

Friday, 9 February 2018

## 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)

**Falzon v Minister for Immigration and Border Protection** (HCA) - migration law - constitutional law - cancellation of visa - challenge to validity of s501(3A) *Migration Act 1958* (Cth) failed - application dismissed (I B C G)

**Certain Underwriters at Lloyd's Subscribing to Contract Number NCP106108663 v Aquagenics Pty Limited (in liquidation)** (FCAFC) - insurance - professional indemnity policy - insured entitled to indemnity from insurer - appeal dismissed (I B C G)

**Denmark Community Windfarm Ltd v Commissioner of Taxation** (FCAFC) - taxation - claim for depreciation deductions in relation to assets constructed with Government grant's assistance - amounts received were 'assessable recoupments' - appeal dismissed (I B C G)

**Bailey v Broadsword Marine Contractors Pty Ltd** (FCAFC) - administrative law - not established that Tribunal asked itself wrong question or applied wrong test in determining whether appellant was suffering from 'disease' or 'injury' under *Seafarers Rehabilitation and Compensation Act 1992* (Cth) - appeal dismissed (I B C G)

**Stolyar v Towers** (NSWCA) - real property - easements - rights given by easement to dominant owner 'did not substantially deprive' servient owner of proprietorship rights or possession rights - appeal dismissed (I B C G)

**Liverpool City Council v Moorebank Recyclers Pty Ltd** (NSWCA) - environment and

planning - conditional approval of construction and operation of recycling facility - appeals dismissed (I B C G)

**Evolution Traffic Control v Skerratt** (NSWSC) - contract - share purchase agreement - misleading and deceptive conduct - judgment for purchaser against each defendant in sum of \$3,537,970 (I B C G)

**Curnow Consulting Pty Limited v JPD Media and Design Pty Ltd t/a Durie Design (No. 2)** (NSWSC) - damages - contract - quantum - determination of three questions arising from quantum hearing (I B C G)

**Ian Street Developer Pty Ltd v Arrow International Pty Ltd** (VSC) - building and construction - security of payments - application to quash adjudication determination failed - proceedings dismissed (I B C G)

**Loustas v Sier & Ors** (VSC) - contract - equity - mortgage - guarantee - claim of oral agreement failed - on counterclaim, plaintiff to pay defendants amount under guarantee (I B C G)

**Daicos v Daicos & Anor** (VSC) - summary dismissal - wills and estates - standing - application for summary dismissal of proceedings refused (B)

**Baig v AWX Pty Ltd** (QSC) - negligence - plaintiff employed under labour hire contract injured in course of employment at meat works - conductor of meat works and employer liable (I B C G)

**Caffrey v AAI Limited & Anor** (QSC) - pleadings - motor vehicle accident - duty of care - alleged psychiatric injury to police officer who attended scene of single vehicle collision in which allegedly negligent driver died - defence of vehicle's compulsory insurer not struck out - application dismissed (I B C G)

**Saldanha v City of Belmont** (WASCA) - real property - easement - appeal against dismissal of counterclaim for removal of easement - appeal dismissed (I B C G)

**GR Engineering Services Ltd - v - Eastern Goldfields Ltd** (WASC) - commercial arbitration - matter referred to arbitration - stay granted in part - third defendant granted interpleader relief (I B C G)

**McLean v James Plummer as Executor of the Estate of Robert William McLean** (WASC) - wills and estates - succession - family provision - compromise reached at mediation - approval of compromise granted (B)

**Kent v City of Darwin** (NTSC) - negligence - cyclist injured in fall from bike on cycle path after

bike entangled in vine growing through fence - defendant liable - damages reduced by 30% for contributory negligence (I B C G)

## Summaries With Link (Five Minute Read)

### **Falzon v Minister for Immigration and Border Protection [2018] HCA 2**

High Court of Australia

Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ

Migration law - plaintiff was national of Malta - plaintiff held Absorbed Person Visa and a Class BF Transitional (Permanent) Visa until March 2016 under which his status was lawful non-citizen - in 2008 plaintiff convicted of cannabis trafficking - while in custody for 2008 conviction Absorbed Person Visa cancelled under s501(3A) *Migration Act 1958* (Cth) - cancellation had effect that Minister is taken to have cancelled the other visa - plaintiff was taken into immigration detention at conclusion of non-parole period - plaintiff unsuccessfully sought revocation of cancellation decision - plaintiff challenged s501(3A)'s validity - plaintiff contended s501(3A) purported to confer Commonwealth's judicial power on Minister thus infringing Ch III Constitution - plaintiff contended s501(3A) further punished him for his offences, and that was its purpose - held: s501(3A) did not 'authorise or require' plaintiffs detention, or confer Commonwealth's judicial power on Minister - application dismissed.

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

[From Benchmark Thursday, 8 February 2018]

### **Certain Underwriters at Lloyd's Subscribing to Contract Number NCP106108663 v Aquagenics Pty Limited (in liquidation) [2018] FCAFC 9**

Full Court of the Federal Court of Australia

Allsop CJ; Dowsett & Kerr JJ

Insurance - respondent was insured - appellant was insurer - claim arising from respondent's dispute with council concerning 'design and construct' contract - primary judge found respondent entitled to indemnity from appellant under respondent's professional indemnity policy - whether primary judge misconstrued policy concerning operation of insuring clause and exclusion - 'wrongful act' - whether claim arose from wrongful act - whether 'wrongful act' was 'committed in the course of professional activities' - s54 *Insurance Contracts Act 1984* (Cth) - held: no error in primary judge's decision - appeal dismissed.

[Certain Underwriters at Lloyds](#) (I B C G)

[From Benchmark Tuesday, 6 February 2018]

### **Denmark Community Windfarm Ltd v Commissioner of Taxation [2018] FCAFC 11**

Full Court of the Federal Court of Australia

Gilmour, Jagot & Moshinsky JJ

Taxation - appellant received grant from Commonwealth Government to fund 50% of wind turbines' construction cost - appellant claimed depreciation deductions in relation to assets

# Benchmark

constructed with grant's assistance - primary judge found amounts received by appellant were "assessable recoupments" under s 20-20 *Income Tax Assessment Act 1997* (Cth) - appellant appealed - held: primary judge was correct to find amounts were assessable recoupments - appeal dismissed.

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

[From Benchmark Thursday, 8 February 2018]

## **Bailey v Broadsword Marine Contractors Pty Ltd [2017] FCAFC 219**

Full Court of the Federal Court of Australia

Rares, Reeves & Derrington JJ

Administrative law - in order to take up employment with respondent appellant was required permission of owner of load-out facility to access it - in order to obtain permission, appellant was required to disclose his prior medical conditions - appellant did not disclose 'adjustment disorder with associated depression and anxiety', which had previously caused him to cease work - appellant suffered same condition within one month of employment - appellant required to cease work - Administrative Appeals Tribunal confirmed respondent's determination, in reliance on s10(7) *Seafarers Rehabilitation and Compensation Act 1992* (Cth), to deny claim for ongoing benefits - whether Tribunal asked and answered correct question as to whether applicant suffered "disease" or an "injury (other than a disease)" under Act - whether appellant made wilful or false representation - held: not established that Tribunal asked itself wrong question or applied wrong test - appeal dismissed.

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

[From Benchmark Friday, 9 February 2018]

## **Stolyar v Towers [2018] NSWCA 6**

Court of Appeal of New South Wales

Gleeson, Simpson & White JJA

Real property - easements - 'vehicle parking and garaging' easement - primary judge declared that easement on land which first appellant owned was valid and enforceable - whether interference with area affected by easement substantially deprived first appellant of proprietorship rights or possession rights to degree that easement was invalid - ss88B & 89 *Conveyancing Act 1919* (NSW) - evaluation of interference - held: primary judge did not err in finding rights given by easement to respondent dominant owner 'did not substantially deprive' first appellant servient owner of proprietorship rights or possession rights - appeal dismissed.

[View Decision](#) (I B C G)

[From Benchmark Thursday, 8 February 2018]

## **Liverpool City Council v Moorebank Recyclers Pty Ltd [2018] NSWCA 7**

Court of Appeal of New South Wales

Basten & Leeming JJA; Emmett AJA

Environment and planning - appeals concerned conditional approval for respondent's construction and operation of recycling facility land it owned in Council area - approval granted

under *Environmental Planning and Assessment Act 1979* (NSW) - Objectors (Council and others) appealed to Land and Environment Court - primary judge granted approval with varied conditions - whether failure to consider objectives and/or context of Liverpool Local Environmental Plan - whether erroneous finding concerning noise impacts - held : appeals dismissed

[View Decision](#) (I B C G)

[From Benchmark Thursday, 8 February 2018]

## **Evolution Traffic Control v Skerratt [2018] NSWSC 49**

Supreme Court of New South Wales

McDougall J

Contract - share purchase agreement - plaintiff agreed to buy from defendants issued shares in capital of company for purchase price of \$10 million - balance of purchase price paid - shares transferred - defendants and broker had provided 'financial forecasts' to plaintiff during negotiations - plaintiff contended financial forecasts were misleading or deceptive, and breached warranties in share purchase agreement - plaintiff contended shares were worth 'substantially less' than what it paid - plaintiff sued defendants for misleading or deceptive conduct, breach of warranty, or indemnity against loss under purchase agreement - whether Recognition of Prior Learning (RPL) condition disclosed - whether RPL condition 'capable of achievement' - whether misleading or deceptive conduct - inducement - reasonable reliance - 'fair value' - amount of loss - held: plaintiff succeeded on claim for misleading and deceptive conduct - unnecessary to deal with other issues - judgment for plaintiff in sum of \$3,537,970 against each defendant.

[View Decision](#) (I B C G)

[From Benchmark Wednesday, 7 February 2018]

## **Curnow Consulting Pty Limited v JPD Media and Design Pty Ltd t/a Durie Design (No. 2) [2018] NSWSC 28**

Supreme Court of New South Wales

Slattery J

Damages - contract - quantum - Court found JPD wrongfully terminated and repudiated Management Agreement and Services Agreement, and that Curnow Consulting accepted wrongful repudiation - determination of three questions arising from submissions at quantum hearing - 'Nine Network Deal and the Sean Anderson Carve-Out' - 'unallocated payments' - onus of proof of proof of loss in in 'small commission claims' - held: questions answered - first question answered in the affirmative - second question answered in the affirmative with an adjustment in Curnow Consulting's favour - third question answered in the negative with respect to 'Diversified' deal, and in the affirmative in respect of 'VME' deal - directions given.

[View Decision](#) (I B C G)

[From Benchmark Wednesday, 7 February 2018]

## **Ian Street Developer Pty Ltd v Arrow International Pty Ltd [2018] VSC 14**

Supreme Court of Victoria

Riordan J

Building and construction - security of payments - plaintiff sought to quash adjudication determination - whether determination was made out of time - whether plaintiff was 'in the business of building residences' - validity of payment claim - whether 'out of time determination' was void - ss7(2)(b), 14 & 22(4) *Building and Construction Industry Security of Payment Act 2002* (Vic) - held: adjudicator's determination was made out of time provided in s22(4) - however determination was valid - plaintiff was 'in the business of building residences' - payment claim was not invalid - determination not quashed - proceeding dismissed.s

[Ian Street Developer](#) (I B C G)

[From Benchmark Monday, 5 February 2018]

### **Loustas v Sier & Ors [2018] VSC 13**

Supreme Court of Victoria

Macaulay J

Contract - equity - defendants purchased land from receivers of company owned by plaintiff - defendants had lent money to company secured by mortgage ranked after mortgage held by bank - bank appointed receivers when company defaulted on loans bank made to it - whether defendants bound to share any profits with plaintiff from development they undertook on land - plaintiff claimed equitable interest in land - held: claim of oral agreement failed - plaintiff entitled only to nominal damages for defendants' breach of a written agreement (AMS agreement) by entering joint venture agreement without plaintiff's consent - defendants did not owe plaintiff fiduciary duties arising from arrangement for land's development - defendant breached fiduciary duty to plaintiff as client in connection with AMS agreement's preparation but no loss caused by breach - plaintiff suffered no loss due to any false representations by defendant - defendant not retained as plaintiff's solicitor at time joint venture agreement entered - no breach by defendant of duty owed as plaintiff's solicitor - plaintiff liable under guarantee of company's loans - defendants to pay plaintiff damages of \$1 - on counterclaim plaintiff liable under guarantees of company's loans from defendants to pay amounts to defendants.

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

[From Benchmark Monday, 5 February 2018]

### **Daicos v Daicos & Anor [2018] VSC 18**

Supreme Court of Victoria

Ierodionou AsJ

Summary dismissal - wills and estates - standing - deceased gave son life interest in property - son, at time will made, was residing in property with wife and daughters - will provided that under certain conditions wife would be able to continue residing in property after death of son - son and wife estranged - dispute concerned whether wife could reside at property and compel estate to pay for property's repair - wife sought judicial directions - executor contended wife had no standing because will did not give her right to 'compel him to do anything' - executor sought summary dismissal of proceeding - held: contingent beneficiary could seek directions O54

# Benchmark

*Supreme Court (General Civil Procedure) Rules 2015 (Vic)* - executor did not establish wife lacked standing - s64 *Civil Procedure Act 2010 (Vic)* was applicable - summary dismissal refused.

[Daicos](#) (B)

[From Benchmark Tuesday, 6 February 2018]

## **Baig v AWX Pty Ltd [2017] QSC 325**

Supreme Court of Queensland

McMeekin J

Negligence - plaintiff sued defendants in negligence for back injury in course of employment at meat works - second defendant conducted meat works - plaintiff employed under labour hire contract with first defendant - whether proof that alleged event actually occurred - whether breach of duty of care - whether causation established between work and injury - whether ongoing impairment in relation to work-related injury - whether work system safe - credit - ss305B, 305C *Workers' Compensation and Rehabilitation Act 2003 (Qld)* - held: defendants breached duty of care - causation established - judgment for plaintiff against first defendant in sum of \$921,083 - judgment for plaintiff against second defendant in sum of \$964,254.11

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

[From Benchmark Tuesday, 6 February 2018]

## **Caffrey v AAI Limited & Anor [2017] QSC 339**

Supreme Court of Queensland

Applegarth J

Pleadings - motor vehicle accident - single vehicle collision - psychiatric injury - proceedings in which applicant sued vehicle's compulsory insurer - allegedly negligent driver had died in motor vehicle accident in collision with tree - applicant was police officer who attended scene of collision - applicant contended he had suffered psychiatric injury - applicant sought to strike out parts of defence - whether respondent's pleading to alleged duty of care to act to avoid risk of psychiatric harm was bad in law - whether open to respondent to argue that there was no duty of care - r171 *Uniform Civil Procedure Rules 1999 (Qld)* - held: Court refused to strike out defence - application dismissed.

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

[From Benchmark Thursday, 8 February 2018]

## **Saldanha v City of Belmont [2018] WASCA 7**

Court of Appeal of Western Australia

Mitchell & Beech JJA; Pritchard J

Real property - easements - first respondent registered Deed under *Transfer of Land Act 1893 (WA)* purporting to grant easement over land (No 337) - deed executed by registered proprietor following planning condition's imposition - deed incorporated into No 337's certificate of title by notation on certificate - appellants became No 337's registered proprietors and notified first respondent of intention to withdraw easement - first respondent sought enforce easement, and

to modify it to remove inconsistency - appellants counterclaimed for easement's removal - trial judge granted relief first respondent sought - appellants appealed - *Land Administration Act 1997 (WA)* - *Public Works Act 1902 (WA)* - *Town Planning and Development Act 1928 (WA)* - held: first respondent's registered interest in easement was indefeasible - appeal dismissed.

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

[From Benchmark Monday, 5 February 2018]

## **GR Engineering Services Ltd - v - Eastern Goldfields Ltd [2018] WASC 19**

Supreme Court of Western Australia

Tottle J

Commercial arbitration - first defendant, pursuant to s8 *Commercial Arbitration Act 2012 (WA)*, sought to refer dispute with plaintiff to arbitration and stay of proceedings - third defendant sought interpleader relief under ) O17 r1 *Rules of the Supreme Court 1971 (WA)* - construction of contract - whether claims within arbitration agreement's scope - whether proceedings were 'proceedings to enforce payment due under the Contract' under clause and thus 'carved out' from arbitration agreement's operation - held: matter referred to arbitration - stay granted in part - third defendant granted interpleader relief.

[GR Engineering](#) (I B C G)

[From Benchmark Friday, 9 February 2018]

## **McLean v James Plummer as Executor of the Estate of Robert William McLean [2018] WASC 26**

Supreme Court of Western Australia

Allanson J

Wills and estates - succession - family provision - approval of compromise - deceased 'expressly excluded' his children, from whom he was estranged, from will - three of the children sought provision from will under *Family Provision Act 1972 (WA)* - compromise reached at mediation - parties sought approval of compromise pursuant to O70 r10 *Rules of the Supreme Court 1971 (WA)* - independent counsel's opinion - uncertainty - potential effect of costs on estate's value - held: Counsel's opinion had been 'overtaken by events' - estate was now 'substantially less' - counsel's opinion dispensed with - Court satisfied settlement was in children's best interests - settlement approved.

[McLean](#) (B)

[From Benchmark Friday, 9 February 2018]

## **Kent v City of Darwin [2018] NTSC 3**

Supreme Court of the Northern Territory

Barr J

Negligence - plaintiff cyclist injured in fall from bike on cycle path - plaintiff sued defendant, alleging it breached duty of care by failure to trim vine which had grown through fence and in which bike became entangled when he was distracted by approaching cyclists - whether defendant had negligently failed to prune the vine to stop it encroaching on the path - whether



plaintiff's speed contributed to accident - whether plaintiff failed to take reasonable proportions - held: defendant breached duty of care by failing to 'obviate or eliminate foreseeable risk' - plaintiff's damages reduced by 30% for contributory negligence.

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

[From Benchmark Monday, 5 February 2018]

## CRIMINAL

### Executive Summary

**Xiao v R** (NSWCCA) - criminal law - corporations law - procurement offence - entering agreement to commit offence - erroneous failure to take into account 'utilitarian value' of guilty plea - comparison of conduct with co-offender required lesser sentence - applicant re-sentenced - appeal allowed

**White v R** (NSWCCA) - criminal law - applicant convicted of sexual intercourse without consent and indecent assault - no miscarriage of justice - appeal against conviction dismissed

### Summaries With Link

#### **Xiao v R [2018] NSWCCA 4**

Court of Criminal Appeal of New South Wales

Bathurst CJ; Beazley P, Hoeben CJ at CL, McCallum J & Bellew J

Criminal law - corporations law - applicant charged with offence under ss1043A(1)(d) & 1311(1) *Corporations Act 2001* (Cth) with procurement offence and entering agreement to commit an offence under ss1043A(1)(d) & 1311(1) - applicant pleaded guilty before committal and sentenced to 8 years and 3 months in prison with non-parole period of 5 years and 6 months - whether erroneous assessment of offences' objective seriousness - whether judge erred in not taking into account applicant's guilty plea - whether judge erred in not taking into account that applicant, because he was a foreign national, would experience 'more onerous custody' - whether judge erred in not sentencing applicant under s19AB(1) *Crimes Act 1914* (Cth) - whether sentences manifestly excessive - whether 'legitimate sense of grievance' due to sentence imposed on co-offender - 'utilitarian value' of guilty plea - held: judge erred in not giving discount for guilty plea's 'utilitarian value' - comparison of applicant's conduct with co-offender's conduct required imposition of lesser sentence - 15% discount on sentence allowed for guilty plea's 'utilitarian value' - applicant resentenced to 7 years in prison with non-parole period of 4 years 6 months - appeal allowed.

[View Decision](#)

## **White v R [2018] NSWCCA 1**

Court of Criminal Appeal of New South Wales

Hoeben CJ; Davies & Bellew JJ

Criminal law - sexual intercourse without consent - indecent assault - applicant convicted of one count of sexual intercourse without consent and three counts of indecent assault - applicant sentenced to three years in prison with non-parole period of 18 months - applicant appeal against conviction - applicant contended there had been miscarriage of justice due to incompetence of applicant's counsel - applicant alleged failure by counsel to call applicant to give evidence, failure to take applicant's instructions whether he wished to give evidence, and failure to advise as to ramifications of not giving evidence - applicant also contended judge erroneous permitted Crown Prosecutor to make submission to jury, 'which invited reasoning involving a reversal of onus' - held: grounds of appeal failed - no miscarriage of justice - appeal dismissed.

[View Decision](#)



# Benchmark

## **A Musical Instrument**

**By:** Elizabeth Barrett Browning

### **I.**

WHAT was he doing, the great god Pan,  
Down in the reeds by the river ?  
Spreading ruin and scattering ban,  
Splashing and paddling with hoofs of a goat,  
And breaking the golden lilies afloat  
With the dragon-fly on the river.

### **II.**

He tore out a reed, the great god Pan,  
From the deep cool bed of the river :  
The limpid water turbidly ran,  
And the broken lilies a-dying lay,  
And the dragon-fly had fled away,  
Ere he brought it out of the river.

### **III.**

High on the shore sate the great god Pan,  
While turbidly flowed the river ;  
And hacked and hewed as a great god can,  
With his hard bleak steel at the patient reed,  
Till there was not a sign of a leaf indeed  
To prove it fresh from the river.

### **IV.**

He cut it short, did the great god Pan,  
(How tall it stood in the river !)  
Then drew the pith, like the heart of a man,  
Steadily from the outside ring,  
And notched the poor dry empty thing  
In holes, as he sate by the river.

### **V.**

This is the way,' laughed the great god Pan,  
Laughed while he sate by the river,)  
The only way, since gods began  
To make sweet music, they could succeed.'  
Then, dropping his mouth to a hole in the reed,  
He blew in power by the river.

# Benchmark

## VI.

Sweet, sweet, sweet, O Pan !  
Piercing sweet by the river !  
Blinding sweet, O great god Pan !  
The sun on the hill forgot to die,  
And the lilies revived, and the dragon-fly  
Came back to dream on the river.

## VII.

Yet half a beast is the great god Pan,  
To laugh as he sits by the river,  
Making a poet out of a man :  
The true gods sigh for the cost and pain, —  
For the reed which grows nevermore again  
As a reed with the reeds in the river.

[https://en.wikipedia.org/wiki/Elizabeth\\_Barrett\\_Browning](https://en.wikipedia.org/wiki/Elizabeth_Barrett_Browning)

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