

Friday, 20 October 2017

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)

Clyde River (Hamlet) v. Petroleum Geo-Services Inc (SCC) - constitutional law - authorisation to conduct seismic testing - inadequate consultation with Inuit - appeal allowed - authorisation quashed

Frugtniet v Australian Securities and Investments Commission (FCAFC) - administrative law - imposition of banning order under 80 *National Consumer Credit Protection Act 2009* (Cth) - appeal dismissed

Shop, Distributive and Allied Employees Association v The Australian Industry Group (FCAFC) - judicial review - Fair Work Commission reduced penalty rates and other employee entitlements in awards in hospitality and retail industries - no jurisdictional error in determinations - appeal dismissed

Passmore v Maitland City Council (NSWCA) - negligence - trip and fall on tennis court - Council and Club not liable - appeal dismissed

Shellharbour City Council v Minister for Local Government (NSWCA) - costs - challenge to delegate's report in support of councils' amalgamation dismissed at trial - costs orders made against appellant - appellant's appeal discontinued due to Minister's abandonment of proposal to amalgamate - appeal against the costs orders dismissed

Coshott v Vardas (NSWCA) - competency of appeal - deed of release - insufficient evidence

appeal involved amount of \$100,000 - appeal was incompetent - appeal dismissed (I B C G W WI WB WC)]

Tudor Capital Australia Pty Limited v Christensen (NSWCA) - workers compensation - erroneous dismissal of appeal against Arbitrator's finding that widow of deceased worker was entitled to compensation payments in respect of husband's death - appeal allowed

Barnes v The State of New South Wales (NSWCA) - workers compensation - causation - inadequate reasons for finding worker's injuries caused by motor vehicle accident - evidence favoured the causation finding - notice of contention upheld - appeal dismissed

Tamanna v Zattere; Thakorlal v Zattere; Rabac Pty Ltd v Zattere (NSWSC) - land law - contract - three proceedings - purchasers entitled to damages for loss of bargain following vendors' repudiation of contracts for sale of lots in sub-division

Damm v Coastwide Site Services Pty Ltd (NSWSC) - judgments and orders - consent judgment set aside on basis third defendant was entitled to pursue its cross-claim

Morris Finance Ltd v Free (NSWSC) - equity - plaintiff entitled to enforce equitable charge against third defendant's half-share in property - orders made for sale of property and vacant possession

AAI Limited t/as Suncorp Insurance v Birch (QCA) - limitations - motor vehicle collision - claim against insurer of vehicle at fault for nervous shock - extension of time to bring proceedings granted - appeal dismissed

Berghan & Anor v Berghan (QCA) - contract - loan - amounts advanced to son by parents - oral loan contracts - implied term for repayment on demand - appeal allowed

Central Petroleum Limited v Geoscience Resource Recovery LLC (QSC) - private international law - contract - Court had jurisdiction to hear plaintiff's claim - application to set aside, or stay of proceedings until outcome of Texas proceedings, dismissed

Robinson v The Owners of Reflections Waterfront Apartments West Tower Strata Plan 58085 (WASCA) - negligence - slip and fall in strata complex's common area - strata company not liable - appeal dismissed

Global Advanced Metals Pty Ltd v Metallurg Inc (WASCA) - contract - shareholders deed - injunction - construction of shareholders deed - injunctive relief - appeal dismissed

La Trobe Financial Asset Management Ltd v Mdivest Pty Ltd (WASC) - contract - three actions in which plaintiff sought payment due pursuant to loan agreements, mortgages, and

guarantees, and sought possession of properties - judgment for plaintiff

Summaries With Link (Five Minute Read)

Clyde River (Hamlet) v. Petroleum Geo-Services Inc. [2017] SCC 40

Supreme Court of Canada

McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Constitutional law - proponents applied to National Energy Board (NEB) for authorisation to conduct 'offshore seismic testing for oil and gas in Nunavut' - Inuit of Clyde River opposed seismic testing, contending duty to consult was unfulfilled - NEB granted authorisation to proponents, concluding proponents had made 'sufficient efforts to consult', and that testing 'unlikely to cause significant adverse environmental effect' - Clyde River sought judicial review - Federal Court of Appeal found that Crown's duty to consult as satisfied by NEB's process - held: consultation and accommodation efforts were inadequate - Crown breached duty to consult - appeal allowed - authorisation quashed.

[Clyde River](#)

[From Benchmark Tuesday, 17 October 2017]

Frugtniet v Australian Securities and Investments Commission [2017] FCAFC 162

Full Court of the Federal Court of Australia

Reeves, Farrell & Gleeson JJ

Administrative law - appellant appealed against dismissal of his appeal from Administrative Appeals Tribunal's affirmation of Australian Securities and Investments Commission's decision to make banning order against him under 80 *National Consumer Credit Protection Act 2009* (Cth) - banning order made after delegate decided ASIC had reason to believe appellant 'was not a fit and proper person to engage in credit activities' - whether Div 3 oPt VIIC *Crimes Act 1914* (Cth) prevented Tribunal from taking into account 'spent convictions' - dishonest conduct - held: grounds of appeal failed - appeal dismissed.

[Frugtniet](#)

[From Benchmark Monday, 16 October 2017]

Shop, Distributive and Allied Employees Association v The Australian Industry Group [2017] FCAFC 161

Full Court of the Federal Court of Australia

North, Tracey, Flick, Jagot & Bromberg JJ

Judicial review - Fair Work Commission made determinations reducing penalty rates and other employee entitlements in awards in hospitality and retail industries - 134(1) *Fair Work Act 2009* (Cth) - applicant unions sought judicial review - unions contended Commission 'failed to appreciate that "the review" of awards required by s156 of the Fair Work Act' was conditional on a 'material change in circumstance' since earlier review conducted - unions also contended

Commission did not properly understand inquiry required under s134 of the Act, failed to take 'relative living standards' into account and 'needs of the low paid' pursuant to s134(1)(a), and that Commission's decision was unreasonable - "modern awards objective - "fair and relevant minimum safety net" - held: no jurisdictional error in Commission's construction or application of s134 of the Act - appeal dismissed.

[Shop, Distributive and Allied Employees Association](#)

[From Benchmark Wednesday, 18 October 2017]

Passmore v Maitland City Council [2017] NSWCA 253

Court of Appeal of New South Wales

Basten & White JJA; Sackville AJA

Negligence - appellant playing tennis at club suffered head injury when he tripped and fell - appellant sued Club and Council in negligence - appellant's claim depended on two 'factual propositions' - first proposition, that 'lines were raised a few millimetres above the surrounding surface' was not in dispute - second proposition, that appellant tripped because his foot caught against tramline's raised area, was in dispute - trial judge dismissed claim, not being satisfied that appellant had tripped on tramline - held: appeal raised no point to doubt trial judge's decision - no error in acceptance of witnesses' evidence, or in refusal to adjourn hearing, or in ordering separate determination of liability - grounds of appeal failed - appeal dismissed.

[View Decision](#)

[From Benchmark Monday, 16 October 2017]

Shellharbour City Council v Minister for Local Government [2017] NSWCA 256

Court of Appeal of New South Wales

Basten & Macfarlan JJA; Sackville AJA

Costs - respondent Minister proposed amalgamation of appellant Council with Wollongong City Council - appellant commenced proceedings in Land and Environment Court, challenging delegate's report supporting merger - proceedings dismissed - appellant sought to appeal - Minister did not proceed with amalgamation - appellant discontinued appeal - appellant sought to have Land and Environment Court's cost order against it set aside and payment of its costs by Minister and Secretary of Department of Premier and Cabinet - appellant contended Minister's abandonment of proposed amalgamation was "a complete capitulation" and that appellant would have "almost certainly" succeeded if appeal had gone ahead - appellant also contended Minister's conduct of proceedings was unreasonable - held: Minister's decision was not a capitulation - it was not "almost certain" appeal would have succeeded - no unreasonable conduct by Minister - appeal dismissed.

[View Decision](#)

[From Benchmark Monday, 16 October 2017]

Coshott v Vardas [2017] NSWCA 258

Court of Appeal of New South Wales

McColl JA, Leeming JA, Sackville AJA

Benchmark

Competency of appeal - appellants claimed damages against respondent in District Court for breach of contract and in tort - proceedings transferred to Equity division (Equity Division Proceedings) - Bergin J granted appellants' notice of motion seeking leave to amend statement of claim - Bergin J made costs order in appellants' favour (Costs Order) - Equity Division Proceedings settled - Deed of Release executed in which appellants released respondent from claim arising from amended statement of claim - appellants sought costs assessment - respondent contended entitlement to costs assessment precluded by Deed of Release - respondent sought declaration there were no orders in Equity Division Proceedings requiring payment of costs to appellants - primary judge found appellants breached Deed of Release in respect of costs assessment - appellants contended finding that Deed of Release precluded them from seeking Costs Order's enforcement was erroneous - respondents contended appeal be struck out or dismissed as incompetent - whether sufficient evidence in appellants' affidavit that amount at issue on appeal was at least \$100,000 - whether compliance with r51.22 *Uniform Civil Procedure Rules 2005* (NSW) - held: appeal was incompetent - appeal dismissed - respondent had failed to file motion objecting to competency within 28 day period under r51.41(1) of the Rules - delay not condoned such that Court would 'otherwise order' - respondent not entitled to costs order.

[View Decision](#)

[From Benchmark Thursday, 19 October 2017]

Tudor Capital Australia Pty Limited v Christensen [2017] NSWCA 260

Court of Appeal of New South Wales

McColl, Macfarlan & Payne JJA

Workers compensation - worker died at home from cardiac arrest - worker employed by appellant at time of death - respondent widow commenced proceedings against appellant in Workers Compensation Commission - respondent claimed entitlement to compensation payments under *Workers Compensation Act 1987* (NSW) - Arbitrator upheld respondent's claim, finding worker's death caused by viral myocarditis contracted by worker due to employment stress - Deputy President affirmed decision - whether 'experience of stress' was 'injury' - whether erroneous failure to determine whether 'experience of stress' was 'psychological injury' - held: Arbitrator and Deputy President failed to correctly apply test for identifying "injury" under s4 *Workers Compensation Act 1987* (NSW) - Arbitrator overlooked material facts, or erred in weight given to material facts, in determining inference to be drawn from evidence concerning cause of death of worker - Deputy President failed adequately to analyse medical evidence - appellant had not raised new issue on appeal - even if new issue raised, appellant not precluded from raising it as there was no denial of procedural fairness to respondent - appeal allowed.

[View Decision](#)

[From Benchmark Thursday, 19 October 2017]

Barnes v The State of New South Wales [2017] NSWCA 254

Court of Appeal of New South Wales

Macfarlan & White JJA; Sackville AJA

Workers compensation - worker was passenger in car - work injured when car ran into back of stationary vehicle being driven by appellant work colleague - worker employed by health district - respondent, on behalf of health district, sought indemnity pursuant to s151Z *Workers Compensation Act 1987* (NSW) against appellant for compensation payments made to or for worker, or on worker's behalf - appellant admitted breach of duty of care but denied worker suffered injury, loss or damage due to accident - appellant also pleaded workers compensation payments made on or before certain date were "statute barred from recovery" - appellant contended primary failed to give adequate reasons for finding accident caused worker's injuries, and failed to have regard to evidence suggesting worker's injuries were due to 'pre-existing degenerative condition or to other work-related injuries' - respondent contended causation finding accorded with evidence - respondent, by notice of contention, sought that causation finding be upheld even if primary judge failed to give adequate reasons - held: primary judge erred by 'failing to address significant arguments and evidence', but evidence favoured finding on causation - notice of contention upheld - appeal dismissed.

[View Decision](#)

[From Benchmark Tuesday, 17 October 2017]

Tamanna v Zattere; Thakorlal v Zattere; Rabac Pty Ltd v Zattere [2017] NSWSC 1388

Supreme Court of New South Wales

Darke J

Land law - contract - three proceedings heard together - plaintiffs were purchasers who made damages claims under contracts for sale of lots in sub-division - first and second defendants were vendors - contracts conditional upon registration of plan of sub-division and instrument (documents) under s88B *Conveyancing Act 1919* (NSW) - contracts provided either party could rescind if documents not registered by 'Sunset Date' - documents not registered by Sunset Date - vendors purported to rescind - purchasers contended vendors breached 'best endeavours or reasonable endeavours obligations' and not entitled to rescind - purchasers sought specific performance but property was sold, making specific performance impossible - purchasers purported to terminate on basis of vendors' repudiation - purchasers claimed damages for loss of bargain - purchasers under one contract also claimed damages under s236 Sch 2 *Competition and Consumer Act 2010* (Cth) - held: plaintiffs entitled to damages for loss of bargain following termination for vendors' repudiation - judgment for plaintiffs.

[View Decision](#)

[From Benchmark Monday, 16 October 2017]

Damm v Coastwide Site Services Pty Ltd [2017] NSWSC 1361

Supreme Court of New South Wales

Garling J Judgments and orders - plaintiff employed by labour?hire company worked for first defendant at site - plaintiff fell from platform and was injured - plaintiff commenced proceedings against first defendant, second defendant, third defendant and 'Nominal Insurer' as fourth defendant - second defendant filed a cross-claim (First Cross-Claim) against third defendant -

first defendant filed Second Cross-Claim against second and third defendant - third defendant filed Third Cross-Claim against first defendant, second defendant and Nominal Insurer - prior to filing of Third Cross-Claim, second defendant filed Consent Judgment - Consent Judgment entered by Court - third defendant sought that judgment be set aside - first defendant sought same relief - interests of justice - held: there was suggestion of 'real unfairness' to third defendant in avoidance of determination of its Cross-Claim - third defendant's motion granted - contention rejected that judgment entered irregularly or in bad faith - contention failed that Court's general jurisdiction permitted it to set aside judgment where *Uniform Civil Procedure Rules 2005* (NSW) otherwise prevented such order - first defendant's notice of motion dismissed - consent judgment set aside.

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[From Benchmark Monday, 16 October 2017]

Morris Finance Ltd v Free [2017] NSWSC 1417

Supreme Court of New South Wales

Ward CJ in Eq

Equity - equitable charge - plaintiff sought judicial sale of property and orders for possession - third and fourth defendants, prior to bankruptcies, held title in equal shares to property - first and second defendants were trustees of bankrupt estate of third and fourth defendants - sequestration orders made in respect of third and fourth defendants - fifth defendant was first registered mortgagee - plaintiff sought to enforce alleged equitable charge against property, which secured unpaid money under commercial lease agreement entered with third defendant, whose obligations were guaranteed by fourth defendant - held: plaintiff entitled to enforce equitable charge over third defendant's half-share of property - property to be sold subject Court's supervision - third and fourth defendants ordered to give vacant possession of property to plaintiff.

[View Decision](#)

[From Benchmark Friday, 20 October 2017]

AAI Limited t/as Suncorp Insurance v Birch [2017] QCA 232

Court of Appeal of Queensland

Holmes CJ, Gotterson JA & Flanagan J

Limitations - motor vehicle accident - nervous shock - respondent claimed damages for nervous shock resulting from motor vehicle collision - respondent claimed against appellant insurer of vehicle at fault - respondent sought extension of limitation period to make claim - primary judge granted extension of limitation period - s118 *District Court of Queensland Act 1967* (Qld) - ss30 & 31 *Limitation of Actions Act 1974* (Qld) - whether incorrect application of ss30(1)(b), 30(1)(c) & 32 *Limitation of Actions Act* - whether error in relation to material facts - 'material fact of a decisive character' - medical evidence - means of knowledge - held: grounds of appeal not established - no error by primary judge warranting Court's intervention - appeal dismissed.

[AAI Limited](#)

[From Benchmark Tuesday, 17 October 2017]

Berghan & Anor v Berghan [2017] QCA 236

Court of Appeal of Queensland

Sofronoff P, Philippides JA & Boddice J

Contract - loan - appellants advanced money to their respondent son on 13 occasions - trial judge found money was paid on condition of repayment but that appellants did not discharge onus to prove 'intention to create legally binding loan contracts' with respondent - held: evidence which trial judge accepted led to 'inescapable conclusion' that payments made by appellants to respondent were loan contracts - contracts were oral contracts with no express term as to when money was to be repaid - law implied obligation to repay money on demand - appeal allowed - judgment for appellants.

[Berghan](#)

[From Benchmark Tuesday, 17 October 2017]

Central Petroleum Limited v Geoscience Resource Recovery LLC [2017] QSC 223

Supreme Court of Queensland

Bowskill J

Private international law - plaintiff was Australian listed public company - defendant was American company based in Texas - parties entered agreement that defendant would assist plaintiff to contact and find farm-in partner - defendant claimed entitlement to commission on basis of further agreement (2012 agreement) - defendant sued plaintiff in US District Court of Harris County, Texas, seeking to enforce 2012 agreement - plaintiff objected to Texas Court's jurisdiction - District Court judge determined Court had jurisdiction - Court of Appeals' decision reserved - plaintiff sought declaratory relief it did not enter and was not bound by 2012 agreement - defendant challenged Court's jurisdiction to entertain plaintiff's claim, seeking to set aside proceedings or stay of proceedings until outcome of Texas proceedings - rr124(1)(g) & 124(1)(x) *Uniform Civil Procedure Rules 1999* (Qld) - ss5 & 11 *Foreign Judgments Act 1991* (Cth) - held: Court had jurisdiction in respect of plaintiff's claim - not necessary or appropriate to stay proceedings as sought by defendant - application dismissed.

[Central Petroleum](#)

[From Benchmark Monday, 16 October 2017]

Robinson v The Owners of Reflections Waterfront Apartments West Tower Strata Plan 58085 [2017] WASCA 190

Court of Appeal of Western Australia

Martin CJ; Murphy & Mitchell JJA

Negligence - appellant injured when she slipped and fell in strata complex's common area - respondent strata company managed the strata complex - primary judge dismissed appellant's claim in negligence against respondent - whether erroneous findings that appellant did not prove causation, that respondent had 'adequate and reasonable cleaning regime', and that respondent was not negligent - ss5B, 5C & 5D *Civil Liability Act 2002* (WA) (CLA) - s5 *Occupiers' Liability Act 1985* (WA) (OLA) - whether stain, tile or walkway was a 'danger' under

Benchmark

OLA or 'risk of harm' under s5B(2) CLA - held: no error in primary judge's finding that there was no evidence that stain on floor had caused appellant to slip - grounds of appeal failed - appeal dismissed.

[Robinson](#)

[From Benchmark Friday, 20 October 2017]

Global Advanced Metals Pty Ltd v Metallurg Inc [2017] WASCA 188

Court of Appeal of Western Australia

Buss P, Murphy & Mitchell JJA

Contract - shareholders deed - applicant sought declarations concerning construction of shareholders deed as to its rights to inspect and copy appellant's documents, and injunction to compel appellant to allow it to inspect and copy certain documents - primary judge granted orders substantively in terms sought by applicant - whether primary judge erred in proper construction of shareholders deed - whether erroneous finding that there had 'not been intentional breaches of confidentiality obligations' - whether alleged breaches constituted 'unclean hands' - whether injunctive relief should have been denied - held: no error in decision of primary judge - grounds of appeal failed - appeal dismissed.

[Global Advanced Metals](#)

[From Benchmark Friday, 20 October 2017]

La Trobe Financial Asset Management Ltd v Mdivest Pty Ltd [2017] WASC 272

Supreme Court of Western Australia

Chaney J

Contract - three actions in which plaintiff sought payment due pursuant to loan agreements, mortgages, and guarantees, and sought possession of properties which were security for loans - same defendants in two of the actions - no issue amounts were owing and unpaid - overlap of defences between actions - one defence common to all actions - whether 'lack of clarity' in documents disentitled plaintiff from suing on agreements - effectiveness of assignment of loan agreement, guarantee and mortgage - whether plaintiff barred from claiming relief due to agreement with defendants to forebear action, or due to an estoppel - whether plaintiff failed to comply with s81B(2)(b) *Residential Tenancies Act 1987* (WA), precluding Court from making order for possession - whether s81B applied in the context of one the actions, precluding Court from making order for possession - held: defences unsuccessful - plaintiff entitled to judgment in all three actions.

[La Trobe](#)

[From Benchmark Friday, 20 October 2017]

CRIMINAL

Executive Summary

Benchmark

Director of Public Prosecutions v Dalgliesh (a pseudonym) (HCA) - criminal law - sentencing appeal - incest - manifest inadequacy - Court of Appeal of Victoria erroneously treated range indicated by current sentencing practices as determinative of Director's appeal against sentence - appeal allowed

JWM v Tasmania (TASCCA) - criminal law - sexual offences - indecent assault - maintaining sexual relationship with son under 17 - no error in severity of sentence imposed - appeal dismissed

Summaries With Link

Director of Public Prosecutions v Dalgliesh (a pseudonym) [2017] HCA 41

High Court of Australia

Kiefel CJ, Bell, Gageler, Keane & Gordon JJ

Criminal law - incest - sentence appeal - current sentencing practices - Director of Public Prosecutions appealed against sentence imposed for offence of incest on ground of manifest inadequacy - appeal concerned sentence imposed for one charge, in which offender was sentenced to three years and six months' in prison - Court of Appeal of Supreme Court of Victoria dismissed appeal, finding sentence was within range of current sentencing practices i - however Court also found that the range "reveals error in principle" because it was so low it was not proportionate to offending's 'objective gravity' or offender's 'moral culpability' - Director contended Court of Appeal erred by not concluding sentencing judge had erroneously imposed manifestly inadequate sentence - Director contended Court of Appeal erroneously elevated current sentencing practices' significance such that 'they were determinative of the issue' - s5(2) *Sentencing Act 1991 (Vic)* - held: Court of Appeal erred by treating range which current sentencing practices established as decisive of appeal - appeal allowed.

[Director of Public Prosecutions](#)

JWM v Tasmania [2017] TASCCA 22

Court of Criminal Appeal of Tasmania

Pearce & Brett JJA; Porter AJ

Criminal law - sexual offences - indecent assault - sentencing practices - sentence appeal - appellant pleaded guilty to charge of 'maintaining a sexual relationship with his son' when son was between 10 and 15 years - appellant sentence to four years in prison without eligibility for parole until half the sentence was served - order made that appellant's name be placed on register under *Community Protection (Offender Reporting) Act 2005 (Tas)* for five years - whether sentence manifestly excessive - held: no error in severity of sentence imposed - sentence did not exceed ambit of sentencing discretion - appeal dismissed.

[JWM](#)



Benchmark

Moonrise

By [Gerard Manley Hopkins](#)

I AWOKE in the Midsummer not to call night, in the
white and the walk of the morning:
The moon, dwindled and thinned to the fringe of a
finger-nail held to the candle,
Or paring of paradisaical fruit, lovely in waning but
lustreless,
Stepped from the stool, drew back from the barrow, of
dark Maenefa the mountain;
A cusp still clasped him, a fluke yet fanged him, en-
tangled him, not quit utterly.
This was the prized, the desirable sight, unsought, pre-
sented so easily,
Parted me leaf and leaf, divided me, eyelid and eyelid of
slumber.

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