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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 (One Minute Read)

Crime and Corruption Commission v Carne (HCA) - report prepared by the Queensland Crime and Corruption Commission into the Public Trustee and provided to a parliamentary committee was not a report that s69 of the *Crime and Corruption Act 2001* (Qld) authorised the Commission to request the Committee make public by tabling in Parliament (I B)

O'Mara Holdings Pty Ltd v The Patch Australia Pty Ltd (FCAFC) - joint venture participant had not represented that it was capable of doing the contemplated work at the time of entering into a shareholders agreement, and there was no evidence it was not so capable at that time in any event (I B)

ISPT Pty Ltd and AWP Management No. 2 Pty Ltd v Cao and Zhao (NSWSC) - lease of Chinese restaurant had not been frustrated by the COVID-19 lockdowns, and the lessors had not failed to mitigate their loss, even though they had been unable to find a new tenant (I B C)

In the matter of Training and International Certification Pty Ltd (in liq) (VSC) - misappropriated funds could be traced to a director of the company who had received money as an honest volunteer from an account in which the misappropriated funds had been mixed (I B)

Gulifa v Kotsios & Ors (VSC) - medical panel had given exemplary reasons and had not failed to consider the issues raised by the facts of the case (C I)

HABEAS CANEM

Painting apprentice with yellow tail



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Summaries With Link (Five Minute Read)

Crime and Corruption Commission v Carne [2023] HCA 28

High Court of Australia

Kiefel CJ, Gageler, Gordon, Edelman, & Jagot JJ

Parliamentary privilege - Carne was Public Trustee of Queensland - the Queensland Crime and Corruption Commission received an anonymous complaint that that Carne had been involved in corrupt conduct and was guilty of maladministration, and commenced an investigation - the Commission ultimately decided not to propose criminal proceedings against Carne, and disciplinary proceedings against Carne were terminated by his resignation - the Commission then prepared a report, which it sought to make public by having it tabled in the Legislative Assembly with the assistance of the Parliamentary Crime and Corruption Committee, a committee of the Legislative Assembly - the Commission provided the report to the Committee and requested the Committee make a direction under s69 of the *Crime and Corruption Act 2001* (Qld) that the report be given to the speaker of the Legislative Assembly - Carne brought proceedings in the Supreme Court seeking a declaration that the report was not a report whose tabling was authorised by s69 - the Chairperson of the Committee, at the request of the Commission, issued a certificate under s55 of the *Parliament of Queensland Act 2001* (Qld), which certified that the report was a document prepared for the purposes of, or incidental to, transacting business of the Committee under s9(2)(c) of the *Parliament of Queensland Act*, and was a document "presented or submitted" to the Committee - s8(1) of *Parliament of Queensland Act* provides that freedom of speech and debates or proceedings in the Assembly cannot be impeached or questioned in any court or place out of the Assembly - s9(1) defines "proceedings in the Assembly" as all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee, and s9(2)(c) also includes as "proceedings in the Assembly" presenting or submitting a document to the Assembly, a committee, or an inquiry - a judge of the Supreme Court dismissed Carne's application - the Court of Appeal allowed Carne's appeal and made the declaration sought - the Commission appealed to the High Court - held: the Commission's argument that its preparation and presentation of the report were brought within the scope of "proceedings" in the Legislative Assembly by s9 of the *Parliament of Queensland Act* failed on the facts - the report was not prepared for, or presented to, the Committee for purposes of transacting business of the Committee; it was prepared by the Commission and presented to the Committee for the Commission's own purposes - whether s8(1) would have the preclusive effect contended for did not arise for consideration - s69(1) of the *Crime and Corruption Act* authorises the Commission to request tabling of reports on a public hearing, research reports, or other reports - the reports to which s69(1) refers are those made under the broad power of s64, which permits the Commission to report about the performance of its functions - to qualify as a report for the purposes of a direction under s69(1), the report must be one for which s64 provides a power to report - the report in this case was not a report to which s69(1) of the *Crime and Corruption Act* applied - there was no provision of that Act which authorised a report of that nature - appeal dismissed.

[Crime and Corruption Commission](#) (I B)

O'Mara Holdings Pty Ltd v The Patch Australia Pty Ltd [2023] FCAFC 154

Full Court of the Federal Court of Australia

Markovic, Halley, & Goodman JJ

Misleading or deceptive conduct - O'Mara and Williams pursued a joint venture for the development of an internet portal for the Canberra real estate market - O'Mara was to contribute capital and Williams was to contribute skill and expertise - they established a joint venture company and entered into a shareholders agreement - the O'Mara interests later withdrew their support for the joint venture and commenced proceedings against the Williams interests, alleging that Williams' company had made representations which were misleading or deceptive in contravention of s18 of the *Australian Consumer Law* and that Williams was liable under s236 of the *Australian Consumer Law* as a person involved in that contravention - the pleaded misleading or deceptive representations were that Williams' company had, and would continue to have, the capacity to fulfil the terms of the shareholders agreement within the space of approximately six months, including a readiness, willingness, and ability to provide the services contemplated by the shareholders agreement - the primary judge dismissed the proceedings - the O'Mara interests appealed - held: there were two pleaded representations, that Williams' company had the relevant capacity at the time of entry into the shareholders agreement, and that the company would continue to have such capacity - at trial, O'Mara had eschewed a case based upon the future representation, and it did not seek to resile from this position on appeal - the Court considered this was a curious way for it to put its case, as it thereby lost the advantage of using s4 of the *Australian Consumer Law* to shift the evidentiary burden onto the respondents to prove that they had reasonable grounds for making the future representation at the time that it was made - further, the authorities which find that the conclusion of a contract gives rise to representations as to willingness and ability to perform the contract generally characterise such representations as representations as to future matters - the primary judge had been correct to find that the representation as to present capacity had not been made - in any event, O'Mara had adduced no evidence as to the lack of capacity of Williams' company to perform its contractual obligations at the time the shareholder agreement was concluded - O'Mara had borne the burden of proving such lack of capacity, and had not discharged that burden - appeal dismissed.

[O'Mara Holdings Pty Ltd](#) (I B)

ISPT Pty Ltd and AWP Management No. 2 Pty Ltd v Cao and Zhao [2023] NSWSC 1115

Supreme Court of New South Wales

Nixon J

Leases - the plaintiffs owned the World Square Shopping Centre on George Street, Sydney - they leased premises over two levels in that Centre to a company for use as an up-market, licensed, a la carte Chinese restaurant, and the defendants guaranteed the obligations of the lessee under that lease - when the first lockdown commenced in NSW in response to the COVID-19 pandemic, the lessee was already significantly in arrears in its payment of rent - the

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lessee shut the restaurant in March 2020 and did not re-open it, even after restrictions were eased - the plaintiffs claimed about \$1.7million in unpaid rent and other amounts under the lease from the defendants under their guarantee and indemnity - the defendants contended that the lease had been frustrated by the COVID-19 lockdowns, that the plaintiffs had failed to take reasonable steps to mitigate their loss, and that the plaintiffs were not entitled to the claimed amounts to "make good" the premises - held: the *Frustrated Contracts Act 1978* (NSW) contains provisions concerning the effect of the frustration of a contract on promises due to be performed before the time of frustration, and on the assessment of damages for a breach of contract which had accrued before the time of frustration, and on adjustments to be made on the frustration of a contract, but does not contain any provisions regarding the circumstances in which frustration occurs - the Act was therefore of no assistance in resolving whether the lease had been frustrated - there was no precedent binding on the Court to the effect that the doctrine of frustration is incapable of applying to a lease - a contract is not frustrated unless a supervening event: (a) confounds a mistaken common assumption that some particular thing or state of affairs essential to the performance of the contract will continue to exist or be available, neither party undertaking responsibility in that regard; and (b) in so doing has the effect that, without default of either party, a contractual obligation becomes incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract - a period of just over two months in which dining on the premises was banned or severely restricted was not of such significance, in the context of a three year lease, as to lead to the conclusion that the leasehold estate had been rendered unusable - the authorities do not suggest that frustration occurs when the business of one of the parties to the contract has been transformed, by supervening events, into a "radically different business" (here, transforming a dine-in restaurant into a take away only restaurant) - the lease had not been frustrated - a defendant does not establish a failure to mitigate merely because it can suggest other and more beneficial conduct if it was reasonable for the plaintiff to do what it in fact did - the plaintiffs did take reasonable steps from the beginning of 2021 to obtain a new tenant, but had been unable to do so - the defendants had not established that the failure to find a new tenant was due to any failure by the plaintiffs to mitigate their loss and to take all reasonable steps to minimise the effects of that loss and damage - on the evidence, including correspondence between the parties, the Court was unable to find that the lessee had an obligation to make good the premises by removing the fitout, and therefore rejected that part of the plaintiffs' claim - parties to attempt to agree on orders to give effect to the Court's reasons for judgment.

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

In the matter of Training and International Certification Pty Ltd (in liq) [2023] VSC 550

Supreme Court of Victoria

Irving AsJ

Equity - the liquidators of Training and International Certification Pty Ltd sought to recover money from various directors and recipients of funds - by the time of trial, the liquidators had settled their claims against all defendants, other than one director (Heidi) - the liquidators

Benchmark

alleged that another director (Fritz) had committed a breach of fiduciary duty by making certain transfers, and that the last two transfers could be traced to Heidi, and that she had breached her directors' duties under the *Corporations Act 2001* (Cth) - held: a director has no implied authority to act unilaterally - there were no company resolutions authorising the transfers, and Fritz had therefore not had authority to make them - the last two transfers had not been loans by the company, they had been misappropriations - where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character - if the thief pays it over to another person, then it may be followed into that other person's hands - Fritz had made the transfers in breach of his fiduciary duty - Fritz had held the proceeds of the last two transfers on trust for the company on account of being a knowing recipient under the first limb of *Barnes v Addy* - Heidi had received, as a volunteer, \$425,000 from the bank account that contained the misappropriated funds, and had used about \$270,000 of those funds to purchase a property - where a trustee wrongfully causes funds to lose their separate existence by mixing them with his own, his interests are subordinated to those of the claimant - *Re Hallett's Estate* is not authority for the proposition that a volunteer in receipt of trust funds can seek to retain those funds on the basis that the funds the volunteer received from the mixed fund are taken to be the trustee's own money - where a fund mixed with trust moneys is used to acquire other property, the beneficiary is entitled to charge both the fund and any property acquired from that fund - volunteers are in no better position than the wrongdoer, and are liable to suffer the same subordination of their interests to those of the claimant as the wrongdoer would have been - it was not part of the liquidators' case that Heidi received funds as anything other than an honest volunteer, and it was not necessary for the liquidators to prove that Heidi had knowledge at the time she received the funds that the company was their source or that Fritz had misappropriated those funds - it was sufficient that Heidi retained the funds once she had notice of their source - the last two transfers were traceable in equity to both Heidi and the property she had bought - Heidi had been validly appointed a director of the company, notwithstanding her claim that she had signed the documents appointing her at Fritz's request and without reading them - Heidi breached her duties under s180 of the *Corporations Act* to exercise due care and skill and to have regard to the interests of creditors - the liquidators had not properly pleaded Heidi's alleged breach of her duties under s181 to exercise her powers and discharge her duties in good faith in the best interests of the Company and for a proper purpose - Heidi had not breached her duties under s182 not to improperly use her position to gain an advantage for herself or someone else, or to cause detriment to the Company - the Court was not satisfied that the company had suffered loss by reason of Heidi's breach of duties - as an alternative to the tracing claim, the liquidators were also entitled to recover the funds paid to Heidi as voidable transactions under Part 5.7B of the *Corporations Act* - parties to attempt to agree on orders to give effect to the Court's reasons for judgment.

[In the matter of Training and International Certification Pty Ltd](#) (I B)

Gulifa v Kotsios & Ors [2023] VSC 546

Supreme Court of Victoria

O'Meara J

Benchmark

Workers compensation - the plaintiff worked in the building and construction industry as a sub-contractor, in various roles including as a plasterer, labourer, renderer, concreter; and graffiti removalist - in 2009, the plaintiff sustained a low back injury while using a jackhammer, and had back pain and pain radiating down his right leg, but recovered quickly with no specific treatment - in 2016, the plaintiff commenced employment with Better Scaffolding & Truck Hire Company as a full time labourer, and his duties included setting up scaffolding, steel fixing, concreting and plastering, as well as moving panels, frames, cement sheet, doors, and windows - the plaintiff suffered injury to his lumbar spine in the course of this employment due to unloading a container of heavy double-glazed windows - the plaintiff ceased work and made a claim for workers' compensation, which was accepted - the plaintiff attempted a return to work on light duties; two hours per day, three days per week, but ceased work about two weeks later due to the severity of his back pain and had not worked since - in 2019, the agent terminated the plaintiff's entitlements to weekly payments of compensation on the basis that, among other things, his compensable injury had resolved and he was not incapacitated for work - a judge referred 11 medical questions to a medical panel under s274(1)(b) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) - a medical panel was assembled comprising two psychiatrists, a rheumatologist, an orthopaedic surgeon, and a neurologist - the panel gave its opinion, including that the medical condition of the plaintiff's lumbar spine was "non-specific low back pain" - the plaintiff sought judicial review of the medical panel's opinion - held: the function of a medical panel is to form and give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise - the medical panel's statement of reasons must explain the actual path of reasoning by which it formed its opinion and in detail sufficient to enable a court to see whether the opinion does or does not involve any error of law - a medical panel is under no obligation to explain why it did not reach an opinion it did not form, even if that different opinion is shown by material before it to have been formed by someone else - the reasons of a panel must be read fairly, as a whole and in context, and should not be subjected to overly zealous judicial review - a panel will fall into jurisdictional error if it fails to give genuine consideration to fundamental issues raised by the facts of the case - the reasons of the panel were detailed and related to its answers to the 11 medical questions posed by the County Court - it was plain that the panel specifically sought to explain what it meant by "non-specific low back pain" for the benefit of the non-expert reader - the panel specifically referred to and considered the issue of the genuineness of the plaintiff's self-reported symptoms, but did not consider it to be fruitful to speculate as to the objective accuracy of the plaintiff's perceptions and simply accepted the plaintiff's claims as factual - the panel's reasons were exemplary - the panel considered and did not fail to address the issues of whether (a) the plaintiff's complaints of symptoms were "genuine"; and (b) whether the plaintiff's pain had an "organic" or psychological basis - proceedings dismissed.

[Gulifa](#) (C I)

Poem for Friday

My Dead Dream

By: Sarojini Naidu (1879-1949)

Have you found me, at last, O my Dream? Seven eons ago
You died and I buried you deep under forests of snow.
Why have you come hither? Who bade you awake from your sleep
And track me beyond the cerulean foam of the deep?
Would you tear from my lintels these sacred green garlands of leaves?
Would you scare the white, nested, wild pigeons of joy from my eaves?
Would you touch and defile with dead fingers the robes of my priest?
Would you weave your dim moan with the chantings of love at my feast?
Go back to your grave, O my Dream, under forests of snow,
Where a heart-riven child hid you once, seven eons ago.
Who bade you arise from your darkness? I bid you depart!
Profane not the shrines I have raised in the clefts of my heart.

Dr. Sarojini Naidu, born Sarojini Chattopadhyaya, in Hyderabad, India on 13 February 1879, was a child prodigy, and considered to be brilliant intellectually as a poet, linguist, writer and political activist. She won a scholarship to Kings College, London where she studied from 1895, when she was 16 years of age, and later at Madras University and Girton College, Cambridge. She married in 1898, to Dr Naidu, a marriage supported by both their parents, although the inter-caste marriage was at that time in India considered to be against societal norms, and even criminal in some parts of society. They had five children. She spoke many languages fluently. In 1905 she joined the Indian Nationalist Movement, and met Mahatma Gandhi in 1916. She worked in the movement for freedom for India from British control, and for women's rights and civil rights. For 3 years from 1915 she travelled throughout India giving political lectures. She was arrested and imprisoned for two years because of her political activism. In 1925 she became the President of the Indian National Congress and from 1947 she was Governor of the United Provinces (later Uttar Pradesh). She received the Hind Kesari medal in 1928. She wrote books, poetry and songs throughout her life. She died on 2 March 1949. As a poet, she was referred to as the "Nightingale of India". Her birthday, 13 February, is celebrated as Women's Day in India.

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

Sarojini Naidu, gives a speech in the USA on her arrival in 1928

[Sarojini Naidu, gives a speech in the USA on arrival](#)

Dr Sarojini Naidu, 11 December 1946, Constituent Assembly Speech,

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<https://www.youtube.com/watch?v=wzf3dWo4EoE>

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