



# HIGH COURT BULLETIN

Produced by the Legal Research Officer,  
High Court of Australia Library  
[2020] HCAB 7 (11 September 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>Private R v Brigadier Michael Cowen &amp; Anor</i></a>	Constitutional Law
<a href="#"><i>Applicant S270/2019 v Minister for Immigration and Border Protection</i></a>	Immigration

### 3: Cases Reserved

Case	Title
<a href="#"><i>GBF v The Queen</i></a>	Criminal Law
<a href="#"><i>The Queen v Abdirahman-Khalif</i></a>	Criminal Law
<a href="#"><i>Roy v O'Neill</i></a>	Evidence
<a href="#"><i>Clayton v Bant</i></a>	Family Law

<a href="#"><i>AUS17 v Minister for Immigration and Border Protection</i></a>	Migration Law
<a href="#"><i>Minister for Home Affairs &amp; Ors v DMA18 as Litigation Guardian for DLZ18 &amp; Anor; Minister for Home Affairs &amp; Anor v Marie Theresa Arthur as Litigation Representative for BXD18; Minister for Home Affairs &amp; Anor v FRX17 as Litigation Representative for FRM17; Minister for Home Affairs &amp; Anor v DJA18 as Litigation Representative for DIZ18</i></a>	Migration Law
<a href="#"><i>Deguisa &amp; Anor v Lynn &amp; Ors</i></a>	Real Property

#### 4: Original Jurisdiction

<b>Case</b>	<b>Title</b>
<a href="#"><i>LibertyWorks Inc v Commonwealth of Australia</i></a>	Constitutional Law
<a href="#"><i>Palmer &amp; Anor v The State of Western Australia &amp; Anor</i></a>	Constitutional Law

#### 5: Section 40 Removal

#### 6: Special Leave Granted

<b>Case</b>	<b>Title</b>
<a href="#"><i>Victoria International Container Terminal Limited v Lunt &amp; Ors</i></a>	Civil Procedure
<a href="#"><i>Matthew Ward Price and Daniel James Price as Executors of the Estate of Alan Leslie Price (Deceased) &amp; Ors v Christine Claire Spoor as Trustee &amp; Ors</i></a>	Contracts
<a href="#"><i>Davidson v The Queen</i></a>	Evidence
<a href="#"><i>DQU16 &amp; Ors v Minister for Home Affairs &amp; Anor</i></a>	Migration Law

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

[8: Special Leave Refused](#)

## 2: CASES HANDED DOWN

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

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### Constitutional Law

*Private R v Brigadier Michael Cowen & Anor*

**S272/2019:** [\[2020\] HCA 31](#)

**Judgment delivered:** 9 September 2020

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

#### Catchwords:

Constitutional law (Cth) – Defence – Military discipline – Where plaintiff charged with assault occasioning actual bodily harm – Where plaintiff and complainant members of Australian Defence Force at time of alleged conduct – Where neither plaintiff nor complainant on duty or in uniform – Where plaintiff charged under s 61(3) of *Defence Force Discipline Act 1982* (Cth) – Where s 61(3) provided defence member guilty of offence if engaged in conduct outside Jervis Bay Territory and that conduct would constitute Territory offence if it took place in Jervis Bay Territory – Where plaintiff's conduct also constituted offence under ordinary criminal law and civil courts available – Where plaintiff challenged jurisdiction of Defence Force magistrate to hear charge – Whether s 51(vi) of *Constitution* supported conferral of jurisdiction by *Defence Force Discipline Act* upon service tribunal to hear charge.

Words and phrases – "Ch III court", "Ch III protections", "concurrent jurisdiction", "conferral of jurisdiction", "courts martial", "defence force discipline", "defence force magistrate", "defence power", "judicial power of the Commonwealth", "maintaining or enforcing service discipline", "military discipline", "military jurisdiction", "naval and military defence", "pre-ordinate jurisdiction of the civil courts", "service connection test", "service offence", "service status test", "service tribunal", "sufficient connection".

*Constitution* – ss 51(vi), 68, 71, 80, 106, Ch III.

*Crimes Act 1900* (ACT) – s 24.

*Defence Force Discipline Act 1982* (Cth) – ss 61(3), 63.

**Held:** Application for constitutional writ dismissed; plaintiff to pay second defendant's costs.

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## Immigration

*Applicant S270/2019 v Minister for Immigration and Border Protection*

**S47/2020:** [\[2020\] HCA 32](#)

**Judgment delivered:** 9 September 2020

**Coram:** Kiefel CJ, Gageler, Netter, Gordon and Edelman JJ

**Catchwords:**

Immigration – Visas – Cancellation of visa – Revocation of cancellation – Where s 501(3A) of *Migration Act 1958* (Cth) provides that Minister must cancel visa if satisfied person does not pass character test because they have substantial criminal record and person is serving sentence of imprisonment on full-time basis – Where s 501CA(4) provides that Minister may revoke decision to cancel visa if conditions in s 501CA(4)(a) and (b) are met – Where s 501CA(4)(a) requires that person makes representations in accordance with invitation from Minister – Where s 501CA(4)(b) requires that Minister is satisfied person passes character test or there is another reason why decision should be revoked – Where appellant held visa which was not protection visa – Where appellant's visa cancelled under s 501(3A) and Minister declined to revoke cancellation under s 501CA(4) – Whether Minister obliged to, and failed to, consider whether non-refoulement obligations were owed to appellant when exercising power under s 501CA(4).

Words and phrases – "another reason", "cancellation", "discretion", "fear of persecution", "international law", "mandatory relevant consideration", "non-refoulement", "refugee", "revocation", "substantial criminal record", "sufficient evidence", "visa".

*Migration Act 1958* (Cth) – ss 501(3A), 501CA.

**Appealed from FCA (FC).**

**Held:** Appeal dismissed with costs.

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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

*Northern Land Council & Anor v Quall & Anor*

**D21/2019:** [\[2020\] HCATrans 109](#); [\[2020\] HCATrans 110](#)

**Dates heard:** 12-13 August 2020

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

**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* to its Chief Executive Officer.

**Appealed from FCA (FC):** [\[2019\] FCAFC 77](#); (2019) 268 FCR 228; (2019) 367 ALR 216; (2019) 164 ALD 63

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

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### Criminal Law

*GBF v The Queen*

**B18/2020:** [\[2020\] HCATrans 140](#)

**Date heard:** 10 September 2020

**Coram:** Kiefel CJ, Bell, Keane, Gordon and Edelman JJ

**Catchwords:**

Criminal law – Right to silence – Presumption of innocence – Where trial judge said to jury that lack of sworn evidence from appellant contradicting complainant’s evidence might “make it easier” to

assess complainant's credibility – Where appellant subsequently convicted – Where Queensland Court of Appeal held that trial judge's statement was error but did not occasion miscarriage of justice where no redirection sought and where other contrary directions given – Whether statement to jury that undermines right to silence and presumption of innocence can be held to not amount to miscarriage of justice.

**Appealed from QCA (CA):** [\[2019\] QCA 4](#)

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*The Queen v Abdirahman-Khalif*

**A5/2020:** [\[2020\] HCATrans 129](#)

**Date heard:** 3 September 2020

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

**Catchwords:**

Criminal law – Terrorism – Where respondent charged with offence of membership of terrorist organisation contrary to s 102.3(1) of *Criminal Code* (Cth) – Where respondent convicted at trial – Where respondent successfully appealed against conviction – Whether prosecution must adduce evidence of terrorist organisation's admission practices in order to prove that accused person has taken steps to become member of that organisation – Whether majority of CCA erred in construing "organisation" for purposes of Div 102 of *Criminal Code* (Cth).

**Appealed from SASC (CCA):** [\[2019\] SASFCFC 133](#)

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## Evidence

*Roy v O'Neill*

**D2/2020:** [\[2020\] HCATrans 135](#)

**Date heard:** 8 September 2020

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

**Catchwords:**

Evidence – Admissibility of evidence obtained in course of "pro-active" policing of compliance with Domestic Violence Order –

Whether common law recognises implied licence permitting all people, including police, to attend upon unobstructed private property as far as front door and to knock on front door for purpose of lawful communication, such licence only being excluded where attendee otherwise has unlawful purpose – How to ascertain existence and scope of any implied licence at common law in favour of person who attends on unobstructed private property only so far as front door – Nature of relationship between common law doctrines of implied licence and police powers to prevent breach of peace.

**Appealed from NTSC (CA):** [\[2019\] NTCA 8](#); (2019) 345 FLR 29

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## Family Law

*Clayton v Bant*

**B21/2020:** [\[2020\] HCATrans 137](#)

**Date heard:** 9 September 2020

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

**Catchwords:**

Family law – Foreign divorce – *Res judicata* – Where respondent obtained fault-based divorce from Dubai court with orders that appellant repay him marriage dowry – Where appellant sought orders in Australia concerning property interests and spousal maintenance under *Family Law Act 1975* (Cth) – Whether foreign divorce precluded prosecution of those proceedings on basis that Dubai court finally determined relevant causes of action between the parties.

**Appealed from FamCA (FC):** [\[2019\] FamCAFC 200](#); (2019) 60 Fam LR 152

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*Hsiao v Fazarri*

**M137/2019:** [\[2020\] HCATrans 105](#)

**Date heard:** 7 August 2020

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

**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 VIIIAB 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:** [\[2020\] HCATrans 106](#); [\[2020\] HCATrans 107](#)

**Dates heard:** 11-12 August 2020

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

### 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) 270 FCR 572; (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:** [\[2020\] HCATrans 104](#)

**Date heard:** 6 August 2020

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

**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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*AUS17 v Minister for Immigration and Border Protection & Anor*  
**S71/2020:** [\[2020\] HCATrans 130](#)

**Date heard:** 4 September 2020

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

**Catchwords:**

Migration law – *Migration Act 1958* (Cth) s 473DD – Circumstances in which Immigration Assessment Authority (“IAA”) can consider new information when reviewing fast track reviewable decision – Where appellant applied for Safe Haven Enterprise Visa and application refused by Minister’s delegate – Where appellant’s representative supplied IAA with further materials including letter of support by third party written after date of delegate’s decision – Where IAA considered that new information in letter could have been provided to the delegate, and so concluded, on basis of s 473DD(b)(i), that exceptional circumstances did not exist such that it could consider new information in letter – Whether failure to satisfy condition in s 473DD(b)(i) sufficient basis for IAA to conclude exceptional circumstances did not exist within meaning of s 473DD(a) where s 473DD(b)(ii) satisfied.

**Appealed from FCA:** [\[2019\] FCA 1686](#); (2019) 167 ALD 313

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*Minister for Home Affairs & Ors v DMA18 as Litigation Guardian for DLZ18 & Anor; Minister for Home Affairs & Anor v Marie Theresa Arthur as Litigation Representative for BXD18; Minister for Home Affairs & Anor v FRX17 as Litigation Representative for FRM17; Minister for Home Affairs & Anor v DJA18 as Litigation Representative for DIZ18*

**[M27/2020; M28/2020; M29/2020; M30/2020](#)**: [\[2020\] HCATrans 127](#)

**Date heard:** 1 September 2020

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

**Catchwords:**

Migration law – Regional processing – Jurisdiction of Federal Court of Australia – Where respondents commenced proceedings against Commonwealth – Where s 494AB of *Migration Act 1958* (Cth) barred certain proceedings relating to “transitory persons” from being instituted or continued in any court other than High Court – Whether proceedings were, for purposes of s 494AB(1)(ca), proceedings “relating to the performance or exercise of a function” under s 198AHA(2) in relation to a transitory person – Whether proceedings were, for purposes of s 494AB(1)(a), proceedings relating to exercise of powers under s 198B of Act – Whether proceedings were, for purposes of s 494AB(1)(d), proceedings relating to removal of a transitory person from Australia under the Act.

**Appealed from FCA (FC):** [\[2019\] FCAFC 148](#); (2019) 271 FCR 254

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## Real Property

*Deguisa & Anor v Lynn & Ors*

**[A4/2020](#)**: [\[2020\] HCATrans 128](#)

**Date heard:** 2 September 2020

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

**Catchwords:**

Real property – Torrens title – Restrictive covenants – Where appellants registered proprietors of Lot 3 and have planning development approval to demolish house on Lot 3, subdivide lot, and build two single story dwellings – Where respondents executors of estate of Mrs Fielder who was party to original Memorandum of Encumbrance containing restrictive covenants subject of proceedings – Where third respondent owns two properties near Lot 3 – Where respondents contended that Lot 3 and 53 other lots were created from earlier subdivision and sold in accordance with building scheme such that restrictive covenants enforceable to prevent appellants from developing Lot 3 as they wish to – Whether there exists “governing principle” to effect that what is “notified” to prospective purchaser by vendor’s certificate of title is everything that would have come to their knowledge if prudent conveyancer had made such searches as ought reasonably to have been made based on what appears on certificate of title – Whether approach taken by majority of Full Court of Supreme Court of South Australia in decision under appeal to ascertaining whether subsequent purchaser of Torrens system land bound by restrictive covenant conflicts with approach taken in *Burke v Yurilla* (1991) 56 SASR 382 – Whether purchaser of land under Torrens system obliged to search other titles for evidence of land being subject of building scheme if note made on encumbrance form that the “encumbrance forms portion of a common building scheme” but where land or lots involved in building scheme not indicated.

**Appealed from SASC (FC): [\[2019\] SASCF 107](#)**

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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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### Constitutional Law

*LibertyWorks Inc v Commonwealth of Australia*

**S10/2020:** [\[2020\] HCATrans 116](#)

**Catchwords:**

Constitutional law – Validity of legislation – *Foreign Influence Transparency Scheme Act 2018* (Cth) (“*FITS Act*”) – Where plaintiff is a not-for-profit think-tank incorporated in Queensland – Where in August 2019, plaintiff organised and held Conservative Political Action Conference in Sydney – Where US corporation, American Conservative Union (“ACU”), runs conference with same name in US, where ACU board members spoke at Sydney conference, and where ACU was advertised as “Think Tank Host Partners” for Sydney conference – Where plaintiff not registered under *FITS Act* – Where in October 2019, notice under s 45 of *FITS Act* issued to President of plaintiff, requiring plaintiff to provide certain information within specified period – Where s 59 of *FITS Act* provides for offence of failing to comply with s 45 notice within time – Where in November 2019, President of plaintiff replied to notice, refusing to provide requested information and disputing validity of notice – Whether terms, operation, or effect of *FITS Act* impermissibly burden implied freedom of political communication – Whether *FITS Act* contravenes s 92 of *Constitution* by impermissibly burdening freedom of intercourse – Whether *FITS Act* supported by head of power in s 51 *Constitution*.

*Special case referred for consideration by Full Court on 20 August 2020.*

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*Palmer & Anor v The State of Western Australia & Anor*

**B26/2020:** [\[2020\] HCATrans 138](#)

**Catchwords:**

Constitutional law – Section 92 – *Quarantine (Closing the Border) Directions* (WA) (“*Directions*”) – *Emergency Management Act 2005* (WA) (“*Act*”) – Where on 15 March 2020, pursuant to s 56 of *Act*, WA Minister for Emergency Services declared state of emergency over whole State of WA to address pandemic caused by COVID-19

– Where state of emergency continued and extended – Where on 5 April 2020, State Emergency Coordinator (second defendant) issued Directions, purportedly pursuant to ss 61, 67, 70 and 72A of Act – Where Directions prohibited entry to WA with limited exceptions for “exempt travellers” – Where Directions subsequently amended, but no change made to broad aim of implementing “hard border” policy – Where first plaintiff Chairman and Managing Director of second plaintiff – Where second plaintiff corporation holds interests in mining projects in WA, and has offices and staff in Brisbane and Perth – Where first plaintiff ordinarily resides in Queensland, but travels to WA often for business, social, charitable, and political purposes – Where first plaintiff unsuccessfully applied for “exempt traveller” status – Whether Directions and/or Act wholly or partly invalid on basis that they impermissibly infringe s 92 *Constitution*.

*Special case referred for consideration by Full Court on 4 September 2020.*

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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

*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17 & Anor*

**P23/2020:** [\[2020\] HCATrans 66](#)

**Date heard:** 29 May 2020 – *Special leave granted.*

**Catchwords:**

Administrative law – Procedural fairness – Where first respondent unsuccessfully applied for protection visa and where Administrative Appeals Tribunal affirmed refusal decision – Where first respondent sought judicial review of Tribunal’s decision in Federal Circuit Court (“FCC”) – Where first respondent appeared in person before FCC with assistance of translator – Where at conclusion of hearing FCC made orders dismissing application and gave ex tempore reasons – Where reasons for judgment published two months later after first respondent had instituted appeal to Federal Court – Where Federal Court allowed appeal on basis that first respondent denied procedural fairness by FCC and that there had therefore been no real exercise of judicial power in the circumstances – Where Federal Court considered that FCC’s review of Tribunal’s decision otherwise unaffected by error warranting appellate attention – Whether requirement of procedural fairness, either generally or in relation to courts, includes duty to provide reasons – If yes, whether such requirement extends to requiring reasons to be provided in particular manner and/or time – What is appropriate form of order for court conducting appeal by way of rehearing to make in circumstances where appellate court finds court below denied appellant procedural fairness and also considers decision under appeal correct.

**Appealed from FCA:** [\[2019\] FCA 1951](#)

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*Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*

**B34/2020:** [\[2020\] HCATrans 73](#)

**Date heard:** 5 June 2020 – *Special leave granted on limited grounds.*

**Catchwords:**

Administrative law – Apprehended bias – Relief – Jurisdiction of inferior courts – Where first respondent applied for two mining leases and to amend existing environmental authority – Where appellant lodged objections to applications – Where Land Court of Queensland rejected applications – Where first respondent sought judicial review of Land Court’s decision, urging grounds that included apprehended bias and errors in relation to groundwater issues – Where Queensland Supreme Court rejected bias grounds but accepted groundwater grounds and remitted issues relating to groundwater to Land Court for redetermination, holding that Land Court bound by original findings and conclusions on questions other than groundwater issues – Where appellant appealed against remittal orders and first respondent cross-appealed on apprehended bias issue – Where Land Court, differently constituted, proceeded with hearing in accordance with remittal orders despite pending appeal, and recommended that applications should be approved – Where Court of Appeal subsequently dismissed appeal on groundwater issues but allowed cross-appeal on apprehended bias – Where despite allowing cross-appeal and making declaration that Land Court’s original decision affected by want of procedural fairness, Court of Appeal did not set aside remittal orders – Whether in circumstances where reviewing court concludes decision of inferior court affected by reasonable apprehension of bias, reviewing court can refuse to set aside decision below and order new trial either at all, in the absence of exceptional circumstances, or on the basis of futility – Whether order of superior court requiring inferior court to proceed in certain way can augment jurisdiction of inferior court so as to validate decision of inferior court that would otherwise be nullity.

**Appealed from QSC (CA):** [\[2019\] QCA 184](#)

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## Civil Procedure

*Victoria International Container Terminal Limited v Lunt & Ors*

**M35/2020:** [\[2020\] HCATrans 143](#)

**Date heard:** 11 September 2020 – *Special leave granted on limited ground.*

**Catchwords:**

Civil procedure – Dismissal of proceedings – Abuse of process – Where Fair Work Commission approved enterprise agreement – Where first respondent sought order in nature of certiorari to quash

Commission's approval – Where applicant applied for dismissal of that proceeding on basis it was abuse of process – Where applicant contended that Construction, Forestry, Maritime, Mining and Energy Union ("CFMMEU") was true moving party and proceeding had been brought in first respondent's name to sidestep fact that CFMMEU's predecessor union had acquiesced in enterprise agreement – Where primary judge acceded to applicant's application and dismissed proceeding, finding CFMMEU was true moving party and first respondent was "front man" – Where appeal to Full Court of Federal Court allowed, and applicant's application to have proceeding dismissed as abuse of process dismissed – Whether it would bring administration of justice into disrepute to allow CFMMEU, using "front man", to challenge Commission's approval of enterprise agreement while avoiding scrutiny of predecessor union's acquiescence in that agreement.

**Appealed from FCA (FC):** [\[2020\] FCAFC 40](#)

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*Wigmans v AMP Limited & Ors*  
**S67/2020:** [\[2020\] HCATrans 52](#)

**Date heard:** 17 April 2020 – *Special leave granted.*

**Catchwords:**

Civil procedure – Representative proceedings – Where multiple representative proceedings on foot against respondent in single forum – Where each plaintiff sought stay of proceedings commenced by other plaintiffs – Where primary judge applied multifactorial analysis to determine which proceeding should progress – Where NSW Court of Appeal dismissed appeal from primary judge's decision – Whether Pt 10 of *Civil Procedure Act 2005* (NSW) authorised approach taken by primary judge – Whether permissible for court faced with multiple open class actions conducted on basis of different funding models and with different incentives, disincentives and risk profiles to assume, without findings in evidence, that different proceedings equally likely to achieve possible settlement or judgment outcome within range of possible outcomes.

**Appealed from NSWSC (CA):** [\[2019\] NSWCA 243](#); (2019) 373 ALR 323

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## Contracts

*Matthew Ward Price as Executor of the Estate of Alan Leslie Price (Deceased) & Ors v Christine Claire Spoor as Trustee & Ors*  
**B9/2020:** [\[2020\] HCATrans 142](#)

**Date heard:** 11 September 2020 – *Special leave granted.*

**Catchwords:**

Contracts – Statutory limitation periods – Exclusion by agreement – Where in 1998, two mortgages executed by deceased Mr A Price and second applicant, and deceased Mr J Price and third applicant in favour of Law Partners Mortgages Pty Ltd (“LPM”), securing \$320,000 loan advanced by LPM to mortgagors – Where respondents are trustees of pension fund successor in title as mortgagee to LPM – Where by 30 April 2001, only \$50,000 of principal repaid and where no repayments made after that date – Where respondents commenced proceedings in 2017, claiming \$4,014,969.22 and recovery of possession of mortgaged land – Where proceedings commenced outside of statutory bars in *Limitation of Actions Act 1974* (Qld) – Where cl 24 of mortgages provided that “[t]he Mortgagor covenants with the Mortgage[e] that the provisions of all statutes now or hereafter in force whereby or in consequence whereof any o[r] all of the powers rights and remedies of the Mortgagee and the obligations of the Mortgagor hereunder may be curtailed, suspended, postponed, defeated or extinguished shall not apply hereto and are expressly excluded insofar as this can lawfully done” – Whether agreement not to plead or to rely on provisions of *Limitation of Actions Act* made at time of entry into loan contract and before accrual of cause of action unenforceable on public policy grounds – Whether, on proper construction of cl 24, applicants entitled to plead defence under *Limitation of Actions Act* – Whether operation of s 24 of *Limitation of Actions Act* can be excluded by agreement – Whether, on proper construction, terms of cl 24 are ambiguous – If cl 24 enforceable, whether breach of cl 24 could sound in any remedy other than claim for damages for breach of warranty.

**Appealed from QSC (CA):** [\[2019\] QCA 297](#)

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## Corporations

*Westpac Securities Administration Ltd & Anor v Australian Securities and Investments Commission*  
**S69/2020:** [\[2020\] HCATrans 57](#)

**Date heard:** 24 April 2020 – *Special leave granted.*

**Catchwords:**

Corporations – Financial product advice – *Corporations Act 2001* (Cth) s 766B(3)(b) – Distinction between personal advice and general advice – Where bank customers received letters or emails highlighting benefits of consolidating superannuation and offering to conduct free search to identify superannuation accounts that customers may have held with other providers – Where representative of bank then called customers, providing them with any relevant search results and offering to roll over superannuation accounts into their account with bank – Where Full Court of Federal Court held that bank provided financial product advice (within meaning of s 766B(1) of *Corporations Act*) to customers – Whether that financial product advice was personal advice – Whether objective limb of definition of “personal advice” in s 766B(3)(b) depends on whether reasonable person might expect that advice provider had *in fact* considered recipient’s personal circumstances or that advice provider *should* have considered those circumstances – Whether consideration of recipient’s personal circumstances (within meaning of s 766B(3)(b)) requires advice provider to engage with and evaluate those circumstances in formulating advice – Extent to which a recipient’s “objectives, financial situation and needs” must be considered by advice provider for advice to be personal advice.

**Appealed from FCA (FC):** [\[2019\] FCAFC 187](#); (2019) 272 FCR 170; (2019) 373 ALR 455; (2019) 141 ACSR 1

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## Criminal Law

*Bell v The Queen*

**H2/2020:** [\[2020\] HCATrans 77](#)

**Date heard:** 5 June 2020 – *Special leave granted.*

**Catchwords:**

Criminal law – Defences – Honest and reasonable mistake – Where applicant charged with one count of rape and one count of supply of controlled drug to child – Where trial judge left defence of honest and reasonable mistake as to age in relation to rape charge – Where counsel for applicant requested similar direction in respect of supply charge – Where trial judge refused to make such direction on basis that defence of honest and reasonable mistake as to age would not relieve applicant of criminal responsibility with respect to supply charge – Where jury convicted applicant of supply charge but could not reach verdict on rape or alternative charge of sexual

intercourse with person under age of 17 – Where at retrial of sexual offence jury found applicant not guilty of rape but convicted on alternative charge – Where Court of Criminal Appeal upheld trial judge’s decision that defence of honest and reasonable mistake as to age not available in relation to supply charge – Whether defence of honest and reasonable mistake of fact only available where its successful use would lead to defendant not being guilty of any crime.

**Appealed from TASSC (CCA):** [\[2019\] TASCRA 19](#)

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*Miller v The Queen*

**A19/2020:** [\[2020\] HCATrans 111](#)

**Date heard:** 14 August 2020 – *Special leave granted.*

**Catchwords:**

Criminal law – Provocation – Where appellant charged with murder and tried before judge and jury – Where self-defence left to jury, but not provocation – Where appellant convicted of murder – Where on appeal to Court of Criminal Appeal (“CCA”), appellant contended provocation should have been left to jury – Where CCA dismissed appeal – Whether CCA erred by conflating question of whether there was evidence raising provocation with question of whether applicant should have been acquitted of murder on account of provocation – Whether there was evidence before jury which might reasonably have led jury to consider provocation established.

**Appealed from SASCFC (CCA):** [\[2019\] SASCFC 91](#); (2019) 134 SASR 155

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*Peniamina v The Queen*

**B32/2020:** [\[2020\] HCATrans 75](#)

**Date heard:** 5 June 2020 – *Special leave granted.*

**Catchwords:**

Criminal law – Defences – Provocation – *Criminal Code* (Qld) s 304 – Where applicant charged with murdering his wife – Where applicant pleaded not guilty to murder but guilty to manslaughter on basis of provocation – Where applicant bore onus of proving provocation – Where jury convicted applicant of murder – Where Court of Appeal held by majority that jury had not been misdirected

as to provocation and dismissed applicant's appeal against conviction – Whether operation of s 304(3)(c) confined to provocative conduct identified by applicant as causing loss of self-control, or whether jury may also consider other conduct.

**Appealed from QSC (CA):** [\[2019\] QCA 273](#)

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## Evidence

*Davidson v The Queen*

**B6/2020:** [\[2020\] HCATrans 141](#)

**Date heard:** 11 September 2020 – *Application for special leave and for extension of time referred to Full Court.*

**Catchwords:**

Evidence – Similar fact evidence – Common law approach – Where applicant was massage therapist – Where applicant charged with counts of sexual assault and rape committed against ten complainant clients – Where prosecution sought to lead similar fact evidence – Where applicant unsuccessfully sought to have separate trials ordered on rape counts on basis that evidence relied upon as similar fact evidence not cross-admissible on other counts – Where following jury trial, applicant convicted of 18 counts of sexual assault and one count of rape – Whether joint trial of sexual assault and rape counts occasioned miscarriage of justice – Whether majority of Court of Appeal effectively lowered threshold for admission of similar fact evidence at common law.

**Appealed from QSC (CA):** [\[2019\] QCA 120](#)

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## Migration Law

*DQU16 & Ors v Minister for Home Affairs & Anor*

**S78/2020:** [\[2020\] HCATrans 136](#)

**Date determined:** 9 September 2020 – *Special leave granted.*

**Catchwords:**

Migration law – Complementary protection – Where first applicant had worked as alcohol distributor in Iraq and claimed he would be

targeted for doing so if he returned to Iraq – Where applications for temporary protection visas refused by Minister’s delegate – Where Immigration Assessment Authority (“IAA”) affirmed delegate’s decision finding first applicant could take reasonable step of not selling alcohol to avoid real chance of persecution in Iraq – Whether principles in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 applicable in considering complementary protection criterion in s 36(2)(aa) of *Migration Act 1958* (Cth) – Whether, in determining complementary protection claims, IAA may rely on finding made in relation to claim for refugee status as to future changes in applicant’s behaviour without addressing reason for intended changed conduct.

**Appealed from FCA:** [\[2020\] FCA 518](#)

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*DVO16 v Minister for Immigration and Border Protection & Anor*  
**S66/2020:** [\[2020\] HCATrans 51](#)

**Date heard:** 17 April 2020 – *Special leave granted.*

**Catchwords:**

Migration law – Fast track review process – *Migration Act 1958* (Cth) Pt 7AA – Where appellant applied for temporary protection visa – Where Minister’s delegate conducted interview with appellant – Where translation errors and omissions occurred in interview – Where Minister’s delegate refused application – Where, relying on material obtained in interview, Immigration Assessment Authority (“IAA”) reviewed delegate’s decision – Where IAA affirmed delegate’s decision – Whether, in circumstances where material translation error occurred in delegate’s interview and IAA relies on material obtained in interview in reviewing delegate’s decision under Pt 7AA, IAA needs to have actual or constructive knowledge of translation error for jurisdictional error to arise.

**Appealed from FCA (FC):** [\[2019\] FCAFC 157](#); (2019) 271 FCR 342

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*Minister for Home Affairs v DUA16 & Anor; Minister for Home Affairs v CHK16 & Anor*  
**M57/2020; M58/2020:** [\[2020\] HCATrans 64](#)

**Date heard:** 29 May 2020 – *Special leave granted.*

**Catchwords:**

Migration law – Third party fraud – Where migration agent (“Agent”) acting for each of respondents provided “submissions” to Immigration Assessment Authority (“IAA”) on their behalf – Where “submissions” pro forma and contained information that did not relate to respondents – Where there was no evidence that respondents had asked Agent to make particular “submissions” to IAA, nor evidence that either respondent wanted to provide “new information” to IAA – Where Full Court of Federal Court held that Agent engaged in fraudulent conduct and dismissed appeal from decision of Federal Circuit Court to quash IAA’s decisions in respondents’ cases on ground that they were stultified by Agent’s fraud – Whether Agent’s fraudulent conduct in how respondents’ cases put to IAA stultified, disabled, or subverted IAA’s review of Minister’s delegate’s decision – Status and significance of “submissions” in assessing effect of fraudulent conduct on IAA’s review processes.

**Appealed from FCA (FC):** [\[2019\] FCAFC 221](#)

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*Minister for Immigration and Border Protection v EFX17*

**B43/2020:** [\[2020\] HCATrans 93](#)

**Date heard:** 3 July 2020 – *Special leave granted on limited grounds.*

**Catchwords:**

Migration law – Visa cancellation – Character test – *Migration Act 1958* (Cth) ss 496, 501, 501CA – Notice of cancellation – Where Minister’s delegate made decision under s 501(3A) to cancel respondent’s protection visa while respondent serving sentence of imprisonment – Where pursuant to duties in s 501CA(3) Minister caused to be given to respondent written notice containing notification of cancellation decision, relevant information as to reason for decision, and invitation to make representations about revocation of cancellation decision – Where notice given to respondent by officer of Queensland Corrective Services – Where respondent commenced proceedings in Federal Circuit Court challenging validity of notice – Where Circuit Court dismissed challenge – Where appeal to Full Court of Federal Court allowed by majority – Whether Minister, in performing duties under s 501CA(3), must have regard to matters relating to former visa holder’s capacity, including literacy, capacity to understand English, mental capacity and health, and facilities available to them in custody – Whether fulfilment of duties in s 501CA(3) dependent on former visa holder’s ability to comprehend notice, particulars, and invitation to make representations – Whether valid performance of duties in s 501CA(3) conditional on person performing them holding delegated authority under s 496(1) or whether s 497 applicable.

**Appealed from FCA (FC):** [\[2019\] FCAFC 230](#); (2019) 374 ALR 272; (2019) 167 ALD 225

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*Minister for Immigration and Border Protection v Makasa*  
**S103/2020:** [\[2020\] HCATrans 81](#)

**Date determined:** 12 June 2020 – *Special leave granted.*

**Catchwords:**

Migration law – Visa cancellation – Character test – Substantial criminal record – Where Minister’s delegate cancelled respondent’s visa on character grounds – Where Administrative Appeals Tribunal (“AAT”) set aside delegate’s decision and decided not to cancel visa – Where Minister subsequently personally purported to cancel respondent’s visa – Whether the Minister can re-exercise discretion conferred by s 501(2) of *Migration Act 1958* (Cth) to cancel person’s visa where AAT has previously set aside Minister’s delegate’s earlier decision to cancel visa under s 501(2) – If yes, whether Minister can rely on same offences (going to whether person has substantial criminal record for purposes of character test) to enliven discretion in s 501(2) as AAT relied upon when reviewing delegate’s decision.

**Appealed from FCA (FC):** [\[2020\] FCAFC 22](#); (2020) 376 ALR 191

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*MZAPC v Minister for Immigration and Border Protection & Anor*  
**M77/2020:** [\[2020\] HCATrans 113](#)

**Date heard:** 14 August 2020 – *Special leave granted.*

**Catchwords:**

Migration law – Procedural fairness – Materiality – Where appellant applied for protection visa – Where appellant’s criminal record and related material provided to Administrative Appeals Tribunal (“AAT”) by first respondent without appellant’s knowledge – Where certificate under s 438 of *Migration Act 1958* (Cth) issued in relation to criminal record and related material and appellant not notified of certificate – Where criminal record disclosed history of serious traffic offences – Where AAT affirmed delegate’s decision to refuse visa application – Where appeal to Federal Circuit Court dismissed – Where appeal to Federal Court dismissed – Where common ground that failure to notify appellant of certificate constituted denial of

procedural fairness – Whether, when considering materiality of denial of procedural fairness occasioned by failure to notify appellant of s 438 certificate, appellant bore onus of rebutting presumption that AAT did not rely on documents subject to certificate and had to prove that documents had been taken into account by AAT – Whether Federal Court erred in finding that denial of procedural fairness immaterial on basis that offences disclosed in criminal record not rationally capable of impacting appellant’s credibility before AAT.

**Appealed from FCA:** [\[2019\] FCA 2024](#)

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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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## Taxation

*The Commissioner of Taxation for the Commonwealth of Australia v Travelex Limited*

**S116/2020:** [\[2020\] HCATrans 89](#)

**Date determined:** 25 June 2020 – *Special leave granted.*

**Catchwords:**

Taxation – Overpayments – Interest – Where supplies which were GST-free wrongly included in Business Activity Statement – Where on 28 June 2012 Commissioner allocated credit of \$149,020 to respondent’s Running Balance Account (“RBA”) and recorded “effective date” of allocation as 16 December 2009 – Whether Commissioner’s actions on 28 June 2012, even if made in error and unreflective of any entitlement under a taxation law on part of respondent, created obligation on part of Commissioner to refund “RBA surplus” within meaning of Pt IIB of *Taxation Administration Act 1953* (Cth) and entitlement on part of respondent to interest under *Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth).

**Appealed from FCA (FC):** [\[2020\] FCAFC 10](#)

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

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## 8: SPECIAL LEAVE REFUSED

### Publication of Reasons: 2 September 2020 (Melbourne)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	McKenzie	The Queen (B23/2020)	Supreme Court of Queensland (Court of Appeal) [2020] QCA 39	Application dismissed <a href="#">[2020] HCASL 171</a>
2.	Bridges	Bridges (M39/2020)	Full Court of the Family Court of Australia	Application dismissed with costs <a href="#">[2020] HCASL 172</a>
3.	FQL17	Minister for Immigration and Border Protection & Anor (S30/2020)	Federal Court of Australia [2020] FCA 121	Application dismissed with costs <a href="#">[2020] HCASL 173</a>
4.	Kowalski	Attorney-General for the State of South Australia & Ors (A6/2020)	Supreme Court of South Australia	Application dismissed <a href="#">[2020] HCASL 174</a>
5.	Kowalski	Attorney-General for the State of South Australia & Ors (A7/2020)	Supreme Court of South Australia	Application dismissed <a href="#">[2020] HCASL 175</a>
6.	Kowalski	Attorney-General for the State of South Australia & Ors (A9/2020)	Supreme Court of South Australia	Application dismissed <a href="#">[2020] HCASL 176</a>
7.	DBC17	Minister for Immigration and Border Protection & Anor (A11/2020)	Federal Court of Australia [2020] FCA 570	Application dismissed <a href="#">[2020] HCASL 177</a>
8.	Kowalski	Attorney-General for the State of South Australia (A16/2020)	Supreme Court of South Australia	Application dismissed <a href="#">[2020] HCASL 178</a>
9.	Keenan	The Queen (M47/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 105	Application dismissed <a href="#">[2020] HCASL 179</a>
10.	Frailing	Mackay (P29/2020)	Supreme Court of Western Australia (Court of Appeal) [2020] WASCA 73	Application dismissed <a href="#">[2020] HCASL 180</a>

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## Publication of Reasons: 9 September 2020 (Sydney)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	BXP18	Minister for Home Affairs & Anor (B41/2020)	Federal Court of Australia [2020] FCA 799	Application dismissed <a href="#">[2020] HCASL 181</a>
2.	AYW16	Minister for Immigration and Border Protection & Anor (M32/2020)	Federal Court of Australia [2020] FCA 277	Application dismissed <a href="#">[2020] HCASL 182</a>
3.	LG & Anor	Melbourne Health & Ors (M48/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 64	Application dismissed <a href="#">[2020] HCASL183</a>
4.	LG & Anor	The Public Health Advocate (M49/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 65	Application dismissed <a href="#">[2020] HCASL184</a>
5.	Agapis	A Justice of the Federal Court of Australia at Perth (WAD 460/2013) & Ors (P25/2020)	High Court of Australia	Application dismissed <a href="#">[2020] HCASL 185</a>
6.	Herbert	New South Wales Land and Housing Corporation & Anor (S89/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 80	Application dismissed <a href="#">[2020] HCASL 186</a>
7.	Barbeliuk	NSW Commissioner of Police & Ors (S43/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 11 [2020] NSWCA 34	Application dismissed with costs <a href="#">[2020] HCASL 187</a>
8.	Salh & Anor	Minister for Immigration and Border Protection & Anor (S52/2020)	Federal Court of Australia [2020] FCA 340	Application dismissed with costs <a href="#">[2020] HCASL 188</a>
9.	Rawson & Ors	Studholme (S83/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 76	Application dismissed with costs <a href="#">[2020] HCASL 189</a>
10.	Zerjavic	Chevron Australia Pty Ltd (P19/2020)	Supreme Court of Western Australia (Court of Appeal) [2020] WASCA 40	Application dismissed with costs <a href="#">[2020] HCASL 190</a>
11.	Weisbord & Ors	Rodny (S45/2020)	Supreme Court of New South Wales (Court of Appeal) [2020] NSWCA 22	Application dismissed with costs <a href="#">[2020] HCASL 191</a>

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## Publication of Reasons: 10 September 2020 (Brisbane)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Aldridge	Johnston (A10/2020)	Supreme Court of South Australia [2020] SASFC 31	Application dismissed <a href="#">[2020] HCASL 192</a>
2.	Gray	Minister for Energy Environment & Climate Change & Ors (M53/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 121	Application dismissed <a href="#">[2020] HCASL 193</a>
3.	Mullen	Aged Care Quality and Safety Commissioner (P22/2020)	Full Court of the Federal Court of Australia [2020] FCAFC 78	Application dismissed <a href="#">[2020] HCASL 194</a>
4.	Halls	Pioneer Credit Solutions Pty Ltd (S110/2020)	Supreme Court of New South Wales [2020] NSWSC 621	Application dismissed <a href="#">[2020] HCASL 195</a>

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## 11 September 2020: Brisbane (and by video-link to Melbourne)

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	Hoth Mai	Commissioner of the Australian Federal Police (M26/2020)	Supreme Court of Victoria (Court of Appeal) [2020] VSCA 38	Application dismissed <a href="#">[2020] HCATrans 145</a>
2.	BDQ17	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (P21/2020)	Federal Court of Australia [2020] FCA 492	Application dismissed <a href="#">[2020] HCATrans 146</a>
3.	Kinghorn	Commonwealth Director of Public Prosecutions (S57/2020)	Supreme Court of New South Wales (Court of Criminal Appeal) [2020] NSWCCA 48	Application dismissed <a href="#">[2020] HCATrans 144</a>
4.	Kinghorn	Commissioner of Taxation & Anor (S58/2020)	Supreme Court of New South Wales (Court of Criminal Appeal) [2020] NSWCCA 48	Application dismissed <a href="#">[2020] HCATrans 144</a>

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