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Daily Civil Law A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (One Minute Read)

Sunlite Australia Pty Ltd v Commissioner of Taxation (FCAFC) - taxpayer registered as an R&D entity in its own right could not claim notional deductions for R&D expenditure incurred in its capacity as a trustee (B)

Xiao v BCEG International (Australia) Pty Ltd (NSWCA) - company was entitled to seek equitable compensation from directors who had breached their fiduciary duties and simultaneously seek an account of profits from parties who had knowingly received the fruits of those fiduciary breaches (B C I)

Kennedy Civil Contracting Pty Ltd (Administrators Appointed) v Richard Crookes Construction Pty Ltd; In the matter of Kennedy Civil Contracting Pty Ltd (No 2) (NSWSC) - indemnity costs not ordered because offers of compromise were not genuine, and stay pending appeal ordered given difficulty of recovering payment to successful insolvent party if appeal were successful (C)

Drake v PKF (Gold Coast) Pty Ltd & Anor (QSC) - negligence - statement of claim that had gone through ten iterations without becoming satisfactory struck out without leave to replead, and proceedings dismissed (I)

In the estate of Loncar (deceased) (SASC) - "issue" in particular part of intestacy legislation meant "children, grandchildren and more remote lineal descendants of such a relative", and the children and more remote lineal descendants take *per stirpes* (B)



Sultan v Melick & ors (TASSC) - orders for letters of administration with the Will annexed made in respect of a document that was not the most recent document propounded as the last Will of the deceased, where the interested parties had all agreed on the orders to be made, and litigating the issue would be time consuming and expensive (B)

HABEAS CANEM

The classic catch



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Summaries With Link (Five Minute Read)

Sunlite Australia Pty Ltd v Commissioner of Taxation [2023] FCAFC 43

Full Court of the Federal Court of Australia

Colvin, O'Sullivan & Feurill JJ

Taxation - the appellant is the trustee of a trading trust that owns and operates a business developing and manufacturing products such as awnings, external venetians, glazing and weather shades - was registered in its own right (not as a trustee) as an R&D entity for the purposes of Division 355 of the *Income Tax Assessment Act 1997* (Cth) - claimed notional deductions for expenditure on R&D activities - Commissioner disallowed deductions - objection to Commissioner and review to Administrative Appeal Tribunal unsuccessful - appeal to Federal Court on question of law - held: the starting point for statutory construction is the text of the statute, having regard to its context and purpose - tax statutes do not form a special class of their own, they are to be construed using the standard general principles - the ordinary meaning of a defined term is displaced by a statutory definition - the word "entity" is defined in the *Income Tax Assessment Act 1997* as a collective term meaning any of a number of listed things, some of which are not legal persons - an individual acting in a personal capacity is one entity and that same individual when acting as a trustee is a different and distinct entity - the appellant could not claim notional deductions for expenditure incurred as a trustee where it could not be registered as a trustee for the R&D activities - appeal dismissed.

[Sunlite Australia Pty Ltd](#) (B)

Xiao v BCEG International (Australia) Pty Ltd [2023] NSWCA 48

Court of Appeal of New South Wales

Gleeson JA, Mitchelmore JA, & Griffiths AJA

Equity - BCEG was engaged in two property development, on the Gold Coast and at Wagga Wagga - BCEG was run by Xiao and his wife, who were both directors - other directors resided in China - Xiao and his wife were also engaged in their own property development project at West Wyalong through their own companies - BCEG sued Xiao and his wife in the Supreme Court, alleging they had diverted BCEG's funds to their own companies to fund the West Wyalong project - primary judge held that Xiao and his wife had breached their fiduciary obligations as directors, and that their companies were liable for being knowingly involved in those breaches, and knowingly receiving the proceeds of those breaches - primary judge also held the fiduciary breaches had caused further losses to BCEG in respect of its Wagga project - the trial judge held that, had BCEG known of the breaches of fiduciary duty, it would not have committed to an ongoing commercial relationship, and would not have subsequently entered into transactions in respect of the Wagga project - primary judge awarded equitable compensation, an account of profits, and declared that certain profits of the West Wyalong project were held on constructive trust - appeal to the Court of Appeal - held: a plaintiff cannot obtain equitable compensation and an account of profits against the same defendant - however, BCEG could seek equitable compensation from Xiao and his wife and an account of profits from their companies - liability of a fiduciary is different in nature and extent to the liability of a

knowing recipient, including that the knowing recipient does not owe a duty of loyalty to the principal - a compensation remedy against a defaulting fiduciary is not inconsistent with a gain-based remedy against a knowing recipient - however, the trial judge had erred in finding that the breaches of fiduciary duty had caused BCEG's losses regarding its Wagga project - disclosure by a fiduciary of a conflict of interest or duty is not a positive obligation, it is rather a defence to what would otherwise be a breach of duty - appeal partially allowed, with the relief ordered in respect of the losses in the Wagga project set aside - parties to make submissions on costs of both the appeal and the trial.

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

Kennedy Civil Contracting Pty Ltd (Administrators Appointed) v Richard Crookes Construction Pty Ltd; In the matter of Kennedy Civil Contracting Pty Ltd (No 2) [2023] NSWSC 248

Supreme Court of New South Wales

Bell J

Construction litigation - Court had previously given judgment in which it held that an insolvent company operating under a deed of company arrangement was entitled to pursue a claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW), even though s32B(1) of that Act prevents a company in liquidation from pursuing a claim under the Act - the Court rejected an argument that the deed of company arrangement should be terminated under s445D(1) of the *Corporations Act 2001* (Cth) because it was entered into for a wrongful purpose of circumventing the operation of s32B - the plaintiff made formal offers of compromise under r20.26 of the *Uniform Civil Procedure Rules 2005* (NSW) - the plaintiff sought indemnity costs - the defendant sought a stay pending appeal - held: neither offer was a genuine offer of compromise - in substance, both offers invited the defendant to capitulate in relation to arguable points of law - the plaintiff to have its costs only on the ordinary basis - a stay should be granted - the plaintiff is in administration and insolvent - is no simple mechanism by which any payment made by the defendant to satisfy the judgment would be returned to it if it were successful on appeal - the only prejudice to the plaintiff would be a delay in payment, which could be cured by an award of interest - costs and stay ordered.

[View Decision](#) (C)

Drake v PKF (Gold Coast) Pty Ltd & Anor [2023] QSC 45

Supreme Court of Queensland

Cooper J

Negligence - plaintiff sued the first defendant, his former accountants, and the second defendant, a director or partner of the first defendant - claimed damages of more than \$120 million - alleged defendants failed to advise him of the consequences of appointing administrators to two companies he controlled - plaintiff had made ten attempts at pleading his cause of action - defendants applied to have the statement of claim struck out without leave to replead and that the proceedings be dismissed - held: the pleading of causation and loss did not include any facts to support the plaintiff's asserted outcomes if the allegedly negligent conduct

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had not occurred - similar criticisms had been made about earlier iterations of the statement of claim - the plaintiff had been given repeated opportunities to obtain the documents required to address the deficiencies in his pleadings - it had been 10 years since the alleged acts of negligence - the proceedings had been commenced just before the limitation period expired - the plaintiff's delays had breached his undertakings to proceed expeditiously - statement of claim struck out without leave to replead - proceedings dismissed for want of prosecution.

[Drake \(I\)](#)

In the estate of Loncar (deceased) [2023] SASC 37

Supreme Court of South Australia

Brampton J

Intestacy - deceased died leaving a last Will executed in 1965 - the Will gave the entirety of his estate to his wife, or, if she predeceased him without leaving children, to his brother - deceased and his wife had not had children - deceased's wife and brother had predeceased him - estate therefore to be distributed as on an intestacy - deceased had no spouse, children, or parents, but had had 10 nieces and nephews, two of which were deceased - the executor sought judicial advice in respect of the proper construction of s72J(b)(iv) of the *Administration and Probate Act 1919* (SA) - executor was unsure whether the words "issue of such a relative" in s72J(b)(iv) meant "children of such a relative" or "children, grandchildren and more remote lineal descendants of such a relative", and whether, if it meant the latter, whether in s72J(b)(iv) required that the grandchildren and more remote descendants take *per stirpes* or *per capita* - held: on their proper construction, the words "issue of such a relative" in s72J(b)(iv) mean "children, grandchildren and more remote lineal descendants of such a relative" - further, grandchildren and more remote lineal descendants take *per stirpes* - directions to executor that it would be appropriate to distribute the estate in accordance with these answers.

[In the estate of Loncar \(deceased\) \(B\)](#)

Sultan v Melick & ors [2023] TASSC 4

Supreme Court of Tasmania

Brett J

Probate - various parties propounded different Wills as the Will which should be pronounced in solemn form as the deceased's last Will - parties reached a compromise under which letters of administration with the Will annexed would be granted of a particular purported Will that was not the last purported Will - executors named in that Will each renounced entitlement to probate and to administer the estate - held: the question of what order should be made is a matter for the Court - the consent of the parties, although relevant, is not determinative - when the Court makes the grant in solemn form, it is performing a public act - where there is a genuine doubt as to the validity of a testamentary document, the court, as part of a compromise, may be willing to pronounce against that testamentary document, but the court will not pass over a testamentary document which is apparently valid and as to which there is no evidence of invalidity - where the evidence does raise a genuine doubt concerning the validity of a subsequent Will, the fact that the parties do not seek to propound the subsequent Will may support the Court pronouncing in

accordance with a compromise reached by the parties - if the litigation in this case proceeded, it would be considerably complex and involve great time and expense - sufficient evidence raising doubt as to the validity of the later purported Wills had been given - orders made in accordance with the agreement of the parties.

[Sultan](#) (B)

Poem for Friday

Brumby's Run

By: A.B. 'Banjo' Paterson (1864-1941), published 13 January 1894 in The Bulletin.

It lies beyond the Western Pines
Towards the sinking sun,
And not a survey mark defines
The bounds of "Brumby's Run".

On odds and ends of mountain land,
On tracks of range and rock
Where no one else can make a stand,
Old Brumby rears his stock.

A wild, unhandled lot they are
Of every shape and breed.
They venture out 'neath moon and star
Along the flats to feed;

But when the dawn makes pink the sky
And steals along the plain,
The Brumby horses turn and fly
Towards the hills again.

The traveller by the mountain-track
May hear their hoof-beats pass,
And catch a glimpse of brown and black
Dim shadows on the grass.

The eager stockhorse pricks his ears
And lifts his head on high
In wild excitement when he hears
The Brumby mob go by.



Old Brumby asks no price or fee
O'er all his wide domains:
The man who yards his stock is free
To keep them for his pains.

So, off to scour the mountain-side
With eager eyes aglow,
To strongholds where the wild mobs hide
The gully-rakers go.

A rush of horses through the trees,
A red shirt making play;
A sound of stockwhips on the breeze,
They vanish far away!

Ah, me! before our day is done
To ride once more on Brumby's Run
And yard his mob again.
We long with bitter pain

Andrew Barton 'Banjo' Paterson, was born on 17 February 1864, near Orange. He died on 5 February 1941, in Sydney. A.B. Paterson was a journalist, bush poet, lawyer and author. His early years were spent living on properties in NSW and he was familiar with the scenes that he later described in his bush ballads. He attended Sydney Grammar School, for a couple of years, leaving when he was 16. The library at that school was later named after him. Paterson was a law clerk at the firm Herbert Salwey and admitted to practise in 1886. His earliest poems were published in the Bulletin from when he was 21 years of age. Paterson often wrote using the pseudonym "the Banjo." In the Second Boer War he was a war correspondent for the Sydney Morning Herald and the Age. He was the editor of the Sydney Evening News and the Sydney Sportsman. He was an ambulance driver, horse trainer, and commissioned as a Captain, and later promoted to Major during World War 1. He served in Egypt. later farmed 40,000 acres near Yass. His image is on the \$10 note. In 1983 a recording by Slim Dusty of Paterson's bush ballad, *Waltzing Matilda*, was beamed from the spaceship Columbia as it passed over Australia. His other best-known poems include *Clancy of the Overflow* and *The Man from Snowy River*.

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

Johnny Cash sings *Waltzing Matilda*, words by A.B. Paterson,
<https://www.youtube.com/watch?v=KL4v7UrqcF4>



“Brumby’s Run, read by Alwyn Kurts, in “Banjo’s Australia - The Poems of A.B. Paterson”, 1987, narrated by Charles “Bud” Tingwell

<https://www.youtube.com/watch?v=6FFShQpC11s>

Tom Burlinson, reciting The Man from Snowy River by Banjo Paterson

<https://www.youtube.com/watch?v=9YCa7YuYty0>

Jack Thompson reciting Clancy of the Overflow by A.B. Paterson

<https://www.youtube.com/watch?v=-s27QP0QGv0>

Legal Diary, 1892, contained in the Papers of Andrew Barton ‘Banjo’ Paterson, 1807-1950, held at the National Library

<https://nla.gov.au/nla.cat-vn8047102>

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