

Friday, 12 April 2019

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

Clubb v Edwards; Preston v Avery (HCA) - constitutional law - 'implied constitutional freedom of political communication' - challenges to validity of *Reproductive Health (Access to Terminations) Act 2013* (Tas) and *Public Health and Wellbeing Act 2008* (Vic) rejected

CXXXVIII v Commonwealth of Australia (FCAFC) - administrative law - officers of Australian Crime Commission served summonses and notices to produce on appellant - respondents conceded one summons and notice invalid - challenge to validity of other summons and notice rejected - appeal dismissed

R & B Directional Drilling Pty Ltd (in liq) v CGU Insurance Limited (No 2) (FCA) - insurance - construction - 'business insurance policy' - liability arising from sub-contract's performance - first applicant not entitled to payment under policy - application dismissed

Cando Management and Maintenance Pty Ltd v Cumberland Council (NSWCA) - environment and planning - erroneous finding that development consent had lapsed - appeal allowed in part

Commissioner for Fair Trading v Digital Marketing and Solutions Pty Ltd (ACN 614 430 983) trading as Android Enjoyed and Camerasky & Anor (NSWSC) - consumer law - fair trading - breaches of Australian Consumer Law - breach of *Electricity (Consumer Safety) Act 2004* (NSW) - breach of 'Undertaking' - declarations and orders

Boss Constructions (NSW) Pty Ltd v Rohrig (NSW) Pty Ltd (NSWSC) - contract - parties claimed against each other for breach of an 'asserted contract' - neither party established

contract it contended for - claim and cross-claim dismissed

Hampshire Automotive Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd (VSCA) - real property - easements - trespass - 'easement by prescription by long user' - appeal allowed - retrial

Midland Metals Overseas Pte Ltd v Powercor Network Services Pty Ltd (VSCA) - corporations - statutory demand - contract - three statutory demands set aside - genuine dispute - leave to appeal refused

Traspunt No 4 Pty Ltd v Moreton Bay Regional Council (QCA) - environment and planning - development permit - clearing of vegetation - whether work 'assessable development' - respondent's appeal allowed - applicant's appeal dismissed

Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor (QSC) - security of payments - service - jurisdiction - adjudicator found lack of jurisdiction to determine claims - challenge to adjudicator's decisions failed - application dismissed

Thomson v State of Queensland & Anor (QSC) - damages - negligence - plaintiff employed by second defendant contracted Q Fever while working on farm operated by first defendant - liability admitted - assessment of damages

Stokes v Ragless (SASCFC) - costs - defamation - procedural fairness - obligations to unrepresented litigants - offers of settlement - refusal to award indemnity costs - appeal allowed

Summaries With Link (Five Minute Read)

Clubb v Edwards; Preston v Avery [2019] HCA 11

High Court of Australia

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

Constitutional law - Tasmanian Parliament enacted *Reproductive Health (Access to Terminations) Act 2013* (Tas) (RHAT Act) - Victorian Parliament enacted *Public Health and Wellbeing Act 2008* (Vic) (PHW Act) - s185B(1) PHW Act prohibited, 'in certain circumstances', "communicating by any means in relation to abortions" - s9(2) RHAT Act prohibited 'in certain circumstances', "a protest in relation to terminations" - appellant (Clubb) convicted of offence under s185B(1) PHW Act - appellant (Preston) convicted of offence under s9(2) RHAT Act - whether provisions of RHAT Act and PHW Act were contrary to 'implied constitutional freedom of political communication' - 'test for invalidity' in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 - held: Court not satisfied provisions of RHAT Act and PHW were invalid.

[Clubb](#)

[From Benchmark Friday, 12 April 2019]

CXXXVIII v Commonwealth of Australia [2019] FCAFC 54

Full Court of the Federal Court of Australia

Logan, Bromwich & Charlesworth JJ

Administrative law - officers of Australian Crime Commission served 'two summonses and two notices to produce' on appellant - respondents conceded 'first summons' and 'first notice' invalid - primary judge rejected challenge to validity of 'second summons' and 'second notice' - whether erroneous failure by primary judge to find first notice and first summons invalid and grant declaratory relief - whether erroneous failure by primary judge to find determination of Board of Australian Crime Commission was not capable of supporting issue of second summons and second notice - whether erroneous failure by primary judge to find second notice invalid due to its imposition on appellant of obligations 'with which it was impossible to comply' - *Australian Crime Commission Act 2002* (Cth) - held: appeal dismissed.

[CXXXVIII](#)

[From Benchmark Monday, 8 April 2019]

R & B Directional Drilling Pty Ltd (in liq) v CGU Insurance Limited (No 2) [2019] FCA 458

Federal Court of Australia

Allsop CJ

Insurance - construction - first applicant provided 'specialist drilling services' - respondent issued 'business insurance policy' (policy) to first applicant - first applicant entered sub-contract with second applicant - applicants contended first applicant's liability to second applicant arising from sub-contract's performance entitled first applicant to payment under policy - construction of policy - 'coverage clause' - whether "physical injury to tangible property" - exclusions - held: application dismissed.

[R & B](#)

[From Benchmark Tuesday, 9 April 2019]

Cando Management and Maintenance Pty Ltd v Cumberland Council [2019] NSWCA 26

Court of Appeal of New South Wales

Beazley P; Meagher & White JJA

Environment and planning - respondent sought declaration appellant, in breach of s4.3 *Environmental Planning and Assessment Act 1979* (EPA), 'carried out prohibited development for which no development consent was in force' - respondent also sought declaration appellant breached ss81A(2)(a) & s81A(2)(b) EPA - no dispute appellant breached ss81A(2)(a) & 81A(2)(b) - respondent also sought injunction to restrain appellant from use of premises - appeal concerned two issues - whether primary judge erred in finding lapse of development consent - whether Land and Environment Court could and should have ordered breaches of EPA 'should be sanctioned and authorised' if certain 'rectification works' performed - held: development consent had not lapsed - injunction against property's 'use and occupation' to

continue until appellant obtained construction certificate, appointed 'principal certifying authority' and obtained occupation certificate - appeal allowed in part.

[View Decision](#)

[From Benchmark Thursday, 11 April 2019]

Commissioner for Fair Trading v Digital Marketing and Solutions Pty Ltd (ACN 614 430 983) trading as Android Enjoyed and Camerasky & Anor [2019] NSWSC 370

Supreme Court of New South Wales

Fullerton J

Consumer law - fair trading - first defendant was supplier of 'electronics and electrical goods' - second defendant was first defendant's 'director and secretary' - goods purchased from 'Websites' - plaintiff contended first defendant contravened ss18, 29(1)(a), 33, 36(3) & 36(4) Australian Consumer Law - plaintiff also contended first defendant 'sold electrical articles' which did not meet requirements of *Electricity (Consumer Safety) Act 2004* (NSW) (ECSA Act) in breach of ECSA Act and in breach of 'Undertaking' - held: plaintiff established claims - first defendant contravened Australian Consumer Law - second defendant involved in first defendant's contraventions - defendants breached Undertaking and ECSA - declarations and orders made, including orders for payment of pecuniary penalties and for second defendant's disqualification.

[View Decision](#)

[From Benchmark Monday, 8 April 2019]

Boss Constructions (NSW) Pty Ltd v Rohrig (NSW) Pty Ltd [2019] NSWSC 374

Supreme Court of New South Wales

Hammerschlag J

Contract - parties sued each other for breach of an 'asserted contract' - 'lengthy commercial dealings' - whether 'binding contract' concluded - 'objective assessment' of behaviour of parties - *Building and Construction Industry Security of Payment Act 1997* (NSW) - held: neither party established contract which it contended for - no binding contract between parties - claim and cross-claim dismissed.

[View Decision](#)

[From Benchmark Tuesday, 9 April 2019]

Hampshire Automotive Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd [2019] VSCA 77

Court of Appeal of Victoria

Tate, Niall & Emerton JJA

Real property - easements - trespass - applicant and first respondent were 'tenants of neighbouring commercial properties' - applicant breached fence which separated properties - applicant used property of first respondent 'for access and ingress' and to store vehicles - first respondent sued applicant in trespass - applicant counterclaimed on basis it used land under easement 'created by prescription based on long user' - primary judge found owner's consent was necessary for counterclaim, dismissed counterclaim and found in favour of first respondent

- whether easement could be created by tenant's use independent of consent of landlord and enforced by person in land's possession - held: judge incorrectly concluded owner's consent was required for tenant to enforce easement - dominant's owner's 'knowledge or consent' not required to create 'easement by prescription by long user' - appeal allowed - retrial.

[Hampshire](#)

[From Benchmark Thursday, 11 April 2019]

Midland Metals Overseas Pte Ltd v Powercor Network Services Pty Ltd [2019] VSCA 76

Court of Appeal of Victoria

Tate & Whelan JJA; Almond AJA

Corporations - statutory demand - contract - parties entered contract for electrical cables' supply - applicant sought payment of invoices in relation to orders for cables - applicant served three statutory demands on respondent - respondent sought to set aside demands on basis there was genuine dispute in relation to debts underlying them - associate judge found existence of genuine disputes concerning compliance of cables with specification under contract - associate judge set demands aside - applicant sought to appeal - construction of contract - whether erroneous finding of genuine dispute - whether associate judge decided or purported to decide 'any ultimate question' on construction issue - ss459G & 459H *Corporations Act 2001* (Cth) - held: leave to appeal refused.

[Midland](#)

[From Benchmark Thursday, 11 April 2019]

Traspunt No 4 Pty Ltd v Moreton Bay Regional Council [2019] QCA 51

Court of Appeal of Queensland

Gotterson and McMurdo JJA; David J

Environment and planning - applicant owned land within area of respondent - applicant sought development permit for clearing of vegetation - respondent refused permit - Planning and Environment Court found applicant entitled 'to clear firebreaks' along two boundaries (northern and eastern boundaries) - applicant was refused permission to clear firebreaks along two boundaries (southern and western boundaries) - appeal allowed to extent of declaration that firebreaks' clearing along northern and eastern boundaries was 'not an assessable development' - parties each sought to appeal - respondent's position changed - respondent did not oppose work on northern and eastern boundaries but contended it should be 'pursuant to a different order' than that which judge made - whether erroneous finding that work was not assessable development - *Sustainable Planning Act 2009* (Qld) - held: respondent's appeal allowed - primary judge erred in finding work was not assessable development - order set aside - matter remitted - respondent's appeal otherwise dismissed - applicant's appeal dismissed.

[Traspunt](#)

[From Benchmark Thursday, 11 April 2019]

Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor [2019] QSC 91

Supreme Court of Queensland

Ryan J

Security of payments - applicant sought orders concerning 'adjudication applications' which it made under *Building and Construction Industry Payments Act 2004* (Qld) - in three of four applications, adjudicator found lack of jurisdiction to determine the claims on basis claims not served on respondent in accordance with the Act - applicant sought to quash adjudicator's decision - adjudicator had not yet made decision in respect of fourth application but 'same argument' concerning jurisdiction had been raised - whether service on respondent of 'adjudication application form' was necessary for conferral of jurisdiction on adjudicator - time within which service was required to be made - whether service on respondent 'well after service of the submissions' was sufficient for conferral of jurisdiction - held: challenge to adjudicator's decisions failed - application dismissed.

[Niclin](#)

[From Benchmark Wednesday, 10 April 2019]

Thomson v State of Queensland & Anor [2019] QSC 95

Supreme Court of Queensland

Applegarth J

Damages - negligence - plaintiff employed by second defendant - plaintiff contracted Q Fever on farm in course of employment and Q Fever Debility Syndrome as a result of Q fever - plaintiff subsequently developed depressive disorder and adjustment disorder - plaintiff sued first defendant operator of farm second defendant employer - liability admitted by both defendants - defendants agreed first defendant was 80 per cent responsible and second defendant is 20 per cent responsible - assessment of damages - general damages - 'likely employment and income' if plaintiff had not contracted Q Fever - special damages - 'future medical and other expenses' - 'past and future care' - held: damages assessed - judgment against first defendant in sum of \$1,179,872 - judgment against second defendant in sum of \$240,975.

[Thomson](#)

[From Benchmark Friday, 12 April 2019]

Stokes v Ragless [2019] SASCFC 31

Full Court of the Supreme Court of South Australia

Blue, Parker & Lovell JJ

Costs - defamation - procedural fairness - obligations to unrepresented litigants - appellant succeeded in proceedings against unrepresented respondent - appellant had filed settlement offers before trial - respondent did not accept offers - appellant sought indemnity costs under s38(2)(a) *Defamation Act 2005* (SA) - primary judge found respondent not informed by solicitors for appellant of 'consequences of accepting or rejecting filed settlement offers' - primary judge awarded appellant costs on party/party basis, finding it was not in interests of justice to grant appellant costs on indemnity basis - whether denial of procedural fairness to appellant - whether 'represented party' obliged 'to inform an unrepresented party' of implications of failure to accept settlement offer - held: appeal allowed.

[Stokes](#)

[From Benchmark Tuesday, 9 April 2019]

Benchmark

A Midsummer Night's Dream, Act II, Scene I [Over hill, over dale]

By: William Shakespeare, 1564 - 1616

A wood near Athens. A Fairy speaks.

Over hill, over dale,
Thorough bush, thorough brier,
Over park, over pale,
Thorough flood, thorough fire,
I do wander every where,
Swifter than the moon's sphere;
And I serve the fairy queen,
To dew her orbs upon the green:
The cowslips tall her pensioners be;
In their gold coats spots you see;
Those be rubies, fairy favours,
In those freckles live their savours:
I must go seek some dew-drops here
And hang a pearl in every cowslip's ear.
Farewell, thou lob of spirits: I'll be gone;
Our queen and all her elves come here anon.

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

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