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

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

AGL Energy Limited v Hardy (No 3) (FCA) - costs - indemnity costs - contempt - contemnor to pay AGL's costs on indemnity basis (I B C G)

Boyd v Thorn (NSWCA) - land law - estoppel - appeal against orders of Sackar J - erroneous order that litigation costs to be paid out of first appellant's share of sale proceeds - appeal allowed in part (I B C G)

Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd (NSWSC) - security of payments - building and construction - no valid payment claim - adjudication determination was void - adjudicator not entitled to fees and expenses (I B C G)

Reliance Rail Pty Limited v Permanent Custodians Limited (NSWSC) - contract - contractual construction - 'voluminous documents' - whether and on what conditions plaintiffs able to refinance debt without creditors' consent - plaintiffs succeeded to certain extent - parties to bring in draft orders (I B C G)

Leary v NSW Trustee and Guardian (NSWSC) - succession - family provision - full and frank disclosure - Court not satisfied plaintiff put forward financial position truthfully - application dismissed (B)

Traynor v Cunningham [No 2] (WASCA) - judicial review - security for costs - application for

review of decision to grant security for costs dismissed (I B C G)

Atarashii Stone Pty Ltd v Granite Transformations Pty Ltd (No 4) (ACTSC)- notices to produce - parties to provide documents in accordance with respective notices to produce - orders made (I B C G)

Summaries With Link (Five Minute Read)

AGL Energy Limited v Hardy (No 3) [2017] FCA 952

Federal Court of Australia

O'Callaghan J

Costs - indemnity costs - contempt - Court respondent guilty of contempt of court for failure to comply with Court's order by refusing to permit "Search Party" members to enter "Premises" to carry out search and activities - Court imposed penalty of \$25,000 - prospective applicants sought indemnity costs under s43 *Federal Court of Australia Act 1976* (Cth) and r7.47 *Federal Court Rules 2011* (Cth) - whether 'inflexible or normal rule' for award of indemnity costs in contempt cases - conduct - whether substantial nature of penalty, or amount respondent paid to comply with protocol to which he consented, were relevant to determination of costs - held: there were discretionary factors strongly in favour of awarding indemnity costs, including that respondent's refusal to comply with order was 'deliberately defiant and contumacious', and that respondent knew he was committing contempt - no countervailing considerations - indemnity costs awarded.

[AGL Energy](#) (I B C G)

Boyd v Thorn [2017] NSWCA 210

Court of Appeal of New South Wales

Macfarlan & Leeming JJA; Emmett AJA

Land law - estoppel - appellants were registered proprietors of property - second appellant appealed against Sackar J's orders under s66G *Conveyancing Act 1919* (NSW) for vesting of property in trustees for sale (ground 1) - first appellant appealed against orders that litigation costs be paid out of his share of sale proceeds (ground 2) - appellants appealed against order that real estate agent's commission and charges and trustee's sale expenses of sale be paid from proceeds of sale before division of net proceeds between appellants (ground 3) - held: in respect of ground 1 the Court found that first appellant was not entitled to raise issues inconsistent with unchallenged orders made by Robb J earlier in proceedings - Court upheld ground 2, finding that Sackar J erred in ordering litigation costs to be paid out of first appellant's share of sale proceeds - in respect of ground 3 Court found no error in Sackar J's orders for payment of trustees' expenses of sale - appeal allowed in part.

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

Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd [2017] NSWSC 1121

Supreme Court of New South Wales
Hammerschlag J

Security of payments - building and construction - plaintiff challenged validity of adjudicator's adjudication determination in first defendant's favour pursuant to *Building and Construction Industry (Security of Payment) Act 1999* (NSW) - plaintiff contended payment claim not validly served and was not accompanied, as required by s 13(7), with supporting statement - plaintiff also contended adjudication was made outside time limit under s21(3)(a) - plaintiff also sought declaration that adjudicator was not entitled to be paid fees or expenses - held: supporting statement was non-compliant - valid payment claim was not served - Act's machinery not invoked - determination void - adjudicator not entitled to fees and expenses.

[Mt Lewis Estate](#) (I B C G)

Reliance Rail Pty Limited v Permanent Custodians Limited [2017] NSWSC 1111

Supreme Court of New South Wales
McDougall J

Contract - contractual construction - plaintiffs sought to refinance debt they incurred - whether plaintiffs could refinance debt without creditors' consent and, if so, on what conditions - construction of 'voluminous documents' - Senior Intercreditor Deed - Common Terms Deed - 'approach to construction of commercial contracts' - whether 'right to redeem Senior Bonds' - conditions of redemption - what must be paid on refinance - whether amount of indemnity under Common Terms Deed must be paid. - 'Bullet Junior Bonds' - held: plaintiffs succeeded to certain extent - parties to bring in draft orders

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

Leary v NSW Trustee and Guardian [2017] NSWSC 1113

Supreme Court of New South Wales
Ward CJ in Eq

Succession - family provision - plaintiff was adult child of deceased who sought provision from deceased's estate - plaintiff contended will did not adequately provide for him in circumstances of his homelessness, receipt of disability pension and psychiatric illness - statutory declarations of deceased - circumstances of deceased's other children - whether provision inadequate - whether 'lack of a safeguard' to prevent squandering of inheritance meant provision was inadequate - conduct - whether plaintiff made 'full and frank disclosure' - ss57, 59, 60(1) & 60(2) *Succession Act 2006* (NSW) - held: Court not plaintiff had put forward his financial position truthfully - application dismissed.

[Leary](#) (B)

Traynor v Cunningham [No 2] [2017] WASCA 159

Court of Appeal of Western Australia
Murphy & Beech JJA

Judicial review - security for costs - David DCJ found appellant members of police force tortiously liable to first and second respondents - Mitchell J upheld first and second respondents

application for security for costs against appellants - appellants sought judicial review of Mitchell J's decision - appellants challenged factual findings - appellants also contended there was no basis for primary judge's award of aggravated or exemplary damages - appellants also contended that, if their appeal against liability failed, the trial judge erred in amount of damages and apportionment of liability - held: appellants were impecunious - appeal was arguable but faced 'significant constraints on appellate interference with fact-finding' - respondents would incur would 'incur substantial costs' responding to the appeal due to number of grounds - appellants' costs were being met by Police Union but respondents must bear own costs - respondents had acted promptly in seeking security for costs - application dismissed.

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

Atarashii Stone Pty Ltd v Granite Transformations Pty Ltd (No 4) [2017] ACTSC 230

Supreme Court of the Australian Capital Territory

Mossop J

Notice to produce - plaintiff sought to enforce compliance with orders for production of documents - defendant sought to enforce compliance with notice to produce served on plaintiff - defendant objected to six categories of documents - r6748 *Court Procedures Rules 2006* (ACT) - held: defendant not required to produce certain items - parties required to produce documents in accordance with respective notices to produce - orders made.

[Atarashii Stone](#) (I B C G)

CRIMINAL

Executive Summary

Taub v R (NSWCCA) - criminal law - expert opinion evidence - concession by expert as to quantity of drug manufactured - Crown failed to prove beyond reasonable doubt that appellant manufactured large commercial quantity of drug - evidence established appellant manufactured commercial quantity of drug - verdict substituted

Fernando v The Queen (VSCA) - criminal law - applicant found guilty of one charge of trafficking in commercial quantity of drug and three charges of trafficking in drug of dependence - sentencing errors established - appeal allowed - applicant resentenced

Summaries With Link

Taub v R [2017] NSWCCA 198

Court of Criminal Appeal of New South Wales

Simpson JA; Walton & Button JJ

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Criminal law - appellant arraigned on charge he 'manufactured not less than the large commercial quantity of a prohibited drug' in contravention of s24(2) *Drug Misuse and Trafficking Act 1985* (NSW) - a large commercial quantity was 1 kg - appellant pleaded not guilty - jury returned guilty verdict - appellant sentenced to 9 years 4 months in prison with 7 year non-parole period - appellant appealed against conviction - appellant contended trial judge erred in admitting expert opinion evidence - appellant also contended guilty verdict was unreasonable and unable to be supported on evidence - whether expert opinion evidence satisfied requirements in *Makita (Australia) Pty Ltd v Spowles* (2001) 52 NSWLR 705 - whether, if expert opinion evidence was admissible, verdict was unreasonable due to undue weight given to expert opinion - held: expert opinion evidence was admissible - expert had conceded that it was possible that less than 1 kg of drug was produced - Crown failed to prove beyond reasonable doubt appellant had manufactured large commercial quantity - Court satisfied evidence established appellant manufactured at least 250 grams, which was offence of manufacturing not less than commercial quantity - guilty verdict for manufacture of not less than large commercial quantity of drug set aside - verdict substituted - matter remitted

[Taub](#)

Fernando v The Queen [2017] VSCA 208

Court of Appeal of Victoria

Ashley, Relich & Tate JJA

Criminal law - applicant found guilty of one charge of trafficking in commercial quantity of drug and three charges of trafficking in drug of dependence - applicant sentenced to 7 years 8 months' in prison with a non-parole period of 3 years 10 months - applicant contended sentences manifestly excessive, and that sentencing judge erred in taking into account Court of Appeal's indication that 'current sentencing practices for trafficking, particularly in a commercial quantity, have inadequately reflected the seriousness of this crime' - *Gregory (a Pseudonym) v The Queen* [2017] VSCA 151 - *Haddara v The Queen* [2016] VSCA 168 - held: respondent conceded that sentencing on charge of trafficking ketamine was manifestly excessive and also conceded error in charge of trafficking in commercial quantity of drug - error also established in relation to uplift in sentencing standards - appeal allowed - applicant resentenced.

[Fernando](#)



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from **The Prelude: Book 2: School-time**

BY [WILLIAM WORDSWORTH](#)

Thus far, O Friend! have we, though leaving much
Unvisited, endeavour'd to retrace
My life through its first years, and measured back
The way I travell'd when I first began
To love the woods and fields; the passion yet
Was in its birth, sustain'd, as might befall,
By nourishment that came unsought, for still,
From week to week, from month to month, we liv'd
A round of tumult: duly were our games
Prolong'd in summer till the day-light fail'd;
No chair remain'd before the doors, the bench
And threshold steps were empty; fast asleep
The Labourer, and the old Man who had sate,
A later lingerer, yet the revelry
Continued, and the loud uproar: at last,
When all the ground was dark, and the huge clouds
Were edged with twinkling stars, to bed we went,
With weary joints, and with a beating mind.
Ah! is there one who ever has been young,
Nor needs a monitory voice to tame
The pride of virtue, and of intellect?
And is there one, the wisest and the best
Of all mankind, who does not sometimes wish
For things which cannot be, who would not give,
If so he might, to duty and to truth
The eagerness of infantine desire?
A tranquillizing spirit presses now
On my corporeal frame: so wide appears
The vacancy between me and those days,
Which yet have such self-presence in my mind
That, sometimes, when I think of them, I seem
Two consciousnesses, conscious of myself
And of some other Being. A grey Stone
Of native rock, left midway in the Square
Of our small market Village, was the home
And centre of these joys, and when, return'd
After long absence, thither I repair'd,
I found that it was split, and gone to build
A smart Assembly-room that perk'd and flar'd
With wash and rough-cast elbowing the ground



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Which had been ours. But let the fiddle scream,
And be ye happy! yet, my Friends! I know
That more than one of you will think with me
Of those soft starry nights, and that old Dame
From whom the stone was nam'd who there had sate
And watch'd her Table with its huckster's wares
Assiduous, thro' the length of sixty years.

<https://www.poetryfoundation.org/poets/william-wordsworth?>

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