

Friday, 21 June 2024

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

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 (One Minute Read)

Rizk v Basseal (FCA) - builder's labourer/carpenter who provided services in house renovations was not an employee (I B C)

Wu v DSMJ Pty Ltd (FCA) - Court refused to refer appeal from the Federal Circuit and Family Court of Australia to the Full Court (B I)

M. & S. Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd (NSWCA) - summonses stated a wrong date for commission of an environmental offence, which was before the relevant section commenced - primary judge erred by dismissing the summonses and refusing leave to amend the date (I B C)

Commissioner of Police v Attorney General for New South Wales (NSWCA) - public interest immunity abrogated by necessary intendment regarding production to the Law Enforcement Conduct Commission under notices under s114 of the *Law Enforcement Conduct Commission Act 2016* (NSW) for the purpose of oversight and monitoring of a critical incident investigation (I)

Cosgrove v Hutchinson; Hutchinson v Cosgrove (NSWSC) - Court dismissed related proceedings regarding a tenant's right to reside in a home that had been owned by a deceased (B I)

Jens v The Society of Jesus in Australia (VSC) - 2011 settlement deeds releasing the defendant from claims for sexual abuse that occurred around 1970 set aside under s27QD and s27QE of the *Limitations of Actions Act 1958* (Vic) (I)

HABEAS CANEM

Small dog, big surf



Benchmark

Summaries With Link (Five Minute Read)

Rizk v Basseal [2024] FCA 647

Federal Court of Australia

Shariff J

Employment law - the appellant was a builder's labourer and carpenter who had assisted with house renovations - he claimed that he had been an employee and that he was underpaid as a result of various alleged contraventions of the *Fair Work Act 2009* (Cth) - the primary judge was not satisfied that the appellant was an employee and dismissed the proceedings - the appellant appealed - held: then appeal was an appeal by way of rehearing and the appellant had to demonstrate error of law or fact on the part of the primary judge - making a finding whether a worker is an employee is not an exercise in, or akin to, discretionary decision-making - although there may be evaluation involved, the worker is either an employee or an independent contractor - the appropriate standard of review in this case was therefore the "correctness standard" set out in authorities such as *Warren v Coombes* (1979) 142 CLR 531 - however, the appellant did not challenge any of the findings made by the primary judge as to his credit and reliability, or the finding that certain documentary evidence which he tendered was unreliable - the Court therefore proceeded on the basis that the primary judge had all the advantages of making an assessment of the evidence at trial, noting that findings of fact based on the credibility of witnesses can only be reversed by an appellate court "in exceptional cases" - the Court therefore had to do a real review of the evidence that was before the primary judge but noting that the primary judge enjoyed all the advantages of being the trial judge - where there is no written contract, the identification of the parties' contractual rights and duties must proceed somewhat differently from where there is a written contract, but the fundamental task remains the same: the parties' contractual rights and obligations are to be ascertained and characterised - on the evidence before the primary judge and facts as found, once the appellant accepted the engagement, he decided which days to work, when to work on those days and for how long - the primary judge had not failed to consider and apply binding authority - appeal dismissed.

[Rizk](#) (I B C)

Wu v DSMJ Pty Ltd [2024] FCA 661

Federal Court of Australia

Kennett J

Appeals - the Federal Circuit and Family Court of Australia, Division 2, dismissed a claim for relief under s62 of the *Fair Work Act 2009* (Cth) about the reasonableness of additional hours of work - the appellant appealed, and sought that the appeal be heard by a Full Court - held: s25(1AA) of the *Federal Court of Australia Act 1976* (Cth) provides that the appellate jurisdiction in an appeal from the Federal Circuit and Family Court is to be exercised by a single judge or, if a judge considers it appropriate, to be exercised by a Full Court - case law has recognised that appeals from the Federal Circuit and Family Court will be heard by a single judge unless there is some persuasive reason why it is more appropriate for the case to go to a Full Court - this recognises the additional public resources that are involved in having a case heard by three

judges, and the more complicated logistics, and usually accompanying delay, involved in convening a Full Court to hear an appeal - usually, an appeal is referred to the Full Court because it raises novel issues of law or issues of general importance, or questions the correctness of existing authority - the appellant's concern as to whether the allocated judge had specific expertise in workplace relations law was not relevant - where an appellate court is asked to make adverse findings regarding the conduct of a judge of the Federal Court, the appeal might be referred to a Full Court, but no such considerations arose where there is an allegation against a judge of a lower court - there is no general principle that an absence of precedent on a point the appellant wishes to raise justifies referring an appeal to a Full Court - while it may be accepted that the rights of large numbers of workers and employers are affected by s62, it does not follow that this particular case had special significance for a large body of employees - application dismissed.

[Wu](#) (B I)

M. & S. Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd [2024] NSWCA 151

Ward P, Mitchelmore JA, Preston CJ of LEC

Environmental law - M&S commenced proceedings, charging the defendants with each committing an offence against s144AAA of the *Protection of the Environment Operations Act 1997* (NSW) by unlawfully disposing of asbestos waste - the summonses stated that the offence was committed during a particular period - this period was before the Act had been amended to add s144AAA - M&S sought to amend the summonses to alleged breaches after s144AAA commenced, and the defendants applied to have the summonses dismissed - the primary judge dismissed the summonses - by two applications, M&S sought to appeal from and sought review of the primary judge's decision - held: s15(2) and s16(1) and (2) of the *Criminal Procedure Act 1986* (Cth) provided that the summonses were not "bad, insufficient, void, erroneous or defective" on the ground that they stated time wrongly or stated an "impossible day", and that no objection could be taken to the summonses on the grounds of any alleged defect in substance or form - the general rule is that a statement in an indictment or other process by which criminal proceedings are commenced, including a summons, of the date on which the offence was committed is not a material matter, unless it is actually an essential part of the alleged offence - contrary to the primary judge's finding, the summonses did disclose an offence known to law, and so were not nullities for failing to do so - the stated date of the offence may have been "an impossible day" on which to commit the offence, but that did not make the offence one that is now not known to the law - the primary judge erred in deciding to dismiss M&S's notice of motion seeking leave to amend the summonses - appeal allowed.

[View Decision](#) (I B C)

Commissioner of Police v Attorney General for New South Wales [2024] NSWCA 150

Court of Appeal of New South Wales

Ward P, Gleeson, & Adamson JJA

Public interest immunity - the Law Enforcement Conduct Commission (LECC) is currently

monitoring two critical incident investigations pursuant to Pt 8 of the *Law Enforcement Conduct Commission Act 2016* (NSW), each incident involving the death of a person during a police operation - the LECC issued notices to two offices calling for a copy of the State Technical Investigation Branch surveillance records and iSURV logs relating to the first critical incident and a copy of the Less Lethal Manual and iSURV logs relating to the second critical incident - the Police Commissioner and the two officers sought declaratory relief from the Court of Appeal as to the proper construction of s114(3)(d) of the *Law Enforcement Conduct Commission Act 2016* (NSW), and in particular whether the officers could decline to produce the documents sought on the grounds of public interest immunity - held: on the proper construction of s114(3)(d), read in the context of the legislation as a whole and having regard to the objects and purpose of the legislation, public interest immunity had been abrogated by necessary intendment in relation to the production of material to LECC under notices issued under s114 for the purpose of oversight and monitoring of a critical incident investigation - declarations sought by the Commissioner and the officers not made.

[View Decision](#) (I)

Cosgrove v Hutchinson; Hutchinson v Cosgrove [2024] NSWSC 748

Supreme Court of New South Wales

Hammerschlag CJ in Eq

Leases - a retired financial planner died, leaving a will that gave his household chattels and an indexed annuity to his wife, and the residue of his estate to his children - he owned a house in which the plaintiff (the wife's daughter from a previous relationship) lived with her son - the plaintiff said that the deceased had asked her to move closer to him and his wife, and had told her that he would buy a house for her to live in, that she would not have to pay more than \$200 per week, even after he died, but that when she was elderly and did not need the House, it would be sold and the proceeds given to his children - the deceased and the plaintiff had entered into a 30-year lease in 2011 - the deceased children, who after administration of the estate owned the property as tenants in common, served a notice increasing the rent to \$750 per week - the plaintiff continued to pay \$200 per week, and the children served a termination notice for failure to pay the increased rent - the NSW Civil and Administrative Tribunal did not have jurisdiction as the dispute was between residents of different states - the children sought possession and rent in the Local Court - the plaintiff commenced proceedings in the Supreme Court and the Local Court proceedings were transferred to the Supreme Court - held: s119 of the *Residential Tenancies Act 2010* (NSW) provides that a landlord must not commence proceedings against a tenant or former tenant of the landlord in the Supreme Court, the District Court, or the Local Court to obtain recovery of possession of residential premises subject to a residential tenancy agreement - the children's claim for possession had to be dismissed, leaving their claim for rent - even though the children's Local Court claim included a claim for money, which could have been brought on its own, the Local Court proceedings constituted one suit which was commenced contrary to the express prohibition in s119.

[View Decision](#) (B I)



Jens v The Society of Jesus in Australia [2024] VSC 329

Supreme Court of Victoria

Ierodiaconou AsJ

Historical sexual abuse - the sexually abused by a Jesuit priest while student boarder at Xavier College in Melbourne in 1968 and 1970 - the plaintiff had signed settlement deeds in 2011 releasing the defendant from claims relevant to the abuse in return for \$150,000 and the costs of boarding the plaintiff's two sons at the College - the plaintiff now applied to set aside the settlement deeds in whole, pursuant to s27QD and s27QE of the *Limitations of Actions Act 1958* (Vic) - held the question was whether it is just and reasonable to set aside the settlement deeds, whether wholly or in part - at the time of negotiating the settlement deed, the plaintiff's claim was subject to a time limitation barrier and a legal identity barrier - these legal barriers materially impacted the plaintiff's decision to enter into the settlement deed - the plaintiff received legal advice before negotiating the settlement deed, but did not have legal advice while negotiating the deed or regarding the quantum of the settlement - save for the legal barriers, the plaintiff had a good prospect of success if he proceeded to trial when he entered into the settlement deed - the compensation paid to the plaintiff was heavily discounted in comparison to the damages that he might be awarded now - the effluxion of time causes prejudice, but the defendant had not identified any material prejudice by reason that would make it not just and reasonable to set aside the settlement deeds - it was just and reasonable to set aside the settlement deeds.

[Jens \(I\)](#)



Poem for Friday

"Hope" is the thing with feathers (314)

By Emily Dickinson (10 December, 1830-15 May, 1886)

Hope is the thing with feathers -
That perches in the soul -
And sings the tune without the words -
And never stops - at all -

And sweetest - in the Gale - is heard -
And sore must be the storm -
That could abash the little Bird
That kept so many warm -

I've heard it in the chilliest land -
And on the strangest Sea -
Yet - never - in Extremity,
It asked a crumb - of me.

Emily Dickinson https://en.wikipedia.org/wiki/Emily_Dickinson

Emily Dickinson Museum https://en.wikipedia.org/wiki/Emily_Dickinson_Museum

Hope is the thing with feathers, sung by Nazareth College Treble Choir, Linehan Chapel,
Nazareth College

<https://www.youtube.com/watch?v=gDlSo4hEzmE>

Recitation by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada.

Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir



Benchmark

Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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