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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)

Donaghy v Council of the Law Society of NSW (No 2) (NSWCA) - Council's reprimand for legal practitioner's conduct was appropriate - Tribunal's orders setting Council's decision aside could not stand - appeal allowed (I G)

In the matter of Ambient Advertising Pty Ltd (in liq) (NSWSC) - corporations - winding up - appointment of special purpose liquidator (B)

Carter Holt Harvey Woodproducts Australia Pty Ltd v David (VSC) - service - appeal against refusal to make substituted service order allowed (I C)

Re IPR Nominees Pty Ltd (VSC) - trusts and trustees - judicial advice - it was appropriate for trustee to defend substantive proceeding unconditionally (B)

In the estate of Czerny (deceased) (SASC) - Wills and estates - litigation guardian permitted to enter compromise agreement on behalf of deceased's grandchildren (B)

Dean v Collins [No 2] (WASCA) - succession - family provision - erroneous dismissal of claim - appeal allowed (B)

Hitchcock v Goldspan Investments Pty Ltd [No 3] (WASC) - pleadings - leave to strike out statement of claim granted in part (B)

Summaries With Link (Five Minute Read)

Donaghy v Council of the Law Society of NSW (No 2) [2015] NSWCA 224

Court of Appeal of New South Wales

Basten & Gleeson JJA; Sackville AJA

Legal practitioners - solicitors' costs - appellant solicitor subject of complaint by barrister in relation to non-payment of fees - Professional Conduct Committee resolved, on Council of the Law Society's behalf, to deal with conduct by reprimand for conduct reasonably likely to be found to be unsatisfactory professional conduct - appellant sought review of decision in Tribunal - practitioner appealed from Civil and Administrative Tribunal's decision to set aside Council's decision on basis it should consider instituting formal disciplinary proceedings - appellant sought to set aside Tribunal's decision on judicial review grounds including procedural unfairness - Council conceded Tribunal's orders should not stand - s540 *Legal Practitioners Act 2004* (NSW) - held: reprimand was appropriate course for Council to take given need for firm professional disapprobation of conduct - Tribunal's decision set aside but challenge to Council's decision dismissed - appeal allowed.

[Donaghy](#) (I G)

In the matter of Ambient Advertising Pty Ltd (in liq) [2015] NSWSC 1079

Supreme Court of New South Wales

Robb J

Corporations - winding up - plaintiff was largest unrelated creditor of first defendant company in liquidation - second defendants were sued in capacity as liquidators - plaintiff sought appointment of special purpose liquidator and orders to enable special purpose liquidator to execute funding agreement under which funder would provide funding to company, and to enable special purpose liquidator to carry out special purposes - funder was plaintiff's director - s477(2B) *Corporations Act 2001* (Cth) - held: Court satisfied it would be beneficial to administration of winding up and in creditors' interest for special purpose liquidator to be appointed - Court satisfied it had jurisdiction to appoint additional or special purpose liquidator in manner sought plaintiff notwithstanding liquidation was creditors' voluntary winding up - orders ought under s477(2B) made.

[Ambient](#) (B)

Carter Holt Harvey Woodproducts Australia Pty Ltd v David [2015] VSC 393

Supreme Court of Victoria

Bell J

Service - Associate Justice refused to make order for substituted service of writ and statement of claim upon first defendant - application made on summons was supported by evidence that first defendant might be in Ghana but had current connection with premises in Melbourne, was known to have email addresses and was represented in related proceeding by solicitors -

summons had sought order for substituted service of court documents at premises and addresses and on solicitors - rr6.10, 7.03, 77.06 *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* - held: evidence established it was impracticable to serve first defendant personally - steps proposed were very likely to bring court documents to first defendant's attention - appeal allowed - substituted service order made.

[Carter](#) (I C)

Re IPR Nominees Pty Ltd [2015] VSC 395

Supreme Court of Victoria

Bell J

Trusts and trustees - judicial advice - trustee sought Court's advice as to whether it should defend proceeding in which minor beneficiaries sought relief against it in relation to trust - r54.02 *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* - held: relief and remedy sought was wide ranging and would affect administration of trust and distribution of benefits between beneficiaries in fundamental way - Court determined it was appropriate for trustee to defend substantive proceeding unconditionally.

[IPR](#) (B)

In the estate of Czerny (deceased) [2015] SASC 111

Supreme Court of South Australia

Gray J

Wills and estates - application for admission of Will to probate - deceased executed formal will drafted by solicitors (2013 Will) - deceased unhappy with Will and executed a will kit Will - subsequently deceased wanted to revert to 2013 Will, destroyed her copy of will kit Will and arranged for other copy to be destroyed - following deceased's death search identified folder of personal papers including photocopy of 2013 Will and letter to niece in envelope titled "additions to my will" - letter consisted of writings of testamentary nature - whether Court should allow litigation guardian of deceased's grandchildren to enter compromise reached between parties - held: contested hearing could put grandchildren in worse position than compromise - appropriate in all circumstances for litigation guardian to enter compromise on grandchildren's behalf - terms of compromise approved.

[Czerny](#) (B)

Dean v Collins [No 2] [2015] WASCA 151

Court of Appeal of Western Australia

Martin CJ, Buss JA & Cheney J

Succession - family provision - Master dismissed appellant's application under s6(1) *Family Provision Act 1972 (WA)* for financial provision from estate of late mother - Master found appellant failed to establish adequate provision not made for appellant's proper maintenance, support, education or advancement in life - held: Master erred in determining jurisdictional question on basis of failure to demonstrate greater need than beneficiaries under Will - appeal allowed - costs orders set aside.

[Dean](#) (B)

Hitchcock v Goldspan Investments Pty Ltd [No 3] [2015] WASC 277

Supreme Court of Western Australia

Allanson J

Pleadings - first and fourth defendants sought leave to strike out plaintiff's statement of claim on basis it disclosed no reasonable cause of action - claims for breach of fiduciary duty, breach of shareholder agreement and breach of consumer laws - ss8, & 20 *Australian Consumer Law* (Cth) - ss10 & 11A *Fair Trading Act 1987* (WA) - O29 r8 Rules of the Supreme Court 1971 (WA) - ss51AC & 52 *Trade Practices Act 1974* (WA) - held: certain pleas struck out - application allowed in part.

[Hitchcock](#) (B)

CRIMINAL

Executive Summary

Smith v The Queen (HCA) - criminal law - no denial of procedural fairness by trial judge's failure to inform counsel of jury's interim votes and interim voting patterns - appeal dismissed

Police v Dunstall (HCA) - criminal law - evidence - 'general unfairness discretion' - admission of evidence of breath analysis reading would not render trial unfair - appeal allowed

Lin v R (NSWCCA) - criminal law - Director of Public Prosecution not obliged to particularise indictable offence - application to stay or quash indictment dismissed

Miller v R (NSWCCA) - criminal law - offence of break, enter and steal - full extent of personal history and circumstances not taken into account - error in sentencing process - applicant resentenced

Summaries With Link

Smith v The Queen [2015] HCA 27

High Court of Australia

French CJ; Kiefel, Bell, Gageler & Gordon JJ

Criminal law - procedural fairness - appellant charged with one count of rape - appellant tried in District Court of Queensland - after jury retired to consider verdict, trial judge received note from jury which disclosed interim votes and voting pattern for each disclosed interim vote - trial judge told counsel note indicated jury not in total agreement but did not disclose interim votes or interim voting patterns - whether failure of trial judge to inform counsel of interim votes and

interim voting patterns constituted denial of procedural fairness - held: there was no denial of procedural fairness - interim votes and interim voting patterns of jury were not relevant to future conduct of trial - relevant matters were jury speaker's answers to trial judge's direct questions about whether allowing majority verdict might resolve situation, and whether jury wanted more time to consider verdict - appeal dismissed.

[Smith](#)

Police v Dunstall [2015] HCA 26

High Court of Australia

French CJ; Kiefel, Bell, Gageler, Keane & Nettle JJ

Criminal law - evidence - drink-driving - breath analysis reading - Full Court of Supreme Court of South Australia upheld primary judge's affirmation of Magistrate's decision to dismiss charge that respondent drove motor vehicle with prescribed concentration of alcohol present in blood in contravention of s47B(1)(a) *Road Traffic Act 1961* (SA) - appeal concerned statutory presumption that concentration of alcohol indicated as being present in blood by a breath analysing instrument was the concentration of alcohol in the driver's blood at the time of breath analysis and throughout the preceding two hours - presumption only able to be rebutted if defendant arranged for sample of blood to be taken by medical practitioner in accordance with prescribed procedures and adduced evidence that analysis of blood demonstrated breath analysing instrument gave exaggerated reading - whether, in a case in which medical practitioner failed to take blood sample in accordance with prescribed procedures, Court had discretion to exclude evidence engaging presumption on basis its admission would render trial unfair - 'general unfairness discretion' - held: respondent did not have "statutory right" to have sample of blood taken and dealt with in accordance with prescribed procedures - onus on respondent to bring himself or herself within confines - Kourakis J, in dissenting judgment in the Full Court of Supreme Court of South Australia, was correct to conclude admission of evidence of breath analysis reading did not make trial unfair - appeal allowed.

[Police](#)

Lin v R [2015] NSWCCA 204

Court of Criminal Appeal of New South Wales

Simpson, R A Hulme & Bellew JJ

Criminal law - Director of Public Prosecutions charged applicant with five counts of offences against s400.9 *Criminal Code* (Cth) - applicant sought that indictment presented against him be "stayed or quashed" on basis Director refused to provide certain particulars sought on behalf of applicant - applicant contended that without the provision of proper particulars, indictment was defective and trial would be unable to proceed - Director contended that by reason of s400.9(2) he was not obliged to particularise an indictable offence - applicant sought leave to appeal against interlocutory decision dismissing motion - held: it was inappropriate to require Director to identify a "predicate" indictable offence subject of the charge - any one or more of the circumstances specified in sub-s(2) sufficient to prove element of a s400.9 offence required by sub-s(1)(b) - appeal dismissed.

[Lin](#)



Miller v R [2015] NSWCCA 86

Court of Criminal Appeal of New South Wales

Meagher JA; Simpson & Schmidt JJ

Criminal law - applicant sought leave to appeal sentences imposed after pleading guilty to two offences of break, enter and steal under s112 *Crimes Act 1900* (NSW), for which he received discount of 25% on sentencing - applicant contended primary judge erred in giving primary or determinative significance to applicable standard non-parole periods, in failing to have proper regard to applicant's deprived background, in failing to take into account fact that applicant was serving his sentence in protective custody, and that sentence imposed was otherwise manifestly excessive - held: full extent of applicant's personal history and circumstances not taken into account - error demonstrated in sentencing process - appeal upheld - sentences set aside - appellant resentenced.

[Miller](#)



Snow flakes. (45)

BY EMILY DICKINSON

I counted till they danced so
Their slippers leaped the town –
And then I took a pencil
To note the rebels down –
And then they grew so jolly
I did resign the prig –
And ten of my once stately toes
Are marshalled for a jig!

[Emily Dickinson](#)

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