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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)

**McGarrigle v National Disability Insurance Agency (FCA)** - human rights - National Disability Insurance Scheme - funding for transport - erroneous approach to s34(1) *National Disability Insurance Scheme Act 2013* (Cth) - appeal allowed - matter remitted (I G)

**Comptroller-General of Customs v Sulo MGB Australia Pty Ltd (FCA)** - taxation - correct classification of imported wheels for tariff purposes - erroneous construction of 'other vehicles, not mechanically propelled' - matter remitted to Tribunal for redetermination (B G)

**Beijing Hua Xin Liu He Investment (Australia) Pty Ltd v Lu (FCA)** - summary judgment - contract - respondents entitled to summary judgment on part of applicants' claim (I B C G)

**McGarry v Southern NSW Local Health District (NSWSC)** - pleadings - negligence - two notices of motion - permission granted to amend statement of claim - vacation of timetable for preparation of expert evidence refused (I)

**Twenty Ninth Macorp Nominees Pty Ltd v George & Anor (VSC)** - contract - agency - equity - proper character of transaction - defendants liable to repay plaintiff amount owing pursuant to loan - judgment of plaintiff (I B)

**Frontlink Pty Ltd v Commissioner of State Revenue (VSC)** - taxation - administrative law - Commissioner allowed an exemption for primary production in part in respect of land - Victorian

Civil and Appeals Tribunal disallowed the exemption - no error of law by Tribunal - appeal dismissed (B G)

**Sednaoui v Amac Corrosion Protection Pty Ltd (VSCA)** - accident compensation - refusal of leave to bring common law proceedings for serious injury - leave to appeal refused (I G)

## Summaries With Link (Five Minute Read)

### **McGarrigle v National Disability Insurance Agency [2017] FCA 308**

Federal Court of Australia

Mortimer J

Human rights - applicant with autism spectrum disorder and intellectual disability was participant in National Disability Insurance Scheme (NDIS) - applicant received funding from National Disability Insurance Agency to cover transport expenses for travel to work and to group program - Administrative Appeals Tribunal affirmed Agency's decision to provide partial funding under *National Disability Insurance Scheme Act 2013* (Cth) for applicant's transport costs - applicant sought increase in amount specified in NDIS plan for transport - 'reasonable and necessary supports' - Tribunal erred in approach to s34(1) - appeal allowed - matter remitted to Tribunal - amount of funding to which applicant entitled was matter for Tribunal.

[McGarrigle](#) (I G)

### **Comptroller-General of Customs v Sulo MGB Australia Pty Ltd [2017] FCA 315**

Federal Court of Australia

Moshinsky J

Taxation - respondent manufactured 'wheelie bins' - case concerned correct classification, for customs tariff purposes, of wheels which respondent imported - Administrative Appeals Tribunal found wheels should be classified to subheading 8716.90.00, Sch 3 *Customs Tariff Act 1995* (Cth) - Tribunal found wheelie bins fell within meaning of 'other vehicles, not mechanically propelled' and should be classified as 'parts thereof' - applicant challenged Tribunal's classification of the wheels - applicant contended Tribunal erred by not considering other possible classifications of the wheelie bins and also erred in construing 'other vehicles, not mechanically propelled' - whether failure to consider other headings - construction of heading 8716 - held: Tribunal erred in construing 'other vehicles, not mechanically propelled' - Tribunal required to consider 'not just text and explanatory materials' but 'other headings and subheadings in Sch 3 likely to apply to wheelie bins' - matter remitted to Tribunal for redetermination.

[Comptroller](#) (B G)

### **Beijing Hua Xin Liu He Investment (Australia) Pty Ltd v Lu [2017] FCA 319**

Federal Court of Australia

McKerracher J

Summary judgment - respondents sought summary judgment on contractual component of applicants' claim in which they sought relief in respect of oral agreement to transfer shares - applicants claimed they paid consideration for shares - respondents denied agreement existed and that any consideration paid - whether oral agreement entered - terms of agreement, if entered - whether breach of agreement - s31A(2) *Federal Court of Australia Act 1976* (Cth) - r26.01(a) *Federal Court Rules 2011* (Cth) - held: applicants had no reasonable prospects of success - respondents entitled to summary judgment.

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

## **McGarry v Southern NSW Local Health District [2017] NSWSC 305**

Supreme Court of New South Wales

Button J

Pleadings - negligence - two notices of motion - plaintiff sought to amend statement of claim - plaintiff sought interruption of timetable for preparation of expert evidence - s64 *Civil Procedure Act 2005* (NSW) - r31.36 *Uniform Civil Procedure Rules 2005* (NSW) - held: Court granted leave to amend statement of claim but refused vacation of timetable.

[McGarry](#) (I)

## **Twenty Ninth Macorp Nominees Pty Ltd v George & Anor [2017] VSC 136**

Supreme Court of Victoria

Almond J

Contract - agency - equity - plaintiff claimed it lent amount to first and second defendants to enable them to participate in venture, loan secured by mortgage which second defendant granted over defendants' home, that defendants failed to repay loan, and that defendants were jointly and severally liable for loan's repayment - proper characterisation of transaction - whether transaction was investment by plaintiff or loan made by plaintiff to either or both defendants - if transaction was a loan, whether second defendant also liable as borrower and mortgagor - held: transaction was loan by plaintiff to defendants - second defendant authorised first defendant to act on her behalf in entering loan agreement provision of security for loan - second defendant did not show insufficient understanding of transaction - defence in *Yerkey v Jones* not available to second defendant - judgment for plaintiff in terms sought.

[Twenty Ninth Macorp](#) (I B)

## **Frontlink Pty Ltd v Commissioner of State Revenue [2017] VSC 121**

Supreme Court of Victoria

Kennedy J

Taxation - administrative law - Commissioner allowed an exemption for primary production in part in respect of land - Victorian Civil and Appeals Tribunal disallowed the exemption - legality of Tribunal's approach - plaintiff's primary contentions were that Tribunal had no jurisdiction to vary Commissioner's determination given it was not dissatisfied with it, and that it did not bear onus to prove Commissioner's determination correct - ss65, 66 & 68 *Land Tax Act 2005* (Vic) - Part 10 *Taxation Administration Act 1997* (Vic) - held: grounds of appeal not made out - appeal

dismissed.

[Frontlink](#) (B G)

## **Sednaoui v Amac Corrosion Protection Pty Ltd [2017] VSCA 66**

Court of Appeal of Victoria

Priest & Beach JJA; Cameron AJA

Accident compensation - serious injury application - applicant sought to appeal against refusal of leave to bring common law proceedings for serious injury - primary judge found applicant failed to prove on balance of probabilities his injury 'occurred in compensable circumstances' - applicant contended primary judge erred in application of principles in *Ansett Australia Limited v Taylor* [2006] VSCA 171 - held: judge's approach and reasoning process 'entirely correct' - no error in primary judge's 'ultimate conclusion' - leave to appeal refused.

[Sednaoui](#) (I G)

## CRIMINAL

### Executive Summary

**JV v R** (NSWCCA) - criminal law - aggravated sexual intercourse without consent on child under sixteen - aggravated indecent assault on child under sixteen - no miscarriage of justice due to trial counsel's decision not to lead evidence of good character - appeal against conviction dismissed

**Franchina v The State of Western Australia** (WASCA) - criminal law - appellant sentenced to 4 years in prison for possession of cannabis with intent to sell or supply - appeal against sentence dismissed

### Summaries With Link

## **JV v R [2017] NSWCCA 49**

Court of Criminal Appeal of New South Wales

Leeming JA; Fagan & N Adams JJ

Criminal law - applicant convicted of aggravated sexual intercourse without consent on child under sixteen years contrary to s61J(1) *Crimes Act 1900* (NSW) and aggravated indecent assault on child under sixteen contrary to s61M(2) of the Act - applicant sought to appeal on sole ground that trial miscarried because counsel failed to lead evidence of his good character - held: trial counsel's decision not to adduce evidence of good character was rational one - no miscarriage of justice established - appeal dismissed.

[JV](#)

**Franchina v The State of Western Australia [2017] WASCA 56**

Court of Appeal of Western Australia

Buss P; Mazza & Mitchell JJA

Criminal law - appellant convicted of possession of cannabis with intent to sell or supply it contrary to s6(1)(a) *Misuse of Drugs Act 1981* (WA) - appellant sentenced to 4 years in prison - appellant contended sentence was manifestly excessive and challenged correctness of sentencing approach for cannabis offences in *Lester v The State of Western Australia* [2011] WASCA 128 - held: no grounds to doubt correctness of approach in *Lester* and cases following it - Court not satisfied sentence was manifestly excessive - sentence not unreasonable or plainly unjust - appeal dismissed.

[Franchina](#)



# Benchmark

## **The Seasons: Spring**

By [James Thomson](#)

As rising from the vegetable World  
My Theme ascends, with equal Wing ascend,  
My panting Muse; and hark, how loud the Woods  
Invite you forth in all your gayest Trim.  
Lend me your Song, ye Nightingales! oh pour  
The mazy-running Soul of Melody  
Into my varied Verse! while I deduce,  
From the first Note the hollow Cuckoo sings,  
The Symphony of Spring, and touch a Theme  
Unknown to Fame, *the Passion of the Groves.*

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