

Friday, 31 July 2020

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

James Cook University v Ridd (FCAFC) - industrial law - termination of respondent's employment with appellant did not contravene s50 *Fair Work Act 2009* (Cth) - appeal allowed

Hughes trading as Beesley and Hughes Lawyers v Hill (FCAFC) - human rights - sexual harassment - trial judge found appellant sexually harassed respondent - appellant ordered to pay respondent general damages and aggravated damages - appeal dismissed

Ceramiche Caesar S.p.A v Caesarstone Ltd (FCAFC) - trade mark - three proceedings - 'deceptively similar' - 'honest concurrent use' - 'authorised use' - 'quality control' - 'control on a wider basis' - appeals allowed

Gooley v NSW Rural Assistance Authority (NSWCA) - contract - banking - dismissal of second cross-claim against bank - appeal dismissed

Padraic Gibson (on behalf of the Dungay family) v Commissioner of Police (NSW Police Force) (NSWCA) - public assembly - respondent granted 'prohibition order' pursuant to s25(1) *Summary Offences Act 1988* (NSW) - jurisdiction - appeal dismissed

Cottle v NSW Commissioner of Police; Police Association of New South Wales v Commissioner of Police (NSW Police Force) (NSWCA) - judicial review - Industrial Relations Commission had jurisdiction to deal with applicant's claim for relief under s84 *Industrial Relations Act 1996* (NSW) - appeal allowed

Commissioner of Police (NSW) v Gibson (NSWSC) - public assembly - plaintiff sought

'prohibition order' pursuant to s25(1) *Summary Offences Act 1988* (NSW) - application granted

New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc (QSC) - corporations - winding up - applicant sought to wind up respondent on basis of insolvency - respondent sought stay or adjournment of application until after appeal's hearing in High Court - winding up application adjourned

Summaries With Link (Five Minute Read)

James Cook University v Ridd [2020] FCAFC 123

Full Court of the Federal Court of Australia

Griffiths, Rangiah & SC Derrington JJ

Industrial law - Federal Circuit Court declared that appellant, in making findings against respondent of breach of 'Code of Conduct; giving respondent 'speech directions, 'confidentiality directions', 'no-satire direction', censures, and terminating respondent's employment in breach of cl14 of 'Enterprise Agreement, contravened s50 *Fair Work Act 2009* (Cth) (FWA) - whether primary judge erred in construing Enterprise Agreement - whether termination of respondent's employment with appellant contravened s50 FWA - whether to dismiss proceeding - whether there should be 'further hearing' - held: appeal allowed - second further amended application dismissed.

[James Cook](#)

[From Benchmark Monday, 27 July 2020]

Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126

Full Court of the Federal Court of Australia

Collier, Reeves & Perram JJ

Human rights - sexual harassment - respondent claimed appellant sexually harassed her - trial judge found sexual harassment established - trial judge ordered that appellant pay respondent \$120,000 general damages and \$50,000 aggravated damages - appellant appealed - appellant contended evidence did not support conclusion he sexually harassed respondent - appellant also contended that general damages of \$120,000 was manifestly excessive and that there was 'no basis for' aggravated damages - ss3 & 46PO *Australian Human Rights Commission Act 1986* (Cth) - ss28A & 28B *Sex Discrimination Act 1984* (Cth) - whether erroneous failure to consider authority preceding decision in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 - whether blurring of distinction between aggravated damages and 'punitive or exemplary damages' - held: appeal dismissed.

[Hughes](#)

[From Benchmark Tuesday, 28 July 2020]

Ceramiche Caesar S.p.A v Caesarstone Ltd [2020] FCAFC 124

Full Court of the Federal Court of Australia

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Nicholas, Burley & Thawley JJ

Trade mark - three proceedings - in first proceeding 'Ceramiche Caesar' sought to appeal against orders which allowed application of 'Caeserstone' for 'Caesarstone Goods Word Mark' 'to proceed to registration' - in second proceeding Ceramiche Caesar sought to appeal against orders which allowed application of Caesarstone for 'Caesarstone Device Mark' 'to proceed to registration' - in third proceeding Ceramiche Caesar appealed against orders which allowed application of Caesarstone for 'Caesarstone Services Word Mark' to remain registered - 'deceptively similar' - 'honest concurrent use' - 'authorised use' - 'quality control' - 'control on a wider basis' - "because of other circumstances" - ss8, 44, 88, 89 & 195(2) *Trade Marks Act 1995* (Cth) held: appeals allowed.

[Ceramiche](#)

[From Benchmark Thursday, 30 July 2020]

Gooley v NSW Rural Assistance Authority [2020] NSWCA 156

Court of Appeal of New South Wales

Macfarlan, Meagher & White JJA

Contract - banking - appellants operated 'farming business in partnership' - appellants transferred 'banking facilities' to 'BankWest' - BankWest's 'assets and liabilities' transferred to Commonwealth Bank of Australia ('CBA') - appellants commenced proceedings against respondent - appellant sought declaration respondent 'acted wrongfully in issuing a certificate under' s11 *Farm Debt Mediation Act 1994* (NSW) - CBA filed cross-claim for judgment for outstanding amount and possession of properties - appellants, by second cross-claim, claimed 'damages and compensation' - appellants claimed Bankwest and subsequently CBA breached contract and contravened 'federal consumer and credit laws' - primary judge dismissed second cross-claim - whether making of loan involved 'breach of contract or actionable misconduct' - whether Fixed Interest Rate Loan was varied - conduct - ss12CB & 12DA *Australian Securities and Investments Commission Act 2001* (Cth) - Code of Banking Practice - National Credit Code - Sheld: appeal dismissed.

[View Decision](#)

[From Benchmark Tuesday, 28 July 2020]

Padraic Gibson (on behalf of the Dungay family) v Commissioner of Police (NSW Police Force) [2020] NSWCA 160

Court of Appeal of New South Wales

Bathurst CJ; Bell P; Macfarlan JA

Public assembly - administrative law - respondent sought, pursuant to s25(1) *Summary Offences Act 1988* (NSW), 'prohibition order' in respect of 'public assembly and procession' - protest's 'stated purpose' was "To protest against Aboriginal deaths in custody and demand justice for David Dungay Jnr" - prohibition order granted - appellant appealed - jurisdiction - procedural fairness - whether non-compliance with procedures in s25(2) *Summary Offences Act* deprived Court of jurisdiction - held: appeal dismissed.

[View Decision](#)

[From Benchmark Wednesday, 29 July 2020]

Cottle v NSW Commissioner of Police; Police Association of New South Wales v Commissioner of Police (NSW Police Force) [2020] NSWCA 159

Court of Appeal of New South Wales

Bell P; Basten & Payne JJA

Judicial review - applicant was notified of decision of Police Commissioner under s72A *Police Act 1990* (NSW) to "cause [him] to be retired" - applicant sought relief under s84 *Industrial Relations Act 1996* (NSW) - Police Commissioner sought declaration that Industrial Relations Commission did not have jurisdiction to deal with applicant's claim - Murphy C acceded to motion - Full Bench upheld appeal, holding Industrial Relations Commission had jurisdiction to determine applicant's claim - Police Commissioner sought judicial review - primary judge quashed Full Bench's decision - applicant sought to appeal - statutory construction - held: Industrial Relations Commission had jurisdiction to deal with applicant's claim - appeal allowed.

[View Decision](#)

[From Benchmark Wednesday, 29 July 2020]

Commissioner of Police (NSW) v Gibson [2020] NSWSC 953

Supreme Court of New South Wales

Ierace J

Public assembly - administrative law - plaintiff, pursuant to s25(1) *Summary Offences Act 1988* (NSW), sought 'prohibition order' in of 'public assembly and procession' - protest's 'stated purpose' was "To protest against Aboriginal deaths in custody and demand justice for David Dungay Jnr" - COVID-19 - Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020 - *Public Health Act 2010* (NSW) - 'constitutional bar' - 'Implied freedom of political communication jurisdiction' - 'right to free speech' - 'balancing of the competing concerns' - held: application granted.

[View Decision](#)

[From Benchmark Tuesday, 28 July 2020]

New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc [2020] QSC 212

Supreme Court of Queensland

Davis J

Corporations - winding up - applicant sought to wind up respondent incorporated association on basis of insolvency - debt which gave applicant standing to make application was a costs order which had been made in litigation between parties - respondent had appealed judgment in litigation to High Court of Australia - special leave to appeal had been granted - respondent sought stay or adjournment of application until after appeal's hearing in High Court - whether 'discretionary considerations' in favour of making winding up order - respondent's interest in prosecution of appeal - whether appeal would be practically frustrated by winding up order - applicant's interest to 'avoid incurring ongoing costs' in defence of appeal where respondent would likely be unable to meet costs order if unsuccessful - possibility of High Court



ordering security for costs - prejudice to respondent's interest if adjournment refused - *Mineral Resources Act 1989* (Qld) - *Associations Incorporation Act 1981* (Qld) - held: application for winding up of respondent adjourned.

[New Acland](#)

[From Benchmark Thursday, 30 July 2020]



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About Ben Adhem

By: Leigh Hunt

Abou Ben Adhem (may his tribe increase!)

Awoke one night from a deep dream of peace,

And saw, within the moonlight in his room,

Making it rich, and like a lily in bloom,

An angel writing in a book of gold:—

Exceeding peace had made Ben Adhem bold,

And to the presence in the room he said,

"What writest thou?"—The vision raised its head,

And with a look made of all sweet accord,

Answered, "The names of those who love the Lord."

"And is mine one?" said Abou. "Nay, not so,"

Replied the angel. Abou spoke more low,

But cheerly still; and said, "I pray thee, then,

Write me as one that loves his fellow men."

The angel wrote, and vanished. The next night

It came again with a great wakening light,

And showed the names whom love of God had blest,

And lo! Ben Adhem's name led all the rest.

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

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