



Friday, 15 July 2016

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

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Burroughs v Australian Prudential Regulatory Authority (FCA) - insurance - Authority's disqualification of applicant as holder of senior insurance role revoked - application granted (I B C G)

Safe is Safe Pty Ltd v Royal National Agricultural and Industrial Association of Queensland (FCA) - consumer law - application for injunctions restraining Authority from advising ride operators it would accept applicants' inspection certificates and from refusing to accept applicants' inspection certificates - application dismissed (I B C G)

Davies bhnf McRae v Body Corporate for the Phoenician (NSWSC) - cross-vesting - personal injury proceedings transferred to Supreme Court of Queensland (I B C G)

Willoughby City Council v Attorney General of NSW (NSWSC) - equity - approval of cy-près scheme granted (B)

Ironside v Thisainayagan (WASC) - contract - plaintiff entitled to interest in property and order for property's sale (I B C G)

Mineral Crushing Services (WA) Pty Ltd v Edna May Operations Pty Ltd [No 2] (WASC) - security for costs - defendant granted further security for costs for 'costs up to and including entry for trial' (I B C G)

Phoenix Eagle Company Pty Ltd v Ardrey (WASC) - freezing orders - application for variation of freezing orders misconceived - application dismissed (I B C G)

Summaries With Link (Five Minute Read)

Burroughs v Australian Prudential Regulatory Authority [2016] FCA 775

Federal Court of Australia

Allsop CJ

Insurance - application for order pursuant to s26 *Insurance Act 1973* (Cth) for revocation of applicant's disqualification as holder of senior insurance role - Authority had disqualified applicant in 2004 on basis it was satisfied he was 'not a fit and proper person to be or act as the holder of a senior insurance role' - *Financial Sector Legislation Amendment (Review of Prudential Decisions) Act 2008* (Cth) amended the Act which changed operation of legislation in relation to disqualification - result of amendments was that Authority no longer authorised to disqualify a person - instead, powers of disqualification and revocation vested in Court - Amending Act also empowered Court to revoke disqualification orders which Authority made before 2008 - held: applicant had engaged in improper conduct but Court satisfied it was not justified to maintain disqualification - disqualification revoked.

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

Safe is Safe Pty Ltd v Royal National Agricultural and Industrial Association of Queensland [2016] FCA 770

Federal Court of Australia

Jagot J

Consumer law - injunction - applicants were company and its principal - principal inspected rides formally known as "amusement devices - respondent Authority was responsible for running Show - applicants sought to restrain authority from advising ride operators it would accept applicants' inspection certificates and from refusing to accept applicants' inspection certificates from applicants - ss18, 45, 46 *Australian Consumer Law* (Cth) - *Royal National Agricultural and Industrial Association of Queensland Act 1971* (Qld) - *Work Health and Safety Act 2012* (SA) - s241(5)(b) *Work Health and Safety Regulation 2011* (Qld) - charges pending against applicants under Work Health and Safety Act - held: Court prepared to accept there was prima facie case established - however balance of convenience did not favour making injunctions sought - application dismissed.

[Safe is Safe](#) (I B C G)

Davies bhnf McRae v Body Corporate for the Phoenician [2016] NSWSC 973

Supreme Court of New South Wales

Rothman J

Cross-vesting - claim against defendant occupier of premises for damages for personal injury to

Benchmark

first plaintiff - tort occurred in Queensland - second and third plaintiffs sued defendant for nervous shock - defendant sought order under s5(2)(b)(iii) *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) transferring proceedings to Supreme Court of Queensland - *Civil Liability Act 2002* (NSW) - *Civil Liability Act 2003* (Qld) - *Motor Accidents Compensation Act 1999* (NSW) - *Personal Injuries Proceeding Act 2002* (Qld) - whether "it is more appropriate that the ... proceeding" be transferred having regard, relevantly, to the interests of justice' - difference of law to be applied between New South Wales and Queensland - held: Court satisfied it was appropriate for proceedings to be heard in Supreme Court of Queensland.

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

Willoughby City Council v Attorney General of NSW [2016] NSWSC 972

Supreme Court of New South Wales

Hallen J

Equity - charities - trusts and trustees - plaintiff sought approval of cy-près scheme as to funds held by it following determination of compensation payable for compulsory acquisition of land - land had been held by Council on trust for charitable purposes - *Charitable Trusts Act 1993* (NSW) - held: Court satisfied trusts with which compensation funds impressed could no longer be performed on sites - original purpose of trust had ceased to be 'a suitable, or effective, method for performing the trust purpose' - proposed use of compensation funds would be for almost identical purpose with surplus to be used to improve and maintain land acquired for use redevelop or refurbishment facility for the use.

[Willoughby](#) (B)

Ironside v Thisainayagan [2016] WASC 174

Supreme Court of Western Australia

Beech J

Contract - plaintiff claimed he had interest in property under agreement with defendant which reflected his 'contributions to its purchase, renovation and maintenance and his right to a half share of profits on its sale' - plaintiff also sought order for property's sale - defendant denied agreement gave plaintiff any interest and contended it was replaced by oral agreement - held: agreement not void for uncertainty - parties agreed plaintiff's entitlements in relation to property would be treated as capital subscriptions - agreement on foot and not varied - plaintiff's unpaid rent entitlements to be treated as capital contributions by him - plaintiff entitled to order for property's sale.

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

Mineral Crushing Services (WA) Pty Ltd v Edna May Operations Pty Ltd [No 2] [2016] WASC 184

Supreme Court of Western Australia

Martino J

Security for costs - defendant sought further security for costs against plaintiff on basis of costs already incurred in provision and inspection of documents - application also made on basis of

Benchmark

occurrence of mediation, which was adjourned - plaintiff did not oppose further order - issue was as to amount of security to be ordered - held: security for costs could extend to costs already incurred - Court was not satisfied it should order further security in respect of provision and inspection of documents - Court granted order for further security in respect of 'costs up to and including entry for trial' - further security granted.

[Mineral Crushing Services](#) (I B C G)

Phoenix Eagle Company Pty Ltd v Ardrey [2016] WASC 175

Supreme Court of Western Australia

Kenneth Martin J

Freezing orders - self-represented litigant - plaintiff sought variation of freezing orders made against him - plaintiff sought proper compliance by defendant with previous orders for disclosure of assets and cross-applied for orders - held: application was misconceived - application dismissed.

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

CRIMINAL

Executive Summary

DPP v Perry; Perry v The Queen (VSCA) - Criminal law - statutory murder - sentencing guideline judgment - Crown leniency appeal - respondent, who was on parole, stabbed the victim to death during an armed robbery - Crown charged respondent with murder, but accepted a plea of guilty to statutory murder (s3A *Crimes Act 1958* (Vic)) - sentenced to 20 years - respondent also pleaded guilty to other offences - total effective sentence 27 years, NPP 23 years - construction of s3A considered - elements of statutory murder considered - Victorian and NSW sentence authorities examined - NSW approach preferred - sentences for statutory murder should be adjusted in line with sentences for murder - sentence within range and leniency appeal dismissed - respondent sought leave to appeal severity of sentence - application of principle of totality where offender has served time prior to committing offence while on parole (s16(3B) *Sentencing Act 1991*) referred to - correctness of cumulation order considered - respondent refused leave to appeal

DPP v Dalgliesh (VSCA) - Criminal law - incest - sentencing guideline judgment - indecent assaults & sexual penetration of child under 16 years - Crown leniency appeal - victim 13 year old daughter of de facto partner - victim falling pregnant - mid-range seriousness - respondent pleaded guilty - sentencing judge required to have regard to current sentencing practices (s5(2)(b) *Sentencing Act 1991* (Vic)) - sentences imposed of 3 years 6 months and 3 years on incest counts with orders of cumulation of 2 years, giving effective sentence of 5 years 6 months - NPP 3 years - Crown argued sentences manifestly inadequate - appeal dismissed - sentences not demonstrated to be outside the range - current sentencing practices too lenient and

sentences should be progressively increased to reflect objective gravity of offence of incest

Summaries With Link

DPP v Perry; Perry v The Queen [2016] VSCA 152

Victorian Court of Appeal

Maxwell ACJ, Redlich & Whelan JJA

Criminal law - statutory murder - sentencing guideline judgement - Crown leniency appeal - respondent, who was on parole, stabbed the victim to death during armed robbery - respondent on ice - Crown charged respondent with murder, but accepted a plea of guilty to statutory murder (s3A *Crimes Act 1958* (Vic)) - sentenced to 20 years - respondent also pleaded guilty to other offences - total effective sentence 27 years, NPP 23 years - construction of s3A considered - Victorian and NSW authorities on sentence considered - respondent sought leave to appeal severity of sentence - application of principle of totality where offender has served time prior to committing offence while on parole (*DPP v Oksuz* [2015] VSCA 316; s16(3B) *Sentencing Act 1991*) - correctness of accumulation order considered - held: the common law "felony murder" rule was reformulated by s3A *Crimes Act 1958* (the "statutory murder" rule) - a person who unintentionally causes the death of another person in the course of a crime of violence (the "foundational crime") is liable to be convicted of murder as though he/she had killed the victim intentionally - the prosecution does not have to prove the killing was unintentional - the act "of violence" causing death must have been conscious, voluntary and deliberate - death occurring in the course of the foundational crime of violence supplies the mental element for murder - statutory murder is not inherently less serious than murder - the seriousness of any particular statutory murder is assessed according to the nature of the act causing death - offender's intention is relevant on sentence - existing sentencing standards for statutory murder are inadequate and sentences must be increased to reflect the objective gravity of the offence - sentences should be encompassed within the range of sentences for murder - here the sentence was, according to current sentencing practice, within the range reasonably open - the appropriate sentence would have been at least 25 years - no error identified in the cumulation order - leniency appeal dismissed - respondent refused leave to appeal sentence.

[Perry](#)

DPP v Dalgliesh (a Pseudonym) [2016] VSCA 148

Victorian Court of Appeal

Maxwell ACJ, Redlich & Beach JJA

Criminal law - incest - sentencing guideline judgment - indecent assaults & sexual penetration of child under 16 years - 4 counts - Crown leniency appeal - victim 13 year old daughter of de facto partner - victim falling pregnant - mid - range seriousness - respondent pleaded guilty - sentencing judge required to have regard to current sentencing practices (s5(2) *Sentencing Act*

Benchmark

1991(Vic)) - sentences imposed of 3 years 6 months and 3 years on 2 counts of incest, with orders of cumulation of 2 years, giving effective sentence of 5 years 6 months - NPP 3 years - Crown argued sentence of 3 years 6 months on incest count manifestly inadequate - cumulation order manifestly inadequate - limitations inherent in Crown leniency appeal noted and *DPP v Bright* ((2006) 163 A Crim R 538) approved - here offence of incest highly aggravated by the pregnancy - consideration of appellate court discretion to provide guidance on appropriate sentence standards to reflect the objective seriousness of the offence considered (*Ashdown v The Queen* (2011) 37 VR 341) - held: rejecting the respondent's submissions that the offence of incest did not involve violence or harm - noting the effect of s5(2) *Sentencing Act 1991* and the responsibility of the parties to provide sentencing judges with details of comparable decisions - the sentence of 3 years 6 months for incest was lenient but not wholly outside current sentencing practice - current sentencing practice for the offence of incest with a depend child does not reflect the moral culpability of the offender or the objective seriousness of the offence - the offence here involving pregnancy was toward the top of mid - range seriousness - the trauma and long term harm to the victims must be reflected in sentences - incest is a crime of violence - the sentences here were manifestly inadequate - appropriate sentences would have been for count 2, incest, 7 years and a significantly higher term for the incest involving pregnancy.

[Dalgliesh](#)



Benchmark

The Flower Boat

By [Robert Frost](#)

THE FISHERMAN'S swapping a yarn for a yarn
Under the hand of the village barber,
And here in the angle of house and barn
His deep-sea dory has found a harbor.

At anchor she rides the sunny sod
As full to the gunnel with flowers a-growing
As ever she turned her home with cod
From George's Bank when winds were blowing.

And I know from that Elysian freight
She will brave but once more the Atlantic weather,
When dory and fisherman sail by fate
To seek for the Happy Isles together.

[Click Here to access our Benchmark Search Engine](#)