

Friday, 4 September 2015

## Weekly Construction Law Review A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Royal Commission into Trade Union Governance and Corruption** - Commissioner Heydon's reasons for ruling on disqualification applications - applications dismissed

**Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy; FBIS International Protective Services (Aust) Pty Ltd v Hennessy** (NSWCA) - work injury damages - slip and fall on door-sill - occupier and employer not liable - appeal allowed

**Cram Fluid Power Pty Ltd v Green** (NSWCA) - workers compensation - worker disentitled from making further claim for lump sum compensation - appeal allowed

**Boral Resources (Vic) Pty Ltd v CFMEU (Ruling No 1)** (VSC) - evidence - tort of intimidation - impact of pleaded ban was fact in issue - evidence (with one exception) admissible

**Absolute Analogue Inc v Sundance Resources Ltd** (WASCA) - contract - oral contract - erroneous credibility findings - appeal allowed - retrial

**Adapt Constructions Pty Ltd v Whittaker** (ACTSC) - commercial arbitration - building contract - no error in arbitrator's award - leave to appeal refused

### Summaries With Link (Five Minute Read)

**[Royal Commission into Trade Union Governance and Corruption](#)**

# Benchmark

## Reasons for Ruling on Disqualification Applications

Commissioner Heydon

Royal Commission - bias - four groups of persons sought disqualification on ground of apprehended bias - applications centred on an agreement to deliver Sixth Annual Sir Garfield Barwick Address, an event organised by Lawyer's Branch and Legal Policy Branch of NSW Division of Liberal Party of Australia (agreement) - applicants contended agreement might cause fair-minded lay observer reasonably to apprehend Commissioner might not bring impartial mind to resolution of questions in course of Commission's inquiries - two main submissions: 'Liberal Party Event' submission and 'Liberal Party fundraiser' submission - Commissioner rejected 'Liberal Party Event' submission for three reasons: 'no apprehension of bias from non-political speech', 'no logical connection between any predisposition and the issues' and 'no reason to find incapacity to deal with issues impartially' - Commissioner rejected 'Liberal Party fundraiser' submission for three reasons: 'no apprehension of intention to raise funds or generate support', 'no logical connection between any predisposition and the issues' and 'no reason to find incapacity to deal with issues' - Commissioner concluded it was not the case that fair-minded lay observer might apprehend Commissioner might not bring impartial mind to resolution of questions - applications dismissed.

[RoyalCommission](#)

[From Benchmark Wednesday, 2 September 2015]

## **Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy; FBIS International Protective Services (Aust) Pty Ltd v Hennessy [2015] NSWCA 253**

Court of Appeal of New South Wales

McColl, Basten & Leeming JJA

Negligence - employee injured in slip and fall on door-sill at worksite in wet weather - employee sued occupier of premises and employer - occupier occupied container terminal - employer provided security services at site under a written security services agreement executed on behalf of occupier and employer - ss5B, 5C, 5E & 5R Civil Liability Act 2002 (NSW) - ss151H & 151Z Workers Compensation Act 1987 (NSW) - primary judge satisfied that reasonable person in occupier's position would have taken precaution of installing step and awning at entrance - occupier negligent - employer in breach of non-delegable duty of care and personally negligent for failing to undertake relevant inspection of gatehouse and to request that occupier undertake repairs - no contributory negligence - failure to install step was necessary condition of injury - occupier had direct control of premises and primary responsibilities as occupier - liability apportioned at 60% for occupier - 40% for employer - ss5B, 5C, 5D Civil Liability Act 2002 (NSW) - r51.53 *Civil Procedure Rules 2005* (NSW) - s151Z *Workers Compensation Act 1987* (NSW) - employer and occupier appealed, challenging primary judge's findings of breach and causation in light of limited findings of primary fact - held: neither employer nor occupier breached duties of care in failing to take precautions against risk posed by step from the ground into demountable hut which was "higher than normal" - conclusion rested on unchallenged rejection of employee's case as to height of step, leaving behind insufficient evidence to support finding it was reasonable to take measures to address risk posed by step - appeal allowed.

[Patrick](#)

[From Benchmark Friday, 28 August 2015]

## **Cram Fluid Power Pty Ltd v Green [2015] NSWCA 250**

Court of Appeal of New South Wales

Beazley ACJ, Emmett & Gleeson JJA

Workers' compensation - injured worker employed as maintenance fitter made claim for lump sum compensation under s66 *Workers Compensation Act 1987* (NSW) (1987 Act) - claim accepted and compensation paid - worker's condition deteriorated - worker underwent spinal surgery - solicitors made claim on worker's behalf for further lump sum compensation under s66 - employer rejected claim on basis that in light of amendments made to 1987 Act by provisions introduced by *Workers Compensation Legislation Amendment Act 2012* (NSW) (2012 Amendments), worker was precluded from pursuing claim - worker sought referral of dispute to Workers Compensation Commission - employer appealed against decision of arbitrator that matter be remitted to Registrar for referral to approved medical specialist for assessment of whole person impairment - President of Commission confirmed arbitrator's decision - employer sought leave to appeal under s 353(4) *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - whether worker entitled to pursue second claim for compensation - held: transitional provisions made plain that new "one claim" limitation applied to claims for lump sum compensation made on or after critical date - worker had already made his one claim for lump sum compensation - the new s66(1A) disentitled worker from making claim further lump sum compensation - appeal allowed.

[CramFluid](#)

[From Benchmark Friday, 28 August 2015]

## **Boral Resources (Vic) Pty Ltd v CFMEU (Ruling No 1) [2015] VSC 445**

Supreme Court of Victoria

Bell J

Evidence - Boral claimed against Union in reliance on tort of intimidation in relation to ban on purchase of concrete products from Boral by Victorian construction principals and sub-contractors - common ground that by reason of entry of default judgment, allegations in statement of claim taken to be admitted - trial for assessment of damages - Union objected to evidence proposed to be led by Boral on basis it did not relate to any fact in issue - held: proposed evidence (with one exception) relevant and admissible under s56(1) *Evidence Act 2008* (Vic) because it met test of relevance specified in s55(1) - impact of pleaded ban was a fact in issue in relation to categories of loss on which Boral relied - proposed evidence relevant to that issue - exception pertained to excluded evidence which did not relate to pleaded ban and was not probative of any issue in trial.

[Boral](#)

[From Benchmark Friday, 28 August 2015]

## **Absolute Analogue Inc v Sundance Resources Ltd [2015] WASCA 168**

Court of Appeal of Western Australia

McLure P; Buss & Mazza JJA

Contract - trial judge held that respondent (Sundance) not contractually obliged to issue 30 million options in Sundance to second appellant - alleged oral contract made between second appellant on appellants' behalf and two others on Sundance's behalf - trial judge made adverse general credibility findings against second appellant and did not accept his uncorroborated evidence where contradicted by other evidence or unlikely - general credibility findings challenged on appeal - appellants contended trial judge's failure to accept second appellant's evidence concerning crucial conversations was against weight of evidence and compelling inferences - appellants also challenged individual findings of fact - held: trial judge erred in findings as to credibility and factual findings - appeal allowed - retrial ordered.

[Absolute](#)

[From Benchmark Tuesday, 1 September 2015]

## **Adapt Constructions Pty Ltd v Whittaker [2015] ACTSC 188**

Supreme Court of the Australian Capital Territory

Burns J

Commercial arbitration - building contract - appellant was builder - respondents were owners of property - parties signed building contract engaging appellant to build home - disputes arose concerning allegation by builder that owners had denied it payment, and respondents' allegations that building work defective - arbitrator made findings in favour of owners, ordering builder to pay amount to owners and costs - builder sought leave to appeal from orders - builder contended arbitrator denied it procedural fairness and erred in assessment of damages - s38 *Commercial Arbitration Act 1986* (ACT) - held: appellant did not demonstrate any manifest error on the face of award or strong evidence that arbitrator made error of law - leave to appeal refused.

[Adapt](#)

[From Benchmark Monday, 31 August 2015]



# Benchmark

## **The Road Not Taken**

By Robert Frost

Two roads diverged in a yellow wood,  
And sorry I could not travel both  
And be one traveler, long I stood  
And looked down one as far as I could  
To where it bent in the undergrowth;

Then took the other, as just as fair,  
And having perhaps the better claim,  
Because it was grassy and wanted wear;  
Though as for that the passing there  
Had worn them really about the same,

And both that morning equally lay  
In leaves no step had trodden black.  
Oh, I kept the first for another day!  
Yet knowing how way leads on to way,  
I doubted if I should ever come back.

I shall be telling this with a sigh  
Somewhere ages and ages hence:  
Two roads diverged in a wood, and I—  
I took the one less traveled by,  
And that has made all the difference.

[Robert Frost](#)

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