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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)

**Ipstar Australia Pty Ltd v APS Satellite Pty Ltd (NSWCA)** - consumer law - contract - unconscionable conduct - defective goods - appeal against decision in respondent's favour dismissed (I B C G)

**Bagshaw v Director of Public Prosecutions (NSW)** (NSWCA) - administrative law - application for judicial review of decision permitting applicant to withdraw appeal against severity of sentences which Local Court imposed - summons dismissed (I B C G)

**Pacific International Insurance Co Ltd v Walsh (NSWCA)** - insurance - General & Public Liability insurance policy - Professional Indemnity insurance policy - exclusion clauses did not operate - insurer's appeal dismissed (I B C G)

**Spata v Tumino (NSWCA)** - wills and estates - succession - rejection of appellant's eligibility on basis 'dependency' on deceased was not established - appeal and cross-appeal dismissed (B)

**A-One Metal Services Pty Limited v A.A.R.A. Pty Ltd (NSWSC)** - contract - building and construction - Local Court appeal - judicial notice - evidence - appeal dismissed (I B C G)

**In the Will of Thomas Henry Finch (dec'd) (QSC)** - wills and estates - succession - extension of time to apply for rectification of will granted - will not rectified in terms sought - declaration (B)

**Australian Executor Trustees Ltd (as Administrator of the Estate of Reece William Hodder) v Hodder** (WASC) - wills and estates - intestacy - summons seeking orders and directions concerning deceased's surviving beneficiaries - orders granted as sought with certain amendments (B)

## Summaries With Link (Five Minute Read)

### **Ipstar Australia Pty Ltd v APS Satellite Pty Ltd [2018] NSWCA 15**

Court of Appeal of New South Wales

Bathurst CJ, Beazley P & Leeming JJ

Consumer law - appellant wholesaler of broadband services and respondent telecommunications carrier entered agreement under which appellant sold bandwidth to respondent at 'price per megabytes per second' (Mbps) per month - there were three variations on agreement - respondent claimed price increase in third variation 'Second Addendum' involved conduct contravening s22 *Australian Consumer Law* and that it suffered loss and damage - respondent claimed damages or sought variation of Second Addendum - respondent also claimed that equipment appellant provided was defective and appellant was obliged to indemnify it for loss under *Trade Practices Act 1974* (Cth) and *Australian Consumer Law* - primary judge found in respondent's favour on claims both for unconscionability and defective goods - appellant appealed - challenges to finding of unconscionable conduct, assessment of compensation, and width of defective goods claim - held: appeal dismissed.

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

### **Bagshaw v Director of Public Prosecutions (NSW) [2018] NSWCA 14**

Court of Appeal of New South Wales

McCull & Payne JJA; Sackville AJA

Administrative law - applicant sought judicial review of decision of District Court permitting him to withdraw appeal against severity of sentences which Local Court had imposed - which District Court judge had "opened the case up" so that he was hearing not only 'severity appeal' but also conviction appeal - whether denial of procedural fairness - 'Parker warning' - termination of cross-examination of police officer by applicant - held: no jurisdictional error established warranting Court's intervention - appeal dismissed.

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

### **Pacific International Insurance Co Ltd v Walsh [2018] NSWCA 9**

Court of Appeal of New South Wales

Macfarlan, Leeming & White JJA

Insurance - General & Public Liability insurance policy - Professional Indemnity insurance policy - appeal arising from claim in negligence against company (second respondent) and company's principal (first respondent) in respect of building inspection report's preparation - respondents

# Benchmark

cross-claimed against appellant insurer - negligence claim was successful - appellant appealed from judgments which found it liable to indemnify respondents - operation of exclusion clauses - exclusion of liability for negligence 'in providing professional advice or services' - exclusion for liability arising from "Any Personal Injury or Property Damage" - construction of 'Professional Indemnity wording' and 'General & Public Liability wording' - held: exclusions did not operate - appeal dismissed

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

## **Spata v Tumino [2018] NSWCA 17**

Court of Appeal of New South Wales  
Macfarlan & Payne JJA; Sackville AJA

Wills and estates - succession - appellant was stepson of deceased - respondents were deceased's nephew and niece - deceased left estate to respondents - appeal and cross-appeal arising from decision in which primary judge rejected appellant's eligibility for provision from deceased's estate on basis 'dependency' on deceased was not established - *Succession Act 2006* (NSW) - 'wholly or partially dependent' - adequacy of provision - whether circumstances warranting making of application - held: appeal and cross-appeal dismissed.

[View Decision](#) (B)

## **A-One Metal Services Pty Limited v A.A.R.A. Pty Ltd [2018] NSWSC 100**

Supreme Court of New South Wales  
Harrison AsJ

Contract - building and construction - Local Court appeal - appeal arising from dispute between defendant contractor and plaintiff subcontractor concerning whether subcontractor's welding services were defective - plaintiff sought leave to appeal from Magistrate's decision, contending Magistrate erred in taking judicial notice of welding workmanship standards, and in making findings with no evidence of defective work or damage suffered - ss136 & 144 *Evidence Act 1995* (NSW) - held: grounds of appeal failed - appeal dismissed.

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

## **In the Will of Thomas Henry Finch (dec'd) [2018] QSC 16**

Supreme Court of Queensland  
Lyons SJA

Wills and estates - succession - deceased died in 2014 - disputes arose concerning construction of will and whether it should be rectified - application for extension of time to apply to seek rectification of will, for rectification of will, and declaration - application for construction of will - whether clerical error - whether will carried out deceased's instructions - construction of will - admissibility of affidavit - *Succession Act 1981* (Qld) - extension of time granted - will did not give effect to deceased's instructions thus did not carry out deceased's instructions - Will rectified - rectification of will not granted in terms sought - declaration made.

[In the Will of Thomas Henry Finch](#) (B)

# Benchmark

## **Australian Executor Trustees Ltd (as Administrator of the Estate of Reece William Hodder) v Hodder [2018] WASC 48**

Supreme Court of Western Australia  
Allanson J

Wills and estates - intestacy - plaintiff was administrator of deceased's will - plaintiff by summons sought orders and directions under 45 *Administration Act 1903 (WA)* (Administration Act) and ss66 & 92 *Trustees Act 1962 (WA)* - deceased at time of death was not married and had no children - deceased survived by mother, father and siblings - deceased left no will - estate to be distributed according to Administration Act - plaintiff sought Court's assistance in relation to ascertainment of deceased's surviving beneficiaries - held: orders sought by plaintiff granted, with certain amendments.

[Australian Executor Trustees \(B\)](#)

## CRIMINAL

### Executive Summary

**Katsis v R (NSWCCA)** - criminal law - sexual intercourse - murder - appeal against sentences dismissed

**DPP v Cooper (VSCA)** - criminal law - murder - aggravated burglary - theft - appeal against sentences allowed on grounds of manifest inadequacy

### Summaries With Link

#### **Katsis v R [2018] NSWCCA 9**

Court of Criminal Appeal of New South Wales  
Hoeben CJ at CL, Schmidt & Campbell JJ

Criminal law - sexual intercourse without consent - murder - sentence appeal - applicant was sentenced to 6 years in prison for sexual intercourse without consent and 20 years in prison for murder with non-parole period of 15 years - applicant contended judge erroneously took into account as aggravating factor that 'the victim was vulnerable', erroneously applied principles concerning sentencing for historical offences, erroneously found no special circumstances justifying 'downward adjustment' of ratio in s44 *Crimes (Sentencing Procedure) Act 1999 (NSW)*, erroneously failed to assess applicant's moral culpability taking into account his upbringing, and erroneously failed to take into account that applicant was 'a person to be regarded as a person of good character' - *Crimes Act 1900 (NSW) - Probation and Parole Act 1983 (NSW)* - held: grounds of appeal not made out - appeal dismissed

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**DPP v Cooper [2018] VSCA 21**

Court of Appeal of Victoria

Weinberg, Priest & Beach JJ

Criminal law - murder - aggravated burglary - theft - sentence appeal - respondent pleaded guilty to murder, aggravated burglary and theft - respondent sentenced to total effective sentence of 16 years with 13 year non-parole period - Director of Public Prosecutions appeal against sentence - manifest inadequacy - specific deterrence - 'serious example' - order for cumulation - held: Court agreed with DPP's central contention, which was that 'overall sentence' was manifestly inadequate - individual sentences, total effective sentence and non-parole period were manifestly inadequate - appellant allowed - respondent resentenced to 24 years in prison with non-parole period of 20 years.

[DPP](#)



# Benchmark

## **To a Friend who sent me some Roses**

**By:** John Keats

As late I rambled in the happy fields,  
    What time the sky-lark shakes the tremulous dew  
    From his lush clover covert;—when anew  
Adventurous knights take up their dinted shields:  
I saw the sweetest flower wild nature yields,  
    A fresh-blown musk-rose; 'twas the first that threw  
    Its sweets upon the summer: graceful it grew  
As is the wand that queen Titania wields.  
And, as I feasted on its fragrancy,  
    I thought the garden-rose it far excell'd:  
But when, O Wells! thy roses came to me  
    My sense with their deliciousness was spell'd:  
Soft voices had they, that with tender plea  
    Whisper'd of peace, and truth, and friendliness unquell'd.

[https://en.wikipedia.org/wiki/John\\_Keats](https://en.wikipedia.org/wiki/John_Keats)

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