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## Daily Composite 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)

**Director of Consumer Affairs Victoria v Alpha Flight Services Pty Ltd** (FCAFC) - consumer law - contraventions of Australian Consumer Law - appeal against pecuniary penalties imposed on companies dismissed (I B)

**Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy; FBIS International Protective Services (Aust) Pty Ltd v Hennessy** (NSWCA) - work injury damages - slip and fall on door-sill - occupier and employer not liable - appeal allowed (I C)

**Cram Fluid Power Pty Ltd v Green** (NSWCA) - workers compensation - worker disentitled from making further claim for lump sum compensation - appeal allowed (I C)

**Pham v NRMA Insurance Ltd** (NSWSC) - judicial review - motor accidents compensation - causation - no error in decision of Medical Review Panel - summons dismissed (I G)

**Boral Resources (Vic) Pty Ltd v CFMEU (Ruling No 1)** (VSC) - evidence - tort of intimidation - impact of pleaded ban was fact in issue - evidence (with one exception) admissible (I C)

**Fertility Control Clinic v Melbourne City Council** (VSC) - judicial review - alleged nuisance by protesters' activities - Council's advice to Clinic erroneous but within jurisdiction - Court's power to grant mandamus not enlivened - declaration (I G)



**Hewitt v Bayntun & Allianz Australia Insurance Ltd (QSC) - equity - trusts and trustees - motor vehicle accident - sanction of settlement not required - administrator not to be appointed (I B)**

# Benchmark

## Summaries With Link (Five Minute Read)

### **Director of Consumer Affairs Victoria v Alpha Flight Services Pty Ltd [2015] FCAFC 118**

Full Court of the Federal Court of Australia

Barker, Katzmann & Beach JJ

Consumer law - Director of Consumer Affairs Victoria appealed against pecuniary penalties imposed on companies in respect of product safety contraventions of Australian Consumer Law - contraventions concerned supply, offer for supply and possession or control of goods subject of permanent ban imposed by Consumer Protection Notice No 5 of 2012 issued under *Competition and Consumer Act 2010* (Cth) - Sch 2, ss118(1), (2) & (3) & 224 *Competition and Consumer Act - s8 Australian Consumer Law and Fair Trading Act 2012* (Vic) - held: no error in primary judge's treatment of issue of deterrence - no failure to have regard to maximum penalties - no error in primary judge's approach to looking at course of conduct - no error in primary judge's approach to character of contraventions and object of provisions of Australian Consumer Law - penalties imposed on companies not manifestly inadequate - appeal dismissed.

[Director](#) (I B)

### **Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy; FBIS International Protective Services (Aust) Pty Ltd v Hennessy [2015] NSWCA 253**

Court of Appeal of New South Wales

McColl, Basten & Leeming JJA

Negligence - employee injured in slip and fall on door-sill at worksite in wet weather - employee sued occupier of premises and employer - occupier occupied container terminal - employer provided security services at site under a written security services agreement executed on behalf of occupier and employer - ss5B, 5C, 5E & 5R *Civil Liability Act 2002* (NSW) - ss151H & 151Z *Workers Compensation Act 1987* (NSW) - primary judge satisfied that reasonable person in occupier's position would have taken precaution of installing step and awning at entrance - occupier negligent - employer in breach of non-delegable duty of care and personally negligent for failing to undertake relevant inspection of gatehouse and to request that occupier undertake repairs - no contributory negligence - failure to install step was necessary condition of injury - occupier had direct control of premises and primary responsibilities as occupier - liability apportioned at 60% for occupier - 40% for employer - ss5B, 5C, 5D *Civil Liability Act 2002* (NSW) - r51.53 *Civil Procedure Rules 2005* (NSW) - s151Z *Workers Compensation Act 1987* (NSW) - employer and occupier appealed, challenging primary judge's findings of breach and causation in light of limited findings of primary fact - held: neither employer nor occupier breached duties of care in failing to take precautions against risk posed by step from the ground into demountable hut which was "higher than normal" - conclusion rested on unchallenged rejection of employee's case as to height of step, leaving behind insufficient evidence to support finding it was reasonable to take measures to address risk posed by step - appeal allowed.

[Patrick](#) (I C)

## **Cram Fluid Power Pty Ltd v Green [2015] NSWCA 250**

Court of Appeal of New South Wales  
Beazley ACJ, Emmett & Gleeson JJA

Workers' compensation - injured worker employed as maintenance fitter made claim for lump sum compensation under s66 *Workers Compensation Act 1987* (NSW) (1987 Act) - claim accepted and compensation paid - worker's condition deteriorated - worker underwent spinal surgery - solicitors made claim on worker's behalf for further lump sum compensation under s66 - employer rejected claim on basis that in light of amendments made to 1987 Act by provisions introduced by *Workers Compensation Legislation Amendment Act 2012* (NSW) (2012 Amendments), worker was precluded from pursuing claim - worker sought referral of dispute to Workers Compensation Commission - employer appealed against decision of arbitrator that matter be remitted to Registrar for referral to approved medical specialist for assessment of whole person impairment - President of Commission confirmed arbitrator's decision - employer sought leave to appeal under s 353(4) *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - whether worker entitled to pursue second claim for compensation - held: transitional provisions made plain that new "one claim" limitation applied to claims for lump sum compensation made on or after critical date - worker had already made his one claim for lump sum compensation - the new s66(1A) disentitled worker from making claim further lump sum compensation - appeal allowed.

[CramFluid](#) (I C)

## **Pham v NRMA Insurance Ltd [2015] NSWSC 1205**

Supreme Court of New South Wales  
Harrison AsJ

Judicial review - motor accidents compensation - plaintiff injured in motor vehicle accident, then subsequently injured in second motor vehicle accident - proceedings concerned second motor vehicle accident - plaintiff suffered minimal physical injury in second accident but developed major psychological injury - Medical Review Panel found psychological injury not caused by second motor vehicle accident - plaintiff sought declaration that certificate and statement of reasons issued by Medical Panel was void and of no effect - causation - s58 *Motor Accidents Compensation Act 1999* (NSW) - *Allianz Australia Insurance Ltd v Gonzales* [2013] NSWSC 362 - Clauses 1.7, 1.8 & 1.9 Permanent Impairment Guidelines - whether injury caused by "the use or operation of the vehicle" or by some other factor - held: Panel did not err by not concluding that there was very substantial link between motor vehicle accident and major depressive episode Review - Panel's reasons were adequate - Panel did not misunderstand or misapply *Gonzales*, nor misdirect itself - nothing illogical, irrational or unreasonable about Panel's decision to rely heavily on doctor's report - summons dismissed.

[Pham](#) (I G)

## **Boral Resources (Vic) Pty Ltd v CFMEU (Ruling No 1) [2015] VSC 445**

Supreme Court of Victoria  
Bell J



# Benchmark

Evidence - Boral claimed against Union in reliance on tort of intimidation in relation to ban on purchase of concrete products from Boral by Victorian construction principals and sub-contractors - common ground that by reason of entry of default judgment, allegations in statement of claim taken to be admitted - trial for assessment of damages - Union objected to evidence proposed to be led by Boral on basis it did not relate to any fact in issue - held: proposed evidence (with one exception) relevant and admissible under s56(1) *Evidence Act 2008* (Vic) because it met test of relevance specified in s55(1) - impact of pleaded ban was a fact in issue in relation to categories of loss on which Boral relied - proposed evidence relevant to that issue - exception pertained to excluded evidence which did not relate to pleaded ban and was not probative of any issue in trial.

[Boral](#) (I C)

## **Fertility Control Clinic v Melbourne City Council [2015] VSC 424**

Supreme Court of Victoria

McDonald J

Judicial review - Clinic contended activities of protesters constituted a nuisance under *Public Health and Wellbeing Act 2008* (Vic) and that Council was required by ss60 & 62 to take steps to remedy alleged nuisance - Clinic contended Council's response to its complaint amounted to a constructive failure to perform duties imposed by Act - Clinic sought orders compelling Council to remedy alleged nuisance - held: no actual or constructive failure by Council to perform duties imposed by Act - Council did not misdirect itself when addressing whether protesters' activities constituted a nuisance - Clinic entitled to declaration that Council's advice did not constitute advice as to method of settling matter privately within meaning of s62(3)(b) - Council's advice erroneous, but within jurisdiction - Court's power to grant mandamus not enlivened - declaration made.

[Fertility](#) (I G)

## **Hewitt v Bayntun & Allianz Australia Insurance Ltd [2015] QSC 250**

Supreme Court of Queensland

McMeekin J

Equity - trusts and trustees - plaintiff injured in motor vehicle collision brought proceedings for damages in negligence - claim compromised in sum of \$1,000,000 - whether necessary that compromise be sanctioned pursuant to s59 *Public Trustee Act 1978* (Qld) - whether administrator should be appointed - 'a person with impaired capacity for a matter within the meaning of the Guardianship and Administration Act 2000' - Sch 2 s1, Sch 1, Sch 2 s8, Sch 40 ss10, 82 & 245 *Guardianship and Administration Act 2000* (Qld) - held: plaintiff understood nature and effect of compromise - Court declined to sanction settlement - it was matter for plaintiff whether he wished to enter compromise - Court's power to order administrator be appointed depended upon its satisfaction that a sanction of settlement was required - declarations made that plaintiff not under legal disability so as to require sanction of settlement, and that plaintiff did not have impaired capacity regarding financial matter relevant to receiving, investing and managing settlement sum.

[Hewitt](#) (I B)

## CRIMINAL

### Executive Summary

**Dimitrovska v The State of Western Australia** (WASCA) - criminal law - unlawfully doing grievous bodily harm with intent to maim, disfigure, disable or do grievous bodily harm - appeal against sentence of 17 years imprisonment dismissed

**Hughes v The State of Western Australia** (WASCA) - criminal law - possession of MDMA and methylamphetamine with intent to sell or supply - appeals against conviction dismissed - leave to appeal against sentence refused

### Summaries With Link

#### **Dimitrovska v The State of Western Australia [2015] WASCA 162**

Court of Appeal of Western Australia

Martin CJ, McLure P & Hall J

Criminal law - appellant sentenced to 17 years imprisonment following conviction of unlawfully doing grievous bodily harm with intent to maim, disfigure, disable or do grievous bodily harm - appellant contended sentence should be set aside because it was based on erroneous findings of fact arising from Court's acceptance of assertions in victim impact statement VIS which unbeknownst to Court were inconsistent with or contradicted by evidence from video recordings made at about time sentence passed - appellant also contended sentence manifestly excessive - held: sentencing judge accepted accuracy of VIS and took it into account in sentencing - footage taken at time victim preparing VIS - nothing in footage provided foundation for arguable challenge to accuracy of any of certain statements and most parts of remaining statements - unchallenged parts of VIS confirmed accuracy of picture it conveyed - footage did not persuade Court different sentence could and should have been imposed - sentence imposed by trial judge entirely justified by circumstances - appeal dismissed.

[Dimitrovska](#)

#### **Hughes v The State of Western Australia [2015] WASCA 164**

Court of Appeal of Western Australia

McLure P, Mazza JA & Chaney J

Criminal law - applicants (Hughes and Rizeq) convicted on one count of possession of MDMA with intent to sell or supply contrary to s6(1)(a) *Misuse of Drugs Act 1981* (WA) (MDA) (count 1) and one count of possession of methylamphetamine with intent to sell or supply - applicants sought leave to appeal against conviction - applicant (Hughes) also sought leave to appeal

against sentence - applications and appeals heard together - prosecution's statutory disclosure obligations - effect of non-disclosure - miscarriage and the proviso - held: notwithstanding prosecution's breach of duty to disclose evidentiary material relevant to charges against applicant (Hughes), Court satisfied there had been no substantial miscarriage of justice - individual sentences and total effective sentence imposed on Hughes broadly consistent with the sentences customarily imposed in jurisdiction - no prospect of success on contentions by applicant (Rizeq) trial judge misdirected jury with 'overawing' comments, that verdict unsafe and unsatisfactory, that trial judge improperly 'expanded' State case - Rizeq's constitutional argument failed - prosecutor's misleading submissions arising from the failure to disclose, were of no significance in determining verdicts against Rizeq - leave to appeal against sentence refused - appeals against conviction dismissed.

[Hughes](#)

## **I started Early – Took my Dog – (656)**

By Emily Dickinson

I started Early – Took my Dog –  
And visited the Sea –  
The Mermaids in the Basement  
Came out to look at me –

And Frigates – in the Upper Floor  
Extended Hempen Hands –  
Presuming Me to be a Mouse –  
Aground – upon the Sands –

But no Man moved Me – till the Tide  
Went past my simple Shoe –  
And past my Apron – and my Belt  
And past my Boddice – too –

And made as He would eat me up –  
As wholly as a Dew  
Upon a Dandelion's Sleeve –  
And then – I started – too –

And He – He followed – close behind –  
I felt His Silver Heel  
Upon my Ankle – Then My Shoes  
Would overflow with Pearl –



# Benchmark

Until We met the Solid Town –  
No One He seemed to know –  
And bowing – with a Mighty look –

At me – The Sea withdrew –  
[Emily Dickinson](#)

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