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Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (HCA) - employment law - s357(1) *Fair Work Act 2009* (Cth) prohibited employer from misrepresenting to employee that employee performed work as independent contractor under contract for services with third party - appeal allowed (I B C G)

Macoun v Commissioner of Taxation (HCA) - income tax - monthly pension payments not exempt from liability to tax - appeal dismissed (I B C G)

Firebird Global Master Fund II Ltd v Republic of Nauru (HCA) - public international law - foreign state immunity - registration of foreign judgment not set aside - appeal dismissed (I B C G)

KRNJULAC v LINCUI (NSWCA) - equity - natural justice - fraud - trusts and trustees - findings of primary judge went beyond case pleaded and run at trial - appeal allowed (I B G)

Alexander v Burne (NSWCA) - corporations - resolution approving merger of accounting firms invalid under unit-holders deed - appeal allowed (I B)

Chel v Fairfax Media Publications Pty Ltd (No 2) (NSWCA) - defamation - respondents not entitled to revoke election for trial to be heard by jury - appeal allowed (I)

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Bay Bon Investments Pty Ltd v Sultana (NSWSC) - real property - possession - forged mortgages and indefeasibility - plaintiff entitled to possession of property against defendants (I B C)

Summaries With Link (Five Minute Read)

Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] HCA 45

High Court of Australia

French CJ; Kiefer, Bell, Gageler & Nettle JJ

Employment law - respondent provided serviced apartments and employed housekeepers - respondent and labour hire business entered "triangular contracting" arrangement - labour hire business purported to engage housekeepers as independent contractors under contracts for services and purported to provide the services to respondent under a labour hire agreement between it and respondent - respondent represented to housekeepers they were performing work for respondent as independent contractors of labour hire company appellant sought pecuniary penalty orders against respondent for contraventions of s357(1) *Fair Work Act 2009* (Cth) - whether s357(1) prohibited an employer from misrepresenting to employee that employee performed work as an independent contractor under contract for services with third party - Full Court of the Federal Court had held that to contravene provision, employer's representation must mischaracterise contract of employment that existed between them "as a contract for services made between the employee and the employer" - statutory interpretation - "contract for services" - "independent contractor" - "sham arrangement" - held: Full Court of Federal Court erred in construction of provision - misrepresentation was squarely within scope of s357(1) - appeal allowed.

[Fair Work Ombudsman](#) (I B C G)

Macoun v Commissioner of Taxation [2015] HCA 44

High Court of Australia

French CJ; Bell, Gageler, Nettle & Gordon JJ

Income tax - appellant former sanitary engineer with International Bank for Reconstruction and Development (IBRD) received monthly pension payments from Retirement Fund established under Staff Retirement Plan when he no longer held office in IBRD - Commissioner sought to include monthly pension payments in assessable income - whether exempt under s6-20(1) *Income Tax Assessment Act 1997* (Cth) due to *International Organisations (Privileges and Immunities) Act 1963* (Cth) (IOPI Act) and *Specialized Agencies (Privileges and Immunities) Regulations* (Cth) (SAPI Regulations) - s27H *Income Tax Assessment Act 1936* (Cth) - held: 6(1)(d)(i) and Fourth Schedule IOPI Act and reg 8(1) SAPI Regulations did not together confer taxation exemption - monthly pension payments fell outside "salaries and emoluments received from the organisation" in Item 2 of Pt I of Fourth Schedule IOPI Act - Convention on the Privileges and Immunities of the Specialized Agencies did not require Australia not to tax monthly pension payments - appeal dismissed.

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

Firebird Global Master Fund II Ltd v Republic of Nauru [2015] HCA 43

High Court of Australia

French CJ; Kiefel, Gageler, Nettle & Gordon JJ

Public international law - foreign state immunity - respondent sought to set aside registration of foreign judgment and garnishee order - immunity from jurisdiction - implied repeal - service - immunity from execution - held: s9 *Foreign States Immunities Act 1985* (Cth) applied to proceedings for registration of foreign judgment under *Foreign Judgments Act 1991* (Cth) - respondent was immune from jurisdiction of Australian courts subject to exceptions under Immunities Act - exception in s11(1) Immunities Act applied because proceedings concerned commercial transaction - respondent's immunity from jurisdiction lost - however respondent immune from execution against its property represented by bank accounts in Australia because accounts' purpose or purpose of money in accounts were not commercial purposes - appeal dismissed - orders below varied to reflect Supreme Court of New South Wales' jurisdiction to register foreign judgment.

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

KRNJULAC v LINCUI [2015] NSWCA 367

Court of Appeal of New South Wales

Bathurst CJ, Leeming JA & Emmett AJA

Equity - natural justice - fraud - trusts and trustees - proceedings arising from transfer of property from first and second respondents and Mr Laza Krnjulac, to Mr Laza Krnjulac and appellants, and mortgage of property to credit union - primary judge found transfer procured by Mr Laza Krnjulac's fraudulent breach of trust - primary judge ordered appellants to transfer interests in property to first, second and fourth respondents, as trustees for trust for religious purposes, and entered judgment in respondents' favour - held: primary judge's findings concerning appellants went beyond pleaded case run at trial - primary judge's orders against appellants set aside - appellants had not paid for transfer and were volunteers - appellants could only be liable to extent they retained interest in property or interest could be traced - Mr Laza Krnjulac's liability unaffected - appeal allowed.

[KRNJULAC](#) (I B G)

Alexander v Burne [2015] NSWCA 377

Court of Appeal of New South Wales

Ward & Gleeson JJA; Tobias AJA

Corporations - BDO and Grant Thornton were accounting firms - meeting of Unitholders of Trust called by trustee of Trust was to consider resolution that approval be given to proposed merger between Grant Thornton and offices of BDO - resolution passed after two-thirds of those present voted in its favour - appellant unit holders of trust claimed resolution invalid as number of votes was less than two-thirds of total unitholders as required operation of certain clause of unitholders deed and definition of Special Majority in another clause - separate question ordered for determination: "Was the resolution to approve a proposed merger between Grant

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Thornton and Capital BDO identified in paragraph 25 of the further amended statement of claim filed 11 January 2013 (FASC) passed by a special majority vote of the Unitholders within the meaning of clause 6.1(b) of the Unitholders Deed identified in paragraph 16 of the FASC?" - primary judge answered in affirmative - appellants contended primary judge ought to have answered in negative - held: primary judge erred in answering question in affirmative - combined operation of clauses required two-thirds of total unitholders must vote in favour of resolution - resolution passed by only two-thirds of those present at meeting invalid - separate question should be answered in negative - appeal allowed.

[Alexander](#) (I B)

Chel v Fairfax Media Publications Pty Ltd (No 2) [2015] NSWCA 379

Court of Appeal of New South Wales

Macfarlan & Meagher JJA; Tobias AJA

Defamation - Court granted interim relief in relation to Supreme Court's decision to hear defamation proceedings without jury - primary judge had held respondents were entitled to withdraw their earlier election under s21(1) *Defamation Act 2005* (NSW) to have proceedings tried by jury - held: respondents not entitled to withdraw their election - proceedings should be tried by a jury unless Court made order under s 21 dispensing with a jury trial on application of a party - nothing in Defamation Act to suggest that legislature intended "elect" to be understood differently to its understanding under general law - election for jury trial should be regarded as irrevocable - a trial judge empowered under r1.12 *Uniform Civil Procedure Rules 2005* (NSW) to extend the time limits under r 29.2A for party to make election for jury trial - appeal allowed.

[Chel](#) (I)

Bay Bon Investments Pty Ltd v Sultana [2015] NSWSC 1797

Supreme Court of New South Wales

Davies J

Summary judgement - real property - possession - fraud - forgery - plaintiff sought summary judgment for possession of a property on basis of default under mortgage - first and second defendants were registered proprietors - second defendant's estate sequestrated - first defendant contended he did not sign mortgage or its variations and did not know or acquiesce in signature being placed on documents - first defendant claimed signature was forged by his wife (second defendant) - whether indefeasibility provisions of *Real Property Act 1900* (NSW) resulted in plaintiff's entitlement to possession of first defendant's interest in land - forged mortgages and indefeasibility - s41 - whether liability of defendants joint or several - held: plaintiff entitled to possession of land against both defendants - first defendant may have rights to claim against Torrens Assurance Fund.

[Bay Bon Investments](#) (I B C)

CRIMINAL

Executive Summary

Dunkley-Price v The Queen (VSCA) - criminal law - culpable driving - negligently causing serious injury - leave to appeal against convictions refused

R v L, GA (SASCFC) - criminal law - criminal assault - rape - interventions by trial judge deprived appellant of fair trial - appeal allowed - convictions set aside - retrial ordered

Summaries With Link

Dunkley-Price v The Queen [2015] VSCA 310

Court of Appeal of Victoria

Relich & Kaye JJA; Ginnane AJA

Criminal law - culpable driving - applicant convicted of one charge of culpable driving, and one charge of negligently causing serious injury - applicant's co-accused also found guilty of one charge of dangerous driving causing death, and one charge of driving causing serious injury - applicant sought to appeal on basis guilty verdicts unsafe and unsatisfactory - appellant contended jury must have had reasonable doubt that applicant's driving as opposed to co-accused's driving caused death and serious injury - held: jury entitled to conclude applicant's action in stopping on highway together with co-accused's dangerous driving were substantial and operative causes of collision - open to jury to be satisfied beyond reasonable doubt applicant's action was a substantial and operative cause of accident resulting in death and serious injury - leave to appeal against conviction refused.

[Dunkley-Price](#)

R v L, GA [2015] SASCFC 166

Full Court of the Supreme Court of South Australia

Sulan, Peek & Lovell JJ

Criminal law - appellant was convicted of two counts of criminal assault and one count of rape, acquitted of one count of rape, one count of unlawful sexual intercourse and one count of indecent assault - during course of trial, trial judge had intervened and cross-examined witnesses including appellant - appellant contended persistence interventions by trial judge resulted in unfair trial - held: trial judge's interventions so numerous and extensive that appellant not afforded fair trial - appeal allowed - convictions set aside - retrial ordered.

[R v L, GA](#)



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The Song of the Ungirt Runners

BY CHARLES HAMILTON SORLEY

We swing ungirded hips,
And lightened are our eyes,
The rain is on our lips,
We do not run for prize.
We know not whom we trust
Nor whitherward we fare,
But we run because we must
Through the great wide air.

The waters of the seas
Are troubled as by storm.
The tempest strips the trees
And does not leave them warm.
Does the tearing tempest pause?
Do the tree-tops ask it why?
So we run without a cause
'Neath the big bare sky.

The rain is on our lips,
We do not run for prize.
But the storm the water whips
And the wave howls to the skies.
The winds arise and strike it
And scatter it like sand,
And we run because we like it
Through the broad bright land.

[CHARLES HAMILTON SORLEY](#)

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