

Friday, 16 March 2018

## 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)

**Barton (Appellant) v Wright Hassall LLP (Respondent)** (UKSC) - service - service by email - non-compliant service by email - Court declined to validate service - appeal dismissed

**Pike v Tighe** (HCA) - town planning - successor in title to ownership of land created by reconfiguration of larger parcel obliged to comply with condition of reconfiguration's approval that original owner failed to satisfy - Planning and Environment Court of Queensland could make "enforcement order" to require condition's fulfilment - appeal allowed

**Stone & Wood Group Pty Ltd v Intellectual Property Development Corporation Pty Ltd** (FCAFC) - intellectual property - trade marks - dismissal of claims of passing off, misleading or deceptive conduct, false or misleading representations, and trade mark infringement claim - cross-claim established - leave to appeal in respect of cross-claim refused - appeal and notice of contention dismissed

**Prysmian Cavi E Sistemi S.R.L. v Australian Competition and Consumer Commission** (FCAFC) - trade practices - cartel agreement - contraventions of *Trade Practices Act 1974* (Cth) established - appeal dismissed

**Smith v Aircraft Maintenance Services Australia (AMSA) Pty Ltd** (FCA) - evidence - refusal to admit affidavit into evidence - erroneous failure to consider matter - exercise of judgment miscarried - appeal allowed

# Benchmark

**Ryde Developments Pty Ltd v The Property Investors Alliance Pty Ltd (No 2)** (NSWCA) - costs - appellant successful on appeal in one respect - respondent to pay 30 per cent of appellant's costs of appeal - appellant to pay 75 per cent of respondent's costs of amended summons and amended first cross-summons - orders made

**Mahaffy v Mahaffy** (NSWCA) - contempt - appeal against decision in which 8 of 13 charges of contempt were found proved beyond reasonable doubt - appeal allowed in part

**Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary** (NSWCA) - industrial law - penalty imposed for contravention of orders was manifestly excessive - appeal allowed - lesser penalty imposed

**Michelangelo Alfredo Mascarello & Anor v Registrar-General of New South Wales** (NSWSC) - equity - subrogation - negligence - solicitors' duties - subrogated cross-claims pursuant to ss133(2) & 133(4) *Real Property Act 1900* (NSW) not made out

**Soens v Rathborne** (NSWSC) - succession - family provision - application by plaintiff child of deceased for further provision from deceased's will granted - plaintiff granted lump sum - notional estate order to be made

**Davison v Kempson** (VSCA) - testator's family maintenance - failure to take into account applicant's 'ongoing dependency' on deceased - applicant awarded further provision from deceased's estate - appeal allowed

## Summaries With Link (Five Minute Read)

### **Barton (Appellant) v Wright Hassall LLP (Respondent) [2018] UKSC 12**

United Kingdom Supreme Court

Lady Hale, President; Lord Wilson, Lord Sumption, Lord Carnwath & Lord Briggs

Service - service by email - limitations - solicitors' duties - appellant was litigant in person who claimed against defendant solicitors for breach of duty in acting for him against other law firm and in relation to coming off the record after fee dispute - appellant served claim form by email on defendant's solicitors - appellant had not obtained indication whether solicitors prepared to accept email service - common ground it was not good service - on following day, claim form expired unserved - issue on appeal was whether Court should validate service - appeal conducted on assumption that if Court declined to validate service and appellant was required to commence new action, that action would be statute-barred - Pt 6 *Civil Procedure Rules* - Court's power to 'waive compliance with procedural conditions' - whether 'good reason' to validate service which was non-compliant - whether prejudice to defendant - whether

# Benchmark

reasonable steps by claimant to serve in compliance with rules - whether defendant or solicitor knew claim's contents when claim expired - whether result in Court below incompatible with appellant's right to fair trial in Article 6 European Convention on Human Rights - held: non-compliant service not validated - appeal dismissed.

[Barton](#)

[From Benchmark Wednesday, 14 March 2018]

## **Pike v Tighe [2018] HCA 9**

High Court of Australia

Kiefel CJ; Bell, Keane, Gordon & Edelman JJ

Town planning - statutory construction - appeal concerned two questions: first question was whether a successor in title to ownership of land created by reconfiguration of larger parcel was obliged by s245 *Sustainable Planning Act 2009* (Qld) to comply with condition of reconfiguration's approval that original owner failed to satisfy before reconfiguration's completion - if first question answered in the affirmative, second question was whether Planning and Environment Court of Queensland could make "enforcement order" under ss601, 604 and 605 to require successor's fulfilment of condition - 'access and utilities easement' allowing for provision access, on-site manoeuvring and for services and utilities to be connected - whether fact that successor in title was not party to development approval meant enforcement order could not be made against successor in title - held: both questions answered in the affirmative - appeal allowed.

[Pike](#)

[From Benchmark Friday, 16 March 2018]

## **Stone & Wood Group Pty Ltd v Intellectual Property Development Corporation Pty Ltd [2018] FCAFC 29**

Full Court of the Federal Court of Australia

Allsop CJ, Nicholas & Katzmann JJ

Intellectual property - trade marks - appellants (Stone & Wood) were craft beer brewers - Stone & Wood sold beer which was called 'Pacific Ale' - respondents (Elixir) were also craft beer brewers - proceedings concerned products sold by Elixir - Stone & Wood claimed against Elixir for passing off, and also for misleading or deceptive conduct, and false or misleading representations in contravention of Australian Consumer Law - Stone & Wood amended pleading to claim infringement of registered trade mark under *Trade Marks Act 1995* (Cth) (Trade Marks Act) - Elixir parties cross-claimed on basis Stone & Wood had made 'groundless threats' to make trade mark infringement claim and did not pursue infringement claim 'with due diligence' - primary judge rejected Stone & Wood's claims for misleading or deceptive conduct, false or misleading representations and for passing off, and also rejected trade mark claim - primary judge found cross-claim established, rejecting Stone & Wood's defence under s129(5) Trade Marks Act - *Competition and Consumer Act 2010* (Cth) - *Trade Marks Act 1995* (Cth) - held: leave to appeal in respect of cross-claim refused - appeal and notice of contention dismissed.

[Stone & Wood Group](#)

[From Benchmark Monday, 12 March 2018]

**Prysmian Cavi E Sistemi S.R.L. v Australian Competition and Consumer Commission [2018] FCAFC 30**

Full Court of the Federal Court of Australia

Middleton, Perram & Griffiths JJ

Trade practices - competition - respondent alleged appellant entered arrangement with companies which involving market sharing and price fixing (A/R Cartel Agreement) - respondent alleged impugned conduct (Snowy Hydro Project Agreement) gave effect to A/R Cartel Agreement in contravention of *Trade Practices Act 1974* (Cth) - primary judge found contraventions based on impugned conduct made out - whether open to primary judge to find contraventions in view of conclusions regarding other company (Nexans) - whether primary judge's findings contrary to evidence or inconsistent with respondent's case - whether appellant acted 'unilaterally' and outside process which A/R Cartel Agreement envisaged - whether improper consideration of evidence - held: appeal dismissed.

[Prysmian](#)

[From Benchmark Friday, 16 March 2018]

**Smith v Aircraft Maintenance Services Australia (AMSA) Pty Ltd [2018] FCA 264**

Federal Court of Australia

Rangiah J

Evidence - appellant contended respondent contravened ss44, 45 & 357 *Fair Work Act 2009* (Cth) - appellant challenged decision of primary judge to refuse admission of applicant's affidavit as evidence - primary judge found affidavit admissible under s63 *Evidence Act 1995* (Cth) but excluded it under s135 of the Act - whether primary judge erroneously refused to admit the affidavit - held: primary judge failed to consider whether evidence's 'misleading, confusing and prejudicial effect' was able to be overcome by 'ascribing appropriate weight' to evidence - primary judge's 'evaluative judgment' under s135 of the Act miscarried due to failure to consider this matter - appeal allowed.

[Smith](#)

[From Benchmark Wednesday, 14 March 2018]

**Ryde Developments Pty Ltd v The Property Investors Alliance Pty Ltd (No 2) [2018] NSWCA 40**

Court of Appeal of New South Wales

Beazley P, Payne JA & Barrett AJA

Costs - appellant succeeded on appeal in one respect - primary judge made no order for costs so that parties could make submissions - determination of order for costs of appeal and order for costs of trial - appellant sought that respondent pay its appeal costs, or 80 per cent those costs, that respondent pay 50 per cent of its costs of amended summons, and that appellant should pay 50 per cent of respondent's costs of amended first cross-summons - respondent

# Benchmark

sought that it should pay 30 per cent of appellant's appeal costs, that appellant should pay 70 per cent of its appeal costs, and that appellant should pay its costs of trial - alternatively, respondent sought that if appellant was entitled to discount for its success, then that discount should not exceed 10 per cent - whether costs order should reflect successful party's lack of success on issues which took up significant part of proceedings - held: respondent to pay 30 per cent of appellant's costs of appeal - appellant to pay 75 per cent of respondent's costs of amended summons and amended first cross-summons - orders made.

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[From Benchmark Wednesday, 14 March 2018]

## **Mahaffy v Mahaffy [2018] NSWCA 42**

Court of Appeal of New South Wales

Simpson & Payne JJA; Emmett AJA

Contempt - contempt charges brought against appellant by respondent brother arising from District Court proceedings which appellant, and company of which was director and shareholder, brought against respondent - proceedings were dismissed - Court made order in favour of respondent on cross-claim - costs orders made in respondent's favour in District Court proceedings and related proceedings - contempt charges arose from company's failure to pay amounts, from allegations made by appellant as to judicial officers' conduct and from alleged failure by appellant to produce subpoenaed documents - primary judge found 8 contempt charges proved beyond reasonable doubt and dismissed 5 charges - appellant sentenced to 10 months in prison - appellant appealed - whether convictions should stand - held: appeal upheld in respect of 5 charges - appeal dismissed in respect of 3 charges - appeal allowed in part.

[View Decision](#)

[From Benchmark Thursday, 15 March 2018]

## **Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary [2018] NSWCA 39**

Court of Appeal of New South Wales

Bathurst CJ; Gleeson & Simpson JJA

Industrial law - appellant appealed from decision in which primary judge imposed penalty of \$84,000 on appellant for contravention of Industrial Relations Commission of New South Wales's orders pursuant to s137(1)(a) *Industrial Relations Act 1996* (NSW) - grounds of appeal concerned Supreme Court's power to impose penalty, and the amount of the penalty imposed - whether open to Court to impose penalty for 'daily contraventions' - whether primary judge correct to find there had been a 'single contravention' - whether 'overall penalty' manifestly excessive - held: penalty was manifestly excessive - penalty set aside - appeal allowed - lesser penalty imposed.

[View Decision](#)

[From Benchmark Thursday, 15 March 2018]

# Benchmark

## **Michelangelo Alfredo Mascarello & Anor v Registrar-General of New South Wales [2018]**

### **NSWSC 284**

Supreme Court of New South Wales

Sackar J

Equity - subrogation - negligence - solicitors' duties - plaintiffs claimed compensation from NSW Torrens Assurance Fund from first cross-defendant - claim settled for \$3,000,050.00 - present proceedings concerned first cross-defendant's subrogated cross-claim in negligence against second cross-defendant lawyers - first cross-defendant alleged second cross-defendants negligently contributed to plaintiffs' loss - proceedings also concerned first cross-defendant's subrogated cross-claim against third cross-defendant (NWC Finance) - first cross-defendant contended it was entitled to recover amount settled with plaintiffs from NSW Finance on basis the obligation which gave rise to the payment was void as penalty - cross-claims made pursuant to ss133(2) & 133(4) *Real Property Act 1900* (NSW) - held: cross-claims against lawyers and NWC Finance not made out - parties to prepare short minutes.

[View Decision](#)

[From Benchmark Monday, 12 March 2018]

## **Soens v Rathborne [2018] NSWSC 302**

Supreme Court of New South Wales

Hallen J

Succession - family provision - plaintiff child of deceased sought provision from deceased's estate and notional estate of under Ch 3 *Succession Act 2006* (NSW) - unusual case as plaintiff had not seen deceased for first 24 years of life - deceased's will made no provision for plaintiff - defendant widow of deceased held property which could be designated as notional estate - assessment of plaintiff's financial position - size of estate - defendant's competing claim - plaintiff's relationship with deceased - contribution by plaintiff to deceased's welfare - deceased's entitlement to testamentary freedom - held: adequate provision not made for plaintiff by deceased's will - provision in form of lump sum granted to plaintiff - deceased's actual estate not sufficient to make order - notional estate order required to be made - orders and directions made.

[View Decision](#)

[From Benchmark Friday, 16 March 2018]

## **Davison v Kempson [2018] VSCA 51**

Court of Appeal of Victoria

Tate, Santamaria & Beach JJA

Testator's family maintenance - intestacy - deceased died intestate - applicant adult child of deceased made claim for further provision under pt IV *Administration and Probate Act 1958* (Vic) - trial judge ordered further provision in applicant's favour by legacy - primary judge also ordered that estate's remainder be equally divided between applicant, second respondent and third respondent - applicant contended trial judge failed to take considerations into account with result discretion miscarried - whether trial judge failed to take into account that applicant built up

# Benchmark

estate's assets - whether trial judge failed to take into account that applicant would not be able to fund alternative accommodation due to dependency on deceased, lack of alternative accommodation, not working 'considerable period of time' and being unlikely to work in the future - whether failure to take 'comparative wealth of siblings' into account - whether failure to take into account impact of costs order on financial circumstances of applicant - whether failure to take into account applicant's conduct following deceased's death - held: trial judge failed to take into account applicant's 'ongoing dependency' on deceased - error established - trial judge's discretion miscarried - applicant awarded further provision - balance to be divided equally between applicant, second respondent and third respondent - appeal allowed.

[Davison](#)

[From Benchmark Tuesday, 13 March 2018]

## CRIMINAL

### Executive Summary

**Kalbasi v Western Australia** (HCA) - criminal law - drug offences - attempting to supply prohibited drug with intent to sell or supply to another - jury erroneously instructed and directed in accordance with s11 *Misuse of Drugs Act 1981* (WA) - wrong direction to jury did not result in substantial miscarriage of justice - appeal against conviction dismissed

**Irwin v The Queen** (HCA) - criminal law - appellant convicted of one count of grievous bodily harm - verdict not unreasonable or incapable of support by evidence - appeal dismissed

### Summaries With Link

#### **Kalbasi v Western Australia [2018] HCA 7**

High Court of Australia

Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ

Criminal law - drug offences - proviso - appellant charged with attempting to supply prohibited drug with intent to sell or supply to another - judge, prosecutor and defence counsel assumed that s11 *Misuse of Drugs Act 1981* (WA) applied - *Krakouer v The Queen* (1998) 194 CLR 202 had held s11 did not apply on prosecution of charge of attempted possession of prohibited drug - however jury was directed to, and instructed in accordance with s11 presumption that if it was satisfied appellant was in possession of "drugs", then intention to sell or supply the "drugs" to another was proved beyond reasonable doubt - appellant appealed against conviction pursuant to s30 *Criminal Appeals Act 2004* (WA) - State conceded wrongness of direction on proof of intention but sought to dismiss appeal on basis there was no substantial miscarriage of justice - Court of Appeal of Western Australian found conviction inevitable and dismissed the appeal -



whether Court of Appeal erred in finding no substantial miscarriage of justice and dismissal of appeal - held: wrong direction to jury had not resulted in a substantial miscarriage of justice - appeal dismissed.

[Kalbasi](#)

## **Irwin v The Queen [2018] HCA 8**

High Court of Australia

Kiefel CJ; Bell, Gageler, Nettle & Gordon JJ

Criminal law - grievous bodily harm - appellant convicted of one count of unlawfully doing grievous bodily harm - appellant acquitted of count of assault occasioning bodily harm Court of Appeal of the Supreme Court of Queensland dismissed appeal - whether Court of Appeal erred by not finding that guilty verdict was 'unreasonable or could not be supported having regard to the evidence' - held: verdict not unreasonable - verdict not incapable of support by the evidence - appeal dismissed.

[Irwin](#)





# Benchmark

## Sonnet 105

**By:** William Shakespeare

Let not my love be call'd idolatry,  
Nor my beloved as an idol show,  
Since all alike my songs and praises be  
To one, of one, still such, and ever so.  
Kind is my love to-day, to-morrow kind,  
Still constant in a wondrous excellence;  
Therefore my verse to constancy confined,  
One thing expressing, leaves out difference.  
'Fair, kind and true' is all my argument,  
'Fair, kind, and true' varying to other words;  
And in this change is my invention spent,  
Three themes in one, which wondrous scope affords.  
'Fair, kind, and true,' have often lived alone,  
Which three till now never kept seat in one.

[https://en.wikipedia.org/wiki/William\\_Shakespeare](https://en.wikipedia.org/wiki/William_Shakespeare)

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