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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)

Bailey v Broadsword Marine Contractors Pty Ltd (FCAFC) - administrative law - not established that Tribunal asked itself wrong question or applied wrong test in determining whether appellant was suffering from 'disease' or 'injury' under *Seafarers Rehabilitation and Compensation Act 1992* (Cth) - appeal dismissed (I B C G)

Noble v Phillips (NSWSC) - pleadings - defamation - impermissible to plead multiple publications as single publication - certain pleading struck out with leave to replead - certain pleading struck out - imputation struck out - certain imputations to go to jury (I B C G)

Shepard v HP Industrial Pty Ltd (QSC) - corporations - 'potential voidable transactions' - shelf order - extension of time granted to commence proceedings (I B C G)

Mandrek v Marstella & Anor (QSC) - damages - assessment of damages - motor vehicle accident - liability admitted - contentious claims for damages - judgment for first plaintiff in sum of \$377,739.95 - judgment for second plaintiff in sum of \$306,431.32 (I B)

GR Engineering Services Ltd - v - Eastern Goldfields Ltd (WASC) - commercial arbitration - matter referred to arbitration - stay granted in part - third defendant granted interpleader relief (I B C G)

Fortune Technology Fund Ltd - v - Premiere Eastern Energy Ltd (WASC) - corporations law

- application to wind up company on grounds of insolvency granted (I B C G)

McLean v James Plummer as Executor of the Estate of Robert William McLean (WASC) - wills and estates - succession - family provision - compromise reached at mediation - approval of compromise granted (B)

Summaries With Link (Five Minute Read)

Bailey v Broadsword Marine Contractors Pty Ltd [2017] FCAFC 219

Full Court of the Federal Court of Australia

Rares, Reeves & Derrington JJ

Administrative law - in order to take up employment with respondent appellant was required permission of owner of load-out facility to access it - in order to obtain permission, appellant was required to disclose his prior medical conditions - appellant did not disclose 'adjustment disorder with associated depression and anxiety', which had previously caused him to cease work - appellant suffered same condition within one month of employment - appellant required to cease work - Administrative Appeals Tribunal confirmed respondent's determination, in reliance on s10(7) *Seafarers Rehabilitation and Compensation Act 1992* (Cth), to deny claim for ongoing benefits - whether Tribunal asked and answered correct question as to whether applicant suffered "disease" or an "injury (other than a disease)" under Act - whether appellant made wilful or false representation - held: not established that Tribunal asked itself wrong question or applied wrong test - appeal dismissed.

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

Noble v Phillips [2018] NSWSC 25

Supreme Court of New South Wales

McCallum J

Pleadings - defamation - plaintiff was director of company on whose land music festival was held - claim arising from article published in newspaper which claimed noise from music festival had destroyed koala population - plaintiff sued consultant to whom newspaper had attributed claim, consultant's company, and journalist - plaintiff sued in respect of article, and 'anterior communications' between consultant and journalist - defendants raised objections to pleading - objections to form and capacity - novel pleading - whether permissible to plead five 'disparate publications' as single publication - held: due to their disparate nature, it was not permissible to plead matter in schedules as single publication - certain pleading struck out with leave to replead - certain pleading struck out - imputation struck out - certain imputations to go to jury

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

Shepard v HP Industrial Pty Ltd [2018] QSC 10

Supreme Court of Queensland

Douglas J

Corporations - shelf order - voidable transactions - applicant, pursuant to s588FF(3)(b) *Corporations Act 2001* (Cth), sought extension of time ('shelf order') to commence proceedings for orders concerning 'potential voidable transactions' in relation to respondent - applicant sought the shelf order due to not currently being in position to identify all transactions and parties - whether fair and just to make order - whether adequate explanation for delay - prejudice - held: Court satisfied to grant shelf order for a period of 6 months - extension of time granted.

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

Mandrek v Marstella & Anor [2018] QSC 8

Supreme Court of Queensland

Douglas J

Damages - assessment of damages - motor vehicle accident - plaintiffs injured in motor vehicle accident - second plaintiff was 36 weeks' pregnant at time of accident - liability not in issue but amounts which each plaintiff claimed was contentious - ss55 & 59 *Civil Liability Act 2003* (Qld) - s87 *Civil Liability Regulation 2003* (Qld) - held: judgment for first plaintiff in sum of \$377,739.95 - judgment for second plaintiff in sum of \$306,431.32.

[Mandrek](#) (I B)

GR Engineering Services Ltd - v - Eastern Goldfields Ltd [2018] WASC 19

Supreme Court of Western Australia

Tottle J

Commercial arbitration - first defendant, pursuant to s8 *Commercial Arbitration Act 2012* (WA), sought to refer dispute with plaintiff to arbitration and stay of proceedings - third defendant sought interpleader relief under) O17 r1 *Rules of the Supreme Court 1971* (WA) - construction of contract - whether claims within arbitration agreement's scope - whether proceedings were 'proceedings to enforce payment due under the Contract' under clause and thus 'carved out' from arbitration agreement's operation - held: matter referred to arbitration - stay granted in part - third defendant granted interpleader relief.

[GR Engineering](#) (I B C G)

Fortune Technology Fund Ltd - v - Premiere Eastern Energy Ltd [2018] WASC 35

Supreme Court of Western Australia

Master Sanderson

Corporations law - winding up - insolvency - plaintiffs sought to wind up defendant on insolvency grounds of insolvency - application contended that defendant had failed to comply with statutory demand - whether defendant established solvency - *Corporations Act 2001* (Cth) - held: adjournment sought by defendant refused - defendant did not establish solvency - Court not satisfied that defendant could meet its debts 'as and when they fell due' - order to wind up defendant on grounds of insolvency granted.

[Fortune Technology](#) (I B C G)

McLean v James Plummer as Executor of the Estate of Robert William McLean [2018]

WASC 26

Supreme Court of Western Australia

Allanson J

Wills and estates - succession - family provision - approval of compromise - deceased 'expressly excluded' his children, from whom he was estranged, from will - three of the children sought provision from will under *Family Provision Act 1972 (WA)* - compromise reached at mediation - parties sought approval of compromise pursuant to O70 r10 *Rules of the Supreme Court 1971 (WA)* - independent counsel's opinion - uncertainty - potential effect of costs on estate's value - held: Counsel's opinion had been 'overtaken by events' - estate was now 'substantially less' - counsel's opinion dispensed with - Court satisfied settlement was in children's best interests - settlement approved.

[McLean](#) (B)

CRIMINAL

Executive Summary

Xiao v R (NSWCCA) - criminal law - corporations law - procurement offence - entering agreement to commit offence - erroneous failure to take into account 'utilitarian value' of guilty plea - comparison of conduct with co-offender required lesser sentence - applicant re-sentenced - appeal allowed

White v R (NSWCCA) - criminal law - applicant convicted of sexual intercourse without consent and indecent assault - no miscarriage of justice - appeal against conviction dismissed

Summaries With Link

Xiao v R [2018] NSWCCA 4

Court of Criminal Appeal of New South Wales

Bathurst CJ; Beazley P, Hoeben CJ at CL, McCallum J & Bellew J

Criminal law - corporations law - applicant charged with offence under ss1043A(1)(d) & 1311(1) *Corporations Act 2001* (Cth) with procurement offence and entering agreement to commit an offence under ss1043A(1)(d) & 1311(1) - applicant pleaded guilty before committal and sentenced to 8 years and 3 months in prison with non-parole period of 5 years and 6 months - whether erroneous assessment of offences' objective seriousness - whether judge erred in not taking into account applicant's guilty plea - whether judge erred in not taking into account that applicant, because he was a foreign national, would experience 'more onerous custody' - whether judge erred in not sentencing applicant under s19AB(1) *Crimes Act 1914* (Cth) -

whether sentences manifestly excessive - whether 'legitimate sense of grievance' due to sentence imposed on co-offender - 'utilitarian value' of guilty plea - held: judge erred in not giving discount for guilty plea's 'utilitarian value' - comparison of applicant's conduct with co-offender's conduct required imposition of lesser sentence - 15% discount on sentence allowed for guilty plea's 'utilitarian value' - applicant resentenced to 7 years in prison with non-parole period of 4 years 6 months - appeal allowed.

[View Decision](#)

White v R [2018] NSWCCA 1

Court of Criminal Appeal of New South Wales

Hoeben CJ; Davies & Bellew JJ

Criminal law - sexual intercourse without consent - indecent assault - applicant convicted of one count of sexual intercourse without consent and three counts of indecent assault - applicant sentenced to three years in prison with non-parole period of 18 months - applicant appeal against conviction - applicant contended there had been miscarriage of justice due to incompetence of applicant's counsel - applicant alleged failure by counsel to call applicant to give evidence, failure to take applicant's instructions whether he wished to give evidence, and failure to advise as to ramifications of not giving evidence - applicant also contended judge erroneous permitted Crown Prosecutor to make submission to jury, 'which invited reasoning involving a reversal of onus' - held: grounds of appeal failed - no miscarriage of justice - appeal dismissed.

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A Musical Instrument

By: Elizabeth Barrett Browning

I.

WHAT was he doing, the great god Pan,
Down in the reeds by the river ?
Spreading ruin and scattering ban,
Splashing and paddling with hoofs of a goat,
And breaking the golden lilies afloat
With the dragon-fly on the river.

II.

He tore out a reed, the great god Pan,
From the deep cool bed of the river :
The limpid water turbidly ran,
And the broken lilies a-dying lay,
And the dragon-fly had fled away,
Ere he brought it out of the river.

III.

High on the shore sate the great god Pan,
While turbidly flowed the river ;
And hacked and hewed as a great god can,
With his hard bleak steel at the patient reed,
Till there was not a sign of a leaf indeed
To prove it fresh from the river.

IV.

He cut it short, did the great god Pan,
(How tall it stood in the river !)
Then drew the pith, like the heart of a man,
Steadily from the outside ring,
And notched the poor dry empty thing
In holes, as he sate by the river.

V.

This is the way,' laughed the great god Pan,
Laughed while he sate by the river,)
The only way, since gods began
To make sweet music, they could succeed.'
Then, dropping his mouth to a hole in the reed,
He blew in power by the river.



Benchmark

VI.

Sweet, sweet, sweet, O Pan !
Piercing sweet by the river !
Blinding sweet, O great god Pan !
The sun on the hill forgot to die,
And the lilies revived, and the dragon-fly
Came back to dream on the river.

VII.

Yet half a beast is the great god Pan,
To laugh as he sits by the river,
Making a poet out of a man :
The true gods sigh for the cost and pain, —
For the reed which grows nevermore again
As a reed with the reeds in the river.

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

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