

Friday, 20 November 2015

Weekly Law Review

Selected from our Daily Bulletins covering Insurance, Banking,
Construction & Government

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

North Australian Aboriginal Justice Agency Limited v Northern Territory (HCA) - statutory interpretation - constitutional law - challenge to validity of Div 4AA of Pt VII *Police Administration Act* (NT) failed - matter remitted to single Justice for further directions (I B C G)

McAdam v Chylos Pty Ltd (FCAFC) - corporations - respondent entitled to set off disputed loans to appellants against dividends declared and payable to appellants - appeal dismissed (I B)

The White Ant Co Pty Ltd v Robson (NSWCA) - contract - deed of arrangement - liability term not enlivened - appeal allowed (I B C)

Hunter Development Corporation v Save Our Rail NSW Incorporated (NSWCA) - administrative law - acquisition of land - assets did not vest in appellant under *Transport Administration Act 1988* (NSW) - appellant was not a "rain infrastructure owner" - appeal allowed (I B C G)

JM & PM Holdings Pty Ltd v Snap-on Tools (Australia) Pty Ltd (NSWCA) - contract - franchise agreement - "monthly cash flow projection" spreadsheet not relied on in decision to enter agreement - appeal dismissed (I B C)

Alqudsi v Commonwealth of Australia; Alqudsi v R (NSWCA) - constitutional law - external affairs power - provisions of *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) validly enacted pursuant to s51(xxix) of the Constitution - appeal dismissed (I B C G)

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (NSWCA) - Aboriginal land rights - rejection of claim in respect of two parcels of land on basis of lawful occupation and use by Corrective Services NSW - appeal dismissed (I B C G)

Harrison v Retail Employees Superannuation Pty Ltd (NSWSC) - contract - insurance policy - superannuation - plaintiff entitled to receive total and permanent disablement benefit under policy (I B)

Woolworths Ltd v Howarth (NSWSC) - judicial review - work-related injury - no error in decision of approved medical specialist - medical assessment certificate not attended with error - summons dismissed (I G)

Buses + 4WD Hire Pty Ltd v Oz Snow Adventures Pty Ltd (NSWSC) - negligence - bus crash - unusual order sought pursuant to r7.8 *Uniform Civil Procedure Rules 2005* (NSW) refused (I B)

Nelson v Cyran (QCA) - judgments and orders - leave to commence enforcement proceedings against defendant - no error in exercise of discretion - appeal dismissed (I)

Schuller v S J Webb Nominees Pty Ltd (SASCFC) - negligence - intoxicated appellant dancing on chair at hotel injured when she fell from the chair - no duty of care owed to appellant by hotel - appeal dismissed (I)

Regional Development Australia Murraylands and Riverland Inc v Smith (SASCFC) - contract - repudiation of employment contract - failure to mitigate loss - appeal against award of damages allowed (I B C)

George 218 Pty Ltd v Bank of Queensland Ltd (WASC) - loans and mortgages - plaintiffs obliged to make payment to bank under guarantees - declaration refused - claim dismissed - judgment for defendant on counterclaim (B)

Steen v Senton by his litigation guardian The Public Advocate of the Australian Capital Territory (ACTCA) - negligence - respondent injured when struck by motor vehicle driven by appellant - contributory negligence 50% - recalculation of certain damages - appeal upheld in part (I)

Meyer v Cool Chilli Pty Ltd (ACTSC) - work injury - negligence - worker injured in slip and fall from ladder - employer negligent - breaches of statutory duty by employer and third party - third party liable to employer for 25% contribution (I B C)

Summaries With Link (Five Minute Read)

North Australian Aboriginal Justice Agency Limited v Northern Territory [2015] HCA 41

High Court of Australia

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

Statutory interpretation - constitutional law - first plaintiff corporation provided legal services to Aboriginal and Torres Strait Islanders - second plaintiff was Aboriginal person resident in Northern Territory arrested by officer or officers of Police Force and taken into custody under s133AB *Police Administration Act* (NT) - second plaintiff held in custody and issued with infringement notice which recorded offences and provided for payment of fines - plaintiffs alleged Div 4AA of Pt VII in which s133AB appeared was invalid, contending it purported to confer on Executive of the Northern Territory power to detain which was penal or punitive in character and beyond powers of Legislative Assembly of Northern Territory to pass - plaintiffs also contended Division 4AA conferred on Executive of Northern Territory power of detention which undermined or interfered with courts' institutional contrary to Constitution - second plaintiff also alleged false imprisonment - separate questions - issues of validity - costs of the proceedings - orders to be made in light of answers - held (by majority): plaintiffs' challenge to validity of Div 4AA failed - questions in Special Case answered accordingly - matter remitted to single Justice for further directions.

[North Australian](#) (I B C G)

[From Benchmark Thursday, 12 November 2015]

McAdam v Chylos Pty Ltd [2015] FCAFC 161

Full Court of the Federal Court of Australia

Griffiths, Farrell & Gleeson JJ

Corporations - primary judge found respondent entitled to set off disputed loans to appellants against dividends declared and payable to appellants - appellants contended primary judge erred in finding loans recorded in respondent's accounts existed irrespective whether primary judge correct to conclude appellants carried onus of proving their non-existence - s 1305 *Corporations Act 2001* (Cth) - s140 *Evidence Act 1995* (Cth) - s24 *Federal Court of Australia Act 1976* (Cth) - Div 7A *Income Tax Assessment Act 1936* (Cth) - held: appellants failed to establish any appellable error by primary judge - appeal dismissed.

[McAdam](#) (I B)

[From Benchmark Wednesday, 18 November 2015]

The White Ant Co Pty Ltd v Robson [2015] NSWCA 345

Court of Appeal of New South Wales

Macfarlan & Gleeson JJA; Emmett AJA

Contract - appellant contractor and respondents (homeowner) made deed of arrangement relating to termite infestation in house Homeowner constructed on property - homeowner claimed contractor liable under deed to pay reasonable costs of rectification of damage - District Court judge gave judgment for homeowner - contractor contended primary judge erred in

drawing inference there was evidence of actual damage caused by termites and in finding contractor liable under deed - construction of deed - whether clause of deed (liability term) enlivened other than by operation of deed's other provisions - held: primary judge's conclusion that contractor was liable had been based not on operative provisions of deed but on estoppels binding contractor as consequence of entering deed - homeowner's construction of deed rejected - clause of deed (liability term) was not enlivened - leave to appeal revoked insofar it related to quantification of damages - appeal allowed.

[The White Ant](#) (I B C)

[From Benchmark Thursday, 12 November 2015]

Hunter Development Corporation v Save Our Rail NSW Incorporated [2015] NSWCA 34

Court of Appeal of New South Wales

Beazley ACJ; Macfarlan & Meagher JJA

Administrative law - appellant entered agreements for acquisition of land and assets from RailCorp - first respondent sought to restrain RailCorp, Transport NSW and appellant from acting contrary to law in disposing of land or undertaking proposed removal works - first respondent relied on s99A *Transport Administration Act 1988* (NSW) which provided that a "rail infrastructure owner" must not close railway line unless authorised by Act of Parliament - no such Act at time of proceedings below or on appeal - appellant appealed against trial judge's declaration that assets had "vested by or under" Act and appellant had become a "rail infrastructure owner" - first respondent cross-appealed against trial judge's finding that land transfer did not constitute closure of a railway line and RailCorp had not "otherwise disposed of" under s99A - held: Ministerial direction to RailCorp under s3B required it to sell assets but did not effect a transfer to or vesting of assets in appellant - assets vested in appellant pursuant to Asset Sale Agreement - assets did not "vest" in appellant "by or under" Act - appellant was not a "rail infrastructure owner" - appeal allowed - cross-appeal dismissed.

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

[From Benchmark Thursday, 12 November 2015]

JM & PM Holdings Pty Ltd v Snap-on Tools (Australia) Pty Ltd [2015] NSWCA 347

Court of Appeal of New South Wales

Macfarlan & Leeming JJA; Emmett AJA

Contract - franchise agreement - first appellant franchisee entered franchise agreement with respondent franchisor which gave franchisee right to operate a "Snap-on" franchise - franchisee fell into arrears - agreement terminated - franchisor sued franchisee and second appellant director and shareholder of franchisee for recovery of debt - director sued on a guarantee - franchisor obtained judgment against appellants - appellants had cross-claimed based on contraventions of ss52 & 51AD *Trade Practices Act 1974* (Cth) in relation to "monthly cash flow projection" spreadsheet (document) given to director before entry into agreement - primary judge found aspects of document misleading but found director did not rely on it when entering into agreement - appellants challenged dismissal of cross-claim - held: no appellable error demonstrated in primary judge's findings that document not relied on in decision to enter agreement - appeal dismissed.

[JM & PM Holdings](#) (I B C)

[From Benchmark Friday, 13 November 2015]

Alqudsi v Commonwealth of Australia; Alqudsi v R [2015] NSWCA 351

Court of Appeal of New South Wales

Basten & Leeming JJA; McCallum J

Constitutional law - applicant charged with offences under s7(1)(e) *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) alleging performance of services for another named individual with intention of supporting or promoting that person's entry into Syria with intent to engage in armed hostilities - applicant challenged constitutional validity of provisions - Commonwealth provisions contended provisions validly enacted pursuant to 51(xxix) of the Constitution being "laws for the peace, order, and good government of the Commonwealth with respect to ... external affairs". - whether power to legislate with respect to external affairs sustained s7(1)(e) of the Act - held: primary judge correct to conclude s7(1)(e) in its application to s6(1)(a) read with s6(3)(aa) was law with respect to geographically external affairs because it criminalised conduct intended to support or promote persons entering foreign countries with hostile intent - appeal dismissed. .

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

[From Benchmark Wednesday, 18 November 2015]

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2015] NSWCA 349

Court of Appeal of New South Wales

Beazley P; Macfarlan & Leeming JJA

Aboriginal land rights - appellant lodged claim in respect of two adjacent parcels of Crown land pursuant to s36 *Aboriginal Land Rights Act 1983* (NSW) - claimed land subject to three dedications made under predecessors of *Crown Lands Act 1989* (NSW) - Minister rejected appellant's claim on basis land lawfully used and occupied by Corrective Services NSW (CSNSW) - primary judge rejected appeal - held: ground of appeal in relation to evidential burden and erroneous findings of fact failed - primary judge correct in approach to assessing whether there was occupation in fact - primary judge's failure to address buildings erected on claimed land individually when that submission not raised at trial was not an error of law - s2 *New South Wales Constitution Act 1855* (18 & 19 Vict c 54) did entail statutory authorisation required in order for occupation of Crown land to be lawful and did not abrogate Crown prerogative power - appeal dismissed.

[New South Wales Aboriginal Land Council](#) (I B C G)

[From Benchmark Wednesday, 18 November 2015]

Harrison v Retail Employees Superannuation Pty Ltd [2015] NSWSC 1665

Supreme Court of New South Wales

Lindsay J

Contract - insurance policy - superannuation - plaintiff claimed "Total and Permanent Disablement (TPD) Benefit" against first defendant trustee of superannuation trust and second

defendant insurer who issued insurance policy to trustee - plaintiff's only contradictor was insurer - it was agreed that nothing in trust deed was critical to determination of plaintiff's claim - question was whether insurance policy answered plaintiff's claim - ss14 & 54 *Insurance Contracts Act 1984* (Cth) - proper construction of "total and permanent disablement" - held: plaintiff was entitled to receive aTPD benefit under policy of insurance - judgment for plaintiff.

[Harrison](#) (I B)

[From Benchmark Thursday, 12 November 2015]

Woolworths Ltd v Howarth [2015] NSWSC 1624

Supreme Court of New South Wales

Hamill J

Judicial review - work related injury - first defendant worker worked for plaintiff employer - worker suffered work related injury when attempting to access packet of crumpets - employer sought to quash decision of approved medical specialist (AMS) that worker sustained 17% whole person impairment - employer also sought review of decision of delegate of Registrar of Workers Compensation Commission that appeal against medical assessment to Review Panel was not to proceed because grounds in s327(3) *Workplace Injury Management and Workers Compensation Act 1998* (NSW) not made out - employer contended it was denied procedural fairness, that AMS failed to apply provisions of relevant guidelines and erred in accepting what worker told him and/or did not give adequate reasons - whether AMS conducted medical assessment in accordance with law - held: grounds raised in summons not established - no jurisdictional error by AMS - Medical Assessment Certificate not attended with error - summons dismissed.

[Woolworths](#) (I G)

[From Benchmark Thursday, 12 November 2015]

Buses + 4WD Hire Pty Ltd v Oz Snow Adventures Pty Ltd [2015] NSWSC 1687

Supreme Court of New South Wales

Schmidt J

Negligence - bus accident in which bus hired by first plaintiff to first and/or second defendant, driven by second plaintiff crashed through guardrail and rolled down embankment injuring passengers - proceedings commenced in District Court and transferred to Supreme Court - plaintiffs sought unusual order pursuant to r7.8 *Uniform Civil Procedure Rules 2005* (NSW) that senior associate of law firm be appointed to conduct issues between first plaintiff and first and second defendants - motion supported by plaintiffs' solicitor who was acting for statutory insurer under policy issued to first plaintiff - defendants and senior associate opposed order - law firm acted for property insurer of bus and senior associate had carriage of matter - held: Court not satisfied order sought could justly be made given senior associate's interest in proceedings flowed only from employment by law firm and current retainer with insurer - problems lying between first plaintiff, insurer of bus and the defendants must be resolved in some other way - motion dismissed.

[Buses](#) (I B)

[From Benchmark Monday, 16 November 2015]

Nelson v Cyran [2015] QCA 226

Court of Appeal of Queensland

M McMurdo P, Morrison JA & North J

Judgments and orders - appellant was bouncer - respondent was wrongfully assaulted and injured when appellant preventing him from entering club - appellant convicted of unlawfully doing grievous bodily harm - respondent sought damages against appellant and owner of club, who employed appellant - proceedings served on appellant - before trial appellant could not be found - judgment entered against appellant in 2002 - respondent's solicitors did not locate appellant until 2012 - application was brought for leave to commence enforcement proceedings against appellant - application served on appellant in 2014 - primary judge ordered leave be granted - appellant sought to challenge order - ss12 & 13 *Civil Judgments Enforcement Act 2004* (WA) - s105 *Service and Execution of Process Act 1992* (Cth) - rr8, 93, 95(1), 371(1), 793 & 799 *Uniform Civil Procedure Rules 1999* (Qld) - whether there was error of principle or mistake of fact which caused appellant substantial injustice - held: no grounds of appeal established error by primary judge in exercising his discretion to grant leave - appeal dismissed.

[Nelson](#) (I)

[From Benchmark Tuesday, 17 November 2015]

Schuller v S J Webb Nominees Pty Ltd [2015] SASCFC 162

Full Court of the Supreme Court of South Australia

Gray, Stanley & Lovell JJ

Negligence - intoxicated appellant injured when she fell from a chair on which she was dancing at hotel - appellant sued proprietors of hotel in negligence and for breach of statutory duty - primary judge held hotel did not owe appellant a duty of care, no relevant causative breach of duty, and appellant's fall solely her own fault - primary judge held that in any event hotel had good defence on basis of voluntary assumption of risk - primary judge found that if Court wrong in finding respondent not liable, contributory negligence was to be assessed at 90% and damages assessed at \$129,380 - appellant appealed - ss3(1), 36, 37 & 58(3); *Civil Liability Act 1936* (SA) - ss5F & 5G *Civil Liability Act 2002* (NSW) - held: primary judge did not err in finding no duty of care existed - primary judge's reasons for finding an absence of duty of care were adequate - if duty of care had existed defence of voluntary assumption of risk established - appeal dismissed.

[Schuller](#) (I)

[From Benchmark Wednesday, 18 November 2015]

Regional Development Australia Murraylands and Riverland Inc v Smith [2015] SASCFC 160

Full Court of the Supreme Court of South Australia

Gray, Sulan & Nicholson JJ

Contract - employment dispute - primary judge found respondent entitled to damages following repudiation of his fixed term employment contract as employer's CEO - before contract due to expire employer amalgamated with board to form appellant - position of CEO abolished -

Benchmark

respondent had sued appellant for damages on basis that liability for repudiation by employer had transferred to appellant under 22(6) *Associations Incorporation Act 1985* (SA) - appellant contended contract had been frustrated or appellant failed to mitigate his loss - held: contract had not been frustrated - primary judge correct to find liability for damages following repudiation - respondent unreasonably failed to accept position which appellant offered and thereby failed to mitigate loss - if respondent had accepted alternate position, loss claimed and awarded by primary judge would have been eliminated - appeal allowed.

[Regional](#) (I B C)

[From Benchmark Wednesday, 18 November 2015]

George 218 Pty Ltd v Bank of Queensland Ltd [2015] WASC 434

Supreme Court of Western Australia

Mitchell J

Loans and mortgages - guarantee - company (Success) borrowed money from lender (Statewest) to assist with purchase of land on security of mortgage over land - plaintiffs executed deeds of guarantee and indemnity in favour of Statewest - loan to Success repaid using money Success borrowed from lender Home Building Society Ltd (Home) - guarantees continued to confer rights on Statewest in relation to future lending to Success - Statewest's rights under guarantees transferred to defendant - Home's rights under existing loan agreements between Home, Success and plaintiffs also transferred to defendant - defendant agreed to lend Success money to pay out existing facilities secured by mortgages over properties (2010 loans) - money lent secured by guarantees - plaintiffs signed Deed of Consent manifesting common understanding that guarantees secured 2010 loans - Success defaulted on repayment of 2010 loans - defendant demanded plaintiffs pay shortfall under guarantees - plaintiffs sought declaration defendant not entitled to payment under guarantees - ss22 & 43 *Financial Sector (Business Transfer and Group Restructure) Act 1999* (Cth) - Code of Banking Practice - estoppel - held: guarantees required plaintiffs to pay amount owed to defendant without set off - claimed breaches of duty in relation to appointment of receiver and sale of mortgaged properties did not affect obligation to make payment - declaration refused.

[George 218 Pty Ltd](#) (B)

[From Benchmark Wednesday, 18 November 2015]

Steen v Senton by his litigation guardian The Public Advocate of the Australian Capital Territory [2015] ACTCA 57

Court of Appeal of the Australian Capital Territory

Refshauge, Penfold & Rangiah JJ

Negligence - contributory negligence - damages - respondent injured when struck by motor vehicle driven by appellant - respondent sued appellant - appellant admitted negligence but alleged contributory negligence - Master found appellant negligent but reduced damages by 30% for contributory negligence - appellant contended Master erred in assessment of contributory negligence, in assessing damages for future care and awarding damages for future care after time which on Master's findings respondent would have moved into residential aged care facility - *Civil Law (Wrongs) Act 2002* (ACT) - ss5B(2) & 5R *Civil Liability Act 2002* (NSW) -

Benchmark

s74 *Motor Accidents Act 1988* (NSW) - ss138(1) & 138(3) *Motor Accidents Compensation Act 1999* (NSW) - held: appellant succeeded on contributory negligence case - appellant succeeded on one of two aspects of argument concerning quantum - appeal upheld in part - judgment varied by assessing contributory negligence at 50% and reducing damages by 50% - portion of damages payable for care while respondent in an aged care facility recalculated.

[Steen](#) (I)

[From Benchmark Friday, 13 November 2015]

Meyer v Cool Chilli Pty Ltd [2015] ACTSC 336

Supreme Court of the Australian Capital Territory

Mossop AsJ

Work injury - negligence - breach of statutory duty - apportionment - plaintiff worked in IT support role for defendant employer - plaintiff working at premises of third party - while plaintiff climbing ladder to get into ceiling space it slipped from beneath her and she injured herself - plaintiff sued employer in negligence - employer issued third-party notice against third party seeking contribution or indemnity - ss21 & 168 *Civil Law (Wrongs) Act 2002* (ACT) - s24 *Scaffolding and Lifts Act 1912* (ACT) - *Workers Compensation Act 1951* (ACT) - ss6, 7, 73 & 80 *Scaffolding and Lifts Regulation 1950* (ACT) - held: employer breached duty of care to plaintiff and was liable for damage caused by accident - no contributory negligence - third party claim failed insofar as relied on allegation of negligence - work being carried out was building work under *Scaffolding and Lifts Act* - both third party and employer breached s73 *Scaffolding and Lifts Act* when they carried out work in ceiling space - employer breached s80(7) *Scaffolding and Lifts Act* - appropriate contribution from third party was 25% - judgment for plaintiff against employer - judgment for employer against third party.

[Meyer](#) (I B C)

[From Benchmark Friday, 13 November 2015]

CRIMINAL

Executive Summary

DPP v Walters (a pseudonym) (VSCA) - criminal law - incest - base-line sentencing provisions incurably defective - no error in conclusion of sentencing judge - appeal against sentence dismissed

R v Place (SASCFC) - criminal law - indecent assault - complaint evidence admissible - uncharged acts admissible - verdicts not unreasonable, unsafe or unsatisfactory - appeal dismissed

Summaries With Link

DPP v Walters (a pseudonym) [2015] VSCA 303

Court of Appeal of Victoria

Maxwell P, Redlich, Tate, Whelan & Priest JJA

Criminal law - respondent pleaded guilty to two charges of committing indecent act with child under 16 and four charges of incest - sentencing judge imposed total effective sentence of six years and eight months' imprisonment with non-parole period of four years' imprisonment - DPP appealed against sentence on ground of manifest inadequacy resulting from errors of law in judge's application of baseline provisions - statutory interpretation - s5A *Sentencing Act 1991* (Vic) - held: baseline sentencing provisions incapable of any practical operation - sentencing judge correct to conclude provisions did not require him to impose different sentence from that which he would otherwise have imposed - statutory provisions incapable of implementation - unnecessary to consider DPP's complaints about judge's endeavour to apply provisions - appeal dismissed.

[Walters](#)

R v Place [2015] SASCFC 163

Full Court of the Supreme Court of South Australia

Sulan, Peek & Lovell JJ

Criminal law - indecent assault - admissibility of evidence - appellant convicted of four counts of indecently assaulting EK - EK gave evidence she complained about appellant's conduct to her then boyfriend (Mr Bottomley), who gave greater detail of the conversation in evidence - appellant contended evidence should not have been admitted as it did not sufficiently refer to charges, or should have been excluded in exercise of discretion - appellant also contended evidence of uncharged similar conduct should not have been admitted and that verdicts were unsafe and unsatisfactory - s34M *Evidence Act 1929* (SA) - held: complaint to boyfriend was complaint evidence admissible pursuant to s34M - Court not persuaded probative value of complaint evidence outweighed by its prejudicial effect - evidence should not be excluded - uncharged acts admissible - permissible and impermissible uses sufficiently explained - verdicts not unreasonable, unsafe or unsatisfactory - appeal dismissed.

[Place](#)



Benchmark

The Enkindled Spring

BY D. H. LAWRENCE

This spring as it comes bursts up in bonfires green,
Wild puffing of emerald trees, and flame-filled bushes,
Thorn-blossom lifting in wreaths of smoke between
Where the wood fumes up and the watery, flickering rushes.

I am amazed at this spring, this conflagration
Of green fires lit on the soil of the earth, this blaze
Of growing, and sparks that puff in wild gyration,
Faces of people streaming across my gaze.

And I, what fountain of fire am I among
This leaping combustion of spring? My spirit is tossed
About like a shadow buffeted in the throng
Of flames, a shadow that's gone astray, and is lost.

[D. H. LAWRENCE](#)

[Click Here to access our Benchmark Search Engine](#)