

Friday, 20 December 2019

## Weekly Government Review A Weekly Bulletin listing Decisions of Superior Courts of Australia covering government

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### Executive Summary (1 minute read)

**CNY17 v Minister for Immigration and Border Protection** (HCA) - migration law - refusal to grant appellant a protection visa - Secretary provided Immigration Assessment Authority with material which was 'irrelevant and prejudicial' - reasonable apprehension of bias established - Authority's decision quashed

**Boensch v Pascoe** (HCA) - bankruptcy - real property - trusts and trustees - respondent did not act without "reasonable cause" 'in lodging and not withdrawing' caveat in respect of property - appeal dismissed

**Chhabra v McPherson as Trustee for the McPherson Practice Trust** (FCAFC) - copyright - artistic works - dismissal of copyright infringement claim - appeal dismissed

**Carter v Australian Securities & Investments Commission** (FCAFC) - corporations - service - statutory construction - respondent 'effected service' on appellant of 'Notice of disqualification from managing corporations' - appeal dismissed

**Martinez as trustee for Martinez HWL Practice Trust as representative of the partners trading as HWL Ebsworth Lawyers v Griffiths as trustee for the Griffiths HWL Practice Trust** (NSWCA) - employment law - summary dismissal of respondent - claim for breach of contract upheld - appellant's challenge to assessment of damages allowed in part - judgment in respondent's favour reduced

**Drama Unit Pty Ltd v Fearndale Holdings Pty Ltd (Administrator Appointed) & Anor** (NSWCA) - leases and tenancies - primary judge declared lease between parties 'validly

terminated' by respondent and awarded respondent judgments for unpaid rent and outgoings - appeal allowed in part

**Director of Public Prosecutions (NSW) v Hamzy** (NSWCA) - administrative law - criminal law - assault - District Court erred in ordering permanent stay of 'criminal proceedings' against respondent - orders set aside

**Civmec Electrical & Instrumental Pty Ltd v Southern Cross Electrical Engineering Limited & Ors** (QSC) - security of payments - applicant sought declaration 'adjudication decision' was void or 'liable to be set aside' - application dismissed

## Summaries With Link (Five Minute Read)

### **CNY17 v Minister for Immigration and Border Protection [2019] HCA 50**

High Court of Australia

Kiefel CJ; Gageler, Nettle, Gordon & Edelman JJ

Migration law - bias - first respondent's delegate refused to grant appellant a protection visa - appellant's application referred for review under Pt 7AA *Migration Act 1958* (Cth) (Migration Act) to Immigration Assessment Authority - Secretary of the Department (Secretary), in 'purported compliance with' s473CB(1)(c) Migration Act, gave Authority certain 'review material' which was 'irrelevant and prejudicial to' appellant - Immigration Assessment Authority affirmed delegate's decision - whether 'a hypothetical fair-minded lay observer with knowledge of the material objective facts might reasonably apprehend' Authority 'might not bring an impartial mind to the decision before it' due to information it was given by Secretary - held: reasonable apprehension of bias established - appeal allowed - Immigration Assessment Authority's decision quashed - matter remitted.

[CNY17](#)

[From Benchmark Thursday, 19 December 2019]

### **Boensch v Pascoe [2019] HCA 49**

High Court of Australia

Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ

Bankruptcy - real property - trusts and trustees - appellant was 'registered proprietor of an estate in fee simple' over land ('Rydellmere property') - Supreme Court of New South Wales found respondent did not act without "reasonable cause" under s74P(1) *Real Property Act 1900* (NSW) (Real Property Act) 'in lodging and not withdrawing a caveat against dealings over' Rydellmere property - Full Court of the Federal Court of Australia dismissed appeal - appeal raised question whether property which was 'held by a bankrupt on trust for another' vested in trustee in bankruptcy pursuant to s58 *Bankruptcy Act 1966* (Cth) - whether appellant had 'equitable interest' in Rydellmere property subsisting at time of appellant's bankruptcy arising from his 'right of indemnity as trustee' - whether equitable interest vested in respondent -

whether equitable interest which vested in respondent was a 'caveatable interest' - whether respondent was 'entitled to be registered as proprietor' of Rydalmere property under s90 Real Property Act - whether respondent 'honestly believed on reasonable grounds' that property vested - held: appeal dismissed.

[Boensch](#)

[From Benchmark Thursday, 19 December 2019]

## **Chhabra v McPherson as Trustee for the McPherson Practice Trust [2019] FCAFC 228**

Full Court of the Federal Court of Australia

Greenwood, Charlesworth & Burley JJ

Copyright - respondents were law firm partners - appellants claimed respondents used 'logos and the Kaden Boriss name' under 'bare licence revocable at will' - appellants claimed they revoked licence and that respondents had, by subsequent use of the logos and the Kaden Boriss name, infringed 'copyright subsisting in the artistic works' - appellants also contended respondent had 'engaged in passing off and contravened the Australian Consumer Law' - primary judge dismissed appellants' originating application - appellants challenged primary judge's rejection of their claim of infringement of copyright - whether first appellant was copyright's 'sole owner' - whether first appellant as 'co-owner' of copyright could revoke licence independently - whether licence revocable at will - whether licence was revoked - *Copyright Act 1968 (Cth)* - *Copyright (International Protection) Regulations 1969 (Cth)* - held: appeal dismissed.

[Chhabra](#)

[From Benchmark Tuesday, 17 December 2019]

## **Carter v Australian Securities & Investments Commission [2019] FCAFC 229**

Full Court of the Federal Court of Australia

Greenwood, Kerr & Burley JJ

Corporations - service - primary judge found respondent 'effected service of a Notice of disqualification from managing corporations' on appellant 'in accordance with' s206F *Corporations Act 2001 (Cth)* (Corporations Act) - appellant appealed, contending primary judge erred in finding respondent had effected service - statutory construction - "ASIC must serve a notice on the person advising them of the disqualification" - s206F(3) Corporations Act - whether primary judge erred in finding respondent had 'personally served' appellant - held: appeal dismissed.

[Carter](#)

[From Benchmark Wednesday, 18 December 2019]

## **Martinez as trustee for Martinez HWL Practice Trust as representative of the partners trading as HWL Ebsworth Lawyers v Griffiths as trustee for the Griffiths HWL Practice Trust [2019] NSWCA 310**

Court of Appeal of New South Wales

Bell ACJ, Meagher JA & Barrett AJA

# Benchmark

Employment law - contract - appellant, on behalf of law firm's 'equity partners', 'purported to dismiss' respondent from employment with law firm 'with immediate effect' - respondent claimed breach of contract - primary judge upheld claim - damages assessed at \$450,000 - appellant challenged finding that conduct of respondent did not entitle law firm summarily to terminate respondent's employment - appellant also challenged damages' assessment, especially concerning \$305,375 awarded for 'lost opportunity to seek other employment' while respondent was working for law during notice period - 'whether lack of candour' concerning 'printing of practice precedents' justifying summary dismissal - whether erroneous finding concerning 'when and how lawful notice of termination would be given' - whether erroneous award of damages for 'alleged loss of "benefit of incumbency" - whether "benefit of incumbency" was, in case's circumstances, 'a commercial advantage or other contractual benefit' - held: appeal allowed in part in respect of challenge to damages' assessment - judgment in respondent's favour reduced.

[View Decision](#)

[From Benchmark Thursday, 19 December 2019]

## **Drama Unit Pty Ltd v Fearndale Holdings Pty Ltd (Administrator Appointed) & Anor [2019] NSWCA 312**

Court of Appeal of New South Wales  
Meagher & Brereton JJA; Emmett AJA

Leases and tenancies - primary judge declared that lease between parties was 'validly terminated' by respondent - primary judge found in respondent's favour for amount of unpaid rent and outgoings - appellant appealed - whether respondent entitled to unpaid rent and outgoing where respondent had 'refused to give' appellant 'possession of the leased premises' - whether appellant breached lease by failure 'to hold, and provide to' respondent copies of authorisation and licence - whether 'breach notices' did not satisfy s129 *Conveyancing Act 1919* (NSW) due to failure to specify "reasonable time" for remedying of 'any relevant breach' by appellant - principles concerning 'suspension of rent by denial of possession' - 'obligation to obtain and maintain' 'consents and approvals' - *Mining Act 1992* (NSW) - *Protection of the Environment Operations Act 1997* (NSW) held: appeal allowed in part.

[View Decision](#)

[From Benchmark Thursday, 19 December 2019]

## **Director of Public Prosecutions (NSW) v Hamzy [2019] NSWCA 314**

Court of Appeal of New South Wales  
Gleeson, Payne & Brereton JJA

Administrative law - respondent convicted and sentenced in Local Court 'for assaulting a law enforcement officer while in the execution of the officer's duties' - Director of Public Prosecutions (NSW) sought judicial review concerning District Court orders which allowed respondent's appeal against 'conviction and sentence' and 'permanently stayed' the 'criminal proceedings' against respondent - whether District Court's order for permanent stay of criminal proceedings 'affected by jurisdictional error' - whether misapprehension of 'nature

and scope of the jurisdiction to stay proceedings for an abuse of process' - whether misconstruction of provision concerning 'double jeopardy' in s63 *Crimes (Administration of Sentences) Act 1999* (NSW) - held: District Court erred in ordering permanent stay of criminal proceedings against respondent - orders set aside.

[View Decision](#)

[From Benchmark Friday, 20 December 2019]

**Civmec Electrical & Instrumental Pty Ltd v Southern Cross Electrical Engineering Limited & Ors [2019] QSC 300**

Supreme Court of Queensland

Mullins J

Security of payments - first respondent made 'adjudication decision' under *Building Industry Fairness (Security of Payment) Act 2017* (Qld) - applicant sought declaration that adjudication decision was void or 'liable to be set aside' due to adjudicator's refusal to consider applicant's submissions in 'adjudication response' - adjudicator found adjudication response had gone "well beyond" reasons given in payment schedule - held: jurisdictional error not established - application dismissed.

[Civmec](#)

[From Benchmark Monday, 16 December 2019]



# Benchmark

**Out there**

**By:** Rev David Conolly

So big, that sea  
out there.

So big.

Stopped in your tracks,  
silence claims you.

What is it, child of Mary?

Could it be that, in your  
sunny spirit of  
adventure,  
you sense  
the sudden passing  
of a shadow?

But the dream  
of a world  
of peace,  
healed by love,  
could remain

just that  
a dream.

Unless  
you step,  
bravely  
and surely,  
to where  
we're waiting.

Out there.

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