



HIGH COURT BULLETIN

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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>Clubb v Edwards & Anor; Preston v Avery & Anor</i>	Constitutional Law
<i>Tjungarrayi v Western Australia; KN (deceased) & Ors (Tjiwarl and Tjiwarl #2) v Western Australia</i>	Native Title

3: Cases Reserved

Case	Title
<i>Glencore International AG & Ors v Commissioner of Taxation of the Commonwealth of Australia & Ors</i>	Constitutional Law
<i>The Northern Territory of Australia v Sangare</i>	Costs
<i>Masson v Parsons & Ors</i>	Family Law
<i>Lee v Lee & Ors; Hsu v RACQ Insurance Limited; Lee v RACQ Insurance Limited</i>	Insurance Law

<i>Brisbane City Council v Amos</i>	Procedure
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4: Original Jurisdiction

Case	Title
<i>Minoque v State of Victoria</i>	Constitutional Law
<i>Palmer & Ors v Australian Electoral Commission & Ors</i>	Constitutional Law

5: Section 40 Removal

6: Special Leave Granted

Case	Title
<i>De Silva v The Queen</i>	Criminal Law
<i>HT v The Queen</i>	Criminal Law
<i>State of New South Wales v Robinson</i>	Tort 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 April 2019 sittings.

Constitutional Law

Clubb v Edwards & Anor; Preston v Avery & Anor
M46/2018; H2/2018: [\[2019\] HCA 11](#)

Judgment delivered: 10 April 2019

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

Catchwords:

Constitutional law (Cth) – Implied freedom of communication about governmental or political matters – Where s 185D of *Public Health and Wellbeing Act 2008* (Vic) and s 9(2) of *Reproductive Health (Access to Terminations) Act 2013* (Tas) prohibit certain communications and activities in relation to abortions within access zone of 150m radius around premises at which abortions are provided – Where appellants engaged in communications and activities in relation to abortions within access zone – Whether communications and activities in relation to abortions are communications about governmental and political matters – Whether provisions effectively burden implied freedom – Whether provisions imposed for legitimate purpose – Whether provisions reasonably appropriate and adapted to that purpose – Whether provisions suitable, necessary and adequate in balance.

Constitutional law (Cth) – Implied freedom of communication about governmental or political matters – Severance, reading down and disapplication – Where appellant charged and convicted of offence against s 185D of *Public Health and Wellbeing Act 2008* (Vic) – Where it was not contended that appellant's conduct involved political communication – Where substantial overlap with issues raised in proceedings in relation to interstate Act – Whether s 185D able to be severed, read down or partially disappplied so as to have valid operation in respect of appellant – Whether appropriate to proceed to determine constitutional validity of s 185D.

Words and phrases – "access zone", "adequate in its balance", "calibration", "compatible with the maintenance of the constitutionally prescribed system of representative and responsible government", "compelling purpose", "dignity", "discriminatory", "legitimate purpose", "necessary", "partial disapplication", "political communication", "privacy", "prohibited behaviour", "proportionality testing", "protest", "rational connection", "reading down",

"reasonably appropriate and adapted", "safe access zone", "severance", "structured proportionality", "suitable", "undue burden", "viewpoint neutral".

Interpretation of Legislation Act 1984 (Vic) – s 6.

Public Health and Wellbeing Act 2008 (Vic) – ss 185A, 185B, 185C, 185D, 185E.

Reproductive Health (Access to Terminations) Act 2013 (Tas) – s 9.

M46/2018 removed from Supreme Court of Victoria into High Court under s 40 of Judiciary Act 1903 (Cth) on 23 March 2018

H2/2018 removed from Supreme Court of Tasmania into High Court under s 40 of Judiciary Act 1903 (Cth) on 23 March 2018

Held: Appeals dismissed with appellants to pay respondents' costs

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Native Title

Tjungarrayi & Ors v Western Australia & Ors; KN (deceased) & Ors (Tjiwarl and Tjiwarl #2) v Western Australia
[P37/2018](#); [P38/2018](#): [\[2019\] HCA 12](#)

Judgment delivered: 17 April 2019

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

Catchwords:

Aboriginals – Native title rights – Extinguishment of rights – Where s 47B of *Native Title Act 1993* (Cth) provides that any historic extinguishment of native title rights and interests is to be "disregarded" for purposes of claim for determination of native title rights and interests over vacant Crown land – Where s 47B(1)(b)(i) provides that provision does not apply if relevant area is covered by "lease" – Where s 242(2) relevantly provides that "[i]n the case only of references to a mining lease, the expression lease also includes a licence ... or an authority" – Where native title claim groups sought native title determinations over land including parcels of unallocated Crown land – Where claim areas intersected with areas covered by petroleum exploration permits granted under *Petroleum and Geothermal Energy Resources Act 1967* (WA) or mineral exploration licence granted under *Mining Act 1978* (WA) ("exploration tenements") – Where native title right to exclusive possession had been extinguished – Whether exploration tenements were "lease[s]" within exclusion in s 47B(1)(b)(i).

Words and phrases – "declared to be or described as a lease", "disregarded", "extinguishment", "historic extinguishment", "in the case only of references to", "lease", "mineral exploration licence", "mining lease", "native title", "non extinguishment principle", "petroleum exploration permit", "principle of non discrimination", "textual reference".

Mining Act 1978 (WA) – Pt IV Div 2.

Native Title Act 1993 (Cth) – ss 47B, 242, 243, 245, 253.

Petroleum and Geothermal Energy Resources Act 1967 (WA) – Pt III Div 2.

Appealed P37/2018 from FCA (FC): [\[2018\] FCAFC 35](#); (2018) 260 FCR 247; (2018) 359 ALR 256

Appealed P38/2018 from FCA (FC): [\[2018\] FCAFC 8](#); (2018) 258 FCR 521; (2018) 351 ALR 491

Held: Appeals allowed

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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

Comcare v Banerji

C12/2018: [\[2019\] HCATrans 50](#); [\[2019\] HCATrans 51](#)

Date heard: 20 and 21 March 2019

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

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 into High Court under s 40 of Judiciary Act 1903 (Cth) on 12 September 2018

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

S256/2018: [\[2019\] HCATrans 82](#)

Date heard: 17 April 2019

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

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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Plaintiff M47/2018 v Minister for Home Affairs & Anor

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

Orders made: 13 February 2019, reasons to be published at a 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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Spence v State of Queensland

[B35/2018](#): [\[2019\] HCATrans 80](#)

Orders made: 17 April 2019, reasons to be delivered at a later date

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

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) invalid to the extent they touch or concern federal elections – Whether inconsistent with s 302CA of *Commonwealth Electoral Act 1918* (Cth) – Whether s 302CA beyond the Commonwealth's legislative power – Whether s 302CA infringes the implied intergovernmental immunity of States from Commonwealth laws – Whether s 302CA invalid because it seeks to retrospectively

override operation of s 109 of the Constitution – Whether Subdiv 4 of Div 8 of Pt 11 of the *Electoral Act 1992* (Qld) infringes implied freedom of political communication.

Questions answered

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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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Costs

The Northern Territory of Australia v Sangare

D11/2018: [\[2019\] HCATrans 68](#)

Date heard: 11 April 2019

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

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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Family Law

Masson v Parsons & Ors

S6/2019: [\[2019\] HCATrans 79](#); [\[2019\] HCATrans 81](#)

Date heard: 16 and 17 April 2019

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

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](#): [\[2019\] HCATrans 67](#)

Date heard: 10 April 2019

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

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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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 qualify “entitlement” to be registered under s 20(1) – Whether Full Court erred in holding “good character” requirement in *Building Act* not law regulating “manner” of carrying out occupation within meaning of s 17(2) of *Mutual Recognition Act*.

Appealed from FCA (FC): [\[2018\] FCAFC 24](#); (2018) 259 FCR 354; (2018) 74 AAR 78; (2018) 359 ALR 427; (2018) 161 ALD 258

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Procedure

Brisbane City Council v Amos

B47/2018: [\[2019\] HCATrans 66](#)

Date heard: 9 April 2019

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

Catchwords:

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

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

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Tort Law

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 NSWSC (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.

Administrative Law

Taylor v Attorney-General of the Commonwealth

[M36/2018](#): *Special Case*

Catchwords:

Administrative law – Judicial review – Where plaintiff lodged charge-sheet and summons at Magistrates’ Court against Aung Sun Suu Kyi (serving Foreign Minister of Myanmar) for a crime against humanity (deportation or forcible transfer of population) contrary to ss 268.11 and 268.115 of the *Criminal Code Act 1995* (Cth) – Where plaintiff sought defendant’s consent under s 268.121 of the *Criminal Code Act* to commence proceedings – Where consent refused – Whether the decision to refuse consent reviewable – Whether defendant misunderstood the law and committed jurisdictional error in refusing consent – Whether Aung Sun Suu Kyi immune from prosecution in Australia under customary international law – Whether defendant failed to afford plaintiff procedural fairness.

Referred to Full Court on 8 March 2019

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Constitutional Law

Minogue v State of Victoria

[M162/2018](#): *Special Case*

Catchwords:

Constitutional law – Parole – Where plaintiff convicted of murder of police officer – Where plaintiff sentenced to life imprisonment – Where non-parole period expired on 30 September 2016 – Where *Corrections Amendment (Parole) Act 2018* (Vic) inserted new ss 74AAA, 74AB and 127A into *Corrections Act 1986* (Vic) – Whether s 74AAA applies to plaintiff or to consideration of grant of parole to him – Whether ss 74AB and (if applicable) 74AAA substantively amount to cruel, inhuman or degrading treatment or punishment within meaning of Art 7 of International Covenant on

Civil and Political Rights – Whether provision(s) invalid as unconstitutional and/or beyond power of Victorian Parliament.

Referred to Full Court on 5 April 2019

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Palmer & Ors v Australian Electoral Commission & Ors
[B19/2019](#): *Application for constitutional writs*

Catchwords:

Constitutional law – Federal election – Where each plaintiff endorsed by United Australia Party as candidate in House of Representatives or Senate for purpose of 2019 federal election – Whether the exercise by any/all defendants of their powers under *Commonwealth Electoral Act 1918* (Cth) constrained by a statutory limitation preventing publication or release to a nationwide audience, at a time when any poll remains open in Australia, of identity of two candidates selected by Commission for each Electoral Division or of results of indicative two-candidate-preferred count – Whether a constitutional limitation to similar effect by reason of mandate for direct and popular choice contained in ss 7 and 24 of Constitution (Cth).

Referred to Full Court on 5 April 2019

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Migration Law

Love v Commonwealth of Australia; Thoms v Commonwealth of Australia

[B43/2018](#); **[B64/2018](#)**: *Special Case*

Catchwords:

Migration law – Where Love born in Papua New Guinea to Australian father – Where Love identifies as descendant of the Kamilaroi tribe – Where Love has five Australian children – Where Love was sentenced for an offence of assault occasioning bodily harm against s 339 of the *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 the *Migration Act 1958* (Cth) – Where Love detained under s 189 of *Migration Act 1958* (Cth) on suspicion of being an “unlawful non-citizen” – Where cancellation of Love’s visa revoked under s 501CA(4) of the *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 the *Criminal Code*– Where Thoms’ Subclass 444 Special Category (temporary) Visa cancelled under s 501(3A) of the *Migration Act* – Where Thom was and remains detained purportedly under s 189 of the *Migration Act* on suspicion of being an “unlawful non-citizen” – Whether each of Love and/or Thom an “alien” within the meaning of s 51(xix) of the *Constitution* (Cth).

Referred to Full Court on 5 March 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.

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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; (2018) 129 ACSR 540

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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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Criminal Law

De Silva v The Queen

B57/2018: [\[2019\] HCATrans 70](#)

Date heard: 15 April 2019 – *Special leave granted on limited grounds.*

Catchwords:

Criminal law – Misdirection or non-direction – Where appellant was acquitted of one count of rape and convicted of another count of rape – Where appellant neither gave nor called evidence at trial – Where appellant’s account of events was contained in a recording of his police interview that was tendered by prosecution – Where, in summing up, trial judge addressed evidence of appellant’s interview with police – Whether trial judge’s failure to tell jury that, even if they did not positively believe appellant’s account, they could not find against him if his answers gave rise to reasonable doubt, amounted to a miscarriage of justice – Whether Court of Appeal erred in finding that a *Liberato* direction is not required if defendant does not give evidence.

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

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Fennell v The Queen

B20/2019: [\[2019\] HCATrans 58](#)

Date heard: 22 March 2019 – *Special leave granted on limited grounds.*

Catchwords:

Criminal law – Where appellant convicted by jury of murder and sentenced to life imprisonment – Where appellant contended on appeal that there was reasonable hypothesis consistent with innocence open on evidence – Whether Court of Appeal erred in failing to find that the verdict was unreasonable or could not be supported having regard to evidence, in part because it made significant errors of fact.

Appealed from QSC (CA): [\[2017\] QCA 154](#)

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HT v The Queen

S123/2019: [\[2019\] HCATrans 75](#)

Date heard: 12 April 2019 – *Special leave granted.*

Catchwords:

Criminal law – Procedural fairness – Public interest immunity – Where appellant pleaded guilty to five counts of obtaining money by deception and six counts of dishonestly obtaining a financial advantage by deception – Where Crown appeal resulted in longer sentence of imprisonment – Where appellant as respondent to Crown appeal denied access to evidence admitted in sentencing proceedings which may have provided basis for reduction in sentence – Whether appellant was denied procedural fairness at hearing of Crown appeal against sentence by being refused access to evidence regarding her assistance to authorities on basis of public interest immunity – Whether Court of Criminal Appeal erred in exercising its discretion in s 5D of *Criminal Appeal Act 1912* (NSW) to vary sentence imposed on appellant.

Appealed from NSWSC (CCA): *R v HT* (unreported, New South Wales Court of Criminal Appeal, 17 July 2017)

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Lordianto & Anor v Commissioner of the Australian Federal Police; Kalimuthu & Anor v Commissioner of the Australian Federal Police
S110/2019; P17/2019: [\[2019\] HCATrans 54](#)

Date heard: 22 March 2019 – *Special leave granted.*

Catchwords:

Criminal law – Proceeds of crime – Where large number of deposits were made into bank accounts in amounts of less than \$10,000 – Whether each Court of Appeal misconstrued “third party” in s 330(4)(a) of the *Proceeds of Crime Act 2002* (Cth) to exclude person who acquires property at time it becomes proceeds or an instrument of an offence – Whether each Court of Appeal wrongly interpreted term “sufficient consideration” in ss 330(4)(a) and 338 as requiring connection between third party acquirer of property and person from whom property passed – Whether each Court of Appeal erred in interpreting and applying “circumstances that would not arouse a reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence” in s 330(4)(a).

S110/2019 Appealed from NSWSC (CA): [\[2018\] NSWCA 199](#); (2018) 337 FLR 17

P17/2019 Appealed from WASC (CA): [\[2018\] WASCA 192](#)

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The Queen v A2; The Queen v Magennis; The Queen v Vaziri
[S43/2019](#); [S44/2019](#); [S45/2019](#): [\[2019\] 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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Migration Law

BVD17 v Minister for Immigration and Border Protection & Anor
[S46/2019](#): [\[2019\] 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](#); (2018) 261 FCR 35

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Taxation

Commissioner of Taxation of the Commonwealth of Australia v Sharpcan Pty Ltd

M52/2019: [\[2019\] HCATrans 48](#)

Date determined: 20 March 2019 – *Special leave granted.*

Catchwords:

Taxation – Where Administrative Appeals Tribunal held that outgoing of \$600,300 incurred by the trustee of the Daylesford Royal Hotel Trust in the year ended 30 June 2010 for acquisition of 18 gaming machine entitlements under *Gambling Regulation Act 2003* (Vic) was on revenue account and therefore deductible under s 8-1 of the *Income Tax Assessment Act 1997* (Cth) – Whether Full Court (by majority) erred in upholding the decision of Tribunal instead of finding that outgoing was “of capital, or of a capital nature” – Whether Full Court erred in holding that if it was outgoing of capital or of a capital nature, it was expenditure to which s 40-880(6) of *Income Tax Assessment Act* applied and accordingly a deduction was allowable to trustee in respect of expenditure under s 40-880(2).

Appealed from FCA (FC): [\[2018\] FCAFC 163](#); (2018) 362 ALR 123

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Tort Law

State of New South Wales v Robinson

S119/2019: [\[2019\] HCATrans 76](#)

Date heard: 12 April 2019 – *Special leave granted.*

Catchwords:

Tort law – False imprisonment and wrongful arrest – Where respondent suspected of breach of apprehended violence order by police officer – Where respondent was arrested under s 99 of *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) – Where no decision to charge made at time of arrest – Whether Court of Appeal erred in concluding that for an arrest to be lawful

under s 99 there is implied requirement that arresting officer intend to charge arrested person with offence.

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

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7: CASES NOT PROCEEDING OR VACATED

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8: SPECIAL LEAVE REFUSED

Publication of Reasons: 17 April 2019

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
1.	DQG16	Minister for Immigration and Border Protection & Anor (A3/2019)	Federal Court of Australia [2018] FCA 2021	Application Dismissed [2019] HCASL 90
2.	Somasundaram	Department of Education and Training & Ors (M7/2019)	Supreme Court of Victoria (Court of Appeal) [2018] VSCA 318	Application Dismissed [2019] HCASL 91
3.	PXYJ	Minister for Home Affairs & Anor (P8/2019)	Full Court of the Federal Court of Australia [2018] FCAFC 193	Application Dismissed [2019] HCASL 92
4.	BDO15	Minister for Immigration and Border Protection & Anor (P10/2019)	Federal Court of Australia [2018] FCA 619	Application Dismissed [2019] HCASL 93
5.	BGH16	Minister for Immigration and Border Protection & Anor (S355/2018)	Federal Court of Australia [2018] FCA 1883	Application Dismissed [2019] HCASL 94
6.	EB 9 & 10 Pty Ltd	The Owners Strata Plan 934 & Anor (S1/2019)	Supreme Court of New South Wales (Court of Appeal) [2018] NSWCA 288	Application Dismissed [2019] HCASL 95
7.	Dowling	Prothonotary of the Supreme Court of New South Wales (S22/2019)	Supreme Court of New South Wales (Court of Appeal) [2018] NSWCA 340	Application Dismissed [2019] HCASL 96
8.	API16	Minister for Immigration and Border Protection & Anor (S31/2019)	Federal Court of Australia [2019] FCA 48	Application Dismissed [2019] HCASL 97
9.	DHR17	Minister for Immigration and Border Protection & Anor (A38/2018)	Federal Court of Australia [2018] FCA 1907	Application Dismissed [2019] HCASL 98
10.	CFZ15	Minister for Home Affairs & Anor (M1/2019)	Federal Court of Australia [2018] FCA 1944	Application Dismissed [2019] HCASL 99
11.	Applicant in WAD531/2016	Minister for Immigration and Border Protection & Anor (P67/2018)	Full Court of the Federal Court of Australia [2018] FCAFC 213	Application Dismissed [2019] HCASL 100
12.	Lawson	The State of Western Australia (P12/2019)	Supreme Court of Western Australia (Court of Appeal) [2018] WASCA 129	Application Dismissed [2019] HCASL 101

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
13.	CJD17	Minister for Home Affairs & Anor (S313/2018)	Federal Court of Australia	Application Dismissed [2019] HCASL 102
14.	DNB16	Minister for Immigration and Border Protection & Anor (S4/2019)	Federal Court of Australia [2018] FCA 1953	Application Dismissed [2019] HCASL 103
15.	Dimov & Anor	Burner (S8/2019)	Supreme Court of New South Wales (Court of Appeal) [2018] NSWCA 294	Application Dismissed [2019] HCASL 104
16.	CYO16	Minister for Immigration and Border Protection & Anor (S24/2019)	Federal Court of Australia [2019] FCA 2	Application Dismissed [2019] HCASL 105
17.	Chadha	ACM Group Pty Ltd (A39/2018)	Supreme Court of South Australia [2018] SASC 171	Application Dismissed [2019] HCASL 106
18.	CJD16	Minister for Immigration and Border Protection & Anor (A5/2019)	Federal Court of Australia [2019] FCA 20	Application Dismissed [2019] HCASL 107
19.	BAU16	Minister for Home Affairs & Anor (M192/2018)	Federal Court of Australia [2018] FCA 1905	Application Dismissed [2019] HCASL 108
20.	Khan	Victorian Civil and Administrative Tribunal (M11/2019)	Supreme Court of Victoria (Court of Appeal) [2018] VSCA 351	Application Dismissed [2019] HCASL 109
21.	DLB17	Minister for Home Affairs & Anor (P2/2019)	Full Court of the Federal Court of Australia [2018] FCAFC 230	Application Dismissed [2019] HCASL 110
22.	Nugawela	Deputy Commissioner of Taxation (P9/2019)	Federal Court of Australia [2018] FCA 1732	Application Dismissed [2019] HCASL 111
23.	DEC17	Minister for Immigration and Border Protection & Anor (S310/2018)	Federal Court of Australia [2018] FCA 1679	Application Dismissed [2019] HCASL 112
24.	Beni	Minister for Immigration and Border Protection & Anor (S3/2019)	Full Court of the Federal Court of Australia [2018] FCAFC 228	Application Dismissed [2019] HCASL 113
25.	SZWAA	Minister for Immigration and Border Protection & Anor (S5/2019)	Federal Court of Australia [2018] FCA 295	Application Dismissed [2019] HCASL 114
26.	Sentinel Robina Office Pty Ltd	Clarence Property Corporation Limited (B65/2018)	Supreme Court of Queensland (Court of Appeal) [2018] QCA 314	Application Dismissed with Costs [2019] HCASL 115

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
27.	LP 12	The Council of the Law Society of the Australian Capital Territory & Anor (C1/2019)	Supreme Court of the Australian Capital Territory (Court of Appeal) [2018] ACTCA 60	Application Dismissed with Costs [2019] HCASL 116
28.	Holden	The State of Tasmania (H1/2019)	Full Court of the Supreme Court of Tasmania [2018] TASFC 12	Application Dismissed with Costs [2019] HCASL 117
29.	AOV18	Minister for Home Affairs & Anor (S350/2018)	Federal Court of Australia [2018] FCA 1871	Application Dismissed with Costs [2019] HCASL 118
30.	Alterator Medical Pty Ltd (formerly known as Five Star Medical Centre Pty Ltd)	Kempsey Shire Council (S9/2019)	Supreme Court of New South Wales (Court of Appeal) [2018] NSWCA 308	Application Dismissed with Costs [2019] HCASL 119
31.	Jennings	Laming (M5/2019)	Supreme Court of Victoria (Court of Appeal) [2018] VSCA 354	Application Dismissed with Costs [2019] HCASL 120
32.	Ignatov	The Queen (S278/2018)	Supreme Court of New South Wales (Court of Criminal Appeal) [2018] NSWCCA 217	Application Dismissed [2019] HCASL 121
33.	Chiu	Minister for Home Affairs & Anor (S334/2018)	Federal Court of Australia [2018] FCA 1774	Application Dismissed with Costs [2019] HCASL 122
34.	Perera	GetSwift Limited & Anor (S336/2018)	Full Court of the Federal Court of Australia [2018] FCAFC 202	Application Dismissed with Costs [2019] HCASL 123
35.	DYK16	Minister for Immigration and Border Protection & Anor (M4/2019)	Full Court of the Federal Court of Australia [2018] FCAFC 222	Application Dismissed with Costs [2019] HCASL 124
36.	MSB (A Pseudonym)	Chief Commissioner of Police (M6/2019)	Supreme Court of Victoria (Court of Appeal) [2018] VSCA 345	Application Dismissed with Costs [2019] HCASL 125
37.	Karimbla Properties (No. 7) Pty Limited	North Sydney Council (S321/2018)	Supreme Court of New South Wales (Court of Appeal) [2018] NSWCA 257	Applications Dismissed with Costs [2019] HCASL 126
	Karimbla Properties (No.34) Pty Ltd & Ors	Bayside Council (S14/2019)	Supreme Court of New South Wales (Court of Appeal) [2018] NSWCA 257	

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
	Karimbla Properties (No.49) Pty Ltd & Ors	Council of the City of Sydney (S15/2019)	Supreme Court of New South Wales (Court of Appeal) [2018] NSWCA 257	
38.	Ibrahim	Minister for Immigration and Border Protection & Anor (S12/2019)	Federal Court of Australia [2018] FCA 2087	Application Dismissed with Costs [2019] HCASL 127
39.	Plaintiff S164/2018 A	Minister for Home Affairs (S294/2018)	High Court of Australia [2018] HCATrans 172	Application Dismissed with Costs [2019] HCASL 128
40.	Plaintiff S164/2018 B	Minister for Home Affairs (S295/2018)	High Court of Australia [2018] HCA 51	Application Dismissed with Costs [2019] HCASL 129
41.	Plaintiff S164/2018 C	The Honourable James Joshua Edelman Justice of the High Court of Australia & Anor (S331/2018)	Application for a constitutional or other writ	Application Dismissed with Costs [2019] HCASL 130

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12 April 2019: Brisbane

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	Kruithof	The Queen (B42/2018)	Supreme Court of Queensland (Court of Appeal) [2018] QCA 119	Application dismissed [2019] HCATrans 71
2.	DJF16	Minister for Home Affairs & Anor (B45/2018)	Federal Court of Australia [2018] FCA 1285	Application dismissed with costs [2019] HCATrans 72
3.	MCO	The Queen (B60/2018)	Supreme Court of Queensland (Court of Appeal) [2018] QCA 140	Application dismissed [2019] HCATrans 73
4.	Gul	The Queen (M8/2018)	Supreme Court of Victoria (Court of Appeal) [2017] VSCA 153	Application dismissed [2019] HCATrans 69

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12 April 2019: Sydney

<i>No.</i>	<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Results</i>
1.	Abdel-Hady	Minister for Immigration and Border Protection (S293/2018)	Full Court of the Federal Court of Australia [2018] FCAFC 164	Application dismissed with costs [2019] HCATrans 77
2.	Council of the Law Society of New South Wales	Levitt (S300/2018)	Supreme Court of New South Wales (Court of Appeal) [2018] NSWCA 247	Application dismissed with costs [2019] HCATrans 78
3.	Australian Building and Construction Commissioner	Auimatagi & Anor (S323/2018)	Full Court of the Federal Court of Australia [2018] FCAFC 191	Application dismissed with costs [2019] HCATrans 74

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