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Benchmark

Friday, 12 July 2024

Weekly Government Review

A Weekly Bulletin listing Decisions of Superior Courts of Australia covering government

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Executive Summary (One Minute Read)

Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (The Yatala Labour Prison Case) (No 3) (FCA) - pecuniary penalties imposed against a Union and three union officers for improper conduct while exercising rights under the *Fair Work Act 2009* (Cth)

EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (NSWCA) - the *Building and Construction Industry Security of Payment Act 1999* (NSW) does not require that a payment claim be made only for "construction work"

Reimers v Medical Board of Australia (NSWCA) - Tribunal had not erred in finding that a former specialist anaesthetist who had been deregistered in 2003 should not be reinstated

Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd (VSCA) - an improvement for the purposes of land valuation under the *Valuation of Land Act 1960* (Vic) does not need to serve the current highest and best use of the land

CPB Contractors Pty Ltd and Hansen Yuncken Pty Ltd v South Australia (SASC) - no reason for costs not to follow the event after the State had successfully resisted the production of documents in a NSW arbitration on the basis of public interest immunity and parliamentary privilege

HABEAS CANEM

The scent on the breeze

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Summaries With Link (Five Minute Read)

Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (The Yatala Labour Prison Case) (No 3) [2024] FCA 732
Federal Court of Australia
O'Sullivan J
Employment law - Mossop Group Pty Ltd was engaged by South Australia as the head contractor for construction works relating to the redevelopment of the Yatala Labour Prison - three union officers attended the site and issued a notice of entry detailing suspected contraventions of the *Work Health and Safety Act 2012* (SA) and produced Federal and State entry permits - they made comments to senior employees of Mossop that were abusive, derogatory, and offensive - the Ombudsman sought declarations and pecuniary penalties for contraventions of s340 and s500 of the *Fair Work Act 2009* (Cth) against the Union and the three officers - held: two of the officers had contravened s500 of the *Fair Work Act* by acting in an improper manner whilst exercising rights in accordance with Part 3-4 of the Act - the other officer had contravened s340 by taking adverse action that consisted of threatening a representative of Mossop - the Union was knowingly involved in these contraventions - the parties agreed that the contravening conduct did not result in any stoppage of work at the site, nor any economic loss - certain incidents should be treated as one course of conduct and result in a single penalty nearing the maximum amount for one contravention - no respondent had expressed any contrition for their conduct - declarations made, Union ordered to pay a pecuniary penalty of about $214,000, and the officers ordered to pay pecuniary penalties of about $19,000, $7,000, and $8,000.
Fair Work Ombudsman
[From Benchmark Tuesday, 9 July 2024]

EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd [2024] NSWCA 162
Court of Appeal of New South Wales
Meagher JA, Basten, & Griffiths AJJA
Security of Payments - EnerMech contracted with the respondents to supply electrical works for part of the WestConnex project - EnerMech issued a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) for more than $10million - the respondents served a payments schedule stating that nothing was payable - an adjudicator found in favour of EnerMech - the respondents commenced judicial review proceedings - the primary judge quashed the adjudication - EnerMech appealed - held: in the 24 years since the Act commenced, there has been considerable judicial analysis, both of the specific issue as to the nature of a payment claim, and as to principles governing the construction of the Act - as a matter of construction, a payment claim must be for an amount of money, and the claim must assert that the amount is for work done, goods supplied or services rendered, under a construction contract - understanding the objects of the, its structure and its spare language, there was little scope for implying unstated conditions as essential to the validity of a payment claim or a payment schedule - the Act therefore does not require that a payment claim be made

only for "construction work" - under s25(4)(a)(ii) of the Act, the adjudicator's understanding of the construction contract, even if legally erroneous, cannot be challenged on a claim to enforce an adjudication certificate; nor, without more, can it be so challenged on judicial review. - whatever conditions on the entitlement of EnerMech arose from the correct reading of the contract and the Act were properly matters for the adjudicator - appeal allowed.
View Decision
[From Benchmark Friday, 12 July 2024]

Reimers v Medical Board of Australia [2024] NSWCA 164
Court of Appeal of New South Wales
Leeming & Kirk JJA, & Griffiths AJA
Professional standards - the appellant was registered as a specialist anaesthetist who was found to have self-administered opioids, including Fentanyl and Pethidine - he was deregistered from the Register of Medical Practitioners in 2003 following a decision by the NSW Medical Tribunal which him guilty of professional misconduct - in 2018, the NSW Civil and Administrative Tribunal reinstated his general registration - in 2023, he sought reinstatement of his specialist registration as an anaesthetist - the Medical Board of Australia refused this on the basis that he was not a "fit and proper person" and was "unable to practise the profession competently and safely" - the Tribunal affirmed - the appellant appealed - held: the appeal to the Court of Appeal was as of right but confined to a question of law unless the Court granted leave to extend the appeal to other grounds, and no application for such leave had been sought - the Board's opinion that the appellant was not a fit and proper person for the relevant registration entailed that he was no suitable, with the result that the application for registration must be dismissed - the Tribunal had not approached the matter in this way - however, this error was not material - it was amply open to the Tribunal to consider that the appellant, who had not practised at all for two decades and had given no explanation for that and no account of the training and supervision which he would be subject to if he were permitted to practise on some restricted basis, was unable to practise competently and safely - the question of onus of proof had not been important in this case, as the outcome would not change whether or not there were an onus of proof and irrespective of who bore that onus - however, the *Health Practitioner Regulation National Law 2009* (NSW) was deficiently drafted in several respects, including onus of proof, and the question of onus was important and likely to arise in future cases - the Court recommended that the National Law be amended to give more clarity, and so that those administering the National Law, and those affected by it, would not have to read the reasons for judgment in this case in order to understand how eligibility for registration is determined.
View Decision
[From Benchmark Friday, 12 July 2024]

Valuer-General Victoria v WSTI Properties 490 SKR Pty Ltd [2024] VSCA 157
Court of Appeal of Victoria
Emerton P, Kennedy, & Lyons JJA
Land valuation - Landene is a Queen Anne-influenced, two-storey red brick villa constructed in

1897, and is one of the few remaining fragments of the 19th century built environment on St Kilda Road, Melbourne, and surrounded by much newer commercial and residential towers - the Land is zoned 'Commercial 1' under the *Port Phillip Planning Scheme*, and is subject to a number of design and development overlays and a site-specific heritage overlay, which prevent the demolition of Landene without a permit, thus constraining the development of the land in accordance with its zoning - WSTI bought the land in 2019 for $8.25 million, and extensively renovated the interior of Landene for use as a private gallery for its collection of art and antiques - the Valuer-General valued the land in 2020 and 2021 at $6.2million under the *Valuation of Land Act 1960* (Vic) - WSTI objected - the Valuer-General disallowed the objections - WSTI applied to the Victorian Civil and Administrative Tribunal - the Tribunal agreed with WSTI and valued the land in each year at $2.925million - the Valuer-General appealed - held: the 'site value' of land under s2 of the *Valuation of Land Act* is the sum the land might be expected to realise if held in unencumbered fee simple and sold on reasonable terms, and assuming that any improvements had not been made - in order to be an improvement as defined in the Act, the works done or materials used must have the effect of increasing the value of the land - the benefit of an improvement to land may be seen to persist until 'exhausted', in the sense it no longer facilitates the economic use of the land - even if it were necessary for land to achieve its highest and best use in order to become 'improved', there is no reason to doubt that Landene constituted the highest and best use of the land when it was added to the land - the Tribunal had been correct to regarding Landene as an improvement - Landene was a valuable structure accommodating a number of uses that continues to benefit the land - leave to appeal granted but appeal dismissed.
Valuer-General Victoria
[From Benchmark Monday, 8 July 2024]

CPB Contractors Pty Ltd and Hansen Yuncken Pty Ltd v South Australia [2024] SASC 86
Supreme Court of South Australia
Kourakis CJ
Costs in public interest immunity cases - the Court had previously decided that the State had made good ach of its claims of public interest immunity and parliamentary privilege, and was therefore entitled to resist the production of documents sought by the applicant for use in an arbitration that was occurring in NSW - the Court now considered costs - held: the discretion to award costs is, generally, untrammelled, and constrained only by the imperative that it be exercised judicially, not arbitrarily or capriciously and that it cannot be exercised on grounds unconnected with the litigation - the judicial exercise of the costs discretion often, though not invariably, calls for costs to follow the event - the Court was unable in this case to discern any reason justifying departure from the usual exercise of the costs discretion - on each of the contested claims of either public interest immunity or parliamentary privilege, the State had prevailed - although it was true that, during the course of proceedings, the State withdrew a great many of its claims to immunity or privilege over certain documents, the fact remained that, at trial, the State succeeded on each discrete contest still agitated by the parties - the Court was also not persuaded by the applicant's submission that these proceedings were mere satellite

proceedings to the arbitral proceedings, and the State had acted in such a way in the arbitral proceedings that should deprive it of costs in the South Australian Supreme Court - questions of public interest immunity and parliamentary privilege were unable to be determined in the arbitral proceedings, and these proceedings were, from the applicant's perspective, necessary in order to ascertain whether the documents it sought to be disclosed ought to be disclosed - the proceedings were also necessary from the State's perspective, given that public interest immunity and, ordinarily, parliamentary privilege are not capable of being waived at will - the substantive proceedings were not of a kind that naturally attracted the label of 'public interest litigation' - the State awarded its costs of the proceedings on a party-party basis.

CPB Contractors Pty Ltd and Hansen Yuncken Pty Ltd

[From Benchmark Tuesday, 9 July 2024]

Executive Summary and (One Minute Read)

Moody v Netchoice (SCOTUS) - Lower court decisions upholding State statutes prohibiting social media companies from moderating content posted by third parties were reversed for failure to conduct proper First Amendment analysis

Summaries With Link (Five Minute Read)

Moody v Netchoice 603 US ___ (2024)
Supreme Court of the United States
The States of Florida and Texas enacted legislation that prohibited internet platforms from moderating third-party content based on content. The Supreme Court found serious First Amendment implications that the lower courts failed to properly consider. The cases were remanded to the courts below. The Court cited to *Miami Herald Publishing Co v Tornillo*, 418 US 241 (1974), where it was held that a Florida statute requiring newspapers to offer a right of reply violated the First Amendment because it consisted of compelled speech. Compelled speech can violate the First Amendment as much as suppression of speech. The Court said that government cannot meddle in speech by claiming that it is improving the marketplace of ideas. Here, the Court concluded that states were not likely to succeed in prohibiting the platforms from enforcing the platforms' own content moderation rules. The Court said that the States' attempt to better balance the mix of viewpoints on the internet by restricting content moderation amounted to an interference with speech decisions made by the private platforms. The Court added that a State cannot prohibit speech to rebalance the speech market. Inasmuch as the content moderation practices amounted to speech decisions by the platforms, the government was not free to enact laws that infringed those private speech rights.
Moody

Poem for Friday

Iceland

By Jonas Hallgrimsson (1807-1845)

Charming and fair is the land,
and snow-white the peaks of the jokuls [glaciers],
Cloudless and blue is the sky,
the ocean is shimmering bright,
But high on the lave fields, where
still Osar river is flowing
Down into Almanna gorge,
Althing no longer is held,
Now Snorri's booth serves as a sheepfold,
the ling upon Logberg the sacred
Is blue with berries every year,
for children's and ravens' delight.
Oh, ye juvenile host
and full-grown manhood of Iceland!
Thus is our forefathers' fame
forgotten and dormant withal.

Jonas Hallgrimsson was born in Iceland on 16 November, 1807. He is a revered figure in Icelandic literature, writing in the Romantic style. His love of the Icelandic people and country side and pride in the national identity comes through his poetry. He was a promoter of the Icelandic Independence Movement. He was employed for a time by the sheriff of Reykjavik as a clerk. He studied law at the University of Copenhagen. He also worked as a defence lawyer. He founded the Icelandic periodical Fjolnir first published in 1835. He died on 26 May 1845, after slipping on stairs and breaking his leg, the previous day. He died of blood poisoning aged 37 years. His birthday each year is recognised as the Day of the Icelandic Language.

Ég bið að heilsa, words by Jónas Hallgrímsson, composition by Ingi T. Lárusson
https://www.youtube.com/watch?v=6OqbfGSJDUc

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