



Friday, 6 September 2019

## 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)

**Estates 77 Pty Ltd v Minister for the Environment (FCA)** - judicial review - respondent found 'Proposed Action' in respect of 'Subject Land' was a 'controlled action' under EPBC Act - applicants sought judicial review - Court lacked jurisdiction to entertain applicants' argument

**Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd (NSWCA)** - administrative law - challenge to 'revised Rehabilitation Strategy' rejected - appeal against primary judge's decision dismissed - appeal against costs order allowed

**Drivas v Jakopovic (NSWCA)** - wills and estates - succession - evidence - deceased had testamentary capacity when she made September 2007 Will - appeal dismissed

**Davies v Whitehaven Coal Mining Ltd (NSWSC)** - negligence - employer's non-delegable duty of care - plaintiff employee injured at colliery - defendant employer not liable - judgment for defendant

**United Commercial v PHHH (VSCA)** - security for costs - security of payments - dismissal of applicant's application for security for costs on basis of 'unjustified delay' in application's making - appeal allowed

**Queensland Rail Limited v Eden & Ors; State of Queensland & Anor v Kalari Proprietary Limited & Ors (QSC)** - summary judgment - insurance - company sought summary judgment on two 'third party claims' against it - summary judgment refused

**Whitworth v Christian Brothers College Adelaide** (SASC) - default judgment - contract - challenge to dismissal of applications to set aside default judgment - 'arguable defence' established - appeal allowed

**Avwest Aircraft Pty Ltd as trustee for Avwest Aircraft Trust v Clayton Utz (A Firm) [No 2]** (WASC) - negligence - contract - professional negligence - solicitors' duties - defendant failed 'to exercise reasonable skill, care and diligence' in retainer's performance - plaintiff's claim allowed in part - plaintiff entitled to judgment in sum of \$US546,725

## Summaries With Link (Five Minute Read)

### **Estates 77 Pty Ltd v Minister for the Environment [2019] FCA 1427**

Federal Court of Australia

McKerracher J

Judicial review - jurisdiction - respondent, under s75(1) *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBCA Act), found that 'Proposed Action' in respect of 'Subject Land' was a 'controlled action' under EPBC Act, requiring 'assessment and approval' before it could proceed - applicants sought judicial review - whether Court could consider question whether Proposed Action had, would have, or was 'likely to have', 'significant impact' on black cockatoo species purportedly inhabiting Subject Site - whether 'question of jurisdictional fact' - whether 'merits review' - *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* (2018) 262 FCR 527 - *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources* [2008] FCAFC 3 - held: Court lacked jurisdiction to entertain applicants' argument - application dismissed to extent it relied on argument.

[Estates](#)

[From Benchmark Wednesday, 4 September 2019]

### **Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd [2019] NSWCA 216**

Court of Appeal of New South Wales

Basten, Macfarlan & Leeming JJA

Administrative law - respondent submitted 'Rehabilitation Strategy' to Secretary of the Department of Planning and Environment (Secretary) - Secretary conditionally approved Strategy - appellant challenged 'revised Rehabilitation Strategy' ('Strategy') - appellant contended in Land and Environment Court that Strategy did not meet requirements in condition 42, Sch 3, of Approval 'read in combination with Table 14', which condition 42 applied to - primary judge dismissed proceeding and ordered that appellant pay respondent's costs and Secretary's costs - appellant appealed against primary judge's decision and primary judge's decision that it should pay Secretary's costs - *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 - held: appeal against Land and Environment Court decision dismissed - appeal against costs decision allowed.

# Benchmark

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[From Benchmark Wednesday, 4 September 2019]

**Drivas v Jakopovic [2019] NSWCA 218**

Court of Appeal of New South Wales

Bell ACJ; Macfarlan & McCallum JJA

Wills and estates - succession - testamentary capacity - evidence - probate granted to respondent in respect of 'September 2007 Will' - appellant contended September 2007 Will invalid due to deceased's lack of testamentary capacity - appellant sought letters of administration with 'earlier will' ("1998 Will") - primary judge found, 'largely on basis' of evidence of solicitor who arranged signing of 2007 Will, that deceased had testamentary capacity when she signed September 2007 Will - appellant appealed - whether primary judge erred in 'giving weight' to solicitor's evidence - whether erroneous failure to give 'proper weight to the medical evidence' - whether primary judge should have found that conduct of respondent 'gave rise to suspicions' concerning whether 'deceased knew and approved of' September 2007 Will - whether primary judge should have 'expressly considered' whether 'deceased knew and approved' of will's contents - whether erroneous failure properly to evaluate evidence and make 'adverse findings' concerning respondent's credit - *Connor v Blacktown District Hospital* [1971] 1 NSWLR 713 - held: appeal dismissed.

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[From Benchmark Friday, 6 September 2019]

**Davies v Whitehaven Coal Mining Ltd [2019] NSWSC 1125**

Supreme Court of New South Wales

Wright J

Negligence - plaintiff employed by defendant in its colliery - plaintiff contended he was injured due to defendant's 'negligence and breach of statutory duty' and that he suffered 'loss and damage' as a result - defendant denied liability and pleaded payments of compensation to plaintiff under *Workers Compensation Act 1987* (NSW) in defence - employer's 'non-delegable duty of care to take reasonable care' to avoid plaintiff's exposure to 'unnecessary risk of injury' - *Czatyрко v Edith Cowan University* [2005] HCA 14 - held: defendant not liable - judgment for defendant.

[View Decision](#)

[From Benchmark Tuesday, 3 September 2019]

**United Commercial v PHHH [2019] VSCA 192**

Court of Appeal of Victoria

Whelan & Kaye JJA

Security for costs - applicant engaged respondent for work at property it owned - respondent brought proceedings against applicant under *Building and Construction Industry Security of Payment Act 2002* (Vic) - County Court dismissed applicant's application for security for costs on basis of applicant's 'unjustifiable' delay in its making of application - applicant sought to

appeal - *PPK Willoughby Pty Ltd v Baird* [2019] NSWCA 48 - r62.02 *County Court Civil Procedure Rules 2018* (Vic) - whether primary judge erred in relation to prejudice - whether primary judge erred in finding 'actual prejudice could properly be presumed' - whether 'actual prejudice' existed - absence of evidence of prejudice - held: appeal allowed.

[United Commercial](#)

[From Benchmark Wednesday, 4 September 2019]

**Queensland Rail Limited v Eden& Ors; State of Queensland & Anor v Kalari Proprietary Limited & Ors [2019] QSC 212**

Supreme Court of Queensland

Davis J

Summary judgment - insurance - first defendant and second defendants, by 'third party claims', sought indemnity from company (Dornoch) under "Wholesale Risk Solutions; Public and Products Liability Including Errors & Omissions Insurance" insurance policy (policy) - Dornoch, under r293 *Uniform Civil Procedure Rules 1999* (Qld), sought summary judgment on third party claims - Dornoch contended indemnity claims 'doomed to fail' due to exclusions' operation - construction of policy - *Transport Operations (Road Use Management-Dangerous Goods) Regulation 2008 - Transport Operations (Road Use Management-Road Rules) Regulation 2009 - Heavy Vehicle National Law* (Qld) - *Insurance Contracts Act 1984* (Cth) - held: summary judgment refused.

[Queensland Rail](#)

[From Benchmark Monday, 2 September 2019]

**Whitworth v Christian Brothers College Adelaide [2019] SASC 15**

Supreme Court of South Australia

Doyle J

Default judgment - contract - respondent sued appellant for fees for tuition of respondent's son - respondent obtained default judgment - Magistrate dismissed appellant's applications to set aside default judgment on basis there was no 'arguable defence' disclosed - appellant appealed - appellant contended Magistrate erroneously concluded no arguable defence was disclosed by affidavits - construction of parties' relationship - whether 'at least arguable' that parties' relationship 'was that of a series of separate annual contracts' and that an agreement could not be inferred in respect of certain school years - whether 'arguable defence' under r87(2)(a) *Magistrates Court (Civil) Rules 2013* (SA) - held: arguable defence established - appeal allowed.

[Whitworth](#)

[From Benchmark Thursday, 5 September 2019]

**Avwest Aircraft Pty Ltd as trustee for Avwest Aircraft Trust v Clayton Utz (A Firm) [No 2] [2019] WASC 306**

Supreme Court of Western Australia

Vaughan J



Negligence - contract - professional negligence - solicitors' duties - plaintiff sought that its solicitors (defendant) review and 'make appropriate amendments to' clauses of 'Cabin Modification Agreement' - plaintiff claimed against defendant, contending it failed 'to exercise reasonable skill, care and diligence' in retainer's performance - defendant sought damages for 'loss of opportunity' - ss5C & 5AK *Civil Liability Act 2002* (WA) - held: defendant, in performance of retainer, failed to exercise reasonable skill, care and diligence - negligence of defendant caused 'compensable loss' to plaintiff - plaintiff did not establish that, if in receipt of 'non-negligent advice', it 'would not have proceeded with' Cabin Modification Agreement - plaintiff's claim allowed in part - plaintiff entitled to judgment against defendant in sum of \$US546,725.

[Avwest](#)

[From Benchmark Monday, 2 September 2019]

## CRIMINAL

### Executive Summary

### Summaries With Link



# Benchmark

**From: The Hunting of the Snark**

**By: Lewis Carroll**

**Fit the Sixth**

**The Barrister's Dream**

They sought it with thimbles, they sought it with care;  
They pursued it with forks and hope;  
They threatened its life with a railway-share;  
They charmed it with smiles and soap.

But the Barrister, weary of proving in vain  
That the Beaver's lace-making was wrong,  
Fell asleep, and in dreams saw the creature quite plain  
That his fancy had dwelt on so long.

He dreamed that he stood in a shadowy Court,  
Where the Snark, with a glass in its eye,  
Dressed in gown, bands, and wig, was defending a pig  
On the charge of deserting its sty.

The Witnesses proved, without error or flaw,  
That the sty was deserted when found:  
And the Judge kept explaining the state of the law  
In a soft under-current of sound.

The indictment had never been clearly expressed,  
And it seemed that the Snark had begun,  
And had spoken three hours, before any one guessed  
What the pig was supposed to have done.

The Jury had each formed a different view  
(Long before the indictment was read),  
And they all spoke at once, so that none of them knew  
One word that the others had said.

"You must know—" said the Judge: but the Snark exclaimed  
"Fudge!"

That statute is obsolete quite!  
Let me tell you, my friends, the whole question depends  
On an ancient manorial right.



# Benchmark

"In the matter of Treason the pig would appear  
To have aided, but scarcely abetted:  
While the charge of Insolvency fails, it is clear,  
If you grant the plea 'never indebted.'

"The fact of Desertion I will not dispute;  
But its guilt, as I trust, is removed  
(So far as relates to the costs of this suit)  
By the Alibi which has been proved.

"My poor client's fate now depends on your votes."  
Here the speaker sat down in his place,  
And directed the Judge to refer to his notes  
And briefly to sum up the case.

But the Judge said he never had summed up before;  
So the Snark undertook it instead,  
And summed it so well that it came to far more  
Than the Witnesses ever had said!

When the verdict was called for, the Jury declined,  
As the word was so puzzling to spell;  
But they ventured to hope that the Snark wouldn't mind  
Undertaking that duty as well.

So the Snark found the verdict, although, as it owned,  
It was spent with the toils of the day:  
When it said the word "GUILTY!" the Jury all groaned,  
And some of them fainted away.

Then the Snark pronounced sentence, the Judge being  
quite  
Too nervous to utter a word:  
When it rose to its feet, there was silence like night,  
And the fall of a pin might be heard.

"Transportation for life" was the sentence it gave,  
"And then to be fined forty pound."  
The Jury all cheered, though the Judge said he feared  
That the phrase was not legally sound.



# Benchmark

But their wild exultation was suddenly checked  
When the jailer informed them, with tears,  
Such a sentence would have not the slightest effect,  
As the pig had been dead for some years.

The Judge left the Court, looking deeply disgusted:  
But the Snark, though a little aghast,  
As the lawyer to whom the defence was intrusted,  
Went bellowing on to the last.

Thus the Barrister dreamed, while the bellowing seemed  
To grow every moment more clear:  
Till he woke to the knell of a furious bell,  
Which the Bellman rang close at his ear.

[https://en.wikipedia.org/wiki/Lewis\\_Carroll](https://en.wikipedia.org/wiki/Lewis_Carroll)

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