



Friday, 27 October 2017

## 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)

**Australian Olympic Committee, Inc v Telstra Corporation Limited** (FCAFC) - consumer law - marketing campaign - alleged breaches of *Olympic Insignia Protection Act 1987* (Cth) and Australian Consumer Law - dismissal of application for injunctions and declaration - appeal dismissed (I B C G)

**Australian Competition and Consumer Commission v MSY Technology Pty Ltd** (FCA) - consumer law - misleading or deceptive conduct - consumer guarantees - admitted breaches - proposed penalties within range Court would order and were appropriate in the circumstances - declarations and orders (I B C G)

**Mensink v Parbery** (FCA) - security for costs - contempt - liquidators granted order for security for costs of appellant's appeal in sum less than sought (I B C G)

**In the matter of Part IV Trustee Act 1925 (No 2)** (NSWSC) - judgments and orders - unclaimed funds - mortgagor's identity verified - application for payment of unclaimed funds paid into Court granted (I B C G)

**Young v Smith (No 4)** (NSWSC) - contempt - sentencing - breach of orders restraining dealing with property - contemnor sentenced to 6 months in prison - sentence suspended - contemnor to be released on good behaviour bond - contemnor fined \$50,000 (I B C G)

**Kipniak Pty Ltd v Rann** (VSC) - judicial review - accident compensation - assessment of degree of permanent psychiatric impairment - application for judicial review dismissed (I B C G)

**Bodycorp Repairers Pty Ltd v GDG Legal Pty Ltd & Anor** (VSC) - professional negligence - appellant ordered to pay amount into Court as security for costs concerning negligence claim against lawyers - appeal dismissed (I B C G)

## Summaries With Link (Five Minute Read)

### **Australian Olympic Committee, Inc v Telstra Corporation Limited [2017] FCAFC 165**

Full Court of the Federal Court of Australia

Greenwood, Nicholas & Burley JJ

Consumer law - respondent engaged in marketing campaign to promote availability of events streamed by Seven Network from Rio Olympics - appellant contended campaign was 'ambush marketing' prohibited by *Olympic Insignia Protection Act 1987* (Cth) and misleading and deceptive conduct in breach Australian Consumer Law - appellant appealed against primary judge's dismissal of application - whether primary judge erred in relation to weight given to considerations in respect of application of the Olympia Insignia Protection Act, or Australian Consumer Law - whether correction of errors by primary judge would yield different result - held: grounds of appeal failed - appeal dismissed.

[Australian Olympic Committee](#) (I B C G)

### **Australian Competition and Consumer Commission v MSY Technology Pty Ltd [2017] FCA 1251**

Federal Court of Australia

Markovic J

Consumer law - penalties - misleading or deceptive conduct - Australian Competition and Consumer Commission (ACCC) commenced proceeding against respondents, alleging they engaged in conduct contravening Australian Consumer Law concerning consumer guarantees - respondents admitted allegations - parties agreed upon relief and orders - whether Court should grant relief in "Minutes of Proposed Order" - ss18, 29(1)(m), 29(1)(n), 64, 224, 232 & 246 Australian Consumer Law - held: Court satisfied proposed penalties were within range Court would order - proposed penalties were appropriate - declarations and orders made.

[Australian Competition and Consumer Commission](#) (I B C G)

### **Mensink v Parbery [2017] FCA 1248**

Federal Court of Australia

Wigney J

Security for costs - contempt - appellant was former director and company secretary of company in liquidation which was being wound up (Queensland Nickel) - respondents were special purpose liquidators - primary judge ordered appellant to appear before Deputy Registrar

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for examination - appellant did not attend - primary judge ordered arrest of appellant and that he be brought for examination - warrant issued - appellant charged with contempt for failing to comply for order for examination and Registrar's earlier order - primary judge ordered that warrant be issued for appellant's arrest - appellant appealed - liquidators sought security for appeal's costs - held: Court concluded it was appropriate to order security for costs on basis of three main considerations: appellant overseas with no indication of plans to return, 'significant risk' liquidators would have 'no ready means' of enforcing costs order against appellant, and that appellant's prospects of success were 'at best, a neutral consideration' - order for security made in sum less than amount which liquidators' sought.

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

## **In the matter of Part IV Trustee Act 1925 (No 2) [2017] NSWSC 1449**

Supreme Court of New South Wales

Campbell J

Judgments and orders - unclaimed funds - identity of mortgagor - applicant sought payment of unclaimed funds which bank had paid into court under *Trustee Act 1925* (NSW) as surplus of mortgagee sale proceeds - Court had previously not been satisfied applicant was entitled to payment, particularly due to discrepancy between spelling of applicant's surname and surname appearing in affidavit - second affidavit had been sworn - r41.10 *Uniform Civil Procedure Rules 2005* (NSW) - held: Court now satisfied applicant was mortgagor entitled to funds in Court - direction made.

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

## **Young v Smith (No 4) [2017] NSWSC 1443**

Supreme Court of New South Wales

Rothman J

Contempt - contemnor found guilty of contempt by breaching orders restraining dealing with property - determination of sentence - s3A *Crimes (Sentencing Procedure) Act 1999* (NSW) - Pt55 r13 *Supreme Court Rules 1970* (NSW) - range of sentences which Court may impose - contempt's nature and circumstances - contempt's 'impact or likely impact' on administration of justice - extent of culpability - deterrence - whether previous contempt finding - whether contrition, remorse and/or apology - offender's financial and personal circumstances - held: contemnor sentenced to six months' in prison - sentence suspended - contemnor to be released on good behaviour bond - contemnor also fined \$50,000.

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

## **Kipniak Pty Ltd v Rann [2017] VSC 651**

Supreme Court of Victoria

Zammit J

Judicial review - accident compensation - psychiatric impairment - lump sum impairment - plaintiff worker sought to quash opinion of medical panel assessing degree of permanent psychiatric impairment - O56 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - pre-

existing conditions - *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) - s98C *Accident Compensation Act 1985* (Vic) (AC Act) - whether jurisdictional error - whether misapplication of s91(7)(c) AC Act in relation to impairment from unrelated causes - whether reasons adequate - held: grounds for judicial review failed - application dismissed.

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

## **Bodycorp Repairers Pty Ltd v GDG Legal Pty Ltd & Anor [2017] VSC 621**

Supreme Court of Victoria

J Forrest J

Professional negligence - Judicial Registrar required appellant to pay amount into Court as security for costs concerning negligence claim against respondents (lawyers) - appellant appealed - degree of risk costs order may not be satisfied - whether respondents' conduct caused or contributed to appellant's lack of funds - stultification - whether proceeding defensive - whether allegations justified respondents' engagement of external counsel - held: it was appropriate for Judicial Registrar to order security for costs and fix costs at \$90,800 - appeal dismissed.

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

## CRIMINAL

### Executive Summary

**DPP (Cth) v Farmer (a Pseudonym) and Ors** (VSCA) - criminal law - evidence - erroneous exclusion of evidence of content of mobile phones obtained by Customs officers - appeal allowed

**R v Fleming; R v Maher** (SASCFC) - criminal law - evidence - respondents acquitted of two alternative offences of murder - no error in exclusion of 'robbery incident evidence' - leave to appeal refused

### Summaries With Link

## **DPP (Cth) v Farmer (a Pseudonym) and Ors [2017] VSCA 292**

Court of Appeal of Victoria

Maxwell P; Priest & Beach JJA

Criminal law - evidence - statutory construction - Director sought to set aside primary judge's decision to exclude evidence of content of second respondent's mobile phones - Customs officers had downloaded and copied the content - whether provisions of *Customs Act 1901* (Cth) authorised Customs officers to examine phones - whether judge's decision to exclude



evidence under s138 Evidence Act 2008 (Vic) was erroneous - 'import' - 'export' - 'subject to the control of the Customs' - conceded 'contraventions and associated impropriety' - held: judge erred in finding phones not examinable by Customs officers - examination and copying powers were lawfully available in respect of phones - evidence was 'highly - if officers had complied with s186A Customs Act and 'Instructions and Guidelines: Electronic Examination in the Airport Environment (July 2011) evidence would have been obtained - appeal allowed.

[DPP \(Cth\)](#)

**R v Fleming; R v Maher [2017] SASCF 135**

Full Court of the Supreme Court of South Australia

Peek, Nicholson & Hinton JJ

Criminal law - evidence - two respondents jointly charged with two alternative offences of murder concerning deceased - respondents acquitted - prosecution sought to appeal on basis trial judge erroneously refused to admit evidence it tendered of defendants' robbery of a different person - 'robbery incident evidence' - principle in *O'Leary v The King* (1946) 73 CLR 566 - res gestae - s34P *Evidence Act 1929* - held: no error in trial judge's exclusion of evidence - leave to appeal refused.

[R v Fleming; R v Maher](#)

# Benchmark

## The Snail

**By:** Richard Lovelace

Wise emblem of our politic world,  
Sage snail, within thine own self curl'd;  
Instruct me softly to make haste,  
Whilst these my feet go slowly fast.

Compendious snail! thou seem'st to me,  
Large Euclid's strict epitome;  
And in each diagram dost fling  
Thee from the point unto the ring;  
A figure now triangular,  
An oval now, and now a square;  
And then a serpentine dost crawl,  
Now a straight line, now crook'd, now all.

Preventing rival of the day,  
Th'art up and openest thy ray,  
And ere the morn cradles the moon  
Th'art broke into a beauteous noon.  
Then when the sun sups in the deep,  
Thy silver horns ere Cynthia's peep;  
And thou from thine own liquid bed  
New Phoebus heav'st thy pleasant head.

Who shall a name for thee create,  
Deep riddle of mysterious state?  
Bold Nature that gives common birth  
To all products of seas and earth,  
Of thee, as earthquakes, is afraid,  
Nor will thy dire deliv'ry aid.

Thou thine own daughter then, and sire,  
That son and mother art entire,  
That big still with thy self dost go,  
And liv'st an aged embryo;  
That like the cubs of India,  
Thou from thyself a while dost play;  
But frightened with a dog or gun,  
In thine own belly thou dost run,  
And as thy house was thine own womb,  
So thine own womb concludes thy tomb.

# Benchmark

But now I must (analyz'd king)  
Thy economic virtues sing;  
Thou great stay'd husband still within,  
Thou, thee, that's thine dost discipline;  
And when thou art to progress bent,  
Thou mov'st thy self and tenement,  
As warlike Scythians travell'd, you  
Remove your men and city too;  
Then after a sad dearth and rain,  
Thou scatterest thy silver train;  
And when the trees grow nak'd and old,  
Thou clothest them with cloth of gold,  
Which from thy bowels thou dost spin,  
And draw from the rich mines within.

Now hast thou chang'd thee saint; and made  
Thy self a fane that's cupola'd;  
And in thy wreathed cloister thou  
Walkest thine own grey friar too;  
Strict, and lock'd up, th'art hood all o'er,  
And ne'er eliminat'st thy door.  
On salads thou dost feed severe,  
And 'stead of beads thou dropp'st a tear;  
And when to rest, each calls the bell,  
Thou sleep'st within thy marble cell,  
Where in dark contemplation plac'd,  
The sweets of nature thou dost taste;  
Who now with time thy days resolve,  
And in a jelly thee dissolve,  
Like a shot star, which doth repair  
Upward, and rarify the air.

[https://en.wikipedia.org/wiki/Richard\\_Lovelace](https://en.wikipedia.org/wiki/Richard_Lovelace)

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