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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)

Clone Pty Ltd v Players Pty Ltd (In Liquidation) (Receivers & Managers Appointed) (HCA) - equity - judgments and orders - court set aside perfected judgment for misconduct that was not fraud - actual fraud required for court's power to set aside perfected judgment - appeals allowed (I B C G)

Alley v Gillespie (HCA) - constitutional law - question whether defendant was person which Constitution declared to be incapable of sitting as member of House of Representatives for *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth)'s purposes was to be determined not by High Court but by House, unless House referred question to Court of Disputed Returns - proceedings under *Common Informers Parliamentary Disqualifications) Act 1975* (Cth) stayed until question's determination (I B C G)

Re Kakoschke-Moore (HCA) - constitutional law - determination of questions concerning filling of vacancy following declaration Ms Kakoschke-Moore incapable of being chosen or sitting by due to s44(i) Constitution (I B C G)

McDougall v Workcover Corporation of South Australia (FCA) - bankruptcy - applicant made bankrupt by sequestration order - leave to appeal against Registrar's orders refused - extension of time to seek leave to appeal refused - leave to appeal refused (I B C G)

Riva NSW Pty Ltd v Mark A Fraser and Christopher P Clancy trading as Fraser Clancy

Lawyers (NSWCA) - security for costs - special circumstances established - order for security for costs granted in sum of \$70000 (I B C G)

Shout Rocks Cafes Pty Ltd & Anor v City of Port Philip & Ors (VSC) - judgments and orders - right of reinstatement confined to limited purpose - plaintiff not entitled to reinstate proceedings in general - application dismissed (I B C G)

Puleio v Olam Orchards Pty Ltd (VSC) - negligence - nervous shock - claim by widow of deceased against deceased's employer for psychiatric injury suffered as 'secondary victim' - defendant not negligent - claim dismissed (I B C G)

Summaries With Link (Five Minute Read)

Clone Pty Ltd v Players Pty Ltd (In Liquidation) (Receivers & Managers Appointed) [2018] HCA

High Court of Australia

Kiefel CJ; Gageler, Keane, Gordon & Edelman JJ

Equity - judgments and orders - proceedings concerned court's power to set aside its own 'perfected judgments' - primary judge in Supreme Court of South Australia set aside a perfected judgment for misconduct that was not fraud - Full Court dismissed appeal - whether court's power to set aside perfected judgment extended to misconduct by successful party not amounting to fraud - whether court's power to set aside perfected judgment extended to circumstances of unsuccessful party's failure to 'exercise reasonable diligence to discover fraud or misconduct' - held: 'actual fraud' required for court's power to set aside perfected judgment - there were other grounds to set aside perfected judgment - such other grounds not at issue - exercise of reasonable diligence to attempt discovery of fraud not a precondition to exercise of court's power - no fraud alleged or proven against appellant by first to fourth respondents seeking to set aside perfected judgment - appeals allowed.

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

Alley v Gillespie [2018] HCA 11

High Court of Australia

Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ

Constitutional law - defendant declared elected as member of House of Representatives (member) - plaintiff brought action against defendant under *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) (Common Informers Act) - plaintiff contended defendant not capable to be chosen as member and not capable of sitting as member because company in which he was shareholder leased premises to Australia Post - plaintiff contended lease was an agreement "with the Public Service of the Commonwealth" under s44(v) Constitution which provided that a person with 'pecuniary interest' in such agreement "shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives" - whether High

Court could decide whether defendant was person Constitution declared to be incapable of sitting as member for Common Informers Act's purposes - held: whether defendant was incapable of sitting as member due to Constitution was to be determined, not by High Court, but by House, unless House reserved matter to Court of Disputed Returns - proceeding stayed until determination whether defendant was incapable of sitting as member.

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

Re Kakoschke-Moore [2018] HCA 10

High Court of Australia

Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ

Constitutional law - Ms Kakoschke-Moore was British citizen when she nominated as candidate for election as senator, standing as nominee of Nick Xenophon Team (NXT) political party - Ms Kakoschke-Moore returned as elected as senator for South Australia - Nettle J declared Ms Kakoschke-Moore incapable of being chosen or sitting due to s44(i) Constitution - questions concerned how vacancy should be filled - held: vacancy should be filled by 'a special count of the votes cast at the poll on 2 July 2016' - Ms Skye Kakoschke-Moore's renunciation of British citizenship did not render her capable of filling vacancy - Timothy Storer should not be excluded from special count on basis he ceased to be member of Nick Xenophon Team party 'on or by' 6/11/17 - questions answered.

[Re Kakoschke-Moore](#) (I B C G W WI WB WC WG) (I B C G)

McDougall v Workcover Corporation of South Australia [2018] FCA 353

Federal Court of Australia

Charlesworth J

Bankruptcy - applicant made bankrupt by sequestration order - respondent's petition founded on judgment debt - applicant sought review of Registrar's orders - application made over two years four months following expiry of time - primary judge refused to grant extension of time on basis of failure adequately to explain delay and that there was no reasonable prospects of success on application - applicant sought to appeal - delay - prejudice - explanation of delay - proposed appeal's merits - s52 *Bankruptcy Act 1966* (Cth) - held: no explanation for failure to seek leave to appeal within prescribed time but delay was short and there would not be prejudice if extension of time granted - Court satisfied to consider merits of proposed appeal in order to decide whether to grant extension of time - held: proposed grounds of appeal had no merit - extension of time refused - leave to appeal refused.

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

Riva NSW Pty Ltd v Mark A Fraser and Christopher P Clancy trading as Fraser Clancy Lawyers [2018] NSWCA 53

Court of Appeal of New South Wales

Simpson JA

Security for costs - judicial review - application for security for costs in judicial review proceedings which Riva commenced - applicant for security for costs was a firm of solicitors

which was the respondent in proceedings (Fraser Clancy) - whether exceptional circumstances to justify order of security - Pt 59.11. *Uniform Civil Procedure Rules 2005* (NSW) - held: Court satisfied that circumstances were made out - Riva would not meet costs order - making of order would not stultify proceedings - order for security for costs granted in sum of \$70000.

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

Shout Rocks Cafes Pty Ltd & Anor v City of Port Philip & Ors [2018] VSC 120

Supreme Court of Victoria

J Forrest J

Judgments and orders - reinstatement of proceedings - plaintiffs settled case against defendants - trial judged dismissed proceeding by consent orders with right of reinstatement to be exercised within 60 days - plaintiff sought reinstatement of proceedings - held: right of reinstatement confined to limited purpose of non-compliance defendants' non-compliance with provisions for payment under settlement terms - plaintiff not entitled by right of reinstatement to reinstate case in general - application to reinstate proceedings dismissed.

[Shout Rocks](#) (I B C G)

Puleio v Olam Orchards Pty Ltd [2018] VSC 109

Supreme Court of Victoria

Zammit J

Negligence - nervous shock - plaintiff was deceased's widow - deceased was employed by defendant - deceased died in accident at orchard when slasher rolled on him - deceased's level of intoxication when accident occurred was critical issue - plaintiff claimed deceased's death caused by defendant's negligence - plaintiff contended deceased had breached duty to her as a 'secondary victim' with result she suffered psychiatric injury - not dispute defendant owed deceased duty, and plaintiff duty as 'secondary victim' - whether defendant breached duty causing deceased's death and in turn injury to plaintiff - reasonable foreseeability - held: no breach of duty of care to avoid risk to deceased - no breach of duty of care to plaintiff to avoid causing plaintiff psychiatric injury - claim dismissed.

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

CRIMINAL

Executive Summary

Craig v The Queen (HCA) - criminal law - murder - incorrect advice by counsel concerning likelihood of appellant's cross-examination on criminal history if he gave evidence - miscarriage of justice not established - appeal dismissed

McPadden v The Queen (VSCA) - criminal law - arson, reckless conduct endangering serious injury, attempting to obtain property by deception and perjury - applications for leave to appeal

against conviction and sentence dismissed

Summaries With Link

Craig v The Queen [2018] HCA 13

High Court of Australia

Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ

Criminal law - appellant convicted in Supreme Court of Queensland of murdering partner by stabbing - appellant incorrectly advised by counsel that if he gave evidence he would likely be cross-examined on criminal history - appellant also correctly advised by counsel that if he gave evidence he would likely be cross-examined on inconsistencies between his evidence and account he gave in interview to police - appellant did not give evidence - appellant appealed on grounds of miscarriage of justice arising from counsel's incorrect advice - appellant contended 'accused's informed choice to give evidence' was an 'essential component' of fair trial, and that denial of informed choice was miscarriage of justice - whether incorrect advice produced miscarriage of justice - held: Court did not accept generality of appellant's proposition - Court required to consider effect of the incorrect advice which bore on appellant's choice not to give evidence on the trial's conduct - miscarriage of justice not established - appeal dismissed.

[Craig](#)

McPadden v The Queen [2018] VSCA 57

Court of Appeal of Victoria

Priest & Hargrave JJA; Kidd AJA

Criminal law - applicant owned and operated restaurant - 'HB' set fire to restaurant premises with applicant's connivance - applicant made insurance claim for compensation and made partially false statement to police - applicant convicted of arson, reckless conduct endangering serious injury, attempting to obtain property by deception and perjury - applicant sentenced to nine years in prison with six year non-parole period - applicant sought to appeal, contending there was 'substantial miscarriage of justice' due to interjections by trial judge - applicant also contended sentence was manifestly excessive and that sentencing judge erroneously took in account and fixed sentence by reference to s6AAA *Sentencing Act 1991* (Vic) declaration concerning HB - held: no miscarriage of justice arising from interjections by trial judge - even if interjections had 'potential to cause' miscarriage of justice conviction was inevitable - trial judge did not fetter sentencing discretion's exercise by reference to the 's6AAA' concerning HB - Court satisfied total effective sentence 'wholly appropriate' - applications dismissed.

[McPadden](#)



Benchmark

Book 1, Epigram 5: Ad lectorem de subjecto operis sui.

By: Thomas Bastard

The little world, the subject of my muse,
Is a huge task and labor infinite;
Like to a wilderness or mass confuse,
Or to an endless gulf, or to the night:
How many strange Meanders do I find?
How many paths do turn my straying pen?
How many doubtful twilights make me blind,
Which seek to limb out this strange All of men?
Easy it were the earth to portray out,
Or to draw forth the heavens' purest frame,
Whose restless course, by order whirls about
Of change and place, and still remains the same.
 But how shall man's, or manner's, form appear,
 Which while I write, do change from what they were?

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

The Reverend Thomas Bastard (1565/1566 – April 19, 1618) was an English clergyman famed for his published English language epigrams. Life. Born in Blandford Forum
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