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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)

Balaev v University of Adelaide (FCA) - discovery - employment agreement - application for further discovery dismissed except in relation to documents conceded by respondents (I B)

Bilaczenko v Bochner (FCA) - administrative law - abuse of process - application for review of Registrars' refusals to accept documents lodged for filing - application dismissed (I G)

Buckworth v Gladio Pty Ltd (NSWCA) - contract - corporations - contract for sale of shares carrying right to exclusively occupy company title home unit in building - purchaser entitled to rescind for breach of contract - appeal dismissed (I B C)

Averkiou v CIC Allianz Australia Insurance Ltd (NSWSC) - judicial review - motor accidents compensation - decision of medical panel quashed (I G)

Nelmeer Ashfield Pty Ltd v Farah (NSWSC) - contract - corporations - leases and tenancies - defendant not entitled to occupy premises pursuant to retail shop lease - appeal allowed (I B G)

Dias v Oakleigh Centre Industries (VSC) - judicial review - no inadequacy of reasons for medical panel's decision that plaintiff did not have no work capacity - proceedings dismissed (I G)

VWA v Probuild (VSC) - accident compensation - recovery proceedings - calculation of Factor X - defendants liable to indemnify plaintiff - apportionment (I G)

Summaries With Link (Five Minute Read)

Balaev v University of Adelaide [2016] FCA 278

Federal Court of Australia

Besanko J

Discovery - employment agreement - applicant alleged respondent's employees or agents made representations constituting misleading or deceptive conduct in relation to employment position resulting in loss and damage - applicant also alleged termination of employment breached *Fair Work Act 2009* (Cth) resulting in loss and damage, hurt and humiliation - applicant sought further discovery - rr20.14, 20.21 *Federal Court Rules 2011* (Cth) - relevance - fishing - held: orders made in relation to certain paragraphs of Annexure conceded by respondents - application otherwise dismissed.

[Balaev](#) (I B)

Bilaczenko v Bochner [2016] FCA 275

Federal Court of Australia

White J

Administrative law - unrepresented litigant - applicant sought judicial review of District Registrars' decisions not to accept documents he lodged for filing principally on basis proposed proceedings were abuse of process - ss3, 5 & 11(3)(a) *Administrative Decisions (Judicial Review) Act 1977* (Cth) - s17A(2) *Federal Circuit Court Act 2001* (Cth) - r13.10 *Federal Circuit Court Rules 2001* (Cth) - r2.26 *Federal Court Rules 2011* (Cth) - held: applicant seeking to relitigate issue determined against him in earlier proceedings - proceedings were abuse of process - no error in Registrars' decisions - application dismissed.

[Bilaczenko](#) (I G)

Buckworth v Gladio Pty Ltd [2016] NSWCA 54

Supreme Court of New South Wales

Beazley P, Bergin CJ in Eq & Emmett AJA

Contract - corporations - appellant vendor and first respondent purchaser entered contract for sale of shares - ownership of shares carried right to exclusively occupy company title home unit in building - second respondent owed building - purchaser rescinded on basis second respondent did not provide requisite approval - contract primary judge found in purchaser's favour against vendor for recovery of deposit - primary judge found requisite approval not given and that even if it was purchaser entitled to rescind for breach of contractual provision requiring that books which law required second respondent to keep were properly kept - held: second respondent had given approval of purchaser - purchaser not entitled to rescind under clause in relation to requisite approval - no error in finding there was breach contract concerning keeping of books which entitled purchaser to rescind or terminate - appeal dismissed.

[Buckworth](#) (I B C)

Averkiou v CIC Allianz Australia Insurance Ltd [2016] NSWSC 311

Supreme Court of New South Wales

Harrison AsJ

Motor accidents compensation - judicial review - plaintiff sought to quash certificate and medical assessment of review panel of State Insurance Regulatory Authority made pursuant to ss61 & 63 *Motor Accidents Compensation Act 1999* (NSW) - plaintiff also sought remittal of medical assessment to differently constituted panel - *Motor Accidents Compensation Act 1999* (NSW) - *State Insurance and Care Governance Act 2015* (NSW) - attribution of injuries caused by first motor vehicle accident to second accident - pre-existing injuries - held: panel asked itself wrong question wrongly applied clauses 1.33 and 1.34 of *Permanent Impairment Guidelines* - decision quashed.

[Averkiou](#) (I G)

Nelmeer Ashfield Pty Ltd v Farah [2016] NSWSC 279

Supreme Court of New South Wales

Adamson J

Contract - corporations - leases and tenancies - plaintiff purported to terminate defendant's right of occupation of premises - premises located on property owned by company which leased premises to plaintiff - plaintiff had contracted with defendant to give right to occupy premises - Civil and Administrative Tribunal found plaintiff entitled to occupy premises pursuant to retail shop lease - Appeal Panel dismissed plaintiff's appeal - plaintiff sought leave to appeal - ss3, 29, 32, 36, 38, 80, 82 & 83 *Civil and Administrative Tribunal Act 2013* (NSW) - s127(1) *Conveyancing Act 1919* (NSW) - s33 *Interpretation Act 1987* (NSW) - ss3, 7, 16, 63, 70, 71 *Retail Leases Act 1994* (NSW) - held: leave to appeal granted in relation to ground of summons contending Appeal Panel erred by failing to find s16 *Retail Leases Act* did not apply to agreement - due to inconsistency between Head Lease's terms and five-year retail shop lease s16 did not apply - defendant did not have benefit of five year shop lease - appeal allowed.

[Nelmeer](#) (I B G)

Dias v Oakleigh Centre Industries [2016] VSC 115

Supreme Court of Victoria

Cavanough J

Judicial review - worker's compensation - plaintiff sought to establish entitlement to continuation of weekly payments for injury suffered at work - plaintiff sought judicial review of medical panel's decision that plaintiff did not have no current work capacity - ss5, 93C *Accident Compensation Act 1985* (Vic) - ss274, 313 *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) - held: no inadequacy of reasons given by medical panel - proceedings dismissed.

[Dias](#) (I G)

VWA v Probuild [2016] VSC 102

Supreme Court of Victoria
Zammit J

Accident compensation - recovery proceedings - VWA sought to recover compensation payments made to worker for work injury subject of contribution proceeding - proportion of defendants' liability of defendants under Factor X of the formula in s138(3) *Accident Compensation Act 1985* (Vic) - held: Court assessed Factor X at 75% - Factor A agreed by consent - defendants liable to indemnify the VWA under s138(1) - Factor X was 50% as against one defendant (Probuild) and 25% against other defendant (Tubeway).

[VWA](#) (I G)

CRIMINAL

Executive Summary

Lucas Gentry (a Pseudonym) v The Queen (VSCA) - criminal law - sexual penetration of trial - "between dates" charge - alibi evidence was not "fresh evidence" - appeal dismissed

Higgins (a Pseudonym) v The Queen (VSCA) - criminal law - possession of thing (magazine) in connection with assistance in terrorist act - tendency evidence - no error in primary judge's treatment of evidence - application for leave to appeal dismissed

Summaries With Link

Lucas Gentry (a Pseudonym) v The Queen [2016] VSCA 54

Court of Appeal of Victoria

Maxwell P, Santamaria JA & Beale AJA

Criminal law - sexual penetration of a child - appellant charged with sexual offences against complainant and convicted of one charge - charge was a 'between dates' charge - appellant contended significance of certain date was not made clear to him until after sentence - appellant's wife was then able to gather evidence of alibi on that date - appellant appealed on basis of 'fresh evidence' - held: alibi evidence was not 'fresh evidence' - failure to adduce evidence at trial did not cause miscarriage of justice - presentation of the alibi evidence would not have resulted in acquittal - appeal dismissed.

[Lucas](#)

Higgins (a Pseudonym) v The Queen [2016] VSCA 47

Court of Appeal of Victoria

Redlich, Weinberg & Osborn JJA

Criminal law - tendency evidence - interlocutory appeal - applicant charged with possession of a

thing (magazine) in connection with assistance in terrorist act - applicant objected to proposed tendency evidence - Crown disavowed reliance on evidence as tendency evidence but contended items admissible as evidence of accused's continuing state of mind, motive and context - trial judge ruled items of evidence were admissible against him - s97 *Evidence Act 2008* (Vic) - s101.4 *Commonwealth Criminal Code 1995* - held: no error in primary judge's approach to evidence - evidence "not admissible only as tendency evidence" - application for leave to appeal refused.

[Higgins](#)



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from Don Juan: Canto 1, Stanzas 217-221
BY LORD BYRON (GEORGE GORDON)

217

Ambition was my idol, which was broken
Before the shrines of Sorrow and of Pleasure;
And the two last have left me many a token
O'er which reflection may be made at leisure:
Now, like Friar Bacon's brazen head, I've spoken,
'Time is, Time was, Time's past', a chymic treasure
Is glittering youth, which I have spent betimes—
My heart in passion, and my head on rhymes.

218

What is the end of Fame? 'tis but to fill
A certain portion of uncertain paper:
Some liken it to climbing up a hill,
Whose summit, like all hills', is lost in vapour;
For this men write, speak, preach, and heroes kill,
And bards burn what they call their 'midnight taper,'
To have, when the original is dust,
A name, a wretched picture, and worse bust.

219

What are the hopes of man? old Egypt's King
Cheops erected the first pyramid
And largest, thinking it was just the thing
To keep his memory whole, and mummy hid;
But somebody or other rummaging,
Burglariously broke his coffin's lid:
Let not a monument give you or me hopes,
Since not a pinch of dust remains of Cheops.

220

But I being fond of true philosophy,
Say very often to myself, 'Alas!
All things that have been born were born to die,
And flesh (which Death mows down to hay) is grass;
You've pass'd your youth not so unpleasantly,
And if you had it o'er again—'twould pass—
So thank your stars that matters are no worse,
And read your Bible, sir, and mind your purse.'



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221

But for the present, gentle reader! and
Still gentler purchaser! the bard—that's I—
Must, with permission, shake you by the hand,
And so your humble servant, and good bye!
We meet again, if we should understand
Each other; and if not, I shall not try
Your patience further than by this short sample—
'Twere well if others follow'd my example.

[LORD BYRON \(GEORGE GORDON\)](#)

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