



HIGH COURT BULLETIN

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High Court of Australia Library
[2019] HCAB 1 (26 February 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>Unions NSW & Ors v State of New South Wales</i>	Constitutional Law
<i>Work Health Authority v Outback Ballooning Pty Ltd & Anor</i>	Constitutional Law
<i>Williams v Wreck Bay Aboriginal Community Council & Anor</i>	Constitutional Law
<i>McKell v The Queen</i>	Criminal Law
<i>Minister for Immigration and Border Protection v SZMTA & Anor; CQZ15 v Minister for Immigration and Border Protection & Anor; BEG15 v Minister for Immigration and Border Protection & Anor</i>	Migration Law

3: Cases Reserved

Case	Title
<i>Plaintiff M47/2018 v Minister for Home Affairs & Anor</i>	Constitutional Law
<i>Frugtniet v Australian Securities & Investments Commission</i>	Consumer Law
<i>Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth of Australia & Ors</i>	Corporations Law
<i>OKS v The State of Western Australia</i>	Criminal Law
<i>Victorian Building Authority v Andriotis</i>	Interpretation

4: Original Jurisdiction

Case	Title
<i>Spence v State of Queensland</i>	Constitutional Law

5: Section 40 Removal6: Special Leave Granted

Case	Title
<i>BVD17 v Minister for Immigration and Border Protection & Anor</i>	Migration Law
<i>The Queen v A2; The Queen v Magennis; The Queen v Vaziri</i>	Criminal Law

7: Cases Not Proceeding or Vacated

2: CASES HANDED DOWN

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

Constitutional Law

Unions NSW & Ors v State of New South Wales

S204/2018: [\[2019\] HCA 1](#)

Judgment delivered: 29 January 2019

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

Catchwords:

Constitutional law (Cth) – Implied freedom of communication on governmental and political matters – Where s 29(10) of *Electoral Funding Act 2018* (NSW) ("EF Act") substantially reduced cap on electoral expenditure applicable to third-party campaigners from cap applicable under previous legislation – Where third-party campaigners subject to substantially lower cap than political parties – Where s 35 of EF Act prohibits third-party campaigner from acting in concert with another person to incur electoral expenditure exceeding cap – Where preparatory materials to EF Act recommended reduction in cap for various reasons, including that third parties should not be able to "drown out" political parties, which should have a "privileged position" in election campaigns – Where subsequent parliamentary committee report recommended that, before reducing cap, government consider whether proposed reduced cap would enable third-party campaigners reasonably to present their case – Where no evidence that such consideration was undertaken – Whether s 29(10) enacted for purpose compatible with maintenance of constitutionally prescribed system of representative government – Whether s 29(10) necessary to achieve that purpose – Whether necessary to decide validity of s 35.

Words and phrases – "capped expenditure period", "compatible with maintenance of the constitutionally prescribed system of representative government", "deference to Parliament", "domain of selections", "domain of the legislative discretion", "effect of the law", "electoral expenditure", "expenditure cap", "justified", "legislative purpose", "legitimate purpose", "level playing field", "marginalise", "margin of appreciation", "necessity", "reasonably appropriate and adapted", "third-party campaigner".

Constitution – ss 7, 24.

Electoral Funding Act 2018 (NSW) – ss 3, 29, 33, 35.

Expenditure and Disclosures Act 1981 (NSW) – ss 4, 4A, 95F.

Held: Questions answered

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Work Health Authority v Outback Ballooning Pty Ltd & Anor
D4/2018: [\[2019\] HCA 2](#)

Judgment delivered: 6 February 2019

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

Catchwords:

Constitutional law (Cth) – Powers of Commonwealth Parliament – Territories – Inconsistency between Commonwealth and Territory laws – Where Commonwealth civil aviation law regulates matters preparatory to and subsequent to aircraft flight including embarkation and disembarkation of passengers – Where Commonwealth law implements and extends international obligations designed to achieve uniformity in regulation of civil aviation – Where Territory law regulates work health and safety – Whether Commonwealth law designed to operate within framework of other State, Territory and Commonwealth laws – Whether Commonwealth law contains implicit negative proposition that it is only law with respect to safety of persons affected by operations of aircraft including embarkation – Whether Territory law inconsistent with Commonwealth law.

Words and phrases – "alter, impair or detract from", "anti-exclusivity clause", "Chicago Convention", "civil aviation", "cover the field", "embarkation", "implicit negative proposition", "indirect inconsistency", "intention to deal completely, exhaustively or exclusively", "legislative intention", "nationally harmonised laws", "operations associated with aircraft", "rule of conduct", "safety standards", "subject matter".

Constitution – ss 109, 122.

Air Navigation Act 1920 (Cth).

Civil Aviation Act 1988 (Cth) – ss 3, 3A, 9, 11, 20A, 27, 28BA, 28BD, 28BE, 29, 98.

Civil Aviation Regulations 1988 (Cth) – regs 2, 215, 235.

Crimes Act 1914 (Cth) – s 4C.

Northern Territory (Self –Government) Act 1978 (Cth) – s 6.

Work Health and Safety Act 2011 (Cth).

Work Health and Safety (National Uniform Legislation) Act 2011 (NT) – ss 19, 27, 32.

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

Held: Appeal allowed with costs to be paid by first respondent

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Williams v Wreck Bay Aboriginal Community Council & Anor
C5/2018: [\[2019\] HCA 4](#)

Judgment delivered: 13 February 2019

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

Catchwords:

Constitutional law (Cth) – Powers of Commonwealth Parliament – Territories – Inconsistency between Commonwealth and Territory laws – Where Council empowered under *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) ("Land Grant Act") to grant leases over certain land within Jervis Bay Territory ("JBT") – Where Land Grant Act does not affect application of other laws to extent other laws "capable of operating concurrently" with Land Grant Act – Where *Residential Tenancies Act 1997* (ACT) applies in JBT as if JBT formed part of Australian Capital Territory – Where *Residential Tenancies Act* provides that all leases to which it applies include "standard residential tenancy terms" including term requiring lessor to maintain premises in reasonable state of repair – Whether, and to what extent, *Residential Tenancies Act* is law which is not capable of operating concurrently with Land Grant Act.

Words and phrases – "alter, impair or detract from", "anti-exclusivity provision", "capable of operating concurrently", "complete or exhaustive statement", "implicit negative proposition", "indirect inconsistency", "residential tenancy agreement", "standard residential tenancy terms", "statutory power".

Constitution – s 109.

Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth) – ss 6, 7, 12, 38, 40, 41, 42, 46.

Australian Capital Territory (Self –Government) Act 1988 (Cth), s 28.

Jervis Bay Territory Acceptance Act 1915 (Cth) – s 4A.

Residential Tenancies Act 1997 (ACT) – ss 8, 9, 10, 54, 128, Sch 1.

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

Held: Appeal allowed; questions answered

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Criminal Law

McKell v The Queen

S223/2018: [\[2019\] HCA 5](#)

Judgment delivered: 13 February 2019

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

Catchwords:

Criminal practice – Trial – Summing-up – Where appellant convicted of drug-related offences – Where trial judge made comments on evidence that went beyond arguments advanced by prosecution – Whether trial judge may make comments which convey his or her opinion as to proper determination of disputed issue of fact to be determined by jury – Whether comments apt to create danger or substantial risk that jury might be persuaded of appellant's guilt – Whether comments so lacking in balance as to be exercise in persuading jury of appellant's guilt – Whether comments unfair to appellant – Whether comments resulted in miscarriage of justice.

Words and phrases – "comment on the facts", "discretion to comment", "disputed issue of fact", "duty to give fair and accurate instructions", "fair trial", "fairness", "fundamental task of a trial judge", "lacking in balance", "miscarriage of justice", "overawing the jury", "right to comment", "strong Crown case", "summing-up".

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

Held: Appeal allowed; conviction quashed and new trial ordered

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Migration

Minister for Immigration and Border Protection v SZMTA & Anor;
CQZ15 v Minister for Immigration and Border Protection & Anor;
BEG15 v Minister for Immigration and Border Protection & Anor
[S36/2018](#); [M75/2018](#); [S135/2018](#): [\[2019\] HCA 3](#)

Judgment delivered: 13 February 2019

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

Catchwords:

Immigration – Refugees – Administrative Appeals Tribunal – Refugee Review Tribunal – Review by Tribunal under Pt 7 of *Migration Act 1958* (Cth) – Where visa applicants sought review by Tribunal of decisions by delegates of Minister for Immigration and Border Protection to refuse visas – Where Secretary of Department of Immigration and Border Protection gave Tribunal documents considered relevant to Tribunal's review – Where Secretary or officer of Department purported to notify Tribunal that s 438 of Act applied to information contained in provided documents – Where s 438 applies if either of two preconditions concerning confidentiality or public interest in non-disclosure of documents or information met – Where s 438(3) conferred discretions on Tribunal, upon notification that s 438 applies to document or information, to have regard to matter in document or to information and to disclose such matter or information to applicant for review – Where fact of notification not disclosed to visa applicants during Tribunal's review – Where notifications incorrect and invalid – Whether procedural fairness required Tribunal to disclose fact of notification to visa applicants – Whether incorrect and invalid notification resulted in denial of procedural fairness.

Administrative law – Judicial review – Jurisdictional error – Procedural fairness – Materiality – Where denial of procedural fairness occurred – Whether denial constitutes jurisdictional error if and only if denial was material in that denial deprived applicant for review of possibility of successful outcome – Whether Tribunal's review affected by jurisdictional error.

Words and phrases – "disclosure", "discretion to refuse relief", "document or information", "fact of notification", "incorrect and invalid notification", "jurisdictional error", "material", "onus of proof", "possibility of a successful outcome", "practical injustice", "procedural fairness", "s 438 certificate".

Migration Act 1958 (Cth) – Pt 7.

Appealed from FCA (FC): [\[2017\] FCA 1055](#); (2017) 255 FCR 215 (S36/2018); [\[2017\] FCAFC 194](#); (2017) 253 FCR 1 (M75/2018); [\[2017\] FCAFC 198](#); (2017) 253 FCR 36 (S135/2018)

Held: S36/2018 appeal allowed with costs to be paid by first respondent; M75/2018 appeal dismissed with costs, application for special leave to cross-appeal dismissed with costs; S135/2018 appeal dismissed with costs

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3: CASES RESERVED

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

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 234](#); [\[2018\] HCATrans 236](#)

Date heard: 13 and 14 November 2018

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

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) 257 FCR 442; (2017) 350 ALR 658; [\[2017\] FCAFC 208](#)

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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 s 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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Plaintiff M47/2018 v Minister for Home Affairs & Anor

M47/2018: [\[2019\] HCATrans 9](#)

Orders made: 13 February 2019, reasons to be published at later date

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

Catchwords:

Constitutional law – Constitution Ch III – Detention – Immigration detention – Where plaintiff arrived in Australia in 2010 – Where plaintiff detained under ss 189 and 196 of *Migration Act 1958* (Cth) – Where plaintiff claims he has no right, or entitlement to obtain right, to enter or reside in any country – Whether ss 189 and 196 of Act authorise detention of plaintiff – If yes, whether ss 189 and 196 of Act beyond legislative power of Commonwealth insofar as they apply to plaintiff.

Questions answered

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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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Consumer Law

Australian Securities and Investments Commission v Kobelt

A32/2018: [\[2018\] HCATrans 252](#)

Date heard: 4 December 2018

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

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 – Whether Full Court gave due weight to special disadvantage or vulnerability of customers and gave undue weight to voluntary entry into agreements.

Appealed from FCA (FC): [\[2018\] FCAFC 18](#); (2018) 352 ALR 689

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Frugtniet v Australian Securities & Investments Commission

M136/2018: [\[2019\] HCATrans 7](#)

Date heard: 7 February 2019

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

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 Law

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

M137/2018: [\[2019\] HCATrans 6](#)

Date heard: 5 February 2019

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

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) 54 VR 230; (2018) 354 ALR 789; (2018) 124 ACSR 246; (2018) 330 FLR 149

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Criminal Law

Director of Public Prosecutions Reference No 1 of 2017

[M129/2018](#): [\[2018\] HCATrans 227](#)

Date heard: 6 November 2018

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

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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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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OKS v The State of Western Australia

P62/2018: [\[2019\] HCATrans 11](#)

Date heard: 14 February 2019

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

Catchwords:

Criminal law – Jury directions – Application of proviso – *Criminal Appeals Act 2004* (WA) s 30(4) – Where appellant charged with four counts of indecently dealing with child – Where appellant acquitted of all but one count – Where trial judge directed jury not to reason all complainant's evidence dishonest and cannot be relied upon on basis complainant told or admitted she told lie – Where Court of Appeal found direction erroneous but dismissed appeal on basis no substantial miscarriage of justice occurred – Whether the Court of Appeal erred in applying proviso and failing to quash the appellant's conviction.

Appealed from WASC (CA): [\[2018\] WASCA 48](#); (2018) 52 WAR 482

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Interpretation

Victorian Building Authority v Andriotis

M134/2018: [\[2019\] HCATrans 8](#)

Date heard: 12 February 2019

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

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 quality “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](#); (2018) 359 ALR 427; (2018) 161 ALD 258

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Native Title

KN (deceased) and Others on behalf of the Tjiwarl and Tjiwarl #2 v State of Western Australia & Ors

P38/2018: [\[2018\] HCATrans 233](#)

Date heard: 8 November 2018

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

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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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) 256 FCR 478; (2017) 346 ALR 247

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Tjungarrayi & Ors v State of Western Australia & Ors

[P37/2018](#): [\[2018\] HCATrans 233](#)

Date heard: 8 November 2018

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

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](#); (2018) 359 ALR 256

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Tort

Parkes Shire Council v South West Helicopters Pty Limited

S140/2018: [\[2018\] HCATrans 237](#)

Date heard: 14 November 2018

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

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) 356 ALR 63; (2017) 327 FLR 110

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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

Glencore International AG & Ors v Commissioner of Taxation of the Commonwealth of Australia & Ors

[**S256/2018**](#): *Demurrer*

Catchwords:

Constitutional law – Constitution s 75(iii) – Where defendants obtained documents held by overseas law practice – Where plaintiffs claim documents created by law practice for sole or dominant purpose of providing legal advice to plaintiffs – Whether documents subject to legal professional privilege – Whether plaintiffs entitled to injunction under *Judiciary Act 1903* (Cth) s 31 or s 32 restraining defendants and any other officer of Australian Taxation Office from relying upon, referring to or making use of documents – Whether common law of Australia confers on privilege holder actionable right to restrain use by third party of privileged communication – Whether defendants entitled and/or obliged to retain and use communications under *Income Tax Assessment Act 1936* (Cth) s 166.

Referred to Full Court on 5 November 2018

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Spence v State of Queensland

[**B35/2018**](#): *Special Case*

Catchwords:

Constitutional law (Cth) – Implied freedom of political communication – Federal legislative power with respect to federal elections – Implied doctrine of intergovernmental immunities – State immunity from Commonwealth laws – Operation of s 109 of Constitution (Cth) – Where *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld) purports to prohibit making of political donations by property developers – Whether s 275 of the *Electoral Act 1992* (Qld) and s 113B of the *Local Government Electoral Act 2011* (Qld) are invalid to the extent that they touch or concern federal elections – Whether inconsistent with s 302CA of the

Commonwealth Electoral Act 1918 (Cth) – Whether s 302CA is beyond the Commonwealth’s legislative power – Whether s 302CA of the infringes the implied intergovernmental immunity of States from Commonwealth laws – Whether s 302CA is invalid because it seeks to retrospectively override the operation of s 109 of the Constitution – Whether Subdiv 4 of Div 8 of Pt 11 of the *Electoral Act 1992* (Qld) infringes the implied freedom of political communication.

Referred to Full Court on 25 January 2019

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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.

Contract Law

Mann & Anor v Paterson Constructions Pty Ltd

M197/2018: [\[2018\] HCATrans 261](#)

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

Catchwords:

Contracts – Termination – Repudiation – Where appellants and respondent entered into building contract – Where appellants purported to terminate on basis respondent repudiated – Where respondent then purported to terminate on basis appellants' conduct constituted repudiation – Where Victorian Civil and Administrative Tribunal upheld claim by respondent for quantum meruit in amount exceeding contract price – Where Supreme Court and Court of Appeal dismissed appeals – Whether Court of Appeal erred in holding respondent entitled to sue on quantum meruit for works carried out – Whether Court of Appeal erred in holding contract price did not operate as ceiling on amount claimable – Whether Court of Appeal erred in concluding respondent able to recover for variations to works because s 38 of *Domestic Building Contracts Act 1995* (Vic) did not apply to quantum meruit claim.

Appealed from VSC (CA): [\[2018\] VSCA 231](#)

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Corporations Law

Connective Services Pty Ltd & Anor v Slea Pty Ltd & Ors

M203/2018: [\[2018\] HCATrans 263](#)

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

Catchwords:

Corporations – Financial assistance to acquire shares – *Corporations Act 2001* (Cth) s 260A – Where appellants' constitutions require member who wishes to transfer shares of particular class to first offer shares to existing holders of that class ("pre-emptive rights

provisions”) – Where appellants commenced proceeding alleging first and second respondents entered into agreement to avoid preemptive rights provisions – Where primary judge held proceeding not instituted in breach of s 260A – Where Court of Appeal allowed appeal – Whether Court of Appeal erred in holding appellants’ conduct capable of amounting to financial assistance to acquire shares within meaning of s 260A – Whether Court of Appeal erred in concluding open to primary judge to characterise appellants’ conduct as net transfer of value to appellants’ shareholders – Whether Court of Appeal erred in concluding open to primary judge to characterise conduct as capable of materially prejudicing interests of appellants and/or shareholders or creditors – Whether Court of Appeal erred in concluding financial assistance directed to enabling appellants’ shareholders to acquire shares.

Appealed from VSC (CA): [\[2018\] VSCA 180](#); (2018) 359 ALR 159

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Costs

Bell Lawyers Pty Ltd v Pentelow & Anor
S352/2018: [\[2018\] HCATrans 264](#)

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

Catchwords:

Costs – *Chorley* exception – *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 – Where first respondent is barrister – Where first respondent commenced proceedings against appellant – Where Supreme Court entered judgment for first respondent and ordered appellant to pay first respondent’s costs – Where first respondent sought to recover costs for work performed by her in addition to costs and disbursements of solicitors and counsel – Where costs assessor and review panel disallowed costs for work performed by first respondent – Where Court of Appeal allowed appeal – Whether Court of Appeal erred in concluding first respondent entitled to recover costs for time spent in conduct of proceedings – Whether Court of Appeal erred in concluding *Chorley* exception applied in circumstances where first respondent had retained solicitors and counsel – Whether Court of Appeal erred in determining s 98 of *Civil Procedure Act 2005* (NSW) permitted application of *Chorley* exception.

Appealed from NSWSC (CA): [\[2018\] NSWCA 150](#)

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The Northern Territory of Australia v Sangare
D11/2018: [\[2018\] HCATrans 254](#)

Date determined: 5 December 2018 – *Special leave granted.*

Catchwords:

Costs – Discretion to award costs – Impecuniosity – Where Department of Infrastructure offered employment to respondent – Where respondent sought support for skilled migration visa application from Minister for Infrastructure – Where Departmental officers provided briefing to Minister – Where respondent alleged briefing contained defamatory material fabricated by Department – Where respondent commenced proceedings seeking damages for publication of defamatory statements in briefing – Where Supreme Court dismissed claim – Where Court of Appeal dismissed respondent’s appeal – Where Court of Appeal declined to award appellant costs because respondent impecunious – Whether Court of Appeal erred in refusing to award costs because respondent unlikely to be able to pay any costs awarded against him.

Appealed from NTSC (CA): [\[2018\] NTCA 10](#)

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Criminal Law

The Queen v A2; The Queen v Magennis; The Queen v Vaziri
S235/2018; S236/2018; S237/2018: [\[2019\] HCATrans 16](#)

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

Catchwords:

Criminal law – Female genital mutilation – Where A2 and Magennis had been convicted of offences of female genital mutilation contrary to s 45(1)(a), *Crimes Act 1990* (NSW) – Where Vaziri had been convicted of being an accessory to those offences – Where, on appeal, the Court of Criminal Appeal of New South Wales (CCA) entered verdicts of acquittal for A2, Magennis and Vaziri – Whether the CCA erred in construing the words “otherwise mutilates” and “clitoris” in s 45(1)(a) of the *Crimes Act* – Whether “otherwise mutilates” extends to include any injury and/or damage to another person’s clitoris in s 45(1)(a) of the *Crimes Act* – Whether “clitoris” includes the clitoral hood or prepuce in s 45(1)(a) of the *Crimes Act*.

Appealed from NSWSC (CCA): [\[2018\] NSWCCA 174](#)

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Family Law

Masson v Parsons & Ors

S6/2019: [\[2018\] HCATrans 265](#)

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

Catchwords:

Family law – Parentage – Artificial insemination – Where appellant and first respondent conceived child using artificial insemination – Where appellant listed on child’s birth certificate as father – Where primary judge found appellant was “parent” for purpose of *Family Law Act 1975* (Cth) because provided genetic material for purpose of fathering child he expected to parent – Where Full Court allowed appeal on basis s 79 of *Judiciary Act 1903* (Cth) picked up s 14(2) of *Status of Children Act 1996* (NSW) which operated to determine appellant not “parent” – Whether Full Court erred in concluding s 14(2) of *Status of Children Act* operated to determine appellant not “parent” for purpose of *Family Law Act* – Whether Full Court erred in concluding s 60H of *Family Law Act* exhaustively defines parents of child for purpose of *Family Law Act*.

Appealed from FamCA (FC): [\[2018\] FamCAFC 115](#); (2018) 334 FLR 381

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Insurance Law

Lee v Lee & Ors; Hsu v RACQ Insurance Limited; Lee v RACQ Insurance Limited

B61/2018; B62/2018; B63/2018: [\[2018\] HCATrans 241](#)

Date heard: 16 November 2018 – *Special leave granted.*

Catchwords:

Insurance law – Motor vehicles – Personal injury – Where appellant injured in motor vehicle collision – Where appellant alleged injuries caused by negligence of father – Where appellant gave evidence father driving vehicle at time of collision – Where appellant’s blood located on driver airbag – Where pathologist gave evidence relating to possible source of blood – Where mechanical engineer gave evidence relating to seatbelts and airbag design – Where trial judge

concluded appellant driving vehicle – Where Court of Appeal dismissed appeal – Whether Court of Appeal failed to give adequate reasons by failing to address aspects of mechanical engineer’s evidence and inferences arising from evidence – Whether Court of Appeal erred by failing to conclude trial judge misused advantage as trial judge – Whether finding appellant was driver contrary to compelling inferences from uncontroverted evidence.

Appealed from QSC (CA): [\[2018\] QCA 104](#); (2018) 84 MVR 316

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Migration Law

BVD17 v Minister for Immigration and Border Protection & Anor
S219/2018: [\[2019\] HCATrans 13](#)

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

Catchwords:

Migration law – Procedural fairness – Where certificate issued under s 473GB of *Migration Act 1958* (Cth) – Where failure to disclose the fact of certification and appellant unaware of certificate – Whether Immigration Assessment Authority denied procedural fairness by not disclosing that part of the review material included material subject of certificate – Whether Immigration Assessment Authority failed to consider exercising discretion to disclose information – Whether Immigration Assessment Authority acted legally unreasonable in circumstances.

Appealed from FCA (FC): [\[2018\] FCAFC 114](#)

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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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7: CASES NOT PROCEEDING OR VACATED

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8: SPECIAL LEAVE REFUSED

Publication of Reasons: 6 February 2019

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	Day	Professor John Humphrey & Ors (B49/2018)	Supreme Court of Queensland (Court of Appeal) [2018] QCA 224	Application Dismissed [2019] HCASL 1
2.	Day	Professor John Humphrey & Ors (B50/2018)	Supreme Court of Queensland (Court of Appeal) [2018] QCA 224	Application Dismissed [2019] HCASL 2
3.	Colefax & Ors	National Australia Bank Limited (B52/2018)	Supreme Court of Queensland (Court of Appeal) [2018] QCA 244	Application Dismissed [2019] HCASL 3
4.	Kaur & Anor	Minister for Immigration and Border Protection & Anor (C13/2018)	Federal Court of Australia [2018] FCA 1765	Application Dismissed [2019] HCASL 4
5.	Field & Ors	Corlett & Anor (P57/2018)	Supreme Court of Western Australia (Court of Appeal) [2018] WASCA 184	Application Dismissed [2019] HCASL 5
6.	Huynh	The Queen (S283/2018)	Supreme Court of New South Wales (Court of Criminal Appeal) [2017] NSWSCCA 234	Application Dismissed [2019] HCASL 6
7.	Plaintiff S122/2018	Minister for Home Affairs & Ors (S290/2018)	High Court of Australia [2018] HCATrans 209	Application Dismissed [2019] HCASL 7
8.	Collins	The Queen (B58/2018)	Supreme Court of Queensland (Court of Appeal) [2018] QCA 277	Application Dismissed [2019] HCASL 8
9.	In the matter of an application by Jerrod James Conomy for leave to appeal (P56/2018)		High Court of Australia [2018] HCA Trans 212	Application Dismissed [2019] HCASL 9
10.	Akhtar	Gaber (S297/2018)	Full Court of the Family Court of Australia [2018] FamCAFC 176	Application Dismissed [2019] HCASL 10
11.	EAK16	Minister for Home Affairs & Anor (S301/2018)	Federal Court of Australia [2018] FCA 1663	Application Dismissed [2019] HCASL 11
12.	Tahan	Aukuso (S179/2018)	Supreme Court of New South Wales (Court of Appeal) [2018] NSWCA 117	Application Dismissed with costs [2019] HCASL 12

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Publication of Reasons: 13 February 2019

No.	Applicant	Respondent	Court appealed from	Result
1.	AIC15	Minister for Immigration and Border Protection & Anor (M89/2018)	Federal Court of Australia [2018] FCA 774	Application Dismissed [2019] HCASL 13
2.	In the matter of an application by Arjay Martin for leave to appeal (B54/2018)		High Court of Australia [2018] HCATrans 197	Application Dismissed [2019] HCASL 14
3.	Pau	The Queen (B56/2018)	Supreme Court of Queensland (Court of Appeal) [2016] QCA 197	Application Dismissed [2019] HCASL 15
4.	Gill	Minister for Immigration and Border Protection & Anor (M165/2018)	High Court of Australia [2018] HCATrans 199	Application Dismissed [2019] HCASL 16
5.	Young	Road and Maritime Services & Anor (S288/2018)	Supreme Court of New South Wales (Court of Appeal) [2018] NSWCA 106	Application Dismissed [2019] HCASL 17
6.	Chandra	Minister for Immigration and Border Protection (S291/2018)	Full Court of the Federal Court of Australia [2018] FCAFC 152	Application Dismissed [2019] HCASL 18
7.	CCQ17	Minister for Immigration and Border Protection & Anor (S304/2018)	Federal Court of Australia [2018] FCA 1641	Application Dismissed [2019] HCASL 19
8.	Luck	University of Southern Queensland (M111/2018)	Full Court of the Federal Court of Australia [2018] FCAFC 102	Application Dismissed [2019] HCASL 20
9.	Lavender & Anor	Director of Fisheries Compliance, Department of Industry, Skills and Regional Development & Ors (S233/2018)	Supreme Court of New South Wales (Court of Appeal) [2018] NSWCA 174	Application Dismissed with costs [2019] HCASL 21
10.	Xu & Ors	Minister for Immigration and Border Protection & Anor (S246/2018)	Federal Court of Australia [2018] FCA 1181	Application Dismissed with costs [2019] HCASL 22
11.	BBE15	Minister for Immigration and Border Protection & Anor (B46/2018)	Federal Court of Australia [2017] FCA 111	Application Dismissed with costs [2019] HCASL 23
12.	Western Australian Planning Commission	Board of Valuers & Anor (P47/2018)	Supreme Court of Western Australia (Court of Appeal) [2018] WASCA 145	Application Dismissed with costs [2019] HCASL 24
13.	Hooton	Minister for Home Affairs (P50/2018)	Full Court of the Federal Court of Australia [2018] FCAFC 142	Application Dismissed with costs [2019] HCASL 25

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15 February 2019: Sydney

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	Presley	The Queen (A19/2018)	Supreme Court of South Australia (Court of Criminal Appeal) [2017] SASCF 123	Application refused [2019] HCATrans 12
2.	Smith	The Queen (A29/2018)	Supreme Court of South Australia (Court of Criminal Appeal) [2017] SASCF 123	Application refused [2019] HCATrans 12
3.	Manolas	The Queen (D8/2018)	Supreme Court of the Northern Territory (Court of Criminal Appeal) [2018] NTCCA 12	Application refused [2019] HCATrans 17
4.	Zetta Jet Pte Ltd & Anor	The Ship "Dragon Pearl" & Anor (M143/2018)	Full Court of the Federal Court of Australia [2018] FCAFC 132	Application refused with costs [2019] HCATrans 14
5.	Onley	Catlin Syndicate Ltd as the Underwriting Member of Lloyd's Syndicate 2003 (S226/2018)	Full Court of the Federal Court of Australia [2018] FCAFC 119	Application refused with costs [2019] HCATrans 18
6.	Blue Visions Management Pty Ltd	Chidiac & Ors (S241/2018)	Supreme Court of New South Wales (Court of Appeal) [2018] NSWCA 179	Application refused with costs [2019] HCATrans 15

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