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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)

**Flight Centre Limited v Australian Competition and Consumer Commission (No 2)** (FCAFC) - competition - trade practices - contraventions of s45(2)(a)(ii) *Trade Practices Act 1974* (Cth) - appellant to pay total of \$12.5 million in pecuniary penalties (I B C G)

**Comcare v Wuth** (FCAFC) - workers compensation - claim for compensation under *Safety, Rehabilitation and Compensation Act 1988* (Cth) - calculation of normal weekly earnings - appeal allowed in part (I B C G)

**Gilles v Palmieri** (NSWSC) - judicial review - costs assessor erred in returning application to manager of costs assessment - decision quashed (I B C G)

**Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq); Ostwald Bros Pty Ltd (in liq) v Seymour Whyte Constructions Pty Ltd** (NSWSC) - contract - security of payments - contract rectified - adjudication determination valid - any judgment obtained to be stayed until completion of procedure in s553C *Corporations Act 2001* (Cth) (I B C G)

**Shield Limestone Holdings Pty Limited v LSKF Holdings Pty Limited** (NSWSC) - contract - shareholders agreement - 'illusory obligation' - uncertainty - provisions of shareholder agreement not void for being uncertain or illusory (I B C G)

**King v Chrisis** (NSWSC) - compromise - person under legal incapacity - transfer of property

allegedly procured by undue influence - Court satisfied settlement was in plaintiff's best interests - settlement approved (I B C G)

**D'Ortenzio v Charles Paretta Real Estate Pty Ltd (SASC)** - corporations - statutory derivative action - leave to uplift documents refused - order requiring availability of director for cross-examination refused - subpoenas set aside (I B C G)

## Summaries With Link (Five Minute Read)

### **Flight Centre Limited v Australian Competition and Consumer Commission (No 2) [2018] FCAFC 53**

Full Court of the Federal Court of Australia

Allsop CJ; Davies & Wigney JJ

Competition - trade practices - appeal and cross-appeal arising from penalties imposed for contraventions of s45(2)(a)(ii) *Trade Practices Act 1974* (Cth) - attempts to 'fix or control' prices offered by airlines - whether any relevance of belief of innocence of unlawful conduct - deterrence - involvement of 'very senior management' in conduct - held: Court not of view primary judge erred in imposition of \$11 million total penalties - however Court had come to its own view on figures - appellant to pay total of \$12.5 million in pecuniary penalties.

[Flight Centre](#) (I B C G)

### **Comcare v Wuth [2018] FCAFC 13**

Full Court of the Federal Court of Australia

Siopis, Flick & Perry JJ

Workers compensation - respondent claimed compensation under *Safety, Rehabilitation and Compensation Act 1988* (Cth) - Comcare liable to pay compensation to respondent for "chronic daily headache" - appeal concerned manner of calculation of normal weekly earnings - whether Tribunal's reliance on American Medical Association's Guides to the Evaluation of Permanent Impairment (5th Edition) was appropriate (AMA Guides) - whether Tribunal denied Comcare procedural fairness by reliance placed on Chapter in AMA Guides which was not referred to in 'evidence or submissions' - whether Tribunal empowered to assess permanent impairment using its 'lay "clinical judgment"' - meaning of 'net weekly earnings' in s8(1) of the Act - held: appeal allowed in part.

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

### **Gilles v Palmieri [2018] NSWSC 350**

Supreme Court of New South Wales

Harrison AsJ

Judicial review - application for review of decision of costs assessor - whether costs assessor erred in returning application to manager of costs assessments while appeal from District Court judgment extant - whether costs assessor incorrectly concluded he was precluded from

proceeding with costs assessment - whether lack of good faith - whether costs assessor erred in not awaiting outcome of Court of Appeal decision - *Supreme Court Act 1970* (NSW) - *Legal Profession Act 1987* (NSW) - *Legal Profession Act 2004* (NSW) - held: decision of costs assessor quashed - matter remitted.

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

**Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq); Ostwald Bros Pty Ltd (in liq) v Seymour Whyte Constructions Pty Ltd [2018] NSWSC 412**

Supreme Court of New South Wales

Stevenson J

Contract - security of payments - corporations - Seymour Whyte Constructions Pty Ltd (Seymour White) as contractor entered contract with Ostwald Bros Pty Ltd (now in liquidation) (Ostwald) as subcontractor to perform works - Seymour Whyte terminated contract under clause providing for 'termination without cause' - Ostwald had earlier served payment claim on Seymour Whyte under *Building and Construction Industry Security of Payment Act 1999* (NSW) (Act) - Seymour Whyte did not pay Ostwald any of scheduled amount - Ostwald made adjudication application - adjudicator determined amount due by Seymour Whyte to Ostwald - Seymour White contended determination was void as adjudication application was not made in time specified in s17 of the Act - held: Court satisfied that contract should be rectified as Ostwald contended by deletion of certain special conditions - Ostwald's adjudication application was in time - determination valid - any judgment obtained by Ostwald to be stayed until procedure in s553C *Corporations Act 2001* (Cth) finalised.

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

**Shield Limestone Holdings Pty Limited v LSKF Holdings Pty Limited [2018] NSWSC 335**

Supreme Court of New South Wales

Pembroke J

Contract - shareholders agreement - dispute concerning shareholders agreement regulating rights of plaintiff and first defendant as equal shareholders in company carrying on business - first defendant provided 'intellectual property and expertise' and plaintiff provided funding - shareholders fell out - plaintiff refused to provide additional funding - whether shareholders agreement was void on basis provisions concerning funding imposed 'illusory obligation' or were uncertain - provisions concerning obligation to request shareholder loan - construction of contract - held: provisions of contract were not illusory or uncertain.

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

**King v Chrisis [2018] NSWSC 377**

Supreme Court of New South Wales

Hallen J

Compromise - person under legal incapacity - request to Court for approval of settlement - plaintiff sought to set aside transfer he made in favour of third and fourth defendants on basis first and second defendants had procured transfer by undue influence - s76(4) *Civil Procedure*

*Act 2005 (NSW)* - 'costs and complexity' of proceedings were they to proceed - 'real dispute' on facts - property's value - uncertainty of result of plaintiff's case - held: Court satisfied that proposed settlement was in plaintiff's best interests - settlement approved

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

## **D'Ortenzio v Charles Paretta Real Estate Pty Ltd [2018] SASC 37**

Supreme Court of South Australia

Master Bochner

Corporations - statutory derivative action - plaintiff shareholder of defendant seeking leave to bring proceeding on defendant's behalf pursuant to s237 *Corporations Act 2001* (Cth) against defendant's directors - plaintiff, before hearing, issued three subpoenas - first subpoena issued to auditors' firm seeking files concerning audit - second and third subpoenas issued to author of auditor's report - plaintiff sought leave to 'uplift, inspect and copy' documents produced under subpoenas - plaintiff also sought order requiring director to be available for cross-examination - defendant sought to set aside subpoenas - hearing of originating process vacated - held: leave to uplift documents refused - order requiring availability of director for cross-examination refused - subpoenas set aside.

[D'Ortenzio](#) (I B C G)

## CRIMINAL

### Executive Summary

**Glover v R** (NSWCCA) - criminal law - child prostitution - appellant found guilty of 10 offences - appellant sentenced to 10 years in prison with non-parole period of 6 years - appeal against conviction on some counts dismissed - appeal against severity of sentence dismissed

**R v Orchard** (QCA) - criminal law - appellant found guilty of dishonestly obtaining money from complainant - dishonesty - 'subjective knowledge or intention' - appeal against conviction dismissed

### Summaries With Link

#### **Glover v R [2016] NSWCCA 316**

Court of Criminal Appeal of New South Wales

Gleeson JA; Fagan & N Adams JJ

Criminal law - child prostitution - primary judge, after judge-alone trial, found appellant guilty of ten sexual offences involving 'two juvenile female complainants' - appellant sentenced to aggregate sentence of 10 years in prison with 6 year non-parole period - appellant appealed



conviction on some of the counts and sought to appeal against sentence's severity - ss91D & 91F *Crimes Act 1900* (NSW) - causing child to participate in child prostitution - exercise of 'lawful control over premises' in which child participating in prostitution - whether duplicity and/or double jeopardy - offences' elements - held: appeal against conviction dismissed - leave to appeal against severity of sentence granted - appeal dismissed.

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## **R v Orchard [2018] QCA 58**

Court of Appeal of Queensland

Sofronoff P; Gotterson JA & Henry J

Criminal law - appellant found guilty of offence under s408C(1)(b) *Criminal Code* (Qld) of dishonestly obtaining \$100,000 from complainant in circumstance of aggravation due to sum being of \$30,000 value or more - appellant sentenced to two years in prison with parole release date of 21 February 2018 - appellant appealed against conviction - adequacy of trial judge's directions concerning dishonesty - 'beyond reasonable doubt' - whether directions deficiently failed to reference 'subjective knowledge or intention' of appellant - whether 'subjective dishonest intent' was element of dishonesty - whether erroneous failure by trial judge to warn against speculation concerning 'evidence of witnesses not called to give evidence' - whether miscarriage of justice arising from conduct of trial by appellant's trial counsel - held: grounds of appeal failed - appeal dismissed.

[Orchard](#)



# Benchmark

## The Definition of Love

**By:** Andrew Marvell

My Love is of a birth as rare  
As 'tis for object strange and high:  
It was begotten by despair  
Upon Impossibility.

Magnanimous Despair alone  
Could show me so divine a thing,  
Where feeble Hope could ne'r have flown  
But vainly flapt its Tinsel Wing.

And yet I quickly might arrive  
Where my extended Soul is fixt,  
But Fate does Iron wedges drive,  
And alwaies crowds it self betwixt.

For Fate with jealous Eye does see  
Two perfect Loves; nor lets them close:  
Their union would her ruine be,  
And her Tyrannick pow'er depose.

And therefore her Decrees of Steel  
Us as the distant Poles have plac'd,  
(Though Love's whole World on us doth wheel)  
Not by themselves to be embrac'd.

Unless the giddy Heaven fall,  
And Earth some new Convulsion tear;  
And, us to joyn, the World should all  
Be cramp'd into a Planisphere.

As Lines so Loves oblique may well  
Themselves in every Angle greet:  
But ours so truly Parallel,  
Though infinite can never meet.

Therefore the Love which us doth bind,  
But Fate so enviously debarrs,  
Is the Conjunction of the Mind,  
And Opposition of the Stars.



# Benchmark

[https://en.wikipedia.org/wiki/Andrew\\_Marvell](https://en.wikipedia.org/wiki/Andrew_Marvell)

Andrew Marvell - Wikipedia

en.wikipedia.org

Andrew Marvell (/ ʔ m ??r v ?l /; 31 March 1621 – 16 August 1678) was an English metaphysical poet, satirist and politician who sat in the House of Commons at various times between 1659 and 1678.

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