AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 28 February 2025

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)

KMD v CEO (Department of Health NT) & Ors (HCA) - appellant's refusal to cooperate with mental health experts during review of custodial supervision order after finding of not guilty because of mental impairment was part of the evidence relevant to an assessment of the risk appellant posed, and did not preclude such an assessment (I)

Sun Pharma ANZ Pty Ltd v Otsuka Pharmaceutical Co Ltd (FCA) - extension of patent term under s70 of the *Patents Act 1990* (Cth) had been wrongly granted (I B)

TAL Life Insurance Services Limited, in the matter of TAL Life Insurance Services Limited (FCA) - Court approved transfer of life insurance business between two companies in the same corporate group (I B)

Platypus Impact Housing Australia Ltd v Elsegood (NSWSC) - Court rejected plaintiff's submission that a proceeding to establish an offsetting debt to a debt the defendant had claimed against it was defensive in nature - security for costs ordered (I B C)

Reiter v News Corp Australia Pty Ltd & Anor (VSC) - Court summarily dismissed defamation proceedings on the basis the plaintiff had not served a valid concerns notice (I B)

HABEAS CANEM

McGregor in love again, at the pub

Summaries With Link (Five Minute Read)

KMD v CEO (Department of Health NT) & Ors [2025] HCA 4
High Court of Australia
Gordon, Steward, Gleeson, Jagot, & Beech-Jones JJ
Mental impairment - KMD found not guilty because of mental impairment - Chief Justice made custodial supervision order (CSO) - Supreme Court judge twice confirmed - during third review by primary judge, KMD refused to cooperate with medical experts - primary judge found safety of the public or KMD would not be seriously at risk if KMD were released on a non-custodial supervision order (NCSO) with conditions, and made such a NCSO - NT Court of Criminal Appeal (NTCCA) allowed Health Department CEO's appeal by majority, finding review had miscarried because of KMD's failure to cooperate, and, in the light of such non-cooperation, it was not open to the primary judge to make the safety finding she did - KMD granted special leave to appeal to High Court - held (by Gordon, Steward, Gleeson, & Beech-Jones JJ; Jagot J agreeing in separate reasons): KMD was under no statutory obligation to cooperate with the medical experts - primary judge required to decide, on available evidence, whether she was satisfied safety of public or KMD would be seriously at risk if KMD were released - that required evaluation of available evidence, including KMD's failure to cooperate - KMD's failure to cooperate did not preclude that evaluation - CEO's appeal not properly determined and matter should be remitted to NTCCA - for guidance of NTCAA on remitter, majority also noted NTCAA had erred by confirming original CSO without evidence of risk arising from the year KMD had spent in the community on the NCSO - appeal to NTCCA was by way of rehearing - if NTCCA found error by primary judge, and elected to decide matter itself instead of remitting, it would exercise the same statutory power as the primary judge, which would require it to address the safety question by reference to the 'evidence available', which would require assessment of the safety question as at the time the power were exercised, which would have to include consideration of what had happened while KMD was at liberty under the NCSO - appeal allowed, proceeding remitted to NTCCA for hearing by a differently constituted bench - primary judge's order setting aside CSO and imposing NCSO stayed for 14 days from date of High Court's order to allow parties or Director of Public Prosecutions to apply for any appropriate order.
KMD (I)

Sun Pharma ANZ Pty Ltd v Otsuka Pharmaceutical Co Ltd [2025] FCA 44
Federal Court of Australia
Downes J
Patents - Otsuka owned a patent for controlled release formulations contain aripiprazole as the active pharmaceutical ingredient - IP Australia granted Otsuka an extension of the patent term under s70 of the *Patents Act 1990* (Cth) - Sun Pharma wanted to sell la generic version of aripiprazole, and commenced proceedings, contending the extension was wrongly granted - Otsuka cross-claimed for threatened infringement - held: s70 requires a pharmaceutical substance satisfy three conditions in order for a patent term to be extended: (1) one or more

pharmaceutical substances (either per se or produced by recombinant DNA technology) must be disclosed in the patent and fall within the patent's claims; (2) goods containing at least one of those pharmaceutical substances must be included in the Australian Register of Therapeutic Goods with at least five years from the patent date to first regulatory approval; and (3) the patent term has not already been extended - under previous authority that no party submitted was plainly wrong, a formulation including excipients or non-active ingredients can be a pharmaceutical substance - a pharmaceutical substance must take all of the integers of a patent claim to 'fall within the scope' of the claim within the meaning of s70 - Otsuka's asserted pharmaceutical substances did not take all the integers of any of the claims of the patent - the patent claims were bad for ambiguity because the instructions in the patent for attaining the relevant feature (release of aripiprazole upon injunction over a specified period of time) were meaningless to those skilled in the art - asserted pharmaceutical substances per se did not meet the requirements of s70 - Sun Pharma's claim must succeed and Otsuka's cross-claim must fail.
Sun Pharma ANZ Pty Ltd (I B)

TAL Life Insurance Services Limited, in the matter of TAL Life Insurance Services Limited [2025] FCA 130
Federal Court of Australia
Jackman J
Life insurance - two related companies sought an order under s194 of the *Life Insurance Act 1995* (Cth) confirming the transfer of the life insurance business of one to the other - held: s190(1) of the *Life Insurance Act* provides that no part of the life insurance business of a life company may be transferred to another life company except under a scheme confirmed by the Court - confirmation is neither a matter of course nor a mere formality - the Court's discretion is broad, but not unfettered, and must be exercised on the evidence and having regard to the objects of the *Life Insurance Act*, principally the protection of the interests of policy owners in a manner consistent with the continued development of a viable, competitive, and innovative life insurance industry - the protection of the interests of policy owners has both a procedural and a substantive dimension - two policy holders had objected - the general objection that the policy owners did not want their insurer changed was not a valid objection - the concern expressed that the scheme may result in a change to the policy terms or the quality of service was not persuasive - the objection on the basis that the policies would be transferred to a non-Australian insurer or parent entity did not constitute a proper basis for not confirming the scheme - the interests of policy owners are not necessarily the same as the preferences of each and every one of them - the actuarial evidence showed the scheme would not be prejudicial to policy owners' interests, and would indeed be beneficial to them - appropriate to confirm the scheme without modification.
TAL Life Insurance Services Limited, in the matter of TAL Life Insurance Services Limited (I B)

Platypus Impact Housing Australia Ltd v Elsegood [2025] NSWSC 114
Supreme Court of New South Wales

Stevenson J
Security for costs - Elsegood was a former director of Platypus, a company that pursued property development opportunities in NSW and Queensland - Elsegood served a statutory demand on Platypus for an alleged debt - Supreme Court set aside the statutory demand with costs on the basis of an offsetting claim, on condition Platypus commenced proceedings to vindicate its offsetting claim - Platypus sued Elsegood and his company to vindicate the offsetting claim - Platypus claimed, after he resigned as a director, Elsegood had wrongly caused an investment opportunity Platypus had identified during his directorship to be taken away from Platypus and given to persons with whom he had a business relationship, in breach of fiduciary duty and director's duties under the *Corporations Act 2001* (Cth) - Elsegood cross-claimed for the alleged debt - Elsegood also sought security for costs - held; Platypus did not dispute there was reason to believe it could not meet an adverse costs order - however, it resisted the security for costs claim on the basis that its claim was defensive in nature and it was effectively in the position of a defendant - the proceedings had no doubt been commenced because of the condition the Court imposed for setting aside the statutory demand - however, that did not make these proceedings defensive to Elsegood's claim of a debt - Platypus was not seeking in these proceedings to impugn that debt, but it rather brought a separate claim of its own - the Court did not agree Platypus's claim was defensive in nature in the sense required by the authorities - Platypus should be ordered to pay security for costs in the amount of $185,000 - however, as Elsegood had not paid the costs of the statutory demand proceedings, or provided any assurance he would pay those costs once assessed, the Court would not make any order for security until Elsegood paid those costs.
View Decision (I B C)

Reiter v News Corp Australia Pty Ltd & Anor [2025] VSC 54
Supreme Court of Victoria
Goulden AsJ
Defamation - journalist emailed Reiter at about 10am informing him of an upcoming story alleging he had bene been posing as a lawyer and telling people he had been working for high profile musicians, and inviting his reply by 2pm that day - Reiter replied three times before 2pm, asking reporter to hold the story for one day to enable him to provide documents - Geelong Advertiser published journalist's story at 3pm - Reiter commenced defamation proceedings - the defendants sought summary dismissal on the basis Reiter had not served a valid concerns notice as required by s12A and s12B of the *Defamation Act 2005* (Vic), nor provided an opportunity for the defendants to make amends before commencing proceedings - held: neither an alleged conversation between Reiter and the journalist (if one occurred), nor any of the emails from Reiter before publication of the article, could constitute a valid concerns notice - two draft originating motions Reiter had sent to the defendants might in principle have constituted a concerns notice - however, this document had not identified the defamatory imputations Reiter alleged - regarding serious harm, that document also made a bare assertion that Reiger's online reputation would be severely damaged - a purported concerns notice Reiter had filed with his statement of claim also could not be a valid concerns notice as it also failed to identify any

imputations or make a proper particularisation of serious harm - even if any of these documents had been a valid concerns notice, the plaintiff had failed to comply with s12B by waiting 28 days before commencing proceedings - proceedings summarily dismissed.
Reiter (I B)

Poem for Friday

Blessed are you who bear the light

By Jan Richardson

Blessed are you
who bear the light
in unbearable times,
who testify
to its endurance
amid the unendurable,
who bear witness
to its persistence
when everything seems
in shadow
and grief.

Blessed are you
in whom
the light lives,
in whom
the brightness blazes—
your heart
a chapel,
an altar where
in the deepest night
can be seen
the fire that
shines forth in you
in unaccountable faith,
in stubborn hope,
in love that illumines
every broken thing
it finds.

Copyright of Jan Richardson. All Rights Reserved.

"Blessed Are You Who Bear the Light" © Jan Richardson from *Circle of Grace: A Book of Blessings for the Seasons*. Used by permission. janrichardson.com

Jan Richardson, is an American artist, collagist, writer, author and poet and speaker. Her published books include The Cure for Sorrow, In Wisdom's Path and Night Visions. She grew up near Gainesvile, Florida.

Click Here to access our Benchmark Search Engine