

Friday, 24 April 2020

Special COVID-19 Law A Weekly Bulletin listing Decisions of Superior Courts of Australia covering COVID-19

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Executive Summary (1 minute read)

Capic v Ford Motor Company of Australia Limited (Adjournment) (FCA) - adjournment - COVID-19 - respondent sought adjournment of proceedings - adjournment refused

Wallis v Rudek (NSWCA) - possession - COVID-19 - application for stay of orders pending appeal - order to provide vacant possession of unit - elderly appellants - self-isolation - conditional stay granted

Herbert v New South Wales Land and Housing Corporation (NSWCA) - residential tenancies - COVID-19 - application to vacate hearing date - notice of motion dismissed

Borg v R; Gray v R (NSWCCA) - criminal law - COVID-19 - drug offences - two applicants - sentence appeals - manifest excess - parity - appeals dismissed

Catalyst Provisional Lending Pty Ltd v Dick-Telfar (NSWSC) - real property - stay - residential tenancies - COVID-19 - *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) - defendants sought stay of writ of possession - stay refused

Seven Sisters Vineyard Pty Ltd v Konigs Pty Ltd (VSC) - application for vacation of trial date - COVID-19 - evidence - application granted

KC Australia LNG Pty Ltd v CH2M Hill Companies Ltd (WASCA) - adjournment - COVID-19 - respondents sought adjournment of appeal's hearing - adequacy of appeal's hearing by telephone or video-link - application dismissed

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Summaries With Link (Five Minute Read)

Capic v Ford Motor Company of Australia Limited (Adjournment) [2020] FCA 486

Federal Court of Australia

Perram J

Adjournment - COVID-19 - respondent sought adjournment on basis of COVID-19 - respondent raised issues concerning 'safe system of work', 'technological limitations', 'physical separation of legal teams', lay witnesses and cross-examination, 'document management, 'future issues' and 'trial length and expense' - .respondent submitted trial should not proceed on 15/6/20 but 'later in the year' - applicant contended technology was such that trial could 'realistically proceed' - risk of spread of virus - risk of contracting virus - whether to conduct trial over 'virtual platforms' - fairness - s37M *Federal Court of Australia Act 1976 (Cth)* - held: trial to proceed over virtual platforms - adjournment refused.

[Capic](#)

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Wallis v Rudek [2020] NSWCA 61

Court of Appeal of New South Wales

White J

Possession - COVID-19 - appellants sought stay of orders pending appeal - primary judge rejected application - 'real issue' concerned 'order 4', which required provision by appellants of vacant possession of unit - appellants aged 75 and 80 - appellants had 'health issues' - appellants concerned about COVID-19 pandemic's effect - advice 'to stay home and self-isolate' - risk of exposing appellants to infection - opposition to stay on basis of 'threat of continued conflict' at property - *Yeshiva Synagogue Inc v Karimbla Properties (No 10) Pty Ltd* [2017] NSWCA 331 - held: stay granted on conditions - appellants' counsel to bring in short minutes of order.

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Herbert v New South Wales Land and Housing Corporation [2020] NSWCA 74

Court of Appeal of New South Wales

Basten JA

Residential tenancies - application to vacate hearing date - COVID-19 - residential tenancies - respondent was applicant's landlord - respondent issued termination notice under s87 *Residential Tenancies Act 2010 (NSW)* 'for non-payment of rental' - Civil and Administrative Tribunal ordered termination of applicant's residential tenancy agreement - applicant appealed to Appeal Panel - appeal dismissed by Appeal Panel - applicant appealed against decision of Appeal Panel - Adamson J dismissed appeal - applicant sought leave to appeal from Adamson J's judgment - applicant sought that leave application's hearing be adjourned - applicant, by notice of motion, sought vacation of hearing date - applicant's 'primary complaint' concerned 'circumstances arising from' COVID-19 pandemic - other

issues concerned 'request for subpoena' and 'notice of appearance' - whether 'moratorium' inconsistent with 'pursuit of evictions' under Residential Tenancies Act - whether s109 Constitution applicable - insertion of 'new Pt 13' of Residential Tenancies Act by *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) - Pt 6A "Response to COVID-19 pandemic" in *Residential Tenancies Regulation 2019* (NSW) - "moratorium period" - whether applicant was "impacted tenant" - hardship - held: notice of motion dismissed.

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Borg v R; Gray v R [2020] NSWCCA 67

Court of Criminal Appeal of New South Wales

McCallum JA; Johnson & Adamson JJ

Criminal law - drug offences - sentence appeals - parity - applicants found guilty of offence contrary to s25(2) *Drug Misuse and Trafficking Act 1985* (NSW) - applicants sought to appeal against sentences - one applicant (Ms Borg) challenged sentence on ground of manifest excess - other applicant (Ms Gray) challenged sentence on grounds of manifest excess and parity - whether sentences manifestly excessive - whether 'unjustified disparity' - whether Court had authority, in absence of any error by sentencing judge, to re-sentence applicants 'on the basis of the likely impact on prisoners of the COVID-19 pandemic' - *Rakielbakhour v DPP [2020]* - amendments to *Crimes (Administration of Sentences) Act 1999* (NSW) empowering Commissioner of Corrective Services to order release of inmate 'belonging to certain classes of inmates on parole' - whether Court authorised 'to arrogate any such emergency power to itself' - whether Court should take COVID-19 submissions into account in relation to re-sentencing and/or question of manifest excess - whether Court could allow appeal against a sentence which was not manifestly excessive when it was made - held: appeals dismissed.

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Catalyst Provisional Lending Pty Ltd v Dick-Telfar [2020] NSWSC 324

Supreme Court of New South Wales

Harrison J

Real property - stay - residential tenancies - COVID-19 - defendants sought stay of writ of possession issued to plaintiffs - amendments to *Residential Tenancies Act 2010* (NSW) by *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) - s229 *Residential Tenancies Act 2010* (NSW) - "Regulation-making power" - whether basis to grant stay - held: stay refused.

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Seven Sisters Vineyard Pty Ltd v Konigs Pty Ltd [2020] VSC 161

Supreme Court of Victoria

John Dixon J



Application for vacation of trial date - COVID-19 - applicant sought to vacate trial date - vacation of trial date sought so that applicant could file and serve further 'expert accounting evidence' - applicant also contended it was impractical, due to 'community restrictions' arising from COVID-19 pandemic, for trial to proceed on date set - whether to vacate trial date and adjourn trial - 'overarching obligation' under *Civil Procedure Act 2010* (Vic) - held: application granted.

[Seven Sisters](#)

[From Benchmark Friday, 24 April 2020]

JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd [2020] WASCA 38

Court of Appeal of Western Australia

Buss P & Vaughan JA

Adjournment - COVID-19 - respondents, by interim application, sought adjournment of appeal's hearing 'to a date to be fixed' - respondents sought adjournment on basis of 'issues said to arise from' COVID 19 pandemic - interests of justice - adequacy of appeal's hearing by telephone or video-link - *Snook v Registrar of Fines Enforcement Registry* [2019] WASCA 204 - held: application dismissed.

[JKC Australia](#)

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“Alone”

By Edgar Allan Poe

From childhood's hour I have not been
As others were—I have not seen
As others saw—I could not bring
My passions from a common spring—
From the same source I have not taken
My sorrow—I could not awaken
My heart to joy at the same tone—
And all I lov'd—/ lov'd alone—
Then—in my childhood—in the dawn
Of a most stormy life—was drawn
From ev'ry depth of good and ill
The mystery which binds me still—
From the torrent, or the fountain—
From the red cliff of the mountain—
From the sun that 'round me roll'd
In its autumn tint of gold—
From the lightning in the sky
As it pass'd me flying by—
From the thunder, and the storm—
And the cloud that took the form
(When the rest of Heaven was blue)
Of a demon in my view—

[Edgar Allan Poe](#)

This Lime-tree Bower my Prison

By Samuel Taylor Coleridge

Well, they are gone, and here must I remain,
This lime-tree bower my prison! I have lost
Beauties and feelings, such as would have been
Most sweet to my remembrance even when age
Had dimm'd mine eyes to blindness! They, meanwhile,
Friends, whom I never more may meet again,
On springy heath, along the hill-top edge,
Wander in gladness, and wind down, perchance,
To that still roaring dell, of which I told;
The roaring dell, o'erwooded, narrow, deep,
And only speckled by the mid-day sun;



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Where its slim trunk the ash from rock to rock
Flings arching like a bridge;—that branchless ash,
Unsun'd and damp, whose few poor yellow leaves
Ne'er tremble in the gale, yet tremble still,
Fann'd by the water-fall! and there my friends
Behold the dark green file of long lank weeds,
That all at once (a most fantastic sight!)
Still nod and drip beneath the dripping edge
Of the blue clay-stone.

Now, my friends emerge
Beneath the wide wide Heaven—and view again
The many-steeped tract magnificent
Of hilly fields and meadows, and the sea,
With some fair bark, perhaps, whose sails light up
The slip of smooth clear blue betwixt two Isles
Of purple shadow! Yes! they wander on
In gladness all; but thou, methinks, most glad,
My gentle-hearted Charles! for thou hast pined
And hunger'd after Nature, many a year,
In the great City pent, winning thy way
With sad yet patient soul, through evil and pain
And strange calamity! Ah! slowly sink
Behind the western ridge, thou glorious Sun!
Shine in the slant beams of the sinking orb,
Ye purple heath-flowers! richlier burn, ye clouds!
Live in the yellow light, ye distant groves!
And kindle, thou blue Ocean! So my friend
Struck with deep joy may stand, as I have stood,
Silent with swimming sense; yea, gazing round
On the wide landscape, gaze till all doth seem
Less gross than bodily; and of such hues
As veil the Almighty Spirit, when yet he makes
Spirits perceive his presence.

A delight
Comes sudden on my heart, and I am glad
As I myself were there! Nor in this bower,
This little lime-tree bower, have I not mark'd
Much that has sooth'd me. Pale beneath the blaze
Hung the transparent foliage; and I watch'd
Some broad and sunny leaf, and lov'd to see



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The shadow of the leaf and stem above
Dappling its sunshine! And that walnut-tree
Was richly ting'd, and a deep radiance lay
Full on the ancient ivy, which usurps
Those fronting elms, and now, with blackest mass
Makes their dark branches gleam a lighter hue
Through the late twilight: and though now the bat
Wheels silent by, and not a swallow twitters,
Yet still the solitary humble-bee
Sings in the bean-flower! Henceforth I shall know
That Nature ne'er deserts the wise and pure;
No plot so narrow, be but Nature there,
No waste so vacant, but may well employ
Each faculty of sense, and keep the heart
Awake to Love and Beauty! and sometimes
'Tis well to be bereft of promis'd good,
That we may lift the soul, and contemplate
With lively joy the joys we cannot share.
My gentle-hearted Charles! when the last rook
Beat its straight path along the dusky air
Homewards, I blest it! deeming its black wing
(Now a dim speck, now vanishing in light)
Had cross'd the mighty Orb's dilated glory,
While thou stood'st gazing; or, when all was still,
Flew creaking o'er thy head, and had a charm
For thee, my gentle-hearted Charles, to whom
No sound is dissonant which tells of Life.

https://en.wikipedia.org/wiki/Samuel_Taylor_Coleridge

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