

Friday, 26 April 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)

**Tjungarrayi v Western Australia; KN (deceased) and Others (Tjiwarl and Tjiwarl #2) v Western Australia** (HCA) - native title - two appeals - Full Court of the Federal Court erred in finding both 'petroleum exploration permit' and 'mineral exploration licence' to be a "lease" under s47B(1)(b)(i) *Petroleum and Geothermal Energy Resources Act 1967* (WA) - appeals allowed

**Erskine as liquidator of North Shore Property Developments Pty Ltd (in liq) v 72-74 Gordon Crescent Lane Cove Pty Ltd** (FCAFC) - corporations - liquidator refused extension of time to make applications concerning 'unreasonable director-related transactions' - appeal dismissed

**Nichia Corporation v Arrow Electronics Australia Pty Ltd** (FCAFC) - patent - construction of 'claim 3' of patent not erroneous - invention obvious - appeal dismissed - cross-appeal allowed

**Hall v Bank of Australia Limited, in the matter of Hall** (FCA) - bankruptcy - interlocutory application for reinstatement of bankruptcy notice - application dismissed

**Ridd v James Cook University** (FCCA) - industrial law - employment - climate change - intellectual freedom - applicant's employment terminated by respondent - respondent's findings and directions unlawful - rulings made

**Aristocrat Technologies Australia Pty Limited v Ainsworth Game Technology Limited (No 2)** (FCA) - costs - applicant successfully sought preliminary discovery against respondent - determination of costs

# Benchmark

**The Dempsey Group Pty Ltd v Spotlight Pty Ltd (No 3)** (FCA) - costs - copyright - Court ordered respondent to pay damages to applicant for loss of profits and of reputation - costs order reduced to take into account applicant's 'lack of success' - respondent to pay 65% of applicant's costs

**Mylan Health Pty Ltd v Cipla Australia Pty Ltd** (FCA) - intellectual property - patent - appellants sought 'interlocutory injunctive relief in appeal' - application dismissed

**Trenfield (Liquidator), in the matter of Ostwald Bros. Pty Ltd (In Liq)** (FCA) - corporations - liquidators sought approval for 'funding agreement' - approval granted

**Harford v Hallmark Construction Pty Ltd** (NSWSC) - negligence - two proceedings arising from accident in which Mr Harford injured in fall into 'stormwater retention pit' on site first defendant was developing - claim against first defendant by Mr Harford - claim against first defendant by insurer of company of which Mr Harford was principal - claims upheld

**In the matter of Garfox 86 Pty Limited** (NSWSC) - corporations - application for company's reinstatement and for ancillary orders - orders granted as sought

**Midland Metals Overseas Pte Ltd v Powercor Network Services Pty Ltd [No 2]** (VSCA) - costs - applicant refused leave to appeal against decision in which associate judge set aside statutory demands - applicant to pay respondent's appeal costs on ordinary basis - respondent refused indemnity costs order

**Midland Metals Overseas Pte Ltd v Powercor Network Services Pty Ltd [No 2]** (VSCA) - costs - applicant refused leave to appeal against decision in which associate judge set aside statutory demands - applicant to pay respondent's appeal costs on ordinary basis - respondent refused indemnity costs order

**Vickers v Queensland Building and Construction Commission & Ors** (QCA) - building and construction - corporations - constitutional law - company in liquidation was a "construction company" under s56AC(7) *Queensland Building and Construction Commission Act 1991* (Qld) (QBCC Act) - s56AC QBCC Act was 'constitutionally valid' - appeal dismissed

**Buurabalayji Thalanyji Aboriginal Corporation RNTBC v Hayes** (WASC) - summary judgment - corporations - loan - parties entered loan agreement - defendant defaulted - summary judgment granted in plaintiff's favour

**Antony Leslie John Woodings as liquidator of The Bell Group Ltd and The Bell Group Finance Pty Ltd v WA Glendinning & Associates Pty Ltd** (WASC) - corporations - evidence - privilege - two interlocutory applications - one application granted - other application determined in part

## Summaries With Link (Five Minute Read)

### **Tjungarrayi v Western Australia; KN (deceased) and Others (Tjiwarl and Tjiwarl #2) v Western Australia [2019] HCA 12**

High Court of Australia

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

Native title - 'claim group members' occupied 'parcels of unallocated Crown land' - two appeals, each arising from a claim group's native title claim - in one appeal ("Ngurra matter") issue was whether 'petroleum exploration permit' was a "lease" under s47B(1)(b)(i) *Petroleum and Geothermal Energy Resources Act 1967* (WA) (Petroleum Act) - in other appeal ("Tjiwarl matter") issue was whether 'mineral exploration licence' was a "lease" under s47B(1)(b)(i) Petroleum Act - petroleum exploration permit was granted under Petroleum Act - mineral exploration licence granted under *Mining Act 1978* (WA) - Full Court of the Federal Court found both the petroleum exploration permit and mineral exploration licence to be a "lease" - whether failure to give effect to 'prefatory words' of s242 *Native Title Act 1993* (Cth) - held: appeal allowed.

[Tjungarrayi](#)

[From Benchmark Tuesday, 23 April 2019]

### **Erskine as liquidator of North Shore Property Developments Pty Ltd (in liq) v 72-74 Gordon Crescent Lane Cove Pty Ltd [2019] FCAFC 62**

Full Court of the Federal Court of Australia

Jagot, Gleeson & Markovic JJ

Corporations - former liquidator of company (North Shore Property Developments) entered 'deed of release and settlement' - primary judge refused to grant appellant liquidator extension of time to make applications concerning 'unreasonable director-related transactions' subject of the deed of release and settlement - appellant appealed - whether erroneous exercise of discretion - whether misapplication of principle - whether primary judge should have taken approach in *Taylor v Woden Constructions Pty Ltd* [1998] FCA 1228 - whether erroneous consideration of prospects of success - whether circular reasoning - s588FF(3)(b) *Corporations Act 2001* (Cth) - held: appeal dismissed.

[Erskine](#)

[From Benchmark Tuesday, 23 April 2019]

### **Nichia Corporation v Arrow Electronics Australia Pty Ltd [2019] FCAFC 2**

Full Court of the Federal Court of Australia

Besanko, Jagot & Nicholas JJ

Patent - disputed patent concerned 'white light emitting device' ('LED') - appeal concerned whether primary judge misconstrued word "contains" in 'claim 3' of disputed patent, and whether primary judge's reasoning on invention's obviousness had miscarried - whether

erroneous failure to consider obviousness 'by reference to the claimed invention' - whether erroneous consideration of obviousness 'by reference to the invention as described in the specification' - whether lack of 'inventive step' - whether invention obvious - s18(b)(ii) & 7(2) *Patents Act 1990* (Cth) - held: primary judge's construction of claim 3 not erroneous - invention obvious - appeal dismissed - cross-appeal allowed.

[Nichia](#)

[From Benchmark Friday, 26 April 2019]

## **Hall v Bank of Australia Limited, in the matter of Hall [2019] FCA 514**

Federal Court of Australia

Kerr J

Bankruptcy - respondent, by interlocutory application, sought reinstatement of bankruptcy notice which was issued at its request - Registrar had set aside the bankruptcy notice - whether respondent persuaded Court that applicant was 'was not a witness of the truth' - s35A(6) *Federal Court of Australia Act 1976* (Cth) - held: interlocutory application dismissed.

[Hall](#)

[From Benchmark Tuesday, 23 April 2019]

## **Ridd v James Cook University [2019] FCCA 997**

Federal Circuit Court of Australia

Judge Vasta

Industrial law - employment - climate change - intellectual freedom - applicant was 'head of physics' at respondent University - Vice-Chancellor terminated applicant's employment - proceedings concerned proper construction of clause of Enterprise Agreement entitled "Intellectual Freedom" (cl.14) - applicant sought declarations that Court make declarations that respondent breached Enterprise Agreement in breach of s50 *Fair Work Act 2009* (Cth) - parties sought that Court rule on lawfulness of 17 of respondent's findings and of 'directions' - whether 'Code of Conduct' took precedence over cl.14 of Enterprise Agreement - whether Code of Conduct sat with 'concept of intellectual freedom' - whether Code of Conduct breached cl.14 of Enterprise Agreement - 'speech directions' - 'confidentiality directions' - 'no satire direction' - 'censure and final censure' - held: findings and directions were unlawful - rulings made.

[Ridd](#)

[From Benchmark Tuesday, 23 April 2019]

## **Aristocrat Technologies Australia Pty Limited v Ainsworth Game Technology Limited (No 2) [2019] FCA 511**

Federal Court of Australia

Yates J

Costs - preliminary discovery - applicant sought costs of its successful preliminary discovery application against respondent - respondent sought treatment of costs 'as costs in any substantive proceeding' commenced against it by applicant 'within 60 days' of respondent's compliance with preliminary discovery orders - respondent sought that, if proceedings not

commenced within the 60 days, then applicant should pay its costs of application - whether 'adversarial and frequently obstructive stance' taken by respondent - whether respondent made 'appropriate concessions' - whether opposition to application 'limited and focused' - whether 'clear and irresistible case for preliminary discovery' - held: costs determined - orders made.

[Aristocrat](#)

[From Benchmark Friday, 26 April 2019]

## **The Dempsey Group Pty Ltd v Spotlight Pty Ltd (No 3) [2019] FCA 519**

Federal Court of Australia

Davies J

Costs - intellectual property - copyright - Court gave judgment in proceeding - Court ordered that respondent pay applicant damages for loss of profits and loss of reputation - applicant sought that respondent pay its costs of proceedings (except its costs of an interlocutory application) on party-party basis - respondent sought that applicant pay 50% of its costs on indemnity basis - whether applicant had 'substantial success' - whether costs order should be reduced to take into account applicant's 'lack of success' on 'infringement claims', 'additional damages claim' and failure to obtain damages in amount claimed - conduct - offer of settlement by respondent - whether to reduce costs pursuant to 40.08 *Federal Court Rules 2011* (Cth) (Rules) - r25.14(1) of the Rules - held: respondent to pay 65% of applicant's costs.

[The Dempsey Group](#)

[From Benchmark Friday, 26 April 2019]

## **Mylan Health Pty Ltd v Cipla Australia Pty Ltd [2019] FCA 506**

Federal Court of Australia

Yates J

Injunction - intellectual property - patent - primary judge found appellant's 'claims in suit' invalid for 'lack of novelty' and 'lack of inventive step' - appellants sought 'interim injunctive relief' against respondents in appeal - whether appellant's appeal arguable - prospects of success - balance of convenience - s25(2B)(ab) *Federal Court of Australia Act 1976* (Cth) - held: application dismissed.

[Mylan](#)

[From Benchmark Friday, 26 April 2019]

## **Trenfield (Liquidator), in the matter of Ostwald Bros. Pty Ltd (In Liq) [2019] FCA 558**

Federal Court of Australia

Greenwood J

Corporations - applicants were joint and several liquidators of company (Ostwald) - applicants, under s477(2B) *Corporations Act 2001* (Cth), sought approval for 'funding agreement' between Ostwald, applicants and Commonwealth ("Department of Jobs and Small Business") - funding agreement's purpose was to enable applicants to obtain 'insolvency report' as step towards possible proceedings against creditor or creditors on basis one or more of them had received 'preferential payment' - funding agreement's impact on liquidation's duration - whether approval

of funding agreement was in the administration's interests - held: funding agreement approved.

[Trenfield](#)

[From Benchmark Friday, 26 April 2019]

## **Harford v Hallmark Construction Pty Ltd [2019] NSWSC 371**

Supreme Court of New South Wales

Fagan J

Negligence - two proceedings arising from accident in which Mr Harford was injured in fall into 'stormwater retention pit' on 'building site' which was being developed by first defendant - in one proceeding Mr Harford claimed damages for injuries from defendant - Mr Harford, at time of accident, was private company's principal - company employed Mr Harford as 'sole truck driver' - company's workers compensation insurer paid Mr Harford benefits - in second proceeding, insurer, in company's name, sought, pursuant to s151Z(1)(d) *Workers Compensation Act 1987* (NSW), to recover paid benefits from first defendant - held: claims upheld.

[View Decision](#)

[From Benchmark Tuesday, 23 April 2019]

## **In the matter of Garfox 86 Pty Limited [2019] NSWSC 442**

Supreme Court of New South Wales

Rees J

Corporations - plaintiff sought company's reinstatement and ancillary orders - whether plaintiff was 'person aggrieved' by company's deregistration - whether just to reinstate company - appropriate ancillary orders - ss601AH(2) & 601AH(3) *Corporations Act 2001* (Cth) - held: Court satisfied to make orders sought by plaintiff.

[View Decision](#)

[From Benchmark Friday, 26 April 2019]

## **Midland Metals Overseas Pte Ltd v Powercor Network Services Pty Ltd [No 2] [2019] VSCA 90**

Court of Appeal of Victoria

Tate JA & Almond AJA

Costs - applicant unsuccessfully sought to appeal against associate judge's decision to set aside 'three statutory demands' which applicant served on respondent - respondent sought indemnity costs order - respondent contended 'statutory demand process' inappropriate and incurred costs disproportionate to amounts claimed in demands - respondent also relied on Calderbank offer which had put applicant on notice that respondent would seek indemnity costs - held: grounds for indemnity costs order failed - applicant to pay respondent's appeal costs on ordinary basis.

[Midland](#)

[From Benchmark Tuesday, 23 April 2019]

## **Midland Metals Overseas Pte Ltd v Powercor Network Services Pty Ltd [No 2] [2019]**

## **VSCA 90**

Court of Appeal of Victoria

Tate JA & Almond AJA

Costs - applicant unsuccessfully sought to appeal against associate judge's decision to set aside 'three statutory demands' which applicant served on respondent - respondent sought indemnity costs order - respondent contended 'statutory demand process' inappropriate and incurred costs disproportionate to amounts claimed in demands - respondent also relied on Calderbank offer which had put applicant on notice that respondent would seek indemnity costs - held: grounds for indemnity costs order failed - applicant to pay respondent's appeal costs on ordinary basis.

[Midland](#)

[From Benchmark Friday, 26 April 2019]

## **Vickers v Queensland Building and Construction Commission & Ors [2019] QCA 66**

Court of Appeal of Queensland

Holmes CJ; Gotterson & Morrison JJA

Building and construction - corporations - constitutional law - proceedings concerned whether company in liquidation (Midson NSW) was a "construction company" under s56AC(7) *Queensland Building and Construction Commission Act 1991* (Qld) ('QBCC Act') and whether s56AC QBCC Act was 'constitutionally invalid' - primary judge found Midson NSW was construction company under s56AC(7) QBCC Act and s56AC QBCC Act 'constitutionally valid' - appellants challenged primary judge's findings - statutory interpretation - held: appeal dismissed.

[Vickers](#)

[From Benchmark Tuesday, 23 April 2019]

## **Buurabalayji Thalanyji Aboriginal Corporation RNTBC v Hayes [2019] WASC 50**

Supreme Court of Western Australia

Master Sanderson

Summary judgment - corporations - loan - parties entered 'Loan Agreement' - defendant defaulted - plaintiff sought summary judgment - whether any defence disclosed - *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) - *National Consumer Credit Protection Act 2009* (Cth) - held: summary judgment granted in plaintiff's favour.

[Buurabalayji](#)

[From Benchmark Tuesday, 23 April 2019]

## **Antony Leslie John Woodings as liquidator of The Bell Group Ltd and The Bell Group Finance Pty Ltd v WA Glendinning & Associates Pty Ltd [2019] WASC 54**

Supreme Court of Western Australia

Smith J

Corporations - evidence - privilege - interlocutory applications - plaintiff liquidator of 'Bell Group Ltd' and 'Bell Group Finance' sought that Insurance Commission of Western Australia (ICWA)

serve 'revised list of documents' with certain documents removed, and orders that IWCA refuse permission for 'certain parties or intervenors' to inspect documents - second defendant 'Bell Group NV (in liq)' sought that certain documents in respect of which it claimed privilege 'not be produced for made available for inspection' - s1408(1) *Corporations Act 2001* (Cth) - held: plaintiff's application granted - second defendant's application determined in part.

[Antony Leslie John](#)

[From Benchmark Tuesday, 23 April 2019]



# Benchmark

**From: The Tempest**

**By: William Shakespeare, 1564 - 1616**

Come unto these yellow sands,  
And then take hands:  
Court'sied when you have, and kiss'd,--  
The wild waves whist--  
Foot it feately here and there;  
And, sweet sprites, the burthen bear.  
Hark, hark!  
Bow, wow,  
The watch-dogs bark:  
Bow, wow.  
Hark, hark! I hear  
The strain of strutting chanticleer  
Cry, Cock-a-diddle-dow!

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