



HIGH COURT BULLETIN

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High Court of Australia Library
[2018] HCAB 8 (24 October 2018)

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

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1: SUMMARY OF NEW ENTRIES

2: Cases Handed Down

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3: Cases Reserved

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| <u>Grajewski v Director of Public Prosecutions (NSW)</u> | Criminal Law |

4: Original Jurisdiction

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| <u>Unions NSW & Ors v State of New South Wales</u> | Constitutional Law |

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2: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the October 2018 sittings.

Criminal Law

Johnson v The Queen

A9/2018: [\[2018\] HCA 48](#)

Judgment delivered: 17 October 2018

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

Catchwords:

Criminal law – Appeal against convictions – Where appellant convicted of five counts of sexual offending against single complainant being his sister – Where counts joined – Where s 34P of *Evidence Act 1929* (SA) provided for admission of discreditable conduct evidence for permissible use – Where applications to have counts one and two tried separately and to prevent Crown from leading evidence of discreditable conduct against complainant dismissed – Where Crown relied upon evidence of appellant's other alleged sexual misconduct to rebut presumption of *doli incapax* and to show relationship between appellant and complainant – Where verdicts on counts one and three quashed on appeal – Whether evidence of appellant's other alleged sexual misconduct admissible on trial of each remaining count – Whether joinder occasioned miscarriage of justice.

Evidence – Criminal trial – Sexual offences – Propensity evidence – Admissibility – Where Crown relied on uncharged acts as relationship or context evidence – Where evidence of one uncharged act improperly admitted – Whether miscarriage of justice.

Words and phrases – "admissibility", "context evidence", "contextual use", "discreditable conduct evidence", "effluxion of time", "impermissible use", "non-propensity use", "other alleged sexual misconduct", "permissible use", "prejudicial effect", "probative value", "relationship evidence", "uncharged act".

Evidence Act 1929 (SA) – Pt 3 Div 3, s 34P

Appealed from SASC (FC): [\[2015\] SASCF 170](#)

Held: Appeal dismissed

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Rodi v State of Western Australia

P24/2018: [\[2018\] HCA 44](#)

Judgment delivered: 10 October 2018

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

Catchwords:

Criminal law – Prohibited drug – Appeal against conviction – Fresh evidence – Miscarriage of justice – Where appellant convicted of possession of prohibited drug with intent to sell or supply it to another – Where expert witness gave evidence at trial casting doubt on credibility of appellant's testimony – Where expert witness gave evidence in earlier proceedings inconsistent with evidence given in appellant's proceedings – Where earlier inconsistent evidence not disclosed to appellant at trial – Where Court of Appeal of Supreme Court of Western Australia admitted expert witness's earlier inconsistent evidence as fresh evidence but determined that no miscarriage of justice had occurred – Whether miscarriage of justice occurred.

Words and phrases – "credible and cogent", "fresh evidence", "miscarriage of justice", "new evidence", "onus of proof", "significant possibility of acquittal", "yield".

Misuse of Drugs Act 1981 (WA) – ss 6(1)(a), 11(a).

Appealed from WASC (CA): [\[2017\] WASCA 81](#); (2017) 51 WAR 96

Held: Appeal allowed

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Equity

Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited & Anor

A37/2017: [\[2018\] HCA 43](#)

Judgment delivered: 10 October 2018

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

Catchwords:

Equity – Knowing assistance in breach of fiduciary duty – Remedies – Account of profits – Causation – Where employees of first respondent breached fiduciary duties to respondents by assisting appellant, and then joined appellant – Where appellant knowingly assisted in breaches of fiduciary duty – Where primary judge found profits of appellant's business not direct result of appellant's knowing assistance – Whether account of profits available.

Equity – Knowing assistance in breach of fiduciary duty – Remedies – Account of profits – Assessment of quantum – Whether knowing assistant obliged to account for entire capital value of business acquired – Whether account of profits may be ordered in respect of anticipated profits.

Words and phrases – "account of profits", "actual profits", "anticipated profits", "as a result of", "but for", "causation", "disgorgement" "knowing assistance", "material contribution".

Appealed from FCA (FC): [\[2017\] FCAFC 74](#); (2017) 250 FCR 1

Held: Appeal dismissed; cross-appeal allowed

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Migration

ETA067 v The Republic of Nauru

M167/2017: [\[2018\] HCA 46](#)

Judgment delivered: 17 October 2018

Coram: Bell, Keane and Gordon JJ

Catchwords:

Immigration – Nauru – Refugees – Application for refugee status – Where Secretary of Department of Justice and Border Control determined appellant not refugee – Where Refugee Status Review Tribunal affirmed Secretary's determination – Whether Tribunal failed to act according to principles of natural justice – Whether Tribunal failed to assess evidence provided by appellant in relation to his claim to have a well-founded fear of persecution by reason of his political opinion – Whether Tribunal failed to give appellant an opportunity to comment on evidence concerning membership of political party – Whether Supreme Court of Nauru erred in affirming Tribunal's determination.

Words and phrases – "evidence material to assessment", "principles of natural justice", "well-founded fear of persecution".

Refugees Convention Act 2012 (Nr) – ss 5, 22(b), 40(1).

Appealed from Supreme Court of Nauru: [\[2017\] NRSC 99](#)

Held: Appeal dismissed with costs

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WET052 v The Republic of Nauru

S267/2017: [\[2018\] HCA 47](#)

Judgment delivered: 17 October 2018

Coram: Gageler, Keane and Edelman JJ

Catchwords:

Nauru – Appeal as of right from Supreme Court of Nauru – Refugees – Where Secretary of Department of Justice and Border Control determined appellant not refugee and not owed complementary protection – Where Refugee Status Review Tribunal affirmed Secretary's determination – Where Tribunal made adverse finding as to credibility of appellant – Where Supreme Court of Nauru affirmed Tribunal's decision – Whether Tribunal's adverse finding made without logical foundation – Whether Tribunal failed to properly consider appellant's claims relating to treatment in Iran as a returned asylum seeker.

Words and phrases – "adverse credibility finding", "country information", "failed asylum seeker", "political profile", "well-founded fear of persecution".

Refugees Convention Act 2012 (Nr) – ss 3, 5, 6, 31.

Appealed from Supreme Court of Nauru: [\[2017\] NRSC 96](#)

Held: Appeal dismissed with costs

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Practice and Procedure

Nobarani v Mariconte (No 2)

S270/2017: [\[2018\] HCA 49](#)

Judgment delivered: 17 October 2018

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

Catchwords:

Practice and procedure – Costs – Wills, probate, and administration
– Where respondent sought and obtained grant of probate in solemn form – Where respondent resisted appeals to set aside grant of probate – Where grant of probate set aside on appeal – Where respondent applied for order that appellant's costs of trial and appeals be paid out of estate of deceased and on trustee basis
– Where costs not shown to be other than properly and reasonably incurred by respondent in connection with administration of estate
– Whether order sought by respondent should be made.

Words and phrases – "administration of the estate", "costs payable from the estate", "executor", "litigation expenses", "properly and reasonably incurred".

Appealed from NSWSC(CA): [\[2017\] NSWCA 124](#)

Held: Order made

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UBS AG v Scott Francis Tyne as Trustee of the Argot Trust
B54/2017: [\[2018\] HCA 45](#)

Judgment delivered: 17 October 2018

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

Catchwords:

Practice and procedure – Permanent stay of proceedings – Abuse of process – Where respondent (in personal capacity) was controlling mind of former trustee and related company – Where respondent (in personal capacity), former trustee and related company commenced proceedings in Supreme Court of New South Wales – Where respondent (in personal capacity) and former trustee discontinued as parties in Supreme Court proceedings – Where Supreme Court proceedings permanently stayed – Where respondent (as trustee) pursued substantially same claims in Federal Court of Australia – Where primary judge permanently stayed proceedings for abuse of process – Whether on appeal Full Court erred in finding no abuse of process and setting aside permanent stay – Whether Full Court failed to consider overarching purpose of conduct of civil litigation.

Words and phrases – "abuse of process", "administration of justice", "conduct of civil litigation", "discontinue", "final determination", "just resolution", "overarching purpose of the conduct of civil litigation", "permanent stay", "related parties", "unconditional discontinuance", "unjustifiably oppressive".

Federal Court of Australia Act 1976 (Cth) – ss 23, 37M, 37N.

Federal Court Rules 2011 (Cth) – r 26. 14.

Uniform Civil Procedure Rules 2005 (NSW) – rr 12. 3(1), 12. 4.

Appealed from FCA (FC): [\[2017\] FCAFC 5](#); (2017) 250 FCR 341; (2017) 341 ALR 415

Held: Appeal allowed with costs

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3: CASES RESERVED

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

Constitutional Law

Clubb v Edwards & Anor

M46/2018: [\[2018\] HCATrans 206](#); [\[2018\] HCATrans 208](#); [\[2018\] HCATrans 210](#)

Date heard: 9, 10 and 11 October 2018

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

Catchwords:

Constitutional law – Implied freedom of political communication – *Public Health and Wellbeing Act 2008* (Vic) s 185D – Where s 185D prohibits engaging in “prohibited behaviour” within “safe access zone” – Where “prohibited behaviour” defined to include “communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, or attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety” – Where appellant convicted of charge under s 185D in Magistrates’ Court – Whether 185D impermissibly burdens implied freedom of political communication.

Removed from Supreme Court of Victoria into High Court under s 40 of Judiciary Act 1903 (Cth) on 23 March 2018

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Preston v Avery & Anor

H2/2018: [\[2018\] HCATrans 206](#); [\[2018\] HCATrans 208](#); [\[2018\] HCATrans 210](#)

Date heard: 9, 10 and 11 October 2018

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

Catchwords:

Constitutional law – Implied freedom of political communication – *Reproductive Health (Access to Termination) Act 2013* (Tas) s 9(2) – Where s 9(2) prohibits protest in relation to terminations that is

able to be seen or heard by person accessing or attempting to access premises at which terminations provided – Where appellant convicted in Hobart Court of Petty Sessions of contraventions of s 9(2) – Whether s 9(2) impermissibly burdens implied freedom of political communication.

Removed from Supreme Court of Tasmania into High Court under s 40 of Judiciary Act 1903 (Cth) on 23 March 2018

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Work Health Authority v Outback Ballooning Pty Ltd & Anor

D4/2018: [\[2018\] HCATrans 144](#); [\[2018\] HCATrans 146](#)

Date heard: 14 and 15 August 2018

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

Catchwords:

Constitutional law – Inconsistency – *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) – Where hot air balloon passenger died from injuries suffered as result of scarf being sucked into inflation fan – Where appellant alleged first respondent breached s 32 of Act – Where magistrate dismissed complaint on basis *Air Navigation Act 1920* (Cth), *Civil Aviation Act 1988* (Cth) and other Commonwealth regulation covered field of safety of air navigation – Where Supreme Court quashed magistrate’s decision – Where Court of Appeal allowed appeal – Whether Court of Appeal erred in concluding federal civil aviation legislation excluded operation of *Work Health and Safety (National Uniform Legislation) Act 2011* (NT).

Appealed from NTSC (CA): [\[2017\] NTCA 7](#); (2017) 326 FLR 1

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Corporations Law

Australian Securities & Investments Commission v Lewski & Anor;
Australian Securities & Investments Commission v Wooldridge & Anor;
Australian Securities & Investments Commission v Butler & Anor;
Australian Securities & Investments Commission v Jaques & Anor;
Australian Securities & Investments Commission v Clarke & Anor

M79/2018; **M80/2018;** **M81/2018;** **M82/2018;** **M83/2018:** [\[2018\] HCATrans 213](#); [\[2018\] HCATrans 214](#)

Date heard: 17 and 18 October 2018

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

Catchwords:

Corporations – Managed investment schemes – Third party transactions – *Corporations Act 2001* (Cth) ss 208, 209, 601FC, 601FD, 601GC – Where directors resolved to lodge deed purporting to amend constitution to authorise payment of fee to responsible entity – Where appellant brought civil penalty proceedings for contraventions of Act against responsible entity and directors – Where trial judge concluded directors breached duties in resolving to lodge deed and authorising payment of fee – Where Full Court allowed appeals – Whether Full Court erred in concluding deed purporting to amend constitution valid until set aside by Court – Whether Full Court erred in concluding deed binding on responsible entity – Whether Full Court erred in failing to find directors involved in contravention of s 208 by authorising payment of fee to responsible entity.

Appealed from FCA (FC): [\[2017\] FCAFC 171](#); (2017) 352 ALR 64; (2017) 126 ACSR 1

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Criminal Law

Grajewski v Director of Public Prosecutions (NSW)

S141/2018: [\[2018\] HCATrans 211](#)

Date heard: 12 October 2018

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

Catchwords:

Criminal law – Destroy or damage property – *Crimes Act 1900* (NSW) s 195(1) – Meaning of “damage” – Where appellant climbed machine causing operator to shut down machine – Where appellant convicted of intentionally or recklessly damaging property contrary to s 195(1)(a) – Where District Court dismissed appeal and referred question whether facts can support finding of guilt to Court of Criminal Appeal – Where Court of Criminal Appeal answered “yes” – Whether Court of Criminal Appeal erred in concluding “damage” can be established where no physical derangement of property – Whether Court of Criminal Appeal erred in concluding temporary

physical interference with functionality of property may constitute “damage” for purpose of s 195.

Appealed from NSWSC (CA): [\[2017\] NSWCCA 251](#)

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Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions & Ors; Tucker (a pseudonym) v Commonwealth Director of Public Prosecutions & Ors; Hodges (a pseudonym) v Commonwealth Director of Public Prosecutions & Ors; Galloway (a pseudonym) v Commonwealth Director of Public Prosecutions & Ors

[M168/2017](#); [M176/2017](#); [M175/2017](#); [M174/2017](#): [\[2018\] HCATrans 75](#); [\[2018\] HCATrans 78](#)

Date heard: 8 and 9 May 2018

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

Catchwords:

Criminal law – Stay of proceedings – *Australian Crime Commission Act 2002* (Cth) – Investigations – Where Australian Federal Police (“AFP”) commenced investigation – Where appellants summoned by Australian Crime Commission for compulsory examination – Where examiner failed to make non-publication direction under s 25A(9) of Act prohibiting publication of examination material concerning appellants to AFP and Commonwealth Director of Public Prosecutions – Where primary judge found examination conducted for improper purpose of assisting AFP and had unfair consequences for trial – Where primary judge ordered permanent stay of proceedings – Where Court of Appeal quashed order – Whether Court of Appeal erred in finding unlawful compulsory examination for purpose of achieving forensic advantage insufficient in circumstances to justify permanent stay of proceedings.

Appealed from VSC (CA): [\[2017\] VSCA 120](#)

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Evidence

McPhillamy v The Queen

[S121/2018](#): [\[2018\] HCATrans 141](#)

Date heard: 9 August 2018

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

Catchwords:

Evidence – Tendency evidence – Where appellant charged with offences involving child sexual abuse – Where trial judge admitted tendency evidence – Where appellant convicted at trial – Where Court of Criminal Appeal dismissed appeal – Whether majority of Court of Criminal Appeal erred in holding tendency evidence had significant probative value – Whether majority of Court of Criminal Appeal erred in holding probative value of tendency evidence substantially outweighed prejudicial effect.

Appealed from NSW (CA): [\[2017\] NSWCCA 130](#)

*Orders made on 9 August 2018 allowing the appeal.
Written reasons of the Court to be published at a future date.*

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Interpretation

Commissioner of Taxation for the Commonwealth of Australia v Tomaras & Ors

B9/2018: [\[2018\] HCATrans 143](#)

Date heard: 10 August 2018

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

Catchwords:

Interpretation – Crown immunity – *Family Law Act 1975* (Cth) s 90AE – Presumption that statutory provisions expressed in general terms do not bind Crown – Where wife commenced proceedings against husband seeking alteration of property interests including order under s 90AE substituting husband for wife in respect of indebtedness to Commissioner – Where Full Family Court held s 90AE conferred power to make order – Whether Full Family Court erred in concluding presumption Crown not bound by statute did not apply in construction of s 90AE – If yes, whether Full Family Court erred in concluding presumption would have been rebutted – Whether Full Family Court erred in failing to conclude neither Commissioner nor Commonwealth “creditor” or “third party” for purposes of s 90AE.

Appealed from Fam CA (FC): [\[2017\] FamCAFC 216](#); (2017) 327 FLR 228; (2017) 106 ATR 878

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Comptroller General of Customs v Zappia

[S91/2018](#): [\[2018\] HCATrans 140](#)

Date heard: 8 August 2018

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

Catchwords:

Interpretation – *Customs Act 1901* (Cth) s 35A – Where respondent employed as general manager of company operating warehouse – Where cigarettes stolen from warehouse – Where respondent served with notice under s 35A of Act requiring payment of amount of duty payable on stolen cigarettes – Where Administrative Appeals Tribunal dismissed application for review of decision to issue notice – Where Full Federal Court allowed appeal – Whether majority of Full Court erred in holding employee of entity holding license to warehouse dutiable goods not capable of being “person who has, or has been entrusted with, the possession, custody or control of dutiable goods” within meaning of s 35A(1) – Whether majority of Full Court erred in holding that on proper construction of s 35A(1), statutory demand issued by appellant to respondent invalid and of no effect.

Appealed from FCA (FC): [\[2017\] FCAFC 147](#); (2017) 254 FCR 363

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SAS Trustee Corporation v Miles

[S260/2017](#): [\[2018\] HCATrans 147](#)

Date heard: 16 August 2018

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

Catchwords:

Interpretation – *Police Regulation (Superannuation) Act 1906* (NSW) – Where respondent discharged from police force due to infirmities as result of being “hurt on duty” – Where respondent applied for increase in annual superannuation allowance – Where application rejected by trustee – Where trustee’s decision upheld by District Court – Where Court of Appeal allowed appeal – Whether Court of Appeal erred in failing to construe s 10(1A)(b) in context – Whether s 10(1A)(b) authorises payment of additional superannuation allowance where incapacity not due to infirmity

determined by Commissioner under s 10B(3) to have been caused by being "hurt on duty".

Appealed from NSWSC (CA): [\[2017\] NSWCA 86](#)

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Williams v Wreck Bay Aboriginal Community Council & Anor
C5/2018: [\[2018\] HCATrans 183](#)

Date heard: 12 September 2018

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

Catchwords:

Interpretation – Concurrent operation – Where Council leased property to appellant under residential tenancy agreement – Where appellant commenced proceedings in ACT Civil and Administrative Tribunal seeking orders for repairs and compensation – Where Tribunal referred questions of law to Supreme Court for determination – Where Court of Appeal allowed appeal – Whether Court of Appeal erred in concluding ACT laws retain subordinate status when applied to Jervis Bay Territory by force of s 4A of *Jervis Bay Territory Acceptance Act 1915* (Cth) – Whether Court of Appeal erred in concluding ss 8 and 9 of *Residential Tenancies Act 1997* (ACT) not capable of operating concurrently with *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) such that ss 8 and 9 do not apply to "Aboriginal Land" for purposes of s 46 of *Aboriginal Land Grant (Jervis Bay Territory) Act*.

Appealed from ACT (CA): [\[2017\] ACTCA 46](#); (2017) 12 ACTLR 207; (2017) 326 FLR 58; (2017) 230 LGERA 1

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Migration

BEG15 v Minister for Immigration and Border Protection & Anor
S135/2018: [\[2018\] HCATrans 177](#)

Date heard: 10 September 2018

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

Catchwords:

Migration – Jurisdictional error – *Migration Act 1958* (Cth) s 438 – Where appellant applied for protection visa – Where application refused by delegate – Where appellant applied to Refugee Review Tribunal for review of decision – Where delegate issued certificate under s 438(1)(a) that disclosure of certain information would be contrary to public interest – Where certificate invalid – Where Tribunal did not inform appellant of certificate or disclose information to appellant – Where Tribunal affirmed delegate’s decision – Where Federal Circuit Court dismissed application for judicial review – Where Full Federal Court dismissed appeal – Whether Full Court erred in failing to find Tribunal fell into jurisdictional error in acting on invalid certificate – Whether Full Court erred in failing to find not open to primary judge to withhold relief where decision affected by jurisdictional error – Whether necessary for applicant to show denial of procedural fairness in addition to invalidity of certificate.

Appealed from FCA (FC): [\[2017\] FCAFC 198](#); (2017) 253 FCR 36

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CQZ15 v Minister for Immigration and Border Protection & Anor
M75/2018: [\[2018\] HCATrans 177](#)

Date heard: 10 September 2018

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

Catchwords:

Migration – Jurisdictional error – *Migration Act 1958* (Cth) s 438 – Where appellant applied for protection visa – Where application refused by delegate – Where appellant applied to Administrative Appeals Tribunal for review of decision – Where delegate issued certificate under s 438(1)(a) that disclosure of certain information would be contrary to public interest – Where certificate invalid – Where delegate issued further certificate – Where Tribunal did not inform appellant of certificates or disclose information to appellant – Where Tribunal affirmed delegate’s decision – Where Federal Circuit Court concluded Tribunal fell into jurisdictional error in acting upon invalid certificate and failing to disclose existence of certificates to appellant – Where Full Federal Court allowed appeal – Whether Full Court erred in departing from *Minister for Immigration and Border Protection v Singh* (2016) 244 FCR 305 by failing to find Tribunal fell into jurisdictional error in not disclosing certificates – Whether Full Court erred in failing to find not open to primary judge to withhold relief where decision affected by jurisdictional error.

Appealed from FCA (FC): [\[2017\] FCAFC 194](#); (2017) 253 FCR 1

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Minister for Immigration and Border Protection v SZMTA & Anor
S36/2018: [\[2018\] HCATrans 177](#)

Date heard: 10 September 2018

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

Catchwords:

Migration – Procedural fairness – *Migration Act 1958* (Cth) s 438(2) – Where first respondent applied for Protection (Class XA) visa – Where application refused by delegate – Where first respondent applied to Administrative Appeals Tribunal for review of decision – Where delegate notified Tribunal s 438(2)(a) applied to certain documents because given in confidence to Minister or Department – Where Tribunal did not inform first respondent of notification – Where copies of documents previously provided to first respondent – Where Federal Circuit Court dismissed application for judicial review – Where Federal Court allowed appeal on basis Tribunal denied first respondent procedural fairness – Whether Federal Court erred in relying on possibility Tribunal may not have had regard to certain information because of notification under s 438(2) in finding Tribunal denied first respondent procedural fairness – Whether Federal Court erred in holding Tribunal denied first respondent procedural fairness in circumstances where documents in possession of first respondent prior to Tribunal hearing.

Appealed from FCA: [\[2017\] FCA 1055](#); (2017) 255 FCR 215

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Native Title

Northern Territory of Australia v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor; Commonwealth of Australia v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Anor; Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory of Australia & Anor

D1/2018; **D2/2018**; **D3/2018**: [\[2018\] HCATrans 174](#); [\[2018\] HCATrans 175](#); [\[2018\] HCATrans 176](#)

Date heard: 4, 5 and 6 September 2018

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

Catchwords:

Native title – Extinguishment – Compensation for extinguishment – *Native Title Act 1993* (Cth) – Where claim brought against Commonwealth and Northern Territory for extinguishment of non-exclusive native title rights and interests in Timber Creek – Where primary judge awarded claim group compensation for economic value of extinguished rights, interest, and solatium for loss or impairment of rights and interests – Where Full Court held primary judge erred in assessing value of extinguished rights and concluded value of rights was 65% of value of freehold title – Whether Full Court’s assessment of economic value of rights erroneous or manifestly excessive in light of restrictions and limitations on rights – Whether Full Court erred in failing to find primary judge erred in awarding interest as part of compensation under s 51(1) of Act and not as interest on compensation – Whether Full Court erred in assessing interest by reference to 65% of value of freehold title – Whether Full Court erred in failing to find primary judge erred in assessing compensation for non-economic loss – Whether Full Court erred in failing to find primary judge’s assessment of compensation for non-economic loss manifestly excessive – Whether Full Court erred in finding commercial agreements entered into by claimants containing solatium-type payments irrelevant to assessment of compensation.

Appealed from FCA (FC): [\[2017\] FCAFC 106](#); (2017) 346 ALR 247

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Stamp Duty

Commissioner of State Revenue v Placer Dome Inc

P6/2018: [\[2018\] HCATrans 119](#)

Date heard: 18 June 2018

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

Catchwords:

Stamp duty – *Stamp Act 1921* (WA) s 76ATI – Assessment – Acquisition of shares – Where Commissioner assessed stamp duty payable for share acquisition on basis value of respondent’s land was value of all respondent’s property less value of “non-land assets” – Where Tribunal affirmed Commissioner’s decision – Where Court of Appeal allowed appeal on basis Tribunal failed to distinguish between value of respondent’s land and value of

respondent's business – Whether Court of Appeal erred in holding Tribunal erred in failing to apply “conventional *Spencer* principles” in valuing land – Whether Court of Appeal erred in concluding evidence supported finding respondent's business had material goodwill.

Appealed from WASC (CA): [\[2017\] WASCA 165](#); (2017) 106 ATR 511

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4: ORIGINAL JURISDICTION

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

Constitutional Law

Unions NSW & Ors v State of New South Wales

S204/2018: *Special Case*

Catchwords:

Constitutional law – Implied freedom of political communication – Where plaintiffs assert intention to incur electoral expenditure during capped State expenditure period within meaning of *Electoral Funding Act 2018* (NSW) – Where ss 29(1) and 35 of Act cap electoral expenditure by third-party campaigners – Whether s 29(10) and/or s 35 invalid because impermissibly burden implied freedom of political communication.

Referred to Full Court on 23 October 2018

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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.

Constitutional Law

Comcare v Banerji

C12/2018: *Removed into High Court under s 40 of Judiciary Act 1903 (Cth) on 12 September 2018*

Catchwords:

Constitutional law – Implied freedom of political communication – Where employee of Department of Immigration and Citizenship used Twitter account to post anonymous “tweets” critical of Department – Where Department terminated employment under s 15 of *Public Service Act 1999* (Cth) on basis employee used social media in breach of ss 13(1), 13(7) and 13(11) of Australian Public Service Code of Conduct – Where employee submitted claim for compensation under s 14 of *Safety, Compensation and Rehabilitation Act 1988* (Cth) on basis termination led to psychological condition – Where Comcare rejected claim – Where Administrative Appeals Tribunal set aside decision on basis termination infringed implied freedom of political communication so termination not “reasonable administrative action taken in a reasonable manner” within meaning of s 5A of *Safety, Compensation and Rehabilitation Act* – Whether ss 13(11) and 15 of *Public Service Act* incompatible with implied freedom of political communication – Whether Tribunal erred in failing to find decision to terminate employment constituted “reasonable administrative action taken in a reasonable manner”.

Removed from Federal 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.

Arbitration

Rinehart & Anor v Hancock Prospecting Pty Ltd & Ors; Rinehart & Anor v Georgina Hope Rinehart (in her personal capacity and as trustee of the Hope Margaret Hancock Trust and as trustee of the HFMF Trust) & Ors

S143/2018; S144/2018: [\[2018\] HCATrans 90](#)

Date heard: 18 May 2018 – *Special leave granted on limited grounds.*

Catchwords:

Arbitration – Arbitration agreements – Interpretation – Where parties entered into series of deeds containing arbitration agreements – Where primary judge ordered trial of question whether arbitration agreements in deeds null and void, inoperative or incapable of being performed – Where Full Court stayed proceeding and referred parties to arbitration – Whether Full Court erred in concluding arbitration clauses expressed to cover disputes “under” agreement extended to disputes concerning the validity of the deeds or provisions thereof.

Appealed from FCA (FC): [\[2017\] FCAFC 170](#); (2017) 350 ALR 658 and [\[2017\] FCAFC 208](#)

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Consumer Law

Australian Securities and Investments Commission v Kobelt

A32/2018: [\[2018\] HCATrans 153](#)

Date heard: 17 August 2018 – *Special leave granted.*

Catchwords:

Consumer law – *Australian Securities and Investments Act 2001* (Cth) s 12CB, 12CC – Unconscionable conduct – Where respondent operated general store in remote town – Where respondent provided credit to indigenous customers – Where primary judge

held respondent contravened s 12CB(1) by engaging in system of unconscionable conduct in connection with supply of financial services to customers – Where Full Federal Court allowed appeal – Whether Full Federal Court erred in construction and application of ss 12CB and 12CC.

Appealed from FCA (FC): [\[2018\] FCAFC 18](#)

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Frugtniet v Australian Securities & Investments Commission

M136/2018: [\[2018\] HCATrans 155](#)

Date heard: 17 August 2018 – *Special leave granted.*

Catchwords:

Consumer law – Banning orders – *National Consumer Credit Protection Act 2009* (Cth) s 80 – *Crimes Act 1914* (Cth) s 85ZZH – Where Commission made banning order under s 80 on basis appellant not “fit and proper person to engage in credit activities” – Where Administrative Appeals Tribunal affirmed Commission’s order – Where primary judge and Full Federal Court dismissed appeals – Whether Full Federal Court erred in holding Tribunal not prevented by *Crimes Act* from considering “spent convictions”.

Appealed from FCA (FC): [\[2017\] FCAFC 162](#); (2017) 255 FCR 96

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Corporations

Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth of Australia & Ors

M137/2018: [\[2018\] HCATrans 156](#)

Date heard: 17 August 2018 – *Special leave granted.*

Catchwords:

Corporations – Trustee corporations – *Corporations Act 2001* (Cth) s 433(2) – Where creditors resolved to wind up corporate trustee – Where receivers sought directions – Where primary judge held receivers justified in proceeding on basis receivership surplus properly characterised as trust property and s 433 did not apply to surplus – Where Court of Appeal allowed appeal – Whether Court of Appeal erred in concluding “property of the company” in s 433(2) included not only trustee’s right of indemnity but also underlying

trust assets to which trustee company could have recourse – Whether Court of Appeal erred in concluding corporate trustee’s right of indemnity from trust assets was “property comprised in or subject to a circulating security interest” for purposes of s 433(2).

Appealed from VSC (CA): [\[2018\] VSCA 41](#); (2018) 330 FLR 149; (2018) 354 ALR 789; (2018) 124 ACSR 246

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Criminal Law

Director of Public Prosecutions Reference No 1 of 2017

M129/2018: [\[2018\] HCATrans 145](#)

Date determined: 15 August 2018 – *Special leave granted.*

Catchwords:

Criminal law – Trial by jury – *Prasad* direction – Where accused charged with murder – Where counsel for accused sought *Prasad* direction on basis prosecution case not strong insofar as prosecution required to prove beyond reasonable doubt accused not acting in self-defence – Where trial judge gave *Prasad* direction – Where jury returned verdicts of not guilty of murder or manslaughter – Where Director of Public Prosecutions referred point of law to Court of Appeal under s 308 of *Criminal Procedure Act 2009* (Vic) – Where Court of Appeal determined giving of *Prasad* direction not contrary to law – Where majority of Court of Appeal determined direction may continue to be administered to jury in criminal trial – Whether Court of Appeal erred in determining giving of *Prasad* direction not contrary to law – Whether majority of Court of Appeal erred in determining *Prasad* direction may continue to be administered to jury in criminal trial.

Appealed from VSC (CA): [\[2018\] VSCA 69](#)

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McKell v The Queen

S223/2018: [\[2018\] HCATrans 151](#)

Date heard: 17 August 2018 – *Special leave granted.*

Catchwords:

Criminal law – Trial by jury – Summing up – Where appellant intercepted two consignments between arrival in Sydney and

transfer to freight forwarding agency – Where second consignment contained prohibited drug – Where appellant charged with importing commercial quantity of prohibited drug, conspiring to import commercial quantity of prohibited drug and dealing with proceeds of crime – Where appellant tried before jury – Where trial judge commented on evidence in summing up – Where appellant convicted of charges – Where majority of Court of Appeal dismissed appeal against convictions – Whether majority of Court of Appeal erred in failing to find trial judge’s summing up unbalanced and caused miscarriage of justice.

Appealed from NSWSC (CA): [\[2017\] NSWCCA 291](#)

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Interpretation

Victorian Building Authority v Andriotis

M134/2018: [\[2018\] HCATrans 154](#)

Date heard: 17 August 2018 – *Special leave granted.*

Catchwords:

Interpretation – *Mutual Recognition Act 1999* (Cth) s 17, 20 – Where respondent registered in New South Wales as waterproofing technician – Where respondent applied to appellant for registration under *Building Act 1993* (Vic) – Where appellant refused to grant registration because respondent not of “good character” as required by s 170(1)(c) of *Building Act* – Where Administrative Appeals Tribunal affirmed decision – Where Full Federal Court allowed appeal – Whether Full Federal Court erred in holding appellant required by s 20(2) to register respondent for equivalent occupation under *Building Act* notwithstanding appellant found respondent not of good character – Whether Full Federal Court erred in holding exception to mutual recognition principle in s 17(2) of *Mutual Recognition Act* does not qualify “entitlement” to be registered under s 20(1) – Whether Full Court erred in holding “good character” requirement in *Building Act* not law regulating “manner” of carrying out occupation within meaning of s 17(2) of *Mutual Recognition Act*.

Appealed from FCA (FC): [\[2018\] FCAFC 24](#)

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Native Title

KN (deceased) and Others on behalf of the Tjiwarl and Tjiwarl#2 Native Title Claim Groups v State of Western Australia & Ors
P38/2018: [\[2018\] HCATrans 124](#)

Date heard: 21 June 2018 – *Special leave granted.*

Catchwords:

Native title – Extinguishment – Exploration licence – *Native Title Act 1993* (Cth) s 47B – Where unallocated Crown land subject to exploration licence granted under *Mining Act 1978* (WA) – Where native title determination application filed in respect of land – Where primary judge concluded s 47B applied because exploration licence not “lease” within meaning of s 47B(1)(b)(i) – Where Federal Court allowed appeal – Whether Federal Court erred in concluding exploration licence is “lease” within meaning of s 47B(1)(b)(i).

Appealed from FCA (FC): [\[2018\] FCAFC 8](#); (2018) 351 ALR 491

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Tjungarrayi & Ors v State of Western Australia & Ors
P37/2018: [\[2018\] HCATrans 124](#)

Date heard: 21 June 2018 – *Special leave granted.*

Catchwords:

Native title – Extinguishment – Petroleum exploration permits – *Native Title Act 1993* (Cth) s 47B – Where land subject to petroleum exploration permits granted under *Petroleum and Geothermal Energy Resources Act 1967* (WA) – Where native title determination application filed in respect of land – Where primary judge concluded s 47B applied because petroleum exploration permits not “leases” within meaning of s 47B(1)(b)(i) – Where Federal Court allowed appeal – Whether Federal Court erred in concluding petroleum exploration permits “leases” within meaning of s 47B(1)(b)(i).

Appealed from FCA (FC): [\[2018\] FCAFC 35](#)

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Procedure

Brisbane City Council v Amos

[B47/2018](#): [\[2018\] HCATrans 186](#)

Date heard: 14 September 2018 – *Special leave granted.*

Catchwords:

Procedure – Limitation periods – *Limitation of Actions Act 1974* (Qld) – Where Council commenced proceeding against respondent for overdue rates and charges – Where primary judge gave judgment for Council – Where majority of Court of Appeal allowed appeal on basis part of claim beyond 6 year limitation period in s 10(1)(d) of Act – Whether majority erred in holding proceeding falls within both ss 10(1)(d) and 26(1) of Act and inconsistency should be resolved by applying shorter limitation period in s 10(1)(d).

Appealed from QSC (CA): [\[2018\] QCA 11](#); (2018) 230 LGERA 51

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Tort

Parkes Shire Council v South West Helicopters Pty Limited

[S140/2018](#): [\[2018\] HCATrans 92](#)

Date heard: 18 May 2018 – *Special leave granted on limited grounds.*

Catchwords:

Tort – Negligence – Psychiatric injury – Where Council engaged South West Helicopters to provide helicopter and pilot for aerial survey – Where Council employees died in helicopter crash – Where relatives brought proceedings in negligence for nervous shock against Council and South West Helicopters under *Compensation to Relatives Act 1897* (NSW) – Where primary judge upheld claim – Where majority of Court of Appeal allowed appeal on basis any liability South West Helicopters might have had under *Compensation to Relatives Act* or general law excluded by *Civil Aviation (Carriers' Liability) Act 1959* (Cth) – Whether majority of Court of Appeal erred in construction of s 35 of *Civil Aviation (Carriers' Liability) Act* – Whether majority of Court of Appeal erred in failing to conclude claims against carriers brought by non-passengers following death of passenger not regulated by s 35.

Appealed from NSW (CA): [\[2017\] NSWCA 312](#); (2017) 327 FLR 110

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7: CASES NOT PROCEEDING OR VACATED

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8: SPECIAL LEAVE REFUSED

Publication of Reasons: 10 October 2018

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Result</i> |
|------------|------------------|---|---|--|
| 1. | BSE15 | Minister for Immigration and Border Protection & Anor (M76/2018) | Federal Court of Australia [2018] FCA 689 | Application dismissed [2018] HCASL 287 |
| 2. | Guss | Storace (M88/2018) | Supreme Court of Victoria (Court of Appeal) [2018] VSCA 121 | Application dismissed [2018] HCASL 288 |
| 3. | AFZ15 | Minister for Immigration and Border Protection & Anor (M92/2018) | Federal Court of Australia [2018] FCA 869 | Application dismissed [2018] HCASL 289 |
| 4. | Audsley | The Queen (M113/2018) | Supreme Court of Victoria (Court of Appeal) [2018] VSCA 162 | Application dismissed [2018] HCASL 290 |
| 5. | Corica | Throssell (P29/2018) (P30/2018) (P31/2018) | Supreme Court of Western Australia (Court of Appeal) [2017] WASCA 209 | Application dismissed [2018] HCASL 291 |
| 6. | Corica & Anor | Shire of Mundaring (P32/2018) | Supreme Court of Western Australia (Court of Appeal) [2017] WASCA 211 | Application dismissed [2018] HCASL 292 |
| 7. | BKX15 | Minister for Immigration and Border Protection & Anor (S153/2018) | Federal Court of Australia [2018] FCA 967 | Application dismissed [2018] HCASL 293 |
| 8. | AXM16 | Minister for Immigration and Border Protection & Anor (S189/2018) | Federal Court of Australia [2018] FCA 926 | Application dismissed [2018] HCASL 294 |
| 9. | AQA16 & Ors | Minister for Immigration and Border Protection & Ors (S195/2018) | Federal Court of Australia [2018] FCA 961 | Application dismissed [2018] HCASL 295 |
| 10. | CHM16 | Minister for Immigration and Border Protection & Anor (S215/2018) | Federal Court of Australia [2018] FCA 1132 | Application dismissed [2018] HCASL 296 |
| 11. | AAM15 & Ors | Minister for Immigration and Border Protection & Anor (S218/2018) | Federal Court of Australia [2018] FCA 1143 | Application dismissed [2018] HCASL 297 |
| 12. | Verma | Minister for Immigration and Border Protection & Anor (S182/2018) | Full Court of the Federal Court of Australia [2018] FCAFC 87 | Application dismissed with costs [2018] HCASL 298 |
| 13. | Gould | The Queen (S184/2018) | Supreme Court of New South Wales (Court of Criminal Appeal) [2018] NSWCCA 109 | Application dismissed [2018] HCASL 299 |

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Publication of Reasons: 17 October 2018

| No. | Applicant | Respondent | Court appealed from | Result |
|------------|---|--|--|---|
| 1. | Ragless | South Australian Field and Game Association Southern Branch Inc (A27/2018) | Full Court of the Supreme Court of South Australia [2016] SASCFC 64 | Application dismissed [2018] HCASL 302 |
| 2. | Russell | Wisewould Mahony Lawyers (M86/2018) | Supreme Court of Victoria (Court of Appeal) [2018] VSCA 125 | Application dismissed [2018] HCASL 303 |
| 3. | Mohammed | Minister for Immigration and Border Protection & Anor (M87/2018) | High Court of Australia [2018] HCA Trans 107 | Application dismissed [2018] HCASL 304 |
| 4. | Aulakh & Ors | Minister for Immigration and Border Protection & Anor (M105/2018) | Full Court of the Federal Court of Australia [2018] FCAFC 91 | Application dismissed [2018] HCASL 305 |
| 5. | In the matter of an application by Jerrod James Conomy for leave to appeal (P35/2018) | | High Court of Australia [2018] HCATrans 103 | Application dismissed [2018] HCASL 306 |
| 6. | Hughes | The State of Western Australia (P39/2018) | Supreme Court of Western Australia (Court of Criminal Appeal) [2015] WASCA 164 | Application dismissed [2018] HCASL 307 |
| 7. | SZTZY | Minister for Immigration and Border Protection & Anor (S159/2018) | Federal Court of Australia [2018] FCA 911 | Application dismissed [2018] HCASL 308 |
| 8. | CMR16 | Minister for Immigration and Border Protection & Anor (S190/2018) | Federal Court of Australia [2018] FCA 916 | Application dismissed [2018] HCASL 309 |
| 9. | Wang | MTC Australia Ltd (S203/2018) | Federal Court of Australia [2018] FCA 1037 | Application dismissed [2018] HCASL 310 |
| 10. | SZQIW | Minister for Immigration and Border Protection & Anor (S213/2018) | Federal Court of Australia [2018] FCA 1078 | Application dismissed [2018] HCASL 311 |
| 11. | White | Moffat (B38/2018) | Supreme Court of New South Wales (Court of Appeal) [2016] QCA 286 | Application dismissed [2018] HCASL 312 |
| 12. | Leeworthy | Registrar of the Licensing Appeals Tribunal & Anor (M85/2018) | Supreme Court of Victoria (Court of Appeal) [2017] VSCA 353 | Application dismissed [2018] HCASL 313 |
| 13. | BKB15 | Minister for Immigration and Border Protection & Anor (M91/2018) | Federal Court of Australia [2018] FCA 770 | Application dismissed [2018] HCASL 314 |
| 14. | AOL15 | Minister for Immigration and Border Protection & Anor (M110/2018) | Federal Court of Australia [2017] FCA 979 | Application dismissed [2018] HCASL 315 |
| 15. | In the matter of an application by Jerrod James Conomy for leave to appeal (P41/2018) | | High Court of Australia [2018] HCATrans 117 | Application dismissed [2018] HCASL 316 |

| No. | Applicant | Respondent | Court appealed from | Result |
|------------|------------------|---|--|--|
| 16. | Fathima & Ors | Minister for Immigration and Border Protection & Anor (S201/2018) | Federal Court of Australia [2018] FCA 1117 | Application dismissed [2018] HCASL 317 |
| 17. | CCG17 | Minister for Immigration and Border Protection & Anor (S214/2018) | Federal Court of Australia [2018] FCA 775 | Application dismissed [2018] HCASL 318 |
| 18. | AQP15 | Minister for Immigration and Border Protection & Anor (S221/2018) | Federal Court of Australia [2018] FCA 1103 | Application dismissed [2018] HCASL 319 |
| 19. | SZUYU | Minister for Immigration and Border Protection & Anor (S173/2018) | Federal Court of Australia [2018] FCA 786 | Application dismissed [2018] HCASL 320 |
| 20. | CTS15 | Minister for Immigration and Border Protection & Anor (S191/2018) | Federal Court of Australia [2018] FCA 938 | Application dismissed [2018] HCASL 321 |
| 21. | AEN15 | Minister for Immigration and Border Protection & Anor (M66/2018) | Federal Court of Australia [2018] FCA 509 | Application dismissed with costs [2018] HCASL 300 |
| 22. | Wilson | The Queen (M95/2018) | Supreme Court of Victoria (Court of Appeal) [2016] VSCA 62 | Application dismissed [2018] HCASL 301 |
| 23. | Pintarich | Deputy Commissioner of Taxation (H3/2018) | Full Court of the Federal Court of Australia [2018] FCAFC 79 | Application dismissed with costs [2018] HCASL 322 |
| 24. | Hunter | Regis Aged Care Pty Ltd (P26/2018) | Supreme Court of Western Australia (Court of Appeal) [2018] WASCA 50 | Application dismissed with costs [2018] HCASL 323 |
| 25. | AEP16 | Minister for Immigration and Border Protection & Anor (S87/2018) | Federal Court of Australia [2018] FCA 328 | Application dismissed with costs [2018] HCASL 324 |

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19 October 2018: Sydney

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Results</i> |
|------------|--|---|---|---|
| 1. | Singh | Minister for Immigration and Border Protection & Anor (S123/2018) | Full Court of the Federal Court of Australia [2018] FCAFC 52 | Application refused with costs [2018] HCATrans 217 |
| 2. | Elomar | The Queen (S128/2018) | Supreme Court of New South Wales (Court of Criminal Appeal) [2014] NSWCCA 303 | Application refused [2018] HCATrans 219 |
| 3. | Australian Competition and Consumer Commission | Pfizer Australia Pty Ltd (S172/2018) | Full Court of the Federal Court of Australia [2018] FCAFC 78 | Application refused with costs [2018] HCATrans 218 |

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19 October 2018: Canberra

| <i>No.</i> | <i>Applicant</i> | <i>Respondent</i> | <i>Court appealed from</i> | <i>Results</i> |
|------------|---------------------------|--|---|---|
| 1. | Paige & Ors | State of South Australia & Ors (A16/2018) | Full Court of the Federal Court of Australia [2018] FCAFC 36 | Application refused [2018] HCATrans 216 |
| | Anderson & Ors | State of South Australia & Ors (A17/2018) | Full Court of the Federal Court of Australia [2018] FCAFC 36 | Application refused [2018] HCATrans 216 |
| | Starkey & Anor | State of South Australia & Ors (A18/2018) | Full Court of the Federal Court of Australia [2018] FCAFC 36 | Application refused [2018] HCATrans 216 |
| 2. | Yazaki Corporation & Anor | Australian Competition and Consumer Commission (A24/2018) | Full Court of the Federal Court of Australia [2018] FCAFC 73 | Application refused with costs [2018] HCATrans 215 |

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