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Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Deputy Commissioner of Taxation v VFS Employment Services Pty Ltd, in the matter of VFS Employment Services Pty Ltd (FCA) - corporations - winding up - company granted leave for creditors' voluntary winding up (I B C G)

Bigg v SAS Trustee Corporation (NSWCA) - superannuation - rejection of application under s10B(2) *Police Regulation (Superannuation) Act 1906* (NSW) for certification of incapacity - leave to appeal refused (I B C G)

Hamilton v State of New South Wales (NSWSC) - client legal privilege - DPP demonstrated client legal privilege attached to documents - no waiver - appeal dismissed (I B C G)

Mullett v Nixon (VSC) - misfeasance in public office - malicious prosecution - action arising from suspension, charging and prosecution of former head of police association - causes of action not established - judgment for defendants (I B C G)

Russell v Corrections Officer Reid (VSCA) - battery - dismissal of claims by prisoner at remand centre against State and its employees - appeal dismissed (I B C G)

Bank of Queensland Ltd v Prestige Pools Paving and Landscapes Pty Ltd (QSC) - guarantee - determination of counter-claim against bank by guarantor - no misleading conduct unconscionable conduct, breach of fiduciary duty, breach of statutory provisions or breach of

Banking Code of Conduct - counter-claim dismissed (I B C G)

Wagner v Nine Network Australia (No. 2) (QSC) - pleadings - defamation - defendants established certain imputations incapable of arising - certain paragraphs of statement of claim struck out (I B C G)

Summaries With Link (Five Minute Read)

Deputy Commissioner of Taxation v VFS Employment Services Pty Ltd, in the matter of VFS Employment Services Pty Ltd [2016] FCA 1054

Federal Court of Australia

Beach J

Corporations - winding up - plaintiff sought to wind up defendant under ss459A & 459P *Corporations Act 2001* (Cth) - defendant sought leave nunc pro tunc under s490(1) for a creditors' voluntary winding up under Div 3 of Pt 5.5 - plaintiff did not oppose defendant's application for leave - factors for consideration in determining whether to grant leave retrospectively - petitioning creditor's views - whether refusal to grant leave would involve duplication of pre-existing liquidator's work - whether grant of leave would adversely affect any voidable transaction's recovery - any difference between powers of pre-existing liquidator if leave granted and powers of court appointed liquidator if leave refused - held: Court satisfied that leave should be granted in terms sought.

[Deputy Commissioner](#) (I B C G)

Bigg v SAS Trustee Corporation [2016] NSWCA 236

Court of Appeal of New South Wales

Beazley ACJ; Basten & Macfarlan JJA

Superannuation - applicant former police officer sought to appeal from dismissal of appeal against respondent's rejection of his application under s10B(2) *Police Regulation (Superannuation) Act 1906* (NSW) for certification of incapacity - applicant contended that a former member of police force whose dismissal had later been found to be unjust may be entitled to superannuation benefits if certified by SAS Trustee Corporation as incapable of exercising police officer's functions at time of 'resignation or retirement' - held: it was not a permissible construction of s10B(2) operated such that person found unjustly dismissed and so prevented from resigning fell within its terms - leave to appeal refused.

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

Hamilton v State of New South Wales [2016] NSWSC 1213

Supreme Court of New South Wales

Beech-Jones J

Client legal privilege - appellant appealed against decision upholding claim by Director of Public Prosecution for client legal privilege over subpoenaed documents - *Crown Prosecutors Act 1986*

(NSW) - *Director of Public Prosecutions Act 1986* (NSW) - *Evidence Act 1995* (NSW) - *Law Reform (Vicarious Liability) Act 1983* (NSW) - *Limitation Act 1969* (NSW) - *Police Act 1900* (NSW) - held: no error in finding that DPP demonstrated client legal privilege attached to documents, or in finding DPP and State had 'common interest' relating to proceedings - appellant failed to demonstrate waiver of client legal privilege under s122(2) *Evidence Act 1995* (NSW) - appeal dismissed.

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

Mullett v Nixon [2016] VSC 512

Supreme Court of Victoria

T Forrest J

Misfeasance in public office - malicious prosecution - action arising from suspension, charging and prosecution of plaintiff former head of police association - claimed misfeasance in public office against first and second defendant and malicious prosecution by all three defendants - held: plaintiff failed to establish prosecution 'groundless and unjustified', or any misuse or abuse of power by public officer holder - no cause of action established - judgment for defendants.

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

Russell v Corrections Officer Reid [2016] VSCA 207

Court of Appeal of Victoria

Osborn, Beach & McLeish JJA

Battery - applicant was prisoner at remand centre - applicant claimed damages in respect of three incidents pleaded as battery - defendants were State of Victoria and four employees- trial judge dismissed proceeding - applicant sought leave to appeal - s23 *Corrections Act 1986* (Vic) - control of prisoners - self-defence - held: no error in decision of primary judge in respect of either incident - appeal dismissed.

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

Bank of Queensland Ltd v Prestige Pools Paving and Landscapes Pty Ltd [2016] QSC 197

Supreme Court of Queensland

Boddice J

Guarantee - plaintiff sought recovery of money loaned to first defendant - payment of loan was guaranteed by second defendant under guarantee and indemnity - second defendant counterclaimed for recovery of money credited by bank - plaintiff obtained summary judgment against defendants - determination of second defendant's counter-claim - held: no basis for finding of misleading conduct or unconscionable conduct by plaintiff - no basis for finding of breach by plaintiff of fiduciary duty, statutory provisions or Banking Code of Conduct - defendants' counter-claim dismissed.

[Bank of Queensland](#) (I B C G)

Wagner v Nine Network Australia (No. 2) [2016] QSC 198

Supreme Court of Queensland
Boddice J

Pleadings - defamation - action arising from material published on television channel as part of current affairs programme defendants sought to strike out imputations pleaded in paragraphs of amended statement of claim - whether imputations so incapable of arising as to warrant strike-out order, or pleaded in form justifying strike-out order - held: defendants established that certain imputations were incapable of reasonably being conveyed - certain paragraphs of statement of claim struck out.

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

CRIMINAL

Executive Summary

Miller v The Queen; Smith v The Queen; Presley v DPP (SA) (HCA) - criminal law - joint criminal enterprise - appellants convicted of murder on the basis of extended joint criminal enterprise principles (*McAuliffe v The Queen* (1995) 183 CLR 108) - decision *R v Jogee*; *Ruddock v The Queen* [2016] UKPC 7 considered - *McAuliffe* correctly states the law-appeals allowed in part-remitted

The Queen v Baden-Clay (HCA) - Criminal law-murder - circumstantial evidence - respondent convicted of wife's murder - respondent sexually involved with another woman - Court of Appeal held hypothesis of unintentional killing not excluded and substituted verdict of manslaughter - appeal allowed, verdict of murder substituted

Summaries With Link

Miller v The Queen; Smith v The Queen; Presley v DPP (SA) [2016] HCA 30

High Court of Australia

French CJ, Kiefel, Bell, Gageler, Keane, Nettle, Gordon JJ

Criminal law - joint criminal enterprise - the appellants were convicted of murder on the basis of extended joint criminal enterprise principles (*McAuliffe v The Queen* (1995) 183 CLR 108) - decision *R v Jogee*; *Ruddock v The Queen* [2016] UKPC 7 considered - whether *McAuliffe* should be reconsidered - development of extended joint criminal enterprise principles from mid-18th century considered at length - doctrine of *stare decisis* considered - appellants were also convicted of causing harm to a second victim - all had been drinking and were probably intoxicated at the time of both offences - appellants also argued verdicts were unreasonable - held: it is not appropriate to abandon extended joint criminal liability and require proof of intention in line with the decision in *Jogee* - *McAuliffe* remains a correct statement of the

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common law of Australia - the law is that a joint criminal enterprise comes into being when two or more persons agree to commit a crime - the existence of the agreement need not be express and may be inferred from conduct - if the crime which is the object of the agreement is committed while the agreement is on foot, all parties to the agreement are equally liable regardless of the part each has individually played in the *actus reus* - each party is also guilty of any other crime ("the incidental crime") committed by a co-venturer that is within the scope of the agreement - an incidental crime is within the scope of the agreement if the parties contemplate its commission as a possible incident of the execution of their agreement - a party to the agreement who foresees, but who does not agree to, the commission of the incidental crime, but who continues to participate in the agreement with that awareness, is liable for the incidental crime - cases where the accused has dismissed the contemplated incidental crime as fanciful will be rare and can be covered by a direction - in the paradigm case of murder the accused's foresight is not that in executing the agreed criminal enterprise a person may die or suffer grievous bodily harm, but that in executing the agreement a party to it may commit murder and with that knowledge the accused continues to participate in the agreed criminal enterprise-the Court of Criminal Appeal did not review the sufficiency of the evidence to sustain the verdicts consistently with the task explained in *M v The Queen* 181 CLR 487) - appeals allowed - it is not usual for the High Court to embark upon an assessment of the sufficiency of evidence-matters remitted for determination.

[Miller](#)

The Queen v Baden-Clay [2016] HCA 35

High Court of Australia

French CJ, Kiefel, Bell, Keane, Gordon JJ

Criminal law - murder - circumstantial evidence - respondent's wife disappeared - her body was later found - the cause of her death could not be ascertained, but no skull fractures were identified - respondent was involved sexually with another woman - injuries to respondent's cheek likely caused by fingernails - respondent gave evidence at trial and denied he had fought with his wife, killed her and disposed of her body - his defence was that he had nothing to do with her death - jury convicted of murder - Court of Appeal held hypothesis of unintentional killing not excluded and substituted verdict of manslaughter - on appeal, common ground that respondent had killed his wife - whether hypothesis consistent with innocence of murder was open - whether jury verdict of murder unreasonable - whether jury entitled to be satisfied beyond reasonable doubt that respondent acted with intent to kill or cause grievous bodily harm - held: the Crown case was circumstantial - the principles concerning cases which turn upon circumstantial evidence are well settled (*Barca v The Queen* (1975) 133 CLR 82)) - to enable a jury to be satisfied beyond reasonable doubt of guilt it is necessary not only that his guilt should be the rational inference but it should be the only rational inference that the circumstances enable the jury to draw - for an inference to be reasonable it "must rest upon something more than mere conjecture" and all of the evidence is to be considered and weighed (*Peacock v The King* (1911) 13 CLR 619; *R v Hillier* (2007) 228 CLR 618; *Chamberlain v The Queen [No2]* (1984) 153 CLR 521) - a criminal trial is accusatorial and adversarial and, subject to well -



defined exceptions, the parties are bound by the conduct of their counsel 80 ALJR 614) - the was no evidence to support the proposition advanced by the Court of Appeal that there was a physical confrontation between the deceased and the respondent and that the deceased may have fallen and hit her head - that proposition was also contradicted by the respondent's evidence and it was not put to the jury - the hypothesis was not open to the Court of Appeal - further, the Court of Appeal appears not to have considered and weighed all of the circumstances established by evidence at trial - upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the respondent was guilty of murder - appeal allowed - verdict of Court of Appeal set aside - verdict of murder restored.

[Baden-Clay](#)



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Lights Out

[Edward Thomas](#), 1878 - 1917

I have come to the borders of sleep,
The unfathomable deep
Forest where all must lose
Their way, however straight,
Or winding, soon or late;
They cannot choose.

Many a road and track
That, since the dawn's first crack,
Up to the forest brink,
Deceived the travellers,
Suddenly now blurs,
And in they sink.

Here love ends,
Despair, ambition ends;
All pleasure and all trouble,
Although most sweet or bitter,
Here ends in sleep that is sweeter
Than tasks most noble.

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