



Friday, 26 August 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)

Sio v The Queen (HCA) - criminal law - acquittal of murder and conviction of armed robbery with wounding - erroneous admission of hearsay evidence - erroneous directions to jury - conviction of armed robbery with wounding could not stand - new trial ordered for armed robbery offence - appeal allowed (I B C G)

Otsuka Pharmaceutical Co., Ltd v Generic Health Pty Ltd (No 2) (FCAFC) - patents - dismissal of claims for infringement of patent - claims were invalid for lack of novelty and lack of inventive step - appeal dismissed (I B C G)

Nash Bros Builders Pty Ltd v Riverina Water County Council (NSWCA) - environment and planning - developer of retirement village required to pay fee to Council for provision of water supply - appeal dismissed (I B C G)

AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen (NSWCA) - judicial review - motor accidents compensation - review panel erred in confirmation of decision that none of referred injuries were related to motor accident so assessment of permanent impairment not required - appeal dismissed (I B C G)

Sanchez-Sidiropoulos v Canavan (NSWCA) - negligence - student injured during game of tag - no breach of duty by School - no basis for appellate intervention - appeal dismissed (I B C G)

Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd (NSWCA) - real property - equity - compulsory acquisition of land - entitlement to compensation under contract for sale - purchaser had compensable interest - appeal dismissed (I B C G)

Re Hancock; Rennie v The Whippet Association of Victoria Inc (VSC) - wills and estates - Court not satisfied deceased intended will instruction sheets to operate as final will - application dismissed (B)

Abraham v The Hon Peter Charles Collier MLC, Minister for Aboriginal Affairs (WASC) - judicial review - application to quash decision of Aboriginal Cultural Material Committee - no denial of procedural fairness - application dismissed (I B C G)

Summaries With Link (Five Minute Read)

Sio v The Queen [2016] HCA 32

High Court of Australia

French CJ; Bell, Gageler, Keane & Gordon JJ

Criminal law - evidence - hearsay evidence - appellant charged with murder contrary to s18(1)(a) *Crimes Act 1900* (NSW) and armed robbery with wounding contrary to s98 *Crimes Act* - Supreme Court of New South Wales acquitted appellant of murder but convicted of armed robbery with wounding - appellant sentenced to 10 years imprisonment with non-parole period of seven years and six months - Court of Criminal Appeal dismissed appeal - whether appellant's conviction for armed robbery with wounding unreasonable due to inconsistency with acquittal of murder - whether conditions for admissibility of evidence under s65(2)(d) *Evidence Act 1995* (NSW) satisfied - held: trial judge erred in directions to jury by failing to refer to foresight of wounding with knife as element of armed robbery with wounding - trial judge erred in admitting hearsay evidence - conviction for armed robbery with wounding could not stand - Court could not order retrial on charge of armed robbery with wounding because it would traverse verdict of acquittal of murder - Court could not substitute verdict of guilty of armed robbery due to inadmissible hearsay being wrongfully admitted - new trial ordered for armed robbery offence - appeal allowed.

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

Otsuka Pharmaceutical Co., Ltd v Generic Health Pty Ltd (No 2) [2016] FCAFC 111

Full Court of the Federal Court of Australia

Besanko, Nicholas & Beach JJ

Patents - owner and licensee of patent sued respondent for infringement of claims of patent - primary judge found that if claims were valid respondent had infringed or threatened to infringe them - however primary judge found claims invalid for lack of novelty and lack of inventive step - primary judge dismissed claims for infringement - appellants contended primary judge erred in

construction of claims and findings on novelty and inventive step were flawed - held: no error in primary judge's construction of claims or conclusions - appeal dismissed.

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

Nash Bros Builders Pty Ltd v Riverina Water County Council [2016] NSWCA 225

Court of Appeal of New South Wales

Basten, Macfarlan & Ward JJA

Environment and planning - appellants were builders responsible for retirement village's construction on land within local government area - Council was consent authority for development - issue was whether developer is required to pay Council 'development servicing charge' as upfront fee for supply of water to village - Land and Environment Court found in Council's favour - ss81, 94 & 109J *Environmental Planning and Assessment Act 1979* (NSW) - s58(1) *Land and Environment Court Act 1979* (NSW) - cl120 & 21 *Local Government (General) Regulation 2005* (NSW) - ss64, 387, 394, 400, 405, 491, 493, 494, 496, 501, 503, 608, 610, 610A, 610B, Ch 15, Ch 5, Pt 3, Div 2; Ch 12, Pt 5; Pt 10 *Local Government Act 1993* (NSW) - cl1 223 & 224 *Water Management (General) Regulation 2011* (NSW) - ss283, 305, 306, 307, Div 5, Ch 6, Pt 2 *Water Management Act 2000* (NSW) - held: water supply authority not empowered under s306(2) *Water Management Act* to require payment of contribution to water management works' cost in advance of application for certificate of compliance - broad power under s608 *Local Government Act* supported charges levied - operation of 306 *Water Management Act* did not make s608 redundant - appeal dismissed.

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

AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen [2016] NSWCA 229

Court of Appeal of New South Wales

Meagher, Simpson & Payne JJA

Judicial review - motor accidents compensation - respondent sought review of review panel's confirmation of decision of medical assessor that none of referred injuries were related to motor accident so assessment of permanent impairment not required - primary judge quashed certificate of review panel - causation - ss3, 44, 57, 58, 59, 60, 61, 63, 65, 131 & 133 *Motor Accidents Compensation Act 1999* (NSW) - held: primary judge correct to find review panel failed to address correct question - review panel's failure to respond to 'substantial argument' had led to practical injustice - jurisdictional error established - appeal dismissed.

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

Sanchez - Sidiropoulos v Canavan [2016] NSWCA 221

Court of Appeal of New South Wales

Beazley ACJ, Basten & Payne JJA

Negligence - appellant student playing tag injured wrist after colliding with another player - student sued Trustees of Roman Catholic Church for Archdiocese of Sydney in negligence - Trustees removed as defendant - Brother Kelvin Canavan sued as owner of land and person with school's care, control and management - primary judge dismissed claim, finding no breach

Benchmark

of the duty of care owed by School to appellant - s101 *Supreme Court Act 1970* (NSW) - players' age - selection of game - how game played - adequacy of instructions - held: no sufficient level of prejudice in not being allowed to pursue proposed amended ground of appeal - no basis for appellant intervention in primary judge's findings on liability - appeal dismissed.

[Sanchez - Sidiropoulos](#) (I B C G)

Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd [2016] NSWCA 224

Court of Appeal of New South Wales

Basten, Meagher & Ward JJA

Real property - equity - Transport for NSW compulsorily acquired land - dispute concerned entitlement to compensation under *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) between land's registered proprietor (Golden Mile) and purchaser (Cudgegong) under contract for sale of land entered by Golden Mile's mortgagee (Stacks) - primary judge decided Cudgegong had compensable interest - Golden Mile sought to appeal under s57 *Land and Environment Court Act 1979* (NSW) - ss23C, 54A & 111A *Conveyancing Act 1919* (NSW) - ss420A(1)(a), 601AD(2) & 601AH(2) *Corporations Act 2001* (Cth) - ss4, 19, 20 & 37 *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) - ss25(2) & 57 *Land and Environment Court Act 1979* (NSW) - s57(2)(b) *Real Property Act 1900* (NSW) - validity and effectiveness of Stacks' exercise of power of sale to confer equitable interest on purchaser - held: no error in conclusion oral agreement did not contravene s23C *Conveyancing Act* - enforceability of oral agreement not precluded by s54A once Rescission Deed entered - even to extent primary judge erred in finding no "independent" exercise of power of sale it does not lead to upholding of appeal - challenge to finding that interest of purchaser under second contract superior to appellant's for purposes of *Land Acquisition (Just Terms Compensation) Act* failed - appeal dismissed.

[Golden Mile Property](#) (I B C G)

Re Hancock; Rennie v The Whippet Association of Victoria Inc [2016] VSC 496

Supreme Court of Victoria

McMillan J

Wills and estates - deceased died in 2015 - deceased left 2009 Will and 2015 will instruction sheets - plaintiff sought to propound will instruction sheets as deceased's final will - defendant challenged application on ground deceased lacked testamentary capacity and did not intend will instruction sheets to have effect as will - s9 *Wills Act 1997* (Vic) - held: Court not satisfied deceased intended will instruction sheets to operate as final will - application dismissed.

[Re Hancock](#) (B)

Abraham v The Hon Peter Charles Collier MLC, Minister for Aboriginal Affairs [2016] WASC 269

Supreme Court of Western Australia

Pritchard J

Judicial review - applicant sought to quash Aboriginal Cultural Material Committee's decision pursuant to s18 *Aboriginal Heritage Act 1972* (WA) which resolved that two sites were not Aboriginal sites and recommended to Minister for Aboriginal Affairs that he consent on conditions to proposed works whose construction would impact on Aboriginal site - applicant contended decision invalid because made without affording applicant procedural fairness - held: applicant failed to establish Committee owed her duty to afford procedural fairness or breached requirement to afford procedural fairness to Chair of CAAC - application dismissed.

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

CRIMINAL

Executive Summary

Gittany v R (NSWCCA) - criminal law - murder - conviction appeal - applicants partner plunged to her death from 15th floor balcony - evidence of an eyewitness (Rathmell) critical to Crown case - whether eyewitness's evidence of seeing deceased thrown over balcony was reliable, or was re-constructed or contaminated - failure to identify post-event contamination of evidence - whether verdict unreasonable - appeal dismissed

Nguyen v The Queen (VSCA) - criminal law - sentence guideline judgment - cultivation of commercial quantity of cannabis - trafficking - plea entered to 4 counts - appellant was an illegal immigrant - whether sentences were manifestly excessive - whether the sentencing judge erred by failing to take into account the likelihood of deportation - no errors - need to increase sentences for cultivation offences in mid-range-appeal dismissed

Summaries With Link

Gittany v R [2016] NSWCCA 182

Court of Criminal Appeal of New South Wales

Basten JA, R A Hulme & Fagan JJ

Criminal law - murder - conviction appeal - applicants partner plunged to her death from 15th floor balcony - judge alone trial - evidence of an eyewitness (Rathmell) critical to Crown case - whether eyewitness's evidence of seeing deceased thrown over balcony was reliable - whether eyewitness's evidence was unconsciously contaminated or re-constructed - expert evidence (Dr Kemp) adduced at trial on phenomenon of changing memories - on appeal, argued that trial judge erroneously discounted expert evidence and failed to properly assess the reliability of Rathmell's evidence - leave to appeal required (s5(1) *Criminal Appeal Act 1912*) - held: there were problems afflicting the force of the expert's evidence, including a failure to identify the post-event information which might have contaminated the eyewitness' understanding of his

Benchmark

own perception - the trial judge did not inappropriately discount the expert evidence - no error in trial judge's assessment of the reliability of Rathmells' evidence - in considering whether the verdict was unreasonable, the manner in which the appeal is presented in important - *Filippou v The Queen* (2015) 256 CLR 47 and s133(1) *Criminal Procedure Act 1986* considered - no basis for concluding that the judgment was "unreasonable" - leave to appeal granted, appeal dismissed.

[Gittany](#)

Nguyen v The Queen [2016] VSCA 198

Court of Appeal of Victoria

Redlich, Tate & Whelan JJA

Criminal law - sentence guideline judgment - cultivation of commercial quantity of cannabis (narcotic plant) - trafficking - theft of electricity - plea entered to 4 counts - appellant was an illegal immigrant who had married an Australian citizen - total effective sentence of 3 years 6 months imposed, NPP 2 years 6 months - relevance of appellants role in cultivation and trafficking - whether the sentences were manifestly excessive - whether the sentencing judge erred by failing to take into account in mitigation the likelihood of deportation - held: authorities dealing with the relevance of the risk of deportation on sentence considered (*Guden v The Queen* (2010) 28 VR 288; *Konamala v The Queen* [2016] VSCA 48; *Da Costs Jnr v The Queen* (2016) 74 MVR 489; *Schneider v The Queen* [2016] VSCA 76) - the appellant's circumstances differed to offenders in other cases as he was not lawfully resident in Australia - it was entirely speculative whether the Minister might grant a waiver of the "no further stay condition" so as to permit him to pursue an application for a partner visa - no error demonstrated in judge's approach to risk of deportation - the objective seriousness of the offending will usually be described as falling within the low, mid or high range of seriousness 37 VR 341) - in assessing the objective seriousness the appellant's role in the cultivation is of primary importance and is to be determined on a case by case basis - here, the agreed facts demonstrated that the scale of the cultivation was considerable and that it occurred under the appellant's tutelage - the onus lay upon the appellant to adduce evidence in mitigation and he failed to do so - the evidence supported the finding that the appellant was culpable as a principal - the aggravating features of the offending well supported the finding that the offending was within the mid-range - the sentence was not beyond the range of sentences reasonably open to the sentencing judge under the existing sentencing standards - there is a need to correct current sentencing practices for offences of cultivating a commercial quantity of narcotic plant - in future sentencing courts should, by increments, increase the sentences to be imposed for offending in the mid category of seriousness - appeal dismissed.

[Nguyen](#)



Benchmark

Floating Island

By [Dorothy Wordsworth](#)

Harmonious Powers with Nature work
On sky, earth, river, lake, and sea:
Sunshine and storm, whirlwind and breeze
All in one duteous task agree.

Once did I see a slip of earth,
By throbbing waves long undermined,
Loosed from its hold; — *how* no one knew
But all might see it float, obedient to the wind.

Might see it, from the mossy shore
Dissevered float upon the Lake,
Float, with its crest of trees adorned
On which the warbling birds their pastime take.

Food, shelter, safety there they find
There berries ripen, flowerets bloom;
There insects live their lives — and die:
A peopled *world* it is; in size a tiny room.

And thus through many seasons' space
This little Island may survive
But Nature, though we mark her not,
Will take away — may cease to give.

Perchance when you are wandering forth
Upon some vacant sunny day
Without an object, hope, or fear,
Thither your eyes may turn — the Isle is passed away.

Buried beneath the glittering Lake!
Its place no longer to be found,
Yet the lost fragments shall remain,
To fertilize some other ground.

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