

# Benchmark

Friday, 7 August 2015

## Weekly Law Review

Selected from our Daily Bulletins covering Insurance, Banking,  
Construction & Government

 Follow @Benchmark\_Legal

## Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

## CIVIL (Insurance, Banking, Construction & Government) Executive Summary (1 minute read)

**Zurich Insurance PLC UK Branch v International Energy Group Ltd** (UKSC) - negligence - insurance - employee with mesothelioma - insurer's liability to indemnify employer - rule of proportionate recovery - appeal allowed (I B C)

**Flight Centre Ltd v Australian Competition and Consumer Commission** (FCAFC) - competition - impugned conduct did not occur in market where Flight Centre and airlines supplied services in competition - appeal allowed (I G)

**Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd** (FCAFC) - competition - ANZ and mortgage broker did not compete in market for supply of loan arrangement services - ACCC's appeal dismissed - ANZ's cross-appeal allowed (I B G)

**Alameddine v Glenworth Valley Horse Riding Pty Ltd** (NSWCA) - negligence - consumer law - fall from quad bike at respondents' recreational facility - respondents negligent and breached guarantee - compensation - damages (I B)

**Adisan Pty Ltd v Irwin** (NSWCA) - contract - loan agreement - consumer law - guarantee did not extend to cover amended loan facility - appeal dismissed (I B)

**Pioneer Studios Pty Ltd v Hills** (NSWCA) - workers compensation - employee injured at party at employer's premises - erroneous determination of course of employment - appeal allowed (I G)

# Benchmark

**Yesilhat v Calokerinos** (NSWSC) - wills and estates - succession - summary dismissal of family provision claim refused - security for costs refused - notice of motion dismissed (B)

**Clayton Utz (a firm) v Dale** (VSCA) - contract - partnership - *Protean Holdings* 'split' of trial - permission to rely on privilege against self-incrimination - appeal allowed to extent of variation of orders (I B)

**Bare v IBAC** (VSCA) - administrative law - refusal to investigate allegation of mistreatment by police - failure to give proper consideration to appellant's human rights - appeal allowed (I G)

**Cruise Oz Pty Ltd v AAI Ltd** (QSC) - insurance contract - motor dealers insurance policy - damage or loss caused to applicant's insured vehicles in flood at trade show - insurer required to indemnify applicant (I)

## Summaries With Link (Five Minute Read)

### **Zurich Insurance PLC UK Branch v International Energy Group Ltd [2015] UKSC 33**

Supreme Court of the United Kingdom

Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Reed, Lord Carnwath & Lord Hodge

Negligence - insurance - employee was negligently exposed to asbestos dust by employer - employee contracted mesothelioma - before his death from mesothelioma employee sued respondent as successor in title of employer and recovered compensation - during the 27 years of employee's exposure employer had two identifiable liability insurances one of which was with Midland Assurance Ltd - appellant (Zurich) was successor to Midland - appellant maintained it was only liable to meet 22.08% of respondent's loss and defence costs because Midland only insured employer for 6/27ths of 27 year period - trial judge ordered Zurich to meet 22.08% of compensation but 100% of defence costs - Court of Appeal ordered Zurich to pay 100% of both compensation and defence costs - Zurich appealed - appeal was from Guernsey where there was no equivalent of *Compensation Act 2006*, which had reversed ruling in *Barker v Corus* [2006] UKHL 20 that each employer was only liable pro rata to period which exposure by it bore to total of all periods of exposure - held: rule of proportionate recovery established in *Barker* remained part of common law in Guernsey - Zurich's appeal allowed in respect of compensation but dismissed in relation to defence costs - trial judge's order restored.

Zurich (I B C)

[From Benchmark Monday, 3 August 2015]

### **Flight Centre Ltd v Australian Competition and Consumer Commission [2015] FCAFC 104**

Full Court of the Federal Court of Australia

Allsop CJ, Davies & Wigley JJ

# Benchmark

Competition - Australian Competition and Consumer Commission commenced proceedings against Flight Centre alleging it contravened s45(2)(a)(ii) *Trade Practices Act 1974* (Cth) - ACCC alleged that Flight Centre attempted to induce other airlines to make contract, arrangement, or understanding containing provision which substantially lessened competition in a market - primary judge found Flight Centre engaged in alleged conduct and that conduct occurred in market in which Flight Centre and airlines competed, being the market for supply of distribution and booking services in relation to available international passenger air travel - Flight Centre ordered to pay pecuniary penalties totalling \$11 million - parties appealed and cross-appealed - whether primary judge correctly characterised supplies made by participants in market for international air passenger transportation - held: primary judge erred in finding Flight Centre and airlines competed in market for distribution and booking services - impugned conduct took place in market for supply of international passenger air travel - in this market Flight Centre acted as agent for, not in competition with, the airlines - appeal allowed - cross-appeal dismissed.

[Flight \(I G\)](#)

[From Benchmark Tuesday, 4 August 2015]

## **Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd [2015] FCAFC 103**

Full Court of the Federal Court

Allsop CJ, Davies & Wigney JJ

Competition - Australian Competition and Consumer Commission commenced proceedings against ANZ alleging it contravened ss45(2)(a)(ii) & 45(2)(b)(ii) *Trade Practices Act 1974* (Cth) - ACCC alleged ANZ entered agreement with mortgage broker which contained provision substantially lessening competition in market for supply of loan arrangement services to members of public by loan providers, franchisees and brokers - primary judge found that ANZ did not participate in any market in which brokers provided loan arrangement services to potential borrowers - ACCC appealed - ANZ cross-appealed against finding refunds paid by mortgage broker to borrowers that were subject of agreement with ANZ were "rebates" within the meaning of s45A - held: ACCC failed to demonstrate any error by primary judge - appeal dismissed - cross-appeal allowed.

[ACCC \(I B G\)](#)

[From Benchmark Wednesday, 5 August 2015]

## **Alameddine v Glenworth Valley Horse Riding Pty Ltd [2015] NSWCA 219**

Court of Appeal of New South Wales

Macfarlan & Simpson JJA; J C Campbell AJA

Negligence - consumer law - appellant injured when she fell off quad bike she was riding at respondents' recreational facility - appellant sued respondents for negligence and non-compliance with guarantees concerning supply of services under ss60 & 61 *Australian Consumer Law* - at time of injury appellant being led by instructor employed by respondents - primary judge found in favour of respondents - ss5B, 5F, 5K, 5L, 5M, 5N, 16 & 18(1)(a) *Civil Liability Act 2002* (NSW) - ss87M, 87ZA(1)(a), 139A, 139A(3), 139A(4) & 139A(5) *Competition*

# Benchmark

*and Consumer Act 2010 (Cth) - held: respondents negligent because instructor caused appellant to travel at excessive speed - injury not result of materialisation of obvious risk - activity not dangerous recreational activity - respondents warned appellant of risks of riding quad bike but risk that materialised was not inherent in or incidental to that activity - exclusion of liability clause did not form part of contract with appellant - in any event terms of exclusion clause did not extend to respondents' negligence - respondents failed to comply with guarantee under s60 they would perform services with due care and skill - entitlement to compensation under Competition and Consumer Act did not preclude award of damages for non-economic loss calculated under s16 Civil Liability Act - appeal allowed.*

## Alameddine (I B)

[From Benchmark Thursday, 30 July 2015]

## **Adisan Pty Ltd v Irwin [2015] NSWCA 217**

Court of Appeal of New South Wales

Beazley ACJ, Meagher & Gleeson JJA

Contract - guarantee and indemnity - loan agreement between appellant lender and borrower - loan agreement guaranteed by six co-guarantors including respondent - borrower failed to pay money on agreed date - terms of loan renegotiated - proposed amendments included provision of mortgage over property owned by company and guarantee from company - lender, borrower and company agreed that company's liability as guarantor limited to amount realised from sale of property - Deed of Variation executed by appellant, borrower, guarantors and company - agreement as to company's liability not disclosed in Deed or otherwise - borrower failed to pay money due - appellant required payment from guarantors - respondent contended he was discharged from liability as guarantor because of agreement to cap company's liability - primary judge found in favour of respondent - held: respondent not liable as guarantor for money not paid in accordance with original loan facility - guarantee provided for extension of its application to cover amended facility with guarantor's consent - respondent's execution of Deed not effective to extend guarantee to cover moneys due under loan contract as varied as lender, in obtaining respondent's consent by execution of Deed, did not disclose that 'proposed new loan contract' included agreement to cap company's liability - statement in Deed reasonably to be understood as representing that company agreed to guarantee whole obligations of borrower, which was a misleading representation - however respondent not likely to suffer damage from conduct as guarantee did not extend to cover amended facility - appeal dismissed.

## Adison (I B)

[From Benchmark Monday, 3 August 2015]

## **Pioneer Studios Pty Ltd v Hills [2015] NSWCA 222**

Court of Appeal of New South Wales

Workers compensation - respondent photographer attended party at employer's premises - respondent injured when she fell over a balustrade in stairwell - respondent made worker's compensation claim - Workers Compensation Commission rejected claim - deputy president allowed claim but Court set decision aside - different deputy president upheld claim - appellant appealed - s353(1) *Workplace Injury Management and Workers Compensation Act 1998 (NSW)*

# Benchmark

- whether erroneous approach to fact-finding - whether deputy president erred in reliance on subjective belief of respondent when determining course of employment - held (by majority): fact that respondent encouraged or induced to attend party not sufficient to render it part of her employment - deputy president took incorrect approach to legal standard or criterion to be applied to determination of course of employment - course of employment depended on objective characterisation of employer's requirements and expectations - appeal allowed.

Pioneer (I G)

[From Benchmark Wednesday, 5 August 2015]

### **Yesilhat v Calokerinos [2015] NSWSC 1028**

Supreme Court of New South Wales

White J

Summary dismissal - wills and estates - succession - security for costs - defendant sought summary dismissal of plaintiff's application for provision from deceased's estate pursuant to Pt 3.2 *Succession Act 2006* (NSW) - defendant contended it was not seriously arguable that plaintiff was an eligible applicant for a family provision order - defendant claimed no reasonable cause of action was disclosed and that proceedings were abuse of process and vexatious - defendant's submissions focused on requirement for existence of a *de facto* relationship that *de facto* partners lived together as a couple - held: arguable that present case was an exceptional case in which two people, who had not lived in common residence and had not made actual provision for mutual support, might be said to have been 'living together as couple on a genuine domestic basis' - summary judgment refused - security for costs refused - notice of motion dismissed.

Yesilhat (B)

[From Benchmark Friday, 31 July 2015]

### **Clayton Utz (a firm) v Dale [2015] VSCA 186**

Court of Appeal of Victoria

Ashley, Tate & Ferguson JJA

Contract - evidence - partnership - respondent sued firm for wrongful repudiation of partnership agreement - board of firm expelled respondent from partnership - interlocutory orders permitted respondent to 'split' his case based on rule in *Protean (Holdings) Ltd v American Home Assurance Co* [1985] VicRp 18 and to rely upon privileges against self-incrimination and exposure to penalty - firm sought leave to appeal against orders - held (by majority): appeal allowed only to extent of variation of orders - trial judge correct to order a Protean Holdings 'split' of trial but not wholly on basis of reasons given - trial judge correct to conclude privilege against self-incrimination available and respondent could rely upon it until and unless he decided to give evidence to conduct positive case in rebuttal of allegations.

Clayton (I B)

[From Benchmark Thursday, 30 July 2015]

### **Bare v IBAC [2015] VSCA 197**

Court of Appeal of Victoria

# Benchmark

Warren CJ, Tate & Santamaria JJA

Administrative law - human rights - employee of Office of Police Integrity (OPI) rejected appellant's application to investigate allegation of mistreatment by members of Victorian Police under s40(4)(b)(i)[2] *Police Integrity Act 2008* (Vic) (PIA) - another employee made second decision not to investigate - primary judge dismissed application for judicial review - appellant's rights under *Charter of Human Rights and Responsibilities* (Charter) - whether implied procedural right under s10(b) Charter to 'effective' investigation of claim of breach of human rights stated in section - held (by majority): delegate failed to give proper consideration to appellant's human rights - s109 PIA did not preclude judicial review - appeal allowed.

Bare (I G)

[From Benchmark Thursday, 30 July 2015]

## **Cruise Oz Pty Ltd v AAI Ltd [2015] QSC 215**

Supreme Court of Queensland

Carmody J

Insurance contract - motor dealers insurance policy - applicant sought declaration that on proper construction, insurance agreement executed by parties extended to cover flood damage sustained by caravans displayed at trade show - whether open for applicant to claim insurance under agreement - proper construction of "your premises" in definition of "your vehicle" in Section 3 of agreement - held: applicant successfully established Section 3 responded to its insurance claim - Section 3 was subject to perils exclusion clause which would substantially preclude recovery in respect of several insured vehicles - the Two Section Exclusion Clause prescribed Section 3 would respond to claim - respondent must indemnify applicant in respect of damage or loss caused to the applicant's insured vehicles on under Section 3 - declaration.

Cruise (I)

[From Benchmark Friday, 31 July 2015]

## CRIMINAL

### Executive Summary

**Smith v The Queen** (HCA) - criminal law - no denial of procedural fairness by trial judge's failure to inform counsel of jury's interim votes and interim voting patterns - appeal dismissed

**Police v Dunstall** (HCA) - criminal law - evidence - 'general unfairness discretion' - admission of evidence of breath analysis reading would not render trial unfair - appeal allowed

**Lin v R** (NSWCCA) - criminal law - Director of Public Prosecution not obliged to particularise indictable offence - application to stay or quash indictment dismissed

**Miller v R** (NSWCCA) - criminal law - offence of break, enter and steal - full extent of personal

# Benchmark

history and circumstances not taken into account - error in sentencing process - applicant resentenced

## Summaries With Link

### **Smith v The Queen [2015] HCA 27**

High Court of Australia

French CJ; Kiefel, Bell, Gageler & Gordon JJ

Criminal law - procedural fairness - appellant charged with one count of rape - appellant tried in District Court of Queensland - after jury retired to consider verdict, trial judge received note from jury which disclosed interim votes and voting pattern for each disclosed interim vote - trial judge told counsel note indicated jury not in total agreement but did not disclose interim votes or interim voting patterns - whether failure of trial judge to inform counsel of interim votes and interim voting patterns constituted denial of procedural fairness - held: there was no denial of procedural fairness - interim votes and interim voting patterns of jury were not relevant to future conduct of trial - relevant matters were jury speaker's answers to trial judge's direct questions about whether allowing majority verdict might resolve situation, and whether jury wanted more time to consider verdict - appeal dismissed.

[Smith](#)

### **Police v Dunstall [2015] HCA 26**

High Court of Australia

French CJ; Kiefel, Bell, Gageler, Keane & Nettle JJ

Criminal law - evidence - drink-driving - breath analysis reading - Full Court of Supreme Court of South Australia upheld primary judge's affirmation of Magistrate's decision to dismiss charge that respondent drove motor vehicle with prescribed concentration of alcohol present his blood in contravention of s47B(1)(a) *Road Traffic Act 1961* (SA) - appeal concerned statutory presumption that concentration of alcohol indicated as being present in blood by a breath analysing instrument was the concentration of alcohol in the driver's blood at the time of breath analysis and throughout the preceding two hours - presumption only able to be rebutted if defendant arranged for sample of blood to be taken by medical practitioner in accordance with prescribed procedures and adduced evidence that analysis of blood demonstrated breath analysing instrument gave exaggerated reading - whether, in a case in which medical practitioner failed to take blood sample in accordance with prescribed procedures, Court had discretion to exclude evidence engaging presumption on basis its admission would render trial unfair - 'general unfairness discretion' - held: respondent did not have "statutory right" to have sample of blood taken and dealt with in accordance with prescribed procedures - onus on respondent to bring himself or herself within confines - Kourakis J, in dissenting judgment in the Full Court of Supreme Court of South Australia, was correct to conclude admission of evidence of breath analysis reading did not make trial unfair - appeal allowed.

[Police](#)

# Benchmark

## Lin v R [2015] NSWCCA 204

Court of Criminal Appeal of New South Wales

Simpson, R A Hulme & Bellew JJ

Criminal law - Director of Public Prosecutions charged applicant with five counts of offences against s400.9 *Criminal Code* (Cth) - applicant sought that indictment presented against him be "stayed or quashed" on basis Director refused to provide certain particulars sought on behalf of applicant - applicant contended that without the provision of proper particulars, indictment was defective and trial would be unable to proceed - Director contended that by reason of s400.9(2) he was not obliged to particularise an indictable offence - applicant sought leave to appeal against interlocutory decision dismissing motion - held: it was inappropriate to require Director to identify a "predicate" indictable offence subject of the charge - any one or more of the circumstances specified in sub-s(2) sufficient to prove element of a s400.9 offence required by sub-s(1)(b) - appeal dismissed.

[Lin](#)

## Miller v R [2015] NSWCCA 86

Court of Criminal Appeal of New South Wales

Meagher JA; Simpson & Schmidt JJ

Criminal law - applicant sought leave to appeal sentences imposed after pleading guilty to two offences of break, enter and steal under s112 *Crimes Act 1900* (NSW), for which he received discount of 25% on sentencing - applicant contended primary judge erred in giving primary or determinative significance to applicable standard non-parole periods, in failing to have proper regard to applicant's deprived background, in failing to take into account fact that applicant was serving his sentence in protective custody, and that sentence imposed was otherwise manifestly excessive - held: full extent of applicant's personal history and circumstances not taken into account - error demonstrated in sentencing process - appeal upheld - sentences set aside - appellant resentenced.

[Miller](#)

# Benchmark

## Snow flakes. (45)

BY EMILY DICKINSON

I counted till they danced so  
Their slippers leaped the town –  
And then I took a pencil  
To note the rebels down –  
And then they grew so jolly  
I did resign the prig –  
And ten of my once stately toes  
Are marshalled for a jig!

[Emily Dickinson](#)

[Click Here to access our Benchmark Search Engine](#)