use of Generative AI (Gen AI) tools in litigation

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– *Pasuengos v Minister for Immigration and Citizenship (No 2)* [2026] FedCFamC2G 96.

This matter involved the filing of submissions that contained fictitious authorities which had been generated by Google's 'AI Summary' tool during open-source research conducted by a junior solicitor.

The junior solicitor did not cross-check the authorities against any legal databases before including them in the submissions, and the error was not subsequently identified by the principal solicitor responsible for their supervision.

The fictitious authorities were eventually brought to the Court's attention by the respondent's representative.

# Use of Generative AI (Gen AI) tools in litigation

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- *Murray on behalf of the Wamba Wemba Native Title Claim Group v State of Victoria* [2025] FCA 731.

This matter concerned a document, drafted by a junior solicitor, entitled 'Applicant's Summary of Native Title Claim Group and Decision Making Process' which contained numerous footnotes referencing anthropological and historical reports and papers relied on by the applicant. The citations were later discovered to be 'hallucinations', possibly arising from the use of Google Scholar's AI research tool.

The principal solicitor later conceded in evidence that *'he was not aware that anyone had checked the junior solicitor's work'*.

# Use of Generative AI (Gen AI) tools in litigation

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– *QWYN and Commissioner of Taxation (Taxation and Business)* [2025] ARTA 83.

In this matter, the applicant provided submissions to the Tribunal which were an exact reproduction of a response drafted by Microsoft Copilot.

Included in those submissions was a hallucinated extract of the Explanatory Memorandum to the Taxation Laws Amendment (Superannuation) Bill 1992. The Tribunal attempted to locate the extract in the Explanatory Memorandum but ultimately concluded that it did not exist.

# Use of Generative AI (Gen AI) tools in litigation

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"[T]he Court expects that if legal practitioners and litigants conducting their own proceedings make use of Generative Artificial Intelligence, they do so in a responsible way consistent with their existing obligations to the Court and to other parties. Further, it is also expected that parties and practitioners disclose such use if required to do so by a Judge or Registrar of the Court."

Notice to the Profession, Artificial Intelligence use in the Federal Court of Australia (29 April 2025).

# Use of Generative AI (Gen AI) tools in litigation

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Response from the Courts?

- Referrals to regulators: *Dayal* [2024] FedCFamC2F 1166; *Valu v Minister for Immigration and Multicultural Affairs (No 2)* [2025] FedCFamC2G 95.
- Personal costs orders: *Pasuengos v Minister for Immigration and Citizenship (No 2)* [2025] FedCFamC2G 96; *JNE24 v Minister for Immigration and Citizenship* [2025] FedCFamC2G 1314.
- Indemnity costs orders: *Murray on behalf of the Wamba Wemba Native Title Claim Group v State of Victoria* [2025] FCA 731.

# Use of Generative AI (Gen AI) tools in litigation

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In the Administrative Review Tribunal?

- “[I]f artificial intelligence is used as a research tool by litigants before the Tribunal, each case identified by artificial intelligence needs to be located on public websites (such as [www.austlii.edu.au](http://www.austlii.edu.au)) and (assuming it exists) read in order to ensure it stands for the proposition for which it is cited before it is put to the Tribunal. Otherwise, the Tribunal's time and scarce resources are being wasted, as the Tribunal must look for cases that do not exist and read cases that have no relevance at all”: *Smith and Commissioner of Taxation (Taxation)* [2026] ARTA 25 at [83]
- “It is my assessment that submitting unverified material generated by AI, is not consistent with a party's duty to use their best endeavours to assist the Tribunal to achieve its statutory objectives”: *QWYN and Commissioner of Taxation (Taxation and Business)* [2025] ARTA 83 at [63]

# Use of Generative AI (Gen AI) tools in litigation

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## ART Member Code of Conduct:

- 9.1 A Member **must not** use Generative AI to obtain guidance on the outcome of a proceeding, to produce any part of the Member's reasons for a decision or to obtain any form of feedback or assistance on any part of the Member's reasons for a decision which the Member has already prepared.
- 9.2 A Member **must not** enter any Tribunal information, data or records, including case or party data, emails, reports, chat logs, code and system errors, into any Generative AI application.
- 9.3 **Where a Member uses Generative AI as a general research tool** without breaching the obligations in [9.1] and [9.2], the Member must check any research generated by Generative AI and verify its accuracy before relying on that research.

# Use of Generative AI (Gen AI) tools in litigation

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Guidelines published by Queensland Courts on 15 September 2025 provide:

- [23] You are personally responsible for material which is produced in your name.
- [24] Provided these guidelines are appropriately followed, there is no reason why you cannot use generative AI as a potentially useful secondary tool for research or **preparatory work**. However, you must ensure that any use of AI tools by you or your staff is consistent with the core judicial values of open justice, accountability, impartiality and equality before the law, procedural fairness, access to justice and efficiency.
- [25] AI tools should not be used for decision-making nor used to develop or prepare reasons for decision. The development and expression of judicial reasoning must be done by the judicial officer themselves.
- [26] If your staff are using AI tools in the course of their work for you, you should discuss it with them to ensure they are using such tools appropriately and taking steps to mitigate any risks.

# Development and implementation of a Commonwealth ADM Framework

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**Recommendation 17:** The Commonwealth should consider legislative reform to introduce a consistent legal framework in which automation in government services can operate.

Where automated decision-making is implemented:

- there should be a clear path for those affected by decisions to seek review;
- departmental websites should contain information advising that automated decision-making is used and explaining in plain language how the process works; and
- business rules and algorithms should be made available, to enable independent expert scrutiny.

# Development and implementation of a Commonwealth ADM Framework

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- *6 out of 14* respondents said that they were not aware that government agencies used ADM to make decisions.
- In answer to the question: 'should we have the same rules whether an ADM system or a human makes a decision?' *50%* of respondents said that the rules should be stricter for ADM systems and *40%* of respondents said that the rules that bind ADM systems and humans should be the same.
- *90 percent* of respondents thought that it was 'very important' to know that you can ask for review of a decision made by an ADM system.
- Respondents said that they cared about *transparency, fairness, accountability and consistency* across government.
- ADM systems should include a place for *human intervention* at different and appropriate stages including oversight, review and auditing.


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