

Friday, 10 May 2019

## Weekly Business Law A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Business Law

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### Executive Summary (1 minute read)

**Parkes Shire Council v South West Helicopters Pty Limited** (HCA) - aviation - negligence - 'psychiatric harm' - limitations - helicopter crash - claims by family of deceased officer of appellant - entitlement to claim under s28 *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (CACL Act) extinguished by s34 CACL Act - appeal dismissed

**Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart** (HCA) - contract - arbitration - appellants' "validity claims" in respect of deeds were within scope of deeds' 'arbitral clauses' - appeal dismissed - cross-appeal allowed

**Bauer Consumer Media Ltd v Evergreen Television Pty Ltd** (FCAFC) - trade marks - opposition to registration of trade mark - argument under s59(a) *Trade Marks Act 1995* (Cth) upheld - appeal allowed

**Chhabra v McPherson as Trustee for the McPherson Practice Trust (No 2)** (FCA) - costs - Court dismissed amended originating application - applicants' refusal of offer to compromise was unreasonable - respondents' granted indemnity costs order

**Hyperbaric Health International Pty Ltd v Healing Chambers of Australia Pty Ltd (No 2)** (FCA) - costs - freezing order - interlocutory application for vacation of freezing order and extra time to pay amount of 'costs judgment' - interlocutory application dismissed

**Kraft Foods Group Brands LLC v Bega Cheese Limited (No 8)** (FCA) - contract - intellectual property - 'trade dress' - trade mark - copyright - passing off - consumer law - ownership of "Peanut Butter Trade Dress" - issues determined - further hearing to be fixed on agreed date

**Independent Liquor and Gaming Authority v Auld (NSWCA)** - administrative law - applicant did not have power to approve application for removal of licence from tavern to supermarket - appeal allowed - applicant's refusal of application affirmed

**Officeworks Ltd v Christopher (NSWCA)** - damages - negligence - occupier's liability - appellant challenged assessment of damages - respondent sought retrial on damages - appeal allowed - judgment set aside - no retrial - directions made

**Visual Building Construction Pty Ltd v David Armistead (NSWCA)** - security for costs - corporations - respondents sought that appellant pay security for costs of appeal - appellant to pay security for costs in amount of \$15,000

## Summaries With Link (Five Minute Read)

### **Parkes Shire Council v South West Helicopters Pty Limited [2019] HCA 14**

High Court of Australia

Kiefel CJ; Bell, Keane, Gordon & Edelman JJ

Aviation - negligence - 'psychiatric harm' - limitations - appellant engaged respondent to assist appellant in carrying out weed survey - helicopter operated by respondent crashed - all helicopter's occupants killed, including Mr Stephenson, who was an officer of appellant - appeal concerned claims brought against appellant and respondent by 'widow, daughter and son' (Stephensons) of Mr Stephenson - claims were for 'negligently inflicted psychiatric harm resulting from the death of Mr Stephenson' - Stephensons' proceedings were not commenced within two year limitation period under s34 *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (CACL Act) - Supreme Court of New South Wales found s34 CACL Act did not extinguish Stephensons' claims - Stephensons succeeded against appellant - appellant obtained contribution against respondent 'as co-tortfeasor' under s37(b) CACL Act - respondent succeeded on appeal - appeal concerned whether Stephensons' claim against respondent precluded by CACL Act - whether entitlement to claim under s28 of CACL Act extinguished by s34 CACL Act - whether s35(2) CACL Act precluded Stephensons from claiming other than within two year limitation period under s34 CACL Act - held: s34 CACL Act extinguished Stephensons' entitlement to claim under s28 CACL Act - held: appeal dismissed.

[Parkes](#)

[From Benchmark Friday, 10 May 2019]

### **Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart [2019] HCA 13**

High Court of Australia

Kiefel CJ; Gageler, Nettle, Gordon & Edelman JJ

Contract - arbitration - appeal concerned three deeds: 'Deed of Obligation and Release', 'Hope Downs Deed' and 'April 2007 Deed' - deeds contained 'releases or abandonment of claims' and

'promises not to make further claims' - deeds contained 'arbitral clauses' - appellants contended they were not bound by deeds' terms because appellants' assent to deeds 'procured by misconduct' by 'Mrs Rinehart, HPPL and others' - appellants sought declarations deeds void against them ("validity claims") - appeals concerned whether validity claims were subject to deeds' 'arbitral clauses' - sixth, seventh and eighth respondents, who were not parties to deed, cross-appealed, seeking stay of appellants' claims against them - ss2 & 8 *Commercial Arbitration Act 2010* (NSW) - held: no error in decision of Full Court of the Federal Court that validity claims were within arbitral clauses' scope - appeals dismissed - cross-appeal allowed.

[Rinehart](#)

[From Benchmark Friday, 10 May 2019]

## **Bauer Consumer Media Ltd v Evergreen Television Pty Ltd [2019] FCAFC 71**

HEADLINE: Trade mark

Full Court of the Federal Court of Australia

Trade marks - respondent sought registration of 'Trade Mark Application No. 1324177 for the words DISCOVER DOWNUNDER' ('mark') - application made in respect of certain services - appellants ('Bauer') opposed registration - delegate of Registrar of Trade Marks dismissed Bauer's opposition - Bauer appealed against delegate's decision and also sought application's removal from Register for non-use - primary judge dismissed proceedings - Bauer appealed, seeking leave to appeal in respect of delegate's decision - whether erroneous refusal by primary judge to permit Bauer to 'advance an argument' based on s59(a) *Trade Marks Act 1995* (Cth) (Trade Marks Act) - whether Bauer established 'lack of intention to use' services - ss92(4)(a) & 92(4)(b) Trade Marks Act - held: appeal allowed - delegate's decision set aside - registration of mark refused.

[Bauer](#)

[From Benchmark Friday, 10 May 2019]

## **Chhabra v McPherson as Trustee for the McPherson Practice Trust (No 2) [2019] FCA 448**

Federal Court of Australia

Yates J

Costs - copyright - passing off - consumer law - Court dismissed amended originating application - successful respondents sought 'special costs order' on basis of offer to compromise - whether applicants' rejection of offer reasonable - r25.01 of the *Federal Court Rules 2011* (Cth) - s196(3) *Copyright Act 1968* (Cth) - held: applicants 'failure to accept' respondents' offer unreasonable - indemnity costs order granted.

[Chhabra](#)

[From Benchmark Friday, 10 May 2019]

## **Hyperbaric Health International Pty Ltd v Healing Chambers of Australia Pty Ltd (No 2) [2019] FCA 513**

Federal Court of Australia

Nicholas J

# Benchmark

Costs - freezing order - Court dismissed application and fixed costs in sum of \$100,000 payable to respondents by first applicant company in liquidation - two directors of first applicant sought vacation of freezing and order allowing 'additional 11 months' to pay 'costs judgment' - whether respondents should be permitted to enforce costs judgment - whether 'sufficient reason' to discharge freezing order - held: interlocutory application dismissed.

[Hyberbaric](#)

[From Benchmark Friday, 10 May 2019]

## **Kraft Foods Group Brands LLC v Bega Cheese Limited (No 8) [2019] FCA 593**

Federal Court of Australia

O'Callaghan J

Contract - intellectual property - 'trade dress' - trade mark - copyright - passing off - consumer law - proceedings principally concerned ownership of "Peanut Butter Trade Dress" - 'six inter-related issues' - twelve 'additional questions' - goodwill - 'legal nature' of Peanut Butter Trade Dress as 'unregistered trade mark' - what Peanut Butter Trade Dress designates/designated 'to consumers' - how goodwill inured 'to an entity' - how an unregistered trade mark 'assigned or transferred' - 'to whom' 'relevant goodwill' had inured immediately before date of restructure of 'Kraft Foods Inc' and after restructure - Master Trade Mark Agreement (MTA) - whether respondent (Bega) precluded by 'Mondelez Licence' from claiming "ownership" of Peanut Butter Trade Dress - whether Bega had breached (MTA) - whether Australian Consumer Law issues and passing off issues could be determined without ascertainment of whether trade dress rights had accrued to first applicant (Kraft Food Brands) - whether Bega breached Australian Consumer Law - whether Kraft Food Brands infringed Bega's copyright - whether use of Kraft Food Brands' shippers by Bega was unlawful - *Competition and Consumer Act 2010 (Cth)* - *Trade Marks Act 1995 (Cth)* - *Trademark Act of 1946 (USA)* - held: issues determined - further hearing of proceeding to be fixed on agreed date.

[Kraft](#)

[From Benchmark Friday, 10 May 2019]

## **Independent Liquor and Gaming Authority v Auld [2019] NSWCA 88**

Court of Appeal of New South Wales

Macfarlan & White JJA; Sackville AJA

Administrative law - applicant refused to grant respondent's application under s59(1) *Liquor Act 2007* (NSW) (Liquor Act) for removal of hotel licence from 'Tavern' to 'Supermarket' ('removal application') - Civil and Administrative Tribunal of New South Wales set applicant's decision aside - Tribunal approved removal application with conditions on licence that Supermarket 'would sell only packaged liquor' - Appeal Panel dismissed appeal - whether Appeal erroneously concluded applicant empowered to approve respondent's application by granting a licence 'other than a hotel licence' - whether applicant empowered to approve application 'only if it could have granted a hotel licence' - statutory construction - ss53 & 59 *Liquor Act* - 'hotel primary purpose test' - held: Appeal Panel erred in finding applicant empowered to approve removal

application - held: appeal allowed - applicant's refusal of application approved.

[View Decision](#)

[From Benchmark Friday, 10 May 2019]

## **Officeworks Ltd v Christopher [2019] NSWCA 96**

Court of Appeal of New South Wales

Meagher, Gleeson & Leeming JJA

Damages - negligence - occupier's liability - respondent, while at premises occupied by appellant, was struck by object when it fell from shelf - primary judge awarded \$215,203.40 against appellant in respondent's favour - appellant did not challenge finding of liability - appellant challenged assessment of damages - respondent accepted 'she could not defend all aspects' of damages - respondent accepted appeal should be allowed - respondent sought retrial on damages - causation - whether to order retrial in order to resolve 'factual matters' which primary judge had not determined - whether to 're-determine damages' - quantification - *Civil Liability Act 2002* (NSW) - held: appeal allowed - judgments set aside - Court not satisfied to order retrial - directions.

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## **Visual Building Construction Pty Ltd v David Armistead [2019] NSWCA 92**

Court of Appeal of New South Wales

Meagher JA

Security for costs - corporations - District Court judge gave judgment for respondents, awarding damages for breach of contract by 'appellant builder' - respondents sought that appellant pay security for costs of appeal - whether 'reason to believe' appellant would not be able to pay costs if appeal dismissed - whether reason not to grant security for costs - determination of amount of security - s1335(1) *Corporations Act 2001* (Cth) - held: appellant to pay security for costs in amount of \$15,000.

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[From Benchmark Friday, 10 May 2019]



# Benchmark

## **Dream-Time**

**By:** Ella Higginson

It is the time when crimson stars  
    Weary of heaven's cold delight,  
And take, like petals from a rose,  
    Their soft and hesitating flight  
Upon the cool wings of the air  
    Across the purple night.

It is the time when silver sails  
    Go drifting down the violet sea,  
And every poppy's crimson mouth  
    Kisses to sleep a lovesick bee;  
The fireweed waves her rosy plumes  
    On pasture, hill and lea.

It is the time to dream—and feel  
    The languid rocking of a boat,  
The pushing ripple round the keel  
    Where cool, deep-hearted lilies float,  
And hear thro' wild syringas steal  
    Some songster's drowsy note.

It is the time, at eve, to lie  
    And in a hammock faintly sway,  
To watch the golds and crimsons die  
    Across the blue stretch of the bay;  
To hear the sweet dusk tiptoe by  
    In the footsteps of the day.

[Ella Higginson](#)

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