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

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

### Executive Summary (One Minute Read)

**Silva, in the matter of Alon Pty Ltd (in liquidation)** (FCA) - liquidators of a trust company were appointed receivers and managers of the trust property (I B)

**Roberts-Smith v Fairfax Media Publications Pty Limited (No 41)** (FCA) - defamation - defences of truth and contextual truth made out concerning imputations that the applicant had committed war crimes, including murder, and domestic violence (I)

**Amirbeaggi v NSW Legal Services Commissioner** (NSWSC) - application by a solicitor for judicial review of a decision to issue a caution for impolite language and reduce costs payable dismissed (I)

**Kvist v GippsAero Pty Ltd & Anor** (VSC) - application by Australian defendants for Victorian proceedings brought by mainly Swedish plaintiffs be stayed on the grounds of *forum non conveniens* dismissed (I)

**Gunawardana v GMA Environmental Services Pty Ltd** (VSC) - appeal from decision of Magistrate finding only a limited entitlement to workers compensation dismissed (I)

**Owen v Warden Stephen Wilson** (WASC) - Mining Warden had not fallen into jurisdictional error in finding there had been compliance with the conditions of three exploration licences, and that those licences should therefore not be forfeited to the Minister (I B C)

## HABEAS CANEM

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# Benchmark

## Summaries With Link (Five Minute Read)

### **Silva, in the matter of Alon Pty Ltd (in liquidation) [2023] FCA 547**

Federal Court of Australia

Cheeseman J

Corporations - the liquidators of Alon Pty Ltd (in liq), the trustee of a family trust, sought to be appointed the receivers and managers of the trust assets - the assets of the trust included two residential units at Brighton Le Sands, six parcels of land at Marsden Park, and approximately \$85,000 cash at bank - Alon had received an offer from the NSW Department of Planning and Environment to compulsorily acquire the six parcels of land, subject to a 120-day deadline - two brothers who were beneficiaries of the trust were granted leave to be heard - one brother supported the liquidators' application - the other brother opposed the liquidators' application and sought to be appointed the receiver and manager of the trust himself - held: an amended trust deed had introduced an *ipso facto* clause which provided that Alon was removed as trustee and appointor of the trust immediately upon it entering into a compulsory or voluntary liquidation (except for the purposes of amalgamation or reconstruction) - the brother who sought to be appointed receiver and manager of the trust was precluded from challenging the validity of the amended trust deed on the basis of either *Anshun* estoppel or because to do so would, in the circumstances of this case, be an abuse of process - on the order of the NSW Supreme Court being made for Alon to be wound up, Alon was reduced to a bare trustee, such that it was necessary to make an order to enable the assets of the trust to be managed - the appropriate mechanism was to appoint receivers to the assets of the trust, and the liquidators were best placed to fairly, competently, and efficiently deal with the trust property as receivers - the liquidators were suitably qualified, independent professionals with a background knowledge of the trust assets and of the operations of Alon - appointing the liquidators as receivers would facilitate the proper maintenance and safekeeping of the two units and a proper consideration of the compulsory acquisition offer in respect of the six parcels for the benefit of the beneficiaries of the trust - the brother who sought to be appointed receiver and manager of the trust was disqualified from being appointed as receiver pursuant to s418 of the *Corporations Act 2001* (Cth), in that he was not a registered liquidator (s418(1)(d)) and he was claiming a security interest in property of the company (s418(1)(a)) - liquidators' application allowed.

[Silva, in the matter of Alon Pty Ltd](#) (I B)

### **Roberts-Smith v Fairfax Media Publications Pty Limited (No 41) [2023] FCA 555**

Federal Court of Australia

Besanko J

**Note: the Court has delayed publishing its full reasons for judgment in this matter. The summary below has been prepared from the judgment summary published by the Court.**

Defamation - the applicant brought three actions for defamation against media organisations and individual reporters - there were 16 publications complained of, that appeared in newspapers and online - there were 14 alleged imputations, that were generally of the nature that the applicant had committed war crimes, including murder, while serving in the Australian

SAS Regiment in Afghanistan - there were also imputations concerning alleged domestic violence - the defendants pleaded defences of justification or substantial truth under s25 of the *Defamation Act 2005* (NSW) and contextual truth under s26 of that Act - held: each of the alleged imputations had been conveyed, save that in one case, the imputation conveyed was that the applicant acquiesced in the execution of an unarmed Afghan by a junior trooper in his patrol, rather than authorised such an execution - the defendants had established the substantial truth of 11 of the 14 imputations (including the major allegations of war crimes including murder), and had established the contextual truth of the remaining 3 imputations (which concerned the domestic violence allegations and a threat to report a trooper to the International Criminal Court for firing at civilians unless that trooper provided an account of a friendly fire incident that was consistent with the applicant's account) - each proceeding dismissed.

[Roberts-Smith](#) (I)

## **Amirbeaggi v NSW Legal Services Commissioner [2023] NSWSC 555**

Supreme Court of New South Wales

Brereton JA

Administrative law - the Legal Services Commissioner made two decisions regarding a solicitor - first, to caution the solicitor pursuant to s290(2)(a) of the *Legal Profession Uniform Law 2014* (NSW) for breach of r4.1.2 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW), which relevantly provides that a solicitor must be courteous in all dealings in the course of legal practice - second, to reduce the legal costs charged by the solicitor to the relevant client from \$5,005 to \$3,000 pursuant to s292 of the *Uniform Law* - held: s286 provides that the Commissioner may not take action unless at least one of the parties has made a reasonable attempt to resolve the matter and the attempt has been unsuccessful, or it would be unreasonable to expect the complainant to be involved in such an attempt - the Commissioner's formation of the opinion referred to in s286 was a jurisdictional prerequisite to the exercise of power to caution under s290 - in circumstances where there was material on which it was open to the Commissioner to form that opinion, and on which the Court itself would have formed that opinion, the Court was not prepared to infer that the Commissioner did not form the opinion required by s286 - compliance with the requirement in s287 to attempt informal resolution is not a jurisdictional prerequisite to making a determination under s290 - in any event, the Commissioner had attempted to resolve the matter by informal means - it was open to the Commissioner to determine that imposition of a caution was in all the circumstances fair and reasonable - the costs decision was entirely rational, and entirely open to the Commissioner - application for judicial review dismissed.

[View Decision](#) (I)

## **Kvist v GippsAero Pty Ltd & Anor [2023] VSC 275**

Supreme Court of Victoria

John Dixon J

Private international law - a small plane being used for skydiving crashed at Storsandskar near

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Umeå in Sweden, resulting in the deaths of the pilot and all eight passengers on board - the plaintiffs were Swedish and US relatives of some of the victims - none of the plaintiffs resided in Australia - the defendants were companies incorporated in Australia that carried on business in Gippsland - the first defendant manufactured the plane, and the second defendant held the Type Certificates that certified that the plane met the requisite standards for airworthiness - these certificates had been issued the Australian Civil Aviation Safety Authority, the European Safety Authority, and the US Federal Aviation Authority - the plaintiffs sued in the Supreme Court of Victoria, claiming damages for negligence - the defendants applied to have the proceedings permanently stayed on the grounds of *forum non conveniens* - held: the doctrine of *forum non conveniens* is an international private law doctrine that provides that an Australian court may decline to exercise its jurisdiction where it is satisfied that, having regard to the circumstances of the particular case, it is a clearly inappropriate forum for the determination of the proceeding - a plaintiff who has regularly invoked the jurisdiction of the Court has a prima facie right to insist on its exercise - the power to stay should only be exercised in a clear case and the onus lies on the defendant to satisfy the Court that it is so inappropriate a forum that it would be oppressive and vexatious to continue - the distinction between the English "more appropriate forum" test and the Australian "clearly inappropriate forum" test is important - although there may later be lively debate regarding choice of laws, at this point in time, the Court was satisfied that the substantive law of negligence that would govern the case would be the law of Victoria - while not dispositive, this was a very important factor - the Court was not persuaded that a trial in Victoria would be oppressive or vexatious in the relevant sense - Victoria was the proper forum for the dispute as pleaded - Victoria had been chosen by the foreign plaintiffs who have appropriately engaged the jurisdiction of the court against local defendants - the Court was not persuaded that there would be any significant language issue either for witnesses or in the use of documents - the Court could not see how or why a view of the crash scene might assist in the resolution of the pleaded issues - application dismissed.

[Kvist \(I\)](#)

## **Gunawardana v GMA Environmental Services Pty Ltd [2023] VSC 281**

Supreme Court of Victoria

Kaye JA

Workers compensation - the appellant worked from 2007 to 2012 as a jet-truck operator with the respondent, which conducted a waste management business, and which undertook maintenance and service works of sewer lines as a contractor for South East Water - the appellant sought compensation under the *Workplace Injury and Rehabilitation and Compensation Act 2013 (Vic)* and the *Accident Compensation Act 1985 (Vic)* in respect of an injury to his lower back and mental injury which he alleged arose out of, or in the course of, his employment with the respondent - when the appellant commenced to work for the respondent, he was a full-time casual employee, but the formal contractual arrangements between the appellant and the respondent had altered in March 2008 - the appellant contended that, notwithstanding those altered arrangements, he remained an employee of the respondent and, therefore, was a "worker" within the meaning of the applicable legislation - the respondent

# Benchmark

contended that the appellant was an independent contractor, and, as such, had no entitlement to compensation - a Magistrate found that the appellant was entitled to weekly payments and to medical and the like expenses for a period in 2012 - the appellant appealed - held: the Magistrate had not erred in the application of *Jones v Dunkel* to the appellant's case - in cases such as this, the opinions of the expert medical witnesses ordinarily significantly rely on the accuracy and reliability of the histories given to them by the plaintiff - therefore, in order for the appellant to be able to persuade the Magistrate to rely on, and accept, the opinions expressed by certain medical experts, it was necessary that the Magistrate accept that the description of the history of the appellant's injury that the appellant gave to the two experts was credible and reliable - the Magistrate had not erred in finding that the appellant's evidence in that respect was neither credible nor reliable - the Magistrate did not err in concluding that the appellant was not a "worker" in the relevant period - appeal dismissed.

[Gunawardana \(I\)](#)

## **Owen v Warden Stephen Wilson [2023] WASC 178**

Supreme Court of Western Australia

Smith J

Exploration licences - three tenements formed part of a group of mining tenements held by Sandhu known as the Credo Project - Owen lodged applications for forfeiture of the exploration licences to the Minister for Mines pursuant to s98(5) of the *Mining Act 1978* (WA), on grounds that the expenditure conditions of each of the tenements had not been carried out or expended, and that the minimum expenditure conditions for each of the tenements had not been met for the 2019 year - Sandhu contended that the minimum expenditure conditions had been met, and, even if they had not been, any non-compliance was not of sufficient gravity, in all the circumstances, to warrant a recommendation by the Mining Warden of forfeiture of any of the three tenements - the Warden found Sandhu had complied with the conditions, and dismissed the application without making any recommendation to the Minister - Owen sought judicial review - held: in an application for judicial review, jurisdictional error will only be established on grounds of a failure to afford procedural fairness if the failure was material to the decision of the decision-maker - the legislature is taken to intend a discretionary power, statutorily conferred, will be exercised reasonably - there are two types of legal unreasonableness, process unreasonableness and outcome unreasonableness - judicial review will not lie on grounds of legal unreasonableness where the challenge to a decision of an administrative decision-maker relies upon an argument that the decision-maker gave too much weight to particular factual evidence and disregarded other factual evidence - the Warden had not misdirected himself, misunderstood, or failed to properly consider allowable expenditure incurred in compliance with the conditions of one exploration licence in respect of ground disturbing equipment, or in respect of work carried out to undertake costeaning and to use a wet gravity circuit - Owen was not denied procedural fairness by the Warden relying on the evidence of a witness who, when giving evidence by telephone from the US, did not complete his evidence, and terminated the audio link unilaterally during cross-examination - not only did Owen's counsel have an opportunity to make submissions about why the evidence of this witness should not be



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accepted or given any weight, that counsel had made lengthy and comprehensive submissions as to why that witness' evidence should not be accepted., and the Warden had merely not accepted those submission - in any event, any such breach of procedural fairness would not have been material - other assertions of jurisdictional error were also rejected - application for judicial review dismissed.

[Owen](#) (I B C)

# Benchmark

## Poem for Friday

### Requiescat

**By:** Oscar Wilde (1854-1900)

Tread lightly, she is near  
Under the snow,  
Speak gently, she can hear  
The daisies grow.

All her bright golden hair  
Tarnished with rust,  
She that was young and fair  
Fallen to dust.

Lily-like, white as snow,  
She hardly knew  
She was a woman, so  
Sweetly she grew.

Coffin-board, heavy stone,  
Lie on her breast,  
I vex my heart alone  
She is at rest.  
Peace, Peace, she cannot hear  
Lyre or sonnet,  
All my life's buried here,  
Heap earth upon it.

**Oscar Fingal O'Flahertie Wills Wilde** was born on 16 October 1854 and died, aged 46 of meningitis on 30 November 1900. He was an Irish novelist and playwright, a great wit, essayist and poet. The poem **Requiescat** was written for his sister Isola Wilde, who died of a fever when she was just nine years old. Wilde was 12 years old at the time and his diaries show that he was greatly affected by her death. Wilde studied at Trinity College Dublin and Magdalen College Oxford. He then moved to London. He toured North America in 1882 and France in 1883. He was one of the best-known writers in 1890s London. Wilde's well known novels include *The Picture of Dorian Gray*, and *The Importance of Being Earnest*. He famously sued the Marquess of Queensberry for libel, and having lost that case, was himself charged. The transcript of the trial is at <https://www.famous-trials.com/wilde/330-libel>. Oscar Wilde was imprisoned from 1895 to 1897 and during that time he wrote *De Profundis*. After his release from prison, he





moved to France, and did not return to Britain or Ireland again. His poem *The Ballad of Reading Gaol*, reflected on capital punishment and prison. Oscar Wilde's last words were said to have been: "My wallpaper and I are fighting a duel to the death. One or the other of us has to go".

Requiescat, sung by the quartet of Grover, Menter, Bishop and Tharaldson.

<https://www.youtube.com/watch?v=4eoJKvyJxkl>

Stephen Fry, as Oscar Wilde, in Wilde, (1997)

<https://www.youtube.com/watch?v=UwhYn-P7hLg>

Stephen Fry, reciting the Ballad of Reading Gaol, in Wilde, (1997)

<https://www.youtube.com/watch?v=QMqK0aWpAPY>

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