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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)

Trkulja v Google LLC (HCA) - defamation - summary dismissal - Court of Appeal erred in setting aside proceeding on basis it had no real prospect of success - appeal allowed (I B C G)

Rozenblit v Vainer (HCA) - stay - leave to amend statement of claim granted on condition proceedings stayed pending payment of costs of earlier unsuccessful applications - primary judge erred in staying proceedings - appeal allowed (I B C G)

Austsino Resources Group Limited, in the matter of Austsino Resources Group Limited (FCA) - corporations - application for extension of time within which issued securities to be admitted to quotation - application granted (I B C G)

Wattie v Industrial Relations Secretary on behalf of the Secretary of the Department of Justice (No 2) (NSWCA) - administrative law - industrial relations - unfair dismissal - primary judge found Commissioner's decision to reinstate appellant vitiated by jurisdictional error - appeal allowed (B C I G)

Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited (No 2) (NSWSC) - evidence - client legal privilege - waiver - notice of motion seeking production of documents dismissed (I B C G)

Re Marsella; Marsella v Wareham (VSC) - succession - family provision - deceased's

husband granted provision in form of 'flexible life interest' in property and pecuniary legacy (B)

Khouri v Khoury (VSC) - summary judgment - probate - no real prospect of success on application for revocation of probate - summary judgment granted (B)

Summaries With Link (Five Minute Read)

Trkulja v Google LLC [2018] HCA 25

High Court of Australia

Kiefel CJ; Bell, Keane, Nettle & Gordon JJ

Defamation - summary dismissal - respondent sought to set aside defamation proceeding which appellant brought against it, and appellant's service on respondent out of jurisdiction - primary judge dismissed application on basis it was not satisfied proceeding had no real prospect of success - Court of Appeal of Victoria allowed respondent's appeal, finding proceeding had no real prospect of success - whether primary judge correct to refuse to set aside proceeding - assessment of 'capacity to defame' - held: Court of Appeal of Victoria erroneously found matters on which appellant relied not capable of conveying pleaded defamatory imputations - Court of Appeal of Victoria erroneously found proceeding had no prospects of success - appeal allowed.

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

Rozenblit v Vainer [2018] HCA 23

High Court of Australia

Kiefel CJ; Bell, Keane, Gordon & Edelman JJ

Judgments and orders - stay - appellant brought proceedings against respondents in Supreme Court of Victoria - appellant, by three summonses, sought to amend statement of claim - leave refused twice - respondents' costs ordered to be taxed immediately - consent orders made to fix respondents' costs - costs not paid - on third occasion respondent sought to amend statement of claim, respondents sought stay pending costs' payment - application to amend was granted on condition proceedings be stayed until payment of costs - exercise of discretion under r63.03(3)(a) *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - whether open to Court to permit appellant to amend claim on condition of costs' payment - held: exercise of discretion miscarried - Court could not be satisfied stay pending costs' payment was the "only practical way to ensure justice between the parties" - appeal allowed.

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

Austsino Resources Group Limited, in the matter of Austsino Resources Group Limited [2018] FCA 883

Federal Court of Australia

McKerracher J

Corporations - plaintiff securities issuer, under ss1322(4)(a) & 1322(4)(d) *Corporations Act 2001*

(Cth) (CA), sought extension of time in ss723(3)(b) & 724(1)(b)(ii) of the Act in which securities issued were to be admitted to quotation - whether substantial injustice likely to be caused by order - whether any discretionary reason to withhold relief - whether persons would be 'adversely affected' if orders not made - whether plaintiff acted promptly remedy irregularity - whether 'substantial misconduct, serious wrongdoing or flagrant disregard of the corporate law' or of plaintiff's constitution - held: Court satisfied to make orders sought.

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

Wattie v Industrial Relations Secretary on behalf of the Secretary of the Department of Justice (No 2) [2018] NSWCA 124

Court of Appeal of New South Wales

McColl & Macfarlan JJA; Emmett AJA

Administrative law - industrial relations - proceedings arose from appellant's dismissal from position as Senior Correctional Office - respondent was appellant's nominal employer - appellant sought reinstatement on basis dismissal was harsh - Commissioner ordered reinstatement - Full Bench refused leave to appeal against Commissioner's decision - respondent sought relief under s69 *Supreme Court Act 1970* (NSW) - primary judge found Commissioner's decision vitiated by jurisdictional error - whether cl131 *Crimes (Administration of Sentences) Regulation 2014* (NSW), and s13.7 CSNSW Operations Procedure Manual, were mandatory relevant considerations - whether Commissioner failed to consider 'regulatory context' - whether decision of Full Bench erroneously set aside without separate finding of jurisdictional error in approach of Full Bench - held: appeal allowed.

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

Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited (No 2) [2018] NSWSC 875

Supreme Court of New South Wales

Ball J

Evidence - client legal privilege - second cross-defendant to first cross-claim in two proceedings sought production of documents discovered by cross-claimants to cross-claim - documents subject to client legal privilege claim - second cross-defendant contended there had been implied or express waiver of client legal privilege - whether conduct inconsistent with maintaining privilege within s122 *Evidence Act 1995* (NSW) - held: notice of motion dismissed.

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

Re Marsella; Marsella v Wareham [2018] VSC 312

Supreme Court of Victoria

McMillan J

Succession - family provision - deceased survived by plaintiff husband and two children (defendants) - defendants were children of deceased's first husband - plaintiff, pursuant to Pt IV *Administration and Probate Act 1958* (Vic), sought further provision from deceased's estate - defendants accepted deceased owed 'moral duty to provide for the plaintiff' - trust claims

against estate - relevance of 'trust claims proceedings' as to whether property should form part of estate's assets - dispute concerning whether amount in superannuation fund was estate asset - held: Court satisfied to make provision order in plaintiff's favour by a 'flexible life interest' property and pecuniary legacy.

[Marsella](#) (B)

Khouri v Khoury [2018] VSC 305

Supreme Court of Victoria

Summary judgment - wills and estates - probate - plaintiff executor, pursuant to s63 *Civil Procedure Act 2010* (Vic) sought summary dismissal of defendant's application to revoke grant of probate - whether application had no real prospect of success - testamentary capacity - 'lack of knowledge and approval' - r23.01 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - held: there was no real prospect of success on application for revocation of probate - summary judgment granted.

[Khouri](#) (B)

CRIMINAL

Executive Summary

Millard v R (NSWCCA) - criminal law - breaking entering and stealing in company - disparity in sentence with co-offender - appeal against sentence upheld - applicant resentenced

Goldberg v R (NSWCCA) - criminal law - possession of more than three unregistered firearms - appeal against aggregate sentence allowed - applicant resentenced

Summaries With Link

Millard v R [2018] NSWCCA 111

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL; Rothman & Button JJ

Criminal law - applicant pleaded guilty in Local Court to breaking entering and stealing in company - primary judge imposed head sentence of three years with one year eight months non-parole period - co-offender sentenced in District Court to head sentence of four years in prison with two years non-parole period - applicant appealed against sentence - applicant contended judge erroneously failed to take applicant's assistance to authorities into account, and erroneously failed to expose reasons for conclusion that only a three year full-time imprisonment sentence was appropriate - applicant also contended sentence imposed on co-offender for same offences gave rise to 'justifiable sense of grievance', and that sentence was manifestly

excessive - held: Court satisfied sentence imposed on co-offender gave rise to justifiable sense of grievance - 'erroneous disparity' established - appeal upheld - sentence quashed - applicant resentenced.

[View Decision](#)

Goldberg v R [2018] NSWCCA 99

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL; White JA & Fullerton J

Criminal law - applicant pleaded guilty to four offences: discharging firearm in public place; possessing prohibited weapon without permit; possessing unauthorised firearm and possessing more than three unregistered firearms (Count 4) - offences on Form 1 taken into account in respect of indicative sentence for Count 4 - applicant received aggregate sentence of 12 years in prison with 9 years non-parole period - applicant appealed against sentence - whether erroneous assessment of 'objective seriousness' of Count 4 offence - whether erroneous application of general deterrence principle - whether erroneous failure to take into account that applicant had 'very limited criminal record' and 'prior good character' - whether aggregate sentence was manifestly excessive - held: sentencing judge erred in assessment of objective seriousness - aggregate sentence was "unreasonable" and "plainly unjust" - applicant's 'lack of criminal antecedents' was 'worthy of some weight' - error by sentencing judge established - appeal allowed - sentence quashed - appellant resentenced.

[View Decision](#)

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Elegy V: His Picture

By: John Donne

Here take my picture; though I bid farewell
Thine, in my heart, where my soul dwells, shall dwell.
'Tis like me now, but I dead, 'twill be more
When we are shadows both, than 'twas before.
When weather-beaten I come back, my hand
Perhaps with rude oars torn, or sun beams tann'd,
My face and breast of haircloth, and my head
With care's rash sudden storms being o'erspread,
My body'a sack of bones, broken within,
And powder's blue stains scatter'd on my skin;
If rival fools tax thee to'have lov'd a man
So foul and coarse as, oh, I may seem then,
This shall say what I was, and thou shalt say,
"Do his hurts reach me? doth my worth decay?
Or do they reach his judging mind, that he
Should now love less, what he did love to see?
That which in him was fair and delicate,
Was but the milk which in love's childish state
Did nurse it; who now is grown strong enough
To feed on that, which to disus'd tastes seems tough."

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

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