

Friday, 13 April 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)

**WET044 v The Republic of Nauru** (HCA) - migration - appellant refused recognition as refugee under *Refugees Convention Act 2012* (Nr) or as person owed 'complementary protection' by Nauru - country information - procedural fairness - appeal dismissed (I B C G)

**Jones (Liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq)** (FCAFC) - trusts and trustees - corporate insolvency - corporations - application by liquidator for declaration and directions - determination of four questions (I B C G)

**Australian Information Commissioner v Elstone Pty Limited** (FCA) - constitutional law - freedom of information - referred questions - threshold issue - questions did not involve "matter" under Ch III Constitution - application dismissed (I B C G)

**SAS Trustee Corporation v Rossetti** (NSWCA) - jurisdiction - industrial law - Supreme Court did not have jurisdiction to hear appeal from determination of appellant of matter arising under *Police Regulation (Superannuation) Act 1906* (NSW) - appeal allowed (I B C G)

**Marketform Managing Agency Ltd v Amashaw Pty Ltd** (NSWCA) - insurance - public liability insurance policy - duty of disclosure - respondent entitled to indemnity for "Restorative Work" category, but not "Preventative Work" category - appeal and cross-appeal dismissed (I B)

**Ku-ring-gai Council v Chan (No 2)** (NSWCA) - costs - indemnity costs - "novel" duty of care -

fourth defendant successful in appeal against judgment in plaintiffs' favour - not unreasonable of plaintiffs to reject Calderbank offer - plaintiffs to pay fourth defendant's costs of first instance proceeding on ordinary basis (I B C G)

**Carroll v United Super Pty Ltd** (NSWSC) - insurance - superannuation - plaintiff was Totally and Permanently Disabled within policy - plaintiff entitled to declaration and payment of amount (I B)

**Secure Loans Solutions Pty Ltd v Smith** (VSCA) - mortgages - entitlement to residue from mortgagee sale of property - leave to appeal refused (I B C G)

**The Gull Lexington Group Pty Ltd v Laguna Bay (Banongill) Agricultural Pty Ltd** (VSCA) - summary judgment - contract - agreement for sale of business assets - no prospects of success on applicant's claim that valuation of assets not made in accordance with agreement - leave to appeal refused (I B C G)

**Harstedt Pty Ltd v Tomanek** (VSCA) - trusts and trustees - equity - accessorial liability - failure to show respondent assisted company in its 'dishonest and fraudulent design' - appeal dismissed (I B C G)

**Sadleir v Kähler & Ors** (QSC) - wills and estates - succession - handwritten document formed deceased's will - letters of administration granted - declaration concerning distribution of deceased's estate granted (B)

**Public Trustee v CBA & Ors** (SASC) - wills and estates - succession - deceased had money in three banks at date of death - banks paid money to deceased's son as executor under purported will - probate granted in respect of other will naming Public Trustee as executor - banks liable to Public Trustee as executor for money - defence of equitable set-off made out (I B C G)

**The Trustee for Allway Unit Trust Trading as Westside Mechanical Contracting Pty Ltd v R&D Airconditioning Pty Ltd & Ors** (SASC) - security of payments - no valid reference date for payment claim - jurisdictional error - adjudicator's determination quashed (I B C G)

**Wheatley v Gwenyth Mary Wheatley as executor of the estate of the late Gerald Leopold Wheatley** (WASCA) - succession - family provision - leave to appeal granted against refusal of extension of time to seek family provision from deceased's father's estate - appeal allowed - time extended (B)

**Dong v Song** (ACTSC) - evidence - misleading and deceptive conduct - video recording made with hidden camera did not contravene *Listening Devices Act 1992* (ACT) - video recording, and plaintiff's evidence in reliance on it, admitted (I B C G)

**KS and XT v Calvary Health Care ACT trading as Calvary Hospital and Dr Andrew Foote** (ACTSC) - medical negligence - psychological harm - two proceedings heard together arising from still birth of plaintiffs' child - hospital and obstetrician/ gynaecologist liable (I)

## Summaries With Link (Five Minute Read)

### **WET044 v The Republic of Nauru [2018] HCA 14**

High Court of Australia

Kiefel CJ; Gageler & Keane JJ

Migration - appellant Iranian citizen of Faili Kurdish ethnicity sought recognition as refugee under *Refugees Convention Act 2012* (Nr) or as person owed 'complementary protection' by Nauru - Secretary of the Department of Justice and Border Control (Secretary) refused application - Tribunal affirmed decision of Secretary - Supreme Court of Nauru dismissed appeal - appellants contended Tribunal erroneously failed to deal with 'submissions and country information' which appellant provided concerning risk of returning, as 'failed asylum seeker' to Iran - appellant sought to insert new ground that Tribunal had denied procedural fairness not putting to him the 'nature and content' of the country information it relied on as to 'risk of harm to Kurds who are Shia Muslim' - held: grounds of appeal lacked merit - appeal dismissed.

[WET044](#) (I B C G)

[From Benchmark Thursday, 12 April 2018]

### **Jones (Liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq) [2018] FCAFC 40**

Full Court of the Federal Court of Australia

Allsop CJ; Siopis & Farrell JJ

Trusts and trustees - corporate insolvency - corporations - right of exoneration - liquidator of company (Killarnee) which was trustee of trading trust sought 'directions and declarations' under s511 *Corporations Act 2001* (Cth) (Corporations Act) and s89 *Trustees Act 1962* (WA) - questions concerned manner in which liquidator of company which was trustee of trading trust, should treat exercise of right of exoneration and proceeds from trust's assets - whether right or proceeds were part of company's general assets for payment of its debts including to liquidator under Corporations Act regime - whether right and proceeds should be used for trust creditors only - whether Corporations Act regime applied to 'distribution amongst trust creditors' - held: four questions determined by Court.

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

[From Benchmark Wednesday, 11 April 2018]

### **Australian Information Commissioner v Elstone Pty Limited [2018] FCA 463**

Federal Court of Australia

# Benchmark

Griffiths J

Constitutional law - freedom of information - Australian Information Commissioner referred two questions of law to Court under s55H *Freedom of Information Act 1982* (Cth) - questions concerned proper construction of FOI Act's provisions on Commissioner's review function when agency varied decision during course of Commissioner's review of original decision - whether review continued to be review of original decision or became a review of decision as varied - threshold issue was whether questions involved a "matter" under Ch III Constitution - held: there was no "matter" under Ch III Constitution - 'unnecessary and inappropriate' to express view on the two questions referred - application dismissed.

[Australian Information Commissioner](#) (I B C G)

[From Benchmark Wednesday, 11 April 2018]

## **SAS Trustee Corporation v Rossetti [2018] NSWCA 68**

Court of Appeal of New South Wales

McColl, Basten & Payne JJA

Jurisdiction - industrial law - appellant administered superannuation scheme which *Police Regulation (Superannuation) Act 1906* (NSW) established (Police Regulation Act) - appellant refused respondent's claim for annuity under Police Regulation Act - appellant sought to appeal to Industrial Court - Industrial Court abolished before matter's determination - jurisdiction and appeal transferred to Supreme Court in which respondent succeeded - appellant appealed - jurisdictional question not raised by parties - whether Supreme Court had jurisdiction to hear the "appeal" from appellant's determination - held: appellant's determination was on matter arising under Police Regulation Act, with right of appeal to District Court under s21 Police Regulation Act - appellant's determination was not of a dispute under s67 *Superannuation Administration Act 1996* (NSW) - there was no right of appeal to Supreme Court - Supreme Court did not have jurisdiction to hear appeal - appeal allowed.

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

[From Benchmark Wednesday, 11 April 2018]

## **Marketform Managing Agency Ltd v Amashaw Pty Ltd [2018] NSWCA 70**

Court of Appeal of New South Wales

Meagher & Leeming JJA; Emmett AJA

Insurance - duty of disclosure - respondent operated service station - respondent claimed under public liability insurance policy for reimbursement of money incurred after contamination - underwriters represented by appellant - appellant refused indemnity due to alleged failure to disclose 'contamination reports' and that claimed expenses not covered by policy's wording - primary judge found respondent entitled to indemnity for "Restorative Work" category, but not "Preventative Work" category - parties appealed and cross-appealed - non-disclosure - coverage under clause of policy - indemnity's quantum - ss21(1) & 28(3) *Insurance Contracts Act 1984* (Cth) - held: no error in primary judge's rejection of contention of non-disclosure - no error in findings concerning whether claim was within scope of clause - no error in primary judge's findings that Preventative Work was 'designed to prevent nuisance rather than to abate

nuisance' - appeal and cross-appeal dismissed.

[View Decision](#) (I B)

[From Benchmark Thursday, 12 April 2018]

## **Ku-ring-gai Council v Chan (No 2) [2018] NSWCA 73**

Court of Appeal of New South Wales

McCull & Meagher JJA; Sackville AJA

Costs - Court allowed fourth defendant Council's appeal from judgment entered in favour of plaintiffs below - primary judge had ordered fourth defendant to pay plaintiffs' costs - Council sought, in place of primary judge's order, an order that plaintiffs pay its costs of proceedings at first instance - Council also sought, on basis of Calderbank offer rejected by plaintiffs, that plaintiffs pay costs from certain date on indemnity basis - claim of "novel" duty of care 'on the principal certifying authority to avoid pure economic loss to a subsequent purchaser' - whether unreasonable for plaintiffs to reject offer - absence of defendants' evidence and opportunity to analyse parties' relationships - held: it was not unreasonable for plaintiffs to reject Council's offer of compromise - plaintiffs to pay Council's costs on ordinary basis.

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

[From Benchmark Friday, 13 April 2018]

## **Carroll v United Super Pty Ltd [2018] NSWSC 403**

Supreme Court of New South Wales

Slattery J

Insurance - superannuation - plaintiff brought proceedings against first defendant trustee of superannuation fund and second defendant insurer (Hannover), which issued policy in respect of fund, challenging their decisions to decline claim for total and permanent disablement benefit (TPD benefit) - whether decisions in breach of duties - whether plaintiff entitled to TPD benefit - duty of 'utmost good faith' - held: plaintiff succeeded in challenging decisions of both defendants that he was not 'Totally and Permanently Disabled' under policy and deed - Court conducted own assessment and found plaintiff was Totally and Permanently Disabled within policy - plaintiff entitled to declaration - Hannover to pay \$104,000 to trustee for distribution to plaintiff.

[View Decision](#) (I B)

[From Benchmark Monday, 9 April 2018]

## **Secure Loans Solutions Pty Ltd v Smith [2018] VSCA 71**

Court of Appeal of Victoria

Niall & Hargrave JJA; McDonald AJA

Mortgages - bank paid money into Court, which was residue from mortgagee sale of property - applicant claimed it was entitled to money because it had a second mortgage over it and was owed money by respondent as guarantor of loan made to companies with which respondent was associated - respondent claimed he was entitled to the money because he was property's registered proprietor and debt to applicant was discharged - primary judge found in favour of

respondent - applicant sought to appeal - issue was whether judge correctly concluded as factual matter that respondent established loan repaid due to applicant taking possession of and selling items provided as security - held: no error in judge's factual findings - leave to appeal refused.

[Secure Loans Solutions](#) (I B C G)

[From Benchmark Monday, 9 April 2018]

## **The Gull Lexington Group Pty Ltd v Laguna Bay (Banongill) Agricultural Pty Ltd [2018] VSCA 85**

Court of Appeal of Victoria

Santamaria JA & McDonald AJA

Summary judgment - contract - applicant owner of property entered agreement with respondent under which applicant would sell business assets to respondent - parties appointed expert to determine livestock's 'current market value' - dispute arose whether valuation made in accordance with agreement - applicant sought to set aside valuation and sought referral of subject matter to special referee - applicant contended expert failed to value some merino lambs and that valuation was thus not in accordance with agreement - applicant also contended expert 'failed to act impartially' - primary judge granted summary judgment for respondent - applicant sought to appeal - construction of agreement - 'inclusive of any progeny' - bias - held: no error in primary judge's finding that applicant's claim had no real prospect of success - leave to appeal refused.

[The Gull Lexington](#) (I B C G)

[From Benchmark Thursday, 12 April 2018]

## **Harstedt Pty Ltd v Tomanek [2018] VSCA 84**

Court of Appeal of Victoria

Santamaria, McLeish and Niall JJ

Trusts and trustees - equity - accessorial liability - appeal arising from investment scheme, known as 'private placement scheme', which failed - applicant sued company (Apollo), respondent secretary of Apollo, and others - applicant contended Apollo fraudulently breached trust by transferring funds deposited by applicant into an account which was not in Apollo's name - applicant contended respondent was liable as knowing assistant pursuant to second limb of *Barnes v Addy* - trial judge gave judgment for applicant against Apollo - applicant appealed against dismissal of claim against respondent - held: leave to appeal granted - applicant failed to establish respondent assisted in 'dishonest and fraudulent design' of Apollo - appeal dismissed.

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

[From Benchmark Thursday, 12 April 2018]

## **Sadleir v Kähler & Ors [2018] QSC 67**

Supreme Court of Queensland

Atkinson J

Wills and estates - succession - applicant sought order that handwritten document formed deceased's will and grant of letters of administration - plaintiff also sought declaration that on will's proper construction, deceased's estate should be distributed 'to applicant and third respondents as tenants in common in equal shares' - whether handwritten document should be regarded as a will - construction of will - 'contingent gift' - rule in *Jones v Westcomb* (1711) Prec Ch 316 - held: Court satisfied to make orders as sought by applicant.

[Sadleir](#) (B)

[From Benchmark Tuesday, 10 April 2018]

## **Public Trustee v CBA & Ors [2018] SASC 25**

Supreme Court of South Australia

Bampton J

Wills and estates - succession - estoppel - guarantee - deceased made three wills following husband's death - in one purported will deceased's son named executor - in another purported will, son's estranged wife named executor - grant of probate made in respect of deceased's 2002 will' appointing Public Trustee as executor - deceased at date of death had money on deposit in three bank accounts - before probate granted, son sought payment of the money as executor - money was paid to son - after probate granted Public Trustee demanded banks repay the money to it as executor - banks refused to repay money, claiming they paid it to son under valid release and discharge to them on estate's behalf - Public trustee alleged banks liable under contract between customer and banker - Public Trustee also contended each of banks were liable as executor de son tort - held: banks liable to Public Trustee - defence of equitable set-off made out - banks were not executors de son tort.

[Public Trustee](#) (I B C G)

[From Benchmark Tuesday, 10 April 2018]

## **The Trustee for Allway Unit Trust Trading as Westside Mechanical Contracting Pty Ltd v R&D Airconditioning Pty Ltd & Ors [2018] SASC 46**

Supreme Court of South Australia

Doyle J

Security of payments - plaintiff sought judicial review of adjudicator's determination under *Building and Construction Industry Security of Payment Act 2009* (SA) - plaintiff and first defendant entered contract for performance of work - first defendant submitted progress claims - plaintiff paid amount leaving an 'unpaid difference' - first defendant ceased work - status of contract controversial - plaintiff served claim for unpaid difference under the Act - plaintiff denied liability and claimed entitlement to set off resulting in balance in its favour - adjudicator found first defendant entitled to payment of claimed amount - central contention of plaintiff was that adjudicator erred in finding first defendant's payment claim had valid reference date under the Act - status of contract when payment claim made - held: contract came to an end in October 2017 - payment claim did not have valid reference date of 23 December 2017 - earlier reference date could not sustain determination where determination had been 'sought and obtained' on basis of 23 December 2017 reference date - determination quashed.

[The Trustee for Allway Unit Trust](#) (I B C G)

[From Benchmark Friday, 13 April 2018]

**Wheatley v Gwenyth Mary Wheatley as executor of the estate of the late Gerald Leopold Wheatley [2018] WASCA 34**

Court of Appeal of Western Australia

Martin CJ, Buss P & Murphy JA

Succession - family provision - appellant sought to appeal against Master's decision to refuse extension of time to seek family provision from deceased's father's estate pursuant to the *Family Provision Act 1972* (WA) - deceased left entire estate to wife - extension of about 7 years required - whether adequate explanation for delay - held: Master erred in finding no evidence of son's financial status - Master erred in finding concerning availability of loan to be applied in litigation's funding - Master failed to have regard to relevant consideration concerning period of delay - in interests of justice to grant leave to appeal - appeal allowed - extension of time granted.

[Wheatley](#) (B)

[From Benchmark Wednesday, 11 April 2018]

**Dong v Song [2018] ACTSC 82**

Supreme Court of the Australian Capital Territory

McWilliam AsJ

Evidence - claim for misleading and deceptive conduct arising from restaurant business's purchase - part-heard proceedings - issue concerned admissibility of video recording of meeting between plaintiff and defendants (and another) - plaintiff had made the video recording with hidden camera and alleged that first defendant, during the meeting, made certain admissions - evidence of admissions - s81 *Evidence Act 2011* (ACT) - whether conversation captured on video inadmissible due to *Listening Devices Act 1992* (ACT) (Listening Devices Act) - held: Court concluded making of the video did not contravene Listening Devices Act - Court admitted the video recording and plaintiff's evidence in reliance on it.

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

[From Benchmark Monday, 9 April 2018]

**KS and XT v Calvary Health Care ACT trading as Calvary Hospital and Dr Andrew Foote [2018] ACTSC 84**

Supreme Court of the Australian Capital Territory

Burns J

Medical negligence - psychological harm - two proceedings heard together arising from still birth of plaintiffs' child - plaintiffs contended they suffered psychological harm due to defendants' negligence - first defendant was hospital - second defendant was obstetrician and gynaecologist - first defendant 'effectively conceded liability' - second defendant made 'limited admissions' of breach - second defendant did not concede liability - *Civil Law (Wrongs) Act 2002* (ACT) - *Civil Liability Act 2002* (NSW) - held: second defendant breached duties to plaintiffs - causation



established - damages assessed - judgment first plaintiff in sum of \$669,518.15 - judgment for second plaintiff in sum of \$220,373.00 - first defendant's liability 30% - second defendant's liability 70%.

[KS and XT](#) (I)

[From Benchmark Tuesday, 10 April 2018]

## CRIMINAL

### Executive Summary

**Hamzy v R** (NSWCCA) - criminal law - manslaughter - wounding with intent - appeals against convictions and sentences dismissed

**Wells v The Queen** (VSCA) - criminal law - conspiracy to defraud - receiving secret commission - sentence appeal - sentence imposed on conspiracy charge was not manifestly excessive - appeal dismissed

### Summaries With Link

#### **Hamzy v R [2018] NSWCCA 53**

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL, Simpson JA & McCallum J

Criminal law - manslaughter - wounding with intent - applicant sought to appeal against convictions and sentence in respect of offences of manslaughter and wounding with intent to cause grievous bodily harm - whether verdicts unreasonable and unsupported by evidence - whether open to jury to find beyond reasonable doubt that appellant's conduct not 'reasonable response' in circumstances as appellant perceived them - whether sentences manifestly excessive - whether error in relation to offences' 'objective seriousness' and applicant's 'moral culpability' - ss18, 24 & 33(1)(a) *Crimes Act 1900* (NSW) - held: appeals against convictions and sentence dismissed.

[View Decision](#)

#### **Wells v The Queen [2018] VSCA 79**

Court of Appeal of Victoria

Tate, Beach & Niall JJA

Criminal law - fraud - secret commissions - applicant pleaded guilty to charge of 'conspiracy to defraud' and three charges of 'receiving a secret commission' contrary to s176(1) *Crimes Act 1958* (Vic) - applicant sought to challenge sentence imposed on conspiracy charge, of 7 years and 6 months in prison, on basis it was manifestly excessive - current sentencing practices -



# Benchmark

guilty plea, assistance and cooperation of applicant - indeterminacy of loss from conspiracy - general deterrence - offending's seriousness - held: judge's sentence was 'very stern' but no outside range of available sentences - leave to appeal granted - appeal dismissed.

[Wells](#)

# Benchmark

## Fragment: Questions

**By:** Percy Bysshe Shelley

Is it that in some brighter sphere  
We part from friends we meet with here?  
Or do we see the Future pass  
Over the Present's dusky glass?  
Or what is that that makes us seem  
To patch up fragments of a dream,  
Part of which comes true, and part  
Beats and trembles in the heart?

[https://en.wikipedia.org/wiki/Percy\\_Bysshe\\_Shelley](https://en.wikipedia.org/wiki/Percy_Bysshe_Shelley)

Percy Bysshe Shelley - Wikipedia  
en.wikipedia.org

Percy Bysshe Shelley (/ ˈ p ɪ r s i ˈ b ɪ ʃ ɪ l i ; 4 August 1792 – 8 July 1822) was one of the major English Romantic poets, and is regarded by some as among the finest lyric poets in the English language, and one of the most influential.

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