

Friday, 11 December 2015

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

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Executive Summary (1 minute read)

Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (HCA) - employment law - s357(1) *Fair Work Act 2009* (Cth) prohibited employer from misrepresenting to employee that employee performed work as independent contractor under contract for services with third party - appeal allowed

Macoun v Commissioner of Taxation (HCA) - income tax - monthly pension payments not exempt from liability to tax - appeal dismissed

Firebird Global Master Fund II Ltd v Republic of Nauru (HCA) - public international law - foreign state immunity - registration of foreign judgment not set aside - appeal dismissed

Westrupp v BIS Industries Ltd (FCAFC) - workers compensation - physical assault outside tavern in remote mining town - injury occurred in course of employment - appeal allowed

Bay Bon Investments Pty Ltd v Sultana (NSWSC) - real property - possession - forged mortgages and indefeasibility - plaintiff entitled to possession of property against defendants

Summaries With Link (Five Minute Read)

Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] HCA 45

High Court of Australia

French CJ; Kiefer, Bell, Gageler & Nettle JJ

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Employment law - respondent provided serviced apartments and employed housekeepers - respondent and labour hire business entered "triangular contracting" arrangement - labour hire business purported to engage housekeepers as independent contractors under contracts for services and purported to provide the services to respondent under a labour hire agreement between it and respondent - respondent represented to housekeepers they were performing work for respondent as independent contractors of labour hire company appellant sought pecuniary penalty orders against respondent for contraventions of s357(1) *Fair Work Act 2009* (Cth) - whether s357(1) prohibited an employer from misrepresenting to employee that employee performed work as an independent contractor under contract for services with third party - Full Court of the Federal Court had held that to contravene provision, employer's representation must mischaracterise contract of employment that existed between them "as a contract for services made between the employee and the employer" - statutory interpretation - "contract for services" - "independent contractor" - "sham arrangement" - held: Full Court of Federal Court erred in construction of provision - misrepresentation was squarely within scope of s357(1) - appeal allowed.

[Fair Work Ombudsman](#)

[From Benchmark Friday, 4 December 2015]

Macoun v Commissioner of Taxation [2015] HCA 44

High Court of Australia

French CJ; Bell, Gageler, Nettle & Gordon JJ

Income tax - appellant former sanitary engineer with International Bank for Reconstruction and Development (IBRD) received monthly pension payments from Retirement Fund established under Staff Retirement Plan when he no longer held office in IBRD - Commissioner sought to include monthly pension payments in assessable income - whether exempt under s6-20(1) *Income Tax Assessment Act 1997* (Cth) due to *International Organisations (Privileges and Immunities) Act 1963* (Cth) (IOPI Act) and *Specialized Agencies (Privileges and Immunities) Regulations* (Cth) (SAPI Regulations) - s27H *Income Tax Assessment Act 1936* (Cth) - held: 6(1)(d)(i) and Fourth Schedule IOPI Act and reg 8(1) SAPI Regulations did not together confer taxation exemption - monthly pension payments fell outside "salaries and emoluments received from the organisation" in Item 2 of Pt I of Fourth Schedule IOPI Act - Convention on the Privileges and Immunities of the Specialized Agencies did not require Australia not to tax monthly pension payments - appeal dismissed.

[Macoun](#)

[From Benchmark Friday, 4 December 2015]

Firebird Global Master Fund II Ltd v Republic of Nauru [2015] HCA 43

High Court of Australia

French CJ; Kiefel, Gageler, Nettle & Gordon JJ

Public international law - foreign state immunity - respondent sought to set aside registration of foreign judgment and garnishee order - immunity from jurisdiction - implied repeal - service - immunity from execution - held: s9 *Foreign States Immunities Act 1985* (Cth) applied to proceedings for registration of foreign judgment under *Foreign Judgments Act 1991* (Cth) -

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respondent was immune from jurisdiction of Australian courts subject to exceptions under Immunities Act - exception in s11(1) Immunities Act applied because proceedings concerned commercial transaction - respondent's immunity from jurisdiction lost - however respondent immune from execution against its property represented by bank accounts in Australia because accounts' purpose or purpose of money in accounts were not commercial purposes - appeal dismissed - orders below varied to reflect Supreme Court of New South Wales' jurisdiction to register foreign judgment.

[Firebird](#)

[From Benchmark Friday, 4 December 2015]

Westrupp v BIS Industries Ltd [2015] FCAFC 173

Full Court of the Federal Court of Australia

Buchanan, McKerracher & Katzmann JJ

Workers compensation - appellant employed as silo operator by first respondent in mining town operated by BHP Billiton - appellant worked on two-week roster followed by one week off - appellant injured shoulder when assaulted after day shift and before night shift by first respondent's employee outside entrance to tavern - appellant would be entitled to compensation under s14 *Safety, Rehabilitation and Compensation Act 1988* (Cth) Act if he sustained "injury" within of s14 - claim for compensation rejected by first respondent - Administrative Appeals Tribunal affirmed first respondent's decision - "arising out of, or in the course of, the employee's employment" in s 5A - liability of employers of "fly in/fly out workers" to pay compensation for injuries in remote locations where employees required to live and work but incurred when employees not engaged in work - consideration of *Hatzimanolis v ANI Corporation Ltd* [1992] HCA 21 as explained by *Comcare v PVYW* [2013] HCA 41 - held: injury occurred during interval between actual periods of work but in overall period or episode of work - first respondent induced or encouraged appellant to spend time between shifts in camp vicinity - appellant did not act to take himself outside course of employment or guilty of serious and wilful misconduct disentitling him to compensation - injury arose in course of employment - appellant entitled to compensation - appeal allowed

[Westrupp](#)

[From Benchmark Wednesday, 9 December 2015]

Bay Bon Investments Pty Ltd v Sultana [2015] NSWSC 1797

Supreme Court of New South Wales

Davies J

Summary judgement - real property - possession - fraud - forgery - plaintiff sought summary judgment for possession of a property on basis of default under mortgage - first and second defendants were registered proprietors - second defendant's estate sequestrated - first defendant contended he did not sign mortgage or its variations and did not know or acquiesce in signature being placed on documents - first defendant claimed signature was forged by his wife (second defendant) - whether indefeasibility provisions of *Real Property Act 1900* (NSW) resulted in plaintiff's entitlement to possession of first defendant's interest in land - forged mortgages and indefeasibility - s41 - whether liability of defendants joint or several - held:

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plaintiff entitled to possession of land against both defendants - first defendant may have rights to claim against Torrens Assurance Fund.

[Bay Bon Investments](#)

[From Benchmark Friday, 4 December 2015]

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The Mower to the Glow-Worms

BY ANDREW MARVELL

Ye living lamps, by whose dear light
The nightingale does sit so late,
And studying all the summer night,
Her matchless songs does meditate;

Ye country comets, that portend
No war nor prince's funeral,
Shining unto no higher end
Than to presage the grass's fall;

Ye glow-worms, whose officious flame
To wand'ring mowers shows the way,
That in the night have lost their aim,
And after foolish fires do stray;

Your courteous lights in vain you waste,
Since Juliana here is come,
For she my mind hath so displac'd
That I shall never find my home.

[ANDREW MARVELL](#)

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