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Daily Civil Law Review A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 2) (FCAFC) - costs - indemnity costs - shareholder class action - refusal of leave to appeal against interlocutory orders - wasted costs - hopeless application - successful respondents granted indemnity costs (I B C G)

Nyoni v Pharmacy Board of Australia (No 4) (FCA) - stay - bankruptcy - stay of claims of misleading or deceptive conduct and malicious falsehood arising from publication of material in reliance on s60(2) *Bankruptcy Act 1966* (Cth) refused (I B C G)

In the matter of Citigroup Global Markets Australia Pty Limited (No 2) (NSWSC) - costs - summary dismissal or strike out refused but plaintiff's case not arguable as pleaded - plaintiff to pay costs of application - variation of costs order refused (I B C G)

Belinda Jane Neal v Kaila Murnain & Anor (NSWSC) - equity - plaintiff expelled from Labour Party after nominating for pre-selection ballot - plaintiff did not have right to be considered in pre-selection ballot count - summons dismissed (I B C G)

Naumovski v Ugrinovski (VSCA) - contract - heads of agreement - special referee's requirements not consistent with Heads of Agreement's proper construction - leave to appeal refused (I B C G)

Robinson v State of Queensland (QSC) - negligence - psychiatric injury - employer's duty of care - managerial mistreatment - State liable - judgment for plaintiff in sum of \$1,468,991.11 (I B C G)

O'Brien v Duthie, Van Der Schoor & Prince (WASC) - succession - family provision - application for extension of time to bring proceedings refused (B)

Summaries With Link (Five Minute Read)

Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 2) [2017] FCAFC 116

Full Court of the Federal Court of Australia

Jagot, Yates & Murphy JJ

Costs - indemnity costs - shareholder class action - Court dismissed applicant's application for leave to appeal against interlocutory orders in respect of class member registration and opt out - first and second respondents sought indemnity costs - ss37M, 37N & 43 *Federal Court of Australia Act 1976* (Cth) - held: applicant failed in opposition to indemnity costs order - respondents had wasted costs in addressing applicant's contentions - applicant should have been aware application was hopeless - in all circumstances Court satisfied that it should depart from ordinary position as to costs - respondents awarded indemnity costs.

[Melbourne City Investments](#) (I B C G)

Nyoni v Pharmacy Board of Australia (No 4) [2017] FCA 911

Federal Court of Australia

Siopis J

Stay - bankruptcy - applicant contended first and third respondents published material which 'impugned his reputation and was misleading or deceptive' - applicant contended publication gave rise to causes of action in defamation, misleading or deceptive conduct and malicious falsehood - applicant claimed compensation and injunctive relief - sequestration order made against applicant's estate - respondents sought stay of applicant's claims for misleading or deceptive conduct and malicious falsehood in reliance on s60(2) *Bankruptcy Act 1966* (Cth) - whether claims fell within s60(4)(a) for being in respect of 'any personal injury or wrong done to the bankrupt...' - whether claims did not fall within s60(4)(a) because claims compensated 'for economic loss' - held: substance of matter in respect of which applicant made claims was a 'personal injury or wrong done to the bankrupt' - stay refused.

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

In the matter of Citigroup Global Markets Australia Pty Limited (No 2) [2017] NSWSC 1040

Supreme Court of New South Wales

Brereton J

Costs - summary dismissal - pleadings - Court refused to summarily dismiss proceedings but

found that if case was to proceed it 'should be properly pleaded' - Court found that case could not succeed as presently formulated - plaintiff sought variation of Court's costs order that plaintiff pay costs of application - plaintiff sought that each party pay own costs, or that costs be defendant's costs in proceedings - plaintiff contended defendant had failed in seeking summary dismissal or strike out and plaintiff was justified to resist application - held: Court's order concerning pleading reflected that claim did not 'disclose an arguable case' - plaintiff had in effect been granted an indulgence to replead or reformulate case - defendant should not have to bear costs - costs order not varied.

[Citigroup Global Markets Australia](#) (I B C G)

Belinda Jane Neal v Kaila Murnain & Anor [2017] NSWSC 1039

Supreme Court of New South Wales

Slattery J

Equity - plaintiff formerly held public office in Australian Parliament elected on behalf of Labor Party - defendant were Labor Party office holders - plaintiff expelled from Labour Party after nominating for pre-selection ballot - whether plaintiff had right to be considered in pre-selection ballot count - plaintiff claimed she had a right to be counted notwithstanding expulsion - proper construction of the 2016 Labor Party Rules - held: there was no prospect of plaintiff's endorsement as candidate - no utility in granting plaintiff relief - defence of hardship to other candidates competing with plaintiff also established - summons dismissed.

[Belinda Jane Neal](#) (I B C G)

Naumovski v Ugrinovski [2017] VSCA 200

Court of Appeal of Victoria

Whelan, Beach & McLeish JJA

Contract - heads of agreement - parties settled agreement by 'Binding Heads of Agreement' (Heads of Agreement) - special referee appointed under Heads of Agreement - special referee produced report setting out steps for Heads of Agreement's implementation - respondent contended steps were inconsistent with Heads of Agreement - primary judge found special referee's requirements not consistent with Heads of Agreement's proper construction - applicant sought to appeal - implementation of provisions on inter-company loans - certain grounds raised for first time on appeal - held: no error in contractual construction - leave refused in respect of grounds raised for first time on appeal - respondent had not had proper opportunity to meet matters raised by grounds, grounds addressed issues not finally determined, and would not render orders incorrect - leave to appeal refused.

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

Robinson v State of Queensland [2017] QSC 165

Supreme Court of Queensland

Henry J

Negligence - psychiatric injury - employer's duty of care - plaintiff alleged defendant owed her non-delegable duty to take 'reasonable care to avoid exposing her to foreseeable risk of

psychiatric injury' and that injury suffered was due to defendant's negligence - defendant's failures said to involve failure to prevent District Chief Executive Officer from behaviour towards plaintiff - defendant alleged to be directly liable for some of DCEO's conduct and vicariously liable for other conduct - safe system of work - managerial mistreatment - held: defendant made out case in negligence against defendant - judgment for plaintiff in sum of \$1,468,991.11.

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

O'Brien v Duthie, Van Der Schoor & Prince [2017] WASC 227

Supreme Court of Western Australia

Master Sanderson

Succession - family provision - plaintiffs were children of deceased - plaintiffs sought extension of time to bring proceedings under *Family Provision Act 1972 (WA)* - length of and explanation for delay - interests of justice - onus - whether estate had been distributed - whether refusal of leave would leave applicant 'without regress against anyone' - whether plaintiffs had arguable case - whether will of deceased failed to provide for plaintiffs' advancement in life - held: on balance of all factors Court not satisfied it should extend time - application refused.

[O'Brien](#) (B)

CRIMINAL

Executive Summary

IL v The Queen (HCA) - criminal law - murder - manslaughter - joint criminal enterprise - trial judge correct to acquit appellant of counts of murder and manslaughter - appeal allowed

SG v Tasmania (TASCCA) - criminal law - aggravated sexual assault - sentence not manifestly excessive - not established that sentencing judge gave insufficient weight to guilty plea - appeal dismissed

Summaries With Link

IL v The Queen [2017] HCA 27

High Court of Australia

Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ

Criminal law - murder - manslaughter - joint criminal enterprise - appellant tried on one count of manufacturing prohibited drug, one count of murder or count of unlawfully causing deceased's death, and offences concerning unlawful possession of firearms - Crown alleged appellant acted with deceased in joint criminal enterprise to manufacture drug (joint criminal exercise) - Crown alleged appellant guilty of deceased's murder or manslaughter, although evidence could

not exclude possibility deceased killed accidentally as result of own act - Crown contended act causing deceased's death committed in course of joint criminal enterprise and was act of appellant as participant - trial judge acquitted appellant of murder and unlawfully causing deceased's death - Court of Criminal Appeal quashed acquittal verdicts and ordered new trial - whether trial judge correct to direct jury to acquit appellant of murder and manslaughter - whether murder in s18 *Crimes Act 1900* (NSW) applied to self-killing - held (by majority): trial judge correct to direct jury to acquit appellant - acquittal verdicts reinstated - appeal allowed.

[IL](#)

SG v Tasmania [2017] TASCCA 12

Court of Criminal Appeal of Tasmania

Pearce J; Marshall & Porter JJ

Criminal law - sexual assault - appellant pleaded guilty to aggravated sexual assault contrary s127A *Criminal Code* (Code) - appellant sentenced to 18 months imprisonment - appellant appealed - appellant's 'state of mind' - 'consent and mistake' - mitigating factors - aggravating factors - whether sentence manifestly excessive - whether insufficient weight given to guilty plea - ss2A, 14 & 14A of the Code - held: sentence not manifestly excessive - 18 months not outside range of sentences available to judge in 'exercise of sound discretionary judgment' - no failure to give adequate weight to guilty plea - appeal dismissed.

[SG](#)



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The Garden

By [Andrew Marvell](#)

How vainly men themselves amaze
To win the palm, the oak, or bays,
And their uncessant labours see
Crown'd from some single herb or tree,
Whose short and narrow verged shade
Does prudently their toils upbraid;
While all flow'rs and all trees do close
To weave the garlands of repose.

Fair Quiet, have I found thee here,
And Innocence, thy sister dear!
Mistaken long, I sought you then
In busy companies of men;
Your sacred plants, if here below,
Only among the plants will grow.
Society is all but rude,
To this delicious solitude.

No white nor red was ever seen
So am'rous as this lovely green.
Fond lovers, cruel as their flame,
Cut in these trees their mistress' name;
Little, alas, they know or heed
How far these beauties hers exceed!
Fair trees! wheres'e'er your barks I wound,
No name shall but your own be found.

When we have run our passion's heat,
Love hither makes his best retreat.
The gods, that mortal beauty chase,
Still in a tree did end their race:
Apollo hunted Daphne so,
Only that she might laurel grow;
And Pan did after Syrinx speed,
Not as a nymph, but for a reed.

What wond'rous life in this I lead!
Ripe apples drop about my head;
The luscious clusters of the vine
Upon my mouth do crush their wine;



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The nectarine and curious peach
Into my hands themselves do reach;
Stumbling on melons as I pass,
Ensnar'd with flow'rs, I fall on grass.

Meanwhile the mind, from pleasure less,
Withdraws into its happiness;
The mind, that ocean where each kind
Does straight its own resemblance find,
Yet it creates, transcending these,
Far other worlds, and other seas;
Annihilating all that's made
To a green thought in a green shade.

Here at the fountain's sliding foot,
Or at some fruit tree's mossy root,
Casting the body's vest aside,
My soul into the boughs does glide;
There like a bird it sits and sings,
Then whets, and combs its silver wings;
And, till prepar'd for longer flight,
Waves in its plumes the various light.

Such was that happy garden-state,
While man there walk'd without a mate;
After a place so pure and sweet,
What other help could yet be meet!
But 'twas beyond a mortal's share
To wander solitary there:
Two paradises 'twere in one
To live in paradise alone.

How well the skillful gard'ner drew
Of flow'rs and herbs this dial new,
Where from above the milder sun
Does through a fragrant zodiac run;
And as it works, th' industrious bee
Computes its time as well as we.
How could such sweet and wholesome hours
Be reckon'd but with herbs and flow'rs!

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