



# HIGH COURT BULLETIN

Produced by the Legal Research Officer,  
High Court of Australia Library  
[2020] HCAB 1 (14 February 2020)

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
<a href="#"><i>Love v Commonwealth of Australia; Thoms v Commonwealth of Australia</i></a>	Constitutional law
<a href="#"><i>Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd</i></a>	Customs and excise
<a href="#"><i>Kadir v The Queen; Grech v The Queen</i></a>	Evidence

### 3: Cases Reserved

Case	Title
<a href="#"><i>Hocking v Director-General of the National Archives of Australia</i></a>	Administrative Law
<a href="#"><i>KMC v Director of Public Prosecutions (SA)</i></a>	Constitutional Law
<a href="#"><i>Moore v Scenic Tours Pty Ltd</i></a>	Consumer Protection

<a href="#"><i>Coughlan v The Queen</i></a>	Criminal Law
<a href="#"><i>Swan v The Queen</i></a>	Criminal Law
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## 2: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the February 2020 sittings.

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### Constitutional law

*Love v Commonwealth of Australia; Thoms v Commonwealth of Australia*

[B43/2018](#); [B64/2018](#): [2020] HCA 3

**Judgment delivered:** 11 February 2020

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

#### Catchwords:

Constitutional law (Cth) – Powers of Commonwealth Parliament – Power to make laws with respect to naturalisation and aliens – Meaning of "aliens" – Where plaintiffs foreign citizens, born outside Australia, who did not acquire Australian citizenship – Where plaintiffs biological descendants of indigenous peoples – Where plaintiffs' visas cancelled under s 501(3A) of *Migration Act 1958* (Cth) – Whether statutory citizenship and constitutional alienage co-terminous – Whether an Aboriginal Australian (defined according to tripartite test in *Mabo v Queensland [No 2]* (1992) 175 CLR 1) can be "alien" within meaning of s 51(xix) of *Constitution* – Whether s 51(xix) supports application of ss 14, 189 and 198 of *Migration Act* to plaintiffs – Whether plaintiffs satisfy tripartite test.

Words and phrases – "Aboriginal Australian", "alienage", "aliens", "allegiance", "body politic", "citizen", "connection to country", "essential meaning", "foreign citizen", "indicia of alienage", "nationality", "non-alien", "non-alienage", "non-citizen", "obligation of protection", "political community", "polity", "sovereignty", "spiritual connection", "subject", "territory", "traditional laws and customs", "tripartite test", "unlawful non-citizen".

*Constitution* – s 51(xix), (xxvii).

*Australian Citizenship Act 2007* (Cth) – ss 12, 13, 14, 15, 16.

*Migration Act 1958* (Cth) – ss 5, 14, 189, 196, 198, 200, 501.

*Special Cases referred to Full Court on 5 March 2019*

**Held:** Questions answered.

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## Customs and excise

*Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd*

**S161/2019:** [\[2020\] HCA 2](#)

**Judgment delivered:** 5 February 2020

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

**Catchwords:**

Customs and excise – Customs tariff – Tariff classification – Where no duty owed if goods classifiable as medicaments under heading 3004 of Sch 3 to *Customs Tariff Act 1995* (Cth) – Where Administrative Appeals Tribunal found vitamin preparations and garcinia preparations classifiable under heading 3004 – Where Comptroller-General of Customs contended vitamin preparations and garcinia preparations classifiable under heading 1704 ("sugar confectionery") or heading 2106 ("food preparations") so that duty owed – Whether vitamin preparations and garcinia preparations excluded from heading 3004 by Note 1(a) to Ch 30 of Sch 3 to *Customs Tariff Act* – Whether Administrative Appeals Tribunal erred in classifying vitamin preparations and garcinia preparations under heading 3004.

Words and phrases – "duties of customs", "error of law", "essential character", "food preparations", "food supplements", "foods", "French language", "Harmonized System", "Harmonized System Convention", "medicament", "most akin", "ordinary meaning", "products for therapeutic or prophylactic uses", "tariff classification", "Vienna Convention", "vitamin".

*Administrative Appeals Tribunal Act 1975* (Cth) – s 44.

*Customs Act 1901* (Cth) – s 273GA.

*Customs Tariff Act 1995* (Cth) – Schs 2, 3.

*International Convention on the Harmonized Commodity Description and Coding System* (1983).

*Vienna Convention on the Law of Treaties* (1969) – Art 33.

**Appealed from FCA (FC):** [\[2018\] FCAFC 237](#); (2018) 262 FCR 449

**Held:** Appeal dismissed.

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# Evidence

*Kadir v The Queen; Grech v The Queen*  
[S160/2019](#); [S163/2019](#): [\[2020\] HCA 1](#)

**Judgment delivered:** 5 February 2020

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

**Catchwords:**

Evidence – Admissibility – Evidence obtained improperly or in contravention of Australian law – *Evidence Act 1995* (NSW), s 138 – Where appellants jointly charged on indictment with acts of serious animal cruelty – Where prosecution proposes to tender video-recordings obtained in contravention of Australian law – Where prosecution proposes to tender search warrant evidence and alleged admissions obtained in consequence of contravention of Australian law – Whether difficulty of lawfully obtaining evidence weighs in favour of admission – Whether weighing of competing public interests under s 138 different for evidence obtained in contravention of law as compared to evidence obtained in consequence of contravention of law – Whether each item of evidence admissible.

Words and phrases – "balancing test", "*Bunning v Cross* discretion", "causal link", "competing public interests", "deliberate contravention of the law", "desirability of admitting evidence", "difficulty of lawfully obtaining evidence", "ease of compliance", "evidence that was obtained improperly or in contravention of an Australian law", "false statement", "illegality", "improperly or illegally obtained", "impropriety", "in consequence of", "misconduct", "probative value", "public interest", "undesirability of admitting evidence", "vigilantism", "way in which the evidence was obtained".

*Criminal Appeal Act 1912* (NSW) – s 5F(3A).

*Evidence Act 1995* (NSW) – s 138.

**Appealed from NSWSC (CCA):** [\[2017\] NSWCCA 288](#)

**Held:** Appeals allowed in part.

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## 3: CASES RESERVED

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

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### Administrative Law

*Hocking v Director-General of the National Archives of Australia*

**S262/2019:** [\[2020\] HCATrans 3](#); [\[2020\] HCATrans 4](#)

**Date heard:** 4, 5 February 2020

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

**Catchwords:**

Administrative law – Where access sought under *Archives Act 1983* (Cth) to records, being correspondence (original or copies) received and sent by former Governor-General or Official Secretary to and from Queen – Whether correspondence is “Commonwealth record” within meaning of Act, or is excluded as personal or private – Whether records created or received in corresponding with Monarch in performance of office of Governor-General are property of Commonwealth or personal property of Governor-General.

**Appealed from FCA (FC):** [\[2019\] FCAFC 12](#); (2019) 264 FCR 1; (2019) 366 ALR 247

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### Constitutional Law

*KMC v Director of Public Prosecutions (SA)*

**A20/2019:** [\[2020\] HCATrans 6](#)

**Date heard:** 6 February 2020

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

**Catchwords:**

Constitutional law – Ch III of *Constitution* (Cth) – Invalidity – Where appellant convicted of one count of persistent sexual exploitation of child contrary to s 50 of *Criminal Law Consolidation Act 1935* (SA) (“CLCA”) – Where CLCA repealed on 24 October 2017 and *Statutes Amendment (Attorney-General’s Portfolio)* (No

2) *Act 2017 (SA)* ("Amendment Act") commenced – Whether s 9(1) of Amendment Act invalid because it impermissibly directs manner or outcome of exercise of appellate jurisdiction, impermissibly impairs institutional integrity of appellate court and/or sentencing court, and/or amounts to or involves an exercise of part of judicial power by Parliament of South Australia in manner contrary to scheme of Ch III of *Constitution*.

*Removed from Full Court of the Supreme Court of South Australia (Court of Criminal Appeal)*

*Orders made on 6 February 2020 allowing the appeal. Written reasons of the Court to be published at a future date.*

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***Smethurst & Anor v Commissioner of Police & Anor***

**[S196/2019](#)**: [\[2019\] HCATrans 216](#); [\[2019\] HCATrans 223](#)

**Date heard:** 12, 13 November 2019

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

**Catchwords:**

Constitutional law – Warrant – Validity of warrant – Form of relief – Implied freedom of political communication – Where members of Australian Federal Police executed search warrant issued under s 3E of *Crimes Act 1914* (Cth) at residential premises of journalist – Where warrant specified contravention of s 79(3) of Act by journalist – Where order made under s 3LA of Act directed to journalist requiring information and assistance to be provided – Where plaintiffs seek to have warrant and s 3LA order quashed – Whether s 79(3), as it stood on 29 April 2018, invalid on ground that it infringed implied freedom of political communication in *Constitution* (Cth) – Whether warrant invalid because misstates substance of s 79(3), does not state offence with sufficient precision, and/or s 79(3) was invalid – Whether s 3LA order invalid.

*Special Case referred to Full Court on 6 September 2019*

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## Consumer Protection

***Moore v Scenic Tours Pty Ltd***

**[S285/2019](#)**: [\[2020\] HCATrans 7](#)

**Date heard:** 11 February 2020

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

**Catchwords:**

Consumer protection – Disappointment and distress damages – Where representative proceedings brought on behalf of passengers who paid for and travelled on European river cruises supplied by respondent – Where number of cruises seriously disrupted by high water levels on rivers – Where seeking compensation for loss of value and damages for disappointment and distress – Whether s 275 of Australian Consumer Law (“ACL”) operates to apply s 16 of *Civil Liability Act 2002* (NSW) as Commonwealth law to direct court exercising federal jurisdiction in how to fix damages under s 267(4) of ACL for breach of statutory guarantees in ss 60 and 61 of ACL – Whether s 16 limited to cases where tort claim governed by NSW law or death or injury suffered in NSW – Whether claim under s 267(4) for damages for disappointment and distress constituted claim governed by s 16 – Whether Court of Appeal erred in finding that claim for damages under s 267(4) of ACL unrelated to bodily injury or psychiatric illness constituted claim for “personal injury” and “personal injury damages” and claim for “pain and suffering” or “loss of amenities of life” so as to be governed by s 16 of *Civil Liability Act*.

**Appealed from NSWSC (CA):** [\[2018\] NSWCA 238](#); (2018) 339 FLR 244; (2018) 361 ALR 456

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## Corporations Law

*Australian Securities and Investments Commission v King & Anor*  
**B29/2019:** [\[2019\] HCATrans 195](#)

**Date heard:** 9 October 2019

**Coram:** Kiefel CJ, Gageler, Keane, Nettle, Gordon JJ

**Catchwords:**

Corporations law – Officers of corporation – Where Australian Securities and Investments Commission (“ASIC”) commenced civil penalty case against MFS Investment Management Ltd (“MFSIM”) and various directors, officers and employees of MFS Group of companies – Where proceedings against MFSIM resolved by consent but trial proceeded against individuals – Whether Court of Appeal erred by concluding that it was necessary for ASIC to prove that



first respondent acted in an “office” of MFSIM in order for him to be an “officer” of MFSIM for purposes of ss 601FD and 9(b)(ii) of *Corporations Act 2001* (Cth).

**Appealed from QSC (CA):** [\[2018\] QCA 352](#); (2018) 134 ACSR 105

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## Criminal Law

*Coughlan v The Queen*

**B60/2019:** [\[2020\] HCATrans 8](#)

**Date heard; date of orders:** 12 February 2020

**Coram:** Kiefel CJ, Bell, Gageler, Keane, Edelman JJ

**Catchwords:**

Criminal law – Unsafe and unsatisfactory verdict – Arson and attempted fraud – Circumstantial evidence – Where house exploded as applicant was walking from back yard – Whether Court of Appeal misapplied *M v The Queen* (1994) 181 CLR 487 by merely identifying pathway to jury’s guilty verdict rather than weighing matters militating against guilty verdict to determine whether jury should have had reasonable doubt as to applicant’s guilt.

**Appealed from QSC (CA):** [\[2019\] QCA 65](#)

*Orders made on 12 February 2020 allowing the appeal and entering a verdict of acquittal. Written reasons of the Court to be published at a future date.*

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*Strbak v The Queen*

**B55/2019:** [\[2019\] HCATrans 242](#)

**Date heard:** 6 December 2019

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

**Catchwords:**

Criminal law – Sentencing – Right to silence – Where appellant pleaded guilty to manslaughter of four year old son but contested factual basis of conviction – Where sentencing judge applied *R v Miller* [2004] 1 Qd R 548 which held that sentencing judge may

more readily accept or draw inferences from prosecution evidence which is uncontradicted – Where contended before Queensland Court of Appeal that *Miller* is wrong and should be revisited because it impermissibly infringes on right to silence – Whether refusing to reconsider *Miller* was constructive failure by Queensland Court of Appeal to exercise its jurisdiction.

**Appealed from QSC (CA):** [\[2019\] QCA 42](#)

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*Swan v The Queen*

**S291/2019:** [\[2020\] HCATrans 9](#)

**Date heard:** 13 February 2020

**Coram:** Bell, Keane, Nettle, Gordon, Edelman JJ

**Catchwords:**

Criminal law – Causation – Where accused and another tried and convicted for murder – Where victim died almost eight months after assault – Where assault caused victim serious injuries amounting to grievous bodily harm – Where victim died due to complications from fractured hip not sustained during assault – Whether Crown case theory on cause of death not supported by evidence and should not have been left to jury – Whether miscarriage of justice resulted from crown prosecutor’s closing address about causation.

**Appealed from NSWSC (CCA):** [\[2018\] NSWCCA 260](#)

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*The Queen v Guode*

**M75/2019:** [\[2019\] HCATrans 224](#)

**Date heard:** 14 November 2019

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

**Catchwords:**

Criminal law – Sentencing – Manifest excess – Infanticide, murder and attempted murder – Where mother caused death of three children and attempted to kill fourth – Where mother pled guilty – Where mother had had traumatic life and suffered a major depressive disorder as consequence of giving birth to youngest child – Whether mother suffering from post-traumatic stress disorder – Whether Court of Appeal erred in taking into account as

relevant consideration in making its determination as to manifest excess fact that prosecution had accepted plea to infanticide in respect of Charge 1 on the indictment.

**Appealed from VSC (CA):** [\[2018\] VSCA 205](#)

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## Evidence

*Commonwealth of Australia v Helicopter Resources Pty Ltd & Ors*  
**S217/2019:** [\[2019\] HCATrans 197](#); [\[2020\] HCATrans 5](#)

**Date heard:** 10 October 2019, 5 February 2020

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

### Catchwords:

Evidence – Admissions made with authority – Where coronial inquest commenced and summary criminal proceedings brought against company and Commonwealth of Australia – Where subpoena issued to company’s employee to give evidence at hearing in inquest, with proposed topics relating to matters required to be proved in criminal prosecution – Whether s 87(1)(b) of *Evidence Act 2011* (ACT) has effect that, by reason of any answers given by employee, company is itself being compelled to provide that information – Whether s 87(1)(b) dictates that employee answers will be admitted into evidence in prosecution if adduced by prosecutor or co-accused – Whether s 87(1)(b) has effect that exercise of compulsory power with respect to employee will compromise protections afforded to accused company by accusatorial process – Whether accusatorial principle require accused company to be protected by precluding employees from being subject to such compulsory power or preventing prosecution or co-accused from learning how accused company may defend charge – Whether compulsory attendance of employee for questioning is inconsistent with accusatorial process.

**Appealed from FCA (FC):** [\[2019\] FCAFC 25](#); (2019) 264 FCR 174; (2019) 365 ALR 233

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## Native Title

*State of Western Australia v Manado & Ors; State of Western Australia v Augustine & Ors; Commonwealth of Australia v Augustine & Ors; Commonwealth of Australia v Manado & Ors*  
[P34/2019; P35/2019; P36/2019; P37/2019](#): [2019] HCATrans 238

**Date heard:** 3 December 2019

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

**Catchwords:**

Native title – Native title interest – Determinations of native title – Whether Full Federal Court erred in holding that existing public access to and enjoyment of waterways, beds and banks or foreshores of waterways, coastal waters or beaches located upon Crown land below high water mark, confirmed by s 14 of *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) in accordance with s 212(2) of *Native Title Act 1993* (Cth), was not a right or privilege in connection with land or waters within definition of "interest" in s 253 of *Native Title Act* – Whether, to be included in determination of native title, is it necessary for public access and enjoyment to be an "interest", as defined in s 253 of *Native Title Act* – Whether existing public access to and enjoyment of waterways, beds and banks or foreshores of waterways, coastal waters or beaches located on unallocated Crown land should be stated in a determination of native title made in accordance with s 225 of *Native Title Act*.

**Appealed from FCA (FC):** [\[2018\] FCAFC 238](#); (2018) 265 FCR 68; (2018) 364 ALR 337

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## Taxation

*BHP Billiton Limited (now named BHP Group Limited) v Commissioner of Taxation*  
[B28/2019](#): [2019] HCATrans 211

**Date heard:** 5 November 2019

**Coram:** Kiefel CJ, Gageler, Keane, Gordon, Edelman JJ

**Catchwords:**

Taxation – Where appellant is part of dual-listed company arrangement with non-resident company – Where third company (BMAG) indirectly owned by appellant and non-resident company – Where BMAG derived income from sale of commodities purchased

from non-resident company's Australian subsidiaries – Whether non-resident company's Australian subsidiaries were "associates" of BMAG within meaning of s 318 of *Income Tax Assessment Act 1936* (Cth) – Whether BMAG, appellant and/or non-resident company were "sufficiently influenced" by appellant and/or non-resident company within meaning of s 318(6) – Whether Full Court erred in concluding that a person or entity acts "in accordance with" directions, instructions or wishes of another entity for purposes of s 318(6)(b) if person or entity merely acts "in harmonious correspondence, agreement or conformity with" those directions, instructions or wishes – Whether Full Court should have found that, in order to act "in accordance with" directions, instructions or wishes of another entity for purposes of s 318(6)(b) a person or entity must treat that other entity's directions, instructions or wishes as themselves being a sufficient reason so to act – Whether Full Court erred in finding that at a minimum appellant and BHP Billiton Plc each acted "in accordance with" the "directions, instructions or wishes" of the other for purposes of s 318(6)(b) – Whether Full Court should have concluded that such actions were not done "in accordance with" the "directions, instructions or wishes" of the other for purposes of s 318(6)(b).

**Appealed from FCA (FC):** [\[2019\] FCAFC 4](#); (2019) 263 FCR 334; (2019) 366 ALR 206; (2019) 134 ACSR 550

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*Commissioner of State Revenue v Rojoda Pty Ltd*

**P26/2019:** [\[2019\] HCATrans 213](#); [\[2019\] HCATrans 214](#)

**Date heard:** 6, 7 November 2019

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

**Catchwords:**

Taxation – Stamp duty assessment - Partnership – Winding up of partnership – Nature of partners' proprietary rights in partnership assets – Whether Court of Appeal erred in holding that after dissolution of partnership but prior to completion of its winding up where surplus of assets each former partner has specific and fixed beneficial or equitable interest in assets comprising a surplus – Whether cl 3 of two deeds each constituted declarations of trust for the purposes of s 11(1)(c) of *Duties Act 2008* (WA).

**Appealed from WASC (CA):** [\[2018\] WASCA 224](#); (2018) 368 ALR 734

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## 4: ORIGINAL JURISDICTION

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

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## 5: SECTION 40 REMOVAL

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

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## 6: SPECIAL LEAVE GRANTED

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

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### Administrative Law

*CXXXVIII v Commonwealth of Australia & Ors*

**A30/2019:** [\[2019\] HCATrans 206](#)

**Date heard:** 18 October 2019 – *Special leave granted.*

**Catchwords:**

Administrative law – Criminal investigation – Where summonses and notices to produce issued pursuant to determinations made by Board of Australian Criminal Intelligence Commission under *Australian Crime Commission Act 2002* (Cth) (“Act”) – Whether first and second determinations validly made within scope of power in s 7C of Act – Whether second summons to appear before Examiner and second notice to produce validly issued pursuant to determinations – Whether second notice to attend and produce valid and not in excess of power in s 21A of Act – Whether Board of Commission can validly make determination which creates as a “special investigation” an “investigation” yet to be identified or undertaken.

**Appealed from FCA (FC):** [\[2019\] FCAFC 54](#); (2019) 266 FCR 339; (2019) 366 ALR 436; (2019) 164 ALD 33

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*Northern Land Council & Anor v Quall & Anor*

**D21/2019:** [\[2019\] HCATrans 232](#)

**Date heard:** 15 November 2019 – *Special leave granted.*

**Catchwords:**

Administrative law – Delegation of statutory functions and powers – Administrative necessity – Statutory interpretation – Where proceedings at first instance challenged certification of application to register Kenbi Indigenous Land Use Agreement on ground that it had been done without “delegated authority” – Where Full Court held Pt 11 of *Native Title Act 1993* (Cth) evinced intention that certification functions could not be delegated – Whether Northern Land Council had power to delegate its certification functions under



s 203BE(1)(b) of *Native Title Act 1993* (Cth) to its Chief Executive Officer.

**Appealed from FCA (FC):** [\[2019\] FCAFC 77](#); (2019) 367 ALR 216; (2019) 164 ALD 63

**Appealed from FCA (FC):** [\[2019\] FCAFC 101](#)

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## Criminal Law

*Cumberland v The Queen*

**D23/2019:** [\[2019\] HCATrans 243](#)

**Date determined:** 11 December 2019 – *Special leave granted.*

### Catchwords:

Criminal law – Crown appeal – Re-sentencing – Where appellant pled guilty to six counts relating to selling cannabis and MDMA – Whether Court of Criminal Appeal (“CCA”) erred when re-sentencing in failing to take into account delay and its effect on appellant, submissions of prosecution at sentencing, appellant’s age and prospects of rehabilitation, and relevant developments since sentencing – Whether CCA erred in separately determining that appeal should be allowed when principles to be applied and circumstances applicable at time of any re-sentencing unknown – Whether CCA failed to accord appellant procedural fairness.

**Appealed from NT (CCA):** [\[2019\] NTCCA 13](#); (2019) 344 FLR 227

**Appealed from NT (CCA):** [\[2019\] NTCCA 14](#)

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*Pell v The Queen*

**M112/2019:** [\[2019\] HCATrans 217](#)

**Date determined:** 13 November 2019 – *Application referred to Full Court for argument as on an appeal.*

### Catchwords:

Criminal law – Unreasonable verdicts – Where applicant convicted of sexual offences against two child complainants – Where Crown case relied on evidence of one complainant and the other complainant deceased – Whether Court of Appeal majority erred by finding that their belief in complainant required applicant to establish that offending was impossible to raise and leave

reasonable doubt – Whether majority erred in concluding that verdicts not unreasonable as, in light of findings made by them, there remained reasonable doubt as to existence of any opportunity for offending to have occurred.

**Appealed from VSC (CA):** [\[2019\] VSCA 186](#)

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*Pickett v The State of Western Australia; Mead v The State of Western Australia; Mead v The State of Western Australia; Anthony v The State of Western Australia; TSM (A Child) v The State of Western Australia*

[P45/2019; P46/2019; P47/2019; P48/2019; P49/2019](#): [\[2019\] HCATrans 181](#)

**Date determined:** 11 September 2019 – *Special leave granted.*

**Catchwords:**

Criminal law – Derivative criminal liability – Where victim killed by stab wound to chest inflicted in course of attack by group of eight males – Where eight males ranged in age from 11 years to 29 years – Where State unable to prove beyond reasonable doubt which of them inflicted fatal stab wound – Where State did not prove that 11 year old had capacity under s 29 of *Criminal Code* (WA) – Whether appellants could be guilty by operation of ss 7(b), 7(c), or 8 of *Criminal Code* (WA) of offence founded upon act of 11 year old alleged co-offender when act of that child did not constitute offence because prosecution had not proved that child was criminally responsible for act.

**Appealed from WASC (CCA):** [\[2019\] WASCA 79](#); (2019) 54 WAR 418

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*Singh v The Queen; Nguyen v The Queen*

[D16/2019; D15/2019](#): [\[2019\] HCATrans 159](#)

**Date heard:** 16 August 2019 – *Special leave granted.*

**Catchwords:**

Criminal law – Prosecutor’s duties regarding “mixed statement” records of interview containing both inculpatory and exculpatory material – Where Crown chose not to adduce applicant’s record of interview of 8 June 2017 – Whether Crown’s decision not to adduce record of interview deprived applicant of reasonable chance of

acquittal – Whether prosecution ordinarily required by duty of fairness to tender “mixed statement” record of interview at trial of accused when it is admissible – Whether prosecution permitted to decline to tender “mixed statement” records of interview for purely tactical reasons.

**D16/2019 appealed from NTSC (CCA):** [\[2019\] NTCCA 8](#); (2019) 344 FLR 137

**D15/2019 appealed from NTSC (FC):** [\[2019\] NTSC 37](#); (2019) 345 FLR 40

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## Employment Law

*Mondelez Australia Pty Ltd v AMWU & Ors; Minister for Jobs and Industrial Relations v AMWU & Ors*

**M160/2019; M165/2019:** [\[2019\] HCATrans 250](#)

**Date determined:** 13 December 2019 – *Special leave granted.*

### Catchwords:

Employment law – Where Mondelez operates food manufacturing plants – Where certain employees work in 12-hour shifts – Where entitlement to paid personal/carer’s leave under Enterprise Agreement – Where Mondelez deducts 12 hours from accrued paid personal/carer’s leave balance when such leave taken for single 12-hour shift – Whether majority of Full Court erred by holding that “day” in s 96(1) of *Fair Work Act 2009* (Cth) means “the portion of a 24 hour period that would otherwise be allotted to work” rather than an average working day calculated as employee’s average daily ordinary hours of work based on standard five-day working week – Whether Full Court erred in construing s 96(1) as entitling national system employees (other than casuals) to paid personal/carer’s leave equivalent to 10 ‘working’ days (of whatever duration would have been worked on day in question) per year of service.

**Appealed from FCA (FC):** [\[2019\] FCAFC 138](#); (2019) 289 IR 29

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## Family Law

*Hsiao v Fazarri*

**M137/2019:** [\[2019\] HCATrans 196](#)

**Date determined:** 10 October 2019 – *Special leave granted.*

**Catchwords:**

Family law – Property proceedings – Order under s 79 of *Family Law Act 1975* (Cth) – Where agreement between parties intended to apply to property settlement proceedings but does not fall within Pt VIIIA or Div 4 of Pt VIIIB of Act – Whether circumstances in which additional 40% legal interest in property obtained and Deed of Gift were distractions in disposition of Full Court appeal – Whether admission of further evidence would have produced different result in Full Court and would not be against interests of justice – Whether trial judge failed to take Deed of Gift into account in making property settlement order – Whether finding of contributions failed to take into account legal interest in property prior to marriage.

**Appealed from FamCA (FC):** [\[2019\] FamCAFC 37](#)

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## Intellectual Property

*Calidad Pty Ltd & Ors v Seiko Epson Corporation & Anor*  
**S329/2019:** [\[2019\] HCATrans 225](#)

**Date heard:** 15 November 2019 – *Special leave granted.*

**Catchwords:**

Intellectual property – Patents – Implied licence – Where Calidad imports and sells printer cartridges modified by third party – Where Seiko Epson claims its two patents infringed by Calidad's conduct – Whether Full Court erred in finding infringement – Whether modifications made to printer cartridges resulted in making of "new" printer cartridges embodying invention as claimed in claim 1 of each patent – Whether Full Court erred in failing to have regard to substance of invention claimed in claim 1 of each patent or to direct attention to whether modifications constituted material changes to claimed features of invention – Whether conduct was within scope of any implied licence arising upon unrestricted first sale by patentee of printer cartridges or otherwise involved permissible repair or modification of those printer cartridges – Whether patentee's rights under s 13 of *Patents Act 1990* (Cth) exhausted in respect of printer cartridges at time of first sale.

**Appealed from FCA (FC):** [\[2019\] FCAFC 115](#); (2019) 370 ALR 563; (2019) 142 IPR 381

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## Migration Law

*ABT17 v Minister for Immigration and Border Protection & Anor*  
**M140/2019:** [\[2019\] HCATrans 207](#)

**Date heard:** 18 October 2019 – *Special leave granted on limited grounds.*

**Catchwords:**

Migration law – Protection visa – Where delegate accepted as plausible that applicant had been sexually tortured – Where such claim not accepted by Immigration Assessment Authority (“IAA”) – Whether IAA decision tainted by jurisdictional error due to failure to exercise discretion under s 473DC of *Migration Act 1958* (Cth) to invite applicant to give new information in form of interview – Whether failure of IAA to exercise its s 473DC discretion was material to decision and constituted jurisdictional error.

**Appealed from FCA:** [\[2019\] FCA 613](#)

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*Minister for Immigration and Border Protection v CED16 & Anor*  
**S347/2019:** [\[2019\] HCATrans 246](#)

**Date heard:** 13 December 2019 – *Special leave granted.*

**Catchwords:**

Migration law – Protection visa – Where first respondent’s application for Safe Haven Enterprise Visa (Class XE Subclass 790) refused and Minister for Immigration and Border Protection (“Minister”) purported to certify that disclosure of information in Identity Assessment Form could form basis for claim of Public Interest Immunity by Crown – Whether certificate issued by Minister purportedly pursuant to s 473GB(5) of *Migration Act 1958* (Cth) comprised ‘new information’ as defined in s 473DC(1) of Act – Whether Immigration Assessment Authority (“IAA”) was required to turn its mind, or show that it had turned its mind, to whether it was required to give particulars of information in certificate itself to first respondent pursuant to s 473DE(1) of Act.

**Appealed from FCA:** [\[2018\] FCA 1451](#); (2019) 265 FCR 115

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## Private International Law

*Mackellar Mining Equipment Pty Ltd and Dramatic Investments Pty Ltd t/as Partnership 818 & Anor v Thornton & Ors*

**B56/2019:** [\[2019\] HCATrans 188](#)

**Date heard:** 13 September 2019 – *Special leave granted.*

**Catchwords:**

Private international law – Restraint of foreign proceedings – Where plane crash in Queensland killed two pilots and 13 passengers – Where respondents, relatives of deceased, commenced proceedings against appellants in Missouri in May 2008 – Where appellants brought application in March 2017 in Queensland Supreme Court for permanent anti-suit injunction in respect of Missouri proceedings – Whether complete relief was available in Queensland proceedings and nothing additional could be gained in Missouri proceedings – Whether continuation of Missouri proceeding, after all foreign parties removed, was vexatious or oppressive or otherwise unconscionable within *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

**Appealed from QSC (CA):** [\[2019\] QCA 77](#); (2019) 367 ALR 171

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## Statutory Interpretation

*Binsaris v Northern Territory of Australia; Webster v Northern Territory of Australia; O’Shea v Northern Territory of Australia; Austral v Northern Territory of Australia*

**D11/2019; D12/2019; D13/2019; D14/2019:** [\[2019\] HCATrans 163](#)

**Date heard:** 16 August 2019 – *Special leave granted.*

**Catchwords:**

Statutory interpretation – Power of superintendent of youth detention centre – Use of CS gas (form of tear gas) in youth detention centre – Where prison officers called upon to assist at youth detention centre – Where CS gas was deployed – Whether exemption in s 12(2) of *Weapons Control Act* (NT) applied to deployment of CS gas by prison officer at youth detention centre – Whether superintendent’s general power under s 152(1) of *Youth Justice Act* (NT) limited by s 153(3).

**Appealed from NTSC (CA):** [\[2019\] NTCA 1](#); (2020) 170 NTR 11; (2019) 373 ALR 1; (2019) 343 FLR 41

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## Tort Law

*Lewis v The Australian Capital Territory*

**C14/2019:** [\[2019\] HCATrans 200](#)

**Date determined:** 16 October 2019 – *Special leave granted.*

**Catchwords:**

Torts – False imprisonment – Compensatory damages – Vindictory damages – Principle of inevitability – Where offender sentenced to 12 months’ imprisonment to be served by periodic detention – Where Sentence Administration Board (“Board”) cancelled periodic detention without giving offender opportunity to decide whether to attend before Board – Where offender arrested and imprisoned for 82 days – Where Board’s decision a nullity and imprisonment held to be unlawful – Where offender awarded nominal damages of \$1 – Whether offender would have been lawfully imprisoned if had not been unlawfully imprisoned and therefore not entitled to substantial compensatory damages – Whether entitled to vindictory damages.

**Appealed from ACTSC (CA):** [\[2019\] ACTCA 16](#)

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*State of Queensland v The Estate of the Late Jennifer Leanne Masson*

**B63/2019:** [\[2019\] HCATrans 233](#)

**Date heard:** 15 November 2019 – *Special leave granted.*

**Catchwords:**

Torts – Negligence – Where appellant suffered severe asthma attack – Where ambulance officer treated appellant initially with salbutamol and later with adrenaline – Where appellant suffered hypoxic brain damage and died without regaining consciousness 13 years later – Where ambulance officer’s manual instructed officer to “consider adrenaline”, not salbutamol – Whether Court of Appeal erred in overturning trial judge’s conclusions that ambulance officer had considered administration of adrenaline in accordance with manual, and that responsible body of opinion in medical profession supported administration of salbutamol – Whether Court of Appeal

erred in holding that ambulance officer immediately rejected use of adrenaline because he misunderstood guideline, and that following responsible body of medical opinion would nonetheless involve failure to take reasonable care because manual referred to adrenaline.

**Appealed from QSC (CA):** [\[2019\] QCA 80](#)

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## Trade Practices

*Berry & Anor v CCL Secure Pty Ltd*

**S315/2019:** [\[2019\] HCATrans 204](#)

**Date heard:** 18 October 2019 – *Special leave granted.*

### Catchwords:

Trade practices – Misleading and deceptive conduct and fraud – Measuring damages – Where misleading, deceptive and fraudulent conduct used to obtain signature terminating Agency Agreement – Whether damages to be assessed pursuant to s 82 of *Trade Practices Act 1974* (Cth) – Whether person guilty of misleading and deceptive conduct and fraud cannot be heard to say that lawful means were available for inflicting same harm – Whether, for purposes of reducing damages, respondent failed to discharge onus of proving possibility or probability of lawful means being used to end Agency Agreement.

**Appealed from FCA (FC):** [\[2019\] FCAFC 81](#)

**Appealed from FCA (FC):** [\[2019\] FCAFC 92](#)

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## **7: CASES NOT PROCEEDING OR VACATED**

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## 8: SPECIAL LEAVE REFUSED

### Publication of Reasons: 5 February 2020 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	DTA16	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M125/2019)	Federal Court of Australia [2019] FCA 1448	Application Dismissed <a href="#">[2020] HCASL 1</a>
2.	Etta	Taverner Hotel Group Pty Ltd (M127/2019)	Supreme Court of Victoria (Court of Appeal) [2019] VSCA 209	Application Dismissed <a href="#">[2020] HCASL 2</a>
3.	AUN17	Minister for Home Affairs & Anor (M135/2019)	Federal Court of Australia [2019] FCA 1576	Application Dismissed <a href="#">[2020] HCASL 3</a>
4.	BLX16	Minister for Immigration and Border Protection & Anor (M146/2019)	Federal Court of Australia (Full Court) [2019] FCAFC 176	Application Dismissed <a href="#">[2020] HCASL 4</a>
5.	DDM17	Minister for Home Affairs & Anor (P52/2019)	Federal Court of Australia [2019] FCA 1510	Application Dismissed <a href="#">[2020] HCASL 5</a>
6.	Li	The Queen (S311/2019)	Supreme Court of New South Wales (Court of Criminal Appeal) [2019] NSWCCA 228	Application Dismissed <a href="#">[2020] HCASL 6</a>
7.	Barkat & Anor	Roads and Maritime Services (S319/2019)	Supreme Court of New South Wales (Court of Appeal) [2019] NSWCA 240	Application Dismissed <a href="#">[2020] HCASL 7</a>
8.	Duraisamy	Sydney Trains (S323/2019)	Supreme Court of New South Wales (Court of Appeal) [2019] NSWCA 269	Application Dismissed <a href="#">[2020] HCASL 8</a>
9.	Burgess	Assistant Minister for Home Affairs & Anor (A25/2019)	Federal Court of Australia (Full Court) [2019] FCAFC 152	Application Dismissed with costs <a href="#">[2020] HCASL 9</a>

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
10.	Thornbury	The Queen (B54/2019)	Supreme Court of Queensland (Court of Appeal) [2017] QCA 283	Application Dismissed <a href="#">[2020] HCASL 10</a>
11.	Tyler	Bettson Properties Pty Ltd & Anor (B57/2019)	Supreme Court of Queensland (Court of Appeal) [2019] QCA 176	Application Dismissed with costs <a href="#">[2020] HCASL 11</a>
12.	Fangaloka	The Queen (S276/2019)	Supreme Court of New South Wales (Court of Criminal Appeal) [2019] NSWCCA 173	Application Dismissed <a href="#">[2020] HCASL 12</a>
13.	Sabharwal	Minister for Immigration and Border Protection (S305/2019)	Federal Court of Australia (Full Court) [2018] FCAFC 160	Application Dismissed with costs <a href="#">[2020] HCASL 13</a>
14.	G Capital Corporation Pty Ltd & Ors	Roads and Maritime Services (S307/2019)	Supreme Court of New South Wales (Court of Appeal) [2019] NSWCA 234	Application Dismissed with costs <a href="#">[2020] HCASL 14</a>

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## Publication of Reasons: 12 February 2020 (Canberra)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	ANF16	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M116/2019)	Federal Court of Australia [2019] FCA 1379	Application dismissed with costs <a href="#">[2020] HCASL 15</a>
2.	The Optical Superstore Pty Ltd as Trustee for OS Management S Trust & Ors	Commissioner of State Revenue (M131/2019)	Supreme Court of Victoria (Court of Appeal) [2019] VSCA 197	Application dismissed with costs <a href="#">[2020] HCASL 16</a>
3.	Tran	The Queen (S268/2019)	Supreme Court of New South Wales (Court of Criminal Appeal) [2018] NSWCCA 220	Application dismissed <a href="#">[2020] HCASL 17</a>
4.	ELA18	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S292/2019)	Federal Court of Australia [2019] FCA 1482	Application dismissed with costs <a href="#">[2020] HCASL 18</a>
5.	Campbell	The Queen (B61/2019)	Supreme Court of Queensland (Court of Appeal) [2019] QCA 127	Application dismissed <a href="#">[2020] HCASL 19</a>
6.	CWS16 & Ors	Minister for Immigration and Border Protection & Anor (M118/2019)	Federal Court of Australia [2019] FCA1414	Applications dismissed <a href="#">[2020] HCASL 20</a>
	CWX16	Minister for Immigration and Border Protection & Anor (M119/2019)	Federal Court of Australia [2019] FCA 1414	
7.	Michos	Eastbrooke Medical Centre Pty Ltd (M120/2019)	Supreme Court of Victoria (Court of Appeal) [2019] VSCA 140	Application dismissed <a href="#">[2020] HCASL 21</a>
8.	Soo	The Queen (M128/2019)	Supreme Court of Victoria (Court of Appeal) [2015] VSCA 84	Application dismissed <a href="#">[2020] HCASL 22</a>

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
9.	DUZ17	Minister for Home Affairs & Anor (M134/2019)	Federal Court of Australia [2019] FCA 1593	Application dismissed <a href="#">[2020] HCASL 23</a>
10.	CVB16	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (M141/2019)	Federal Court of Australia [2019] FCA 1392	Application dismissed <a href="#">[2020] HCASL 24</a>
11.	Bonney	Commonwealth of Australia & Ors (P53/2019)	Supreme Court of Western Australia (Court of Appeal) [2019] WASCA 142	Application dismissed <a href="#">[2020] HCASL 25</a>
12.	Ogbonna	Qantas Airways Limited & Ors (P54/2019)	Supreme Court of Western Australia (Court of Appeal) [2018] WASC 378	Application dismissed <a href="#">[2020] HCASL 26</a>
13.	Holder	The Queen (A22/2019)	Supreme Court of South Australia (Court of Criminal Appeal) [2019] SASCFC 73	Application dismissed <a href="#">[2020] HCASL 27</a>
14.	Golding	The Queen (B51/2019)	Supreme Court of Queensland (Court of Appeal) [2017] QCA 149	Applications dismissed <a href="#">[2020] HCASL 28</a>
	Elfar	The Queen (B52/2019)	Supreme Court of Queensland (Court of Appeal) [2017] QCA 149	
15.	Child and Adolescent Health Service	Sunday John Mabior by next friend Mary Kelei (P55/2019)	Supreme Court of Western Australia (Court of Appeal) [2019] WASCA 151	Application dismissed with costs <a href="#">[2020] HCASL 29</a>
16.	Barrak	City of Parramatta Council (S295/2019)	Supreme Court of New South Wales (Court of Appeal) [2019] NSWCA 213	Application dismissed with costs <a href="#">[2020] HCASL 30</a>

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## Publication of Reasons: 13 February 2020

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	DJB16	Minister for Immigration and Border Protection & Anor (A18/2019)	Federal Court of Australia [2019] FCA1161	Application dismissed <a href="#">[2020] HCASL 31</a>
2.	Kamalasanan	The Queen (M126/2019)	Supreme Court of Victoria (Court of Appeal) [2019] VSCA 180	Application dismissed <a href="#">[2020] HCASL 32</a>
3.	FET18	Minister for Home Affairs & Anor (M132/2019)	Federal Court of Australia [2019] FCA 1524	Application dismissed <a href="#">[2020] HCASL 33</a>
4.	DOY17	Minister for Immigration and Border Protection & Anor (M138/2019)	Federal Court of Australia [2019] FCA 1592	Application dismissed <a href="#">[2020] HCASL 34</a>
5.	Phelan	Melbourne Health (M142/2019)	Supreme Court of Victoria (Court of Appeal) [2019] VSCA 205	Application dismissed <a href="#">[2020] HCASL 35</a>
6.	Miller	Martin & Ors (M143/2019)	Supreme Court of Victoria (Court of Appeal) [2019] VSCA 86	Application dismissed <a href="#">[2020] HCASL 36</a>
7.	DKX17 & Anor	Federal Circuit Court of Australia & Ors (S83/2019)	Federal Court of Australia (Full Court) [2019] FCAFC 10	Applications dismissed with costs <a href="#">[2020] HCASL 37</a>
	DNF17	Federal Circuit Court of Australia & Ors (S84/2019)	Federal Court of Australia (Full Court) [2019] FCAFC 10	
	DNG17	Federal Circuit Court of Australia & Ors (S85/2019)	Federal Court of Australia (Full Court) [2019] FCAFC 10	
	DNH17	Federal Circuit Court of Australia & Ors (S86/2019)	Federal Court of Australia (Full Court) [2019] FCAFC 10	
8.	Boscolo	NSW Land and Housing Corporation (S304/2019)	Supreme Court of New South Wales (Court of Appeal) [2019] NSWCA 246	Application dismissed <a href="#">[2020] HCASL 38</a>

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<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
9.	ELR18 & Anor	Minister for Home Affairs & Anor (S310/2019)	Federal Court of Australia [2019] FCA 1583	Application dismissed <a href="#">[2020] HCASL 39</a>

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## 14 February 2020: Canberra

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	Fair Work Ombudsman	Hu & Ors (B53/2019)	Full Court of the Federal Court of Australia [2019] FCAFC 133	Application refused <a href="#">[2020] HCATrans 11</a>
2.	Meyers	The Commissioner for Social Housing & Anor (C11/2019)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2019] ACTCA 19	Application refused <a href="#">[2020] HCATrans 12</a>
3.	James Engineering Pty Limited	ABB Australia Pty Limited & Anor (D18/2019)	Supreme Court of the Northern Territory (Court of Appeal) [2019] NTCA 7	Application refused with costs <a href="#">[2020] HCATrans 13</a>
4.	Sino Iron Pty Ltd & Ors	Mineralogy Pty Ltd (P38/2019)	Supreme Court of Western Australia (Court of Appeal) [2019] WASCA 80; [2019] WASCA 80 (S)	Application refused with costs <a href="#">[2020] HCATrans 10</a>
5.	CHZ19	Minister for Home Affairs & Anor (P42/2019)	Federal Court of Australia [2019] FCA 1112	Application refused with costs <a href="#">[2020] HCATrans 14</a>
6.	Burton	Commissioner of Taxation (P44/2019)	Full Court of the Federal Court of Australia [2019] FCFCA 141	Application refused with costs <a href="#">[2020] HCATrans 15</a>

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## 14 February 2020: Sydney

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	Changshu Longte Grinding Ball Co., Ltd	Parliamentary Secretary to the Minister for Industry, Innovation and Science & Ors (S256/2019)	Full Court of the Federal Court of Australia [2019] FCAFC 122	Application refused with costs <a href="#">[2020] HCATrans 16</a>
2.	Grafil Pty Ltd	Environmental Protection Authority (S260/2019)	Supreme Court of New South Wales (Court of Criminal Appeal) [2019] NSWCCA 174	Applications refused <a href="#">[2020] HCATrans 17</a>
	Mackenzie	Environmental Protection Authority (S261/2019)	Supreme Court of New South Wales (Court of Criminal Appeal) [2019] NSWCCA 174	
3.	AIG Australia Limited	Bank of Queensland Limited & Anor (S264/2019)	Supreme Court of New South Wales (Court of Appeal) [2019] NSWCA 190	Applications refused with costs <a href="#">[2020] HCATrans 18</a>
	Catlin Australia Pty Ltd	Bank of Queensland Limited & Anor (S265/2019)	Supreme Court of New South Wales (Court of Appeal) [2019] NSWCA 190	
4.	Bevan	Coolahan & Anor (S298/2019)	Supreme Court of New South Wales (Court of Appeal) [2019] NSWCA 217	Application refused with costs <a href="#">[2020] HCATrans 19</a>

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