

Friday, 20 September 2019

## 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)

**Cherry, Reclaiming Motion By Joanna Cherry QC MP And Others Against The Advocate General** (ScotCS CSIH) - reclaiming motion - decision of Government 'to prorogue Parliament' unlawful - reclaiming motion allowed - declarator granted (I B C G)

**Globaltech Corporation Pty Ltd v Australian Mud Company Pty Ltd** (FCAFC) - patent - appellant's 'Orifinder v5' tool infringed 'claims in suit' - no error in primary judge's construction of claims or conclusion of Patent infringement - appeal dismissed (B C I G)

**Encompass Corporation Pty Ltd v InfoTrack Pty Ltd** (FCAFC) - patent - appeal against dismissal of claim of infringement of patents - 'manner of manufacture' - appeal dismissed (B I)

**State of Queensland (Department of Agriculture and Fisheries) v Humane Society International (Australia) Inc** (FCAFC) - environmental law - appeal against decision of Administrative Appeals Tribunal concerning Authority's grant of permissions under *Great Barrier Reef Marine Park Regulations 1983* (Cth) to applicant - appeal dismissed (I B C G)

**MetLife Insurance Limited v MX** (NSWCA) - superannuation - insurance - appeal from determination of separate question - insurer in breach of obligations - appeal dismissed (I)

**Cappello v Roads and Maritime Services** (NSWCA) - administrative law - compulsory acquisition of land - no error in rejection of appellants' challenge to validity of 'proposed acquisition notices' - appeal dismissed (B C I G)

**Voitenko v Zurich Australian Insurance Ltd (NSWCA)** - pleadings - insurance - respondent granted leave to amend defence to allege "fraud in the event" by applicant - leave to appeal refused - summons dismissed (I)

**Wollert Epping Developments Pty Ltd v Batten (VSC)** - contract - sale of land - plaintiff purchaser sought determination of questions concerning 'three warranties' and declarations - questions 'rephrased and answered' - 'motion and summons' dismissed (I B C G)

**VWA v A.C.N 125 830 015 Pty Ltd (Previously known as Asixa) & Anor (VSC)** - negligence - plaintiff claimed indemnity against injured worker's employer and occupier of site at which injury occurred - employer and occupier breached duty - indemnity calculated (I)

**Gardiner v Hughes [No 2] (VSCA)** - wills and estates - probate - testamentary capacity appeal against dismissal of application for revocation of grant of probate - prima facie case established - appeal allowed (B)

**Diakou v Rouse (VSCA)** - costs - wills and estates - proceedings in which respondent sought production of 'documents and property' by applicant - applicant's appeal against primary judge's costs order allowed (B)

**Young v Crime and Corruption Commission (QCA)** - pleadings - negligence - statutory duties - claim and statement of claim struck out - appeal dismissed (I)

**Eaton v Rare Nominees Pty Limited (QCA)** - joint venture - erroneous finding of fiduciary duty owed by company to respondent - appeal allowed (B C I G)

**Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 4) (QSC)** - champerty - maintenance - determination of 'Funding Application' - funding agreements not unenforceable - declarations and orders (B C I G)

## Summaries With Link (Five Minute Read)

### **Cherry, Reclaiming Motion By Joanna Cherry QC MP And Others Against The Advocate General [2019] ScotCS CSIH 49**

First Division, Inner House, Court of Session

Lord President Carloway, Lord Brodie & Lord Drummond Young

'Reclaiming motion' concerning 'two central questions' - whether prorogation could be 'judicially reviewed' where it was alleged that prorogation requested for 'improper motive' viz. the stymying of Parliamentary debate on the issue of the UK leaving the European Union' - whether improper

motive demonstrated - 'subsidiary questions' concerned press's access documents in 'court practice' and whether to call for 'unredacted copies' of documents - Government contended purpose legitimate - whether decision of Government 'to prorogue Parliament' was 'proper exercise of the executive's power' - held: reclaiming motion allowed - declarator granted.

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

[From Benchmark Tuesday, 17 September 2019]

## **Globaltech Corporation Pty Ltd v Australian Mud Company Pty Ltd [2019] FCAFC 162**

Full Court of the Federal Court of Australia

Kenny, Robertson & Moshinsky JJ

Patent - first respondent contended appellant infringed claims in Patent - appellant cross-claimed, challenging validity of 'claims in suit' - primary judge resolved 'construction issues' in first respondent's favour, found appellant infringed claims in suit, rejected appellant's 'validity arguments' to extent they relied on construction issues, and rejected other grounds on which appellant contended Patent invalid - appellant challenged primary judge's approach to claims' construction and conclusion that 'Orifinder v5' infringed claims in suit - *Patents Act 1990* (Cth) - *Patents Regulations 1991* (Cth) - *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth) - held: no error in decision of primary judge - appeal dismissed.

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

[From Benchmark Tuesday, 17 September 2019]

## **Encompass Corporation Pty Ltd v InfoTrack Pty Ltd [2019] FCAFC 161**

Full Court of the Federal Court of Australia

Allsop CJ; Kenny, Besanko, Nicholas & Yates JJ

Patent - appellants were patentee and 'claimed exclusive licensee' of two patents - appellants sued respondent for patents' infringement - respondent sought revocation of claims of patents on basis of invalidity - primary judge found patents not patentable inventions because neither was a 'manner of manufacture' under s6 *Statute of Monopolies* - primary judge revoked patents - appellants appealed, contending primary should have found that invention which each patent claimed involved manner of manufacture - s18(1A) (a) *Patents Act 1990* (Cth) - whether primary judge misapplied *Research Affiliates LLC v Commissioner of Patents* [2014] FCAFC 150 and *Commissioner of Patents v RPL Central Pty Ltd* [2015] FCAFC 177 - held: appeal dismissed.

[Encompass](#) (B I)

[From Benchmark Wednesday, 18 September 2019]

## **State of Queensland (Department of Agriculture and Fisheries) v Humane Society International (Australia) Inc [2019] FCAFC 163**

Full Court of the Federal Court of Australia

Allsop CJ, Greenwood & Robertson JJ

Administrative law - environmental law - appeal against decision of Administrative Appeals Tribunal concerning Authority's grant of permissions under *Great Barrier Reef Marine Park Regulations 1983* (Cth) to applicant - whether Tribunal exceeded 'decision-making power' -

# Benchmark

whether error by Tribunal in application of 'precautionary principle' - whether Tribunal erred in 'consideration of scientific and non-scientific evidence' - whether failure by Tribunal to 'turn its mind to' s43(5B) *Administrative Appeals Tribunal Act 1975* (Cth) - whether denial of procedural fairness - held: appeal dismissed.

[State of Queensland](#) (I B C G)

[From Benchmark Friday, 20 September 2019]

## **MetLife Insurance Limited v MX [2019] NSWCA 228**

Court of Appeal of New South Wales

Meagher, Gleeson & Payne JJA

Superannuation - worker was member of superannuation scheme - worker injured - appeal concerning injured worker's entitlement to benefit under insurance policy which insurer issued to superannuation scheme's trustee - primary judge, in separate question's determination, found insurer breached 'obligations of utmost good faith and of acting reasonably in forming its opinion' - insurer sought to appeal - appeal grounds concerning 'reinsurance issues' - adequacy of reasons - reasonableness of appellant's comments in letter - whether breach of obligation of utmost good faith - held: appeal dismissed.

[View Decision](#) (I)

[From Benchmark Tuesday, 17 September 2019]

## **Cappello v Roads and Maritime Services [2019] NSWCA 227**

Court of Appeal of New South Wales

Payne & Brereton JJA; Emmett AJA

Administrative law - compulsory acquisition of land - appellants were land's registered proprietors - land subject to 'proposed acquisition notices' issued by first respondent to appellants under s11 *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (Just Terms Act) - appellants challenged proposed acquisition notices' validity - appellants contended notices outside scope of *Roads Act 1993* (NSW)'s purposes and thus 'unauthorised and ultra vires' - appellants sought declarations and order restraining land's compulsory acquisition - primary judge dismissed proceedings - first respondent became land's registered proprietor under s19 Just Terms Act - appellants appealed - "purposes of the Roads Act 1993 in connection with the construction, operation and maintenance of WestConnex M4 – M5 Link tunnels" - held: no error in rejection of appellants' challenge to acquisition notices' validity - appeal dismissed.

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

[From Benchmark Wednesday, 18 September 2019]

## **Voitenko v Zurich Australian Insurance Ltd [2019] NSWCA 229**

Court of Appeal of New South Wales

Meagher & McCallum JJA

Pleadings - insurance - respondent sought to amend defence to allege "fraud in the event" by applicant - applicants sought to appeal - whether 'presumptive prejudice' - delay - whether

primary judge took "irrelevant consideration" into account - defence's strength - whether erroneous failure to have regard to matters in ss56-59 *Civil Procedure Act 2005* (NSW) - whether decision 'attended with sufficient doubt' to warrant Court's reconsideration - *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 - held: leave to appeal refused - summons dismissed.

[View Decision](#) (I)

[From Benchmark Thursday, 19 September 2019]

## **Wollert Epping Developments Pty Ltd v Batten [2019] VSC 61**

Supreme Court of Victoria

Derham AsJ

Contract - sale of land - defendants were vendors who, by contract of sale, agreed to sell property to plaintiff purchaser - parties in dispute concerning contract's interpretation - plaintiff, under s49 *Property Law Act 1958* (Vic), sought determination of questions concerning whether defendants had breached 'three warranties' in contract and declarations - '*vendor and purchaser summons*' provision - effect of 'identity clause' - effect of 's27 Notice' on purchaser's rights - held: questions 'rephrased and answered' - plaintiff's 'motion and summons' dismissed.

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

[From Benchmark Monday, 16 September 2019]

## **VWA v A.C.N 125 830 015 Pty Ltd (Previously known as Asixa) & Anor [2019] VSC 607**

Supreme Court of Victoria

Forbes J

Negligence - worker employed by company (Kokoszko) - first defendant (Asixa) contracted with to transport freight to company (Bronzewing) - Asixa contracted with Bronzewing 'to unload freight from Kokoszko's truck and 'transport it onwards' - worker injured at 'Bronzewing depot' (site) in course of employment while assisting employee of Bronzewing - worker made WorkCover claim on Kokoszko and was receiving payments under *Accident Compensation Act 1985* (Vic) (ACA) - worker sued Kokoszko, Asixa and Bronzewing as site's occupier - worker settled claims - plaintiff, pursuant to s138(1) ACA, 'claimed indemnity against Asixa and Bronzewing' - whether Asixa and Bronzewing liable to pay worker damages - employer's non-delegable duty of care - occupier's duty - whether duty of care - whether breach of duty - whether contributory negligence - apportionment - *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34 - held: Asixa and Bronzewing each breached duty of care - indemnity calculated.

[VWA](#) (I)

[From Benchmark Tuesday, 17 September 2019]

## **Gardiner v Hughes [No 2] [2019] VSCA 198**

Court of Appeal of Victoria

Kyrou, McLeish & T Forrest JJA

Wills and estates - applicants sought revocation of grant of probate - applicants sought declaration that deceased wills were invalid due to lack of testamentary capacity and declaration deceased had 'died intestate' - if Court not satisfied to revoke probate, applicants sought

appointment as executors in respondents' place - primary judge dismissed summons for probate's revocation of probate on basis applicants did not establish prima facie case - whether matters raised in particulars called 'for investigation' into testamentary capacity - held: prima facie case established - appeal allowed.

[Gardiner](#) (B)

[From Benchmark Wednesday, 18 September 2019]

## **Diakou v Rouse [2019] VSCA 199**

Court of Appeal of Victoria

Kyrrou, McLeish & Emerton JJA

Costs - wills and estates - deceased died intestate - applicant was deceased's solicitor - respondent was 'former wife' of deceased - respondent sought production of 'documents and property' by applicant - applicant sought to appeal against primary judge's costs order - applicant contended primary judge erred in treatment of order permitting respondent leave to cross-examine applicant as 'fresh evidence' for costs discretion's purposes - applicant also contended primary judge erred in relation to 'procedural history' and resultantly had made erroneous finding that conduct of applicant was 'less than reasonable' - held: appeal allowed.

[Diakou](#) (B)

[From Benchmark Thursday, 19 September 2019]

## **Young v Crime and Corruption Commission [2019] QCA 189**

Court of Appeal of Queensland

Fraser and Morrison and McMurdo JJA

Pleadings - negligence - statutory duties - appellant claimed against respondent in negligence and for 'breach of statutory duties' - appellant also claimed equitable compensation for fiduciary duties' breach - respondent filed 'notice of intention to defend', pleading proceeding was 'frivolous or vexatious and an abuse of process' - appellant filed 'amended statement of claim' - claim and amended statement of claim struck out - appellant appealed - *Crime and Corruption Act 2001* (Qld) (CC Act) - whether CC Act gave appellant 'personal right of action' for breach of statutory duty of respondent - whether negligence claim repeated claim for breach of respondent's statutory duties - held: appeal dismissed.

[Young](#) (I)

[From Benchmark Tuesday, 17 September 2019]

## **Eaton v Rare Nominees Pty Limited [2019] QCA 190**

Court of Appeal of Queensland

Philippides & McMurdo JJA; Davis J

Joint venture - proceedings concerned joint venture agreement (JVA) between company (E-Coastal) as proprietor and respondent as one of the "Contributors" - respondent claimed against appellant 'sole director and controlling mind of E-Coastal (Mr Eaton) and Mrs Eaton - respondent claimed that E-Coastal breached fiduciary duties to respondent - trial judge found E-Coastal had fiduciary duties to respondent which were breached - trial judge found against Mr

# Benchmark

Eaton under Barnes v Addy's 'second limb' - Mr Eaton appealed - construction of "Receipts" in JVA - whether erroneous finding E-Coastal breached fiduciary duty - whether erroneous finding Mr Eaton was liable under Barnes by Addy's second limb - held: trial judge erred in finding there was 'relevant fiduciary obligation' owed to respondent - appeal allowed.

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

[From Benchmark Monday, 16 September 2019]

## **Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 4) [2019] QSC 228**

Supreme Court of Queensland

Crow J

Champerty - maintenance - plaintiffs sought declarations 'funding agreements' with second respondent and between group members and second respondent were "not, by reason of maintenance, champerty or public policy, unenforceable" - plaintiffs alternatively sought. under s103ZA *Civil Proceedings Act 2011* (Qld) (Civil Proceedings Act), 'common fund order' concerning funding agreements - ancillary orders also sought - determination of 'Funding Application' - "Representative Proceeding Funding Agreement, Representative, The 2017 Gladstone Fisheries Scheme" - "Representative Proceeding Funding Agreement, Member, The 2017 Gladstone Fisheries Scheme" - held: funding agreements did 'not involve unlawful conduct or purpose' - funding agreements 'not prejudicial' to justice's administration - funding agreements were in accordance with 'public policy' of Civil Proceedings Act - funding agreements not unenforceable - declarations and orders.

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

[From Benchmark Monday, 16 September 2019]

## CRIMINAL

### Executive Summary

### Summaries With Link



# Benchmark

**To My Friends**

**By:** Henry Lawson

From: Skyline Riders.

These are the songs of the Friends I neglected -  
And the Foes too, in part;  
These are songs that were mostly rejected -  
And songs from my heart.

[https://en.wikipedia.org/wiki/Henry\\_Lawson](https://en.wikipedia.org/wiki/Henry_Lawson) - circa 1910

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