

Friday, 9 October 2015

## 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)

**Howes v Comcare** (FCA) - administrative law - affirmation of Comcare's refusal to reimburse worker for breast reduction - AAT failed to consider case put by applicant - material error - AAT's decision set aside - matter remitted (I G)

**Hammond v State of New South Wales** (NSWCA) - summary dismissal - no error in summary dismissal of claims against State and Commonwealth - extension of time and leave to appeal refused (I)

**Ho v Ebert** (NSWSC) - real property - caveat - alleged entitlement under *Family Law Act 1975* (Cth) to property settlement did not create caveatable interest in land - extension of operation of caveat refused - summons dismissed (B)

**Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq)** (VSC) - corporations - statutory demand - off-setting claim established - statutory demand varied (B C)

**Saunders v The Public Trustee** (WASCA) - Wills and estates - probate - no error in finding testamentary capacity established - appeal dismissed (B)

**Iron Mountain Mining Ltd v K & L Gates [No 2]** (WASCA) - costs - applicant was not a third party payer under *Legal Profession Act 2008* (WA) - appeal allowed (I C)

**NRW Pty Ltd as Trustee for NRW Unit Trust v Samsung C & T Corporation (WASC)** - construction contract - determination that Samsung pay amount to NRW- certiorari refused - leave to enforce determination granted (I B C)

## Summaries With Link (Five Minute Read)

### **Howes v Comcare [2015] FCA 1078**

Federal Court of Australia

Griffiths J

Administrative law - applicant lodged workers compensation claim with respondent - respondent determined liability for injuries including injuries to neck and shoulder - applicant claimed weight of her breasts increased pain in neck and shoulder and she had put on weight because of medication - applicant underwent breast reduction to reduce pain - applicant appealed against Administrative Appeals Tribunal's affirmation of respondent's decision to refuse her claim for reimbursement of cost of the breast reduction under s16 *Safety, Rehabilitation and Compensation Act 1988* (Cth) - held: AAT considered and determined Comcare's case but totally failed to address case as put by applicant - error was material - appeal allowed - AAT's decision set aside - matter remitted.

[Howes](#) (I G)

### **Hammond v State of New South Wales [2015] NSWCA 304**

Court of Appeal of New South Wales

Emmett & Gleeson JJA

Summary dismissal - Hammonds sought leave to appeal from primary judge's summary dismissal of their claims against State of New South Wales and Commonwealth of Australia - Hammonds claimed State and Commonwealth vicariously liable for acts of judicial officers who decided matters adversely to them in various proceedings - Hammonds also claimed Commonwealth had duty to uphold law, monitor judges and correct judges' errors of law - s13 *Civil Procedure Act 2005* (NSW) - ss7 & 8 *Law Reform (Vicarious Liability) Act 1983* (NSW) - ss101(2)(c) & 101(2)(e) *Supreme Court Act 1970* (NSW) - cl14, 8 & 11 *Civil Procedure Regulation 2012* (NSW) - rr4.10 & 51.9 *Uniform Civil Procedure Rules 2005* (NSW) - held: no error in primary judge's conclusion that Statement of Claim disclosed no arguable cause of action against State or Commonwealth - even if Hammonds not outside limitation period for filing summons seeking leave to appeal, leave to appeal would not be granted - extension of time and leave to appeal refused.

[Hammond](#) (I)

### **Ho v Ebert [2015] NSWSC 1468**

Supreme Court of New South Wales

Kunc J

Real property - caveat - parties married in 2009 - relationship ended in 2014 - plaintiff sought

extension of operation of a caveat she lodged over property of which defendant was registered proprietor - held: only basis for interest in property was alleged entitlement under *Family Law Act 1975* (Cth) to a property settlement, which did not create caveatable interest in land which may be part of assets available for settlement - proper place for dispute was Federal Circuit Court - summons dismissed.

[Ho](#) (B)

## **Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq) [2015] VSC 530**

Supreme Court of Victoria

Gardiner J

Corporations - statutory demand - defendant served statutory demand on plaintiff for payment of debt for sale and delivery of fuel and other fluids - plaintiff applied pursuant to ss459G, 459H & 459J *Corporations Act 2001* (Cth) to set aside demand on basis there was a genuine dispute about existence and the amount of debt and a genuine claim by way of set off and cross demand - held: genuine dispute not established - plaintiff established off-setting claim - demand varied to take into account establishment of offsetting claim

[Malec](#) (B C)

## **Saunders v The Public Trustee [2015] WASCA 203**

Court of Appeal of Western Australia

Buss JA; Beech & Mitchell JJ

Wills and estates - probate - testamentary capacity - trial judge ordered grant of probate in solemn form of deceased's Will be made to Public Trustee - Will did not make provision for deceased's daughters - appellant contended mother lacked testamentary capacity when making Will and that trial judge erred in finding testamentary capacity established - r r47(3)(d) *Supreme Court (Court of Appeal) Rules 2005* (WA) - held: evidence adduced at trial established that at time she made Will, deceased had capacity to comprehend and appreciate claims on estate to which she ought give effect - no error by trial judge in finding testamentary capacity established - trial judge conducted trial in manner procedurally fair - appeal dismissed.

[Saunders](#) (B)

## **Iron Mountain Mining Ltd v K & L Gates [No 2] [2015] WASC 373**

Supreme Court of Western Australia

Master Sanderson

Costs - third party payer - client was director of applicant company - applicant sought assessment of costs rendered by respondent law firm to client - appeal from decision in which Registrar determined as preliminary issue that applicant was a third party payer within meaning of *Legal Profession Act 2008* (WA) (LPA) - *Leckenby v Note Printing Australia Ltd* [2014] VSC 538 - *Note Printing Australia Ltd v Leckenby* [2015] VSCA 105 - held: director's conviction of offences under *Corporations Act 2001* (Cth) rendered contractual indemnity and constitutional indemnity automatically void ab initio - applicant was not a third party payer under LPA - appeal allowed.

[Iron Mountain](#) (I C)

## **NRW Pty Ltd as Trustee for NRW Unit Trust v Samsung C & T Corporation [2015] WASC**

**369**

Supreme Court of Western Australia

Mitchell J

Judicial review - construction contract - Samsung sought to quash adjudicator's determination under *Construction Contracts Act 2004* (WA) that Samsung amount to NRW - held: payment dispute arose when Samsung disputed payment claim made by NRW - adjudication application made within permissible time - adjudicator determined merits of dispute by reference to terms of construction contract - any error by adjudicator in construing certain contractual provisions was no more than misconstruction of construction contract and error within adjudicator's jurisdiction - Samsung's claimed set offs did not provide valid reason to refuse leave to enforce determination - certiorari refused - leave to enforce determination granted.

[NRW](#) (I B C)

## CRIMINAL

### Executive Summary

**R & M v IBAC** (VSCA) - criminal law - *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) empowered Commissioner to examine applicants - leave to appeal refused

**Case Stated On Acquittal No 1 Of 2015; R v STAKAJ & N, H** (SASCFC) - criminal law - invalid jury verdicts of not guilty of murder - verdicts quashed - retrial on charge of murder

### Summaries With Link

#### **R & M v IBAC [2015] VSCA 271**

Court of Appeal of Victoria

Priest, Beach & Kaye JJA

Criminal law - judicial review - statutory interpretation - applicants were sworn members of Victoria Police - respondent was Commissioner appointed under *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) - Commission commenced investigation into alleged conduct by members of Victoria Police - respondent issued witness summonses to applicants requiring them to give evidence in relation to document attached to summonses entitled 'Preliminary Information and Directions for Public Examinations in Operation Ross' - applicants suspended on full pay - notices provided applicants reasonably believed to have committed an offence punishable by imprisonment - applicants informed offence was allegation of assault - applicants sought to restrain Commission from examining them or from doing so in public - trial

judge dismissed judicial review proceedings - applicants appealed - whether power to examine persons granted by s115 extended to examining persons subject of an ongoing criminal investigation about its subject matter - whether respondent's reasons for examining applicants in public infected by reviewable error - ss8, 15, 70, 115, 117 & 144 - held: trial judge correct to find Act on its proper construction empowered Commission to examine applicants in present case - applicants' appeal had no prospects of success - leave to appeal refused.

[R & M](#)

**Case Stated on Acquittal No 1 of 2015; R v STAKAJ & N, H [2015] SASCFC 139**

Court of Criminal Appeal of South Australia

Kourakis CJ; Gray & Sulan JJ

Criminal law - trial judge entered verdicts of not guilty to charge of murder and verdicts of guilty to charge of manslaughter in respect of four defendants - DPP sought to expunge or quash verdicts of acquittal - whether Court had inherent jurisdiction to hear application - whether Court had power to expunge or quash jury acquittal entered on Court record - admissibility of evidence of jurors - held: jurors' affidavits admissible insofar as they showed jury had not resolved to return verdicts of not guilty of murder - verdicts delivered in contravention of s57 *Juries Act 1927* (SA) - Court had inherent power to set aside invalid verdicts - application allowed - verdicts quashed - retrial on charge of murder.

[Stakaj](#)

# Benchmark

**Speech: “To be, or not to be, that is the question”**

By William Shakespeare

(from Hamlet, spoken by Hamlet)

To be, or not to be, that is the question:  
Whether 'tis nobler in the mind to suffer  
The slings and arrows of outrageous fortune,  
Or to take arms against a sea of troubles  
And by opposing end them. To die—to sleep,  
No more; and by a sleep to say we end  
The heart-ache and the thousand natural shocks  
That flesh is heir to: 'tis a consummation  
Devoutly to be wish'd. To die, to sleep;  
To sleep, perchance to dream—ay, there's the rub:  
For in that sleep of death what dreams may come,  
When we have shuffled off this mortal coil,  
Must give us pause—there's the respect  
That makes calamity of so long life.  
For who would bear the whips and scorns of time,  
Th'oppressor's wrong, the proud man's contumely,  
The pangs of dispriz'd love, the law's delay,  
The insolence of office, and the spurns  
That patient merit of th'unworthy takes,  
When he himself might his quietus make  
With a bare bodkin? Who would fardels bear,  
To grunt and sweat under a weary life,  
But that the dread of something after death,  
The undiscover'd country, from whose bourn  
No traveller returns, puzzles the will,  
And makes us rather bear those ills we have  
Than fly to others that we know not of?  
Thus conscience does make cowards of us all,  
And thus the native hue of resolution  
Is sicklied o'er with the pale cast of thought,  
And enterprises of great pitch and moment  
With this regard their currents turn awry  
And lose the name of action.

<http://www.poetryfoundation.org/bio/william-shakespeare>

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