

Friday, 28 April 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)

Chevron Australia Holdings Pty Ltd v Commissioner of Taxation (FCAFC) - taxation - income tax - transfer pricing provisions - 'arm's length consideration' - challenge to assessments concerning interest appellant paid to its United States subsidiary under 'Credit Facility Agreement' - appeal dismissed

Cao v Goldsmith t/as Goldsmith Lawyers (FCAFC) - costs - erroneous dismissal of appellant's application to set aside Bankruptcy Notice - appellant to have costs of appeal and hearing before primary judge

Lim v Comcare (FCAFC) - administrative law - worker's compensation - exclusion of appellant's condition from definition of 'injury' under *Safety, Rehabilitation and Compensation Act 1988* (Cth) - failure to address entirety of question to which exclusion in s5A(1) gave rise when read with s5B - appeal allowed

AAP Industries Pty Ltd v Rehau Pte Ltd (NSWSC) - contract - defendant bound by supply agreement's express terms to purchase plumbing articles only from plaintiff - exclusivity term implied to extent suggested by authorities - judgment for plaintiff

United Petroleum Pty Ltd v Bonnie View Petroleum Pty Ltd (In Liquidation) & Ors (VSC) - contract - guarantee - leases and tenancies - proceedings arising from sale of petrol business - breach of Side Agreement - judgment for plaintiff

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Masters Home Improvement Australia Pty Ltd v North East Solutions Pty Ltd (VSCA) - contract - leases and tenancies - guarantee - no breach of agreement for lease of site - appeal allowed

Nationwide News Pty Ltd v Weatherup (QCA) - defamation - costs - finding that imputation was not substantially true set aside - costs to be assessed on indemnity basis with reference to District Court scale - appeal allowed in part

Summaries With Link (Five Minute Read)

Chevron Australia Holdings Pty Ltd v Commissioner of Taxation [2017] FCAFC 62

Full Court of the Federal Court of Australia

Allsop CJ; Perram & Pagone JJ

Taxation - income tax - appellant was Australian company which challenged Commissioner's assessments under Div 13 *Income Tax Assessment Act 1936* (Cth) and Div 815 *Income Tax Assessment Act 1997* (Cth) concerning interest it paid to its United States subsidiary Chevron Texaco Funding Corporation ('CFC') under 'Credit Facility Agreement' between them - assessments made on basis that interest appellant paid to CFC 'was greater than it would have been under an arm's length dealing between independent parties' - transfer pricing provisions - 'arm's length consideration' - 'property' - 'consideration' - 'might reasonably be expected to have been given or agreed to be given' - Div 13's 'fiscal and commercial context' - whether assessment excessive - whether erroneous identification of conditions operating in commercial of financial relations between appellant and CFC - whether erroneous exclusion of 'common ownership' as condition - *Income Tax (Transitional Provisions) Act 1997* (Cth) - *International Tax Agreements Act 1953* (Cth) - *Taxation Administration Act 1953* (Cth) - held: appeal dismissed.

[Chevron](#)

[From Benchmark Tuesday, 25 April 2017]

Cao v Goldsmith t/as Goldsmith Lawyers [2017] FCAFC 63

Full Court of the Federal Court of Australia

Foster, Gleeson & Markovic JJ

Costs - Federal Circuit Court dismissed appellant's application to set aside Bankruptcy Notice - respondent was appellant's former solicitor - respondent had obtained judgment against appellant for unpaid legal fees - appellant sought to appeal - respondent withdrew opposition to appellant's application - Court found primary judge erred in dismissing appellant's application - determination of costs of appeal and hearing before primary judge - whether costs should abide outcome of negligence proceedings which were foreshadowed - s40(1)(g) *Bankruptcy Act 1966* (Cth) - ss98(1)(b) & 99 *Civil Procedure Act 2005* (NSW) - determination of costs - held: costs of appeal should follow event - appellant to have costs both of appeal and hearing before primary judge.

[Cao](#)

[From Benchmark Thursday, 27 April 2017]

Lim v Comcare [2017] FCAFC 64

Full Court of the Federal Court of Australia

Kenny, Tracey & Bromberg JJ

Administrative law - worker's compensation - appellant worked for Australian Communications and Media Authority - appellant claimed compensation pursuant to *Safety, Rehabilitation and Compensation Act 1988* (Cth) - Administrative Appeals Tribunal found applicant suffered psychological condition arising from employment as result of performance appraisal which was 'reasonable administrative action taken in a reasonable manner' and thus appellant's condition excluded from definition of 'injury' under Act - primary judge dismissed appeal, finding Tribunal did not fail to properly apply s5A in making its findings of fact - whether primary judge erroneously failed to find Tribunal misconstrued 'suffered as a result of' in exclusion in definition of injury in s5A(1) - effect of decision in *Comcare v Martin* [2016] HCA 43 - held: Tribunal erred with regard to *Comcare v Martin* by failing to address entirety of question to which exclusion in s5A(1) gave rise when read with s5B - Tribunal erred in 'the application of the causal connection' in the exclusion - appeal allowed.

[Lim](#)

[From Benchmark Thursday, 27 April 2017]

AAP Industries Pty Ltd v Rehau Pte Ltd [2017] NSWSC 390

Supreme Court of New South Wales

Davies J

Contract - parties executed contract for supply by plaintiff of plumbing articles to defendant (supply contract) - also said to be seven informal contracts and documents between parties for other plumbing articles ('further contracts') - plaintiff contended defendant breached contracts when it ceased ordering plumbing articles from plaintiff - principal issue was whether contracts had implied term of exclusivity - construction of contracts - held: defendant obliged by express terms of supply contract to purchase the plumbing articles only from plaintiff - Court found it 'may not be necessary to imply a term of exclusivity' but found term implied to extent authorities suggested it was implied by contract's proper construction - plaintiff entitled to damages for breach of supply agreement.

[AAP](#)

[From Benchmark Tuesday, 25 April 2017]

United Petroleum Pty Ltd v Bonnie View Petroleum Pty Ltd (In Liquidation) & Ors [2017] VSC 185

Supreme Court of Victoria

Kennedy J

Contract - proceedings arising from sale of petrol station business by defendant company (BV) to plaintiff - BV leased sale property from defendant landlords - plaintiff contended BV breached

Side Agreement by failing to remediate land and to take steps to assign lease - plaintiff claimed sum to remediate site and amount incurred in obtaining lease directly with landlords - amounts claimed against BV and defendant guarantor - construction of Side Agreement - held: plaintiff established alleged breaches of Side Agreement - plaintiff entitled to apply Retention Amount and proceeds of Bank Guarantee against its losses under Side Agreement - judgment for plaintiff - counterclaim dismissed.

[United Petroleum](#)

[From Benchmark Friday, 28 April 2017]

Masters Home Improvement Australia Pty Ltd v North East Solutions Pty Ltd [2017] VSCA 88

Court of Appeal of Victoria

Santamaria, Ferguson & Kaye JJA

Contract - respondent (NES) was corporate entity in 'Maxi Foods Group' (Maxi) - first applicant (Masters) was subsidiary of second applicant (Woolworths) - respondent agreed to purchase site to construct store to be leased to Masters - Masters' obligations to be guaranteed by Woolworths - parties entered Agreement for Lease of site - NES sued Woolworths and Masters for breach of agreement - primary judge found Woolworths and Masters breached obligation to act reasonably and in good faith to attempt to resolve differences concerning cost of store's construction and Masters' contribution to costs - appellant appealed - held: Court made critical finding concerning costs of store's construction and amount Masters was to contribute to the costs on basis of a spreadsheet provided by quantity surveyor - spreadsheet was work in progress and its figures not final - no sufficient basis for judge's pivotal finding - no breach of contract by Masters or Woolworths - appeal allowed.

[Masters Home Improvement](#)

[From Benchmark Friday, 28 April 2017]

Nationwide News Pty Ltd v Weatherup [2017] QCA 70

Court of Appeal of Queensland

Fraser JA; Douglas & Applegarth JJ

Defamation - costs - jury found appellant defamed respondent in article, having rejected appellant's defence that imputations were substantially true and defence of contextual truth - appellant contended that no reasonable, properly directed jury could make findings - whether order that costs be assessed by reference to Supreme Court scale was erroneous - whether indemnity costs warranted - s16 *Defamation Act 1974* (NSW) - ss25, 26 & 40 *Defamation Act 2005* (Qld) - held: jury's finding that contextual imputation not substantially true set aside - costs to be assessed on indemnity basis by reference to District Court scale and matters stated in r703 *Uniform Civil Procedure Rules 1999* (Qld) - appeal allowed in part.

[Nationwide News](#)

[From Benchmark Tuesday, 25 April 2017]

CRIMINAL

Executive Summary

Forster v Director of Public Prosecutions (NSWSC) - criminal law - habitual consorting - erroneous statutory construction - conclusion not open on evidence - wrongful conviction - appeal allowed

Bouch v The Queen (VSCA) - criminal law - appellant convicted of culpable driving causing death - jury misdirected by trial judge - no substantial injustice caused by misdirection because conviction was inevitable - appeal dismissed

Summaries With Link

Forster v Director of Public Prosecutions [2017] NSWSC 458

Supreme Court of New South Wales

McCallum J

Criminal law - habitual consorting - plaintiff pleaded guilty to habitual consorting contrary to s93X *Crimes Act 1900* (NSW) - plaintiff sentenced to 12 months in prison with 9 months non-parole period - plaintiff allowed to traverse plea and granted Supreme Court bail almost eleven months after sentence commenced - Magistrate found offence proved - sentence reinstated - plaintiff appealed against conviction - held: there was erroneous construction of statute - conclusion that on-the-street encounters were consorting under s93X was not open on the evidence - no merit in challenge to adequacy of reasons - plaintiff wrongly convicted - appeal allowed.

[Forster](#)

Bouch v The Queen [2017] VSCA 86

Court of Appeal of Victoria

Redlich, Weinberg, Whelan, Priest & Ferguson JJA

Criminal law - appellant charged with culpable driving causing death (CDCD) - appellant found guilty of CDCD and charge of negligently causing serious injury - appellant appealed against convictions - whether substantial miscarriage of justice due to trial judge's direction 'that in order to find the appellant guilty of culpable driving and negligently causing serious injury it was necessary that the jury be satisfied that the appellant's conduct merited criminal punishment' - held: trial judge misdirected jury in relation to charge of CDCD by instructing them that they had to be satisfied appellant's driving 'merited criminal punishment' - misdirection did not give rise to a substantial miscarriage of justice however because conviction for CDCD was inevitable - appeal dismissed.

[Bouch](#)



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The Cloud Confines

By [Dante Gabriel Rossetti](#)

The day is dark and the night
 To him that would search their heart;
 No lips of cloud that will part
Nor morning song in the light:
 Only, gazing alone,
 To him wild shadows are shown,
 Deep under deep unknown
And height above unknown height.
 Still we say as we go,
 "Strange to think by the way,
 Whatever there is to know,
 That shall we know one day."

The Past is over and fled;
 Nam'd new, we name it the old;
 Thereof some tale hath been told,
But no word comes from the dead;
 Whether at all they be,
 Or whether as bond or free,
 Or whether they too were we,
Or by what spell they have sped.
 Still we say as we go,
 "Strange to think by the way,
 Whatever there is to know,
 That shall we know one day."

What of the heart of hate
 That beats in thy breast, O Time?
 Red strife from the furthest prime,
And anguish of fierce debate;
 War that shatters her slain,
 And peace that grinds them as grain,
 And eyes fix'd ever in vain
On the pitiless eyes of Fate.
 Still we say as we go,
 "Strange to think by the way,
 Whatever there is to know,
 That shall we know one day."

What of the heart of love



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That bleeds in thy breast, O Man?
Thy kisses snatch'd 'neath the ban
Of fangs that mock them above;
Thy bells prolong'd unto knells,
Thy hope that a breath dispels,
Thy bitter forlorn farewells
And the empty echoes thereof?
Still we say as we go,
"Strange to think by the way,
Whatever there is to know,
That shall we know one day."

The sky leans dumb on the sea,
Aweary with all its wings;
And oh! the song the sea sings
Is dark everlastingly.
Our past is clean forgot,
Our present is and is not,
Our future's a seal'd seedplot,
And what betwixt them are we?
We who say as we go,
"Strange to think by the way,
Whatever there is to know,
That shall we know one day."

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