

Friday, 17 June 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)

Aveo Group Limited v State Street Australia Ltd in its capacity as Custodian for Retail Employees Superannuation Pty Ltd (Trustee) (FCAFC) - corporations - validity of Super Majority Resolution removing appellant from role under Advisory Services Deed - construction of securityholders deed - appeal dismissed (I B C G)

Waterhouse v Independent Commission Against Corruption (No 2) (NSWCA) - administrative law - ICAC not obliged to investigate further applicant's complaint - allegations of bias rejected - appeal dismissed (I B C G)

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (NSWSC) - security of payments - error on face of record by adjudicator - determination quashed (I B C G)

Kovacic v TAC (VSCA) - accident compensation - transport accident - 'serious injury' application - Court accepted concession of error concerning consideration of 'pain and suffering' consequences - matter remitted - appeal allowed (I B C G)

Miller v Loel (QSC) - real property - caveats - first defendant's summary judgment application refused - second defendant's summary judgment application adjourned (B C)

Jackson v Arawak Holdings Pty Ltd (QSC) - costs - unsuccessful applicant to pay first respondent's costs on indemnity basis as agreed in clause of mortgage (I B C G)

O'Connor v Insurance Commission of Western Australia (WASCA) - negligence - contributory negligence - motor vehicle accident - pedestrian killed when struck by bus - no error in apportionment of liability of two-thirds against deceased - appeal dismissed (I B C G)

Summaries With Link (Five Minute Read)

Aveo Group Limited v State Street Australia Ltd in its capacity as Custodian for Retail Employees Superannuation Pty Ltd (Trustee) [2016] FCAFC 81

Full Court of the Federal Court of Australia

Allsop CJ; Foster & Gleeson JJ

Corporations - primary judge refused appellant's application for declaratory relief as to invalidity of resolutions proposed to be put at meetings - resolutions were passed at meetings as "Super Majority Resolutions" - under parties' contractual arrangements certain resolutions required to be passed as a Super Majority Resolution defined as "a resolution that has been passed by at least 75% of the total votes that may be cast by the holders of the relevant securities entitled to vote on the resolution including those not present at the meeting in person or by proxy" - resolution subject of appeal was Super Majority Resolution concerning second appellant's removal from its role under Advisory Services Deed between it and other parties and appellant's termination as Advisor under deed - management of stapled investment comprised of three entities - whether respondents lawfully entitled to call meetings to propose resolutions - 'whether a super majority resolution was a special resolution' - ss9, 249F, 249Q, 250R & 252D *Corporations Act 2001* (Cth) - construction of securityholders deed - held: grounds of appeal failed - appeal dismissed.

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

Waterhouse v Independent Commission Against Corruption (No 2) [2016] NSWCA 133

Court of Appeal of New South Wales

Basten, Ward & Gleeson JJA

Administrative law - bias - applicant sought leave to appeal from decision of Garling J that Independent Commission Against Corruption (ICAC) had discretion to decline to investigate further the applicant's allegations of corruption - applicant also alleged Supreme Court judges tainted by bias and sought to set aside earlier judgment in application for leave on basis of bias - s187 *Evidence Act 1995* (NSW) - Pt 3, Pt 6, ss2A, 8, 12, 13, 20, 59 & 60 *Independent Commission Against Corruption Act 1988* (NSW) - Sch 1[15] *Independent Commission Against Corruption Amendment Act 2005* (NSW) - Sch 1[1], [2] *Independent Commission Against Corruption (Operations Review Committee) Act 2006* (NSW) - r14.23 *Uniform Civil Procedure Rules 2005* (NSW) - held: ICAC under no obligation to investigate applicant's complaint - allegations of bias rejected - appeal dismissed.

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

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2016] NSWSC 770

Supreme Court of New South Wales

Emmett AJA

Security of payments - first defendant sought adjudication of payment claim it served on plaintiff under agreement whereby first defendant agreed 'to supply and install external louvers to the façade of an apartment complex' - adjudicator found plaintiff owed amount to first defendant under subcontract - plaintiff contended adjudicator denied it procedural fairness or erred on face of record in rejection of claim it was entitled to liquidated damages from first defendant - *Building and Construction Industry Security of Payment Act 1999* (NSW) - *Civil Procedure Act 2005* (NSW) - *Home Building Act 1989* (NSW) - held: no denial of procedural fairness - there was error on face of record in adjudicator's conclusion that plaintiff obliged to prove default by first defendant caused failure achieve practical completion before being entitled to the liquidated damages - adjudicator's determination quashed.

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

Kovacic v TAC [2016] VSCA 139

Court of Appeal of Victoria

Weinberg & Beach JJA

Accident compensation - transport accident - applicant involved in transport accident - applicant commenced County Court proceeding against respondent - applicant sought leave pursuant to s93 *Transport Accident Act 1986* (Vic) to seek recovery of common law damages for injuries allegedly suffered in accident - applicant relied on 'serious injury' definition in s93(17) - primary judge dismissed proceeding - parties filed minutes of consent orders seeking that applicant be granted leave to appeal and appeal be allowed - 'very considerable' test - credibility - held: Court accepted respondent's concession of error by primary judge in that matters concerning pain consequences of injury were either not properly considered or their rejection not adequately explained' - matter remitted- appeal allowed.

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

Miller v Loel [2016] QSC 135

Supreme Court of Queensland

Mullins J

Summary judgment - real property - caveats - plaintiffs sought damages against first defendant on indemnity basis for "abuse of process" and against first and second defendants for loss of profit in respect of caveat's improper lodgement and continuance - defendants sought summary judgment on basis they were not proper defendants and claim had no prospects of success - s130 *Land Title Act 1994* (Qld) - rr171 & 293 *Uniform Civil Procedure Rules 1999* (Qld) - held: not appropriate to order summary judgment in first defendant's favour at this stage - first defendant's application dismissed - second defendant's application adjourned to give plaintiffs opportunity to replead statement of claim.

[Miller](#) (B C)

Jackson v Arawak Holdings Pty Ltd [2016] QSC 133

Supreme Court of Queensland

P McMurdo JA

Costs - Court dismissed applicant's originating application and ordered removal of caveat lodged by applicant - first respondent sought costs on indemnity basis, relying on clause of loan document and clause of mortgage - held: provisions such as that in mortgage clause did not require Court to award indemnity costs however they usually had that consequence - no basis for holding that costs should not be awarded on indemnity basis as agreed in mortgage - indemnity costs awarded to first respondent.

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

O'Connor v Insurance Commission of Western Australia [2016] WASCA 95

Court of Appeal of Western Australia

McLure P; Buss & Mazza JJA

Negligence - motor vehicle accident - action under *Fatal Accidents Act 1959* (WA) - contributory negligence - appellants were deceased's children - deceased died when struck by bus driven by defendant - trial judge found collision caused by driver's negligence but reduced damages by two-thirds for deceased's contributory negligence - Insurance Commission of Western Australia substituted for driver as respondent pursuant to s7(2) *Motor Vehicle (Third Party Insurance) Act 1943* (WA) - appellants contended trial judge erred in apportioning two-thirds/one-third liability against deceased - ss5B, 5K & 5L *Civil Liability Act 2002* (WA) - s4 *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) - held: grounds of appeal failed - appeal dismissed

[O'Connor](#) (I B C G)

CRIMINAL

Executive Summary

Tieu v R (NSWCCA) - criminal law - convictions on counts involving robbery and attempted robbery armed with shotgun - cross-examination of accused as to credit without leave - unfair prejudice - retrial - appeal allowed

R v Lovell (QCA) - criminal law - murder - jury's verdict not unreasonable - trial judge not obliged to give directions sought and no miscarriage of justice arising from failure to give them - appeal dismissed

Summaries With Link

Tieu v R [2016] NSWCCA 111

Court of Criminal Appeal of New South Wales

Basten JA; McCallum & Davies JJ

Criminal law - applicant pleaded not guilty to three counts involving robbery while armed with shotgun and two counts involving attempted robbery while armed with same shotgun - prosecution case was that applicant was getaway driver - person who entered or attempted to enter premises gave evidence implicating applicant in offences - applicant convicted and sentenced - applicant sought to appeal against convictions on basis trial miscarried because prosecutor 'embarked on cross-examination of the applicant on his criminal record, in the absence of leave granted by the trial judge' - gate-way to cross-examination - operation of r4 *Criminal Appeal Rules* - ss5, 5F & 6 *Criminal Appeal Act 1912* (NSW) - s103 *Criminal Justice Act 2003* (UK) - s56 *Evidence Act 1898* - ss38, 55, 101A, 102, 103, 104, 104A, 135, 137, 190 & 192, Dictionary - *Evidence Act 1995* (NSW) - Sch 1 *Evidence Amendment Act 2007* (NSW) - s6 *Interpretation Act 1987* (NSW) - held (by majority): cross-examination had proceeded without leave - trial judge had not adequately considered provisions of Evidence Act - applicant had suffered unfair prejudice - appeal allowed - retrial.

[Tieu](#)

R v Lovell [2016] QCA 151

Court of Appeal of Queensland

Morrison & P McMurdo JJA; Boddice J

Criminal law - murder - appellant convicted of murder of Robin Lawrence Behrendorff - appellant and co-accused sentenced to life imprisonment - appellant appealed against conviction - issues was whether verdict unreasonable in all circumstances and whether trial judge failed to give appropriate directions to jury resulting in miscarriage of justice - held: jury's verdict not unreasonable - trial judge not obliged to give any of the sought directions and there was no miscarriage of justice arising from failure to give them - appeal dismissed.

[Lovell](#)



Benchmark

An Evening Prayer from Under Milk Wood

by [Dylan Thomas](#)

Every morning when I wake,
Dear Lord, a little prayer I make,
O please do keep Thy lovely eye
On all poor creatures born to die.

And every evening at sun-down
I ask a blessing on the town,
For whether we last the night or no
I'm sure is always touch-and-go.

We are not wholly bad or good
Who live our lives under Milk Wood,
And Thou, I know, wilt be the first
To see our best side, not our worst.

O let us see another day!
Bless us all this night, I pray,
And to the sun we all will bow
And say, good-bye – but just for now!

[The Sydney Male Choir](#)

The Sydney Male Choir formed in 1913. Each year, since 1930, the Choir has led the singing at the ANZAC Day Dawn Service at the Cenotaph in Martin Place Sydney. In 2013, the choir's Centenary Year, it sung at the ANZAC Day service in Villers-Bretonneux, France and took part in the Cornwall International Male Voice Choral Festival.

www.sydneymalechoir.com.au

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