

Friday, 1 April 2016

## Weekly Banking Law Review Selected from our Daily Bulletins covering Banking

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (1 minute read)

**Special Issue of the Australian Insurance Law Journal (LexisNexis)** - in order to mark the 250th anniversary of Lord Mansfield's seminal judgment in *Carter v Boehm* (1766) 3 Burr 1905, the Australian Insurance Law Journal (LexisNexis) is devoting an entire issue to the case's legacy - please refer to this link for the [promo and index](#).

**Australian Securities and Investments Commission v Macro Realty Developments Pty Ltd** (FCA) - corporations - counselling or inducing - misleading or deceptive conduct - unlicensed financial services business - ASIC entitled to relief sought

**Perry v Anthony** (NSWCA) - contract - currency trading - appellant required to indemnify respondent for trading losses - appeal dismissed

**Rinehart v Rinehart** (NSWCA) - discovery - privilege - rejection of claim of privilege by former trustee against current trustee - leave to appeal refused

**Zahed v IAG Limited t/as NRMA Insurance** (NSWCA) - judicial review - motor accidents compensation - claims assessor's reasons for assessment were inadequate - assessment set aside - appeal dismissed

**Bankstown City Council v Zraika; Roads and Maritime Services v Zraika** (NSWCA) - negligence - motor vehicle collision while plaintiff in utero - Council and Roads and Maritime

Service not liable - plaintiff's father who was driving car in which plaintiff's pregnant mother was a passenger liable - father's liability greater than liability of owner and driver of other vehicle - appeals allowed - liability reapportioned

**Johnston v Johnston** (NSWCA) - costs - contested probate proceedings - offer was mixed offer to which r42.13A did not apply - not appropriate to remit matter for exercise of residual discretion as to costs - leave to appeal granted - appeal dismissed

**Serrao by his Tutor Serrao v Cornelius** (NSWCA) - negligence - pedestrian struck by motor vehicle from behind in darkness after midnight - pedestrian and driver both intoxicated - respondent's breach of duty did not cause appellant's injuries - cross-appeal allowed

**Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd** (NSWSC) - security of payments - application to set aside adjudicator's determination on basis there was no "payment claim" refused - statutory demand not set aside

**Meticon Qld Pty Ltd v Chief Commissioner of State Revenue (No. 2)** (NSWSC) - land tax - primary production exemption - comparison of primary production with other uses - land tax assessments set aside - one assessment upheld

**Fabfloor (Vic) Pty Ltd v BNY Trust Company of Australia Ltd** (VSC) - pleadings - joinder - proportionate liability - concurrent wrongdoers - refusal of leave to join additional parties as defendants under *Part IVAA Wrongs Act 1958* (Vic) and file amended defence - appeal allowed

**Hettiarachci v RACV** (VSC) - accident compensation - Magistrate's reasons inadequate - erroneous finding of no medical material to support claim - appeal allowed

**Western Australian Planning Commission v Southregal Pty Ltd** (WASCA) - town planning - compensation for injurious affection upon refusal of approval to develop land due to its reservation for public purpose - appeals dismissed

## Summaries With Link (Five Minute Read)

[From Benchmark Friday, 1 April 2016]

### **Australian Securities and Investments Commission v Macro Realty Developments Pty Ltd [2016] FCA 292**

Federal Court of Australia

Beach J

Corporations - ASIC sought declarations and injunctions regarding defendants' conduct in

relation to counselling or procuring investors' contraventions of s181(1) *Corporations Act 2001* (Cth), misleading or deceptive conduct and carrying unlicensed financial services business - defendant consented to certain orders and did not oppose some relief - trial proceeded in order for ASIC to substantiate entitlement to all sought relief - ss12DA & 12DG *Australian Securities and Investments Commission Act 2001* (Cth) - ss181, 471B, 762C, 763A, 763B, 766A, 911A, 1041H, 1324 *Corporations Act* - held: ASIC entitled to relief sought - orders made.

[ASIC](#)

[From Benchmark Wednesday, 30 March 2016]

## **Perry v Anthony [2016] NSWCA 56**

Court of Appeal of New South Wales

Beazley P, Gleeson JA & Emmett AJA

Contract - parties entered contract relating to currency trading - primary judge found appellants required to indemnify respondent for trading losses carrying out contract - appellants contended that there was no consideration for agreement, that respondent not required to be indemnified because no loss suffered, and that distributions made were return of capital rather than profit distribution - construction of agreement - held: mutual promises were sufficient to support a contract - no general principle of no entitlement to benefit of indemnity unless there was actual loss - question was one of construction of indemnity clause - grounds of appeal in relation to actual loss rejected - Court rejected appellants' contention that sums paid were payments of capital - appeal dismissed.

[Perry](#)

[From Benchmark Wednesday, 30 March 2016]

## **Rinehart v Rinehart [2016] NSWCA 58**

Court of Appeal of New South Wales

Beazley P; Leeming & Simpson JJA

Discovery - privilege - primary judge rejected claim of privilege by former trustee Gina Rinehart (applicant) against current trustee Bianca Rinehart (first respondent) - primary judge had refused to view documents requested on basis claim should have been made when documents were produced and that person claiming privilege had no power to require court to inspect documents - whether primary judge erred in concluding there was no evidence to conclude there was a privilege which belonged to applicant personally as opposed to as trustee - whether error in refusal to view documents - ss56-59 *Civil Procedure Act 2005* (NSW) - ss118, 119 & 136 *Evidence Act 1995* (NSW) - rr1.8 & 51.53 *Uniform Civil Procedure Rules 2005* (NSW) - held: applicant did not establish case warranting grant of leave - leave to appeal refused.

[Rinehart](#)

[From Benchmark Wednesday, 30 March 2016]

## **Zahed v IAG Limited t/as NRMA Insurance [2016] NSWCA 55**

Court of Appeal of New South Wales

Meagher & Leeming JJA; Emmett AJA

# Benchmark

Judicial review - motor accidents compensation - appeal from decision in which primary judge set aside assessment of second respondent claims assessor - whether second respondent claims assessor failed to give adequate reasons regarding appellant's claim against first respondent insurer - past and future care requirements - *Interpretation Act 1987 (NSW)* - s94 *Motor Accidents Compensation Act 1999 (NSW)* (MAC Act) - ss69 & 101 *Supreme Court Act 1970 (NSW)* - held: primary judge did not err in setting aside assessor's assessment - it was not possible to discern reasons actual path of assessor's reasoning in sufficient detail to determine whether assessor's decision was erroneous - assessor failed to comply with ss94(5) & 106 MAC Act - appeal dismissed.

[Zahed](#)

[From Benchmark Wednesday, 30 March 2016]

## **Bankstown City Council v Zraika; Roads and Maritime Services v Zraika [2016] NSWCA 51**

Court of Appeal of New South Wales

Gleeson, Leeming & Simpson JJA

Negligence - motor vehicle collision - apportionment - plaintiff claimed damages for injuries suffered in motor vehicle collision when he was in utero - pregnant mother was passenger in care driven by plaintiff's father - driver and owner of other vehicle involved in collision admitted breach of duty - plaintiff also sued father, Council and Roads and Maritime Services (RMS) - primary judge found RMS and Council breached duty of care to plaintiff, that breaches were cause of collision and that father did not breach duty of care - primary judge assessed liability of driver and owner of other vehicle at 50%, RMS's liability at 25% and Council's liability 25% - RMS and Council appealed - held: father breached duty of care and if he had not breached duty collision would not have occurred - father's liability was greater than that of driver and owner of vehicle - liability reapportioned - primary judge erred in finding Council's breach of standard imposed by s43A *Civil Liability Act 2002 (NSW)* - even if Council owed duty there was no breach - primary judge erred in finding RMS breached duty of care - appeals allowed.

[Bankstown](#)

[From Benchmark Thursday, 31 March 2016]

## **Johnston v Johnston [2016] NSWCA 52**

Court of Appeal of New South Wales

Ward, Leeming & Simpson JJA

Costs - contested probate proceedings - applicants were executors and sole beneficiaries of deceased's Will - applicants gave notice of intention to apply for probate - applicants sought removal of caveat filed by respondents - applicants served offer of compromise on respondents which they accepted - primary judge made costs order pursuant to r42.13A(3) *Uniform Civil Procedure Rules 2005 (NSW)* - applicants contended judgment proposed in offer did not enliven r 42.13A(3) but enlivened r42.13A(2) or was a mixed offer - held: offer mixed offer to which r42.13A did not apply - not appropriate to remit matter in order to exercise residual costs discretion due to disproportionate costs of doing so in relation to amount in dispute and there

# Benchmark

was no substantial wrong or miscarriage in any case - leave to appeal granted - appeal dismissed.

[Johnston](#)

[From Benchmark Thursday, 31 March 2016]

## **Serrao by his Tutor Serrao v Cornelius [2016] NSWCA 60**

Court of Appeal of New South Wales

Leeming JA; Sackville & Emmett AJJA

Negligence - motor vehicle accident - appellant walking on road struck from behind by a car driven by respondent - accident occurred in darkness after midnight - parties both affected by alcohol - primary judge found respondent negligent and reduced damages by 40% for contributory negligence - appellant contended primary judge should not have found appellant contributorily negligent and that in any case damages for contributory negligence should be reduced - respondent challenged finding she breached duty of care and finding that breach caused injuries - ss3B(2)(a), 5B, 5D & 5E *Civil Liability Act 2002* (NSW) - ss7A & 7B *Motor Accidents Compensation Act 1999* (NSW) - sch 1 *Road Transport Legislation (Repeal and Amendment) Act 2013* (NSW) - s9 *Road Transport (Safety and Traffic Management) Act 1999* (NSW) - held: primary judge's finding that appellant, immediately before accident, was not on the bitumen surface of road but on gravel verge could not stand - primary judge's conclusion that respondent's breach caused appellant's injuries relied on this finding and must therefore be set aside - cross-appeal allowed - parties be given opportunity to make submissions on "blameless accident" case put by appellant in alternative.

[Serrao](#)

[From Benchmark Friday, 1 April 2016]

## **Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd [2016] NSWSC 334**

Supreme Court of New South Wales

Meagher JA

Security of payments - plaintiff sought to set aside adjudicator's determination that it owed amount to defendant on basis that there was no "payment claim" in accordance with s13(2) *Building and Construction Industry Security of Payment Act 1999* (NSW) - plaintiff also sought to set aside statutory demand made by defendant - ss5, 8, 9, 13, 14, 15, 17 & 24 *Security of Payments Act* - ss459E, 459F & 459G *Corporations Act 2001* (Cth) - s69 *Supreme Court Act 1970* (NSW) - held: defendant did not make binding election to pursue a course in 15(2)(a) *Security of Payments Act* - claims were in respect of different reference dates and did not contravene s13(5) *Security of Payments Act* - no contravention of s13(8) - statutory demand not set aside - amended summons dismissed.

[Kyle Bay](#)

[From Benchmark Friday, 1 April 2016]

## **Metricon Qld Pty Ltd v Chief Commissioner of State Revenue (No. 2) [2016] NSWSC 332**

Supreme Court of New South Wales

White J

Land tax - plaintiff property developer sought review of Commissioner of State Revenue's decision to issue land tax assessments - whether plaintiff entitled to exemptions for land tax under s10AA(2) *Land Tax Management Act 1956* (NSW) on basis lands used for primary production which was dominant use - held: Court concluded comparison of primary production with other uses not confined to comparison with other physical uses - holding of lands as part of stock in trade not a current use - consultants' work was connected with current commercial land development use to extent land physically used in carrying out activities to obtain approval land tax assessments set aside - one assessment upheld - counsel for plaintiff to bring in short minutes of order.

[Metricon](#)

[From Benchmark Friday, 1 April 2016]

## **Fabfloor (Vic) Pty Ltd v BNY Trust Company of Australia Ltd [2016] VSC 99**

Supreme Court of Victoria

John Dixon J

Pleadings - joinder - proportionate liability - concurrent wrongdoers - second defendant in two proceedings appealed against refusal of leave to join additional parties as defendants under Part IVAA *Wrongs Act 1958* (Vic) and file amended defence - r9.06(b) *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - held: claim by plaintiffs in each proceedings was 'apportionable claim' - primary judge erred in finding there was a positive requirement to lead evidence showing substance to proposed claims - sufficient for defendant to establish pleadings contained facts or allegations which could found alleged causes of action alleged - appeal allowed.

[Fabfloor](#)

[From Benchmark Wednesday, 30 March 2016]

## **Hettiarachci v RACV [2016] VSC 97**

Supreme Court of Victoria

J Forrest J

Accident compensation - appellant lost claim for compensation under *Accident Compensation Act 1985* (Vic) - appellant appealed against Magistrate's decision concerning stress and anxiety claim arising out of employment - appellant contended Magistrate's reasons did not address his account of symptoms - appellant contended in the alternative that Magistrate specifically erred in finding there was no medical material to support work stress and anxiety - ss82 & 93 - held: Magistrate's reasons were inadequate - finding of no medical material erroneous - Magistrate's decision quashed - appeal allowed.

[Hettircachci](#)

[From Benchmark Friday, 1 April 2016]

## **Western Australian Planning Commission v Southregal Pty Ltd [2016] WASCA 53**

Court of Appeal of Western Australia

Martin CJ; Newnes & Murphy JJA

Town planning - appeals against determination of question of law - Planning Commission challenged primary judge's findings that person who was not registered proprietor of land when that land reserved for public purpose was entitled to compensation for injurious affection upon refusal of approval to develop land or granted approval subject to conditions unacceptable to applicant - s36 *Metropolitan Region Town Planning Scheme Act 1959* (WA) - ss173, 174, 176, 177, 178, 179 & 181 *Planning and Development Act 2005* (WA) - s11 *Town Planning and Development Act 1928* (WA) - s33 *Western Australian Planning Commission Act 1985* (WA) - held: primary judge correct to answer question of law affirmatively - appeals dismissed.

[Western Australian Planning Commission](#)

[From Benchmark Thursday, 31 March 2016]

## CRIMINAL

### Executive Summary

**Afford v The Queen; DPP (Cth) v Afford** (VSCA) - criminal law - importing commercial quantity of border controlled drug - directions to jury concerning intentional fault element - verdict unsafe and unsatisfactory - conviction set aside - Court directed acquittal - appeal allowed

**Police v Gray** (SASC) - criminal law - father convicted of aggravated assault against son for smacking thigh - defence of lawful parental correction - conviction quashed - appeal allowed

### Summaries With Link

**Afford v The Queen; DPP (Cth) v Afford [2016] VSCA 56**

Court of Appeal of Victoria

Maxwell P, Priest & Beach JJA

Criminal law - applicant found guilty of importing commercial quantity of border controlled drug - applicant sentenced to three years and two months imprisonment with non-parole period of two years - applicant sought to appeal against conviction - Director of Public Prosecutions appealed against sentence imposed - held: applicant's appeal upheld on grounds that the verdict of the jury was unreasonable and/or could not be supported by evidence, and that miscarriage of justice had occurred due to trial judge's failure to direction jury on intentional fault element - conviction was unsafe and unsatisfactory - conviction set aside - Court directed an acquittal - DPP's appeal dismissed without adjudication of merits.

[Afford](#)



**Police v Gray [2016] SASC 39**

Supreme Court of South Australia

Peek J

Criminal law - appellant appealed against finding he was guilty of aggravated assault on 12 year old son - father had smacked son on thigh three times - no conviction recorded - appellant discharged without penalty - defence of lawful parental correction of a child - held: Magistrate erred in approach to parental correction - Magistrate misdirected himself as to matters' relevance and weight - appellant's actions bona fide and conduct not unreasonable - finding of guilt quashed - appeal allowed.

[Police](#)





# Benchmark

**A Shropshire Lad: 52: Far in a western brookland**  
BY A. E. HOUSMAN

Far in a western brookland  
That bred me long ago  
The poplars stand and tremble  
By pools I used to know.  
There, in the windless night-time,  
The wanderer, marvelling why,  
Halts on the bridge to hearken  
How soft the poplars sigh.  
He hears: long since forgotten  
In fields where I was known,  
Here I lie down in London  
And turn to rest alone.  
There, by the starlit fences,  
The wanderer halts and hears  
My soul that lingers sighing  
About the glimmering weirs.

[A. E. HOUSMAN](#)

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