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## Daily Civil Law Review A Daily Bulletin listing Decisions of Superior Courts of Australia

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (1 minute read)

**Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network** (NSWCA) - negligence - appellant injured due to self-harm while on leave from hospital when he attempted suicide - breach of duty by Health District but causation not established - appeal dismissed (I B C G)

**Create Business Australia Pty Ltd v AURFS Pty Ltd** (NSWSC) - injunction - restraint of trade - defendants released from undertaking - plaintiff not entitled to undertakings sought except for two qualifications (I B C G)

**Country Care Pty Ltd v Murphy** (VSC) - judicial review - Medical Panel's opinion vitiated due to denial of procedural fairness - consent orders made (I B C G)

**Telecommunications Industry Ombudsman Ltd v Commissioner of State Revenue** (VSC) - taxation - payroll tax - Commissioner's denial of exemption under s48(1)(a)(iii) *Payroll Tax Act 2007* (Vic) overturned (I B C G)

**Cargill Australia Ltd v Viterra Malt Pty Ltd (No 2)** (VSC) - discovery - commencement of foreign proceeding seeking discovery and evidence by depositions for present proceeding's purposes - injunctive relief granted (I B C G)

**AMP Bank Limited v Onion** (QSC) - judgments and orders - enforcement - defects in

application for warrant of possession - application refused (I B C G)

**National Australia Bank Ltd v Nyasa Nominees Pty Ltd** (WASC) - judgments and orders - bankruptcy - stay of sequestration order granted to second defendant in Federal Court bankruptcy proceedings - second defendant's appeal against summary judgment in present proceedings stayed pursuant to s60(2) *Bankruptcy Act 1966* (Cth) - second defendant not entitled to pursue appeal (I B C G)

## Summaries With Link (Five Minute Read)

### **Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health**

#### **Network [2017] NSWCA 123**

Court of Appeal of New South Wales

Meagher, Gleeson & Payne JJA

Negligence - appellant injured due to self-harm while on leave from hospital when he attempted suicide - appellant by tutor sued respondent in negligence - primary judge found respondent breached duty of care to appellant by failure to give adequate advice to appellant's parents but that causation not proved - appellant contended for different breach of duty on appeal - respondent objected to reliance on formulation of alleged breach of duty because it involved different case to that which was advanced at trial - appellant also challenged finding on causation - ss5B, 5D & 43A *Civil Liability Act 2002* (NSW) - held: appellant not permitted to raise new point on appeal - no error in primary judge's findings on causation - appeal dismissed.

[Daniel Smith](#) (I B C G)

### **Create Business Australia Pty Ltd v AURFS Pty Ltd [2017] NSWSC 680**

Supreme Court of New South Wales

Ball J

Injunction - restraint of trade - defendants gave Court undertaking 'not to offer to provide or provide to any person any training or instruction on money recovery methods, processes or techniques by any means whatsoever (whether by themselves, their servants, agents or anyone else) until further order of the Court, including via the websites accessible at: a. [www.moneycatch.com.au](http://www.moneycatch.com.au); and b. [www.unclaimedmoneyprofessionals.com.au](http://www.unclaimedmoneyprofessionals.com.au).' - whether defendants should be released from undertaking - whether to grant interlocutory injunction in undertaking's terms and interlocutory injunction to restrain second defendant from involvement in activities carried on by organisation 'AAVIP' - serious question to be tried - onus - s4 *Restraints of Trade Act 1976* (NSW) - held: defendants released from undertaking - plaintiff not entitled to injunctions sought subject to two qualifications.

[Create Business](#) (I B C G)

### **Country Care Pty Ltd v Murphy [2017] VSC 309**

Supreme Court of Victoria

Ginnane J

Judicial review - plaintiff was former employer of fifth defendant worker - plaintiff sought judicial review of decision of Medical Panel - parties agreed that Medical Panel's opinion was vitiated due to denial of procedural fairness - whether consent orders were appropriate - ss305 & 537 *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) - held: employer denied fair opportunity to address Panel concerning disorder causally related to workplace injury - Court satisfied consent orders were appropriate - orders made.

[Country Care](#) (I B C G)

## **Telecommunications Industry Ombudsman Ltd v Commissioner of State Revenue [2017] VSC 286**

Supreme Court of Victoria

Croft J

Taxation - payroll tax - trusts and trustees - Commissioner of State Revenue disallowed appellant's objection to denial of application for exemption from payroll tax - appellant claimed it was entitled to exemption from payroll tax in s48(1)(a)(iii) *Payroll Tax Act 2007* (Vic) - whether both limbs of s48(1) were satisfied - 'non-profit organisation having as its ... dominant purpose a charitable ... purpose' - 'engaged exclusively in work of a ... charitable ... nature for the ... non-profit organisation' - *Statute of Charitable Uses 1601* (Eng) (Statute of Elizabeth) - whether charitable purpose - whether wages paid by appellant to staff were exempt wages - held: appeal allowed - Commissioner's determination overturned.

[Telecommunications Industry Ombudsman](#) (I B C G)

## **Cargill Australia Ltd v Viterra Malt Pty Ltd (No 2) [2017] VSC 283**

Supreme Court of Victoria

Elliott J

Discovery - 'Cargill Parties' sought to prevent defendants from taking further steps in proceeding they commenced in United States District Court, District of Minnesota ('foreign proceeding') and mandatory injunction requiring them to withdraw or discontinue the foreign proceeding - in foreign proceeding, defendants sought discovery and evidence by depositions for present proceeding's purposes - ss7, 8, 9, 20, 24 & 55 *Civil Procedure Act 2010* (Vic) - held: injunctive relief granted substantially in form sought - Court did not approve commencement of foreign proceeding.

[Cargill](#) (I B C G)

## **AMP Bank Limited v Onion [2017] QSC 106**

Supreme Court of Queensland

Thomas J

Judgments and orders - enforcement - plaintiff was mortgagee in possession of a house by default judgment - tenants did not vacate premises - plaintiff sought to issue a warrant of possession - defects in application - rr906, 913 & 914 *Uniform Civil Procedure Rules 1999* (Qld)

# Benchmark

- held: plaintiff's application did not attach draft warrant - affidavit was not filed, as required, 2 business days before date of application - defects prevented Court from issuing warrant - application refused.

[AMP](#) (I B C G)

## **National Australia Bank Ltd v Nyasa Nominees Pty Ltd [2017] WASC 150**

Supreme Court of Western Australia

Banks-Smith J

Judgments and orders - bankruptcy - Registrar gave summary judgment in plaintiff's favour against second defendant and ordered second defendant to give possession of property under mortgage - second defendant appealed against Registrar's decision - second defendant was also resisting bankruptcy proceedings in Federal Court and his application to set aside bankruptcy notice was dismissed - application to appeal also dismissed - sequestration order made against second defendant's estate - trustee in bankruptcy appointed - second defendant successfully sought stay of sequestration order - second defendant sought to proceed with appeal - effect of stay of sequestration order - whether respondent able to progress appeal - held: under s60(2) *Bankruptcy Act 1966* (Cth) an action commenced by person who becomes bankrupt was stayed 'until the trustee in bankruptcy makes an election in writing to prosecute or discontinue the action' - second defendant not entitled to pursue appeal - appeal was stayed - appeal adjourned indefinitely.

[National Australia Bank](#) (I B C G)

## CRIMINAL

### Executive Summary

**Hudson (a Pseudonym) v The Queen** (VSCA) - criminal law - rape - failure to direct jury that 'complainant's evidence was of a kind that may have made it unreliable' - substantial miscarriage of justice - appeal against conviction allowed

**DPP (Cth) v Galloway (a Pseudonym) & Ors** (VSCA) - criminal law - administrative law - dissemination of examination material was unlawful but challenge to findings of recklessness and forensic disadvantage succeeded - order for stay of criminal proceedings set aside

### Summaries With Link

## **Hudson (a Pseudonym) v The Queen [2017] VSCA 122**

Court of Appeal of Victoria

Ashley, Beach & Kaye JJA

Criminal law - applicant convicted of one count of rape - applicant previously pleaded guilty to indecent assault in separate indictment - plea hearing held in respect of all charges and applicant sentenced to total effective sentence of 8 year and 6 months in prison - applicant sought to appeal against conviction and sentence - ss12, 14, 31 & 32 *Directions Act 2015* (Vic) - totality principle - held: there was substantial miscarriage of justice due to trial judge's failure to direct jury that 'complainant's evidence was of a kind that may have made it unreliable' - leave to appeal against sentence refused.

[Hudson](#)

## **DPP (Cth) v Galloway (a Pseudonym) & Ors [2017] VSCA 120**

Court of Appeal of Victoria

Maxwell J; Redlich & Beach JJA

Criminal law - administrative law - appeal concerned examinations of respondents, who were under investigation by Australian Federal Police on suspicion of offences against Commonwealth law, by the Australian Crime Commission - respondents subsequently charged with Commonwealth offences - respondents sought permanent stay of criminal proceedings on basis examinations' conduct and dissemination of examination material unlawful with result they would not be able to receive fair trial - trial judge upheld stay application, concluding respondents would be unable to receive fair trial due to material's unlawful dissemination - held: common ground unlawfulness alone could not justify stay - challenge to trial judge's unlawfulness finding failed - challenges to findings on recklessness and forensic disadvantage succeeded - appeal allowed - stay order set aside.

[DPP \(Cth\)](#)



# Benchmark

## Inscription for a Fountain on a Heath

By [Samuel Taylor Coleridge](#)

This Sycamore, oft musical with bees,—  
Such tents the Patriarchs loved! O long unharmed  
May all its agèd boughs o'er-canopy  
The small round basin, which this jutting stone  
Keeps pure from falling leaves! Long may the Spring,  
Quietly as a sleeping infant's breath,  
Send up cold waters to the traveller  
With soft and even pulse! Nor ever cease  
Yon tiny cone of sand its soundless dance,  
Which at the bottom, like a Fairy's Page,  
As merry and no taller, dances still,  
Nor wrinkles the smooth surface of the Fount.  
Here Twilight is and Coolness: here is moss,  
A soft seat, and a deep and ample shade.  
Thou may'st toil far and find no second tree.  
Drink, Pilgrim, here; Here rest! and if thy heart  
Be innocent, here too shalt thou refresh  
Thy spirit, listening to some gentle sound,  
Or passing gale or hum of murmuring bees!

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