

Friday, 5 May 2017

Weekly Civil 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)

Pennsylvania Manufacturers' Association Insurance Company v Johnson Matthey, Inc (CCOP) - insurance - trigger of coverage - insurer sought declaratory judgment it was not obliged to defend or indemnify company concerning Department's lawsuit against company seeking costs of cleanup for environmental contamination - summary relief refused (I B C G)

Expressions Hair Design et al v Schneiderman, Attorney General of New York et al (SCOTUS) - constitutional law - First Amendment - New York General Business Law §518 was not vague in application to petitioners who sought to impose surcharges for credit card use - §518 should be analysed as a 'speech regulation' - vacated and remanded (I B C G)

Plaintiff M96A/2016 v Commonwealth of Australia (HCA) - migration - constitutional law - ss189 & 196 *Migration Act 1958* (Cth) validly authorised detention of plaintiffs brought from Republic of Nauru to Australia for temporary purpose - demurrer allowed - appeal dismissed (I B C G)

Talacko v Bennett (HCA) - judgments and orders - enforcement of judgment - bankruptcy - s15(2) *Foreign Judgments Act 1991* (Cth) prevented application for certificate which would facilitate enforcement of a judgment, which could not be enforced in Australia, in a foreign jurisdiction - appeal allowed (I B C G)

Singh v Minister for Immigration and Border Protection (FCAFC) - migration law - refusal to grant appellant a Partner (Temporary) (Class UK) visa - appellant had not been permitted to

appear at hearing - procedural fairness - appeal dismissed (I B C G)

Bochenski v Minister for Immigration and Border Protection (FCAFC) - migration review - refusal to revoke cancellation of appellant's Class BF Transitional (Permanent) visa - Parliamentary Secretary not bound by Direction 65 made by former Minister - appeal dismissed (I B C G)

Australian Securities and Investments Commission, in the matter of NSG Services Pty Ltd v NSG Services Pty Ltd (FCA) - corporations - financial advice - life risk insurance and superannuation products - accepted contraventions of provisions in Div 2, Part 7.7A *Corporations Act 2001* (Cth) - declarations made (I B C G)

Comcare v Wuth (FCA) - workers' compensation - Comcare liable to pay respondent compensation under *Safety, Rehabilitation and Compensation Act 1988* (Cth) - appeal dismissed - erroneous calculation of normal weekly earnings - cross-appeal allowed (I B C G)

Cheetham v Goulburn Motorcycle Club Inc (NSWCA) - judicial review - planning law - consent for construction of motorcycle facility - consent did not permit development for a prohibited use - appeal dismissed (I B C G)

Issa v Australian Alliance Insurance Co Ltd t/as Shannons Insurance (NSWCA) - motor accident - insurer - failure to establish vehicle was damaged in accident 'that occurs without intent' under insurance policy - appeal dismissed (I B C G)

Mine Subsidence Board v Frank and Louisa Kozak (NSWSC) - possession - plaintiff entitled to possession of property occupied by defendants pursuant to bare licence (I B C G)

Wells v Council of the City of Orange (No 2) (NSWSC) - negligence - motorcyclist injured in collision with water-filled barrier which defendant placed across street as part of works - defendant not liable (I B C G)

Wilson v Transport Accident Commission (VSC) - administrative law - plaintiff injured in collision with parked vehicle while bike riding recreationally - compensation refused on basis collision injured during bike ride which was not work-related - appeal dismissed (I B C G)

Queensland Building and Construction Commission v Turcinovic (QCA) - summary judgment - refusal of summary judgment on claim for amount paid as payments on claim under insurance scheme - error by primary judge in application of s71(1) *Queensland Building and Construction Commission Act 1991* (Qld) - appeal allowed (I B C G)

Pallas Bride and Fashion Pty Ltd v Evans (WASCA) - contract - leases and tenancies - repudiation - rectification - appeal dismissed (I B C G)

Construction Occupations Registrar v Bates (ACTCA) - building and construction - administrative law - dismissal of application for occupational discipline orders against building certifier - appeal allowed - matter remitted (I B C G)

Summaries With Link (Five Minute Read)

Pennsylvania Manufacturers' Association Insurance Company v. Johnson Matthey, Inc No 330 M.D. 2015

Commonwealth Court of Pennsylvania
Colins, Senior Judge

Insurance - environmental contamination - Pennsylvania Manufacturers' Association Insurance Company (insurer) filed petition for review against company (JMI) and Pennsylvania Department of Environmental Protection (DEP) - insurer sought declaratory judgment it was not obliged to defend or indemnify JMI concerning DEP's lawsuit against JMI in which DEP sought costs of environmental contamination cleanup - insurer sought summary relief - identification of 'appropriate trigger of coverage' - construction of insurance contract - whether facts alleged in DEP's lawsuit could trigger coverage under policies - whether insurance policy an 'occurrence' policy or 'claims made' policy - 'first manifestation of the injury' - held: environmental contamination claims fell within exception to first manifestation rule - policies were triggered 'if undetected environmental contamination occurred during the policy period' - insurer did not show contamination did not occur in policy periods or first manifested before policy periods - insurer not entitled to a declaratory judgment it had no obligation to defend or indemnify JMI - summary relief refused.

[Pennsylvania Manufacturers' Association](#) (I B C G)

[From Benchmark Wednesday, 3 May 2017]

Expressions Hair Design et al v Schneiderman, Attorney General of New York et al Docket No 15-1391

Supreme Court of the United States

Roberts CJ, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor & Kagan JJ

Constitutional law - petitioners were New York businesses and owners who sought to impose surcharges for credit card use - petitioners filed suit against state officials - petitioners contended New York General Business Law §518, which provided that '[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means' violated First Amendment by regulating petitioners' communication of prices and that it was unconstitutionally vague - held: §518 was not vague in application to petitioners - Court of Appeals had not determined whether §518 'survived First Amendment scrutiny' - Court of Appeals 'should analyze §518 as a speech regulation' - matter vacated and remanded.

[Expressions Hair Design](#) (I B C G)

[From Benchmark Thursday, 4 May 2017]

Plaintiff M96A/2016 v Commonwealth of Australia [2017] HCA 16

High Court of Australia

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

Migration - plaintiffs were unauthorised maritime arrivals taken to regional processing country (Republic of Nauru) and subsequently brought to Australia for temporary purpose of medical treatment - appeal concerned validity of ss189 & 196 *Migration Act 1958* (Cth) to extent they authorised plaintiffs' detention in Australia - plaintiffs claimed a non-citizen could not be detained because exercise of power under of ss189 & 196 was invalid - 'purpose of detention of transitory persons' - 'duration of detention of transitory purposes' - s51(xix) *Constitution* - ss189, 196, 198, 198AD, 198AH & 198B *Migration Act 1958* (Cth) - held: ss189 & 196 validly authorised the plaintiffs' detention while in Australia - demurrer allowed - proceedings dismissed.

[Plaintiff M96A/2016](#) (I B C G)

[From Benchmark Thursday, 4 May 2017]

Talacko v Bennett [2017] HCA 15

High Court of Australia

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

Judgments and orders - enforcement of debt in foreign jurisdiction - appeal concerned whether s15(2) *Foreign Judgments Act 1991* (Cth) ('Foreign Judgments Act') prevented bankrupt's judgment creditor from obtaining certificate facilitating judgment's enforcement in a foreign jurisdiction - whether a 'stay of enforcement' under s15(2) *Foreign Judgments Act* 'brought about' by s58(3) *Bankruptcy Act 1966* (Cth) - held: Court of Appeal of Victoria, by concluding s15(2) did not prevent issue of certificate 'even though the judgment in question could not be enforced by execution by reason of s 58(3)' of the *Bankruptcy Act*, erred in interpreting s15(2) - purpose of s15(2) was to prevent application for a certificate which would facilitate enforcement of a judgment which could not be enforced in Australia in a foreign jurisdiction - appeal allowed.

[Talacko](#) (I B C G)

[From Benchmark Thursday, 4 May 2017]

Singh v Minister for Immigration and Border Protection [2017] FCAFC 67

Full Court of the Federal Court of Australia

North, Bromberg & Bromwich JJ

Migration law - Migration Review Tribunal affirmed decision of Minister's delegate to refuse to grant appellant a Partner (Temporary) (Class UK) visa - primary judge dismissed application for judicial review - whether Tribunal erred by deciding review application without permitting appellant to appear at hearing - appellant's scheduled hearing cancelled due to appellant's non-response to written invitation to 'comment on or respond to adverse information' that Tribunal raised - Tribunal, in cancelling hearing, had concluded appellant's failure to respond meant there was 'no entitlement to a hearing and no power to permit the appellant to appear' -

statutory construction - whether failure to comply with s360 *Migration Act 1958* (Cth) - whether denial of procedural fairness - held: grounds of appeal failed - appeal dismissed.

[Singh](#) (I B C G)

[From Benchmark Tuesday, 2 May 2017]

Bochenski v Minister for Immigration and Border Protection [2017] FCAFC 68

Full Court of the Federal Court of Australia

Bromberg, Bromwich & Charlesworth JJ

Migration law - Parliamentary Secretary to the Minister decided pursuant to s501CA *Migration Act 1958* (Cth) not to revoke cancellation of appellant's Class BF Transitional (Permanent) visa - primary judge dismissed application for judicial review - cancellation of visa occurred under s501(3A) because appellant had a 'substantial criminal record' - whether Parliamentary Secretary was a 'person' bound by Direction No. 65 made by former Minister under s499(1) - whether Parliamentary Secretary failed to take parts of Direction 65 into account - held: Parliamentary Secretary not bound by Direction 65 - unnecessary to determine theoretical question of whether Parliamentary Secretary complied with Direction 65 - appeal dismissed.

[Bochenski](#) (I B C G)

[From Benchmark Tuesday, 2 May 2017]

Australian Securities and Investments Commission, in the matter of NSG Services Pty Ltd v NSG Services Pty Ltd [2017] FCA 345

Federal Court of Australia

Moshinsky J

Corporations - financial advice - life risk insurance and superannuation products - defendant (NSG) provided financial services advice - Australian Securities and Investments Commission (ASIC) contended NSG's representatives failed to comply with ss961B & 961G *Corporations Act 2001* (Cth) concerning provision of personal advice to clients, and that NSG contravened s961L by failing to take reasonable steps to ensure representatives complied - ASIC also alleged NSG breached s961K in respect of unauthorised representatives' breaches of ss961B & 961G - requirement of compliance with 'Future of Financial Advice Reforms' - *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) - 'best interests' duty - requirement that providers 'provide advice that is appropriate to the retail client' - held: NSG accepted it contravened relevant provisions - parties forwarded agreed minutes of proposed declarations and prepared agreed statement of facts - Court satisfied to make declarations 'substantially in the terms' of minutes of proposed declarations - declarations made.

[Australian Securities and Investments Commission](#) (I B C G)

[From Benchmark Monday, 1 May 2017]

Comcare v Wuth [2017] FCA 433

Federal Court of Australia

Rares J

Workers' compensation - Comcare appealed against decision of Administrative Appeals

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Tribunal that Comcare was liable to pay respondent compensation under s24 *Safety, Rehabilitation and Compensation Act 1988* (Cth) for 'chronic migrainous headaches', non-economic loss, and on basis degree of permanent impairment was 14% - respondent cross-appealed, contending Tribunal erred in construing s8 in calculating normal weekly earnings - whether misconstruction of Ch 18 of AMA Guides - whether erroneous usage of 'clinical judgment' impairment evaluation method - whether denial of procedural fairness - held: Comcare's grounds of appeal failed - Tribunal erred in calculation of normal weekly earnings - appeal dismissed - cross-appeal allowed.

[Comcare](#) (I B C G)

[From Benchmark Tuesday, 2 May 2017]

Cheetham v Goulburn Motorcycle Club Inc [2017] NSWCA 83

Court of Appeal of New South Wales

McColl JA & Sackville AJA; Basten JA

Judicial review - planning law - Council approved development application for construction of motorcycle facility - appellants objected to development - appellants sought judicial review of Land and Environment Court's determination - appellants appealed from dismissal of application - whether proposed development was within a prohibited use, being 'recreation facilities (major)' *Goulburn Mulwaree Local Environmental Plan 2009* ('LEP 2009') - ss76B, 79C, 81, 82(A) & 123 *Environmental Planning and Assessment Act 1979* (NSW) - held: Court satisfied that development consent was not for use as a 'recreation facility (major)' - appeal dismissed.

[Cheetham](#) (I B C G)

[From Benchmark Monday, 1 May 2017]

Issa v Australian Alliance Insurance Co Ltd t/as Shannons Insurance [2017] NSWCA 87

Court of Appeal of New South Wales

Beazley ACJ & Basten JA

Motor accident - insurance - applicants owned car insured for \$26,900 - car 'written off' due to collision between three vehicles - insurer refused payment of claim - applicants commenced Local Court proceedings - Magistrate found applicants did not establish vehicle was damaged in accident 'that occurs without intent' under insurance policy - primary judge dismissed appeal - held: no relevant error demonstrated in Magistrate's decision - appeal dismissed.

[Issa](#) (I B C G)

[From Benchmark Thursday, 4 May 2017]

Mine Subsidence Board v Frank and Louisa Kozak [2017] NSWSC 421

Supreme Court of New South Wales

Hamill J

Possession - defendants' home damaged by mining subsidence - defendants lodged claim with plaintiffs for compensation - defendants vacated property to allow house to be demolished and replaced - plaintiff provided defendant with rent free accommodation during rebuild at property

Benchmark

subject of proceedings - plaintiff sought possession of property - defendants objected to claim for possession - whether action by plaintiff fraudulent or corrupt - whether plaintiff received financial benefit from defendants' permission to destroy and repair house - held: defendants occupied property pursuant to bare licence, not a 'license coupled with equity' - no equitable estoppel precluding plaintiff from taking possession - plaintiff granted judgment for possession.

[Mine Subsidence Board](#) (I B C G)

[From Benchmark Wednesday, 3 May 2017]

Wells v Council of the City of Orange (No 2) [2017] NSWSC 510

Supreme Court of New South Wales

Hoeben CJ at CL

Negligence - defendant controlled public roads - defendant was carrying out road works - defendant placed water-filled barriers across street as part of road works - plaintiff motorcyclist injured when he collided with barrier - plaintiff sued defendants in negligence - plaintiff contended defendant negligently failed to provide adequate lighting and delineation - plaintiff also contended defendant negligently used a Traffic Control Plan (TCP) which failed to comply with Australian Standard and of which barrier was a part - determination of liability - ss5B, 5D, 5R, 43A, 50 & 54 *Civil Liability Act 2002* (NSW) - held: plaintiff failed to establish that defendant was negligent - even if Court wrong in concluding plaintiff failed to establish negligence, claim would fail because defendant would have made out defences under ss43A & 54 *Civil Liability Act* - judgment for defendant.

[Wells](#) (I B C G)

[From Benchmark Friday, 5 May 2017]

Wilson v Transport Accident Commission [2017] VSC 209

Supreme Court of Victoria

Bell J

Administrative law - statutory interpretation - plaintiff lived and worked on farm - plaintiff injured in collision with parked vehicle while bike riding recreationally - plaintiff sought compensation under *Transport Accident Act 1986* (Vic) on basis he was travelling to or from place of employment - Transport Accident Commission rejected application on basis collision occurred during bicycle ride that wasn't work-related - Victorian Civil and Administrative Tribunal dismissed application for review - plaintiff contended Tribunal misconstrued *Transport Accident Act* - 'travelling to or from [the] place of employment' - ss3(1), 3(1A) & 35(1) *Transport Accident Act* - ss82(1) & 83(2)(b) *Accident Compensation Act 1985* (Vic) - held: requirement of connection between travel and place of employment not satisfied - no error of law by Tribunal - appeal dismissed.

[Wilson](#) (I B C G)

[From Benchmark Friday, 5 May 2017]

Queensland Building and Construction Commission v Turcinovic [2017] QCA 77

Court of Appeal of Queensland

Benchmark

Morrison & Philippides J; North J

Summary judgment - appellant sought recovery from respondent of amount paid 'in respect of the claims as payments on a claim under the insurance' under s71(1) *Queensland Building and Construction Commission Act 1991* (Qld) - judge refused appellant's application for summary judgment - appellant appealed - whether costs claimed so unreasonable as to make money paid not 'a payment on a claim' under insurance scheme - whether sufficient evidence for real prospect of defending claim - whether defence was attempt to seek merits review of payment made under insurance scheme - held: primary judge erroneously focussed on factual enquiry into reasonableness without inquiring whether payment made on claim under scheme - primary judge did not give proper effect to s71(1) - appeal allowed - summary judgment granted.

[Queensland Building](#) (I B C G)

[From Benchmark Tuesday, 2 May 2017]

Pallas Bride and Fashion Pty Ltd v Evans [2017] WASCA 84

Court of Appeal of Western Australia

Murphy & Mitchell JJA; Beech J

Leases and tenancies - first appellant leased premises - respondents purchased premises subject to lease - respondents and second appellant, who was first appellant's sole director, signed 'letter agreement' for first appellant's continued occupation under lease - second appellant guaranteed first appellant's obligations under lease - first appellant purported to give one month's notice of termination of lease - after one month, first appellant vacated - respondents sued appellants for repudiation of lease and rectification of letter agreement if necessary - trial judge found for respondents - construction of letter agreement - whether respondents did not plead case on which they succeeded - whether trial judge erred in relation to extrinsic evidence and in finding letter agreement should be rectified if his construction erroneous - held: grounds of appeal failed - appeal dismissed.

[Pallas](#) (I B C G)

[From Benchmark Wednesday, 3 May 2017]

Construction Occupations Registrar v Bates [2017] ACTCA 15

Court of Appeal of the Australian Capital Territory

Elkaim, Rangiah & Mossop JJ

Building and construction - administrative law - ACT Civil and Administrative Tribunal ('ACAT') dismissed appellant's application for occupational discipline orders against respondent building certifier under *Construction Occupations (Licensing) Act 2004* in relation to grant of building approval granted by respondent - Appeal Tribunal and primary judge dismissed appeals - proper interpretation of Building Act - distinction between situations where building work had, and those in which it hadn't, begun - whether it was possible for owners of land to appoint respondent in relation to work that yet to be undertaken - whether exercise undertaken by certifier only involved review of plans - whether plans could be approved as plans without considering work completed on site - held: there was error by primary judge and at both levels of Tribunal - appeal allowed - matter remitted to ACAT for further hearing.

[Construction Occupations Registrar](#) (I B C G)

[From Benchmark Friday, 5 May 2017]

CRIMINAL

Executive Summary

BD v The Queen (NTCCA) - criminal law - appellant found guilty of two counts of indecently dealing with a child 16 contrary to s132(2)(a) *Criminal Code* (NT) - appeal allowed - findings of guilt quashed

Dickson v R (NSWCCA) - criminal law - theft - joint criminal enterprise - conviction on five counts in relation to theft - grounds of appeal concerning reasonableness of verdicts and trial judge's direction to jury failed - appeal dismissed

Summaries With Link

BD v The Queen [2017] NTCCA 2

Court of Criminal Appeal of the Northern Territory

Grant CJ; Kelly & Barr JJ

Criminal law - appellant charged with six counts of indecently dealing with a child under the age of 16 contrary to s132(2)(a) *Criminal Code* (NT) - appellant was teacher and complainants were appellant's pupils - appellant found guilty on counts 1 and 2 of indictment - appellant appealed against findings of guilt - appellant contended Crown's evidence did not disclose indecency, that trial judge failed to properly direct jury on motive, that tendency evidence was erroneously admitted or that its probative value did not outweigh its prejudicial effect, that unanimous verdicts of guilty did not represent jury's true verdicts, and/or integrity of deliberations compromised, or that an enquiry was required to determine whether there was miscarriage of justice in relation to deliberations - whether failure by trial judge to explain to jury the duty owed by a teacher in the circumstances - whether failure by Crown to particularise case - admissibility of evidence - held: appeal allowed - findings of guilt quashed.

[BD](#)

Dickson v R [2017] NSWCCA 78

Court of Criminal Appeal of New South Wales

Bathurst CJ; Johnson & Fullerton JJ

Criminal law - theft - joint criminal enterprise - applicant charged with five offences concerning thefts - there were other individuals said to be applicant's co-offenders but applicant was tried alone - applicant convicted on all counts - applicant appealed against convictions - applicant



contended jury verdict on each count was unreasonable or could not be supported by evidence - applicant also contended trial judge erred in directing jury that 'in order to find the applicant guilty under the principles of joint criminal enterprise, it must be satisfied that the applicant was present when each offence was committed' - held: grounds of appeal failed - appeal dismissed.

[Dickson](#)



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Wash of Cold River

By [Hilda Doolittle](#)

*Wash of cold river
in a glacial land,
Ionian water,
chill, snow-ribbed sand,
drift of rare flowers,
clear, with delicate shell-
like leaf enclosing
frozen lily-leaf,
camellia texture,
colder than a rose;*

*wind-flower
that keeps the breath
of the north-wind—
these and none other;*

*intimate thoughts and kind
reach out to share
the treasure of my mind,
intimate hands and dear
drawn garden-ward and sea-ward
all the sheer rapture
that I would take
to mould a clear
and frigid statue;*

*rare, of pure texture,
beautiful space and line,
marble to grace
your inaccessible shrine.*

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