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## Daily Civil Law A Daily Bulletin listing Decisions of Superior Courts of Australia

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (One Minute Read)

**Clarence City Council v Commonwealth of Australia** (FCAFC) - airport lessees did not have to make rate-equivalent payments to councils for terminal areas connected with aeronautical operations rather than commercial activities (B I)

**Dickson Developments Precinct 5 Pty Ltd v Core Building Group Pty Ltd** (FCA) - Arbitrator's determination under the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) void, as the alleged reference date was wrong, and the only available reference date had already been used for the previous payment claim (I B C)

**Tri-Force Enterprise Limited v Infinite Water Holdings Limited, in the matter of Infinite Water Holdings Limited (administrators appointed)** (FCA) - director with a material personal interest had been properly excluded from discussion of ratification of a debt to equity conversion (I B)

**Re AUSCOAL Superannuation Pty Ltd atf the Mine Superannuation Fund; Application for Judicial Advice** (NSWSC) - Court gave judicial advice to address the issues that may arise where a superannuation fund would have both beneficiaries entitled to accumulation benefits and beneficiaries entitled to defined benefits (I B)

**Eyre-Walker v Swyrydan (Costs)** (VSC) - executor who had consented to his removal only just before trial was denied indemnification from the estate for his legal costs, and ordered to pay



50% of the plaintiffs' costs (I B)

**GLP Batesford Holdings Pty Ltd v 68 Bridge Road Land Pty Ltd** (VSC) - purchaser suing vendor regarding construction of special condition had not made out its allegation of insufficient discovery - subpoenas to telecommunication companies lacked a legitimate forensic purpose (I B C)

**Dickson v Hassum & Levitt Pty Ltd & Anor** (QCA) - Court of Appeal upheld primary judge's refusal to extend limitation period for claim regarding work injury that occurred in 2002 (I B)

## HABEAS CANEM

### Neat Feet



# Benchmark

## Summaries With Link (Five Minute Read)

### **Clarence City Council v Commonwealth of Australia [2024] FCFCA 8**

Full Court of the Federal Court of Australia

Markovic, Stewart, & Anderson JJ

Contracts - the Commonwealth owned land containing the Hobart and Launceston airports, and leased each airport to different lessees - by s52 and s114 of the Constitution, the local councils could not levy rates in respect of Commonwealth land - a clause in each lease required the lessees to pay each council a "fictional" or "notional" equivalent to the rates that would have been payable if the land were not Commonwealth land - this applied to land that was subleased, or on which "trading or financial operations" were undertaken - a dispute arose as to whether certain areas of the terminals that were not subleased, but from which the lessees provided common user facilities and services for a fee, were areas where "trading or financial operations" were undertaken - the councils sought declaratory relief, which the primary judge refused - the councils appealed - held: the phrase "trading or financial operations" was ambiguous, and so the primary judge did not err by having recourse to evidence of surrounding circumstances when construing that phrase - the primary judge was correct to conclude that the list of inclusions and exclusions in the clause supported the view that the expression "trading or financial operations" captured a more limited range of activities, and did not capture parts of the airports devoted to aeronautical operations - the commercial purpose of the leases also supported this conclusion, particularly that they gave effect to a Commonwealth government policy of fair competition and competitive neutrality, which applied to commercial operations, but not aeronautical operations over which the Commonwealth had a monopoly - the primary judge was correct to find that the clause created an obligation to make rates equivalent payments, not simply an obligation to use "reasonable endeavours" to enter into an agreement to make those payments - appeals dismissed.

[Clarence City Council](#) (B I)

### **Dickson Developments Precinct 5 Pty Ltd v Core Building Group Pty Ltd [2024] FCA 86**

Federal Court of Australia

Jackman J

Security of payments - Dickson contracted Core to design and construct the Mulberry Project, a residential development in the ACT - Core submitted a payment claim under the *Building and Construction Industry (Security of Payment) Act 2009* (ACT), and an adjudicator required Dickson to pay Core about \$5.5million - Dickson applied for judicial review in the Federal Court - held: as previously analysed in security of payments litigation between the same parties regarding a different project (see Benchmark 29 November 2023), the Federal Court had jurisdiction because: (a) s9(3) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) grants the Federal Court jurisdiction conferred on that Court by an ACT cross-vesting law; (b) s4(1) of the *Jurisdiction of Courts (Cross-Vesting) Act 1993* (ACT) grants the Federal Court jurisdiction in respect of matters in which the ACT Supreme Court has jurisdiction, other than by a law of the Commonwealth or of another State; and (c) s20(1) of the *Supreme Court Act 1933* (ACT)

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grants the ACT Supreme Court all jurisdiction necessary to administer justice in the ACT, and s34B(1) gives that Court power to give prerogative relief, including in the nature of, or to the same effect as, certiorari - the existence of a valid reference date for a payment claim is an objective matter, not one which depends on the subjective understanding, belief or intention of either of the parties - contrary to the Arbitrator's determination, the reference date alleged in the payment claim was not a date that Core was entitled to claim as a reference date - further, under s15(5) of the Act, the only available reference date for the payment claim was a date that had already been used as the reference date for the previous payment claim - Arbitrator's determination declared void.

[Dickson Developments Precinct 5 Pty Ltd \(I B C\)](#)

## **Tri-Force Enterprise Limited v Infinite Water Holdings Limited, in the matter of Infinite Water Holdings Limited (administrators appointed) [2024] FCA 78**

Federal Court of Australia

Goodman J

Corporations law - Ip was a director and majority shareholder of a NZ company - the NZ company owned shares in an Australian company, IWH, and lent a substantial amount of money to IWH and was its only secured creditor - IWT was a wholly owned subsidiary of IWH that held patents critical to IWH's business of water treatment - Ip was also a director of IWH and IWT - the CEO of IWH purported to convert part of the NZ company's debt into shares in IWH - at a director's meeting of IWH, the directors other than Ip purported to ratify this debt to equity conversion, and Ip was excluded as having a material personal interest - the directors of IWT then purported to appoint two other directors of IWT, and purported to enter into two licence agreements with a New York company - the NZ company and Ip sued, contending that the debt to equity conversion was invalid for want of authority, the purported ratification was invalid because of insufficient notice and the absence of Ip, the new directors' appointments were invalid because of insufficient notice of those appointments, the first licence agreement was invalid because of insufficient notice of the meeting, and the second licence agreement was invalid because the IWT directors did not authorise entry into that agreement - held: the discussion of the ratification motion and its passing, in circumstances where the chair had indicated there would be an adjournment and instead continued the meeting after Ip left, was a procedural, rather than a substantive, irregularity - the exclusion of a director from a meeting when the meeting is considering a motion on which that director has a right to vote is a substantive irregularity, but Ip had not established a right to vote on the ratification motion, as he had a material personal interest in the ratification resolution - s195(1) of the *Corporations Act 2001* (Cth) prohibited Ip from being present during the discussion of, and voting on, the ratification motion - there is no obligation, absent the imposition of such an obligation in the Constitution of a company, for the business proposed to be transacted to form part of the notice of meeting - the ratification had been valid - the appointments of directors had been valid - IWT's Constitution reflected a well-established principle that a director who attends and participates in a meeting of directors will be held to have waived the requirement of notices - Ip had attended and actively participated in the meeting regarding the first licence agreement, and

had thereby waived his right to impugn the meeting for insufficiency of notice - the evidence did not establish that the directors of IWT had not made a decision to enter into the second licence agreement - further it was not apparent that either the NZ company or Ip had standing to seek a declaration that the second licence agreement was void, as any direct cause of action with respect to the setting aside that licence agreement belonged to IWT or the New York company - proceedings dismissed.

[Tri-Force Enterprise Limited](#) (I B)

## **Re AUSCOAL Superannuation Pty Ltd atf the Mine Superannuation Fund; Application for Judicial Advice [2024] NSWSC 32**

Supreme Court of New South Wales

Robb J

Equity - there was proposed merger between the Mine Superannuation Fund and the TWUSUPER superannuation fund - the trustee of Mine Super was concerned that, if the merged Fund or any part of it were terminated or wound up in circumstances where there were a deficit in available assets to meet the Fund's obligations to members, the distributions to the present members of TWUSUPER would be reduced in favour of certain classes of members of Mine Super - the Trustee sought the opinion, advice, or direction of the Court under s63 of the *Trustee Act 1925* (NSW) - held: members of superannuation funds with an accumulation interest are entitled to benefits measured by the accumulated value of the contributions and the product of their investment - by contrast, members with a defined benefit interest are entitled to a benefit calculated by a prescribed formula - Mine Super had both types of members, and TWUSUPER members were all entitled to accumulation benefits - on the proper construction of the trust deed, and notwithstanding the presence of a clause providing that the trust was a single trust, the trustee would be justified in administering Mine Super on the basis that, where there was a deficit in a defined benefit category, or in a winding up of a category or Mine Super, the assets available to fund defined benefit entitlements would be restricted to the assets attributed to the relevant category - it was the Court's opinion and advice that any benefits payable to a beneficiary with respect to a defined benefit interest in Mine Super would not be payable from assets attributed to accumulation member categories, or any other category treated by the trustees as an accumulation category - this advice was subject to the trustee administering Mine Super by exercising all the powers available to it as explained in the Court's reasons for judgment, to ensure that the assets available to fund defined benefit entitlements would be restricted to the assets attributed to the applicable category, or that the aggregate defined benefit entitlements were adjusted so as not to exceed the net realisation value of the assets attributed to the relevant category - it was also subject to the Australian Prudential Regulation Authority exercising its power under s332 of the *Superannuation Industry (Supervision) Act 1993* (Cth) to modify the application of certain regulations in the *Superannuation Industry (Supervision) Regulations 1994* (Cth) to Mine Super in the manner set out in the Court's reasons for judgment.

[View Decision](#) (I B)

# Benchmark

## **Eyre-Walker v Swyrydan (Costs) [2024] VSC 29**

Supreme Court of Victoria

Gray J

Costs in succession cases - two executors sought the removal of the third, claiming that he had a conflict of interest arising from his occupation of an estate property and that he was delaying or preventing the administration of the estate - the third director consented to an order that he be discharged on the day before the hearing - the Court now considered the question of costs - held: under s24(1) of the *Supreme Court Act 1986* (Vic), the Court had a broad discretion as to costs, but that discretion must be exercised judicially, by reference to the factors raised by the case - s34(1) of the *Administration and Probate Act 1958* (Vic), under which the application had been brought, also provides that the Court may make such order as to costs as it thinks fit - the welfare of the beneficiaries and the protection of their interests in the estate is the paramount consideration in exercising the discretion - a person who incurs costs by reason of them suing or being sued as trustee will generally be entitled to their costs out of the fund held by them as trustee, and this will be true of a person suing or being sued as executor and trustee of an estate - the need for a proceeding arose from the defendant's own conduct and, in particular, his failure to obtain timely independent legal advice - the Court therefore disallowed his application to be indemnified for his legal costs out of the assets of the estate - the plaintiffs had been successful in obtaining orders by consent that the defendant cease to be an executor, but not in obtaining an order for occupation rent, or orders that the defendant assume estate liabilities for insurance and other outgoings - the plaintiffs should only receive a costs order against the defendant for that part of the proceeding relating to his removal from office as an executor, which the Court fixed at 50% of their total costs, and which the plaintiffs would be entitled to deduct from the defendant's share of the estate - there was no reason these costs should be on an indemnity basis - the balance of the plaintiffs costs to be borne by the estate.

[Eyre-Walker](#) (I B)

## **GLP Batesford Holdings Pty Ltd v 68 Bridge Road Land Pty Ltd [2024] VSC 36**

Supreme Court of Victoria

M Osborne J

Discovery and subpoenas - the parties contracted for the sale of land for \$176million plus GST - the vendor had an existing contract to acquire the property from its previous owner - a special condition provided that the purchaser was entitled to lodge a caveat, but that, if it did so, the purchaser must permit registration of any dealings, "contemplated by this contract, include those" required for the vendor to become the registered proprietor, and to grant a security interest to a financier for the purpose of the vendor acquiring the property - the purchaser sought a declaration that, on the proper construction of this special condition, the vendor was entitled to register only such dealings, or alternatively for rectification of the special condition by deleting the words "contemplated by this contract, include those" - the Court ordered discovery, and the purchaser contended the vendor's discovery was insufficient - purchaser also issued nine subpoenas to various parties, including telecommunications companies - the vendor objected to the subpoenas to the telecommunications companies on the basis they lacked a

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legitimate forensic purpose - held: the fact that the vendor asserted a state of mind contrary to the limitation on the special condition apprehended by the purchaser did not necessarily mean that the vendor would be expected to have any documents in its possession beyond the contract - it by no means followed that one would ordinarily expect there to be documents that go to the question of the vendor's state of mind in respect of the limitation, beyond a particular email between the parties or the contract of sale - the vendor had confirmed in correspondence that it did not have any such documents - the discovery burden on a party denying an allegation of state of mind did not extend to an obligation to produce all communications between the vendor and its mortgagee, unlimited by subject matter or time - the purchaser's complaint of insufficient discovery was not made out - as to the subpoenas to the telecommunication companies, it was far from clear how the mere fact of a communication between representatives of the vendor and its agents or its lenders in and of itself had any legitimate forensic purpose - there as nothing to suggest that anything turned on the fact that the vendor and its lender and estate agent were in communication during the relevant period - however, as the documents had been produced to the Court, the subpoenas were not set aside, but orders were made that no party may inspect the documents, which could be revisited if the evidence developed in a way so as to make the documents potentially relevant.

[GLP Batesford Holdings Pty Ltd](#) (I B C)

## **Dickson v Hassum & Levitt Pty Ltd & Anor [2024] QCA 15**

Court of Appeal of Queensland

Mullins P, Boddice JA, & Applegarth J

Workers compensation - the appellant claimed to have injured his back and knee at work in 2002 - he lodged applications for compensation under the *WorkCover Queensland Act 1996* (Qld) in respect of the incidents relating to his knee but never made a claim for compensation in respect of the back injury - in 2022, the appellant lodged a notice of claim for damages regarding the back injury, and then commenced proceedings against his former employer and WorkCover in the Supreme Court for damages for personal injuries for an amount in excess of \$900,000, as well as an extension of the limitation period pursuant to s31(2) of the *Limitation of Actions Act 1974* (Qld) - the primary judge refused the application to extend the limitation period - the appellant appealed - held: there was no substance whatsoever in the appellant's submission that the questioning of him by the primary judge that was undertaken to better understand the basis for his application raised an apprehension of bias on the primary judge's part - the primary judge had made it clear that she wanted to hear further from the appellant "about what you say is the material fact of a decisive nature" - the essence of the appellant's argument was that he sustained an injury in 2002 because of the unlawful act of another employee and that it was unfair in those circumstances that the *Limitation of Actions Act* should be used against him - however, the primary judge was bound to apply the Act according to its terms and by reference to the evidence that was adduced on the application, and not by notions of fairness - there was no error in the primary judge's exercise of discretion to make a costs order against the appellant - appeal dismissed with costs.

[Dickson](#) (I B)







## Poem for Friday

### **I wish I could remember that first day**

**By:** Christina Rossetti (1830-1894)

I wish I could remember that first day,  
First hour, first moment of your meeting me,  
If bright or dim the season, it might be  
Summer or Winter for aught I can say;  
So unrecorded did it slip away,  
So blind was I to see and to foresee,  
So dull to mark the budding of my tree  
That would not blossom for many a May.  
If only I could recollect it, such  
A day of days! I let it come and go  
As traceless as a thaw of bygone snow;  
It seemed to mean so little, meant so much;  
If only now I could recall that touch,  
First touch of hand in hand—Did one but know!

**Christina Rossetti** was an English poet and author, born on 5 December, 1830 in London. She was the daughter of the poet and political exile from Italy, Gabriele Rossetti, who later taught at King's College. She was the sister of the painter and poet Dante Gabriel Rossetti and sat for many of his well-known paintings. One of her best-known works was "*In the Bleak Midwinter*" which later became a Christmas carol. She wrote devotional prose, children's books and novels. She was one of the first female stamp collectors commencing in 1847. The world's first adhesive postage stamp, the Penny Black, was issued in the UK on 1 May 1840, only 7 years before Christina Rossetti started her stamp collection. Rossetti died on 29 December 1893 and was buried at Highgate Cemetery in the family grave.

Dame Judi Dench recites **I wish I could remember that first day**.

<https://www.youtube.com/watch?v=jYEOi-3PVkY>

Kings College Choir sings **In the bleak mid-winter**, music by Gustav Holst, arranged by Mack Wilberg.

<https://www.youtube.com/watch?v=pTzqMi2AQF8>

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