

Friday, 20 November 2015

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

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Executive Summary (1 minute read)

North Australian Aboriginal Justice Agency Limited v Northern Territory (HCA) - statutory interpretation - constitutional law - challenge to validity of Div 4AA of Pt VII *Police Administration Act* (NT) failed - matter remitted to single Justice for further directions

The White Ant Co Pty Ltd v Robson (NSWCA) - contract - deed of arrangement - liability term not enlivened - appeal allowed

Hunter Development Corporation v Save Our Rail NSW Incorporated (NSWCA) - administrative law - acquisition of land - assets did not vest in appellant under *Transport Administration Act 1988* (NSW) - appellant was not a "rain infrastructure owner" - appeal allowed

JM & PM Holdings Pty Ltd v Snap-on Tools (Australia) Pty Ltd (NSWCA) - contract - franchise agreement - "monthly cash flow projection" spreadsheet not relied on in decision to enter agreement - appeal dismissed

Alqudsi v Commonwealth of Australia; Alqudsi v R (NSWCA) - constitutional law - external affairs power - provisions of *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) validly enacted pursuant to s51(xxix) of the Constitution - appeal dismissed

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (NSWCA) - Aboriginal land rights - rejection of claim in respect of two parcels of land on basis of lawful occupation and use by Corrective Services NSW - appeal dismissed

Regional Development Australia Murraylands and Riverland Inc v Smith (SASCFC) - contract - repudiation of employment contract - failure to mitigate loss - appeal against award of damages allowed

Meyer v Cool Chilli Pty Ltd (ACTSC) - work injury - negligence - worker injured in slip and fall from ladder - employer negligent - breaches of statutory duty by employer and third party - third party liable to employer for 25% contribution

Summaries With Link (Five Minute Read)

North Australian Aboriginal Justice Agency Limited v Northern Territory [2015] HCA 41

High Court of Australia

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

Statutory interpretation - constitutional law - first plaintiff corporation provided legal services to Aboriginal and Torres Strait Islanders - second plaintiff was Aboriginal person resident in Northern Territory arrested by officer or officers of Police Force and taken into custody under s133AB *Police Administration Act* (NT) - second plaintiff held in custody and issued with infringement notice which recorded offences and provided for payment of fines - plaintiffs alleged Div 4AA of Pt VII in which s133AB appeared was invalid, contending it purported to confer on Executive of the Northern Territory power to detain which was penal or punitive in character and beyond powers of Legislative Assembly of Northern Territory to pass - plaintiffs also contended Division 4AA conferred on Executive of Northern Territory power of detention which undermined or interfered with courts' institutional contrary to Constitution - second plaintiff also alleged false imprisonment - separate questions - issues of validity - costs of the proceedings - orders to be made in light of answers - held (by majority): plaintiffs' challenge to validity of Div 4AA failed - questions in Special Case answered accordingly - matter remitted to single Justice for further directions.

[North Australian](#)

[From Benchmark Thursday, 12 November 2015]

The White Ant Co Pty Ltd v Robson [2015] NSWCA 345

Court of Appeal of New South Wales

Macfarlan & Gleeson JJA; Emmett AJA

Contract - appellant contractor and respondents (homeowner) made deed of arrangement relating to termite infestation in house Homeowner constructed on property - homeowner claimed contractor liable under deed to pay reasonable costs of rectification of damage - District Court judge gave judgment for homeowner - contractor contended primary judge erred in drawing inference there was evidence of actual damage caused by termites and in finding contractor liable under deed - construction of deed - whether clause of deed (liability term) enlivened other than by operation of deed's other provisions - held: primary judge's conclusion that contractor was liable had been based not on operative provisions of deed but on estoppels

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binding contractor as consequence of entering deed - homeowner's construction of deed rejected - clause of deed (liability term) was not enlivened - leave to appeal revoked insofar it related to quantification of damages - appeal allowed.

[The White Ant](#)

[From Benchmark Thursday, 12 November 2015]

Hunter Development Corporation v Save Our Rail NSW Incorporated [2015] NSWCA 34

Court of Appeal of New South Wales

Beazley ACJ; Macfarlan & Meagher JJA

Administrative law - appellant entered agreements for acquisition of land and assets from RailCorp - first respondent sought to restrain RailCorp, Transport NSW and appellant from acting contrary to law in disposing of land or undertaking proposed removal works - first respondent relied on s99A *Transport Administration Act 1988* (NSW) which provided that a "rail infrastructure owner" must not close railway line unless authorised by Act of Parliament - no such Act at time of proceedings below or on appeal - appellant appealed against trial judge's declaration that assets had "vested by or under" Act and appellant had become a "rail infrastructure owner" - first respondent cross-appealed against trial judge's finding that land transfer did not constitute closure of a railway line and RailCorp had not "otherwise disposed of" under s99A - held: Ministerial direction to RailCorp under s3B required it to sell assets but did not effect a transfer to or vesting of assets in appellant - assets vested in appellant pursuant to Asset Sale Agreement - assets did not "vest" in appellant "by or under" Act - appellant was not a "rail infrastructure owner" - appeal allowed - cross-appeal dismissed.

[Hunter](#)

[From Benchmark Thursday, 12 November 2015]

JM & PM Holdings Pty Ltd v Snap-on Tools (Australia) Pty Ltd [2015] NSWCA 347

Court of Appeal of New South Wales

Macfarlan & Leeming JJA; Emmett AJA

Contract - franchise agreement - first appellant franchisee entered franchise agreement with respondent franchisor which gave franchisee right to operate a "Snap-on" franchise - franchisee fell into arrears - agreement terminated - franchisor sued franchisee and second appellant director and shareholder of franchisee for recovery of debt - director sued on a guarantee - franchisor obtained judgment against appellants - appellants had cross-claimed based on contraventions of ss52 & 51AD *Trade Practices Act 1974* (Cth) in relation to "monthly cash flow projection" spreadsheet (document) given to director before entry into agreement - primary judge found aspects of document misleading but found director did not rely on it when entering into agreement - appellants challenged dismissal of cross-claim - held: no appellable error demonstrated in primary judge's findings that document not relied on in decision to enter agreement - appeal dismissed.

[JM & PM Holdings](#)

[From Benchmark Friday, 13 November 2015]

Alqudsi v Commonwealth of Australia; Alqudsi v R [2015] NSWCA 351

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Court of Appeal of New South Wales

Basten & Leeming JJA; McCallum J

Constitutional law - applicant charged with offences under s7(1)(e) *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) alleging performance of services for another named individual with intention of supporting or promoting that person's entry into Syria with intent to engage in armed hostilities - applicant challenged constitutional validity of provisions - Commonwealth provisions contended provisions validly enacted pursuant to 51(xxix) of the Constitution being "laws for the peace, order, and good government of the Commonwealth with respect to ... external affairs". - whether power to legislate with respect to external affairs sustained s7(1)(e) of the Act - held: primary judge correct to conclude s7(1)(e) in its application to s6(1)(a) read with s6(3)(aa) was law with respect to geographically external affairs because it criminalised conduct intended to support or promote persons entering foreign countries with hostile intent - appeal dismissed. .

[Alqudsi](#)

[From Benchmark Wednesday, 18 November 2015]

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2015] NSWCA 349

Court of Appeal of New South Wales

Beazley P; Macfarlan & Leeming JJA

Aboriginal land rights - appellant lodged claim in respect of two adjacent parcels of Crown land pursuant to s36 *Aboriginal Land Rights Act 1983* (NSW) - claimed land subject to three dedications made under predecessors of *Crown Lands Act 1989* (NSW) - Minister rejected appellant's claim on basis land lawfully used and occupied by Corrective Services NSW (CSNSW) - primary judge rejected appeal - held: ground of appeal in relation to evidential burden and erroneous findings of fact failed - primary judge correct in approach to assessing whether there was occupation in fact - primary judge's failure to address buildings erected on claimed land individually when that submission not raised at trial was not an error of law - s2 *New South Wales Constitution Act 1855* (18 & 19 Vict c 54) did entail statutory authorisation required in order for occupation of Crown land to be lawful and did not abrogate Crown prerogative power - appeal dismissed.

[New South Wales Aboriginal Land Council](#)

[From Benchmark Wednesday, 18 November 2015]

Regional Development Australia Murraylands and Riverland Inc v Smith [2015] SASCFC 160

Full Court of the Supreme Court of South Australia

Gray, Sulan & Nicholson JJ

Contract - employment dispute - primary judge found respondent entitled to damages following repudiation of his fixed term employment contract as employer's CEO - before contract due to expire employer amalgamated with board to form appellant - position of CEO abolished - respondent had sued appellant for damages on basis that liability for repudiation by employer had transferred to appellant under 22(6) *Associations Incorporation Act 1985* (SA) - appellant



contended contract had been frustrated or appellant failed to mitigate his loss - held: contract had not been frustrated - primary judge correct to find liability for damages following repudiation - respondent unreasonably failed to accept position which appellant offered and thereby failed to mitigate loss - if respondent had accepted alternate position, loss claimed and awarded by primary judge would have been eliminated - appeal allowed.

[Regional](#)

[From Benchmark Wednesday, 18 November 2015]

Meyer v Cool Chilli Pty Ltd [2015] ACTSC 336

Supreme Court of the Australian Capital Territory

Mossop AsJ

Work injury - negligence - breach of statutory duty - apportionment - plaintiff worked in IT support role for defendant employer - plaintiff working at premises of third party - while plaintiff climbing ladder to get into ceiling space it slipped from beneath her and she injured herself - plaintiff sued employer in negligence - employer issued third-party notice against third party seeking contribution or indemnity - ss21 & 168 *Civil Law (Wrongs) Act 2002* (ACT) - s24 *Scaffolding and Lifts Act 1912* (ACT) - *Workers Compensation Act 1951* (ACT) - ss6, 7, 73 & 80 *Scaffolding and Lifts Regulation 1950* (ACT) - held: employer breached duty of care to plaintiff and was liable for damage caused by accident - no contributory negligence - third party claim failed insofar as relied on allegation of negligence - work being carried out was building work under *Scaffolding and Lifts Act* - both third party and employer breached s73 *Scaffolding and Lifts Act* when they carried out work in ceiling space - employer breached s80(7) *Scaffolding and Lifts Act* - appropriate contribution from third party was 25% - judgment for plaintiff against employer - judgment for employer against third party.

[Meyer](#)

[From Benchmark Friday, 13 November 2015]



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The Enkindled Spring

BY D. H. LAWRENCE

This spring as it comes bursts up in bonfires green,
Wild puffing of emerald trees, and flame-filled bushes,
Thorn-blossom lifting in wreaths of smoke between
Where the wood fumes up and the watery, flickering rushes.

I am amazed at this spring, this conflagration
Of green fires lit on the soil of the earth, this blaze
Of growing, and sparks that puff in wild gyration,
Faces of people streaming across my gaze.

And I, what fountain of fire am I among
This leaping combustion of spring? My spirit is tossed
About like a shadow buffeted in the throng
Of flames, a shadow that's gone astray, and is lost.

[D. H. LAWRENCE](#)

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