

Friday, 12 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)

**Huatong (Asia) Pte Ltd v Lonpac Insurance Bhd** (SGHC) - insurance contract - Work Injury Compensation Insurance Policy - insurer entitled to recover sum it paid to estate of deceased employee (I B C)

**Plaintiff M68-2015 v Minister for Immigration and Border Protection** (HCA) - migration - Commonwealth authorised by 198AHA of the Migration Act to participate in plaintiff's detention at Regional Processing Centre - declaration refused (I B C G)

**Assarapin v Australian Community Pharmacy Authority** (FCAFC) - administrative law - grant of authority to supply pharmaceutical benefits from new premises - no error in Authority's recommendation or Secretary's decision to accept it - appeal and cross-appeal dismissed (I B G)

**Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd** (FCA) - trade practices - no misleading and deceptive conduct, or conduct which was likely to mislead or deceive established - proceedings dismissed (I B)

**Hillam v Iacullo** (NSWCA) - costs - variation of costs orders refused - notice of motion dismissed (I B)

**Consolidated Lawyers Ltd v Abu-Mahmoud; Abu-Mahmoud v Consolidated Lawyers Ltd** (NSWCA) - professional negligence - solicitors' duties - negligent restructure advice caused client's loss - appeal dismissed (I B C)

**Ehrenfeld v Zeng** (NSWCA) - trusts - corporations - contract - respondents entitled to recover from appellant amount paid out of trust account - appeal dismissed (I B C)

**SU v Commonwealth of Australia; BS v Commonwealth of Australia** (NSWSC) - wrongful imprisonment - Indonesian nationals unlawfully arrested and wrongly imprisoned for short period (I)

**Saunders v Legal Profession Admission Board (No 2)** (NSWSC) - costs - Law Society to pay 30% of successful appellant's costs after it commenced as amicus curiae (I)

**Cheikho v Nationwide News Pty Ltd (No 4)** (NSWSC) - defamation - determination of remaining issues by Court not jury - defence of qualified privilege failed - damages awarded in sum of \$100 000 (I)

**Stankovic v Hockey** (NSWSC) - professional negligence - solicitors' duties - no breach of duty by solicitor - proceedings dismissed (I B)

**Mandie v Memart Nominees Pty Ltd** (VSCA) - pleadings - trusts and trustees - leave to amend statement of claim in respect of 'specified beneficiary allegations' (B)

**Pittaway v Noosa Cat Australia Pty Ltd** (QCA) - contract - construction contract - erroneous dismissal of proceedings for want of prosecution - appeal allowed (I B C)

**Australian Securities and Investments Commission v Munro** (QSC) - corporations - financial services - contravention of section 911A *Corporations Act 2001* (Cth) by carrying on financial services business without licence - declarations and injunctions (I B)

**Allianz Australia Insurance Ltd v Inglis** (WASCA) - insurance - preliminary question - legal liability cover - exclusion clause for injury to person who was normally living with insured - appeal allowed (I B C)

**Sakari Resources Ltd v Purvis** (WASCA) - stay - conflict of laws - continuation of proceedings would not vexatious or oppressive - appeal dismissed (I B)

**Cauldron Energy Ltd v Beijing Joseph Investment Co Ltd** (WASC) - contract - share placement agreements - plaintiff entitled to recover contractual debts and to damages for wasted expenditure - claim for interference with contractual relations failed (I B C)

**Motor Accidents Insurance Board v Lester** (TASSC) - negligence - driver injured in collision with steer or steers which had escaped from farming property and onto road - non-indemnifiable defendants liable for scheduled benefits paid or to be paid by Motor Accidents Insurance Board (I B C)

**Clarkson Williams Partners Pty Ltd v Vaughan** (ACTCA) - trade practices - erroneous finding of misleading or deceptive conduct against accounting practice - appeal allowed (I B)

**R Developments Pty Ltd v Forth** (ACTSC) - building contract - builder not entitled to insist that owners provide evidence of capacity to pay amount required under contract (I B C)

## Summaries With Link (Five Minute Read)

### **Huatong (Asia) Pte Ltd v Lonpac Insurance Bhd [2015] SGHC 326**

High Court of Singapore

George Wei J

Insurance contract - appeal against decision in which District Judge allowed insurer's appeal against employer for sum paid pursuant to Work Injury Compensation Insurance Policy - construction of 'Motorcycling Exception' in 'Travelling Extension' - construction of 'Avoidance and Recovery' clause - whether insurer entitled to recover what it had paid to estate of deceased employee - public interest - statutory allocation of risk - Red hand rule - *Work Injury Compensation Act* - held: Court affirmed decision of District Judge that insurer was entitled to recover sum it paid - appeal dismissed.

[Huatong](#) (I B C)

[From Benchmark Tuesday, 9 February 2016]

### **Plaintiff M68-2015 v Minister for Immigration and Border Protection [2016] HCA 1**

High Court of Australia

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

Migration - plaintiff Bangladeshi national was "unauthorised maritime arrival" pursuant to s5AA *Migration Act 1958* (Cth) - plaintiff taken to Nauru - plaintiff sought declaration Commonwealth's conduct in relation to detention, was unlawful - ss198AB, 198AD & 198AHA. - ss51(xix) & 61 *Constitution* - non-statutory executive power - authorisation for participation in detention at Regional Processing Centre - Nauru Constitution - held (by majority): Commonwealth authorised by 198AHA of the Migration Act to participate in plaintiff's detention - declaration refused.

[Plaintiff-M68-2015](#) (I B C G)

[From Benchmark Friday, 5 February 2016]

### **Assarapin v Australian Community Pharmacy Authority [2016] FCAFC 9**

Full Court of the Federal Court of Australia

Bromberg, Rangiah & Perry JJ

Administrative law - applicants sought judicial review of Secretary's grant of approval to second respondent under s90 *National Health Act 1953* (Cth), and Authority's preceding recommendation - approval authorised second respondent to supply pharmaceutical benefits

# Benchmark

from new premises - appellants authorised to dispense pharmaceutical benefits from premises close to second respondent's premises - appellants contended Authority misconstrued criterion that "the existing premises are not in a facility" within meaning of Part 1 of Sch 1 *National Health (Australian Community Pharmacy Authority Rules) Determination 2011*- held: Authority's recommendation and decision to accept it not affected by error of law or jurisdictional error - appeal dismissed - appellants had standing under *Administrative Decisions (Judicial Review) Act 1977* (Cth) Act as persons aggrieved - cross-appeal dismissed.

[Assarapin](#) (I B G)

[From Benchmark Monday, 8 February 2016]

## **Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd [2016] FCA 22**

Federal Court of Australia

Moshinsky J

Trade practices - misleading and deceptive conduct - Director of Consumer Affairs Victoria alleged respondent engaged in conduct which was misleading and deceptive or likely to mislead and deceive, in connection with promotion of goods and extended warranties - ss107, 108, 109, 110, 111, 142, 143, 144, 145 & 149-181 *Australian Consumer Law and Fair Trading Act 2012* (Vic) - ss13 & 38 *Charter of Human Rights and Responsibilities Act 2006* (Vic) - ss2, 4, 18, 29(1)(l) and (m), 51-59, 228, 232, 246, 247, 259-261, 263 & 264 *Competition and Consumer Act 2010* (Cth) - held: objections to evidence on basis of s138 *Evidence Act* (Cth) rejected - conduct not misleading or deceptive, or likely to mislead or deceive - proceedings dismissed.

[Director of Consumer Affairs](#) (I B)

[From Benchmark Monday, 8 February 2016]

## **Hillam v Iacullo [2016] NSWCA 1**

Court of Appeal of New South Wales

Basten, Ward & Leeming JJA

Costs - Court allowed appellant's appeal - respondents ordered to pay costs of appeal - respondents sought to vary orders - Court had set aside primary judge's orders, dismissed proceedings and order payment of costs by respondents - respondents sought to preserve costs order in respect of costs at first instance - respondents also sought clarification of dismissal order by insertion of words "the balance of" - r36.16 *Uniform Civil Procedure Rules 2005* (NSW) - held: appellants were seeking that respondents be ordered to pay costs of proceedings at first instance - Court refused order - Court had found appellants should have lost on issues determined by primary judge - quantum of appellants' claim found to be unsuccessful significantly greater than claims on which they were successful in advance of trial - appellants had benefit of costs orders in respect of application for judgment - notice of motion dismissed.

[Hillam](#) (I B)

[From Benchmark Thursday, 4 February 2016]

## **Consolidated Lawyers Ltd v Abu-Mahmoud; Abu-Mahmoud v Consolidated Lawyers Ltd [2016] NSWCA 4**

Court of Appeal of New South Wales

Bathurst CJ, Macfarlan JA & Tobias AJA

Professional negligence - solicitors' duties - respondent property developer sued appellant lawyers for allegedly negligent advice ("restructure advice") in relation to purchase of property - primary judge found in favour of respondent - causation - post-caveat advice - "independent unreasonable conduct" - held: no error in primary judge's finding that restructure advice was negligent and that negligence caused respondent's loss - appellants precluded from raising argument as to unreasonable conduct and causation for first time on appeal - no error established by primary judge in relation to costs - appeal dismissed.

[Consolidated Lawyers Ltd](#) (I B C)

[From Benchmark Monday, 8 February 2016]

### **Ehrenfeld v Zeng [2016] NSWCA 6**

Court of Appeal of New South Wales

Macfarlan & Gleeson JJA; Emmett AJA

Trusts - corporations - contract - dispute arising from project which failed to reach fruition - project involved acquisition of company which was to acquire quarry and publish prospectus for proposed issue of shares to recapitalise it - respondent and associates contended that payments made out of an account controlled by fourth respondent in accordance with appellant's instructions were made in breach of trust - respondent and associates claimed reimbursement from fourth and fifth respondent and from appellant and associated entities - primary judge found in favour of respondents - whether breach of contract and breach of trust - procedural fairness - natural justice - validity of prospectuses - Sch 2 *Competition and Consumer Act 2010* (Cth) - s719 *Corporations Act 2001* (Cth) - held: appellant failed to make out any grounds of appeal - appeal dismissed.

[Ehrenfeld](#) (I B C)

[From Benchmark Wednesday, 10 February 2016]

### **SU v Commonwealth of Australia; BS v Commonwealth of Australia [2016] NSWSC 8**

Supreme Court of New South Wales

Hamill J

Wrongful imprisonment - plaintiffs were two Indonesian nationals detained by defendants - plaintiffs sued defendants for damages for false or wrongful imprisonment on basis that short period of their detention unlawful - plaintiffs contended arrest was unlawful and they were wrongly imprisoned as result of arrest - residual liberty - "umbrella of lawfulness" - s3W *Crimes Act 1914* (Cth) - s5 *Migration Act 1958* (Cth) - held: arrest of plaintiffs was unlawful - plaintiffs were wrongly imprisoned for around 2 hours and 15 minutes - judgment for plaintiffs.

[SU](#) (I)

[From Benchmark Friday, 5 February 2016]

### **Saunders v Legal Profession Admission Board (No 2) [2016] NSWSC 27**

Supreme Court of New South Wales

Schmidt J

Costs - Court allowed appellant's appeal from Legal Profession Board's decision that appellant not a fit and proper person for admission - Law Society appeared as amicus curiae - appellant sought order that Law Society of New South Wales bear 30% of actual costs incurred - Society opposed order - whether costs order could be made against Society - whether discretion to award costs should be exercised - held: justice demanded costs order should be made in appellant's favour on party/party basis - Society to bear 30% of costs incurred after it commenced acting as amicus curiae.

[Saunders](#) (I)

[From Benchmark Monday, 8 February 2016]

## **Cheikho v Nationwide News Pty Ltd (No 4) [2016] NSWSC 29**

Supreme Court of New South Wales

McCallum J

Defamation - action arising from publication of articles in newspaper concerning protest in park in response to film 'Innocence of Muslims' - jury found plaintiff succeeded in relation to one article - remaining issues for determination by Court, not jury - whether article published on an occasion of qualified privilege - determination of amount of damages to be awarded - 22(3) *Defamation Act 2005* (NSW) - held: plaintiff defence of qualified privilege at common law failed - plaintiff awarded damages of \$100,000.

[Cheikho](#) (I)

[From Benchmark Tuesday, 9 February 2016]

## **Stankovic v Hockey [2016] NSWSC 31**

Supreme Court of New South Wales

Harrison J

Professional negligence - solicitors' duties - bankruptcy - plaintiff client sued former solicitor for professional negligence and breach of retainer in relation to proceedings which followed sequestration of plaintiff's estate - plaintiff alleged solicitor acted without instructions and that dismissal of application for annulment was arranged or consented to by defendant without authorisation - plaintiff claimed losses in amount of \$35M - held: plaintiff failed to demonstrate breach of duty by defendant - no evidence of claimed losses - proceedings dismissed.

[Stankovic](#) (I B)

[From Benchmark Wednesday, 10 February 2016]

## **Mandie v Memart Nominees Pty Ltd [2016] VSCA 4**

Court of Appeal of Victoria

Kyrou, Ferguson & McLeish JJA

Pleadings - trusts and trustees - applicants sought to appeal from refusal of leave to amend statement of claim - applicants also sought to challenge costs order - amendments sought to impugn respondent's declarations regarding beneficiaries' rights under trust - s63(1) *Civil Procedure Act 2010* (Vic) - prospects of success - whether application of wrong test - held: no error in application of test in refusal of leave to amend statement of claim - leave to appeal and appeal allowed in respect of 'specified beneficiary allegations' -leave to appeal refused in

respect of 'conflict of interest' allegations.

[Mandie](#) (B)

[From Benchmark Tuesday, 9 February 2016]

## **Pittaway v Noosa Cat Australia Pty Ltd [2016] QCA 4**

Court of Appeal of Queensland

Morrison JA; Douglas & North JJA

Contract - construction contract - linked agreements - applicant and respondent entered two linked agreements by which applicant would build shed for respondent and respondent would build boat for applicant - applicant contended he built shed but respondent's company did not pay full amount as required - applicant also contended respondent did not build boat as required - applicant sued respondent and company for damages for breach of contract - proceedings dismissed for want of prosecution - applicant sought leave to appeal - whether appeal necessary to correct substantial injustice - whether reasonable argument there was error - delay - prejudice - s118(3) *District Court of Queensland Act 1967* (Qld) - rr5, 214(2)(e), 280, 389 & 444 *Uniform Civil Procedure Rules 1999* (Qld) - held: primary judge erred in finding circumstances warranted dismissal - dismissal of claim amounted to substantial injustice - leave to appeal granted - appeal allowed.

[Pittaway](#) (I B C)

[From Benchmark Thursday, 4 February 2016]

## **Australian Securities and Investments Commission v Munro [2016] QSC 9**

Supreme Court of Queensland

Flanagan J

Corporations - financial services - applicant sought declaratory and injunctive relief pursuant to ss1101B and 1324 *Corporations Act 2001* (Cth) for respondents' conduct in contravention of s911A - applicant alleged respondents conducted financial services business without Australian Financial Services Licence - respondents consented to proposed injunctions and did not oppose declaratory relief - ss19, 24(2), 68(2), 68(3), 76(1) & 76(3) *Australian Securities and Investments Commission Act 2001* (Cth) - ss9, 79, 761A, 763A, 763B(a), 766A, 766C(1)(a), 766E, 911A, 1101B & 1324(1) *Corporations Act* - held: Court satisfied it was appropriate to exercise discretion to make declarations and injunctions - declarations and injunctions made.

[ASIC](#) (I B)

[From Benchmark Thursday, 4 February 2016]

## **Allianz Australia Insurance Ltd v Inglis [2016] WASCA 25**

Court of Appeal of Western Australia

McLure P, Buss JA & Mitchell J

Insurance - Mr and Mrs Inglis were parents of James and Georgia Inglis - Georgia Inglis, while present at home of Daniel Sweeney, Elaine Sweeney and their son Stephen Sweeney, was injured when run over by ride-on lawnmower driven by Stephen Sweeney - lawnmower owned by Stuart Inglis - lawnmower was allegedly driven by James Inglis from home to Sweeneys' home - preliminary question whether Allianz liable to indemnify Stuart and James Inglis under

policy which insured Inglis' home and contents, and also provided legal liability cover, for any liability to Sweeneys in third party proceedings - primary judge found Allianz not entitled to refuse claim - s54 *Insurance Contracts Act 1984* (Cth) - s7 *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) - construction of policy - exclusion of liability for injury to a person who was normally living with insured - whether fact Georgia Inglis was normally living with insured was an act under s 54 rather than state of affairs pertaining to or characteristic of life as 10 year old - held: Court not satisfied that the fact that a person normally lives with an insured does not constitute an 'act' within s 54(1) - appeal allowed.

[Allianz](#) (I B C)

[From Benchmark Friday, 5 February 2016]

### **Sakari Resources Ltd v Purvis [2016] WASCA 24**

Court of Appeal of Western Australia

Buss, Newnes & Murphy JJA

Stay - conflict of laws - respondent sued appellant for balance of termination payment owing under contract of employment - Master dismissed appellant's application for stay of proceedings commenced in Singapore on ground that continuing proceedings would be vexatious or oppressive - held: Master erred by not turning mind to whether continuation of WA proceedings would be vexatious or oppressive in sense in *Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55 - Court not persuaded continuation of proceedings vexatious or oppressive - appeal dismissed.

[Sakari](#) (I B)

[From Benchmark Friday, 5 February 2016]

### **Cauldron Energy Ltd v Beijing Joseph Investment Co Ltd [2016] WASC 22**

Supreme Court of Western Australia

Mitchell J

Contract - inducement of breach of contract - Cauldron Energy was plaintiff by counter-claim (plaintiff) - Cauldron Energy entered agreements with defendants by counterclaim (defendants) and company 'Guangzhou Joseph' for placement of shares in plaintiff - plaintiff sought to recover subscription sums payable by defendants under agreements and to recover wasted expenditure for obtaining shareholder approval - plaintiff also claimed defendants induced or procured defendant and Guangzhou Joseph to breach agreements - ss606, 607, 611 & 1041 *Corporations Act 2001* (Cth) - O 20, r14, O 34, r4 *Rules of the Supreme Court 1971* (WA) - held: subscription sums payable under agreements - plaintiff entitled to recover contractual debts and damages for wasted expenditure - tortious claim for interference with contractual relations failed.

[Cauldron](#) (I B C)

[From Benchmark Wednesday, 10 February 2016]

### **Motor Accidents Insurance Board v Lester [2016] TASSC 2**

Supreme Court of Tasmania

Tennent J

Negligence - driver catastrophically injured in motor vehicle collision with steer or steers wandering on highway, which had escaped farming property - Motor Accidents Insurance Board

# Benchmark

entitled under of *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas) to recover from certain people scheduled benefits it had to pay for driver's benefit - Board sued owners of farming property (first and second defendants) and third defendant, contracted by first and second defendant to replace portion of fencing - defendants were non-indemnifiable persons for purposes of Act - held: Court satisfied defendants owed and breached duty of care to driver by negligent acts - as result of defendants' negligence steers escaped from property and wandered onto highway - clearly foreseeable that if steers escaped they would wander onto roads posing significant risk to road users - risk resulted in injury to driver - defendants are liable to pay scheduled benefits paid or to be paid by Board.

[Motor Accidents Insurance Board](#) (I B C)

[From Benchmark Friday, 5 February 2016]

## **Clarkson Williams Partners Pty Ltd v Vaughan [2016] ACTCA 1**

Court of Appeal of the Australian Capital Territory

Penfold, Burns & Rangiah JJ

Trade practices - misleading or deceptive conduct - appellant was accounting practice - respondent purchased café business - primary judge found appellant engaged in misleading or deceptive conduct by not disclosing that fair value of business was much less than purchase price - appellant claimed primary judge erred in assessing damages - respondent conceded error but cross-appealed for different alleged error - appellant conceded cross-appeal - appellant also appealed against finding that appellant engaged in misleading or deceptive conduct - s12 *Fair Trading Act 1992* (ACT) - held: primary judge erred in finding Mr Clarkson knew business's fair value was much less than purchase price - appeal allowed - judgment set aside.

[Clarkson](#) (I B)

[From Benchmark Thursday, 4 February 2016]

## **R Developments Pty Ltd v Forth [2016] ACTSC 8**

Supreme Court of the Australian Capital Territory

Mossop AsJ

Building contract - action arising out of written contract for construction of residence - plaintiff was builder and defendants were owners - builder terminated for alleged failure to comply with contractual requirement to supply evidence of owners' capacity to pay required amount - whether builder's termination valid - held: builder not entitled to insist that Owners provide evidence of capacity to pay amount or to rely on alternative provision to support validity of termination of the contract - owners entitled only to nominal damages in relation to claim for damages for repudiation.

[R Developments](#) (I B C)

[From Benchmark Tuesday, 9 February 2016]

## CRIMINAL

# Benchmark

## Executive Summary

**Henderson v R** (NSWCCA) - criminal law - indecent assault - old offences - sentencing error established - applicant re-sentenced - appeal allowed

**Ryder v The Queen** (VSCA) - criminal law - incest - appellant's intellectual disability contributed to offending - appellant re-sentenced - appeal allowed

## Summaries With Link

### **Henderson v R [2016] NSWCCA 8**

Court of Criminal Appeal of New South Wales

Bathurst CJ; Hoeben CJ at CL & RS Hulme AJ

Criminal law - indecent assault - old offences - applicant pleaded guilty to counts of indecent assault which took place between 1961 and 1978/9 against complainants - aggregate sentence imposed - applicant appealed against sentence - ss76 & 81 *Crimes Act 1900* (NSW) - s21A(2)(k); ss44 & 53A *Crimes (Sentencing Procedure) Act 1999* - s 5(1) *Criminal Appeal Act 1912* (NSW) - held: sentencing judge failed to have regard to sentencing practice at the time of offences - sentencing judge erred in relation to application of discount for early guilty plea - sentencing judge erred in finding applicant in position of trust or offending on sequences, and in finding applicant not unlikely to reoffend - Court satisfied applicant should be re-sentenced - appeal allowed.

[Henderson](#)

### **Ryder v The Queen [2016] VSCA 3**

Court of Appeal of Victoria

Whelan JA & Cavenough AJA

Criminal law - incest - appellant pleaded guilty to one charge of incest - appellant sentenced to four years in prison with two year non-parole period - appellant contended sentencing judge erred in concluding his intellectual disability did not contribute to offending and failing to mitigate sentence for that contribution - appellant also contended head sentence and non-parole period manifestly excessive - s44(1) *Crimes Act 1958* (Vic) - held: appellant succeeded on ground of appeal in relation to contribution of intellectual disability to offending and mitigation of sentence - appellant resentenced - appeal allowed.

[Ryder](#)



# Benchmark

## **Interim**

Lola Ridge, 1873

The earth is motionless  
And poised in space ...  
A great bird resting in its flight  
Between the alleys of the stars.  
It is the wind's hour off ....  
The wind has nestled down among the corn ....  
The two speak privately together,  
Awaiting the whirr of wings.

[Lola Ridge](#)

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