

Friday, 30 October 2020

Weekly Banking Law Review Selected from our Daily Bulletins covering Banking

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Executive Summary (1 minute read)

Victoria Power Networks Pty Ltd v Commissioner of Taxation (FCAFC) - taxation - income tax - appeals against disallowance of objection to income tax assessments - appeals allowed in part

Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation (FCA) - corporations - *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) - 'admitted contraventions' - \$1.3 billion pecuniary penalty appropriate - declarations and orders made

Minister for the Environment v ACN 089 171 415 Pty Ltd (FCA) - environmental law - admitted contravention of s13(1)(a)(iii) *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) - penalty of \$500,000 imposed - declarations and orders made as sought by parties

Coffs Harbour City Council v Polglase (NSWCA) - negligence - 5 year old plaintiff injured in fall from jetty - Council liable - appeal dismissed - leave to cross-appeal refused - inappropriate to resolve notice of contention

Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd (NSWCA) - negligence - appellant injured in fall from horse whilst participating in 'campdraft organised by respondent - respondent not liable - appeal dismissed

Arcidiacono v The Owners – Strata Plan No 17719; Arcidiacono v The Owners – Strata Plan No 61233 (NSWCA) - easements - respondents had 'present entitlement' to 'easements

by prescription' over two land parcels - leave to appeal granted - appeal dismissed

Gregg v R (NSWCCA) - criminal law - corporations - appellant convicted of offences contrary to s1307(1) *Corporations Act 2001* (Cth) - appeal against conviction allowed - verdicts quashed - appellant acquitted

Moore v Aubusson (NSWSC) - contract - estoppel - wills and estates - trusts - defendant executor held properties on trust for plaintiffs in equal shares as tenants in common - declaration and orders made

Rathswohl v Court (NSWSC) - evidence - wills and estates - objection to tender of mobile phone recording made without testator's consent - recording admitted

Howly v Amoud (NSWSC) - negligence - Local Court appeal - motor vehicle accident - error by Magistrate established - "a substantial wrong or miscarriage" - 'fresh hearing' warranted - appeal allowed

Commissioner of Police v Barbaro (QCA) - warrants - legal professional privilege - criminal law - respondent's entitlement 'to protect privileged information' was 'reasonable excuse' for refusal to give information to police - appeal dismissed

Edwards v Virgin Blue International Pty Ltd (SASCFC) - mental harm - workers compensation - claim arising from death of appellant's son - magistrate summarily dismissed claim - s58AA *Workers Rehabilitation and Compensation Act 1986* (SA) - appeal allowed

Nikolich v Webb (WASCA) - negligence - appellant injured following slip on 'wet bathroom floor' at 'respondents' short?stay accommodation rental property' - respondents not liable - appeal dismissed

Humich Nominees Pty Ltd v Commissioner of Main Roads (WASCA) - planning and environment - judicial review - rejection of 'crossover application' - appeal dismissed

Summaries With Link (Five Minute Read)

Victoria Power Networks Pty Ltd v Commissioner of Taxation [2020] FCAFC 169

Full Court of the Federal Court of Australia

Logan, Colvin & Thawley JJ

Taxation - companies ('Powercor' and 'Citipower') provided 'electricity distribution services' - Powercor and CitiPower were 'subsidiary members of a consolidated tax group' of which appellant was 'head company' - appellant objected to income tax assessments insofar as they

concerned businesses which Powercor and CitiPower conducted - objections disallowed - primary judge found for Commissioner on appeal - appellant appealed - appeal concerned 'proper treatment' of dealings concerning 'uneconomic connections' - s21A *Income Tax Assessment Act 1936* (Cth) - held: appeals allowed in part.

[Victoria](#)

[From Benchmark Monday, 26 October 2020]

Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation [2020] FCA 1538

Federal Court of Australia

Beach J

Corporations - applicant sought declarations respondent contravened provisions of *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and order that respondent pay \$1.3 billion pecuniary penalty to Commonwealth - parties provided 'statement of agreed facts and admissions' and 'joint written submission' - s191 *Evidence Act 1995* (Cth) - *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth) - 'admitted contraventions' - general and specific deterrence - whether \$1.3 billion pecuniary penalty appropriate - held: \$1.3 billion pecuniary penalty appropriate - declarations and orders made.

[Chief Executive Officer](#)

[From Benchmark Wednesday, 28 October 2020]

Minister for the Environment v ACN 089 171 415 Pty Ltd [2020] FCA 1557

Federal Court of Australia

Mortimer J

Environmental law - respondent admitted contravention of s13(1)(a)(iii) *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) - 'agreed statement of facts' - 'amended joint submissions' - whether contravention was proved - whether appropriate to make 'declarations and orders' which parties proposed - held: contravention was proved - penalty of \$500,000 imposed - declarations and orders made as sought by parties.

[Minister for the Environment](#)

[From Benchmark Friday, 30 October 2020]

Coffs Harbour City Council v Polglase [2020] NSWCA 265

Court of Appeal of New South Wales

Basten, Macfarlan & Leeming JJA

Negligence - 5 year old plaintiff injured in fall from jetty - plaintiff sued Council, Trust, State and plaintiff's grandparents - primary judge found Council and Trust liable - other claims were dismissed - Council appealed - plaintiff sought to cross-appeal - State filed notice of contention - occupier's liability - whether Council or Trust breached duty of care - whether 'risk warning' meant that 'no duty of care' owed to plaintiff - whether State liable in light of State's role in restoration of jetty and as 'former occupier' - if State 'otherwise liable', whether Council established breach by State before 2002 'was causally connected' with damage under ss5D(1)

& (2) *Civil Liability Act 2002* (NSW) (Civil Liability Act) - whether State, if liable, entitled to defence under s42 Civil Liability Act - whether grandparents owed duty of care to plaintiff - if grandparents owed duty whether they breached duty causing injury to plaintiff - held: appeal dismissed - leave to cross-appeal refused - inappropriate to resolve notice of contention

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[From Benchmark Monday, 26 October 2020]

Tapp v Australian Bushmen & Campdraft & Rodeo Association Ltd [2020] NSWCA 263

Court of Appeal of New South Wales

Basten, Payne & McCallum JJA

Negligence - appellant participated in 'campdraft event' which respondent organised - appellant fell from horse and injured spine - appellant sought damages in negligence against respondent - quantum was agreed in sum of \$6,750,000 - primary judge found in respondent's favour - appellant appealed - whether breach of duty of care - whether appellant's injury resulted from 'materialisation of an obvious risk of a dangerous recreational activity' - whether respondent had 'duty to warn' appellant of risk - ss5L, 5F & 5K *Civil Liability Act 2002* (NSW) - s60 Australian Consumer Law - held: appeal dismissed.

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[From Benchmark Friday, 30 October 2020]

Arcidiacono v The Owners & Strata Plan No 17719; Arcidiacono v The Owners & Strata Plan No 61233 [2020] NSWCA 269

Court of Appeal of New South Wales

Macfarlan, White & McCallum JJA

Easements - respondents owned properties which adjoined 'two small parcels of land' (parcels) - primary judge found respondents had 'present entitlement to 'easements by prescription' over parcels - primary judge held that if respondents had not had present entitlement to the easements, she would have imposed easements under s88K *Conveyancing Act 1919* (NSW) - appellants owned 'servient tenements' and 'another two adjacent allotments of land' - appellant sought to appeal - appellants contended that requirements for establishing easements by prescription were unsatisfied - appellants also contended requirements for easements' imposition under s88K *Conveyancing Act* were unsatisfied - held: leave to appeal granted - appeal dismissed.

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[From Benchmark Friday, 30 October 2020]

Gregg v R [2020] NSWCCA 245

Court of Criminal Appeal of New South Wales

Bathurst CJ, Hoeben CJ at CL & Leeming JA

Criminal law - corporations - appellant convicted of offences contrary to s1307(1) *Corporations Act 2001* (Cth) - appellant sentenced to 12 months in prison on 'count 1' and 2 years in prison

'count 2', 'to be served concurrently by way of an Intensive Correction Order' - appellant appealed against conviction and sentence - whether verdicts unreasonable - whether primary judge erred in admitting evidence 'on the viability of centralised procurement of steel' - whether primary judge erred in rejection of tender by appellant of 'Global Business Overview presentation' - whether primary judge erred in directions to jury - whether miscarriage of justice arising from 'closing address' of prosecutor - whether miscarriage of justice arising from 'summing up' - held: appeal allowed - verdicts quashed - appellant acquitted.

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[From Benchmark Thursday, 29 October 2020]

Moore v Aubusson [2020] NSWSC 1466

Supreme Court of New South Wales

Ward CJ in Eq

Contract - estoppel - wills and estates - trusts - plaintiffs sought declaration that defendant executor held whole of deceased's estates on trust for plaintiffs 'in equal shares as tenants in common' - plaintiffs also sought transfer of estate to them - contract - proprietary estoppel - equitable estoppel - whether deceased made representation to plaintiffs that she would leave whole estate to them on certain conditions - held: Court satisfied deceased made representation to plaintiffs that she would leave properties to them on certain conditions but promise did not comprise estate's entirety - defendant held properties trust for plaintiffs in equal shares as tenants in common - declaration and orders made.

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[From Benchmark Tuesday, 27 October 2020]

Rathswohl v Court [2020] NSWSC 1490

Supreme Court of New South Wales

Rees J

Evidence - wills and estates - succession - plaintiff, under s59 *Succession Act 2006* (NSW), sought provision from estate of deceased father - plaintiff tendered recording of conversation between other child in family (Mrs Davies) and father without 'knowledge or consent' of father - Ms Davies made recording on her mobile phone - objection taken to tender on basis recording was 'improperly or illegally obtained' - whether conversation's recording was 'reasonably necessary for the protection of Mrs Davies' 'lawful interests' under s7(3)(b)(i) *Surveillance Devices Act 2007* (NSW) - €œreasonably necessary for the protection of the lawful interests€ - held: recording admitted without consent.

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[From Benchmark Wednesday, 28 October 2020]

Khowly v Amoud [2020] NSWSC 1445

Supreme Court of New South Wales

Ierace J

Negligence - Local Court appeal - motor vehicle accident - self-represented litigant - plaintiff

sought to appeal from Magistrate's judgment 'concerning liability arising from a motor vehicle accident' - Magistrate had ordered plaintiff to pay amounts to first and second defendants - whether erroneous finding of no contributory negligence by first defendant - whether erroneous rejection of evidence - whether 'lack of procedural fairness' - whether erroneous failure to admit 'COPS entry' - whether misconstruction of s69 *Civil Liability Act 2002* (NSW) - r51.53(1)(b) *Uniform Civil Procedure Rules 2005* (NSW) - s40 *Local Court Act 2007* (NSW) - held: Magistrate erred in rejecting 'COPS entry' and in disallowing plaintiff's cross-examination of first defendant - a substantial wrong or miscarriage established - 'fresh hearing' warranted - appeal allowed.

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[From Benchmark Friday, 30 October 2020]

Commissioner of Police v Barbaro [2020] QCA 230

Court of Appeal of Queensland

Sofronoff P; Philippides & Mullins JJA

Warrants - legal professional privilege - criminal law - police executed warrant at premises - proceedings arising from respondent's refusal to give PIN to police officer for purpose of unlocking respondent's mobile phone - respondent charged with refusing 'without a reasonable excuse' and was charged under s205A *Criminal Code* (Qld) - respondent claimed phone contained 'privileged communications' between him and his solicitor - respondent claimed that 'a right to protect privileged information' was a reasonable excuse for his refusal - Magistrate found respondent guilty - respondent appealed - primary judge found in respondent's favour - appellant appealed - held: respondent 'entitled to prevent police' from reading respondent's 'privileged material' - respondent's entitlement was a 'reasonable excuse' - appeal dismissed.

[Commissioner](#)

[From Benchmark Friday, 30 October 2020]

Edwards v Virgin Blue International Pty Ltd [2020] SASCFC 98

Full Court of the Supreme Court of South Australia

Kourakis CJ; Stanley & Doyle JJ

Mental harm - workers compensation - appellant brought proceedings seeking damages for 'pure mental harm' allegedly suffered when she was informed of son's death in Thailand - appellant alleged son died in course of employment with respondent and that death was result of respondent's breach of its duty of care - appellant contended her 'nervous shock injury' was also the result of respondent's breach of its duty of care - appellant had brought successful separate compensation claim for son's death under s25 *Workers Compensation Act 1987* (NSW) - magistrate summarily dismissed claim - whether s58AA *Workers Rehabilitation and Compensation Act 1986* (SA) extended to nervous shock damages claim by appellant - held: appeal allowed.

[Edwards](#)

[From Benchmark Wednesday, 28 October 2020]

Nikolich v Webb [2020] WASCA 169

Court of Appeal of Western Australia

Murphy, Beech & Vaughan JJA

Negligence - appellant injured 'after slipping on a wet bathroom floor at' 'respondents' short?stay accommodation rental property' - appellant sued respondents - respondents admitted they owed duty of care but denied it was breached - appellant appealed against primary judge's dismissal of claim - 'obvious risk' - whether primary judge misconstrued s50 *Civil Liability Act 2002 (WA)* (CLA) - whether primary judge erroneously found that 'relevant risk' was 'obvious risk' for purpose of s50 CLA - whether erroneous findings by primary judge concerning 'other pleaded allegations of negligence' - 'volenti non fit injuria' - 'reasonable precautions' - held: appeal dismissed.

[Nikolich](#)

[From Benchmark Tuesday, 27 October 2020]

Humich Nominees Pty Ltd v Commissioner of Main Roads [2020] WASCA 175

Court of Appeal of Western Australia

Murphy, Beech & Vaughan JJA

Planning and environment - appellants owned land (property) - appellants conducted 'liquor store and general store' from land - appellants sought to 'construct two crossovers' from property to road - second respondent referred 'crossover application' to first respondent - first respondent did not approve application on basis respondent 'did not support full movement access; - applicants sought judicial review - primary judge dismissed claim - appellants appealed - whether first respondent's approval was required - whether first respondent's 'exercise of discretion' constrained by development approval's 'grant and terms' - whether first respondent's rejection of crossover application inconsistent with 'earlier position' of first respondent concerning development application - whether first respondent's rejection of crossover application lacked 'evident or intelligible justification' - whether first respondent's rejection of crossover application 'legally unreasonable' - held: appeal dismissed.

[Humich](#) I B C G W WI WB WC WG WENVL)

[From Benchmark Thursday, 29 October 2020]



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The Grasshopper

By: Richard Lovelace

O THOU that swing'st upon the waving hair
Of some well-fillèd oaten beard,
Drunk every night with a delicious tear
Dropt thee from heaven, where thou wert rear'd!

The joys of earth and air are thine entire,
That with thy feet and wings dost hop and fly;
And when thy poppy works, thou dost retire
To thy carved acorn-bed to lie.

5

Up with the day, the Sun thou welcom'st then,
Sport'st in the gilt plaits of his beams, 10
And all these merry days mak'st merry men,
Thyself, and melancholy streams.

https://en.wikipedia.org/wiki/Richard_Lovelace

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