



HIGH COURT BULLETIN

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High Court of Australia Library
[2019] HCAB 10 (16 December 2019)

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
<i>Franz Boensch as trustee of the Boensch Trust v Pascoe</i>	Bankruptcy
<i>De Silva v The Queen</i>	Criminal Practice
<i>CNY17 v Minister for Immigration and Border Protection & Anor</i>	Immigration
<i>State of New South Wales v Robinson</i>	Police
<i>BMW Australia Ltd v Brewster & Anor; Westpac Banking Corporation & Anor v Lenthall & Ors</i>	Practice and Procedure

3: Cases Reserved

Case	Title
<i>Strbak v The Queen</i>	Criminal Law
<i>Love v Commonwealth of Australia; Thoms v Commonwealth of Australia</i>	Migration Law

<i>State of Western Australia v Manado & Ors;</i> <i>State of Western Australia v Augustine & Ors;</i> <i>Commonwealth of Australia v Augustine & Ors;</i> <i>Commonwealth of Australia v Manado & Ors</i>	Native Title
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4: Original Jurisdiction5: Section 40 Removal6: Special Leave Granted

Case	Title
<i>Cumberland v The Queen</i>	Criminal Law
<i>Mondelez Australia Pty Ltd v AMWU & Ors;</i> <i>Minister for Jobs and Industrial Relations v</i> <i>AMWU & Ors</i>	Employment Law
<i>Minister for Immigration and Border Protection</i> <i>v CED16 & Anor.</i>	Migration Law

7: Cases Not Proceeding or Vacated8: Special Leave Refused

2: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the December 2019 sittings.

Bankruptcy

Franz Boensch as trustee of the Boensch Trust v Pascoe

S216/2019: [\[2019\] HCA 49](#)

Judgment delivered: 13 December 2019

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

Catchwords:

Bankruptcy – Bankrupt estate – Where "the property of the bankrupt" vested in trustee in bankruptcy pursuant to s 58 of *Bankruptcy Act 1966* (Cth) – Where bankrupt held estate in land under Torrens system on trust – Whether property held by bankrupt on trust capable of vesting in trustee in bankruptcy – Whether bankrupt had a valid beneficial interest – Whether estate vested in trustee in bankruptcy in equity.

Real property – Torrens system – Caveats – Where trustee in bankruptcy lodged caveat claiming "Legal Interest pursuant to the *Bankruptcy Act 1966*" and refused or failed to withdraw caveat after request – Whether caveator liable to pay compensation under s 74P(1) of *Real Property Act 1900* (NSW) for lodging and maintaining caveat "without reasonable cause" – Whether existence of caveatable interest or honest belief on reasonable grounds in such interest sufficient for "reasonable cause" – Whether claimant established that caveator had neither caveatable interest in property nor honest belief on reasonable grounds in having such interest – Whether possibility of trust being set aside under s 120 or s 121 of *Bankruptcy Act* conferred caveatable interest – Whether caveat adequately described equitable estate in fee simple – Whether deficiency in statement of interest demonstrated absence of "reasonable cause".

Trusts – Trustees – Right of indemnity – Where trustee incurred significant expenses in his capacity as trustee ordinarily entitling him to be indemnified out of trust property – Where trustee asserted "mutually beneficial arrangement" with "the trust" – Whether asserted arrangement prejudiced trustee's right of indemnity wholly or in part – Whether value of benefits to trustee under asserted arrangement equal to or exceeded total of trust expenses incurred.

Words and phrases – "beneficial interest", "caveatable interest", "caveat against dealings", "circuity of action", "contingent beneficial interest", "determination of non-dispositive issues in appeals", "honest belief on reasonable grounds", "judicial economy", "most remote possibility of interest", "property held by the bankrupt in trust for another person", "right of indemnity", "subject to the equities", "the property divisible among the bankrupt's creditors", "the property of the bankrupt", "without reasonable cause".

Bankruptcy Act 1966 (Cth) – ss 5(1), 58, 116.

Real Property Act 1900 (NSW) – ss 74F(1), 74K, 74P(1), 90.

Appealed from FCA (FC): [\[2018\] FCAFC 234](#); (2018) 264 FCR 25; (2018) 365 ALR 24; (2018) 133 ACSR 268; (2018) 16 ABC(NS) 365

Held: Appeal dismissed with costs.

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Criminal Practice

De Silva v The Queen

B24/2019: [\[2019\] HCA 48](#)

Judgment delivered: 13 December 2019

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

Catchwords:

Criminal practice – Trial – Directions to jury – *Liberato v The Queen* (1985) 159 CLR 507 ("*Liberato*") – Where appellant convicted by jury of rape – Where appellant did not give sworn evidence at trial – Where appellant made exculpatory statements in recorded police interview – Where record of interview admitted into evidence – Where appellant did not seek *Liberato* direction at trial – Where trial judge did not give *Liberato* direction – Whether *Liberato* direction required where accused does not give sworn evidence – Whether *Liberato* direction required where record of interview containing exculpatory statements admitted into evidence.

Words and phrases – "beyond reasonable doubt", "choice between witnesses", "conflicting version of events", "criminal standard", "evidence on oath", "exculpatory answers", "interview with the police", "jury directions", "*Liberato* direction", "onus and standard of proof", "out-of-court statement", "recorded interview", "summing-up as a whole", "sworn evidence", "who do you believe", "word-on-word".

Appealed from QSC (CA): [\[2018\] QCA 274](#)

Held: Appeal dismissed.

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Immigration

CNY17 v Minister for Immigration and Border Protection & Anor
M72/2019: [\[2019\] HCA 50](#)

Judgment delivered: 13 December 2019

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

Catchwords:

Immigration – Refugees – Application for protection visa – Where Pt 7AA of *Migration Act 1958* (Cth) requires Immigration Assessment Authority ("IAA") to review certain decisions to refuse applications for protection visas – Where s 473CB(1)(a), (b) and (d) requires Secretary of Department to give certain material to IAA to conduct review – Where s 473CB(1)(c) requires Secretary to give to IAA any other material Secretary considers relevant to review – Where s 473DB requires IAA to review decision by considering material given by Secretary – Where Secretary gave material to IAA pursuant to s 473CB(1)(c) – Where material irrelevant to task of IAA – Where material prejudicial to applicant – Where applicant unaware of material – Whether jurisdictional error by Secretary – Whether jurisdictional error invalidated decision of IAA – Whether apprehended bias.

Administrative law – Judicial review – Procedural fairness – Where s 473FA requires IAA to operate free of bias – Whether apprehended bias.

Words and phrases – "apprehended bias", "bias", "fair-minded lay observer", "fast track reviewable decision", "Immigration Assessment Authority", "impartial", "irrelevant", "irrelevant and prejudicial material", "jurisdictional error", "material", "materiality", "prejudicial", "prejudicial but inadmissible", "procedural fairness", "professional decision maker", "reasonable apprehension of bias", "relevant", "relevant to the review", "required to consider", "review material", "rule against bias", "subconscious bias".

Constitution – s 75(v).

Migration Act 1958 (Cth) – Pt 7AA.

Appealed from FCA (FC): [\[2018\] FCAFC 159](#); (2018) 264 FCR 87

Held: Appeal allowed with costs.

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Police

State of New South Wales v Robinson

S119/2019: [\[2019\] HCA 46](#)

Judgment delivered: 4 December 2019

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

Catchwords:

Police – Arrest without warrant – Where s 99(1) of *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) provides that police officer may, without warrant, arrest person if police officer suspects on reasonable grounds that person is committing or has committed offence and police officer is satisfied that arrest is reasonably necessary for one or more specified reasons – Where s 99(3) provides that police officer who arrests person under s 99 must, as soon as is reasonably practicable, take person before authorised officer to be dealt with according to law – Where police officer had not formed intention to charge arrested person with offence at time of arrest – Where police officer had not formed intention to bring arrested person before authorised officer to be dealt with according to law at time of arrest – Where arrested person brought claim for damages for wrongful arrest and false imprisonment – Whether arrest unlawful.

Words and phrases – "answer a charge for an offence", "arrest", "arrest without a warrant", "as soon as is reasonably practicable", "authorised officer", "dealt with according to law", "false imprisonment", "improper purpose", "intention to charge", "investigation period", "police officer", "power to arrest", "purpose of arrest", "suspects on reasonable grounds".

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) – ss 4, 99, 105, 109, 113, 114, 115, 116.

Appealed from NSWSC (CA): [\[2018\] NSWCA 231](#)

Held: Appeal dismissed with costs.

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Practice and Procedure

BMW Australia Ltd v Brewster & Anor; Westpac Banking Corporation & Anor v Lenthall & Ors
[S152/2019](#); [S154/2019](#): [\[2019\] HCA 45](#)

Judgment delivered: 4 December 2019

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

Catchwords:

Practice and procedure – Representative action – Orders – Where s 33ZF of *Federal Court of Australia Act 1976* (Cth) and s 183 of *Civil Procedure Act 2005* (NSW) provide that in representative proceeding court may make any order court thinks appropriate or necessary to ensure justice is done in proceeding – Where representative proceedings commenced in Federal Court of Australia and Supreme Court of New South Wales – Where proceedings funded by litigation funders – Where litigation funders entered into litigation funding agreements with small number of group members – Where representative parties in each proceeding applied for common fund order – Whether s 33ZF of *Federal Court of Australia Act* and s 183 of *Civil Procedure Act* empower Federal Court of Australia and Supreme Court of New South Wales to make common fund order.

Words and phrases – "access to justice", "appropriate or necessary to ensure that justice is done in the proceeding", "award of damages", "book building", "common fund", "common fund order", "distribution of moneys recovered", "equitable sharing of costs", "fair and reasonable to all group members", "free riding", "funding commission", "funding equalisation order", "interests of justice", "litigation funding", "representative proceeding", "risk", "unfunded group members".

Civil Procedure Act 2005 (NSW) – Pt 10, ss 157, 162, 165, 166, 172, 173, 175, 177, 178, 179, 183, 184.

Federal Court of Australia Act 1976 (Cth) – Pt IVA, ss 33C, 33J, 33M, 33N, 33U, 33V, 33X, 33Z, 33ZA, 33ZB, 33ZF, 33ZJ.

Judiciary Act 1903 (Cth) – s 79.

S152/2019 appealed from NSWSC (CA): [\[2019\] NSWCA 35](#); (2019) 343 FLR 176; (2019) 366 ALR 171

S154/2019 appealed from FCA (FC): [\[2019\] FCAFC 34](#); (2019) 265 FCR 21; (2019) 366 ALR 136

Held: Appeals allowed; first respondent in S152/2019 to pay appellant's costs of appeal; respondents in S154/2019 to pay appellants' costs of appeal.

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3: CASES RESERVED

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

Constitutional Law

Smethurst & Anor v Commissioner of Police & Anor
S196/2019: [\[2019\] HCATrans 216](#); [\[2019\] HCATrans 223](#)

Date heard: 12, 13 November 2019

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

Catchwords:

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

Special Case referred to Full Court on 6 September 2019

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Corporations Law

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

Date heard: 9 October 2019

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

Catchwords:

Corporations law – Officers of corporation – Where Australian Securities and Investments Commission (“ASIC”) commenced civil penalty case against MFS Investment Management Ltd (“MFSIM”) and various directors, officers and employees of MFS Group of companies – Where proceedings against MFSIM resolved by consent but trial proceeded against individuals – Whether Court of Appeal erred by concluding that it was necessary for ASIC to prove that first respondent acted in an “office” of MFSIM in order for him to be an “officer” of MFSIM for purposes of ss 601FD and 9(b)(ii) of *Corporations Act 2001* (Cth).

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

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Criminal Law

Strbak v The Queen

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

Date heard: 6 December 2019

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

Catchwords:

Criminal law – Sentencing – Right to silence – Where appellant pleaded guilty to manslaughter of four year old son but contested factual basis of conviction – Where sentencing judge applied *R v Miller* [2004] 1 Qd R 548 which held that sentencing judge may more readily accept or draw inferences from prosecution evidence which is uncontradicted – Where contended before Queensland Court of Appeal that *Miller* is wrong and should be revisited because it impermissibly infringes on right to silence – Whether refusing to reconsider *Miller* was constructive failure by Queensland Court of Appeal to exercise its jurisdiction.

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

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The Queen v Guode

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

Date heard: 14 November 2019

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

Catchwords:

Criminal law – Sentencing — Manifest excess – Infanticide, murder and attempted murder — Where mother caused death of three children and attempted to kill fourth — Where mother pled guilty — Where mother had had traumatic life and suffered a major depressive disorder as consequence of giving birth to youngest child — Whether mother suffering from post-traumatic stress disorder – Whether Court of Appeal erred in taking into account as relevant consideration in making its determination as to manifest excess fact that prosecution had accepted plea to infanticide in respect of Charge 1 on the indictment.

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

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Evidence

Grech v The Queen; Kadir v The Queen
[S163/2019](#); [S160/2019](#): [\[2019\] HCATrans 199](#)

Date heard: 15 October 2019

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

Catchwords:

Evidence – Discretionary exclusion – Where evidence obtained improperly or illegally – *Evidence Act 1995* (NSW) – Whether New South Wales Court of Criminal Appeal (“CCA”) erred in finding appealable error in trial judge’s decision on basis that trial judge did not assess each item of evidence individually – Whether CCA erred in finding error in trial judge’s finding that s 138 factors governing exclusion of recordings “directly applicable” to other evidence obtained as consequence of illegally obtained recordings – Whether CCA erred in its application of s 138 by failing to apply correctly onus of proof and taking into account considerations contrary to evidence and failing to take into account material consideration.

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

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Migration Law

Love v Commonwealth of Australia; Thoms v Commonwealth of Australia

[B43/2018](#); [B64/2018](#): [\[2019\] HCATrans 90](#); [\[2019\] HCATrans 240](#)

Dates heard: 8 May 2019, 5 December 2019

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

Catchwords:

Migration law – Where Love born in Papua New Guinea to Australian father – Where Love identifies as descendant of Kamilaroi tribe – Where Love has five Australian children – Where Love was sentenced for an offence of assault occasioning bodily harm against s 339 of *Criminal Code 1899* (Qld) and sentenced to imprisonment of 12 months – Where Love’s Class BF Transitional (permanent) Visa cancelled under s 501(3A) of *Migration Act 1958* (Cth) – Where Love detained under s 189 of *Migration Act* on suspicion of being an “unlawful non-citizen” – Where cancellation of Love’s visa revoked under s 501CA(4) of *Migration Act* and Love released from immigration detention – Where Thoms born in New Zealand to Australian mother – Where Thoms identifies as member of Gunggari People – Where Thoms has one Australian child – Where Thoms sentenced to imprisonment of 18 months for assault occasioning bodily harm contrary to ss 339(1) and 47(9) of *Criminal Code* – Where Thoms’ Subclass 444 Special Category (temporary) Visa cancelled under s 501(3A) of *Migration Act* – Where Thoms was and remains detained purportedly under s 189 of *Migration Act* on suspicion of being an “unlawful non-citizen” – Whether each of Love and/or Thoms an “alien” within meaning of s 51(xix) of *Constitution* (Cth).

Special Cases referred to Full Court on 5 March 2019

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Native Title

State of Western Australia v Manado & Ors; State of Western Australia v Augustine & Ors; Commonwealth of Australia v Augustine & Ors; Commonwealth of Australia v Manado & Ors

[P34/2019](#); [P35/2019](#); [P36/2019](#); [P37/2019](#): [\[2019\] HCATrans 238](#)

Date heard: 3 December 2019

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

Catchwords:

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

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

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Taxation

BHP Billiton Limited (now named BHP Group Limited) v Commissioner of Taxation

B28/2019: [\[2019\] HCATrans 211](#)

Date heard: 5 November 2019

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

Catchwords:

Taxation – Where appellant is part of dual-listed company arrangement with non-resident company – Where third company (BMAG) indirectly owned by appellant and non-resident company – Where BMAG derived income from sale of commodities purchased from non-resident company's Australian subsidiaries – Whether non-resident company's Australian subsidiaries were "associates" of BMAG within meaning of s 318 of *Income Tax Assessment Act 1936* (Cth) – Whether BMAG, appellant and/or non-resident company were "sufficiently influenced" by appellant and/or non-resident company within meaning of s 318(6) – Whether Full Court erred in concluding that a person or entity acts "in accordance with" directions, instructions or wishes of another entity for purposes of s 318(6)(b) if person or entity merely acts "in harmonious correspondence, agreement or conformity with" those directions, instructions or wishes – Whether Full Court should have found that,

in order to act "in accordance with" directions, instructions or wishes of another entity for purposes of s 318(6)(b) a person or entity must treat that other entity's directions, instructions or wishes as themselves being a sufficient reason so to act – Whether Full Court erred in finding that at a minimum appellant and BHP Billiton Plc each acted "in accordance with" the "directions, instructions or wishes" of the other for purposes of s 318(6)(b) – Whether Full Court should have concluded that such actions were not done "in accordance with" the "directions, instructions or wishes" of the other for purposes of s 318(6)(b).

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

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Commissioner of State Revenue v Rojoda Pty Ltd
P26/2019: [\[2019\] HCATrans 213](#); [\[2019\] HCATrans 214](#)

Date heard: 6, 7 November 2019

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

Catchwords:

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

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

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Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd
S161/2019: [\[2019\] HCATrans 203](#)

Date heard: 17 October 2019

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

Catchwords:

Taxation – Customs and Excise – Tariff classification – Classifying vitamin preparations and garcinia preparations – Medicaments – Whether Full Court erred in holding Administrative Appeals Tribunal (“Tribunal”) had not erred in construing Note 1(a) to Chapter 30 of Sch 3 of *Customs Tariff Act 1995* (Cth) (“Act”) – Whether Full Court erred in holding that Tribunal had not erred in construing heading 2106 of Act.

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

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4: ORIGINAL JURISDICTION

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

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5: SECTION 40 REMOVAL

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

Constitutional Law

KMC v Director of Public Prosecutions (SA)

[A20/2019](#): Removed into the High Court under s 40 of the Judiciary Act 1903 (Cth) on 30 August 2019

Catchwords:

Constitutional law – Ch III of *Constitution* (Cth) – Invalidity – Where appellant convicted of one count of persistent sexual exploitation of child contrary to s 50 of *Criminal Law Consolidation Act 1935* (SA) (“CLCA”) – Where CLCA repealed on 24 October 2017 and *Statutes Amendment (Attorney-General’s Portfolio) (No 2) Act 2017* (SA) (“Amendment Act”) commenced – Whether s 9(1) of Amendment Act invalid because it impermissibly directs manner or outcome of exercise of appellate jurisdiction, impermissibly impairs institutional integrity of appellate court and/or sentencing court, and/or amounts to or involves an exercise of part of judicial power by Parliament of South Australia in manner contrary to scheme of Ch III of *Constitution*.

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

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6: SPECIAL LEAVE GRANTED

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

Administrative Law

CXXXVIII v Commonwealth of Australia & Ors

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

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

Catchwords:

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

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

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Hocking v Director-General of the National Archives of Australia

S262/2019: [\[2019\] HCATrans 160](#)

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

Catchwords:

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

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

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Northern Land Council & Anor v Quall & Anor

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

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

Catchwords:

Administrative law – Delegation of statutory functions and powers – Administrative necessity – Statutory interpretation – Where proceedings at first instance challenged certification of application to register Kenbi Indigenous Land Use Agreement on ground that it had been done without “delegated authority” – Where Full Court held Pt 11 of *Native Title Act 1993* (Cth) evinced intention that certification functions could not be delegated – Whether Northern Land Council had power to delegate its certification functions under s 203BE(1)(b) of *Native Title Act 1993* (Cth) to its Chief Executive Officer.

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

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

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Consumer Protection

Moore v Scenic Tours Pty Ltd

S285/2019: [\[2019\] HCATrans 189](#)

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

Catchwords:

Consumer protection – Disappointment and distress damages – Where representative proceedings brought on behalf of passengers who paid for and travelled on European river cruises supplied by respondent – Where number of cruises seriously disrupted by high water levels on rivers – Where seeking compensation for loss of value and damages for disappointment and distress – Whether s 275 of Australian Consumer Law (“ACL”) operates to apply s 16 of *Civil Liability Act 2002* (NSW) as Commonwealth law to direct court

exercising federal jurisdiction in how to fix damages under s 267(4) of ACL for breach of statutory guarantees in ss 60 and 61 of ACL – Whether s 16 limited to cases where tort claim governed by NSW law or death or injury suffered in NSW – Whether claim under s 267(4) for damages for disappointment and distress constituted claim governed by s 16 – Whether Court of Appeal erred in finding that claim for damages under s 267(4) of ACL unrelated to bodily injury or psychiatric illness constituted claim for “personal injury” and “personal injury damages” and claim for “pain and suffering” or “loss of amenities of life” so as to be governed by s 16 of *Civil Liability Act*.

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

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Criminal Law

Coughlan v The Queen

B60/2019: [\[2019\] HCATrans 205](#)

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

Catchwords:

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

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

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Cumberland v The Queen

D10/2019: [\[2019\] HCATrans 243](#)

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

Catchwords:

Criminal law – Sentencing – Crown appeal – Re-sentencing – Where appellant pled guilty to six counts relating to selling cannabis and MDMA – Whether Court of Criminal Appeal (“CCA”) erred when re-

sentencing in failing to take into account delay and its effect on appellant, submissions of prosecution at sentencing, appellant's age and prospects of rehabilitation, and relevant developments since sentencing – Whether CCA erred in separately determining that appeal should be allowed when principles to be applied and circumstances applicable at time of any re-sentencing unknown – Whether CCA failed to accord appellant procedural fairness.

Appealed from NT (CCA): [\[2019\] NTCCA 13](#); [\[2019\] NTCCA 14](#)

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Pell v The Queen

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

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

Catchwords:

Criminal law – Unreasonable verdicts – Where applicant convicted of sexual offences against two child complainants – Where Crown case relied on evidence of one complainant and the other complainant deceased – Whether Court of Appeal majority erred by finding that their belief in complainant required applicant to establish that offending was impossible to raise and leave reasonable doubt – Whether majority erred in concluding that verdicts not unreasonable as, in light of findings made by them, there remained reasonable doubt as to existence of any opportunity for offending to have occurred.

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

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

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

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

Catchwords:

Criminal law – Derivative criminal liability – Where victim killed by stab wound to chest inflicted in course of attack by group of eight

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

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

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Singh v The Queen; Nguyen v The Queen
[D16/2019; D15/2019](#): [\[2019\] HCATrans 159](#)

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

Catchwords:

Criminal law – Prosecutor’s duties regarding “mixed statement” records of interview containing both inculpatory and exculpatory material – Where Crown chose not to adduce applicant’s record of interview of 8 June 2017 – Whether Crown’s decision not to adduce record of interview deprived applicant of reasonable chance of acquittal – Whether prosecution ordinarily required by duty of fairness to tender “mixed statement” record of interview at trial of accused when it is admissible – Whether prosecution permitted to decline to tender “mixed statement” records of interview for purely tactical reasons.

D16/2019 appealed from NTSC (CCA): [\[2019\] NTCCA 8](#)
D15/2019 appealed from NTSC (FC): [\[2019\] NTSC 37](#)

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Swan v The Queen
[S291/2019](#): [\[2019\] HCATrans 193](#)

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

Catchwords:

Criminal law – Causation – Where accused and another tried and convicted for murder – Where victim died almost eight months after assault – Where assault caused victim serious injuries amounting to grievous bodily harm – Where victim died due to complications from fractured hip not sustained during assault – Whether Crown case

theory on cause of death not supported by evidence and should not have been left to jury – Whether miscarriage of justice resulted from crown prosecutor’s closing address about causation.

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

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Employment Law

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

M110/2019; M113/2019: [\[2019\] HCATrans 250](#)

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

Catchwords:

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

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

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Evidence

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

Date part heard: 10 October 2019

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

Catchwords:

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

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

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Family Law

Hsiao v Fazarri

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

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

Catchwords:

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

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

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Intellectual Property

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

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

Catchwords:

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

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

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Migration Law

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

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

Catchwords:

Migration law – Protection visa – Where delegate accepted as plausible that applicant had been sexually tortured – Where such claim not accepted by Immigration Assessment Authority (“IAA”) – Whether IAA decision tainted by jurisdictional error due to failure to

exercise discretion under s 473DC of *Migration Act 1958* (Cth) to invite applicant to give new information in form of interview – Whether failure of IAA to exercise its s 473DC discretion was material to decision and constituted jurisdictional error.

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

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Minister for Immigration and Border Protection v CED16 & Anor
S275/2018: [\[2019\] HCATrans 246](#)

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

Catchwords:

Migration law – Safe Haven Enterprise Visa – Fast-track review – Where applicant issued certificate to Immigration Assessment Authority (“IAA”) under s 473GB(5) of *Migration Act 1958* (Cth) – Where common ground that certificate invalid – Whether certificate comprised ‘new information’ as defined in s 473DC(1) of Act – Whether IAA required to turn its mind, or show that it had turned its mind, to whether it was required to give particulars of information in certificate itself to first respondent pursuant to s 473DE(1) of Act.

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

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Statutory Interpretation

Binsaris v Northern Territory of Australia; Webster v Northern Territory of Australia; O’Shea v Northern Territory of Australia; Austral v Northern Territory of Australia
D11/2019; D12/2019; D13/2019; D14/2019: [\[2019\] HCATrans 163](#)

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

Catchwords:

Statutory interpretation – Power of superintendent of youth detention centre – Use of CS gas (form of tear gas) in youth detention centre – Where prison officers called upon to assist at youth detention centre – Where CS gas was deployed – Whether exemption in s 12(2) of *Weapons Control Act* (NT) applied to deployment of CS gas by prison officer at youth detention centre –

Whether superintendent's general power under s 152(1) of *Youth Justice Act* (NT) limited by s 153(3).

Appealed from NTSC (CA): [\[2019\] NTCA 1](#); (2019) 343 FLR 41

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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 on limited grounds.*

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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Tort Law

Lewis v The Australian Capital Territory

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

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

Catchwords:

Torts – False imprisonment – Compensatory damages – Vindictory damages – Principle of inevitability – Where offender sentenced to 12 months' imprisonment to be served by periodic detention –

Where Sentence Administration Board ("Board") cancelled periodic detention without giving offender opportunity to decide whether to attend before Board – Where offender arrested and imprisoned for 82 days – Where Board's decision a nullity and imprisonment held to be unlawful – Where offender awarded nominal damages of \$1 – Whether offender would have been lawfully imprisoned if had not been unlawfully imprisoned and therefore not entitled to substantial compensatory damages – Whether entitled to vindictory damages.

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

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

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

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

Catchwords:

Torts – Negligence – Where appellant suffered severe asthma attack – Where ambulance officer treated appellant initially with salbutamol and later with adrenaline – Where appellant suffered hypoxic brain damage and died without regaining consciousness 13 years later – Where ambulance officer's manual instructed officer to "consider adrenaline", not salbutamol – Whether Court of Appeal erred in overturning trial judge's conclusions that ambulance officer had considered administration of adrenaline in accordance with manual, and that responsible body of opinion in medical profession supported administration of salbutamol – Whether Court of Appeal erred in holding that ambulance officer immediately rejected use of adrenaline because he misunderstood guideline, and that following responsible body of medical opinion would nonetheless involve failure to take reasonable care because manual referred to adrenaline.

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

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Trade Practices

Berry & Anor v CCL Secure Pty Ltd

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

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

Catchwords:

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

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

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

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7: CASES NOT PROCEEDING OR VACATED

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8: SPECIAL LEAVE REFUSED

Publication of Reasons: 4 December 2019

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	CPU18	Minister for Home Affairs & Anor (B44/2019)	Federal Court of Australia [2019] FCA 922	Application Dismissed with costs [2019] HCASL 381
2.	Chin ex parte	(P43/2019)	Supreme Court of Western Australia (Court of Appeal) [2019] WASCA 116	Application Dismissed [2019] HCASL 382
3.	CHH16	Minister for Immigration and Border Protection & Anor (S267/2019)	Federal Court of Australia [2019] FCA 1278	Application Dismissed [2019] HCASL 383
4.	BZP15	Minister for Immigration and Border Protection & Anor (S282/2019)	Federal Court of Australia [2019] FCA 1351	Application Dismissed [2019] HCASL 384
5.	EVW18	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (S284/2019)	Federal Court of Australia [2019] FCA 1363	Application Dismissed [2019] HCASL 385
6.	FDN17	Minister for Immigration and Border Protection & Anor (S290/2019)	Federal Court of Australia [2019] FCA 1395	Application Dismissed [2019] HCASL 386
7.	CVO17	Minister for Immigration and Border Protection & Anor (S306/2019)	Federal Court of Australia [2019] FCA 1612	Application Dismissed [2019] HCASL 387
8.	BGC (Australia) Pty Ltd	Machali (P50/2019)	Supreme Court of Western Australia (Court of Appeal) [2019] WASCA 121	Application Dismissed with costs [2019] HCASL 388
9.	Riva NSW Pty Limited	Official Trustee in Bankruptcy (S259/2019)	Supreme Court of New South Wales (Court of Appeal) [2019] NSWCA 186	Application Dismissed with costs [2019] HCASL 389

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Publication of Reasons: 6 December 2019

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Kowalski	Mitsubishi Motors Australia Limited (A24/2019)	Supreme Court of South Australia Full Court [2019] SASCFC 95	Application Dismissed [2019] HCASL 390
2.	Kowalski	Sim & Ors (A26/2019)	Supreme Court of South Australia Full Court [2019] SASCFC 96	Application Dismissed [2019] HCASL 391
3.	BCQ16	Minister for Immigration and Border Protection & Anor (S105/2018)	Federal Court of Australia [2018] FCA 365	Application Dismissed with costs [2019] HCASL 392
4.	CZD18	Minister for Home Affairs & Anor (S279/2019)	Federal Court of Australia [2019] FCA 1442	Application Dismissed [2019] HCASL 393
5.	CPI15	Minister for Immigration and Border Protection & Anor (S287/2019)	Federal Court of Australia [2019] FCA 1422	Application Dismissed [2019] HCASL 394
6.	EUG17	Minister for Immigration and Border Protection & Anor (S294/2019)	Federal Court of Australia [2019] FCA 421	Application Dismissed [2019] HCASL 395

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Publication of Reasons (Sydney): 11 December 2019

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	EDU17	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor (A23/2019)	Federal Court of Australia [2019] FCA 1428	Application Dismissed [2019] HCASL 396
2.	Young (Bankrupt)	Crime and Corruption Commission (CCC) (B59/2019)	Supreme Court of Queensland (Court of Appeal) [2019] QCA 189	Application Dismissed [2019] HCASL 397
3.	CPP18	Minister for Home Affairs & Anor (S247/2019)	Federal Court of Australia [2019] FCA 1115	Application Dismissed with costs [2019] HCASL 398
4.	SZVZI	Minister for Home Affairs & Anor (S281/2019)	Federal Court of Australia [2019] FCA 1390	Application Dismissed [2019] HCASL 399
5.	FGI17 & Ors	Minister for Home Affairs & Anor (S288/2019)	Federal Court of Australia [2019] FCA 1435	Application Dismissed [2019] HCASL 400
6.	BBN16	Minister for Immigration and Border Protection & Anor (S299/2019)	Federal Court of Australia [2019] FCA 1478	Application Dismissed [2019] HCASL 401
7.	Playford Vineyard Pty Ltd	Wishford Nominees Pty Ltd (A21/2019)	Supreme Court of South Australia (Full Court) [2019] SASCFC 99	Application Dismissed with costs [2019] HCASL 402
8.	Tran & Anor	Minister for Home Affairs & Anor (B49/2019)	Federal Court of Australia [2019] FCA 1126	Application Dismissed with costs [2019] HCASL 403
9.	Abbott	The Queen (P39/2019)	Supreme Court of Western Australia (Court of Appeal) [2019] WASCA 90	Application Dismissed [2019] HCASL 404

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Publication of Reasons: 13 December 2019

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	MDV	The Queen (A19/2019)	Supreme Court of South Australia (Court of Criminal Appeal) [2019] SASCFC 59	Application dismissed [2019] HCASL 405
2.	Thafer	The Queen (S238/2019)	Supreme Court of New South Wales (Court of Criminal Appeal) [2019] NSWCCA 143	Application dismissed [2019] HCASL 406

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13 December 2019: Canberra

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	Return to Work Corporation of South Australia	Stephenson (A17/2019)	Supreme Court of South Australia (Full Court) [2019] SASCF 89	Application refused with costs [2019] HCATrans 249
2.	Gordon Nominees Pty Ltd	JPA Finance Pty Ltd (M95/2019)	Supreme Court of Victoria (Court of Appeal) [2019] VSCA 159	Application refused with costs [2019] HCATrans 248
3.	Bishop	The Council of the City of Sydney (S234/2019)	Supreme Court of New South Wales (Court of Appeal) [2019] NSWCA 157	Application refused with costs [2019] HCATrans 247
4.	Australian Broadcasting Corporation & Ors	Chau (S263/2019)	Full Court of the Federal Court of Australia [2019] FCAFC 125	Application refused with costs [2019] HCATrans 245

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