

Friday, 8 February 2019

## Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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### Executive Summary (1 minute read)

**Work Health Authority v Outback Ballooning Pty Ltd** (HCA) - constitutional law - *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) was not inconsistent with 'Commonwealth aviation law' - appeal allowed

**TTY167 v Republic of Nauru** (HCA) - migration law - Refugee Status Review Tribunal 'legally unreasonable' in failing to adjourn hearing - appeal allowed

**Lacson v Australian Postal Corporation** (FCA) - industrial law - statutory construction - work performed at different locations - operation of enterprise agreements - "particular employment" - s52(2) *Fair Work Act 2009* (Cth) - appeal dismissed

**Dowling v Prothonotary of the Supreme Court of New South Wales** (NSWCA) - contempt - appeal against conviction contempt charges dismissed - appeal against sentence allowed - applicant resentenced

**Ulman v Live Group Pty Ltd** (NSWCA) - contempt - appellants found guilty of criminal contempt for threatening second respondent 'with religious sanctions if he did not submit to' Sydney Beth Din's jurisdiction - appeal allowed in part

**Ku-ring-gai Council v Ichor Constructions Pty Ltd** (NSWCA) - commercial arbitration - dismissal of proceedings seeking declaration that arbitrator's mandate was not terminated and injunction to restrain respondent - application for leave to appeal dismissed for incompetency

**Kai Ling (Australia) Pty Ltd v Rosengreen** (NSWCA) - contract - dismissal of claim of interest

in land arising from alleged novation of contract between respondent and company - appeal dismissed

**Santos Limited v BNP Paribas** (QCA) - summary judgment - bank guarantee - no error in refusal to grant summary judgment in appellant's favour in claim for payment - appeal dismissed

**North Adelaide Service Partnership v Retail Employees Superannuation Pty Ltd** (SASC) - restitution - 'operative mistake' - superannuation - preliminary issue - plaintiffs prima facie entitled to recover superannuation payments in respect of 'exempt employees'

**Warrington Management Pty Ltd v Kingslane Property Investments Pty Ltd** (WASC) - restitution - contract - equity - loan - fiduciary duties - claim dismissed - counterclaim allowed in part

## Summaries With Link (Five Minute Read)

### **Work Health Authority v Outback Ballooning Pty Ltd [2019] HCA 2**

High Court of Australia

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

Constitutional law - appellant, under s32 *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) ('NT WHS Act'), alleged first respondent failed to comply with duty in s19(2) NT WHS Act 'to eliminate or minimise risks to embarking passengers that arose from the use of a fan to inflate' hot air balloon - Northern Territory Court of Summary Jurisdiction dismissed appellant's claim as invalid, finding complaint's subject matter covered by 'Commonwealth regulatory scheme' concerning aviation (scheme) - Magistrate found scheme extended to 'pre-flight operations affecting' passengers' safety on ground - Supreme Court of Northern Territory found Magistrate erred in finding lack of jurisdiction - Court of Appeal upheld appeal, finding 'Commonwealth aviation law' was a 'complete statement' of 'relevant law' and that there was 'indirect inconsistency' between law of Northern Territory and Commonwealth aviation law - "prescription and enforcement of the standards of safety in the conduct of air navigation or air operations" - whether inconsistency between NT WHS Act and Commonwealth aviation law - held: appeal allowed.

[Work Health Authority](#)

[From Benchmark Friday, 8 February 2019]

### **TTY167 v Republic of Nauru [2018] HCA 61**

High Court of Australia

Gageler, Nettle & Edelman JJ

Migration law - Refugee Status Review Tribunal found appellant was not a refugee and was not 'owed complementary protection' - Supreme Court of Nauru upheld Tribunal's decision -

whether appellant was given invitation to appear before Tribunal and, if invitation was not given, Tribunal did not have jurisdiction - whether Tribunal was 'legally unreasonable' not to adjourn hearing when appellant and lawyers did not attend - held: Tribunal was required to give invitation to appellant to attend hearing - appeal ground concerning invitation not raised in Supreme Court - 'too late' to raise appeal point - Tribunal, in 'exceptional circumstances' of the case, was legally unreasonable in failure to adjourn hearing - appeal allowed.

[TTY167](#)

[From Benchmark Friday, 8 February 2019]

## **Lacson v Australian Postal Corporation [2019] FCA 51**

Federal Court of Australia

Mortimer J

Industrial law - appeal concerning construction of s52(2) *Fair Work Act 2009* (Cth) - appellant performed work for respondent at 'two different locations, at two different times, and in the performance of two different sets of duties' - question was whether the work, for purposes of enterprise agreements, was 'one "particular employment"' - whether Federal Circuit Court erred in finding that the work should not be seen as one "particular employment" - whether appellant had 'two different jobs' with respondent - operation of enterprise agreements on contracts of employment - held: no error in Federal Court's decision - appeal dismissed.

[Lacson](#)

[From Benchmark Friday, 8 February 2019]

## **Dowling v Prothonotary of the Supreme Court of New South Wales [2018] NSWCA 340**

Court of Appeal of New South Wales

Basten, Macfarlan & Meagher JJA

Contempt - applicant found guilty on three contempt charges which Prothonotary laid against applicant - applicant sentenced to 18 months in prison with 13 months non-parole period - applicant sought to appeal against convictions - applicant also challenged his sentence - whether suppression orders invalid - whether applicant entitled to rely on 'implied constitutional freedom of political communication' - whether order prohibiting publication was ambiguous, uncertain, and/or not understood by applicant - 'terms of committal' - *Crimes (Sentencing Procedure) Act 1999* (NSW) - 'closely related conduct' - held: appeal against convictions dismissed - Court satisfied that four month sentence was sufficient - appeal against sentence allowed.

[View Decision](#)

[From Benchmark Monday, 4 February 2019]

## **Ulman v Live Group Pty Ltd [2018] NSWCA 338**

Court of Appeal of New South Wales

Bathurst CJ; Beazley P & McColl JA

Contempt - first, second and third appellants were Jewish Rabbis - fourth appellant was Registrar of Beth Din - appellants were found guilty of criminal contempt on basis they

threatened second respondent 'with religious sanctions if he did not submit to' Sydney Beth Din's jurisdiction - whether primary judge's contempt findings 'were those that were charged' - whether erroneous finding that email and letter 'placed improper pressure' on second respondent - whether 'real and definite tendency to interfere with the administration of justice' constituting contempt of court - whether error in respect of penalties' imposition - whether erroneous orders - held: appeal allowed in part.

[View Decision](#)

[From Benchmark Monday, 4 February 2019]

## **Ku-ring-gai Council v Ichor Constructions Pty Ltd [2019] NSWCA 2**

Court of Appeal of New South Wales

Bathurst CJ; Beazley P & Ward CJ in Eq

Commercial arbitration - arbitrator appointed to arbitrate dispute between parties - applicant sought declaration that arbitrator's mandate was not terminated and injunction to restrain respondent from 'purporting to terminate' it - primary judge dismissed proceedings, finding arbitrator had acted as mediator engaging s27D *Commercial Arbitration Act 2010* (NSW), that parties had not given 'written consents' before resumption of arbitration's conduct, that respondent had not waived right to object to resumption of arbitration's conduct, and that respondent was not estopped from asserting requirements of s27D(4) of the Act not met - applicant sought leave to appeal - whether source of Court's power to determine proceedings was s14(2) of the Act or s17(1) of the Act - whether appeal precluded by s14(3) of the Act - held: application for leave to appeal dismissed on basis of incompetency.

[View Decision](#)

[From Benchmark Thursday, 7 February 2019]

## **Kai Ling (Australia) Pty Ltd v Rosengreen [2019] NSWCA 3**

Court of Appeal of New South Wales

Basten JA; Sackville & Barrett AJJA

Contract - proceedings concerned whether appellant had interest in land owned by respondent - appellant claimed interest based on option to purchase land granted, by deed of option, by respondent to company (Saadie Group) - appellant claimed contract between respondent and Saadie Group was novated - appellant claimed that, by novation, the 'contractual rights and obligations' between respondent and Saadie Group had become rights and obligations between appellant and respondent - primary judge found there was no novation and that appellant had no interest in respondent's land - appellant appealed - s38 *Conveyancing Act 1919* (NSW) - held: no error in finding that there had been no novation - respondent and Saadie Group had 'acted on a clear footing' that they remained parties to option agreement - appeal dismissed.

[View Decision](#)

[From Benchmark Thursday, 7 February 2019]

## **Santos Limited v BNP Paribas [2019] QCA 11**



# Benchmark

Court of Appeal of Queensland

Holmes CJ; Fraser & Morrison JJA

Summary judgment - bank guarantee - appellant sought summary judgment on claim for payment of amount under 'performance security' in form of bank guarantee given by respondent - bank guarantee issued to secure contractor's performance in provision of services to services to appellant's project - primary judge refused to grant summary judgment to appellant - primary judge granted summary judgment in favour of respondent - 'principle of strict compliance' - construction of performance security - whether compliance with performance security - held: appellant's notice of demand did not comply with performance security's requirements - no error in primary judge's decision - appeal dismissed.

[Santos](#)

[From Benchmark Thursday, 7 February 2019]

## **North Adelaide Service Partnership v Retail Employees Superannuation Pty Ltd [2019]**

**SASC 5**

Supreme Court of South Australia

Blue J

Restitution - 'operative mistake' - superannuation - preliminary issue - plaintiffs sought to recover in restitution from defendants payments 'in respect of exempt employees', contending payments made by 'operative mistake' - determination of preliminary issue - whether plaintiffs had 'prima facie entitlement to recover the payments in restitution, subject to any defences and assessment of quantum' - whether payroll manager's knowledge that plaintiffs were making the payments to exempt employees negated operative mistake finding in respect of the payments - held: plaintiffs were prima facie - entitled to recover superannuation payments in respect of exempt employees subject to 'defences' and assessment of quantum - preliminary issue determined.

[North Adelaide Service Partnership](#)

[From Benchmark Friday, 8 February 2019]

## **Warrington Management Pty Ltd v Kingslane Property Investments Pty Ltd [2019] WASC**

**2**

Supreme Court of Western Australia

Vaughan J

Restitution - contract - equity - defendant and plaintiff by counterclaim (KPI) was company - plaintiff was company associated with first defendant by counterclaim (Mr Weaver) - plaintiff was also second defendant by counterclaim - plaintiff sought restitution for services' provision to KPI - KPI sought to recover loan amount from Mr Weaver - KPI also alleged Mr Weaver breached fiduciary duties owed to KPI and that plaintiff was also liable for breaches due to knowing receipt of money as consequence of breaches - whether plaintiff proved 'remuneration agreement' - whether loan was 'repayable on demand' - whether KPI had treated certain amount as already satisfied - determination of amount payable to KPI by Mr Weaver - whether breach by Mr Weaver as director and, if so whether loss or damage suffered by KPI due to



breach - whether 'knowing receipt claim' established - whether of 'trust property' on plaintiff's part - claim dismissed - counterclaim allowed in part.

[Warrington](#)

[From Benchmark Tuesday, 5 February 2019]



# Benchmark

## **Fishmonger**

**By:** Marsden Hartley

I have taken scales from off  
The cheeks of the moon.  
I have made fins from bluejays' wings,  
I have made eyes from damsons in the shadow.  
I have taken flushes from the peachlips in the sun.  
From all these I have made a fish of heaven for you,  
Set it swimming on a young October sky.  
I sit on the bank of the stream and watch  
The grasses in amazement  
As they turn to ashy gold.  
Are the fishes from the rainbow  
Still beautiful to you,  
For whom they are made,  
For whom I have set them,  
Swimming?

[https://en.wikipedia.org/wiki/Marsden\\_Hartley](https://en.wikipedia.org/wiki/Marsden_Hartley)

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