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## 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)

**Gosford City Council v Parbery (Liquidator); In the Matter of Lehman Brothers Australia Ltd (In Liq) (Scheme Administrators Appointed)** (FCA) - contract - claims resolution process deed construed according to its terms - liquidators' proof of debt upheld (I B C)

**Herne Investments (NSW) Pty Ltd v Don Watson Proprietary Ltd** (NSWCA) - negligence - driver of overtaking truck did not owe a duty of care to let truck being overtaken merge, where Road Rules required truck being overtaken to give way (I)

**Gmitrovic v Commonwealth of Australia** (NSWSC) - defamation - limitation period not extended merely because plaintiff had not known of time limitation - action would fail in any event (I)

**Davan Developments Pty Ltd v HLB Mann Judd (SE Qld) Pty Ltd** (QCA) - professional negligence - accountants who prepared tax returns showing property sales liable to GST not negligent or in breach of contract (I B C)

**Bend-Tech Group (A Firm) v Beek** (WASC) - costs - failed application for interlocutory injunction to restrain former employee not so hopeless as to justify indemnity costs (I B)

**Denham Constructions Pty Ltd v Islamic Republic of Pakistan** (ACTSC) - construction dispute - defences that certain claims were not payment claims under the Building and Construction Industry (Security of Payment) Act were weak but arguable - summary judgment

refused (I B C)

## Summaries With Link (Five Minute Read)

### **Gosford City Council v Parbery (Liquidator); In the Matter of Lehman Brothers Australia Ltd (In Liq) [2016] FCA 353**

Federal Court of Australia

Foster J

Contract - Gosford Council lodged proof of debt in liquidation of Lehman Brothers - parties entered deed providing for claims resolution process to determine amount to be admitted - deed approved by Court - Adjudicator ruled debt should be only partly admitted - liquidators admitted debt for that amount - Council appealed to the Federal Court - held: deed should be construed objectively in the context of the surrounding circumstances and its purpose - language used in the deed was plain - loss should be calculated on the factual assumptions set out in the deed, notwithstanding the actual circumstances - Council's application dismissed.

[Gosford City Council](#) (I B C)

### **Herne Investments Pty Ltd v Don Watson Proprietary Ltd [2016] NSWCA 72**

Court of Appeal of New South Wales

Ward JA, Sackville AJA & Garling J

Negligence - defendant's truck overtook plaintiff's truck on Pacific Highway - overtaking lane came to an end before overtaking completed - defendant's truck did not decelerate to let plaintiff's truck merge back into the single lane - plaintiff's truck therefore could not merge and struck a guard rail - primary judge held driver of overtaking truck did not breach any duty by not giving way and accident was entirely the fault of the driver of the truck being overtaken - plaintiff appealed to Court of Appeal - held: r148, Road Rules 2008 required truck being overtaken to give way to overtaking truck - driver of overtaking truck had not breached any Road Rule - trial judge's factual findings supported by the evidence - reasonable person in the position of the driver of the overtaking truck would not have slowed down to allow the truck being overtaken to merge - driver of overtaking truck therefore did not owe a duty to do so - appeal dismissed.

[Herne](#) (I)

### **Gmitrovic v Commonwealth of Australia [2016] NSWSC 418**

Supreme Court of New South Wales

Adamson J

Plaintiff employed by Defence Department - subject to disciplinary action and employment terminated - Department issued Intent to Sanction Minute and Statement of Reasons - more than one year later, plaintiff applied for extension of time to commence defamation action based on those documents - held: plaintiff had to establish it was not reasonable to commence proceedings within one year - s56A, Limitation Act 1969 - the plaintiff had not known there was a limitation period - the possibility of extending the time limit does not mean that potential

plaintiffs do not have to inform themselves of the limitation - no extension should be granted - in any event, the Commonwealth had established a defence of qualified privilege - further, even if defamation were made out, only nominal damages would be awarded.

[Gmitrovic \(I\)](#)

## **Davan Developments Pty Ltd v HLB Mann Judd Pty Ltd [2016] QCA 90**

Court of Appeal of Queensland

Gotterson, Morrison & P McMurdo JJA

Professional negligence - development company retained accountants to prepare tax returns - development company acquired two adjoining lots, amalgamated them, and subdivided the land into three lots - sold two of the lots - paid GST on the sale on the basis of returns prepared by the accountants - development company claimed it had not been liable for GST on those sales as it held the land on trust and had merely transferred the property to the beneficiary of that trust - trial judge dismissed the development company's claim against the accountants - held: the development company had not owned the land as trustee - there had been no breach of contract or negligence - appeal dismissed.

[Davan \(I B C\)](#)

## **Bend-Tech Group (A Firm) v Beek [2015] WASC 491**

Supreme Court of Western Australia

Pritchard J

Costs - Bend-Tech sought an interlocutory injunction against a former employee to enforce a restraint clause - application dismissed - Court considered Bend-Tech had not shown a prima facie case that the alleged clause was part of the employment contract, and that the clause, in any event, was too widely drawn - defendant sought indemnity costs - held: indemnity costs will only be made in exceptional circumstances - indemnity costs may be ordered where an action is hopeless, in the sense that the plaintiff, properly advised, should have known that the action had no prospect of success - some aspects of Bend-Tech's case should properly have been regarded as weak - however, Bend-Tech's injunction application was not hopeless in the relevant sense - Bend-Tech's conduct had not been so improper or unreasonable as to warrant an order for indemnity costs - Bend-Tech's failure to accept offers of compromise was not so unreasonable as to justify indemnity costs - indemnity costs refused - due to complexity of case, special costs order made that costs be assessed without regard to upper limit of Supreme Court's Scale of Costs.

[Bend-Tech \(I B\)](#)

## **Denham Constructions Pty Ltd v Islamic Republic of Pakistan [2016] ACTSC 67**

Supreme Court of the Australia Capital Territory

Mossop AsJ

Building and construction - Denham brought proceedings for debt arising out of a payment claim under the Building and Construction Industry (Security of Payment) Act 2009 - Pakistan pleaded defences that the claim was not a payment claim within the meaning of the Act - that a

communication by Pakistan's architect was sufficient to constitute a payment schedule under the Act - that the Act did not apply to land that was subject to the exclusive law-making power of the Commonwealth Parliament under s52, Constitution - Denham sought summary judgment - held: the plaintiff had to demonstrate that the defence was so obviously untenable that it could not possibly succeed - this is a high threshold - Pakistan's case that the claim was not a payment claim was not strong, but was arguable - not necessary to address other defences - summary judgment refused.

[Denham](#) (I B C)

## CRIMINAL

### Executive Summary

**Zaburoni v The Queen** (HCA) - criminal law - prosecution had to prove intent to infect complainant with HIV - conviction of unlawfully transmitting a serious disease to another with intent quashed - conviction of unlawful infliction of grievous bodily harm substituted

**Mok v Director of Public Prosecutions (NSW)** (HCA) - federal law - Commonwealth law picked up and applied state law - appellant could be guilty of an offence contrary to the NSW law picked up

### Summaries With Link

**[Zaburoni v The Queen \[2016\] HCA 12](#)**

High Court of Australia

Kiefel, Bell, Gageler, Keane & Nettle JJ

Criminal law - appellant convicted of unlawfully transmitting a serious disease (infection by HIV) to another with intent to do so - s317, Criminal Code (Q) - appellant had pled guilty to alternative charge of grievous bodily harm, which did not require proof of intent - prosecution did not accept plea in discharge of the indictment - unnecessary to take verdict on grievous bodily harm charge after verdict of guilty on principal charge - held: s317 required proof of actual intent to transmit HIV - purpose is distinct from motive - where intention to produce a particular result must be proved, prosecution must show the accused had that result as his or her purpose when doing the relevant conduct - in the absence of evidence of malice or knowledge of the degree of risk, a subjective intent to inflict the HIV virus was not proven beyond reasonable doubt - foresight of some risk, and reckless indifference to that risk, was not enough - conviction under s317 quashed and conviction of unlawful infliction of grievous bodily harm substituted - matter remitted to District Court of Queensland for sentence on that charge.

[Zaburoni](#)



## **Mok v Director of Public Prosecutions [2016] HCA 13**

High Court of Australia

French CJ; Kiefel, Bell, Keane & Gordon JJ

Federal jurisdiction - appellant arrested in Victoria under warrant under the Service and Execution of Process Act 1992 (Cth) regarding alleged offences against NSW law - order made under s83(8), Service and Execution of Process Act 1992 (Cth), that appellant be taken to NSW - appellant attempted to escape at Tullamarine Airport - charged in respect of escape attempt under s310D, Crimes Act 1900 - s89(4), Service and Execution of Process Act 1992 (Cth), makes law in place of issue of warrant applicable to escapes - NSW magistrate dismissed the charge - single judge of Supreme Court and Court of Appeal overturned magistrate's ruling - appellant appealed to High Court - held: s89(4), Service and Execution of Process Act 1992 (Cth), picks up NSW law and creates a surrogate Commonwealth law - where state laws are picked up by a Commonwealth law, they may be applied analogically, or in a modified way - s310D, Crimes Act 1900 is applicable by analogy to persons to whom s89(4), Service and Execution of Process Act 1992 (Cth), applies - s310D, Crimes Act 1900, could apply to the escape attempt at Tullamarine Airport - appeal dismissed.

[Mok](#)

# Benchmark

## MULGA BILL'S BICYCLE

by A.B. "Banjo" Paterson

'Twas Mulga Bill, from Eaglehawk, that caught the cycling  
craze;

He turned away the good old horse that served him many  
days;

He dressed himself in cycling clothes, resplendent to be  
seen;

He hurried off to town and bought a shining new machine;  
And as he wheeled it through the door, with air of lordly  
pride,

The grinning shop assistant said, "Excuse me, can you  
ride?"

"See here, young man," said Mulga Bill, "from Walgett to the  
sea,

From Conroy's Gap to Castlereagh, there's none can ride  
like me.

I'm good all round at everything as everybody knows,  
Although I'm not the one to talk - I hate a man that blows.

But riding is my special gift, my chiefest, sole delight;

Just ask a wild duck can it swim, a wildcat can it fight.

There's nothing clothed in hair or hide, or built of flesh or  
steel,

There's nothing walks or jumps, or runs, on axle, hoof, or  
wheel,

But what I'll sit, while hide will hold and girths and straps are  
tight:

I'll ride this here two-wheeled concern right straight away at  
sight."

'Twas Mulga Bill, from Eaglehawk, that sought his own  
abode,

That perched above Dead Man's Creek, beside the  
mountain road.

He turned the cycle down the hill and mounted for the fray,

But 'ere he'd gone a dozen yards it bolted clean away.

It left the track, and through the trees, just like a silver steak,



# Benchmark

It whistled down the awful slope towards the Dead Man's Creek.

It shaved a stump by half an inch, it dodged a big white-box:  
The very wallaroos in fright went scrambling up the rocks,  
The wombats hiding in their caves dug deeper underground,  
As Mulga Bill, as white as chalk, sat tight to every bound.  
It struck a stone and gave a spring that cleared a fallen tree,  
It raced beside a precipice as close as close could be;  
And then as Mulga Bill let out one last despairing shriek  
It made a leap of twenty feet into the Dean Man's Creek.

'Twas Mulga Bill, from Eaglehawk, that slowly swam ashore:  
He said, "I've had some narrer shaves and lively rides before;  
I've rode a wild bull round a yard to win a five-pound bet,  
But this was the most awful ride that I've encountered yet.  
I'll give that two-wheeled outlaw best; it's shaken all my nerve  
To feel it whistle through the air and plunge and buck and swerve.  
It's safe at rest in Dead Man's Creek, we'll leave it lying still;  
A horse's back is good enough henceforth for Mulga Bill."

[A.B. "Banjo" Paterson](#)

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