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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)

**Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd (FCAFC)** - representative proceedings - common fund order - orders made to impose burden of costs equally on all class members who stood to benefit from proceeding, not just funded class members (I B C G)

**Walker v Sell (FCA)** - sale of goods - consumer law - contract - sale of car - purchaser bore risk of car not being genuine - appeal dismissed (I B)

**Hadley v BethQ Pty Ltd (FCA)** - corporations - winding up - leave to raise grounds of opposition to winding up of company refused - company wound up (B)

**Timbercorp Finance Pty Ltd (In Liq) v Allan (Costs) (VSC)** - costs - service - two applications - plaintiff enjoyed overall success but on basis of competing factors Court determined parties were to bear own costs (I B C)

**Wright v Glencore Queensland Limited (QSC)** - workers' compensation - declaration refused that workers' compensation insurer's retraction of agreement as to entity who would perform reassessment was invalid (I)

**George 218 Pty Ltd v Bank of Queensland Limited [No 2] (WASCA)** - guarantee - appellants liable to respondent as guarantors under loan agreements - appeal dismissed (I B)

**Cowie v Gungahlin Veterinary Services Pty Ltd (ACTSC)** - negligence - dismissal of claim against employer arising from injury in fall from step-ladder - appeal dismissed - cross-appeal concerning costs dismissed (I)

## Summaries With Link (Five Minute Read)

### **Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd [2016] FCAFC 148**

Full Court of the Federal Court of Australia

Murphy, Gleeson & Beach JJ

Representative proceedings - common fund order - applicant sought orders under s33ZF *Federal Court of Australia Act 1976* (Cth) to apply litigation funding terms obliging all members to contribute equally to legal and litigation funding costs by paying funder - QBE contended common fund order would lead to 'substantial and unjustified increase in the aggregate funding commission' compared to funding commission payable under funding equalisation order, would create financial hurdle to case's resolution, would leave class members with lower proportion of settlement money, and that Court did not have power to make orders - *Australian Securities and Investments Commission Act 2001* (Cth) - *Corporations Act 2001* (Cth) - *Australian Consumer Law* (Cth) - *Federal Court of Australia Act 1976* (Cth) - *Federal Court of Australia Amendment Bill 1991* (Cth) - held: Court satisfied it had power to make orders - Court made orders whose effect was to impose burden of legal and litigation funding commission costs equally on all class members who stand to benefit from proceeding - orders made.

[Money Max](#) (I B C G)

### **Walker v Sell [2016] FCA 1259**

Federal Court of Australia

Bromwich J

Sale of goods - consumer law - contract for sale of car - appeal against decision of Federal Circuit Court of Australia - question of who should bear loss on collectable motor vehicle later found not to be model vendor and purchaser believed it was - common ground car was not worth paid purchase price - primary judge found in vendor's favour - sale by description - express term of contract - 'trade or commerce' - Federal jurisdiction - *Australian Consumer Law and Fair Trading Act 2012* (Vic) - s18 *Australian Consumer Law* (Victoria) - Sch 2 *Competition and Consumer Act 2010* (Cth) - ss191 & 191(2)(b) *Evidence Act 1995* (Cth) - Sch 1 *Federal Circuit Court Rules 2001* (Cth) - rr1.32, 1.34, 1.35, 25.01 & 25.03 *Federal Court Rules 2011* (Cth) - ss18 & 61 *Goods Act 1958* (Vic) - s172 *Legal Profession Uniform Law* (NSW) - s18 *Sale of Goods Act 1923* (NSW) - held: grounds of appeal failed - appeal dismissed.

[Walker](#) (I B)

### **Hadley v BethQ Pty Ltd [2016] FCA 1263**

Federal Court of Australia

Farrell J

Corporations - winding up - applicant sought leave to raise grounds of opposition to winding up of company pursuant to 459S *Corporations Act 2001* (Cth) - ss459C(2)(a), 459F, 459G, 459H, 459P, 459Q, 459S, 465A(c), 467A & 470(1)(a) *Corporations Act 2001* (Cth) - s160(1) *Evidence Act 1995* (Cth) - rr5.4, 5.6 *Federal Court (Corporations) Rules 2000* (Cth) - held: applicant's grounds not material to proving whether applicant solvent - leave to raise grounds refused - company wound up.

[Hadley](#) (B)

## **Timbercorp Finance Pty Ltd (In Liq) v Allan (Costs) [2016] VSC 633**

Supreme Court of Victoria

Derham AsJ

Costs - Court determined two applications - plaintiff had sought to set aside service of writ - defendant had sought to extend validity of writ for service - Court concluded writ's service ineffective due to non-compliance with *Service and Execution of Process Act 1992* (Cth) but that it was appropriate to extend writ's validity for service under r5.12 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - determination of costs - held: plaintiff had achieved aim of continuing with proceedings which was the 'proper characterisation of the overall success' - however there were competing factors to be weighed against conclusion - Court satisfied that it was appropriate for each party to bear own costs.

[Timbercorp](#) (I B C)

## **Wright v Glencore Queensland Limited [2016] QSC 247**

Supreme Court of Queensland

Henry J

Workers' compensation - injured worker sought declaratory relief in resolution of dispute with respondent - respondent was employer's workers' compensation insurer - dispute arose from worker's request for doctor's reassessment of injury - issue was whether insurer could retract agreement with worker as to entity who would perform re-assessment - worker contended withdrawal of agreement was invalid - statutory construction - s14A *Acts Interpretation Act 1954* (Qld) - ss5, 179, 183 & 186 *Workers' Compensation and Rehabilitation Act 2003* (Qld) - *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2013* (Qld) - held: worker's argument not accepted - declaration refused that withdrawal of agreement was invalid.

[Wright](#) (I)

## **George 218 Pty Ltd v Bank of Queensland Limited [No 2] [2016] WASCA 182**

Court of Appeal of Western Australia

Martin CJ; Newnes & Murphy JJA

Guarantee - appeal from decision in which primary judge found appellants liable to respondent as guarantors, concluding that guarantees modified under s22 *Financial Sector (Business Transfer and Group Restructure) Act 1999* (Cth) (Transfer Act) secured money which company owed to bank under loan agreements - primary judge found that even if guarantees did not

# Benchmark

secure money, appellants were estopped from denying state of facts by a conventional estoppel - appellants contended primary judge erred in construing Deed of Consent, in finding appellants estopped from denying guarantees applicable to loan agreements, in finding Transfer Act allowed bank to rely on guarantees, and in finding guarantees included separate indemnity obligation which appellants owed - held: grounds of appeal failed - appeal dismissed.

[George 218](#) (I B)

## **Cowie v Gungahlin Veterinary Services Pty Ltd [2016] ACTSC 311**

Supreme Court of the Australian Capital Territory

Mossop AsJ

Negligence - appeal from decision in which Magistrate dismissed appellant's claim against employer arising from injury at work in fall from step-ladder - whether erroneous finding that step-ladder not faulty - whether failure to take into account finding that respondent on notice that appellant believed ladder unstable - whether failure to infer ladder's instability probably contributed to fall - whether erroneous findings as to whether there was reasonable alternative to using step-ladder - whether failure to consider standard of care and erroneous conclusion as to breach - whether failure to apply provisions of s43 *Civil Law (Wrongs) Act 2002* - *Court Procedures Rules 2006* (ACT) - s267 *Work Health and Safety Act 2011* (ACT) - *Workers Compensation Act 1951* (ACT) - held: appeal dismissed - cross-appeal concerning costs dismissed.

[Cowie](#) (I)

## CRIMINAL

### Executive Summary

**Engelbrecht v Director of Public Prosecutions (NSW)** (NSWCA) - administrative law - criminal law - primary judge misapprehended power pursuant to *Crimes (Appeal and Review) Act 2001* (NSW) - decision quashed - matter returned to District Court

**R v Lowe** (SASCFC) - criminal law - conviction for attempted murder - DNA evidence - any non-disclosure of material to defence did not constitute miscarriage of justice - permission to adduce fresh evidence refused - verdict not unreasonable - appeal dismissed

### Summaries With Link

## **Engelbrecht v Director of Public Prosecutions (NSW) [2016] NSWCA 290**

Court of Appeal of New South Wales

McColl, Macfarlan & Leeming JJA

Administrative law - criminal law - applicant sought review of dismissal of his appeal against sentence imposed by Local Court Magistrate brought pursuant to s11 *Crimes (Appeal and Review) Act 2001* (NSW) - applicant contended primary judge erred due to misapprehension of the nature of power exercised in appeal's determination pursuant to s17 of the Act - applicant contended primary judge fell into jurisdictional error in that 'his Honour refused to have regard to the transcript of the evidence given in the Local Court proceedings in determining the [severity appeal]' - held: primary judge misapprehended power pursuant to s17 - primary judge's determination quashed - proceedings returned to District Court for hearing and determination.

[Engelbrecht](#)

## **R v Lowe [2016] SASCFC 118**

Supreme Court of South Australia

Peek, Nicholson & Doyle JJ

Criminal law - appellant sought to appeal against conviction for attempted murder - appellant contended material concerning miscoding of software used in DNA testing was not disclosed to defence and sought to call fresh evidence contesting aspects of DNA evidence - held: any non-disclosure did not constitute miscarriage of justice - evidence which appellant sought to adduce did not establish prosecution's DNA evidence was erroneous or likely to be erroneous - requirements to admit fresh evidence not satisfied - Court satisfied verdict was not unreasonable - appeal dismissed.

[Lowe](#)

# Benchmark

## Spirits of the Dead

By [Edgar Allan Poe](#)

### I

Thy soul shall find itself alone  
'Mid dark thoughts of the gray tombstone—  
Not one, of all the crowd, to pry  
Into thine hour of secrecy.

### II

Be silent in that solitude,  
Which is not loneliness—for then  
The spirits of the dead who stood  
In life before thee are again  
In death around thee—and their will  
Shall overshadow thee: be still.

### III

The night, tho' clear, shall frown—  
And the stars shall look not down  
From their high thrones in the heaven,  
With light like Hope to mortals given—  
But their red orbs, without beam,  
To thy weariness shall seem  
As a burning and a fever  
Which would cling to thee for ever.

### IV

Now are thoughts thou shalt not banish,  
Now are visions ne'er to vanish;  
From thy spirit shall they pass  
No more—like dew-drop from the grass.

### V

The breeze—the breath of God—is still—  
And the mist upon the hill,  
Shadowy—shadowy—yet unbroken,  
Is a symbol and a token—  
How it hangs upon the trees,  
A mystery of mysteries!?

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