

Friday, 21 June 2019

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

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### Executive Summary (1 minute read)

**Mitolo Wines Aust Pty Ltd v Vito Mitolo & Son Pty Ltd (FCA)** - trade mark - consumer law - passing off - estoppel - trade mark infringements established - contraventions of Australian Consumer law established - passing off established - cross-claim dismissed

**Vito Mitolo & Son Pty Ltd v Mitolo Wines Aust Pty Ltd (FCA)** - trade mark - judicial review - applicant granted extension of time to seek review of decision of Registrar of Trade Marks' delegate

**Stamford Property Services Pty Ltd v Mulpha Australia Ltd (NSWCA)** - environment and planning - heritage - statutory construction - proposed development - appeal against finding that approval was required under Pt 4 Div 3 Subdiv 1 *Heritage Act 1977* (NSW) - "land" - appeal allowed

**Armand-Iskak v Attorney-General of New South Wales (NSWCA)** - administrative law - criminal law - 'attempting to choke with intent to commit an indictable offence' - applicant, under s78 *Crimes (Appeal and Review) Act 2001* (NSW), sought 'inquiry into his conviction and sentence' - Bellew J dismissed application - applicant sought judicial review - summons dismissed

**Makaroff v Nepean Blue Mountains Local Health (NSWSC)** - medical negligence - plaintiff suffered shoulder injury when bitten by horse - general practitioner and hospital not liable - judgment for defendants

**PPK Willoughby Pty Ltd v Baird (NSWSC)** - evidence - negligence - misleading and deceptive

conduct - s5D(3) *Civil Liability Act 2002* (NSW) did not preclude non-party's evidence in support of misleading and deceptive conduct claim - evidence admitted

## Summaries With Link (Five Minute Read)

### **Mitolo Wines Aust Pty Ltd v Vito Mitolo & Son Pty Ltd [2019] FCA 902**

Federal Court of Australia

Besanko J

Trade mark - consumer law - passing off - estoppel - applicants sought relief concerning trade mark infringements, contraventions of Australian Consumer Law and passing off - respondents cross-claimed, alleging and contravention of Australian Consumer Law - ss18 & 29(1)(h) Australian Consumer Law - s120(1) *Trade Marks Act 1995* (Cth) (Trade Marks Act) - 'good faith' - whether respondent 'used its name in good faith' - whether respondents could rely on 'statutory exception' in s122(1)(a)(i) Trade Marks Act - whether applicants estopped from claiming against respondents - held: trade mark infringements established - contraventions of Australian Consumer Law established - passing off established - cross-claim dismissed - judgment for applicants.

[Mitolo](#)

[From Benchmark Tuesday, 18 June 2019]

### **Vito Mitolo & Son Pty Ltd v Mitolo Wines Aust Pty Ltd [2019] FCA 903**

Federal Court of Australia

Besanko J

Trade mark - judicial review - Registrar of Trade Marks' delegate refused applicant's request for 'extensions of time to file evidence in support of a Notice of Intention to Oppose' Australian Trade Marks Office proceedings - applicant sought extension of time to seek judicial review of delegate's decision - delay - explanation for delay - prejudice - 'merits of the substantive application' - held: extension of time granted.

[Vito](#)

[From Benchmark Tuesday, 18 June 2019]

### **Stamford Property Services Pty Ltd v Mulpha Australia Ltd [2019] NSWCA 141**

Court of Appeal of New South Wales

Leeming & McCallum JJA; Emmett AJA

Environment and planning - heritage - appellant owned land (parcel) - appeal concerned 'proposed development' on parcel - one building presently on parcel was 'former Health Department Building' (building) - appeal concerned question whether building's reuse, and residential tower's construction adjacent to building, required approval under Pt 4 Div 3 Subdiv 1 *Heritage Act 1977* (NSW) (Heritage Act) - primary judge found approval required - statutory construction - prohibition contained in s57(1)(e) Heritage Act - whether erroneous finding concerning determination of 'extent of land' which was within "land" under s57(1)(e) Heritage

# Benchmark

Act - "relevant nexus" - whether erroneous failure to find "land" meant land which building occupied - whether prohibition applied to 'whole cadastral lot' - held: appeal allowed.

[View Decision](#)

[From Benchmark Thursday, 20 June 2019]

## **Armand-Iskak v Attorney-General of New South Wales [2019] NSWCA 145**

Court of Appeal of New South Wales

Basten, Macfarlan & White JJA

Administrative law - criminal law - applicant convicted of 'attempting to choke with intent to commit an indictable offence, namely indecent assault' - applicant sentenced to 9 years and 4 months' in prison with 7-year non-parole period - Court of Criminal Appeal refused applicant leave to appeal against conviction and sentence - applicant, under s78 *Crimes (Appeal and Review) Act 2001* (NSW), sought 'inquiry into his conviction and sentence' - Bellew J dismissed application - applicant sought judicial review of Bellew J's decision - held: no error in Bellew J's decision - summons dismissed.

[View Decision](#)

[From Benchmark Thursday, 20 June 2019]

## **Makaroff v Nepean Blue Mountains Local Health District [2019] NSWSC 715**

Supreme Court of New South Wales

Harrison AsJ

Medical negligence - plaintiff suffered shoulder injury when bitten by horse - plaintiff claimed in negligence against defendants in relation to alleged 'failure to conduct appropriate tests and provide adequate advice' - first defendant was hospital - second defendant was general practitioner - 'obvious risk' - 'dangerous recreational activity' - 'standard accepted by peer professional opinion' - whether claim against second defendant statute-barred - contributory negligence - causation - credibility - damages - *Civil Liability Act 2002* (NSW) (Civil Liability Act) - *Limitation Act 1969* (NSW) - held: defendants established defences under s50 Civil Liability Act - claims against defendants failed - judgment for defendants.

[View Decision](#)

[From Benchmark Tuesday, 18 June 2019]

## **PPK Willoughby Pty Ltd v Baird [2019] NSWSC 705**

Supreme Court of New South Wales

Harrison J

Evidence - plaintiff sued defendants in negligence and for misleading and deceptive conduct - issue was whether s5D(3) *Civil Liability Act 2002* (NSW) (Civil Liability Act) precluded evidence of non-party in support of misleading and deceptive conduct claim - limit of exclusion in s5D(3) Civil Liability Act - held: evidence not precluded by s5D(3) Civil Liability Act - evidence admitted.

[View Decision](#)

[From Benchmark Wednesday, 19 June 2019]



# Benchmark

## **The Snow-Storm**

**By:** Ralph Waldo Emerson

Announced by all the trumpets of the sky,  
Arrives the snow, and, driving o'er the fields,  
Seems nowhere to alight: the whited air  
Hides hills and woods, the river, and the heaven,  
And veils the farm-house at the garden's end.  
The sled and traveller stopped, the courier's feet  
Delayed, all friends shut out, the housemates sit  
Around the radiant fireplace, enclosed  
In a tumultuous privacy of storm.

Come see the north wind's masonry.  
Out of an unseen quarry evermore  
Furnished with tile, the fierce artificer  
Curves his white bastions with projected roof  
Round every windward stake, or tree, or door.  
Speeding, the myriad-handed, his wild work  
So fanciful, so savage, nought cares he  
For number or proportion. Mockingly,  
On coop or kennel he hangs Parian wreaths;  
A swan-like form invests the hidden thorn;  
Fills up the farmer's lane from wall to wall,  
Maugre the farmer's sighs; and, at the gate,  
A tapering turret overtops the work.  
And when his hours are numbered, and the world  
Is all his own, retiring, as he were not,  
Leaves, when the sun appears, astonished Art  
To mimic in slow structures, stone by stone,  
Built in an age, the mad wind's night-work,  
The frolic architecture of the snow.

[https://en.wikipedia.org/wiki/Ralph\\_Waldo\\_Emerson](https://en.wikipedia.org/wiki/Ralph_Waldo_Emerson)

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