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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)

Forth v R Developments Pty Ltd (FCA) - corporations - applicants sought that 'resolution to execute' deed of company arrangement (DOCA) be set aside and declaration DOCA void - 'amended originating process' dismissed (I B C G)

Australian Competition and Consumer Commission v Kimberly-Clark Australia Pty Ltd (FCA) - consumer law - Kleenex Cottonelle Flushable Cleansing Cloths - "'flushability" representation' - contravention of Australian Consumer Law not established - parties agreed "Made in Australia" representation 'false or misleading' (I B C G)

Howden Australia Pty Ltd v Minetek Investments Pty Ltd (FCA) - costs - applicants sought interlocutory relief - Court refused application - interlocutory application's costs to be 'respondents' costs in the cause' (I B C G)

Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd (NSWCA) - summary dismissal - pleadings - proportionate liability - applicant named respondent as concurrent wrongdoer in defence - erroneous dismissal of applicant's cross-claim against respondent - appeal allowed (I B C G)

Maher v Maher (VSCA) - wills and estates - family provision - refusal of application for extension of time to appeal against dismissal of family provision claim - appeal dismissed (B)

Douglas v Morgan (SASCFC) - legal professional privilege - dismissal of claim of legal professional privilege in respect of 'investigator's report' which appellant's insurer commissioned - appeal dismissed (I B C G)

Cosenza v Roy Morgan Interviewing Services Pty Ltd (No 2) (SASC) - costs - trespass - default judgment against respondent set aside - appellant unsuccessfully appealed - appellant to pay respondent's costs on party/party basis (I B C G)

Summaries With Link (Five Minute Read)

Forth v R Developments Pty Ltd [2019] FCA 1004

Federal Court of Australia

Jagot J

Corporations - applicants, under s415A(3)(a) *Corporations Act 2001* (Cth) (Corporations Act), sought to set aside 'resolution to execute' deed of company arrangement (DOCA) - - applicants also sought declaration that DOCA was void due to non-compliance with Pt 5.3A Corporations Act - whether unreasonable prejudice - whether omission from 'report to creditors' which could 'reasonably be expected to have been material' - whether impossible to give DOCA effect 'without injustice or undue delay' - whether 'some other reason' to terminate DOCA - held: 'amended originating process' dismissed.

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

Australian Competition and Consumer Commission v Kimberly-Clark Australia Pty Ltd [2019] FCA 992

Federal Court of Australia

Gleeson J

Consumer law - applicant claimed respondent, by 'advertising and marketing of Kleenex Cottonelle Flushable Cleansing Cloths' ('wipes'), contravened Australian Consumer Law - whether "'flushability" representation' was 'false, misleading or deceptive' - whether "flushability" representation 'representation with respect to a future matter' - 'consumer complaint evidence' - Sch 2 *Competition and Consumer Act 2010* (Cth) - held: parties agreed representation that wipes "Made in Australia" was 'false or misleading' - Court not satisfied "flushability" representation contravened Australian Consumer Law.

[Australian Competition and Consumer Commission](#) (I B C G)

Howden Australia Pty Ltd v Minetek Investments Pty Ltd [2019] FCA 1042

Federal Court of Australia

Jagot J

Costs - dispute concerned whether or not respondents had used 'confidential information' of applicants - Court refused application by applicants for 'interlocutory relief' - respondents, during hearing, had sought adjournment during hearing for the purpose of adducing 'further evidence

on the balance of convenience' - application for adjournment did not add to hearing's 'overall length' - determination of costs - whether respondents should have costs - whether costs should be costs in the cause - whether costs should be 'respondents' costs in the cause' - held: Court concluded that interlocutory application's costs should be respondents' costs in the cause.

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

Landpower Australia Pty Ltd v Penske Power Systems Pty Ltd [2019] NSWCA 161

Court of Appeal of New South Wales

Bell P; Macfarlan & Payne JJA

Summary dismissal - pleadings - proportionate liability - contract - negligence - *Trade Practices Act 1974* (Cth) - Australian Consumer Law - proceedings arose from combine harvester's performance - plaintiffs used the combine harvester in their business - plaintiffs sued applicant, who was 'sole defendant' in proceedings - applicant named respondent as a 'concurrent wrongdoer' in its defence - applicant cross-claimed against respondent 'concurrent wrongdoer' - primary judge 'struck out and dismissed' 'Amended Cross-Claim' - applicant sought leave to appeal - whether applicant precluded from cross-claiming against respondent 'based upon an independent cause of action' - s87CB *Competition and Consumer Act 2010* (Cth) (CCA) s35(1) *Civil Liability Act 2002* (NSW) - held: leave to appeal granted - appeal allowed.

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

Maher v Maher [2019] VSCA 161

Court of Appeal of Victoria

Beach, McLeish & Niall JJA

Wills and estates - family provision - proceedings concerned will of applicants' deceased father - father had died in 1975 - applicants of view deceased's will did not adequately provide for them - it was alleged applicants raised issue with mother and that mother had assured applicants that, if they did not contest father's will, 'she would fix the matter by making provision in her own will' - mother died but did not leave applicants 'her largest holding' of land - applicants and their brother separately sought extensions of time to seek family provision from deceased father's will - associate judge refused applications - applicants sought to appeal - delay - prejudice - whether 'incorrect approach to merits' - whether 'irrelevant considerations or excess weight' - whether 'no weight, or insufficient weight' - whether associate judge's decision 'unreasonable or unjust' - s99 *Administration and Probate Act 1958* (Vic) - held: leave to appeal granted - appeal dismissed.

[Maher](#) (B)

Douglas v Morgan [2019] SASCF 76

Full Court of the Supreme Court of South Australia

Kelly, Blue & Nicholson JJ

Legal professional privilege - personal injury proceedings - appellant's car collided with first respondent pedestrian - appellant made claim of legal professional privilege concerning 'investigator's report' (report) which appellant's insurer commissioned - Master upheld claim - Judge reversed decision - whether insurer commissioned report for 'dominant purpose' of

submitting it to lawyers for their use in proceedings which might be instituted by first respondent - held: insurer did not establish it obtained report 'for the requisite dominant purpose' - appeal dismissed.

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

Cosenza v Roy Morgan Interviewing Services Pty Ltd (No 2) [2019] SASC 110

Supreme Court of South Australia

Parker J

Costs - default judgment - trespass - respondent succeeded in setting aside default judgment against it - appellant unsuccessfully appealed - parties accepted respondent entitled to costs order against appellant - respondent sought that costs be awarded on solicitor/client basis - whether 'unreasonable conduct' - settlement offer - whether to depart from 'general rule' - rr264(2) & 264(5) *Supreme Court Civil Rules 2006 (SA)* - held: appellant to pay respondent's costs on party/party basis.

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

CRIMINAL

Executive Summary

Summaries With Link



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In the Past

By: Trumbull Stickney

There lies a somnolent lake
Under a noiseless sky,
Where never the mornings break
Nor the evenings die.

Mad flakes of colour
Whirl on its even face
Iridescent and streaked with pallour;
And, warding the silent place,

The rocks rise sheer and gray
From the sedgeless brink to the sky
Dull-lit with the light of pale half-day
Thro' a void space and dry.

And the hours lag dead in the air
With a sense of coming eternity
To the heart of the lonely boatman there:
That boatman am I,

I, in my lonely boat,
A waif on the somnolent lake,
Watching the colours creep and float
With the sinuous track of a snake.

Now I lean o'er the side
And lazy shades in the water see,
Lapped in the sweep of a sluggish tide
Crawled in from the living sea;

And next I fix mine eyes,
So long that the heart declines,
On the changeless face of the open skies
Where no star shines;

And now to the rocks I turn,
To the rocks, around
That lie like walls of a circling sun



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Wherein lie bound

The waters that feel my powerless strength
And meet my homeless oar
Labouring over their ashen length
Never to find a shore.

But the gleam still skims
At times on the somnolent lake,
And a light there is that swims
With the whirl of a snake;

And tho' dead be the hours i' the air,
And dayless the sky,
The heart is alive of the boatman there:
That boatman am I.

https://en.wikipedia.org/wiki/Trumbull_Stickney

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