

Friday 10 October 2014

## Weekly Civil Law Review

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

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### Executive Summary (1 minute read)

**Tajjour v New South Wales** (HCA) - Constitutional law - NSW consorting laws do not breach constitutional guarantee of freedom of communication on government and political matters (I B C G)

**Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288** (HCA) - builder contracted with property developer - builder did not owe duty of care to Owners Corporation who succeeded developer in title (I B C G)

**Jackson Lalic Lawyers Pty Ltd v Attwells** (NSWCA) - negligence - erroneous refusal to answer separate question - solicitors' advice protected by advocates' immunity - appeal allowed (I B)

**Rankin v Gosford City Council** (NSWSC) - negligence - motorcyclist injured in collision with traffic barriers moved by unknown malefactors - Council not liable (I C)

**Moama Bowling Club Ltd v The Thomson Group Pty Ltd** (VSCA) - negligence - fire at bowling club not caused by shattering globe - electrical contractor not liable (I C)

**Liberty International Underwriters v The Salisbury Group Pty Ltd (in liq)** (QSC) - professional indemnity insurance - beneficiary of discretionary trust sued by trustee for negligent financial advice - trustee sued in its own right as trustee, not on behalf of beneficiaries - exclusions did not apply (I B)

**Hamcor Pty Ltd v Queensland (QSC)** - negligence - chemical factory fire - contamination of land by water applied by fire brigade mixed with chemicals - claims against fire brigade and insurance brokers failed (I B C)

## Summaries with links (5 minute read)

### Tajjour v New South Wales [2014] HCA 35

High Court of Australia

French CJ, Hayne, Crennan, Kiefel, Bell, Gageler & Keane JJ

Constitutional law - s93X *Crimes Act 1900* (NSW) - offence to habitually consort with convicted offenders - three persons convicted under s93X appealed - claimed s93X infringed constitutional freedom of communication on governmental and political matters - held (by Hayne, Crennan, Kiefel, Bell, Gageler & Keane JJ, French CJ dissenting): s93X was valid - held (by the whole Court): two-stage test from *Lange v ABC* (1997) 189 CLR 520 applied - does the law curtail political communication? - is the law reasonably adapted to serve a legitimate purpose? - held (by French CJ, Hayne, Crennan, Kiefel, Bell & Gageler J): s93X curtails political communication to some degree - slightness of degree irrelevant - held (by Hayne, Crennan, Kiefel & Bell JJ) s93X was reasonably appropriate and adapted to serve a legitimate purpose of preventing crime - s93X did not impose an undue burden on political communication - held (by French CJ and Gageler J): s93X was not reasonably appropriate and adapted to serve any legitimate purpose - held (by Gageler J): s93X should be read down so that, on its proper construction, it did not apply to consorting for the purpose of political communication - s31 *Interpretation Act 1987* (NSW) - this did not assist the appellants - held (by French CJ): s93X could not be read down and was therefore invalid - held (by Keane J): s93X did not burden political communication at all - held (by Hayne, Gageler & Keane JJ): there is no independent right of association in the Australian Constitution - held (by French CJ, Hayne, Gageler & Keane JJ): the *International Covenant on Civil and Political Rights* does not constrain the power of State legislatures to enact legislation contrary to the Covenant - appeals dismissed.

Tajjour (I B C G)

[From Benchmark 9 October 2014]

### Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36

High Court of Australia

French CJ, Hayne, Crennan, Kiefel, Bell, Gageler & Keane JJ

Negligence - builder contracted with property developer to build strata units - common property vested in Owners Corporation on registration of strata plan - latent defects in common property - Owners Corporation allegedly suffered economic loss - Owners Corporation sued builder in negligence - Owners Corporation failed before single judge of NSW Supreme Court, but

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succeeded in Court of Appeal - held: when strata plan registered, Owners Corporation came into existence and held common property as agent for developer and was effectively controlled by the developer - builder's responsibilities to developer were defined in detail by design and development contract - Owners Corporation and purchasers of lots were not vulnerable to builder in the required sense - builder owed no duty of care to the developer - builder owed no duty of care to the Owners Corporation - appeal allowed.

Brookfield Multiplex Ltd (I B C G)

[From Benchmark 9 October 2014]

## **Jackson Lalic Lawyers Pty Ltd v Attwells [2014] NSWCA 335**

Court of Appeal of New South Wales

Bathurst CJ; Meagher & Ward JJA

Negligence - solicitors' duties - advocates' immunity - separate question - respondents claimed law firm gave negligent advice when representing them in guarantee proceedings - advice led to settlement of proceedings by consent - law firm appealed against primary judge's decision to decline to answer separate question whether advocates' immunity from suit was complete answer to negligence claim - held: primary judge erred in declining to answer separate question - reasons given for refusal to answer question were irrelevant - in circumstances where alleged breach was clearly defined and agreed upon it was appropriate to answer separate question - advice fell within scope of advocates' immunity as it led to guarantee proceedings being settled and was therefore intimately connected with those proceedings - negligence proceedings would involve re-agitation of issues in guarantee proceedings and would offend principle of finality - appeal allowed - judgment for law firm in negligence proceedings.

Jackson Lalic Lawyers Pty Ltd (I B)

[From Benchmark 3 October 2014]

## **Rankin v Gosford City Council [2014] NSWSC 1354**

Supreme Court of New South Wales

Button J

Negligence - unknown malefactors moved traffic barriers hired by Council for use in road works - plaintiff injured when he collided with barriers while riding motorbike along road - ss5B, 5C, 5D, 5E & 45 Civil Liability Act 2002 (NSW) - s7(4) Roads Act 1993 (NSW) - s45E Transport Administration Act 1988 (NSW) - held: Council not protected by statutory immunity contained in s45 Civil Liability Act 2002 (NSW) - Council did not owe duty of care to forestall crimes of others that harmed plaintiff - judgment for Council.

Rankin (I C)

[From Benchmark 7 October 2014]

# Benchmark

## Moama Bowling Club Ltd v The Thomson Group Pty Ltd [2014] VSCA 245

Court of Appeal of Victoria

Nettle, Tate & Beach JJA

Negligence - appellant's bowling club extensively damaged by fire - proprietor claimed fire caused by floodlight containing halogen lamp installed by electrical contractor and claimed damages in negligence from contractor - causation - Pt X, ss51 & 52 *Wrongs Act 1958* (Vic) - primary judge not satisfied fire initiated by globe in floodlight shattering - primary judge also held that, even if it were necessary to make finding whether contractor was negligent in selection, supply and fitting of floodlight, contractor was not negligent - primary judge dismissed proprietor's action - appellant contended primary judge erred by paying no or insufficient regard to various aspects of evidence - held: all grounds of appeal rejected - no error in decision of primary judge - appeal dismissed.

Moama Bowling Club Ltd (I C)

[From Benchmark 8 October 2014]

## Liberty International Underwriters v The Salisbury Group Pty Ltd (in liq) [2014] QSC 240

Supreme Court of Queensland

Flanagan J

Insurance - equity - trusts and trustees - investment advice company held professional indemnity insurance policy - authorised representative of investment advice company also insured - investment advice company, through the authorised representative, gave financial advice to trustee of authorised representative's family trust - authorised representative and family were discretionary beneficiaries under trust - authorised representative's spouse and children were trustee's directors and shareholders - trustee sued investment advice company and authorised representative for negligent financial advice and misleading and deceptive conduct - investment advice company and authorised representative sought indemnity under policy - policy excluded cover for a claim made on behalf of one insured against another, or one insured's spouse or child against another insured - policy also excluded cover for claim made on behalf of any entity in which an insured had a financial interest - insurer declined indemnity - held: trustee had brought proceedings in its own right as trustee of trust, not on behalf of related entities or family member of insured against another insured - trustee did not have a *financial interest* in trust.

Liberty International Underwriters (I B)

[From Benchmark 9 October 2014]

## Hamcor Pty Ltd v Queensland [2014] QSC 224

Supreme Court of Queensland

Dalton J

Negligence - fire in plaintiffs' chemical factory - water used by fire brigade to douse fire became mixed with chemicals and soaked onto plaintiffs' land contaminating it - cost of remediation accepted to be more than \$9 million which was many times more than value of land - plaintiffs sued State in negligence for acts and omissions of fire brigade - plaintiffs' property insurers had

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paid plaintiffs full amount for which they were insured but refused to pay on policy in name of company which ran business of factory - plaintiffs sued insurance brokers who had arranged liability insurance for company for pure economic loss - held: State owed duty to plaintiffs to take reasonable care not to damage property when acting to combat fire and hazardous materials emergency on plaintiffs' land - fire brigade breached its duty to plaintiffs in applying large amounts of water to certain areas of the land - application of water fell within s129(1) *Fire and Rescue Service Act 1990* (Qld) Act with consequence fire brigade had immunity - brokers owed no duty of care to plaintiffs - plaintiffs' alternative claims against brokers under s912A(1)(a) *Corporations Act 2001* (Cth) and s12ED(1)(a) *Australian Securities and Investments Commission Act 2001* (Cth) also failed - judgment for defendants.

[Hamcor Pty Ltd \(I B C\)](#)

[From Benchmark 3 October 2014]

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**From "The Princess"**

By Lord Alfred Tennyson

Come down, O maid, from yonder mountain height:  
What pleasure lives in height (the shepherd sang),  
In height and cold, the splendour of the hills?  
But cease to move so near the Heavens, and cease  
To glide a sunbeam by the blasted Pine,  
To sit a star upon the sparkling spire;  
And come, for Love is of the valley, come,  
For Love is of the valley, come thou down  
And find him; by the happy threshold, he,  
Or hand in hand with Plenty in the maize,  
Or red with spirited purple of the vats,  
Or foxlike in the vine; nor cares to walk  
With Death and Morning on the silver horns,  
Nor wilt thou snare him in the white ravine,  
Nor find him dropt upon the firths of ice,  
That huddling slant in furrow-cloven falls  
To roll the torrent out of dusky doors:  
But follow; let the torrent dance thee down  
To find him in the valley; let the wild  
Lean-headed Eagles yelp alone, and leave  
The monstrous ledges there to slope, and spill  
Their thousand wreaths of dangling water-smoke  
That like a broken purpose waste in air:  
So waste not thou; but come; for all the vales  
Await thee; azure pillars of the hearth  
Arise to thee; the children call, and I  
Thy shepherd pipe, and sweet is every sound,  
Sweeter thy voice, but every sound is sweet;  
Myriads of rivulets hurrying thro' the lawn,  
The moan of doves is immemorial elms,  
And murmuring of innumerable bees.

[Lord Alfred Tennyson](#)

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