

Friday, 6 September 2019

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

Estates 77 Pty Ltd v Minister for the Environment (FCA) - judicial review - respondent found 'Proposed Action' in respect of 'Subject Land' was a 'controlled action' under EPBC Act - applicants sought judicial review - Court lacked jurisdiction to entertain applicants' argument

Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd (NSWCA) - administrative law - challenge to 'revised Rehabilitation Strategy' rejected - appeal against primary judge's decision dismissed - appeal against costs order allowed

Davies v Whitehaven Coal Mining Ltd (NSWSC) - negligence - employer's non-delegable duty of care - plaintiff employee injured at colliery - defendant employer not liable - judgment for defendant

United Commercial v PHHH (VSCA) - security for costs - security of payments - dismissal of applicant's application for security for costs on basis of 'unjustified delay' in application's making - appeal allowed

Queensland Rail Limited v Eden & Ors; State of Queensland & Anor v Kalari Proprietary Limited & Ors (QSC) - summary judgment - insurance - company sought summary judgment on two 'third party claims' against it - summary judgment refused

Summaries With Link (Five Minute Read)

Estates 77 Pty Ltd v Minister for the Environment [2019] FCA 1427

Federal Court of Australia

McKerracher J

Judicial review - jurisdiction - respondent, under s75(1) *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBCA Act), found that 'Proposed Action' in respect of 'Subject Land' was a 'controlled action' under EPBC Act, requiring 'assessment and approval' before it could proceed - applicants sought judicial review - whether Court could consider question whether Proposed Action had, would have, or was 'likely to have', 'significant impact' on black cockatoo species purportedly inhabiting Subject Site - whether 'question of 'jurisdictional fact' - whether 'merits review' - *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* (2018) 262 FCR 527 - *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources* [2008] FCAFC 3 - held: Court lacked jurisdiction to entertain applicants' argument - application dismissed to extent it relied on argument.

[Estates](#)

[From Benchmark Wednesday, 4 September 2019]

Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd [2019] NSWCA 216

Court of Appeal of New South Wales

Basten, Macfarlan & Leeming JJA

Administrative law - respondent submitted 'Rehabilitation Strategy' to Secretary of the Department of Planning and Environment (Secretary) - Secretary conditionally approved Strategy - appellant challenged 'revised Rehabilitation Strategy' ('Strategy') - appellant contended in Land and Environment Court that Strategy did not meet requirements in condition 42, Sch 3, of Approval 'read in combination with Table 14', which condition 42 applied to - primary judge dismissed proceeding and ordered that appellant pay respondent's costs and Secretary's costs - appellant appealed against primary judge's decision and primary judge's decision that it should pay Secretary's costs - *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 - held: appeal against Land and Environment Court decision dismissed - appeal against costs decision allowed.

[View Decision](#)

[From Benchmark Wednesday, 4 September 2019]

Davies v Whitehaven Coal Mining Ltd [2019] NSWSC 1125

Supreme Court of New South Wales

Wright J

Negligence - plaintiff employed by defendant in its colliery - plaintiff contended he was injured due to defendant's 'negligence and breach of statutory duty' and that he suffered 'loss and damage' as a result - defendant denied liability and pleaded payments of compensation to plaintiff under *Workers Compensation Act 1987* (NSW) in defence - employer's 'non-delegable duty of care to take reasonable care' to avoid plaintiff's exposure to 'unnecessary risk of injury' - *Czatyрко v Edith Cowan University* [2005] HCA 14 - held: defendant not liable - judgment for defendant.

[View Decision](#)

[From Benchmark Tuesday, 3 September 2019]

United Commercial v PHHH [2019] VSCA 192

Court of Appeal of Victoria

Whelan & Kaye JJA

Security for costs - applicant engaged respondent for work at property it owned - respondent brought proceedings against applicant under *Building and Construction Industry Security of Payment Act 2002* (Vic) - County Court dismissed applicant's application for security for costs on basis of applicant's 'unjustifiable' delay in its making of application - applicant sought to appeal - *PPK Willoughby Pty Ltd v Baird* [2019] NSWCA 48 - r62.02 *County Court Civil Procedure Rules 2018* (Vic) - whether primary judge erred in relation to prejudice - whether primary judge erred in finding 'actual prejudice could properly be presumed' - whether 'actual prejudice' existed - absence of evidence of prejudice - held: appeal allowed.

[United Commercial](#)

[From Benchmark Wednesday, 4 September 2019]

Queensland Rail Limited v Eden& Ors;State of Queensland & Anor v Kalari Proprietary Limited & Ors [2019] QSC 212

Supreme Court of Queensland

Davis J

Summary judgment - insurance - first defendant and second defendants, by 'third party claims', sought indemnity from company (Dornoch) under "Wholesale Risk Solutions; Public and Products Liability Including Errors & Omissions Insurance" insurance policy (policy) - Dornoch, under r293 *Uniform Civil Procedure Rules 1999* (Qld), sought summary judgment on third party claims - Dornoch contended indemnity claims 'doomed to fail' due to exclusions' operation - construction of policy - *Transport Operations (Road Use Management-Dangerous Goods) Regulation 2008 - Transport Operations (Road Use Management-Road Rules) Regulation 2009 - Heavy Vehicle National Law* (Qld) - *Insurance Contracts Act 1984* (Cth) - held: summary judgment refused.

[Queensland Rail](#)

[From Benchmark Monday, 2 September 2019]



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From: The Hunting of the Snark

By: Lewis Carroll

Fit the Sixth

The Barrister's Dream

They sought it with thimbles, they sought it with care;
They pursued it with forks and hope;
They threatened its life with a railway-share;
They charmed it with smiles and soap.

But the Barrister, weary of proving in vain
That the Beaver's lace-making was wrong,
Fell asleep, and in dreams saw the creature quite plain
That his fancy had dwelt on so long.

He dreamed that he stood in a shadowy Court,
Where the Snark, with a glass in its eye,
Dressed in gown, bands, and wig, was defending a pig
On the charge of deserting its sty.

The Witnesses proved, without error or flaw,
That the sty was deserted when found:
And the Judge kept explaining the state of the law
In a soft under-current of sound.

The indictment had never been clearly expressed,
And it seemed that the Snark had begun,
And had spoken three hours, before any one guessed
What the pig was supposed to have done.

The Jury had each formed a different view
(Long before the indictment was read),
And they all spoke at once, so that none of them knew
One word that the others had said.

"You must know—" said the Judge: but the Snark exclaimed
"Fudge!"

That statute is obsolete quite!
Let me tell you, my friends, the whole question depends
On an ancient manorial right.



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"In the matter of Treason the pig would appear
To have aided, but scarcely abetted:
While the charge of Insolvency fails, it is clear,
If you grant the plea 'never indebted.'

"The fact of Desertion I will not dispute;
But its guilt, as I trust, is removed
(So far as relates to the costs of this suit)
By the Alibi which has been proved.

"My poor client's fate now depends on your votes."
Here the speaker sat down in his place,
And directed the Judge to refer to his notes
And briefly to sum up the case.

But the Judge said he never had summed up before;
So the Snark undertook it instead,
And summed it so well that it came to far more
Than the Witnesses ever had said!

When the verdict was called for, the Jury declined,
As the word was so puzzling to spell;
But they ventured to hope that the Snark wouldn't mind
Undertaking that duty as well.

So the Snark found the verdict, although, as it owned,
It was spent with the toils of the day:
When it said the word "GUILTY!" the Jury all groaned,
And some of them fainted away.

Then the Snark pronounced sentence, the Judge being
quite
Too nervous to utter a word:
When it rose to its feet, there was silence like night,
And the fall of a pin might be heard.

"Transportation for life" was the sentence it gave,
"And then to be fined forty pound."
The Jury all cheered, though the Judge said he feared
That the phrase was not legally sound.



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But their wild exultation was suddenly checked
When the jailer informed them, with tears,
Such a sentence would have not the slightest effect,
As the pig had been dead for some years.

The Judge left the Court, looking deeply disgusted:
But the Snark, though a little aghast,
As the lawyer to whom the defence was intrusted,
Went bellowing on to the last.

Thus the Barrister dreamed, while the bellowing seemed
To grow every moment more clear:
Till he woke to the knell of a furious bell,
Which the Bellman rang close at his ear.

https://en.wikipedia.org/wiki/Lewis_Carroll

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