

Friday, 14 March 2025

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (One Minute Read)

Commonwealth of Australia v Yunupingu (HCA) - s122 of the Constitution is subject to abstraction (by implication from s51(xxxi)) of power to make laws with respect to the acquisition of property otherwise than on just terms - law is with respect to the acquisition of property otherwise than on just terms to the extent it purported to appropriate an interest in land inconsistent with native title rights before the commencement of the *Native Title Act 1993* (Cth)

Succar v Dominium Homes Pty Ltd (NSWSC) - property owners entitled to recover costs of remedying defects and bringing the works to completion following termination of building contract for defective work

Re Duke Ventures Wellington Street Pty Ltd (VSC) - application to set aside statutory demand to enforce adjudication under *Building and Construction Industry Security of Payment Act 2002* (Vic) - debtor could rely on offsetting claims to extent adjudicator had not made allowance for them

HABEAS CANEM

Dive with pike



Summaries With Link (Five Minute Read)

Commonwealth of Australia v Yunupingu [2025] HCA 6

High Court of Australia

Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ

Constitutional law - Governor-General made appropriations to Commonwealth and third parties of interests in land in the Gove Peninsula in the Northern Territory under the *Northern Territory (Administration) Act 1910* (Cth), an Act supported by s122 of the Constitution - *Native Title Act 1993* (Cth) provides that a past act attributable to the Commonwealth is valid and is taken always to have been valid, but that native title holders are entitled to compensation in certain circumstances - Gumatj Clan claimed compensation - Full Federal Court found: (1) Commonwealth power to make laws for the government of territories under s122 of the Constitution does not permit making a law with respect to the acquisition of property otherwise than on just terms within the meaning of s51(xxxi) of the Constitution; and (2) a law is with respect to the acquisition of property otherwise than on just terms to the extent it purported to appropriate an interest in land inconsistent with native title rights before the commencement of the *Native Title Act* - Commonwealth granted special leave to appeal to High Court - held: (by Gageler CJ, Gleeson, Jagot, & Beech-Jones JJ; Gordon J and Edelman J agreement for separate reasons, and Steward J dissenting): s51(xxxi) is a grant of power to make laws with respect to the acquisition of property on just terms - it has long been recognised that the existence of this grant of power impliedly abstracts power to make laws for compulsory acquisition of property other than on just terms from other legislative powers - majority now clarified that the abstraction by implication from s51(xxxi) does apply to s122 - majority rejected Commonwealth's argument that extinguishing native title rights by the grant of inconsistent rights was not a 'taking' of property, and therefore not the 'acquisition' of property within the meaning of s31(xxxi), in that native title was inherently susceptible to a valid exercise of the Crown's sovereign power to grant interests in land - majority also rejected Commonwealth argument that a pastoral lease granted by South Australia in 1903 had already extinguished relevant native title before the *Northern Territory (Administration) Act 1910* (Cth) was enacted - Steward J would have held that the *Northern Territory Mining Act 1903* (SA) extinguished native title rights regarding minerals in the claim area and would have remitted the matter to a docket judge for redetermination of the claim in light of this - appeal dismissed (by majority).

[Commonwealth of Australia](#)

[From Benchmark Thursday, 13 March 2025]

Succar v Dominium Homes Pty Ltd [2025] NSWSC 183

Supreme Court of New South Wales

Stevenson J

Building contracts - residential property owners entered into contract with builder for the construction of 10 townhouses on their land - issues arose as to adequacy of builder's performance of the works - after a number of breach notices did not resolve issues, property owners terminated the contract before the works were completed - property owners sued for

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breaches of statutory warranties implied into the contract by s18B of the *Home Building Act 1989* (NSW) - builder filed a Technology and Construction List Response and cross-claim - Supreme Court judge struck out the Response and cross claim and entered default judgment for the plaintiffs - Court now assessed damages - held: measure of damages for defective building work is the reasonable costs of rectification, so as to give the plaintiff the equivalent of a building which is substantially in accordance with the contract - any rectification work claimed for must be necessary to produce conformity with the contract, and must also be a reasonable course to adopt - necessity and reasonableness are questions of fact in each case - work that is necessary to produce conformity with the contract will only be unreasonable in a rare case, such as where the plaintiff is using a technical breach to secure an uncovenanted profit - evidence here satisfied Court that total cost of remedying defects and bringing the works to completion was about \$3.8million - evidence showed proposed work was necessary to produce conformity with the contract and was the reasonable course to adopt - no suggestion plaintiffs were seeking to secure an uncovenanted profit or that costs were out of proportion to the benefit to be gained - appropriate to allow an uplift of 15% on the costings in an expert's report that had been prepared over four years previously - also appropriate for the plaintiffs to recover an amount equivalent to the GST payable in respect of rectification and completion costs.

[View Decision](#)

[From Benchmark Wednesday, 12 March 2025]

Re Duke Ventures Wellington Street Pty Ltd [2025] VSC 75

Supreme Court of Victoria

Barrett AsJ

Security of payments - Duke engaged Cobolt to build a 10-storey apartment building - contractual dispute arose with competing claims - Cobolt served payment claim under *Building and Construction Industry Security of Payment Act 2002* (Vic) (SOPA) - adjudicator made determination in favour of Cobolt and Cobolt obtained judgment on that determination - Cobolt served statutory demand - Duke sought to have statutory demand set aside on the basis of offsetting claims - held: relying on offsetting claims to set aside statutory demand does not subvert SOPA's 'pay now, argue later' regime - effect of failure to comply with statutory demand is merely statutory presumption of insolvency in future winding up proceedings - debtor does not have to comply with statutory demand - SOPA creditor has enforcement avenues other than statutory demand/winding up - also question of how far interpretation of Commonwealth Act (statutory demand provisions of *Corporations Act 2001* (Cth) should be determined by policy underlying state Acts (the SOPAs) - where statutory demand relies on debt from SOPA adjudication: (1) debtor may not rely on genuine dispute; (2) debtor may not rely on offsetting claim to the extent adjudicator made allowance for that claim; (3) debtor may rely on offsetting claim to the extent claim raised before adjudicator but rejected; (4) debtor may rely on offsetting claim not raised before adjudicator; and (5) debtor may rely on offsetting claim that arises from transactions separate to the one giving rise to the debt - adjudicator had not made allowances for Duke's alleged offsetting debts - statutory demand set aside.

[Re Duke Ventures Wellington Street Pty Ltd](#)

[From Benchmark Tuesday, 11 March 2025]



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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Dewberry Group v Dewberry Engineers (SCOTUS) - Disgorgement of profits in a trade mark infringement dispute brought under the United States Lanham Act may only be awarded against parties that are named defendants. Profits of defendant's affiliates are not statutorily subject to disgorgement

Summaries With Link (Five Minute Read)

Dewberry Group v Dewberry Engineers 604 US __ (2025)

Supreme Court of the United States

Plaintiff, Dewberry Engineers successfully sued Dewberry Group for trade mark infringement. Pursuant to the Lanham Act, the plaintiff sought damages measured by the amount of defendant's profits, known as disgorgement of profits. The plaintiff was awarded US\$43million. The judgment was affirmed by the Court of Appeals. However, the named defendant did not show any profits on its books. The profits attributable to the infringement appeared on the books of defendant's affiliated companies, and the trial court attributed the profits to the named defendant for purposes of ordering disgorgement. The Supreme Court (per Curiam by Kagan J; Sotomayor J concurring) reversed and remanded based on the plain meaning of the statutory language which permits as a measure of loss, disgorgement of the 'defendant's' profits. The Court found that the word 'defendant' in the statute can only refer to a party so named in the proceedings. The plaintiff had also argued that the Lanham Act allows for a 'just-sum' award of damages where a court is persuaded that the traditional measures of losses are inadequate. The Court declined to decide if the award of damages could be justified on the just-sum theory because this had not been employed by the trial court.

[Dewberry Group](#)



Poem for Friday

The Love Song of J. Alfred Prufrock

By T. S. Eliot

*S'io credesse che mia risposta fosse
A persona che mai tornasse al mondo,
Questa fiamma staria senza piu scosse.
Ma perciocche giammai di questo fondo
Non torno vivo alcun, s'i'odo il vero,
Senza tema d'infamia ti rispondo.*

Let us go then, you and I,
When the evening is spread out against the sky
Like a patient etherized upon a table;
Let us go, through certain half-deserted streets,
The muttering retreats
Of restless nights in one-night cheap hotels
And sawdust restaurants with oyster-shells:
Streets that follow like a tedious argument
Of insidious intent
To lead you to an overwhelming question ...

Oh, do not ask, "What is it?"
Let us go and make our visit.

In the room the women come and go
Talking of Michelangelo.

The yellow fog that rubs its back upon the window-panes,
The yellow smoke that rubs its muzzle on the window-panes,
Licked its tongue into the corners of the evening,
Lingered upon the pools that stand in drains,
Let fall upon its back the soot that falls from chimneys,
Slipped by the terrace, made a sudden leap,
And seeing that it was a soft October night,
Curled once about the house, and fell asleep.

And indeed there will be time
For the yellow smoke that slides along the street,
Rubbing its back upon the window-panes;



There will be time, there will be time
To prepare a face to meet the faces that you meet;
There will be time to murder and create,
And time for all the works and days of hands
That lift and drop a question on your plate;
Time for you and time for me,
And time yet for a hundred indecisions,
And for a hundred visions and revisions,
Before the taking of a toast and tea.

In the room the women come and go
Talking of Michelangelo.

And indeed there will be time
To wonder, "Do I dare?" and, "Do I dare?"
Time to turn back and descend the stair,
With a bald spot in the middle of my hair —
(They will say: "How his hair is growing thin!")
My morning coat, my collar mounting firmly to the chin,
My necktie rich and modest, but asserted by a simple pin —
(They will say: "But how his arms and legs are thin!")
Do I dare
Disturb the universe?
In a minute there is time
For decisions and revisions which a minute will reverse.

For I have known them all already, known them all:
Have known the evenings, mornings, afternoons,
I have measured out my life with coffee spoons;
I know the voices dying with a dying fall
Beneath the music from a farther room.
So how should I presume?

And I have known the eyes already, known them all—
The eyes that fix you in a formulated phrase,
And when I am formulated, sprawling on a pin,
When I am pinned and wriggling on the wall,
Then how should I begin
To spit out all the butt-ends of my days and ways?
And how should I presume?

And I have known the arms already, known them all—



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Arms that are braceleted and white and bare
(But in the lamplight, downed with light brown hair!)
Is it perfume from a dress
That makes me so digress?
Arms that lie along a table, or wrap about a shawl.
And should I then presume?
And how should I begin?

Shall I say, I have gone at dusk through narrow streets
And watched the smoke that rises from the pipes
Of lonely men in shirt-sleeves, leaning out of windows? ...

I should have been a pair of ragged claws
Scuttling across the floors of silent seas.

And the afternoon, the evening, sleeps so peacefully!
Smoothed by long fingers,
Asleep ... tired ... or it malingers,
Stretched on the floor, here beside you and me.
Should I, after tea and cakes and ices,
Have the strength to force the moment to its crisis?
But though I have wept and fasted, wept and prayed,
Though I have seen my head (grown slightly bald) brought in upon a platter,
I am no prophet — and here's no great matter;
I have seen the moment of my greatness flicker,
And I have seen the eternal Footman hold my coat, and snicker,
And in short, I was afraid.

And would it have been worth it, after all,
After the cups, the marmalade, the tea,
Among the porcelain, among some talk of you and me,
Would it have been worth while,
To have bitten off the matter with a smile,
To have squeezed the universe into a ball
To roll it towards some overwhelming question,
To say: "I am Lazarus, come from the dead,
Come back to tell you all, I shall tell you all"—
If one, settling a pillow by her head
Should say: "That is not what I meant at all;
That is not it, at all."

And would it have been worth it, after all,



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Would it have been worth while,
After the sunsets and the dooryards and the sprinkled streets,
After the novels, after the teacups, after the skirts that trail along the floor—
And this, and so much more?—

It is impossible to say just what I mean!
But as if a magic lantern threw the nerves in patterns on a screen:

Would it have been worth while
If one, settling a pillow or throwing off a shawl,
And turning toward the window, should say:

“That is not it at all,
That is not what I meant, at all.”

No! I am not Prince Hamlet, nor was meant to be;
Am an attendant lord, one that will do
To swell a progress, start a scene or two,
Advise the prince; no doubt, an easy tool,
Deferential, glad to be of use,
Politic, cautious, and meticulous;
Full of high sentence, but a bit obtuse;
At times, indeed, almost ridiculous—
Almost, at times, the Fool.

I grow old ... I grow old ...
I shall wear the bottoms of my trousers rolled.

Shall I part my hair behind? Do I dare to eat a peach?
I shall wear white flannel trousers, and walk upon the beach.
I have heard the mermaids singing, each to each.

I do not think that they will sing to me.

I have seen them riding seaward on the waves
Combing the white hair of the waves blown back
When the wind blows the water white and black.
We have lingered in the chambers of the sea
By sea-girls wreathed with seaweed red and brown
Till human voices wake us, and we drown.

Jeremy Irons reads The Love Song of J. Alfred Prufrock "The Love Song of J. Alfred Prufrock" by T. S. Eliot

<https://www.youtube.com/watch?v=adNOs1izBlS>



Thomas Stearns Eliot OM was born on 26 September 1888 in St Louis, Missouri. By the time he was 15, he spoke Greek, Latin, French and English, with some German. He was a leading poet, editor and publisher. He is also well known as an essayist. He started his working life as a clerk in the Colonial and Foreign department of Lloyd's as a linguist. By that time he had also studied Sanskrit, and knew French, Italian and German.

Well known works include *The Waste Land* and *The Hollow Men*. He regarded *Four Quartets* as his greatest masterpiece. He wrote that "*only those who will risk going too far can possibly find out how far one can go*". He received the Nobel Prize in Literature. He relinquished his American citizenship to become a British citizen. Having smoked heavily for most of his life, he suffered worsening problems with his lungs, until his death.

[https://en.wikipedia.org/wiki/T. S. Eliot](https://en.wikipedia.org/wiki/T._S._Eliot)

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