



Friday, 14 February 2025

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

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (One Minute Read)

Impiombato v BHP Group Limited (FCAFC) - primary judges had not erred regarding group definition in class action case, but had erred regarding when amendments to pleadings related to that definition should take effect (I B C)

ACN 117 641 004 Pty Ltd (in liq) v S&P Global, Inc (No 4) (FCA) - Court deferred objections to expert evidence to trial (I B)

Owners Corporation Strata Plan 533 v Random Primer Pty Ltd (NSWCA) - DA included proposal to extend existing easement benefiting applicant's land - servient owner unreasonably refusing consent was an unreasonable interference with dominant owner's rights (I B C)

Commissioner of the Australian Federal Police v D V & Anor (SASC) - Court refused to stay proceeding under the *Proceeds of Crimes Act 2002* (Cth) pending resolution of Australian and US criminal proceedings (I B)

Hansch v Mollross & Ors Trading as Ogilvie Jennings (TASSC) - solicitors could not recover costs from client as they had not provided the required estimated range of costs in the event litigation was successful or unsuccessful (I B C)

HABEAS CANEM

The family that grazes together...



Benchmark

Summaries With Link (Five Minute Read)

[Impiombato v BHP Group Limited \[2025\] FCAFC 9](#)

Full Court of the Federal Court of Australia

Beach, Lee, & O'Bryan JJ

Class actions - collapse of Fundão Dam caused BHP financial loss - class action alleging breach of continuous disclosure obligations under s674(2) of the *Corporations Act 2010* (Cth) and misleading and deceptive conduct - first primary judge made order agreeing with BHP that group members as defined in pleadings restricted to persons who contracted to purchase BHP shares on only some of the exchanges or platforms for which the applicants now contended - applicants sought to amend pleadings to ensure all identified platforms included - second primary judge allowed amendment and ordered it take effect from commencement of proceeding, which got around limitation periods - applicants granted leave to appeal first order and BHP granted leave to appeal second order - held: both appeals dealt with substantive rights and interests, not merely practice and procedure - first primary judge had not erred in his construction of the pleadings - second primary judge had made material errors of fact, and discretion should be re-exercised - held further:(by majority, LeeJ taking a different approach):the proposed amendment including the extra trading platform had two effects: (1) making new group members; and (2) giving existing group members further claims - applying established principles, effect (1) should take effect from date of amendment and effect (2) should take effect from date proceedings commenced, as it involved new claims arising out of substantially similar facts to old claims.

[Impiombato](#) (I B C)

[ACN 117 641 004 Pty Ltd \(in liq\) v S&P Global, Inc \(No 4\) \[2025\] FCA 72](#)

Federal Court of Australia

Shariff J

Expert evidence - in representative proceedings, two sets of applicants alleged S&P engaged in fraudulent conduct, including the tort of deceit - S&P sought orders that expert evidence of the applicants be ruled inadmissible - held: authorities have identified three rules regarding the admissibility of expert evidence: (1) are the facts and assumptions on which the expert's opinion is founded disclosed? (2) is there evidence admitted, or to be admitted, capable of proving matters sufficiently similar to the assumptions to render the opinion of value? and (3) is there a statement of reasoning showing how the facts and assumptions relate to the opinion stated to reveal that that opinion is based on the expert's specialised knowledge? - rigid application of the three rules calls for a counsel of perfection that may affect the smooth running of trials - proof of an assumption may depend not only upon the admissibility of other evidence, but also upon whether the trier of fact accepts that the other evidence establishes the relevant assumptions - often, whether an assumption is established will not be known until after the close of evidence or the close of trial - objections identified by S&P deterred until trial - applications dismissed.

[ACN 117 641 004 Pty Ltd \(in liq\)](#) (I B)

Owners Corporation Strata Plan 533 v Random Primer Pty Ltd [2025] NSWCA 8

Court of Appeal of New South Wales

Gleeson, Mitchelmore, & Kirk JJA

Easements - respondent's land had benefit of right of way over driveway on appellant's land - driveway ran immediately alongside respondent's land - respondent lodged DA to replace existing building with apartment block, including proposal to widen the driveway by about 1.5m, with the extension wholly on respondent's land - Council considered appellant's consent required - appellant did not consent - Council refused application - respondent challenged Council's decision in Land and Environment Court, and sought mandatory injunction against appellant in Supreme Court, requiring appellant to consent - primary judge granted mandatory injunction - appellant appealed - held: dominant owner may obtain relief where actions of servient owner are a substantial interference with an easement - this involves a practical, evaluative judgment about neighbours being able to exercise respective property rights, taking account of the nature, extent, and significance of any interference “servient owner refusing consent to DA can be a substantial interference in rights of dominant owner - appellant disavowed below that increased usage of the driveway would be excessive so as to fall outside the right of way - in practical terms, objection that users of the appellant's land would be required to drive over respondent's land when using the driveway was not meaningful - widening driveway would benefit both lots - requiring servient owner to consent did not mean it could not later complain if there were unreasonable use of the right of way - unreasonable for the appellant to refuse consent, and doing so was substantial interference in the rights of the respondent - appeal dismissed.

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

Commissioner of the Australian Federal Police v D V & Anor [2025] SASC 9

Supreme Court of South Australia

Kourakis CJ

Forfeiture orders - first respondent was being prosecuted both in Australia (including South Australia) and the US for a multitude of drug, financial, and organised crime offences, most of which arose from his alleged engagement in, and facilitation of, offending on the ANOM encrypted communications smart phone application - Commissioner sought a variety of restraining, custody, control, ancillary, and forfeiture orders pursuant to the *Proceeds of Crimes Act 2002* (Cth) and first respondent and his spouse (the second respondent) - respondents sought a stay of proceedings pending final resolution of Australian and US criminal proceedings - held: s319(1) of the *Proceeds of Crimes Act* empowers the Court to stay proceedings under the Act if it considers it is in the interests of justice - subsections (2)-(5) provide the Court must not stay proceedings on grounds including that criminal proceedings have been or may be commenced against the respondent or any other person - on s319's proper construction, 'criminal proceeding' must extend to any proceeding whose just disposition enlivens power to make orders under the Act - Court accepted the submission that criminal proceedings for the purposes of s319 included the US proceedings - not obvious how the accusatorial and adversarial processes of the criminal law would be compromised if answers given under

compulsion in a collateral enquiry were quarantined from the investigators and prosecutors of pending or future criminal charges - such evidence as the spouse might be compelled to give in the *Proceeds of Crimes Act* proceeding would not be admissible in criminal proceedings against the first respondent - not obvious that the risk of the leaking of information, after the making of an examination order, was a relevant consideration unless a prejudice, like the loss of a legitimate forensic choice, could be demonstrated - this possibility was speculative on the evidence in this case - application dismissed.

[Commissioner of the Australian Federal Police](#) (I B)

Hansch v Mollross & Ors Trading as Ogilvie Jennings [2025] TASSC 3

Supreme Court of Tasmania

Marshall AJ

Solicitors' duties - solicitors acted for client in Supreme Court building dispute - client resisted solicitors' claim for costs, contending they had not acted in his best interests, did not act in accordance with his instructions, and did not exercise reasonable care and skill, and that he had a set-off arising from an entitlement to damages caused by his having to retain new solicitors and having suffered unrecoverable costs as a result of solicitors failing to join certain parties to the Supreme Court proceedings - Chief Magistrate upheld solicitors' claim and dismissed client's counterclaim - client appealed - held: s291(1)(f) of the *Legal Profession Act 2007* (Tas) provides that, in a litigious matter, law practice must disclose the range of costs that may be recovered if the client is successful, and the range of costs the client may be ordered to pay if unsuccessful - under s294, disclosure must be made in writing before or as soon as practicable after the law practice is retained in the matter - s300 provides that, if there is a failure to disclose, the client need not pay the legal costs demanded unless assessed under the Act - client had not raised a s300 defence before Chief Magistrate, and there was no evidence as to whether the solicitors gave him the required estimated ranges - as client had been self-represented before Chief Magistrate, he should be permitted to raise this point on appeal - solicitors given opportunity to adduce evidence on appeal on this issue, but chose not to do so - difficult for appellant client to prove a negative (that he was not provided with the required estimated ranges) - solicitors were uniquely in a position to prove they did provide the required estimates, and it would have been easy for them to check their records and provide this evidence - applicant had asserted he did not receive the required disclosure - appeal allowed.

[Hansch](#) (I B C)



Poem for Friday

Sun of God

By Rev David Conolly

No need to search the skies.

The light is here,
down here ' everywhere.

Shimmering
in people
whose lives
banish
rejection,
bitterness,
indifference,
fear.

They beam light
to reach
the shadow places
in us
and out poor world.

Light
from the Light-source
whose birth
we celebrate.

They don't know
they do it.
That's why they shine.

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian parents. He trained at the Royal Central School of Speech and Drama in London. In the UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China,



New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage

actress: https://en.wikipedia.org/wiki/Patricia_Conolly and
<https://trove.nla.gov.au/newspaper/article/47250992>.

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