

Friday, 9 November 2018

## Weekly Employment Law Selected Bulletins covering Employment

 Follow @Benchmark Legal  
**Search Engine**

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

### Executive Summary (1 minute read)

**Altintas v O'Dea Lawyers (No 2)** (FCAFC) - costs - unreasonable conduct by respondent did not cause appellant to incur 'additional costs' - costs application by appellant failed

**Commonwealth Steel Company Limited v BHP Billiton Marine & General Insurance Limited** (NSWCA) - insurance - Employers' Indemnity Policy in Respect of Common Law Liability - respondent not liable to indemnify appellant for losses incurred by payment of damages to former employee - appeal dismissed

**Hearne v Spamil Discretionary Trust** (NSWSC) - judicial review - workers compensation - whole person impairment - jurisdictional error by Workers Compensation Commission Appeal Panel established - decision quashed

**Elsworthy v Forgacs Engineering Pty Ltd** (NSWSC) - judicial review - workers compensation - whole person impairment - no error in decision of Medical Appeal Panel - summons dismissed

**Muscat v Magistrates' Court of Victoria** (VSC) - judgments and orders - occupational health and safety - dismissal of charge under *Occupational Health and Safety Act 2004* (Vic) - irrelevant consideration - appeal allowed - matter remitted

### Summaries With Link (Five Minute Read)

**[Altintas v O'Dea Lawyers \(No 2\) \[2018\] FCAFC 187](#)**  
Full Court of the Federal Court of Australia

White, Perry & Charlesworth JJ

Costs - proceedings concerned question reserved for Court's consideration by South Australian Employment Tribunal - Court found it lacked jurisdiction to answer reserved question - appellant sought that respondent pay some costs - appellant's counsel submitted order appropriate 'even taking into account' s570 *Fair Work Act 2009* (Cth) - respondent legal practitioner opposed costs order and made no application for costs - common ground s570 FW Act was applicable to appellant's application - whether respondent's conduct unreasonable and, if so, whether the conduct caused costs to be incurred by appellant - held: Court not satisfied that appellant incurred 'additional costs' due to respondent's unreasonable conduct - costs application failed.

[Altintas](#)

[From Benchmark Friday, 9 November 2018]

## **Commonwealth Steel Company Limited v BHP Billiton Marine & General Insurance Limited [2018] NSWCA 242**

Court of Appeal of New South Wales

Beazley ACJ; Meagher & White JJA

Insurance - appellant's former employee exposed to asbestos in course of employment - former employee commenced Dust Diseases Tribunal proceedings - proceedings settled - appellant sought indemnity from respondent under contract of insurance (Employers' Indemnity Policy in Respect of Common Law Liability) for loss it incurred in paying damages to former employee - appellant claimed loss of \$466,463 less \$125,000 deductible pursuant to policy in force from 31 March 1978 to 31 March 1979 - primary judge dismissed proceedings - whether deductible of \$125,000 or \$1,000,000 limit was to be indexed according to Primary Limit Stability Clause - primary judge found "(indexed in accordance with attached Stability Clause)" referred to the \$125,000 deductible, not the "amount of the claim over and above that figure (to the upper limit of the Policy)" - appellant appealed - proper construction of policy - 'extrinsic circumstances' - held: appeal dismissed.

[View Decision](#)

[From Benchmark Friday, 9 November 2018]

## **Hearne v Spamil Discretionary Trust [2018] NSWSC 1631**

Supreme Court of New South Wales

Hamill J

Judicial review - workers compensation - whole person impairment - plaintiff was injured at work - first defendant was plaintiff's employer - plaintiff sought judicial review of decision of Appeal Panel of Workers Compensation Commission of New South Wales - whether Appeal Panel erred in failure to consider whether plaintiff had 'reached maximum medical improvement', in failure to give reasons, and in manner in which it assessed plaintiff's injury at 7% whole person impairment (WPI) - held: Appeal Panel failed to consider whether plaintiff had reached maximum medical improvement, or failed to provide reasons for 'implicit conclusion' that she had reached maximum medical improvement - it was a pre-requisite to assessment of plaintiff's

WPI that Appeal Panel consider whether plaintiff had reached maximum medical improvement - jurisdictional error established - decision quashed - matter to be remitted to differently constituted Appeal Panel.

[View Decision](#)

[From Benchmark Friday, 9 November 2018]

## **Elsworthy v Forgacs Engineering Pty Ltd [2018] NSWSC 1638**

Supreme Court of New South Wales

Fagan J

Judicial review - workers compensation - whole person impairment - plaintiff boilermaker employed by first defendant claimed he injured wrist in trip and fall at work and had developed Complex Regional Pain Syndrome (CRPS) as result of wrist injury - approved medical specialist assessed whole person impairment at 0% due to not being satisfied criteria for CRPS were met - Medical Appeal Panel found no error in medical specialist's assessment - plaintiff sought judicial review - *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - whether 'incorrect criteria' applied - whether Panel should have clinically examined plaintiff - whether held: summons dismissed.

[View Decision](#)

[From Benchmark Friday, 9 November 2018]

## **Muscat v Magistrates' Court of Victoria [2018] VSC 650**

Supreme Court of Victoria

Richards J

Judgments and orders - occupational health and safety - appellant inspector under *Occupational Health and Safety Act 2004* (Vic) (OHS Act) charged Southern Alpine Resort Management Board (Board) with two offences arising from fallen tree incident - both charges concerned Board's employees - Magistrate dismissed first charge as he was not satisfied all elements of offence proven - Magistrate dismissed second charge on basis s23 OHS Act did not apply to independent contractors' employees - appellant appealed against dismissal of second charge - statutory interpretation - relationship between ss23 & 21 OHS Act - whether second charge was 'final order' under s272 *Criminal Procedure Act 2009* (Vic) (Criminal Procedure Act) - whether s23(1) OHS Act applied to employees of employer's independent contractors - whether Magistrate had regard to irrelevant - if error established whether matter should be remitted - held: dismissal of second charge was final order under s272 Criminal Procedure Act - appeal competent. - s23(1) OHS Act applied to employees of employer's independent contractors - Magistrate took irrelevant consideration into account - second charge remitted - appeal allowed.

[Muscat](#)

[From Benchmark Friday, 9 November 2018]



# Benchmark

## **Floating Island**

**By:** Dorothy Wordsworth

Harmonious Powers with Nature work

On sky, earth, river, lake, and sea:

Sunshine and storm, whirlwind and breeze

All in one duteous task agree.

Once did I see a slip of earth,  
By throbbing waves long undermined,  
Loosed from its hold; — how no one knew  
But all might see it float, obedient to the wind.

Might see it, from the mossy shore  
Dissevered float upon the Lake,  
Float, with its crest of trees adorned  
On which the warbling birds their pastime take.

Food, shelter, safety there they find  
There berries ripen, flowerets bloom;  
There insects live their lives — and die:  
A peopled world it is; in size a tiny room.

And thus through many seasons' space  
This little Island may survive  
But Nature, though we mark her not,  
Will take away — may cease to give.

Perchance when you are wandering forth  
Upon some vacant sunny day  
Without an object, hope, or fear,  
Thither your eyes may turn — the Isle is passed away.

Buried beneath the glittering Lake!  
Its place no longer to be found,  
Yet the lost fragments shall remain,  
To fertilize some other ground.

[https://en.wikipedia.org/wiki/Dorothy\\_Wordsworth](https://en.wikipedia.org/wiki/Dorothy_Wordsworth)

[Click Here to access our Benchmark Search Engine](#)