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Benchmark

Friday, 30 October 2020

Weekly Construction Law Review

Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

Victoria Power Networks Pty Ltd v Commissioner of Taxation (FCAFC) - taxation - income tax - appeals against disallowance of objection to income tax assessments - appeals allowed in part

Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation (FCA) - corporations - *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) - 'admitted contraventions' - $1.3 billion pecuniary penalty appropriate - declarations and orders made

Minister for the Environment v ACN 089 171 415 Pty Ltd (FCA) - environmental law - admitted contravention of s13(1)(a)(iii) *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) - penalty of $500,000 imposed - declarations and orders made as sought by parties

Coffs Harbour City Council v Polglase (NSWCA) - negligence - 5 year old plaintiff injured in fall from jetty - Council liable - appeal dismissed - leave to cross-appeal refused - inappropriate to resolve notice of contention

Arcidiacono v The Owners – Strata Plan No 17719; Arcidiacono v The Owners – Strata Plan No 61233 (NSWCA) - easements - respondents had 'present entitlement' to 'easements by prescription' over two land parcels - leave to appeal granted - appeal dismissed

Gregg v R (NSWCCA) - criminal law - corporations - appellant convicted of offences contrary to s1307(1) *Corporations Act 2001* (Cth) - appeal against conviction allowed - verdicts quashed -

appellant acquitted

Rathswohl v Court (NSWSC) - evidence - wills and estates - objection to tender of mobile phone recording made without testator's consent - recording admitted

Commissioner of Police v Barbaro (QCA) - warrants - legal professional privilege - criminal law - respondent's entitlement 'to protect privileged information' was 'reasonable excuse' for refusal to give information to police - appeal dismissed

Edwards v Virgin Blue International Pty Ltd (SASCFC) - mental harm - workers compensation - claim arising from death of appellant's son - magistrate summarily dismissed claim - s58AA *Workers Rehabilitation and Compensation Act 1986* (SA) - appeal allowed

Nikolich v Webb (WASCA) - negligence - appellant injured following slip on 'wet bathroom floor' at 'respondents' short?stay accommodation rental property' - respondents not liable - appeal dismissed

Humich Nominees Pty Ltd v Commissioner of Main Roads (WASCA) - planning and environment - judicial review - rejection of 'crossover application' - appeal dismissed

Summaries With Link (Five Minute Read)

Victoria Power Networks Pty Ltd v Commissioner of Taxation [2020] FCAFC 169
Full Court of the Federal Court of Australia
Logan, Colvin & Thawley JJ
Taxation - companies ('Powercor' and 'Citipower') provided 'electricity distribution services' - Powercor and CitiPower were 'subsidiary members of a consolidated tax group' of which appellant was 'head company' - appellant objected to income tax assessments insofar as they concerned businesses which Powercor and CitiPower conducted - objections disallowed - primary judge found for Commissioner on appeal - appellant appealed - appeal concerned 'proper treatment' of dealings concerning 'uneconomic connections' - s21A *Income Tax Assessment Act 1936* (Cth) - held: appeals allowed in part.
Victoria
[From Benchmark Monday, 26 October 2020]

Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation [2020] FCA 1538
Federal Court of Australia
Beach J
Corporations - applicant sought declarations respondent contravened provisions of *Anti-Money*

Laundering and Counter-Terrorism Financing Act 2006 (Cth) and order that respondent pay $1.3 billion pecuniary penalty to Commonwealth - parties provided 'statement of agreed facts and admissions' and 'joint written submission' - s191 *Evidence Act 1995* (Cth) - *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No.1)* (Cth) - 'admitted contraventions' - general and specific deterrence - whether $1.3 billion pecuniary penalty appropriate - held: $1.3 billion pecuniary penalty appropriate - declarations and orders made.
Chief Executive Officer
[From Benchmark Wednesday, 28 October 2020]

Minister for the Environment v ACN 089 171 415 Pty Ltd [2020] FCA 1557
Federal Court of Australia
Mortimer J
Environmental law - respondent admitted contravention of s13(1)(a)(iii) *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) - 'agreed statement of facts' - 'amended joint submissions' - whether contravention was proved - whether appropriate to make 'declarations and orders' which parties proposed - held: contravention was proved - penalty of $500,000 imposed - declarations and orders made as sought by parties.
Minister for the Environment
[From Benchmark Friday, 30 October 2020]

Coffs Harbour City Council v Polglase [2020] NSWCA 265
Court of Appeal of New South Wales
Basten, Macfarlan & Leeming JJA
Negligence - 5 year old plaintiff injured in fall from jetty - plaintiff sued Council, Trust, State and plaintiff's grandparents - primary judge found Council and Trust liable - other claims were dismissed - Council appealed - plaintiff sought to cross-appeal - State filed notice of contention - occupier's liability - whether Council or Trust breached duty of care - whether 'risk warning' meant that 'no duty of care' owed to plaintiff - whether State liable in light of State's role in restoration of jetty and as 'former occupier' - if State 'otherwise liable', whether Council established breach by State before 2002 'was causally connected' with damage under ss5D(1) & (2) *Civil Liability Act 2002* (NSW) (Civil Liability Act) - whether State, if liable, entitled to defence under s42 Civil Liability Act - whether grandparents owed duty of care to plaintiff - if grandparents owed duty whether they breached duty causing injury to plaintiff - held: appeal dismissed - leave to cross-appeal refused - inappropriate to resolve notice of contention
View Decision
[From Benchmark Monday, 26 October 2020]

Arcidiacono v The Owners â€“ Strata Plan No 17719; Arcidiacono v The Owners â€“ Strata Plan No 61233 [2020] NSWCA 269
Court of Appeal of New South Wales
Macfarlan, White & McCallum JJA
Easements - respondents owned properties which adjoined 'two small parcels of land' (parcels)

- primary judge found respondents had 'present entitlement to 'easements by prescription' over parcels - primary judge held that if respondents had not had present entitlement to the easements, she would have imposed easements under s88K *Conveyancing Act 1919* (NSW) - appellants owned 'servient tenements' and 'another two adjacent allotments of land' - appellant sought to appeal - appellants contended that requirements for establishing easements by prescription were unsatisfied - appellants also contended requirements for easements' imposition under s88K Conveyancing Act were unsatisfied - held: leave to appeal granted - appeal dismissed.
View Decision
[From Benchmark Friday, 30 October 2020]

Gregg v R [2020] NSWCCA 245
Court of Criminal Appeal of New South Wales
Bathurst CJ, Hoeben CJ at CL & Leeming JA
Criminal law - corporations - appellant convicted of offences contrary to s1307(1) *Corporations Act 2001* (Cth) - appellant sentenced to 12 months in prison on 'count 1' and 2 years in prison 'count 2', 'to be served concurrently by way of an Intensive Correction Order' - appellant appealed against conviction and sentence - whether verdicts unreasonable - whether primary judge erred in admitting evidence 'on the viability of centralised procurement of steel' - whether primary judge erred in rejection of tender by appellant of 'Global Business Overview presentation' - whether primary judge erred in directions to jury - whether miscarriage of justice arising from 'closing address' of prosecutor - whether miscarriage of justice arising from 'summing up' - held: appeal allowed - verdicts quashed - appellant acquitted.
View Decision
[From Benchmark Thursday, 29 October 2020]

Rathswohl v Court [2020] NSWSC 1490
Supreme Court of New South Wales
Rees J
Evidence - wills and estates - succession - plaintiff, under s59 *Succession Act 2006* (NSW), sought provision from estate of deceased father - plaintiff tendered recording of conversation between other child in family (Mrs Davies) and father without 'knowledge or consent' of father - Ms Davies made recording on her mobile phone - objection taken to tender on basis recording was 'improperly or illegally obtained' - whether conversation's recording was 'reasonably necessary for the protection of Mrs Davies' 'lawful interests' under s7(3)(b)(i) *Surveillance Devices Act 2007* (NSW) - â€œreasonably necessary for the protection of the lawful interestsâ€ - held: recording admitted without consent.
View Decision
[From Benchmark Wednesday, 28 October 2020]

Commissioner of Police v Barbaro [2020] QCA 230
Court of Appeal of Queensland

Sofronoff P; Philippides & Mullins JJA
Warrants - legal professional privilege - criminal law - police executed warrant at premises - proceedings arising from respondent's refusal to give PIN to police officer for purpose of unlocking respondent's mobile phone - respondent charged with refusing 'without a reasonable excuse' and was charged under s205A *Criminal Code* (Qld) - respondent claimed phone contained 'privileged communications' between him and his solicitor - respondent claimed that 'a right to protect privileged information' was a reasonable excuse for his refusal - Magistrate found respondent guilty - respondent appealed - primary judge found in respondent's favour - appellant appealed - held: respondent 'entitled to prevent police' from reading respondent's 'privileged material' - respondent's entitlement was a 'reasonable excuse' - appeal dismissed.
Commissioner
[From Benchmark Friday, 30 October 2020]

Edwards v Virgin Blue International Pty Ltd [2020] SASCFC 98
Full Court of the Supreme Court of South Australia
Kourakis CJ; Stanley & Doyle JJ
Mental harm - workers compensation - appellant brought proceedings seeking damages for 'pure mental harm' allegedly suffered when she was informed of son's death in Thailand - appellant alleged son died in course of employment with respondent and that death was result of respondent's breach of its duty of care - appellant contended her 'nervous shock injury' was also the result of respondent's breach of its duty of care - appellant had brought successful separate compensation claim for son's death under s25 *Workers Compensation Act 1987* (NSW) - magistrate summarily dismissed claim - whether s58AA *Workers Rehabilitation and Compensation Act 1986* (SA) extended to nervous shock damages claim by appellant - held: appeal allowed.
Edwards
[From Benchmark Wednesday, 28 October 2020]

Nikolich v Webb [2020] WASCA 169
Court of Appeal of Western Australia
Murphy, Beech & Vaughan JJA
Negligence - appellant injured 'after slipping on a wet bathroom floor at' 'respondents' short?stay accommodation rental property' - appellant sued respondents - respondents admitted they owed duty of care but denied it was breached - appellant appealed against primary judge's dismissal of claim - 'obvious risk' - whether primary judge misconstrued s5O *Civil Liability Act 2002* (WA) (CLA) - whether primary judge erroneously found that 'relevant risk' was 'obvious risk' for purpose of s5O CLA - whether erroneous findings by primary judge concerning 'other pleaded allegations of negligence' - 'volenti non fit injuria' - 'reasonable precautions' - held: appeal dismissed.
Nikolich
[From Benchmark Tuesday, 27 October 2020]

Humich Nominees Pty Ltd v Commissioner of Main Roads [2020] WASCA 175
Court of Appeal of Western Australia
Murphy, Beech & Vaughan JJA
Planning and environment - appellants owned land (property) - appellants conducted 'liquor store and general store' from land - appellants sought to 'construct two crossovers' from property to road - second respondent referred 'crossover application' to first respondent - first respondent did not approve application on basis respondent 'did not support full movement access; - applicants sought judicial review - primary judge dismissed claim - appellants appealed - whether first respondent's approval was required - whether first respondent's 'exercise of discretion' constrained by development approval's 'grant and terms' - whether first respondent's rejection of crossover application inconsistent with 'earlier position' of first respondent concerning development application - whether first respondent's rejection of crossover application lacked 'evident or intelligible justification' - whether first respondent's rejection of crossover application 'legally unreasonable' - held: appeal dismissed.
Humich I B C G W WI WB WC WG WENVL)
[From Benchmark Thursday, 29 October 2020]

The Grasshopper
By: Richard Lovelace

O THOU that swing'st upon the waving hair
Of some well-fillèd oaten beard,
Drunk every night with a delicious tear
Dropt thee from heaven, where thou wert rear'd!

The joys of earth and air are thine entire,
That with thy feet and wings dost hop and fly;
And when thy poppy works, thou dost retire
To thy carved acorn-bed to lie.

Up with the day, the Sun thou welcom'st then,
Sport'st in the gilt plaits of his beams,
And all these merry days mak'st merry men,
Thyself, and melancholy streams.

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

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