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Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Rigoli v Commissioner of Taxation (FCAFC) - income tax - no error in AAT's rejection of taxpayer's reliance on report - appeal dismissed (B G)

Sahade v Bischoff (No 2) (NSWCA) - costs - indemnity costs - joint offer of compromise not capable of acceptance by individual appellant - indemnity costs refused - costs orders made (I)

T & DC Pty Limited v Workforce Clothing Pty Limited (No 2) (NSWSC) - costs - offer of compromise - proportionality - rejection of offer not unreasonable - indemnity costs refused - plaintiff to pay defendant's costs on ordinary basis (I)

Krongold Constructions (Aust) v SR & RS Wales (VSC) - security of payments - adjudicator's determination invalid - determination quashed (I B C)

Mad Dogs Pty Ltd (in liq) v Gilligan's Backpackers Hotel & Resort Pty Ltd (No 4) (QSC) - damages - breach of contract - loss of profits - assessment of damages, interest and costs (I B)

Schneider v Smith (QSC) - damages - negligence - plaintiff injured in motorcycle accident - liability admitted - assessment of damages - judgment for plaintiff in sum of \$447,969.94 (I)

Kenney v Commonwealth Bank of Australia (WASCA) - summary judgment - mortgage - sale of land - appellant to pay respondent sum and deliver vacant possession of properties - leave to appeal refused - appeal dismissed (B C)

Summaries With Link (Five Minute Read)

Rigoli v Commissioner of Taxation [2016] FCAFC 38

Full Court of the Federal Court of Australia

Kenny, Davies & Moshinsky JJ

Income tax - primary judge upheld Administrative Appeals Tribunal decision to affirm objection decisions made by Commissioner concerning income - Commissioner issued assessments under s167 *Income Tax Assessment Act 1936* (Cth) on basis of default by taxpayer - taxpayer contended assessments were excessive - taxpayer relied in part of on report which Commissioner put in evidence - taxpayer contended AAT erred by excluding consideration of report because it was not evidence led by taxpayer - held: primary judge correct to find that AAT did not make decision that taxpayer could not rely on material solely because taxpayer did not lead it in evidence, and that AAT had rejected taxpayer's reliance on report because it did not establish his taxable income - additional contentions by taxpayer failed - appeal dismissed.

[Rigoli](#) (B G)

Sahade v Bischoff (No 2) [2016] NSWCA 45

Court of Appeal of New South Wales

Basten & Gleeson JJA; Beech-Jones J

Costs - indemnity costs - appellants' appeal unsuccessful - cross-summons seeking leave to cross-appeal dismissed - ss3, 59 & 60 *Civil Procedure Act 2005* (NSW) - Pt 52A r 22 *Supreme Court Rules 1970* (NSW) - respondents sought indemnity costs on basis of offer of compromise - rr9, 20, 41, 42, 51 *Uniform Civil Procedure Rules 2005* (NSW) - held: respondents' joint offer was not capable of acceptance by only one appellant - terms of r42.15A(1) not engaged - same reasoning if offer treated as Calderbank offer - appellants to pay respondents' costs of appeal - cross-applicants to pay the cross-respondents' costs of the cross-summons - parties to pay own costs of costs application.

[Sahade](#) (I)

T & DC Pty Limited v Workforce Clothing Pty Limited (No 2) [2016] NSWSC 239

Supreme Court of New South Wales

McCallum J

Costs - offer of compromise - proportionality - Court dismissed appeal from Local Court decision - defendant sought indemnity costs on basis of Calderbank letter - defendant contended rejection of offer must be assessed with regard to costs likely to be incurred by parties compared with small debt subject of proceedings - ss60 *Civil Procedure Act 2005* (NSW) - Local Court Practice Note Civ 1, Part G - proportionality - relationship between disproportionality and unreasonableness of rejection of offer - held: Calderbank letter reflected offer of compromise - Court not persuaded in all circumstances that plaintiff's refusal to accept offer in Calderbank letter was unreasonable - indemnity costs refused - plaintiffs to pay defendant's costs on

ordinary basis.

[T & DC \(I\)](#)

Krongold Constructions (Aust) v SR & RS Wales [2016] VSC 94

Supreme Court of Victoria

Vickery J

Security of payments - plaintiff sought to quash adjudicator's determination under *Building and Construction Industry Security of Payment Act 2002* (Vic) that plaintiff required to pay defendant amount of payment claim - held: defendant's notice pursuant to s18(2) served on plaintiff was invalid - Court not satisfied invoices and supporting documentation identified construction work with sufficient clarity or that valuation process which adjudicator adopted met Act's requirements - adjudicator had only part of claim before him so adjudicator not in position to comply with s23(2)(c) - determination quashed.

[Krongold \(I B C\)](#)

Mad Dogs Pty Ltd (in liq) v Gilligan's Backpackers Hotel & Resort Pty Ltd (No 4) [2016] QSC 54

Supreme Court of Queensland

Henry J

Damages - contract - breach of contract - Court gave judgment for plaintiff against first defendant - second defendant was successful against plaintiff - determination of damages, interest and costs - loss of profits - future renewal periods - rr681 & 698 *Uniform Civil Procedure Rules 1999* (Qld) - held: judgment for plaintiff in amount of \$201,357.44 damages and \$149,836.13 interest - costs orders made.

[Mad Dogs \(I B\)](#)

Schneider v Smith [2016] QSC 47

Supreme Court of Queensland

McMeekin J

Damages - negligence - plaintiff injured in motorcycle accident - liability admitted - assessment of damages - credit - decision to resign from employment - whether plaintiff suffering from psychiatric disorder which impacted on earning capacity - gratuitous care - preconditions of s59 *Civil Liability Act 2003* (Qld) - plaintiff's cannabis use - held: damages assessed - judgment for plaintiff in sum of \$447,969.94.

[Schneider \(I\)](#)

Kenney v Commonwealth Bank of Australia [2016] WASCA 44

Court of Appeal of New South Wales

Buss, Newnes & Murphy JJA

Summary judgment - mortgage - sale of land - Master ordered appellant to pay respondent sum and deliver vacant possession of properties mortgaged to respondent - appellant contended Master should have granted order for foreclosure - appellant sought to adduce additional

evidence and required extension of time to appeal - *Transfer of Land Act 1893 (WA)* - *Property Law Act 1969 (WA)* - held: no error in refusal of application for foreclosure - contention failed that primary judge erred in granting judgment to respondent without distinction between amount secured by mortgage and unsecured amount - Master entitled to reject appellant's contention he did not agree to advance's terms - contention on basis of unconscionable conduct failed - leave to appeal refused - appeal dismissed.

[Kenney](#) (B C)

CRIMINAL

Executive Summary

Vincenzo Jon Fedele v R (NSWCCA) - criminal law - applicant pleaded guilty to child pornography offences - sentencing process miscarried - appeal allowed - sentences quashed - applicant resentenced

Bulga Underground Operations Pty Ltd v Nash (NSWCCA) - criminal law - occupational health and safety - failure to ensure employee's health, safety and welfare at work - appeal dismissed - appeal against penalty allowed - appeal against costs order allowed

Summaries With Link

[Vincenzo Jon Fedele v R \[2015\] NSWCCA 286](#)

Court of Criminal Appeal of New South Wales

Hidden, Davies & Adamson JJ

Criminal law - applicant pleaded guilty to child pornography offences - Commonwealth charge was using carriage service to access child pornography - State offence was possessing child abuse material - applicant sentenced to 6 months imprisonment for State offence and 12 months imprisonment for Commonwealth offence to be released after 6 months on entering recognizance - applicant sought leave to appeal against sentences - whether failure to apply relevant statutory provisions or consider alternatives to imprisonment - whether sentences manifestly excessive - s471.19(1) *Criminal Code (Cth)* - ss 17A ,91H(2) & 20(1)(B) *Crimes Act 1900 (Cth)* - s5 *Crimes (Sentencing Procedure) Act (NSW)* - Ground 3 complains that his Honour - held (by majority): sentencing process miscarried - unnecessary to decide whether sentences manifestly excessive - appeal allowed - sentences quashed - applicant resentenced.

[Vincenzo](#)

[Bulga Underground Operations Pty Ltd v Nash \[2016\] NSWCCA 37](#)

Court of Criminal Appeal of New South Wales

Bathurst CJ; Hidden & Davies JJ

Criminal law - trial judge convicted appellant of failure to ensure employee's health, safety and welfare at work in contravention of s8(1) *Occupational Health and Safety Act 2000* (NSW) and imposed \$50,000 penalty - appellant appealed against conviction - Attorney General appealed against sentence imposed - Attorney General and prosecutor sought to appeal against costs order - whether failure to take steps which did not entirely eliminate risk constituted breach of Act - whether failure to take steps to prevent risk which existed from crystallising constituted breach of Act - causal nexus - held: appeal dismissed - appeal against penalty allowed - penalty of \$100 000 imposed - appeal against costs order allowed.

[Bulga](#)



Benchmark

I would not paint — a picture — (348)

BY EMILY DICKINSON

I would not paint — a picture —
I'd rather be the One
It's bright impossibility
To dwell — delicious — on —
And wonder how the fingers feel
Whose rare — celestial — stir —
Evokes so sweet a torment —
Such sumptuous — Despair —

I would not talk, like Cornets —
I'd rather be the One
Raised softly to the Ceilings —
And out, and easy on —
Through Villages of Ether —
Myself endued Balloon
By but a lip of Metal —
The pier to my Pontoon —

Nor would I be a Poet —
It's finer — Own the Ear —
Enamored — impotent — content —
The License to revere,
A privilege so awful
What would the Dower be,
Had I the Art to stun myself
With Bolts — of Melody!

[EMILY DICKINSON](#)

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