

Friday, 13 July 2018

## Daily Banking A Daily Bulletin listing Decisions of Superior Courts of Australia

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### CIVIL (Banking)

### Executive Summary (1 minute read)

**State of New South Wales v Thomlinson** (NSWCA) - assault - false imprisonment - malicious prosecution - State's appeal upheld - new trial ordered on certain issues

**Kabic v Workers Compensation Nominal Insurer (No. 5)** (NSWSC) - costs - determination of three remaining costs questions in dispute - costs orders made

**KQG v Trustees of the Marist Brothers** (NSWSC) - pleadings - paragraphs of further amended statement of claim 'too wide' - paragraphs struck out - second further amended statement of claim to be forwarded

**Deputy Commissioner of Taxation (Cth) v Bourke** (VSC) - summary judgment - taxation - wills and estates - grant of summary judgment for possession of property and permission to sell property - appeal dismissed

**Re Metropolis City Promotions Pty Ltd (In Liq)** (VSC) - corporations - application by administrator for approval of remuneration - application granted

**Children's Health Queensland Hospital and Health Service v AT & Anor** (QSC) - judgments and orders - 'parens patriae' jurisdiction - Court satisfied to authorised performance of hemispherotomy on child - order and declaration made

**Raedel & Raedel v Shahin** (SASC) - judgments and orders - Court satisfied to reinstate

appeals in respect of two related proceedings - Court to hear parties on form of order

## Summaries With Link (Five Minute Read)

### **State of New South Wales v Thomlinson [2018] NSWCA 151**

Court of Appeal of New South Wales

Meagher, Leeming & Payne JJA

Assault - false imprisonment - malicious prosecution - police officers 'forcibly removed' respondent from licensed premises, in course of which they 'arrested, handcuffed and searched' respondent - other officers drove respondent in "caged" police vehicle to bus stop - proceedings brought against respondent for "excluded person fail to leave premises when required" offence - charge 'withdrawn and dismissed' - respondent sued appellant for assault, false imprisonment and malicious prosecution - Court upheld claims for assault and false imprisonment and dismissed malicious prosecution claim - appellant appealed - s 77(2)(a) *Liquor Act 2007* (NSW) - 'licensee's power' - 'intoxicated' - 'quarrelsome' - four assault claims - held: appellant succeeded in relation to first and second assaults - primary judge erred in relation to 'comprehension and evaluation' of evidence in relation to 'second assault' such that redetermination of issues was required - challenges in respect of third and fourth assaults depended on outcome in respect of second assault - whether appellant was 'ultimately successful' depended on further trial's outcome - appeal allowed.

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### **Kabic v Workers Compensation Nominal Insurer (No. 5) [2018] NSWSC 1070**

Supreme Court of New South Wales

Button J

Costs - plaintiff succeeded in personal injury claim - Court gave judgment in proceedings - plaintiff's claim was dismissed against second defendant - first and third defendants were unsuccessful - determination of three remaining questions in dispute in relation to costs - second defendant's costs - plaintiff's costs against third defendant - whether third defendant should pay first defendant's costs - held: questions determined - orders made.

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### **KQG v Trustees of the Marist Brothers [2018] NSWSC 1013**

Supreme Court of New South Wales

Harrison AsJ

Pleadings - proceedings concerned plaintiff's alleged abuse while student at school - defendant sought to strike out paragraphs of further amended statement of claim - plaintiff had agreed to replead certain paragraphs - held: Court satisfied paragraphs of further amended statement of claim were 'too wide' and should be repleaded more narrowly - paragraphs of statement of claim struck out - second further amended statement of claim to be forwarded by plaintiff.

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## **Deputy Commissioner of Taxation (Cth) v Bourke [2018] VSC 380**

Supreme Court of Victoria  
Cameron J

Summary judgment - taxation - wills and estates - plaintiffs were Deputy Commissioner of Taxation of the Commonwealth of Australia - plaintiffs sought possession of property - Associate judge granted summary judgment for property's possession and declared first plaintiff entitled to sell property - deceased had been registered proprietor of property - defendants were executors appointed by deceased - one defendant currently in possession of property - whether erroneous refusal of adjournment of summary judgment application in breach of natural justice and procedural fairness - whether erroneous failure to 'accord fair hearing' under s24 *Charter of Human Rights and Responsibilities Act 2006* (Vic) - whether erroneous finding there was no real prospect of defending proceeding - whether matter should be referred to trial - public interest - res judicata - issue estoppel - held: appeal was without merit - appeal dismissed.

[Deputy Commissioner of Taxation](#)

## **Re Metropolis City Promotions Pty Ltd (In Liq) [2018] VSC 381**

Supreme Court of Victoria  
Gardiner J

Corporations - plaintiff sought remuneration as administrator of company in liquidation for certain period - whether Court satisfied to deal with application in public's absence and without attendance by plaintiff - whether plaintiff complied with r9.2(4) *Supreme Court (Corporations) Rules 2013* - whether plaintiff had received objection to Form 16 notice - whether plaintiff had standing under s449E *Corporations Act 2001* (Cth) to seek approval of remuneration - whether claimed remuneration was 'reasonable in the circumstances' - held: Court satisfied to approve remuneration in amount sought by liquidator.

[Re Metropolis](#)

## **Children's Health Queensland Hospital and Health Service v AT & Anor [2018] QSC 147**

Supreme Court of Queensland  
Atkinson J

Judgments and orders - 'parens patriae jurisdiction' - applicant sought that Court, in absence of parents' consent, provide consent for hemispherotomy to be performed on child - Court's power to override parents' wishes - 'the best interests of the child' - s22 *Supreme Court Act 1867* (Qld) - held: Court satisfied to authorise performance of hemispherotomy - order and declaration made.

[Children's Health Queensland](#)

## **Raedel & Raedel v Shahin [2018] SASC 95**

Supreme Court of South Australia  
Hinton J

Judgments and orders - application to reinstate appeals in two related proceedings concerning

# Benchmark

retaining wall between properties of parties - neither appeal 'set down within six months of commencement' - both appeals had lapsed under r296(2) *Supreme Court Civil Rules 2006* (SCCR) - nuisance - *Development Act 1993* (SA) - whether r296(2) SCCR and 'special reasons' requirement applied in respect of each appeal - whether special reasons for appeals' reinstatement - whether appeals should be reinstated - held: Court satisfied to grant reinstatement of appeals - Court to hear parties on form of order.

[Raedel](#)

## CRIMINAL

### Executive Summary

**Commissioner of Corrective Services v Liristis** (NSWCA) - criminal law - jurisdiction - Court not empowered to grant orders in relation to respondent's access to, and permission to use, printer/scanner and laptop - appeal allowed

**Audsley v The Queen** (VSCA) - criminal law - aggravated burglary - common assault - recklessly causing serious injury - armed robbery - appeal against conviction dismissed

### Summaries With Link

#### **Commissioner of Corrective Services v Liristis [2018] NSWCA 143**

Court of Appeal of New South Wales

Beazley P; Basten JA & White JA

Criminal law - jurisdiction - respondent was facing sexual assault charges and was in Long Bay Correctional Complex - respondent claimed he was 'hampered in preparation for his trial' by inability to access laptop and scanner/printer - primary judge granted respondent access to printer/scanner and laptop and permission to use them - Commissioner for Corrective Services sought to appeal - whether jurisdiction to make orders - whether orders supported by ss23 or 69 *Supreme Court Act 1970* (NSW) - inherent jurisdiction - power to deal with contempt - held: primary judge's orders were not supported by its power to deal with contempt, by its power to exercise jurisdiction for purposes of judicial review, or by its 'jurisdiction generally' - appeal allowed.

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#### **Audsley v The Queen [2018] VSCA 162**

Court of Appeal of Victoria

Maxwell P, Priest & Beach JJA

Criminal law - applicant and another convicted of aggravated burglary, common assault[,



# Benchmark

recklessly causing serious injury and armed robbery - applicant sentenced to total effective sentence of six years and six months in prison with six years non-parole period - applicant contended that trial judge had not adequately directed jury concerning identification evidence, that convictions were unsafe and unsatisfactory, and that trial judge had erroneously admitted 'irrelevant and highly prejudicial evidence' against applicant - held: grounds of appeal were without merit - appeal dismissed.

[Audsley](#)



# Benchmark

## Heaven

By: Rupert Brooke

Fish (fly-replete, in depth of June,  
Dawdling away their wat'ry noon)  
Ponder deep wisdom, dark or clear,  
Each secret fishy hope or fear.  
Fish say, they have their Stream and Pond;  
But is there anything Beyond?  
This life cannot be All, they swear,  
For how unpleasant if it were!  
One may not doubt that, somehow, Good  
Shall come of Water and of Mud;  
And, sure, the reverent eye must see  
A Purpose in Liquidity.  
We darkly know, by Faith we cry,  
The future is not Wholly Dry.  
Mud unto mud! – Death eddies near –  
Not here the appointed End, not here!  
But somewhere, beyond Space and Time,  
Is wetter water, slimier slime!  
And there (they trust) there swimmeth One  
Who swam ere rivers were begun,  
Immense, of fishy form and mind,  
Squamous, omnipotent and kind;  
And under that Almighty Fin,  
The littlest fish may enter in.  
Oh! Never fly conceals a hook,  
Fish say, in the Eternal Brook,  
But more than mundane weeds are there,  
And mud, celestially fair;  
Fat caterpillars drift around,  
And Paradisal grubs are found;  
Unfading moths, immortal flies,  
And the worm that never dies.  
And in that Heaven of all their wish,  
There shall be no more land, say fish.

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