



Friday, 5 February 2016

## Weekly Law Review

Selected from our Daily Bulletins covering Insurance, Banking, Construction & Government

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (1 minute read)

**Newport v Australian Postal Corporation** (FCAFC) - workers compensation - permanent impairment - no error in refusal of compensation - appeal dismissed (I G)

**Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (A Firm)** (FCAFC) - pleadings - refusal in part of permission to amend pleadings in separate proceedings - appeal dismissed (I B C)

**Comcare v Power** (FCA) - workers compensation - erroneous finding that pain from compensable injury contributed to significant degree to development of adjustment disorder - appeal allowed in part - matter remitted (I G)

**Medallion Homes Pty Ltd v Lares Homes Pty Ltd** (FCA) - interlocutory injunction - consumer law - copyright - injunction restraining reproduction of floor plans and construction of display home refused (I B C)

**Sahade v Bischoff** (NSWCA) - assault - malicious prosecution - trespass - damages - altercation between neighbours - appeal dismissed - leave to file amended cross-summons refused - cross-summons for leave to cross-appeal dismissed (I)

**Fraser v Health Care Complaints Commission** (NSWCA) - health practitioners - cancellation of nurse's registration for professional misconduct and unsatisfactory professional conduct - appeal dismissed (I G)

**Nightingale v Blacktown City Council** (NSWCA) - negligence - appellant injured when he stepped into depression in footpath - Council not liable - appeal dismissed (I B C)

**Lee v Woolworths Ltd** (NSWSC) - negligence - truck driver subcontracted to third defendant injured while attempting to restack failed load - third defendant not liable (I)

**Jobema Developments Pty Ltd v Zhu** (NSWSC) - real property - conveyancing - vendor refused permission to rescind off the plan contract for sale under sunset clause (I B C)

**Re Estate Ford; Application for Executor's Commission** (NSWSC) - will and estates - review of deputy registrar's determination of application for allowance of commission out of estate refused (B)

**Re: Application of the Anglican Property Trust Diocese of Bathurst** (NSWSC) - judicial advice - trusts and trustees - judicial advice granted (B)

**Wales v Wales (No 2)** (VSCA) - costs - applicant to pay respondents' costs of unsuccessful applications for leave to appeal against costs orders - direction in respect of senior counsel's fees refused (B)

**Zwiersen v Field & Hall Pty Ltd** (VSC) - negligence - contribution proceedings - apportionment of liability between employer and manufacturers/suppliers for contraction of mesothelioma in course of employment (I B C)

**Milburn Lake Pty Ltd v Andritz Pty Ltd** (VSC) - security of payments - injunction granted in relation to determination of adjudication application (C)

**ELS v Countrywide Nominees Pty Ltd** (WASCA) - negligence - slip and fall - CCTV footage did not 'incontrovertibly' contradict primary judge's findings of fact - appeal dismissed (I C)

## Summaries With Link (Five Minute Read)

### **Newport v Australian Postal Corporation [2015] FCAFC 194**

Full Court of the Federal Court of Australia

Allsop CJ, Besanko & Flick JJ

Administrative law - workers compensation - permanent impairment - former employee of respondent claimed compensation pursuant to *Safety, Rehabilitation and Compensation Act 1988* (Cth) - employee assessed as having: 5% permanent impairment to right shoulder; and 6% permanent impairment to left shoulder - compensation denied on basis neither impairment exceeded minimum threshold of 10% - whether the two assessments could be combined to meet 10% threshold - held: Tribunal did not err in refusing compensation for either injury where

either impairment less than 10% - assessor separately assessed "impairment" resulting from "injuries" in accordance with Table 9.11 of the Guide to the Assessment of Permanent Impairment - s24(7) precluded combination of separately assessed "impairments" resulting from separate "injuries" - appeal dismissed.

[Newport](#) (I G)

[From Benchmark Monday, 1 February 2016]

## **Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (A Firm) [2016] FCAFC 2**

Full Court of the Federal Court of Australia

Gilmour, Perram & Beachy JJ

Pleadings - corporations - appellants appealed against refusal in part of applications to amend pleadings in separate proceedings - appellants contended exercise of primary judge's discretion miscarried, that primary judge failed to accord procedural fairness and that primary judge erred in finding that claim under s1041E *Corporations Act 2001* (Cth) liable to be struck out - ss37M & 37N *Federal Court of Australia Act 1976* (Cth) - rr8.21(1) & 16.53 *Federal Court Rules 2011* (Cth) - held: primary judge erred in finding appellant failed to explain importance of amendments but this was a minor error not material to outcome - even if Court obliged to exercise discretion it would not have done so differently - primary judge plainly correct in conclusions - appeal dismissed.

[Tamaya](#) (I B C)

[From Benchmark Wednesday, 3 February 2016]

## **Comcare v Power [2015] FCA 1502**

Federal Court of Australia

Katzmann J

Administrative law - Comcare accepted liability to pay respondent Commonwealth employee compensation for back injury sustained in course of employment - Comcare subsequently determined injury's effects had ceased - respondent later diagnosed with adjustment disorder and claimed compensation - Comcare denied liability - Administrative Appeals Tribunal concluded respondent exaggerated symptoms and evidence "not entirely reliable" - however AAT found substantially in respondent's favour - held: AAT misconstrued "to a significant degree" in s5B *Safety, Rehabilitation and Compensation Act 1988* (Cth) - AAT erred in finding respondent's pain from compensable injury, contributed to significant degree to development of adjustment disorder - appeal allowed in part - matter remitted to AAT.

[Power](#) (I G)

[From Benchmark Monday, 1 February 2016]

## **Medallion Homes Pty Ltd v Lares Homes Pty Ltd [2016] FCA 12**

Federal Court of Australia

Besanko J

Interlocutory injunction - consumer law - copyright - corporations - applicant sought interlocutory injunction restraining respondents from reproducing floor plans and constructing display home - applicant contended respondents copied its plans and also sought to restrain respondents from

# Benchmark

making allegedly misleading or deceptive representations on website and promotional material - *Australian Consumer Law* - s35 *Copyright Act 1968* (Cth) - *Corporations Act 2001* (Cth) - prima facie case - balance of convenience - held: applicant's causes of action failed to support grant of interlocutory injunction - balance of convenience in respondents' favour - application dismissed.

[Medallion](#) (I B C)

[From Benchmark Tuesday, 2 February 2016]

## **Sahade v Bischoff [2015] NSWCA18**

Court of Appeal of New South Wales

Basten & Gleeson JJA; Beech-Jones J

Assault - malicious prosecution - trespass - damages - proceedings concerning altercation between appellants and first respondent at property - first respondent and second respondent occupied separate residences at property - appellants charged with assault and assault occasioning actual bodily harm in company - charges dismissed - appellants claimed damages for malicious prosecution - first appellant claimed damages for assaults and batteries from first respondent - respondents cross-claimed for trespass - primary judge dismissed claims - in second judgment primary judge found he was wrong to find that actual damage required to be proven in claim for trespass before damages could be awarded - primary judge awarded \$500 damages against first appellant for trespass - Pt 2, ss3B, 52 & 53 *Civil Liability Act 2002* (NSW) - s98(1) *Civil Procedure Act 2005* (NSW) - ss59, 61, 418, 419 *Crimes Act 1900* (NSW) - *Crimes Amendment (Self-defence) Act 2001* (NSW) - *Home Invasion (Occupants Protection) Act 1998* (NSW) - s101(2) *Supreme Court Act 1970* (NSW) - rr42.1 & 51.36(2) *Uniform Civil Procedure Rules 2005* (NSW) - held: no error established by primary judge - appeal dismissed - leave to file amended cross-summons refused - cross-summons for leave to cross-appeal dismissed.

[Sahade](#) (I)

[From Benchmark Monday, 1 February 2016]

## **Fraser v Health Care Complaints Commission [2015] NSWCA 421**

Court of Appeal of New South Wales

Basten, Ward & Leeming JJA

Health practitioners - appellant registered general nurse and midwife - appellant sought to overturn Occupational Division of Civil and Administrative Tribunal's cancellation of registration for professional misconduct in relation to administration of experimental cancer treatment - conduct of proceedings as a whole - specific aspects of treatment of four patients - whether penalty "unjust" - whether appellant recklessly indifferent to whether supervising practitioner registered as medical practitioner - "reckless indifference" - Sch 5, Pt 6, cl 29 *Civil and Administrative Tribunal Act 2013* (NSW) - s34A *Health Care Complaints Act 1993* (NSW) - ss139B, 139E *Health Practitioner Regulation National Law* (NSW) - held: challenges to Tribunal's decision failed - appeal dismissed.

[Fraser](#) (I G)

[From Benchmark Monday, 1 February 2016]

## **Nightingale v Blacktown City Council [2015] NSWCA 423**

Court of Appeal of New South Wales

Beazley P; Basten, Macfarlan, Meagher & Simpson JJA

Negligence - appellant injured when he stepped into depression in footpath - appellant sued Council in negligence - trial judge dismissed claim on basis appellant failed to prove Council as "roads authority", had "actual knowledge of "particular risk the materialisation of which resulted in the harm" - provision in s45 *Civil Liability Act 2002* (NSW) that roads authority "not liable" if the harm arose from "a failure of the authority to carry out road work, or to consider carrying out road work" - "actual knowledge" - whether majority view in *North Sydney Council v Roman* [2007] NSWCA 27 correct - whether Council liable because it conducted inspections negligently - principle of restraint in relation to departure from previous authority - held: *Roman* should remain binding - no basis for inference that Council's officers about whom evidence was led and with relevant knowledge for purposes of test in *Roman* had "actual knowledge" of relevant risk - immunity in s45 applied because failure to repair footpath caused injury - appeal dismissed.

[Nightingale](#) (I B C)

[From Benchmark Wednesday, 3 February 2016]

## **Lee v Woolworths Ltd [2015] NSWSC 1789**

Supreme Court of New South Wales

Harrison J

Negligence - industrial law - plaintiff truck driver sub-contracted to third defendant company to haul loads - plaintiff drove semi-trailer from Windsor to Sydney - during journey part of load in truck collapsed - plaintiff injured while attempting to restack failed load - whether third defendant responsible - s5B *Civil Liability Act 2002* (NSW) - held: third defendant did not owe duty of care to plaintiff - third defendant did not exercise control over plaintiff - control reposed in employer - it was not the case that a reasonable person in third defendant's position would have taken precautions to prevent injury to plaintiff - unnecessary to consider defence in s151Z (2) (c) *Workers Compensation Act 1987* (NSW) - proceedings dismissed.

[Lee](#) (I)

[From Benchmark Monday, 1 February 2016]

## **Jobema Developments Pty Ltd v Zhu [2016] NSWSC 3**

Supreme Court of New South Wales

Black J

Real property - conveyancing - plaintiff vendor sought order under 66ZL *Conveyancing Act 1919* (NSW) permitting it to rescind off the plan contract for sale with fourth defendant under sunset clause - ss15, 16, 66ZL, 66ZL(4), 66ZL(6) & 66ZL(7) - *Conveyancing Amendment (Sunset Clauses) Act 2015* (NSW) - "sunset date" - whether just and equitable to grant leave - whether purchaser consented to rescission - whether plaintiff acted unreasonably or in bad faith - reason for delay in creating subject lot - effect of rescission on purchaser - whether reasons for rescission established - held: permission to rescind contract refused - application dismissed.

[Jobema](#) (I B C)

# Benchmark

[From Benchmark Tuesday, 2 February 2016]

## **Re Estate Ford; Application for Executor's Commission [2016] NSWSC 6**

Supreme Court of New South Wales

Lindsay J

Wills and estates - plaintiff executor-beneficiary of deceased aunt's Will sought review of deputy registrar's determination of application under s86 *Probate and Administration Act 1898* (NSW) for allowance of commission out of estate - whether plaintiff should be allowed commission out of small estate - who should bear litigation costs - held: Court considered application afresh, reasons of deputy registrar, evidence, deputy registrar's determination, reasons for decision and whether any error in reasoning or decision-making - no error requiring intervention with determination - deputy registrar's determination in reasonable bounds - interests of justice best served by dismissal of application - application dismissed except in relation to agreed adjustment.

[Re Estate Ford](#) (B)

[From Benchmark Tuesday, 2 February 2016]

## **Re: Application of the Anglican Property Trust Diocese of Bathurst [2016] NSWSC 13**

Supreme Court of New South Wales

Slattery J

Judicial advice - trusts and trustees - plaintiff responsible entity of trust sought judicial advice pursuant to s63 *Trustee Act 1925* (NSW) - whether plaintiff justified to defend proceedings, justified to use Trust's resources of Trust to defend proceedings and justified not to commence proceedings against insurance company in event it denied or did not admit liability under policy - *Anglican Church of Australia Constitution Act 1961* (NSW) - *Anglican Church of Australia Constitution Act 1902* (NSW) - *Australian Securities and Investments Commission Act 2001* (Cth) - *Contracts Review Act 1980* (NSW) - *Fair Trading Act 1987* (NSW) - held: plaintiff justified in defending proceedings, having recourse to trust assets for that purpose and justified in not commencing proceedings against insurance company.

[Anglican Property Trust](#) (B)

[From Benchmark Wednesday, 3 February 2016]

## **Wales v Wales (No 2) [2015] VSCA 365**

Court of Appeal of Victoria

Kyrou & McLeish JJA; Ginnane AJA

Costs - trusts and trustees - Court dismissed two applications for leave to appeal against costs orders in respect of discontinued proceedings - respondents sought that applicants pay costs of application for leave and that Costs Court allow senior counsel's fees in excess of scale - applicants conceded they should pay respondents' costs but opposed direction for senior counsel's costs - costs of negotiating summary of facts - costs of amending written case - r19 *Supreme Court (Chapter 1 Scale of Costs Appendices A and B Amendment) Rules 2014* (Vic) - whether Court should allow greater flexibility than that allowed by maximum fee - held: applicant to pay respondents' costs of each application - no circumstances to justify direction in

respect of senior counsel's costs - direction refused.

[Wales](#) (B)

[From Benchmark Wednesday, 3 February 2016]

## **Zwiersen v Field & Hall Pty Ltd [2016] VSC 16**

Supreme Court of Victoria

Rush J

Negligence - contribution proceedings - joint tortfeasors - plaintiff electrician claimed damages for contraction of mesothelioma in course of employment due to negligent exposure to asbestos - defendants conceded breach of duty of care - plaintiff settled claim against first., second and fourth defendants - first, third and fourth defendants sought contribution against each other pursuant to Pt IV *Wrongs Act 1958* (Vic) - parties' respective responsibilities - apportionment between first defendant employer, and third and fourth defendant manufacturers/suppliers - contribution - held: in relation to culpability, third and fourth defendants, as compared to first defendant, should share more significant contribution on apportionment - first, third and fourth defendants liable for contraction of mesothelioma - liability apportioned in amounts of 20% for first defendant, 40% for third defendant and 40% for fourth defendant.

[Zwiersen](#) (I B C)

[From Benchmark Wednesday, 3 February 2016]

## **Milburn Lake Pty Ltd v Andritz Pty Ltd [2016] VSC 3**

Supreme Court of Victoria

J Forrest J

Injunction - security of payments - parties in dispute over construction of mill - two payment claims made by plaintiff under *Building and Construction Industry Security of Payment Act 2002* (Vic) (the 'Act') - plaintiff sought injunction in relation to second adjudication determination - plaintiff contended adjudicator erred in determination and sought to prevent enforcement of determination - Div 2B, ss3 & 28 - ability of defendant to obtain adjudication certificate under s28Q which would enable enforcement of judgment - held: Court satisfied there was serious question to be tried - balance of convenience favoured granting to injunction on terms that money be paid into Court or agreed managed fund.

[Milburn](#) (C)

[From Benchmark Wednesday, 3 February 2016]

## **ELS v Countrywide Nominees Pty Ltd [2016] WASCA 4**

Court of Appeal of Western Australia

Buss, Murphy & Mazza JJA

Negligence - appellant claimed she slipped on oil deposited by cooking station which respondent used to cook products offered to shoppers - appellant claimed respondent negligently allowed oil to drop and negligently failed to properly clean it - primary judge dismissed claim - appellant contended CCTV footage incontrovertibly demonstrated findings on cause of slip and fall were erroneous. s79 *District Court of Western Australia Act 1969* (WA) - s79C *Evidence Act 1906* (WA) - s58 *Supreme Court Act 1935* (WA) - held: CCTV footage did

not 'incontrovertibly' contradict primary judge's findings of fact - primary judge's findings were amply justified - findings not 'glaringly improbable' or 'contrary to compelling inferences' - appeal dismissed.

[ELS](#) (I C)

[From Benchmark Tuesday, 2 February 2016]

## CRIMINAL

### Executive Summary

**R v Harper** (QCA) - criminal law - drug trafficking - possession of thing for use in connection with producing dangerous drug - appeal against conviction dismissed - leave to appeal against sentence refused

**R v Cheng** (SASCFC) - criminal law - sexual exploitation - failure to give directions and Murray/Robinson warning - conviction overturned - new trial

### Summaries With Link

#### **R v Harper [2015] QCA 273**

Court of Appeal of Queensland

Morrison JA, Mullins and Burns JJ

Criminal law - drug trafficking and possession - appellant convicted of one count trafficking in dangerous drug and three counts of possessing 'a thing for use in connection with producing a dangerous drug' - respondent acquitted of two counts of producing dangerous drug in excess of two grams and twelve counts of possessing a thing for use in connection with producing a dangerous drug - respondent sentenced to 10 years for trafficking offence and concurrent sentences of five years for each count of possessing a thing for use in connection with producing a dangerous drug - appellant appealed - whether loss of forensic advantage - whether unfair trial - whether guilty verdict for trafficking unreasonable - challenges to judge's directions on lies and elements of trafficking - ss25A & 30 *Australian Crime Commission Act 2002* (Cth) - s590AE *Criminal Code* (Qld) - held: all grounds of appeal against conviction failed - sentences not manifestly excessive - appeal against conviction dismissed - leave to appeal against sentence refused.

[Harper](#)

#### **R v Cheng [2015] SASCFC 189**

Full Court of the Supreme Court of South Australia

Sulan, Peek & Stanley JJ



# Benchmark

Criminal law - appellant's wife ran child-care centre - appellant convicted of persistent sexual exploitation of child who attended centre - primary judge questioned child via audio-visual link in presence of counsel and appellant before empanelling jury - DVD of police interview with child admitted into evidence - appellant contended primary judge erred in directing jury in relation to interview - appellant also claimed judge erred in failing to direct jury in relation to requirement to scrutinise complainant's evidence with special care - ss4, 6, 6(5), 9, 9(1), 9(2), 9(2)(a)(i), 9(2)(a)(ii), 9(2)(b), 9(4), 12A, 34CA, 34CA(1)(a), 34D, 34D(1) & 34L *Evidence Act 1929 (SA)* - s50(1) *Criminal Law Consolidation Act 1935 (SA)* - s93A *Evidence Act 1977 (Qld)* - s 294AA *Criminal Procedure Act 1986 (NSW)* - held: judge failed to give directions in relation to interview - judge erred in not being satisfied that general law required a 'Murray/Robinson' warning to be given - appeal allowed - conviction overturned - new trial.

[Cheng](#)



# Benchmark

## **The Grasshopper**

BY RICHARD LOVELACE

To My Noble Friend, Mr. Charles Cotton

O thou that swing'st upon the waving hair  
Of some well-fillèd oaten beard,  
Drunk every night with a delicious tear  
Dropped thee from heaven, where now th' art reared;

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.

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

But ah, the sickle! Golden ears are cropped;  
Ceres and Bacchus bid good night;  
Sharp, frosty fingers all your flowers have topped,  
And what scythes spared, winds shave off quite.

Poor verdant fool, and now green ice! thy joys,  
Large and as lasting as thy perch of grass,  
Bid us lay in 'gainst winter rain, and poise  
Their floods with an o'erflowing glass.

Thou best of men and friends! we will create  
A genuine summer in each other's breast,  
And spite of this cold time and frozen fate,  
Thaw us a warm seat to our rest.

Our sacred hearths shall burn eternally,  
As vestal flames; the North Wind, he  
Shall strike his frost-stretched wings, dissolve, and fly  
This Etna in epitome.

Dropping December shall come weeping in,  
Bewail th'usurping of his reign:  
But when in showers of old Greek we begin,  
Shall cry he hath his crown again!



# Benchmark

Night, as clear Hesper, shall our tapers whip  
From the light casements where we play,  
And the dark hag from her black mantle strip,  
And stick there everlasting day.

Thus richer than untempted kings are we,  
That, asking nothing, nothing need:  
Though lords of all what seas embrace, yet he  
That wants himself is poor indeed.?

[RICHARD LOVELACE](#)

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