

Friday, 14 August 2015

Weekly Law Review

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

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

AusNet Transmission Group Pty Ltd v Federal Commissioner of Taxation (HCA) - taxation - income tax - payments were of a capital nature and therefore not tax deductible under s8-1 *Income Tax Assessment Act 1997* (Cth) - appeal dismissed (I B C)

Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (FCA) - representative proceedings - application for order approving litigation funding agreements refused - application dismissed (I B)

Donaghy v Council of the Law Society of NSW (NSWCA) - bias - association with barrister not "substantial personal relationship" or significant professional relationship and had no connection with matters to be determined - recusal application refused (I)

Donaghy v Council of the Law Society of NSW (No 2) (NSWCA) - Council's reprimand for legal practitioner's conduct was appropriate - Tribunal's orders setting Council's decision aside could not stand - appeal allowed (I G)

Woodlawn Capital Pty Ltd v Motor Vehicles Insurance Ltd (NSWCA) - stay - investment management agreement - conditional stay of execution of judgment granted (I B)

State of New South Wales v McMaster; State of New South Wales v Karakizos; State of New South Wales v McMaster (NSWCA) - trespass to the person - battery - shooting of Justin McMaster by police officer - State's appeals allowed (I)

Aircraft Support Industries Pty Ltd v William Hare UAE LLC (NSWCA) - international commercial arbitration - partial enforcement of arbitral award - appeal dismissed (I B)

Re Estate of Wai Fun CHAN, Deceased (NSWSC) - Wills and estates - formal Will and video Will admitted to probate (B)

Ezstay Systems Pty Ltd v Link 2 Pty Ltd (NSWSC) - deed - confidential information defendants set up business in competition with plaintiffs - breach of directors' duties - judgment for plaintiffs (I B)

Coles v Dormer (QSC) - copyright infringement - conversion - reproduction of house plans and construction of house - remedies - injunction (I B C)

Dean v Collins [No 2] (WASCA) - succession - family provision - erroneous dismissal of claim - appeal allowed (B)

Summaries With Link (Five Minute Read)

AusNet Transmission Group Pty Ltd v Federal Commissioner of Taxation [2015] HCA 25

High Court of Australia

French CJ; Kiefel, Bell, Gageler & Nettle JJ

Taxation - income tax - State of Victoria embarked on privatisation of publicly owned electricity supply industry in 1993 - in 1997 State-owned electricity transmission company incorporated under *Electricity Industry Act 1993* (Vic) sold its assets to appellant including transmission licence held by company under Act - whether payments by appellant of statutory charges imposed on company as holder of licence transferred to appellant and thereafter payable by appellant were payments of capital or of a capital nature within of s 8-1(2)(a) *Income Tax Assessment Act 1997* (Cth) - held (by majority): primary judge and majority in Full Court of the Federal Court were correct to conclude charges paid by appellant were capital in nature and were therefore not tax deductible under s8-1 - appeal dismissed.

[AusNet](#) (I B C)

[From Benchmark Thursday, 6 August 2015]

Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) [2015] FCA 811

Federal Court of Australia

Wigney J

Representative proceedings - applicants commenced representative under Pt IVA *Federal Court of Australia Act 1976* (Cth) - applicants claimed respondents were liable to compensate them and group members for loss or damage suffered as result of alleged of provisions of *Corporations Act 2001* (Cth), *Australian Securities and Investments Commission Act 2001* (Cth)

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and *Fair Trading Act 1987* (NSW) - proceeding was at early stage - applicants sought order approving amounts payable to litigation funder and declaring applicants were entitled to pay those amounts out of any amounts recovered from respondents - applicants claimed proposed order appropriate to ensure justice - respondents contended order unprecedented, unconventional, beyond power and unjust - held: proposed order should not be made - proposed order neither appropriate nor necessary to ensure justice - premature and inconsistent with statutory scheme in Pt IVA to make proposed order at present stage when reasonableness of amounts could not be assessed - Court could not conclude proposed order would be beneficial to or in best interests of group members as whole - application dismissed.

[Blairgowrie](#) (I B)

[From Benchmark Wednesday, 12 August 2015]

Donaghy v Council of the Law Society of NSW [2015] NSWCA 223

Court of Appeal of New South Wales

Basten JA

Bias - appellant solicitor was subject of steps taken under *Legal Profession Act 2004* (NSW) by respondent Council of the Law Society of NSW in response to complaints of unsatisfactory professional conduct - respondent sought that Basten JA recuse himself on basis of "long association" with barrister who made complaints - application also contended steps taken at appeal were "extraordinary" - test for apprehended bias - particular circumstances involved in the association - held: nothing untoward in procedural steps - circumstances relied on by appellant fell well short of demonstrating any "substantial personal relationship" or significant professional relationship - no reasons circumstances should have been disclosed at any stage - limited association did not have any objective connection with matters to be determined on appeal - recusal application refused.

[Donaghy](#) (I)

[From Benchmark Thursday, 6 August 2015]

Donaghy v Council of the Law Society of NSW (No 2) [2015] NSWCA 224

Court of Appeal of New South Wales

Basten & Gleeson JJA; Sackville AJA

Legal practitioners - solicitors' costs - appellant solicitor subject of complaint by barrister in relation to non-payment of fees - Professional Conduct Committee resolved, on Council of the Law Society's behalf, to deal with conduct by reprimand for conduct reasonably likely to be found to be unsatisfactory professional conduct - appellant sought review of decision in Tribunal - practitioner appealed from Civil and Administrative Tribunal's decision to set aside Council's decision on basis it should consider instituting formal disciplinary proceedings - appellant sought to set aside Tribunal's decision on judicial review grounds including procedural unfairness - Council conceded Tribunal's orders should not stand - s540 *Legal Practitioners Act 2004* (NSW) - held: reprimand was appropriate course for Council to take given need for firm professional disapprobation of conduct - Tribunal's decision set aside but challenge to Council's decision dismissed - appeal allowed.

[Donaghy](#) (I G)

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[From Benchmark Friday, 7 August 2015]

Woodlawn Capital Pty Ltd v Motor Vehicles Insurance Ltd [2015] NSWCA 227

Court of Appeal of New South Wales

Beazley P

Stay - applicant funds manager appealed against judgment entered for in sum of \$4,893,115.11 - sum principally represented pre-judgment interest payable pursuant to *Civil Procedure Act 2005* (NSW) in respect of sums found to be owed to defendant client - applicant sought stay of execution - principal issue on appeal was proper construction of clause of Investment Management Agreement - question was whether clause released applicant from liability for payment of pre-judgment interest - fair balance of rights of parties - held: stay should be ordered on basis of possibility that applicant may be forced into liquidation should it not pay judgment sum, or at least amount claimed in statutory demand - stay subject to conditions granted.

[Woodlawn](#) (I B)

[From Benchmark Monday, 10 August 2015]

State of New South Wales v McMaster; State of New South Wales v Karakizos; State of New South Wales v McMaster [2015] NSWCA 228

Court of Appeal of New South Wales

Beazley P, McColl & Meagher JJA

Trespass to the person - battery - three civil suits against NSW in relation to shooting of Justin McMaster (Justin) by police officer responding to violent home invasion occurring at premises at which Justin was living - Justin brought claims in negligence and trespass to the person - trial judge found State liable in battery - mother and sister of Justin, who were present at scene of shooting, successfully sued NSW under s4 *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) for damages - NSW appealed - held: trial judge erred in factual findings - trial judge erred in finding there 'no direct threat by Justin McMaster towards either Constable Fanning or Constable Kleinman at the time he was shot by Constable Fanning' - police officer's liability precluded by statutory defence of self-defence pursuant to s52 *Civil Liability Act 2002* (NSW) or common law defence of self-defence - defence of necessity also made out - trial judge erred in awarding aggravated and exemplary damages - trial judge erred in awards of general damages - appeal allowed in each matter.

[State of New South Wales](#) (I)

[From Benchmark Wednesday, 12 August 2015]

Aircraft Support Industries Pty Ltd v William Hare UAE LLC [2015] NSWCA 229

Court of Appeal of New South Wales

Bathurst CJ, Beazley P & Sackville AJA

International commercial arbitration - primary judge enforced in part an arbitral award made against appellant in favour of respondent - respondent was company incorporated under laws of Abu Dhabi in the United Arab Emirates - appellant appealed - s8 *International Arbitration Act 1974* (Cth) - held: no denial of natural justice in making award as no attempt made to demonstrate practical unfairness or injustice and no failure to by arbitrators to give adequate

reasons - Court had power to partially enforce award - appeal dismissed.

[Aircraft](#) (I B)

[From Benchmark Wednesday, 12 August 2015]

Re Estate of Wai Fun CHAN, Deceased [2015] NSWSC 1107

Supreme Court of New South Wales

Lindsay J

Wills and estates - probate - application for orders admitting digital video disc (DVD) recording of oral statement of testamentary intentions deliberately recorded as 'video will' to probate - DVD served as codicil to formal Will - ss6 & 8 *Succession Act 2006* (NSW) - held: Court satisfied testatrix's formal will satisfied requirements of s6 and that DVD satisfied requirements of s8 for admission to probate as a codicil to Will - Court satisfied declaration should be made under s10(3)(c) insofar as s10 applied to video Will - testatrix knew and approved of dispositions she made in recording DVD - dispositions plainly given or made freely and voluntarily - Court satisfied any suspicious circumstances adequately and properly explained - both formal Will and video Will should be admitted to probate.

[Chan](#) (B)

[From Benchmark Tuesday, 11 August 2015]

Ezystay Systems Pty Ltd v Link 2 Pty Ltd [2015] NSWSC 1105

Supreme Court of New South Wales

Bergin CJ in Eq

Deed - confidential information - directors' duties - plaintiffs were group of companies which operated student accommodation business in Ultimo - defendants started a rival student accommodation business also in Ultimo - no issue defendants entitled to compete with plaintiffs - plaintiffs claimed that while first defendant's director was director of plaintiffs he improperly used plaintiffs' documents and information to set up competing business - plaintiffs claimed defendants refused to deliver up plaintiffs' documents, confidential information and material in breach of covenant in deed terminating the parties' relationship - plaintiffs claimed defendants had copied and used plaintiffs' confidential information in defendants' business construction of deed - confidentiality of plaintiffs' documents - whether director breached statutory and fiduciary duties - held: plaintiffs succeeded in claims in respect of Business Manual, Systems Manual, Elevator Take, Software Manual and Software - plaintiffs' claim in respect of Trade Dress failed - parties given opportunity to reach agreement on the form of final orders,

[Ezystay](#) (I B)

[From Benchmark Wednesday, 12 August 2015]

Coles v Dormer [2015] QSC 224

Supreme Court of Queensland

Henry J

Copyright infringement - conversion - remedies - plaintiff alleged defendants converted house plans in which he held copyright by assignment from building designer to their own use and infringed copyright by reproducing or substantially reproducing plans and constructing house

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substantially based on those plans - ss14, 21, 31, 32, 35, 36, 78, 115, 116 & 196 *Copyright Act 1968* (Cth) - whether building designer was owner of copyright - effectiveness of purported assignment - whether infringement of copyright or conversion - held: infringement of copyright and conversion established - plaintiff entitled to injunction though not in form contemplated when proceedings began - judgment for plaintiff.

[Coles](#) (I B C)

[From Benchmark Thursday, 6 August 2015]

Dean v Collins [No 2] [2015] WASCA 151

Court of Appeal of Western Australia

Martin CJ, Buss JA & Cheney J

Succession - family provision - Master dismissed appellant's application under s6(1) *Family Provision Act 1972* (WA) for financial provision from estate of late mother - Master found appellant failed to establish adequate provision not made for appellant's proper maintenance, support, education or advancement in life - held: Master erred in determining jurisdictional question on basis of failure to demonstrate greater need than beneficiaries under Will - appeal allowed - costs orders set aside.

[Dean](#) (B)

[From Benchmark Friday, 7 August 2015]

CRIMINAL

Executive Summary

R v Pennington (SASCFC) - criminal law - recklessly causing serious harm aggravated because appellant stabbed victim with knife - appeal against sentence allowed

Wilson v The Queen (VSCA) - criminal law - appeal against conviction for armed robbery allowed - appellant convicted for possession of drug of dependence but discharged on basis possession did not warrant 4 months imprisonment

Summaries With Link

R v Pennington [2015] SASCFC 98

Full Court of the Supreme Court of South Australia

Gray, Sulan & Lovell JJ

Criminal law - appellant was traditional Aboriginal man with alcohol addiction and family history of alcohol abuse - appellant convicted of offence of recklessly causing serious harm - offence aggravated because appellant stabbed victim with knife - applicant had been charged with

offence of aggravated causing serious harm with intent to cause serious harm - applicant sentenced to eight years' imprisonment with a non-parole period of five years - applicant appealed against sentence - held (by majority): trial judge erred by treating offence as intentional offence - trial judge erred in failing to have regard to remorse - sentence was manifestly excessive - trial judge erred in failing to have regard to appellant's disadvantages faced as consequence of his Aboriginality - trial judge did not consider whether defendant was offered, or undertook prison courses in manner prohibited by s10(3)(c) *Criminal Law (Sentencing Act) 1988* (SA) - appellant resentenced to term of imprisonment of five years with a three year nonparole period - appeal allowed.

[Pennington](#)

Wilson v The Queen [2015] VSCA 211

Court of Appeal of Victoria

Weinberg & Kyrou JJA; Croucher AJA

Criminal law - appellant arraigned on indictment containing one charge of armed robbery and one charge of possessing a drug of dependence - appellant pleading not guilty to the charge of armed robbery but guilty, jury's presence, to charge of possession of drug of dependence - appellant convicted of charge of armed robbery - appellant sentenced to total effective sentence of 3 years and 4 months imprisonment with non-parole period of 2 years 3 months - appellant appealed against conviction and sentence - held: challenge to validity of conviction for possession drug failed - trial counsel erred egregiously in mentioning appellant's use of a syringe to inject himself with drug while in police custody, which exposed the appellant to prejudice which could not be cured by direction - appeal against conviction for armed robbery allowed - Court considered that possession of handful of OxyContin tablets of uncertain origin did not warrant 4 months imprisonment - appellant convicted and discharged.

[Wilson](#)



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A Song of Rain

By C.J. Dennis

Because a little vagrant wind veered south from China Sea;
Or else, because a sun-spot stirred; and yet again, maybe
Because some idle god in play breathed on an errant cloud,
The heads of twice two million folk in gratitude are bowed.

Patter, patter ... Boolconmatta,
Adelaide and Oodnadatta,
Pepegoona, parched and dry
Laugh beneath a dripping sky.
Riverina's thirsting plain
Knows the benison of rain.
Ararat and Arkaroola
Render thanks with Tantanoola
For the blessings they are gaining,
And it's raining -- raining -- raining!

Because a heaven-sent monsoon the mists before it drove;
Because things happened in the moon; or else, because
High Jove,
Unbending, played at waterman to please a laughing boy,
The hearts through all a continent are raised in grateful joy.

Weeps the sky at Wipipee
Far Farina's folk are dippy
With sheer joy, while Ballarat
Shouts and flings aloft its hat.
Thirsty Thackaringa yells;
Taltabooka gladly tells
Of a season wet and windy;
Men rejoice on Murrindindie;
Kalioota's ceased complaining;
For it's raining -- raining -- raining!

Because a poor bush parson prayed an altruistic prayer,
Rich with unselfish fellow-love that Heaven counted rare;
And yet, mayhap, because one night a meteor was hurled
Across the everlasting blue, the luck was with our world.

On the wilds of Winininnie
Cattle low and horses whinny,

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Frolicking with sheer delight.
From Beltana to The Bight,
In the Mallee's sun-scorched towns,
In the sheds on Darling Downs,
In the huts at Yudnapinna,
Tents on Tidnacoordininna,
To the sky all heads are craning --
For it's raining -- raining -- raining!

Because some strange, cyclonic thing has happened -- God
knows where --
Men dream again of easy days, of cash to spend and spare.
The ring fair Clara coveted, Belinda's furs are nigh,
As clerklings watch their increments fall shining from the
sky.

Rolls the thunder at Eudunda;
Leongatha, Boort, Kapunda
Send a joyous message down;
Sorrows, flooded, sink and drown.
Ninkerloo and Nerim South
Hail the breaking of the drouth;
From Toolangi's wooded mountains
Sounds the song of plashing fountains;
Sovereign Summer's might is waning;
It is raining -- raining -- raining!

Because the breeze blew sou'-by-east across the China
Sea;
Or else, because the thing was willed through all eternity
By gods that rule the rushing stars, or gods long aeons
dead,
The earth is made to smile again, and living things are fed.

Mile on mile from Mallacoota
Runs the news, and far Baroota
Speeds it over hill and plain,
Till the slogan of the rain
Rolls afar to Yankalilla;
Wallaroo and Wirrawilla
Shout it o'er the leagues between,
Telling of the dawning green.
Frogs at Cocoroc are croaking,



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Booboorowie soil is soaking,
Oodla Wirra, Orroroo
Breathe relief and hope anew.
Wycheproof and Wollongong
Catch the burden of the song
That is rolling, rolling ever
O'er the plains of Never Never,
Sounding in each mountain rill,
Echoing from hill to hill ...
In the lonely, silent places
Men lift up their glad, wet faces,
And their thanks ask no explaining --
It is raining -- raining -- raining!

[C.J. Dennis](#)

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