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Daily Civil Law Review 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)

Chief of the Defence Force v Gaynor (FCAFC) - constitutional law - implied freedom of communication on political and governmental matters - appeal against setting aside of termination of respondent's service as Australian Defence Force officer pursuant to reg 85(1)(d) *Defence (Personnel) Regulations 2002* (Cth) allowed (I B C G)

Australian Competition and Consumer Commission v Virgin Australia Airlines Pty Ltd (No 2) (FCA) - consumer law - remedies - pecuniary penalties - breaches of *Australian Consumer Law* (ACL) by representations on website and mobile website - declaration by consent that Virgin Australia was to pay \$200,000 to Commonwealth of Australia (I B)

Australian Competition and Consumer Commission v Jetstar Airways Pty Limited (No 2) (FCA) - consumer law - remedies - pecuniary penalties - breaches of *Australian Consumer Law* (ACL) by representations on mobile website - Jetstar to pay \$545,000 to Commonwealth of Australia (I B)

Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr (NSWCA) - corporations - liquidators' remuneration - erroneous approach to determination of remuneration - application for remuneration remitted (I B)

Gujarat NRE India Pty Ltd v Wollongong Coal Limited (NSWSC) - legal practitioners - proper administration of justice did not require solicitor to be prevented from acting - motion to restrain

solicitor dismissed (I B C)

Dalton v Pinkerton (ACTSC) - damages - motor vehicle - appeal against assessment of damages allowed to extent appellant was entitled to amount for past out-of-pocket expenses - judgment sum increased (I)

Cave v ACT (ACTSC) - costs - personal injury - negligence - plaintiff awarded \$12 million - defendants rejected offer of compromise of \$11,425,399.00 - special costs order granted to plaintiff - defendants to pay plaintiff's costs on solicitor client basis (I)

Summaries With Link (Five Minute Read)

Chief of the Defence Force v Gaynor [2017] FCAFC 41

Full Court of the Federal Court of Australia

Perram, Mortimer & Gleeson JJ

Constitutional law - administrative law - primary judge set aside appellant's termination of respondent's service as Australian Defence Force officer pursuant to reg 85(1)(d) *Defence (Personnel) Regulations 2002* (Cth) on basis it infringed implied constitutional freedom of communication on political and governmental matters - appellant appealed - held: primary judge erred in 'level' at which he applied *Lange* test - reg 85 was valid - administrative law challenge raised in notice of contention failed - appeal allowed.

[Chief of the Defence Force](#) (I B C G)

Australian Competition and Consumer Commission v Virgin Australia Airlines Pty Ltd (No 2) [2017] FCA 204

Federal Court of Australia

Foster J

Consumer law - remedies - pecuniary penalties - Court found Virgin Australia Airlines Pty Ltd contravened ss18, 29(1)(i) & 29(1)(m) *Australian Consumer Law* by making false and misleading representations on its mobile website - determination of remedies to be ordered - whether agreed penalty and agreed position on costs reasonable - held: orders made on which parties had agreed - declaration by consent that Virgin Australia was to pay to Commonwealth of Australia pecuniary penalty of \$200,000.

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

Australian Competition and Consumer Commission v Jetstar Airways Pty Limited (No 2) [2017] FCA 205

Federal Court of Australia

Foster J

Consumer law - remedies - pecuniary penalties - Court found Jetstar contravened ss18, 29(1)(i) & 29(1)(m) *Australian Consumer Law* by making false and misleading representations on its

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website and mobile website - determination of remedies to be ordered - held: website conduct more serious than mobile site conduct - pecuniary penalty of \$295,000 ordered in respect of website conduct and additional pecuniary penalty of \$250,000 ordered for mobile site conduct - Jetstar to pay Commonwealth of Australia pecuniary penalties of \$545,000.

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

Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liquidation) v Sakr [2017] NSWCA 38

Court of Appeal of New South Wales

Bathurst CJ, Beazley P, Gleeson JA; Barrett & Beach AJJA

Corporations - liquidators' remuneration - liquidator sought to appeal against order determining his remuneration as liquidator of company at \$20,000 including GST - ss473, 504, 488, 425 & 449E *Corporations Act 2001* (Cth) - *Corporations Amendment (Insolvency) Act 2007* (Cth) - s75A *Supreme Court Act 1970* (NSW) - submissions by liquidator, ASIC and ARITA - whether failure to consider value of additional work - whether error in consideration of proportionality - whether 'separate approach for smaller liquidations' mandated by statute - held: critical question was 'whether the judge erred in his determination of reasonable remuneration' - primary judge erred in approach to determination - appeal allowed - application for remuneration remitted.

[Sanderson](#) (I B)

Gujarat NRE India Pty Ltd v Wollongong Coal Limited [2017] NSWSC 209

Supreme Court of New South Wales

Slattery J

Legal practitioners - defendant sought to restrain plaintiff's solicitor from acting in proceedings on basis proper administration of justice required that solicitor should be prevented from acting - solicitor had previously represented defendant in negotiating agreement which was subject of claim - 'whether a fair-minded, reasonably informed member of the public' would conclude proper administration of justice required prevention of legal practitioner from acting - *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 Reg. 14* - held: Court concluded that in the circumstances the proper administration of justice did not require solicitor to be prevented from acting - motion dismissed.

[Gujarat](#) (I B C)

Dalton v Pinkerton [2017] ACTSC 28

Supreme Court of the Australian Capital Territory

Murrell CJ

Damages - motor vehicle accident - appellant suffered whiplash injury when appellant's vehicle struck from behind by vehicle driven by first respondent - second respondent was insurer of vehicle - liability admitted - appellant challenged assessment of general damages and interest on them, future wage loss and past out-of-pocket expenses - appellant also contended Magistrate should have awarded damages for future out-of-pocket expenses, past wage loss

and domestic assistance - held: appeal allowed to extent appellant was entitled to past out-of-pocket expenses - judgment sum increased.

[Dalton](#) (I)

Cave v ACT [2017] ACTSC 34

Supreme Court of the Australian Capital Territory

Burns J

Costs - personal injury - claim for damages for defendants' negligence settled - judgment entered for plaintiff in sum of \$12 million - determination of costs - plaintiff had made offer of compromise of \$11,425,399.00 - defendants did not accept offer - plaintiff sought special costs order for payment of costs on solicitor client pursuant to r1010 *Court Procedures Rules 2006* (ACT) - held: plaintiff entitled to special costs order sought - defendants to pay plaintiff's cost on solicitor client basis.

[Cave](#) (I)

CRIMINAL

Executive Summary

DPP v Massey (a Pseudonym) (VSCA) - criminal law - admissibility of evidence - no error in exclusion of DNA evidence - leave to appeal refused

R v Manning (QCA) - criminal law - child sexual offences - miscarriage of justice resulting from prosecution's failure to call evidence - appeal allowed - convictions quashed - retrial

Summaries With Link

DPP v Massey (a Pseudonym) [2017] VSCA 38

Court of Appeal of Victoria

Weinberg, Priest & Ferguson JJA

Criminal law - respondent's wife died from multiple stab wounds - prosecution's case against respondent wholly circumstantial - central fact for prosecution to establish was that respondent was wife's killer - Director of Public Prosecution sought to appeal against trial judge's failure to admit DNA evidence - ss55(1) & 137 *Evidence Act 2008* (Vic) - ss295 & 297 *Criminal Procedure Act 2009* (Vic) - held: no error in exclusion of evidence by trial judge - leave to appeal refused.

[Massey](#)

R v Manning [2017] QCA 23

Court of Appeal of Queensland



Morrison & Philip McMurdo JJA; Boddice J

Criminal law - appellant convicted of 20 counts of child sexual offences - appellant challenged convictions on basis of miscarriage of justice resulting from prosecution's failure to call evidence from his wife and his brother - ss21AK & 93A *Evidence Act 1977* (Qld) - likelihood of evidence affecting jury's assessments - held: Crown's failure to call wife resulted in material miscarriage of justice because 'it deprived the appellant of a chance of an acquittal' - wife's evidence was material not unreliable - fairness required that prosecution produce all material evidence available to it - brother's evidence relevant and admissible with potential to influence jury's reasoning if considered with evidence of appellant's wife - unnecessary to consider whether absence of brother's evidence alone would have resulted in miscarriage of justice - appeal allowed - convictions set aside - retrial.

[Manning](#)

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The Solitary Reaper

By [William Wordsworth](#)

Behold her, single in the field,
Yon solitary Highland Lass!
Reaping and singing by herself;
Stop here, or gently pass!
Alone she cuts and binds the grain,
And sings a melancholy strain;
O listen! for the Vale profound
Is overflowing with the sound.

No Nightingale did ever chaunt
More welcome notes to weary bands
Of travellers in some shady haunt,
Among Arabian sands:
A voice so thrilling ne'er was heard
In spring-time from the Cuckoo-bird,
Breaking the silence of the seas
Among the farthest Hebrides.

Will no one tell me what she sings?—
Perhaps the plaintive numbers flow
For old, unhappy, far-off things,
And battles long ago:
Or is it some more humble lay,
Familiar matter of to-day?
Some natural sorrow, loss, or pain,
That has been, and may be again?

Whate'er the theme, the Maiden sang
As if her song could have no ending;
I saw her singing at her work,
And o'er the sickle bending;—
I listened, motionless and still;
And, as I mounted up the hill,
The music in my heart I bore,
Long after it was heard no more.

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