

Friday, 20 December 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)

Secretary, Department of Social Services v FNPQ (FCA) - AAT had erred in construing s1073A of the *Social Security Act 1991* (Cth) (deeming employment income as payable when actually received) in a way that allowed s1073A to be circumvented simply by making a fresh age pension application

de Robillard v Council of the New South Wales Bar Association; Council of the New South Wales Bar Association v de Robillard (No 2) (NSWCA) - Court of Appeal dismissed appeal against finding of professional misconduct and recommendation barrister be struck off, and ordered that barrister be struck off

de Robillard v Council of the New South Wales Bar Association; Council of the New South Wales Bar Association v de Robillard (NSWCA) - one member of Court of Appeal hearing disciplinary matter regarding barrister (see case above) held he was not disqualified from hearing the case due to apprehended bias

Wilson v City of Onkaparinga (SASC) - Supreme Court largely rejected appeal from Tribunal, which had affirmed Council's order prohibiting applicant from owning dogs and requiring his current dog to be destroyed

McMahon, McMahon v State of Tasmania (TASSC) - purchasers were not registered proprietors of land that had been mistakenly registered as part of the lot they bought



HABEAS CANEM

Merry Christmas from McGregor

Benchmark

Summaries With Link (Five Minute Read)

Secretary, Department of Social Services v FNPQ [2024] FCA 1428

Federal Court of Australia

Snaden J

Administrative law - a woman received lump sum payments from her former employer after it had been found she had been underpaid - the Secretary cancelled her and her husband's age pensions on the basis s1073A of the *Social Security Act 1991* (Cth) deemed the back-pay amounts as payable at the time that they were received - Centrelink rejected fresh applications - the AAT set Centrelink's decision aside and ruled the couple's income for age pension purposes did not include the back-pay amounts - the AAT's General Division affirmed - Secretary appealed to Federal Court - held: where a statutory provision has more than one construction, the court must prefer the one that aligns best with the statute's purpose or object (s15AA of the *Acts Interpretation Act 1901* (Cth)) - s1073A's purpose was to ensure that employment income was brought to bear in calculating eligibility for the age pension; regardless of when the amounts were paid - AAT's construction of s1073A would allow the immediate circumvention of the very consequences s1073A was plainly intended to address - it would allow a cancellation for deemed employment income to be immediately set at naught simply by making a fresh pension application - this would be absurd - parties to consider whether the Court has power to remit the matter to the Administrative Review Tribunal (which has replaced the AAT) in same way it would have earlier remitted the matter to the AAT.

[Secretary, Department of Social Services](#)

[From Benchmark Monday, 16 December 2024]

de Robillard v Council of the New South Wales Bar Association; Council of the New South Wales Bar Association v de Robillard (No 2) [2024] NSWCA 299

Court of Appeal of New South Wales

Gleeson & Leeming JJA, & Griffiths AJA

Professional misconduct - barrister joined solicitor as defendant, alleging solicitor was accessory to client's breach of directors' duties - Court later struck out case against solicitor and ordered barrister pay solicitor's costs - NCAT found barrister guilty of professional misconduct for making allegations of serious misconduct not reasonably justified on material then available, where he did not believe on reasonable grounds factual material already available provided a proper basis, and unsatisfactory professional conduct for failure to comply with a Supreme Court order (the deemed judgment created by solicitor lodging costs certificate) - NCAT recommended barrister be struck off - barrister appealed - Bar Council sought barrister be struck off - Court of Appeal heard both matters concurrently - held (by majority, Leeming JA dissenting): 'apparent urgency' was not a proper basis to make very serious allegations of misconduct - barrister's 'ends justifies the means' argument that interest of his client could not be adequately protected without making solicitor a defendant also failed - NCAT erred in finding failure to pay costs was unsatisfactory professional conduct - costs order did not impose duty to pay - it made barrister a judgment debtor and liable to usual remedies available to a judgment

creditor - NCAT's strike off recommendation based only on professional misconduct finding - *House v The King* standard applied to appellate review of NCAT's recommendation - NCAT did not err in taking past misconduct into account and had not failed to take matters favouring the barrister into account - barrister's appeal failed - as for strike off application, as the challenge to NCAT's factual findings failed, Court should accept those findings, but it should not automatically accept NCAT's recommendation, and had to assess for itself whether to make removal order - barrister failed to appreciate existence, and gravity, of misconduct - barrister not a fit and proper person to remain on roll - Leeming J, dissenting, would have dismissed Bar Council's application, as barrister's return to the profession in the future on strict conditions may be viable - barrister struck off.

[View Decision](#)

[From Benchmark Monday, 16 December 2024]

de Robillard v Council of the New South Wales Bar Association; Council of the New South Wales Bar Association v de Robillard [2024] NSWCA 298

Court of Appeal of New South Wales

Gleeson JA

Apprehended bias - after Court of Appeal reserved judgment in above case, barrister sought to reopen proceedings to apply for one judge to recuse himself for apprehended bias, on the basis: (1) judge's association with his brother who was previously a member of the Bar Council, and with other Supreme Court judges, demonstrated lack of independence, and (2) judge's conduct during hearing demonstrated prejudgment - the decision was first made by the judge whose recusal was sought, with the barrister being able to renew application to Court as a whole if dissatisfied (see *QYFM v Minister* [2023] HCA 15, Benchmark 18 May 2023) - held: test was whether a fair-minded lay observer might reasonably apprehend the judge might not bring an impartial mind to the resolution of the question the judge is required to decide - fair-minded lay observer is to be credited with broad knowledge of material objective facts and actual circumstances of case - that judge's brother was former Bar Council member did not justify recusal - barrister failed to articulate logical connection between matters complained of and feared judicial deviation from deciding case on merits - barrister's argument as to other judges of the Supreme Court assumed relationship between Chief Justice and judges, and between judges, which was contrary to fundamental principles of judicial independence - part of judicial independence is that judges are independent from each other - Chief Justice does not have capacity to direct, or even influence, judges in the discharge of their judicial functions and responsibilities - judge's conduct during hearing provided no basis to think a fair-minded lay observer might hold any apprehension he might not bring an impartial mind to the matters for decision - were it necessary to decide, the barrister had waived any right to raise apprehended bias by his own comments at the hearing - judge declined to recuse himself - barrister chose not to renew application to Court as a whole.

[View Decision](#)

[From Benchmark Monday, 16 December 2024]

Wilson v City of Onkaparinga [2024] SASC 139

Supreme Court of South Australia

Boyle J

Administrative law - applicant owned an American Bulldog, which attacked a Golden Retriever while subject to a Control (Dangerous Dog) Order - Council made a prohibition order prohibiting the applicant owning a dog for five years and requiring each dog owned by the applicant to be destroyed - SA Civil and Administrative Tribunal affirmed - applicant sought leave to appeal to Supreme Court - held: overriding principle regarding leave was the interests of justice, having regard to whether appeal was reasonably arguable, whether any matter of principle or general importance, and whether subject matter involved sufficient substance - Council had discretion whether and in what form to make a prohibition order, so the *House v The King* standard applied - reasonably arguable Tribunal denied procedural fairness, and leave to appeal should be granted on that issue - on balance the Tribunal did not deny procedural fairness - the criteria for prohibition order had been met - Tribunal made no error of principle to justify interfering with the decision to impose a prohibition order - if correctness standard applied, Tribunal's decision was correct - Tribunal erred by not independently considering whether five-year ban was 'preferable' decision - period should be two and a half years - insufficient basis to find Tribunal erred in deciding dog could not be re-homed and should be destroyed - leave to appeal granted but appeal dismissed (other than regarding period of prohibition).

[Wilson](#)

[From Benchmark Wednesday, 18 December 2024]

McMahon, McMahon v State of Tasmania [2024] TASSC 79

Supreme Court of Tasmania

Marshall AJ

Torrens title - State of Tasmania formed the view that unalienated Crown land, including a block of eight flats used for teacher accommodation, was surplus to requirements - it sought to bring the land within the Torrens title system established by the *Land Titles Act 1980* (Tas) - surveyor mistakenly drew a plan that included land across a dividing fence occupied by the State for the purposes of a high school, which included a house leased to the headmaster - the mistaken plan was registered - the land was auctioned, and purchasers after auction later sold it to the plaintiffs - the plaintiffs later identified the mistakenly included land as within the land they had purchased, and gave the headmaster notice to vacate - they sought a declaration they were registered proprietors of the whole of the land, including the mistakenly included land - State sought declaration it owned the mistakenly included land - held: s40(3)(f) of the *Land Titles Act* provides an exception to indefeasibility for portion of land erroneously included on Register by a wrong description of parcels or boundaries - State did not intend to sell mistakenly included land, auction winners did not intend to buy that land or sell it to plaintiffs, and plaintiffs did not intend to buy it - mistakenly included land had been erroneously registered as a result of a wrong description of the borders - plaintiffs were not bona fide purchasers for value of the entirety of the registered land so as to be protected by s42, as they intended to buy only the land with the eight flats on it - plaintiffs' claim dismissed, and declaration made that the State



owned the mistakenly included land.

[McMahon, McMahon](#)

[From Benchmark Wednesday, 18 December 2024]

Benchmark

INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Khachatryan v Armenia (EUHR5S) - In a matter of first impression, the European Court of Human Rights found that a member state has an obligation to provide a mechanism whereby victims of domestic violence may seek compensation for non-pecuniary damage from the perpetrator of the violence

Summaries With Link (Five Minute Read)

Khachatryan v Armenia, Case 11829/16

European Court of Human Rights

Guyomar P, Elósegui, Harutyunyan, Felici, Zünd, Sârcu, & Šimáková JJ

In Armenia, the victim had been subjected to numerous events of serious physical and emotional abuse by her former spouse. He repeatedly threatened and insulted her. He also repeatedly beat her, breaking bones and causing concussions and other grievous injuries. The perpetrator was charged with aggravated torture of a person who was dependent on the perpetrator. However, he was convicted of non-aggravated torture and sentenced to 18 months imprisonment. He did not serve any time as he was exempted under an Amnesty Act. The victim of the abuse unsuccessfully launched civil legal proceedings seeking compensation for both pecuniary and non-pecuniary damage for emotional and psychological suffering due to ill-treatment. Armenian domestic law did not provide for compensation for non-pecuniary damages in this situation. The judgment was affirmed by the local court of appeal. Armenia is one of the 46 member states comprising the Council of Europe and is subject to the European Convention on Human Rights and the jurisdiction of the European Court of Human Rights. The victim sought review of the decision by the Armenian courts by alleging that Armenia had acted in violation of Article 3 of the *European Convention on Human Rights*, which states that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The Court found that the Armenian criminal-law mechanisms were so defective in terms of protecting the victim that they amounted to a breach of Armenia's obligations under Article 3. The European Court said that Armenia had repeatedly failed to discharge its procedural obligation to respond adequately to the serious acts of domestic abuse. In a decision of first impression, the Court also found that Article 3 imposed an obligation on the state to allow claims by the victim against the perpetrator for compensation for non-pecuniary damages in matters of serious domestic abuse. The Court stated that Article 3 created a positive obligation on the part of a member state in respect of allowing claims for non-pecuniary damage from the perpetrators of such violence directly, or indirectly through the member state. The European Court awarded the victim €24,000 plus €2000 in costs as against Armenia.

[Khachatryan](#)



Poem for Friday

Somewhere

By Rev David Conolly

Somewhere,
unexpectedly,
hope is born.

A voice.
At first, only the cry
of a new-born
gulping for breath.

In time, a voice.

The voice speaks to
a world grown used to
darkness, despair.

The voice says,
*You are light for the world;
Let it shine.
Love, and forgive*

And suddenly, hope is born.

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