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LAWYERS

# Benchmark

**Friday, 23 February 2024**

## 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)

**Child Support Registrar v CMU23** (FCA) - while construing the *Child Support (Assessment) Act 1989* (Cth), the Court noted that the rule of law is put in jeopardy when legislation becomes so complex as not readily to admit of administration by ordinary, good, honest civil servants, or ready comprehension by ordinary Australians of average intelligence (I B)

**Neilson v Secretary, Department of Planning and Environment** (NSWCA) - the Department was not required to upgrade two roads in a National Park so as to allow all weather access by a car towing a boat on a trailer to a commercial oyster lease located outside the National Park (I B C)

**Macari v Snack Brands Foods Pty Ltd** (NSWSC) - plaintiff in negligence failed to establish why he slipped on stairs, and had also not established that there were any reasonable precautions which the defendant should have taken which would have prevented him slipping (I)

**Merrindale Property Pty Ltd v AIL C Sub TC Pty Ltd** (VSC) - vendor had not complied with a condition precedent in a contract for the sale of land, and the purchaser had been entitled to rescind (I B)

**Rhino Trading Pty Ltd v Lotte Enterprise Pty Ltd** (VSC) - Court made a freezing order and an order forbidding departure from Victoria where the recipient of an overpayment had dispersed the funds and refused to return them, and had provided inauthentic bank statements

(I B)

**Iris Broadbeach Business Pty Ltd v Descon Group Australia Pty Ltd & Anor** (QSC) - adjudicator under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) had fallen into jurisdictional error in several respects, including by denial of procedural fairness (I B C)

**Titan Plant Hire Pty Ltd v Work Health Authority and Madalena v Work Health Authority (No 2)** (NTSC) - it had been appropriate for the respondent Authority to engage two counsel in an appeal against sentence for workplace safety offences (I B C)

## HABEAS CANEM

### Green pasture, pink tongue, muddy dog

## Summaries With Link (Five Minute Read)

**Child Support Registrar v CMU23 [2024] FCA 109**
Federal Court of Australia
Logan J
Statutory construction - the respondent parents were parties to a child support case that changed following changes to the actual care responsibilities of the children - the Administrative Appeals Tribunal held that s53(1)(c) of the *Child Support (Assessment) Act 1989* (Cth) did not, on its proper construction, prevent the operation of s51 of that Act, which allowed an interim period, during which care that was to occur under a care arrangement continued to be recorded for a specified period, in certain circumstances, despite care no longer actually occurring pursuant to that care arrangement - the Registrar appealed to the Federal Court on this question of law - held: the Court noted that the elegant simplicity of the former s84 of the *Matrimonial Causes Act 1959-1976* (Cth) stood in marked contrast to the current convoluted and Byzantine provisions which have commended themselves to Parliament - the rule of law is put in jeopardy when legislation becomes so complex as not readily to admit of administration by ordinary, good, honest civil servants, or ready comprehension by ordinary Australians of average intelligence - it was apparent from the Tribunal's reasons that the Tribunal perceived an anomaly or absurdity in the text of s53(1)(c), so that it was open, under the principles of statutory construction, to imply or supply particular additional words into that provision - however, there was no certainty of the kind required by the authorities as to what language needed to be supplied to address any gap of the kind apprehended by the Tribunal - it is not permissible to substitute the text of an explanatory memorandum for the text approved by Parliament - appeal allowed and matter remitted to the Tribunal for further review according to law - the Registrar's decision not to seek costs against the parents (who did not appear) was an administrative value judgment, but accorded with the justice of the case, and the particular difficulties of construction presented by the Act.
Child Support Registrar (I B)

**Neilson v Secretary, Department of Planning and Environment [2024] NSWCA 28**
Court of Appeal of New South Wales
Ward P, Payne, & White JJA
Planning law - the appellant sought declarations and orders in the nature of mandamus requiring the Department to upgrade two roads in a National Park so as to allow all weather access by a car towing a boat on a trailer to a commercial oyster lease located outside the National Park - the primary judge in the Land and Environment Court in its Class 4 jurisdiction dismissed the proceedings - the appellant appealed - held: s81 of the *National Parks and Wildlife Act 1974* (NSW) provides that, where the Minister has adopted a plan of management for a national park, the Secretary of the Department shall carry out and give effect to that plan - the duty under s81, as a matter of construction of both the Act and the Plan of Management adopted by the Minister for the relevant National Park, was to carry out and give effect to the Plan of Management as a whole - s81 and the Plan of Management did not impose any

obligation on the Secretary to complete particular "policies and actions" in a plan of management within any specified time or at all - nothing in the text of the Plan of Management supported the appellant's construction that, "All Weather 4WD standard" implies a quality of road that can be driven by 4WD vehicle hauling a boat trailer - the primary judge did not find that the was an "unlimited" discretion, but had correctly concluded that any policy or action in the Plan of Management was subject to Part 6 of the Act, which imports a necessary discretion as to when and how the duty to implement the Plan of Management overall will be carried out based on available staffing and funding - the primary judge had correctly set out and applied the decision of the High Court in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 while considering the *Wednesbury* test - the Department was not required to prove that the delay in maintaining the roads was reasonable - it was no part of the statutory purpose of s 81 or the Plan of Management to provide road access through the National Park to a vehicle towing a boat to a commercial user of oyster farms lying outside the boundaries of the National Park - appeal dismissed.
View Decision (I B C)

**Macari v Snack Brands Foods Pty Ltd [2024] NSWSC 139**
Supreme Court of New South Wales
Cavanagh J
Negligence - the plaintiff was employed by a labour hire company and was placed at the defendant's premises to do process work in producing potato chips under the control of the defendant - the plaintiff claimed that he was injured when he slipped on starchy water which had splashed out of the potato hopper and fell down some metal steps - he sued the defendant in negligence - held: there was evidence that the steps were defective or inherently unsafe, or had become unsafe, through lack of maintenance at the time of the accident - also, the evidence did not support any contention that there was boiling or starchy water on the steps at the time, and there was no evidence that the presence of cold water on the steps (which was likely) rendered the steps slippery and unsafe to use - the Court also did not accept that the steps were rendered unsafe at the time of the accident because of potato debris that had splashed out of the potato hopper onto the step - the Court accepted the plaintiff had fallen, and that he may have slipped, but a person may slip on steps for a number of reasons - the plaintiff bore the onus of establishing what he slipped on - giving the plaintiff the benefit of the doubt and assuming that he was not the author of his own misfortune only led to a finding that the plaintiff slipped on the steps for reasons which had not been established - the plaintiff had also not established that there were any reasonable precautions which the defendant should have taken which would have prevented him slipping - the evidence was overwhelmingly to the effect that the steps were used regularly throughout every day and had not been found to be slippery, in the sense of being unsafe, on earlier occasions - the plaintiff has not established that the defendant had been negligent - judgment for the defendant - if the plaintiff had succeeded, the Court would have assessed damages of $781,500.
View Decision (I)

**Merrindale Property Pty Ltd v AIL C Sub TC Pty Ltd [2024] VSC 49**
Supreme Court of Victoria
Forbes J
Sale of land - premises under a contract of sale were subject to a ten-year lease to a related company of the vendor, which required the tenant pay the vendor a security deposit of 12 months' rent (which could be by provision of bank guarantee) - the contract of sale was subject to a condition precedent that the vendor secure the bank guarantee from the tenant to the reasonable satisfaction of the purchaser by a particular date - the purchaser contended that the condition precedent was not fulfilled, and purported to rescind the contract - the vendor said the condition precedent had been fulfilled, and sought specific performance - held: the dispute was to be resolved by the construction of the terms of the contract, and in particular what was required to satisfy the special condition that imposed the condition precedent - the contract was to be construed objectively by reference to its text, context, and purpose - where a contract requires performance to the reasonable satisfaction of a party, there is both a subjective component (whether the party was in fact satisfied) and an objective component (whether the party ought as a reasonable person to have been satisfied) - the contract was to be construed as requiring the vendor to have obtained the printed original bank guarantee in its favour by the deadline - the evidence was clear that the CEO of the Australian and New Zealand members of the vendor's corporate group, who acted for the vendor on all day-to-day operational and accounting matters, had possession of an electronic copy of the duplicate bank guarantee, but the bank retained possession of the printed original bank guarantee - the evidence showed that the bank was holding the original bank guarantee as its own document pending collection by the customer - the vendor did not have the benefit of securing its tenant's obligations under the lease until such time as it was in a position to present an instrument giving that security, and its obligation under the contract was to obtain a bank guarantee enforceable by the landlord - the vendor had provided nothing to the purchaser, before the purchaser's rescission letter, to confirm that the bank guarantee had been procured (irrespective of who held it) - the vendor had not complied with the condition precedent by the deadline, and the purchaser had been entitled to rescind.
Merrindale Property Pty Ltd (I B)

**Rhino Trading Pty Ltd v Lotte Enterprise Pty Ltd [2024] VSC 52**
Supreme Court of Victoria
M Osborne J
Freezing orders - Rhino operates an online digital currency trading exchange - Rhino noted that Lotte's usual trading pattern had changed, and asked for proof of the source of funds and evidence of Lotte's business activities, and Lotte provided bank statements in an account in Lotte's name from the Bank of Melbourne - Rhino then mistakenly credited Lotte's trading account with AUD995,000 when Lottee had transferred AUD99,500 - Lotte refused to return the mistaken payment and searches revealed only a minimal amount remaining in the blockchain wallet - Rhino also discovered the Bank of Melbourne statements were inauthentic - Rhino applied for freezing orders and an order that the principal of Lotte be restrained from leaving

Victoria or attending any point of international departure, and should be required to deliver up his passport to the Court - held: the circumstances gave rise to a cause of action against Lotte for restitutionary remedies, including moneys paid under a mistake or pursuant to contract where the consideration has totally failed - there was also a good arguable case against Lotte's principal pursuant to the second limb of *Barnes v Addy* on the basis that the money when received by Lotte constituted trust money and the subsequent dealings with that money were dishonest or fraudulent - there was a risk that any prospective judgment against the defendants would be wholly or partly unsatisfied - the balance of convenience favoured the grant of the freezing order - order for substituted service on Lotte's gmail address - the Court had power to make the no departure order under r37A.03 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (power to make an ancillary order to a freezing order), and s37 of the *Supreme Court Act 1986* (Vic) (power to grant an interlocutory or final injunction if it is just and convenient to do so), and the Court's inherent power - a no departure order involves the restriction of a subject's liberty and needs to be exercised with caution - however, there was a reasonable basis to apprehend that, if no order were made, Lotte's principal may depart the jurisdiction and render the freezing order and the Court's power to make final orders against him unenforceable and of no practical consequence - the company search material disclosed that the principal was born in Malaysia, which suggested overseas ties, and the evidence relating to his presence in Australia suggested no firm ties - the balance of convenience favoured the grant of the no departure order - no departure order made.
Rhino Trading Pty Ltd (I B)

**Iris Broadbeach Business Pty Ltd v Descon Group Australia Pty Ltd & Anor [2024] QSC 16**
Supreme Court of Queensland
Wilson J
Security of payments - a principal) engaged a head contractor under a written contract to design and construct a development known as the Victoria and Albert Broadbeach project - the principal terminated the contract - the head contractor submitted its final payment claim for about $13.5million under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) - the superintendent responded with a payment schedule certifying that about $3.6million was payable - there was an adjudication under the Act, and the principal sought judicial review of the adjudicator's decision - held: an adjudicator's decision is not reviewable under the *Judicial Review Act 1991* (Qld), and the Act does not contain any provision for appeal from an adjudicator's decision, or any other mechanism by which the adjudicator's decision may be reviewed for error - however, an adjudicator's decision may be reviewed for jurisdictional error - the adjudicator proceeded on the basis that the principal was advancing a right to withhold retention monies pursuant to a clause in the contract where this was not the principal's case - this was a denial of procedural fairness, rather than an error of construction of the contract - had this not occurred, the applicant could have made substantial submissions that, as a matter of reality and not mere speculation, might have persuaded the adjudicator to change her mind, and so the denial of procedural fairness was material - further, the adjudicator's statement

reveals that the adjudicator either did not consider the applicant's submissions regarding a particular clause of the contract, or did not carry out a process of active intellectual engagement with the applicant's submissions - the head contractor accepted that the adjudicator had erred in awarding insurance costs where it had not claimed those costs - the adjudicator had also exceeded her jurisdiction by awarding more for the structural engineer consultant item than the head contractor had claimed - the adjudicator had also erred in respect of the valuation of the architect item - the purported payment claim had requested payment, and had therefore been a valid payment claim and had founded the adjudicator's jurisdiction under the Act.
Iris Broadbeach Business Pty Ltd (I B C)

**Titan Plant Hire Pty Ltd v Work Health Authority and Madalena v Work Health Authority (No 2) [2024] NTSC 8**
Supreme Court of the Northern Territory
Kelly J
Costs in industrial law cases - Titan was a construction and earthmoving equipment hire company which hired out equipment from four yards in Western Australia and the Northern Territory - Madalena was the sole director and shareholder of Titan - an employee of another company who was picking up an excavator was guiding the excavator onto a trailer at Titan's yard at Wishart, near Darwin, when a smaller "trench" bucket attachment that had been stored within the main excavator bucket fell and killed him - Titan and Madelena both pled guilty in the Local Court to a charge of failure to comply with a health and safety duty, contrary to s32 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) - Titan was fined $960,000 and Madelena was fined $180,000 - Titan and Madelena appealed against sentence - the Court dismissed the appeal (see Benchmark 5 October 2023) - the Work Health Authority, as the successful respondent, sought that the matter be certified as fit for two counsel (one being senior counsel) and that the appellants pay the its costs fixed at about $60,000 - held: as to certification for two counsel, the rule was: would a prudent person not compelled by poverty come into Court in such a case without two counsel? - regard must be had, *inter alia*, to the importance of the case, the probable duration of the trial, the probability of conflict of evidence entailing the necessity of careful cross-examination, and the general practice as to employing two counsel - the factors the appellants relied upon (that minimal evidence was required, no witnesses were called, and the appeal was restricted to questions of law) were less applicable in an appeal - the fact that the appeal did not involve allegations of fraud or other serious imputations of personal reputation or integrity was also not particularly relevant - this was the first appeal to the Northern Territory Supreme Court from a sentence imposed under the *Work Health and Safety (National Uniform Legislation) Act*, which harmonised the Northern Territory jurisdiction with like offending across the national uniform legislation, and the case was important for future prosecutions under that Act and involved extensive consideration of interstate authorities - the amount of money was significant and the appellants had engaged both senior and junior counsel - the Court certified the matter as appropriate for the attendance of two counsel, one of them senior counsel - a lump sum costs order was not appropriate, as the Court could not determine what, if any, duplication was involved in the claimed amount -

appellants to pay the respondent's costs as agreed or taxed.
Titan Plant Hire Pty Ltd (I B C)

## Poem for Friday

**A Shropshire Lad  2: Loveliest of trees, the cherry now**

**By:** A. E. Housman (1859-1936)

Loveliest of trees, the cherry now
Is hung with bloom along the bough,
And stands about the woodland ride
Wearing white for Eastertide.

Now, of my threescore years and ten,
Twenty will not come again,
And take from seventy springs a score,
It only leaves me fifty more.

And since to look at things in bloom
Fifty springs are little room,
About the woodlands I will go
To see the cherry hung with snow.

**Alfred Edward Housman**, an English poet and academic, was born on 26 March 1859 in Bromsgrove, UK. His father was a solicitor. His mother died when he was 12 years old. **Loveliest of trees, the cherry now**, is the second poem in Housman's well known collection A Shropshire Lad. Housman was not revealed to be the poet of the cycle of poems until 1896. He was the Professor of Latin at University College, London and later at Cambridge. His study of the classics, including his editions of **Manilius, Lucan** and **Juvenal** are authoritative works. Housman died on 30 April 1936 at Cambridge.

**Dame Judi Dench** recites Loveliest of trees, the cherry now, for The Queen's Green Canopy launch
https://www.youtube.com/watch?v=AO4gcHaqrhg

**George Williams** sings, Loveliest of trees. Music by George Butterworth
https://www.youtube.com/watch?v=lchJ3h-4U4w

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