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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 (1 minute read)

**Capic v Ford Motor Company of Australia Limited (No 7)** (FCA) - pleadings - new group members' addition effective from amendment date - amendment application otherwise dismissed (I B C G)

**Saric v Commonwealth of Australia** (FCA) - admiralty - evidence - yacht and equipment 'automatically forfeited' under s261A *Migration Act 1958* (Cth) - declarations refused - application dismissed (B C I G)

**Elsworthy v Forgacs Engineering Pty Ltd** (NSWSC) - judicial review - workers compensation - whole person impairment - no error in decision of Medical Appeal Panel - summons dismissed (B C I G)

**Condon v Mehajer** (NSWSC) - real property - caveat - application for withdrawal of caveat - application granted (B C I G)

**IAG Ltd t/as NRMA Insurance v Abiad** (NSWSC) - costs - plaintiff successful in proceedings - proportionality - first and second defendants to pay plaintiff's costs - costs limited (B C I G)

**Pandolfo v Finadri & Ors (Costs)** (VSC) - costs - preliminary discovery - Court granted plaintiff preliminary discovery against defendant - defendants to pay 80% of plaintiff's costs of on indemnity basis (I B C G)

**Muscat v Magistrates' Court of Victoria (VSC)** - judgments and orders - occupational health and safety - dismissal of charge under *Occupational Health and Safety Act 2004 (Vic)* - irrelevant consideration - appeal allowed - matter remitted (B C I G)

## Summaries With Link (Five Minute Read)

### **Capic v Ford Motor Company of Australia Limited (No 7) [2018] FCA 1631**

Federal Court of Australia

31 October 2018

Perram J

Pleadings - applicant sought to amend pleadings - 'group definition' - 'pre-purchase representations' - 'post-purchase representations' - new cause of action alleging unconscionable conduct - s33C *Federal Court of Australia Act 1976 (Cth)* - whether addition of new group members should be effective from amendment date - held: new group members' addition effective from amendment date - amendment application otherwise dismissed - application for injunctive relief dismissed.

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

### **Saric v Commonwealth of Australia [2018] FCA 1620**

Federal Court of Australia

Derrington J

Admiralty - evidence - applicant and companion sailed yacht SY Exodus (Exodus) into Australian migration zone with no visa - Commonwealth asserted that Exodus and equipment on board had been 'automatically forfeited' under s261A *Migration Act 1958 (Cth)* (Migration Act) because it had been involved in contravention of s229(1) Migration Act - applicant sought declarations under s261H(3) Migration Act that Exodus and equipment was not forfeited to Commonwealth, and to recover Exodus or its value - statutory construction - standard of proof required when negating 'any legitimate defence' under ss10.1 & 10.3 *Criminal Code 1995 (Cth)* - *Briginshaw v Briginshaw* [1938] HCA 34 - held: applicant not entitled to declarations - application dismissed.

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

### **Elsworthy v Forgacs Engineering Pty Ltd [2018] NSWSC 1638**

Supreme Court of New South Wales

Fagan J

Judicial review - workers compensation - whole person impairment - plaintiff boilermaker employed by first defendant claimed he injured wrist in trip and fall at work and had developed Complex Regional Pain Syndrome (CRPS) as result of wrist injury - approved medical specialist assessed whole person impairment at 0% due to not being satisfied criteria for CRPS were met - Medical Appeal Panel found no error in medical specialist's assessment - plaintiff sought

judicial review - *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - whether 'incorrect criteria' applied - whether Panel should have clinically examined plaintiff - whether held: summons dismissed.

[View Decision](#) (B C I G)

## **Condon v Mehajer [2018] NSWSC 1637**

Supreme Court of New South Wales

McDougall J

Real property - caveat - plaintiffs sought withdrawal of caveat under s74MA *Real Property Act 1900* (NSW) - whether appropriate to make order to dispense with service - whether claimed "equitable interest" was interest of first defendant caveator - whether caveat clarified why first defendant had right to protect interest on behalf of 'asserted beneficiary' - whether caveat defective - prejudice - lateness of caveat's lodgement - held: Court satisfied to withdraw caveat.

[View Decision](#) (B C I G)

## **IAG Ltd t/as NRMA Insurance v Abiad [2018] NSWSC 1603**

Supreme Court of New South Wales

Harrison J

Costs - plaintiff successful in proceedings - plaintiff sought that first and second defendants pay its costs on the basis costs follow event - s98 *Civil Procedure Act 2005* (NSW) - r42.1 *Uniform Civil Procedure Rules 2005* (NSW) - 'proportionality of costs' - whether costs 'disproportionate to the amounts involved' - s60 *Civil Procedure Act* - Sch 1 Table A *Motor Accidents Compensation Regulation 2015* (NSW) - s6C *Suitors' Fund Act 1951* (NSW) - held: first and second defendant to pay plaintiff's costs - costs limited.

[View Decision](#) (B C I G)

## **Pandolfo v Finadri & Ors (Costs) [2018] VSC 655**

Supreme Court of Victoria

Derham AsJ

Costs - preliminary discovery - Court granted preliminary discovery from fourth defendant to plaintiff - plaintiff sought costs from defendants on indemnity basis, contending that defendants' response to application had been 'very adversarial and unreasonable' - defendants sought costs on indemnity basis, contending that plaintiff had been 'entirely unsuccessful' against 'first to third and fifth to eighth' defendants - defendants also contended that originating process had 'no proper basis' and that demand by plaintiff were excessive - s24(1) *Supreme Court Act 1986* (Vic) - held: defendants to pay 80% of plaintiff's costs of on indemnity basis.

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

## **Muscat v Magistrates' Court of Victoria [2018] VSC 650**

Supreme Court of Victoria

Richards J

Judgments and orders - occupational health and safety - appellant inspector under

# Benchmark

*Occupational Health and Safety Act 2004 (Vic) (OHS Act)* charged Southern Alpine Resort Management Board (Board) with two offences arising from fallen tree incident - both charges concerned Board's employees - Magistrate dismissed first charge as he was not satisfied all elements of offence proven - Magistrate dismissed second charge on basis s23 OHS Act did not apply to independent contractors' employees - appellant appealed against dismissal of second charge - statutory interpretation - relationship between ss23 & 21 OHS Act - whether second charge was 'final order' under s272 *Criminal Procedure Act 2009 (Vic) (Criminal Procedure Act)* - whether s23(1)OHS Act applied to employees of employer's independent contractors - whether Magistrate had regard to irrelevant - if error established whether matter should be remitted - held: dismissal of second charge was final order under s272 *Criminal Procedure Act* - appeal competent. - s23(1) OHS Act applied to employees of employer's independent contractors - Magistrate took irrelevant consideration into account - second charge remitted - appeal allowed.

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

## CRIMINAL

### Executive Summary

### Summaries With Link



# Benchmark

## **From Halloween**

**By:** Robert Burns, 1759 - 1796

Upon that night, when fairies light  
On Cassilis Downans dance,  
Or owre the lays, in splendid blaze,  
On sprightly coursers prance;  
Or for Colean the route is ta'en,  
Beneath the moon's pale beams;  
There, up the cove, to stray and rove,  
Among the rocks and streams  
To sport that night.

Among the bonny winding banks,  
Where Doon rins, wimplin' clear,  
Where Bruce ance ruled the martial ranks,  
And shook his Carrick spear,  
Some merry, friendly, country-folks,  
Together did convene,  
To burn their nits, and pou their stocks,  
And haud their Halloween  
Fu' blithe that night.

The lasses feat, and cleanly neat,  
Mair braw than when they're fine;  
Their faces blithe, fu' sweetly kythe,  
Hearts leal, and warm, and kin';  
The lads sae trig, wi' wooer-babs,  
Weel knotted on their garten,  
Some unco blate, and some wi' gabs,  
Gar lasses' hearts gang startin'  
Whiles fast at night.

Then, first and foremost, through the kail,  
Their stocks maun a' be sought ance;  
They steek their een, and graip and wale,  
For muckle anes and straught anes.  
Poor hav'rel Will fell aff the drift,  
And wander'd through the bow-kail,  
And pou't, for want o' better shift,  
A runt was like a sow-tail,  
Sae bow't that night.





Then, staught or crooked, yird or nane,  
They roar and cry a' throu'ther;  
The very wee things, todlin', rin,  
Wi' stocks out owre their shouter;  
And gif the custoc's sweet or sour.  
Wi' joctelegs they taste them;  
Syne cozily, aboon the door,  
Wi cannie care, they've placed them  
To lie that night.

[https://en.wikipedia.org/wiki/Robert\\_Burns](https://en.wikipedia.org/wiki/Robert_Burns)

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