

Friday, 22 October 2021

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

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### Executive Summary (1 minute read)

**Mineralogy Pty Ltd v Western Australia** (HCA) - constitutional law - special case - questions of law for Full Court's opinion - *The Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) was not 'invalid or inoperative in its entirety' - ss9(1), 9(2), 10(4) & 10(7) *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) 'not invalid or inoperative to any extent'

**Palmer v Western Australia** (HCA) - constitutional law - special case - questions of law for Full Court's opinion - consideration of 'additional bases on which' plaintiff argued *The Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ('Amending Act') was invalid - Amending Act not 'invalid or inoperative in its entirety' - ss9(1), 9(2), 10(4) & 10(7) *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) 'not invalid or inoperative to any extent'

**Swiss Re International Se v LCA Marrickville Pty Limited (Second COVID-19 insurance test cases)** (FCA) - insurance - 'business interruption' - COVID-19 - 'second test case' authorised by Australian Financial Complaints Authority (AFCA) under clause of AFCA's Complaint Resolution Scheme Rules - with exception of one proceeding, insuring clauses did not apply and insurers not liable in respect of claims - declarations made

**Kassam v Hazzard; Henry v Hazzard** (NSWSC) - public health - administrative law - constitutional law - COVID-19 - 'Kazzam plaintiffs' contended *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) and s7 *Public Health Act 2010* (NSW) were invalid - proceedings dismissed

**Miles v Doyle (No 2)** (NSWSC) - sexual assault - psychiatric injury - trespass to the person - plaintiff claimed \$7 million damages against defendant - judgment for plaintiff in sum of \$1,273,125

**Taylor Construction Group Pty Ltd v Strata Plan 92888 t/as The Owners Strata Plan 92888** (NSWSC) - planning and development - Appeal Panel upheld decision of Tribunal that use of cladding was not compliant with Building Code of Australia and in breach of implied statutory warranties - appellants sought to appeal - leave to appeal granted - appeal dismissed

**Brighton Foreshore Association Inc v Bayside City Council** (VSCA) - planning and development - Tribunal granted planning permit - appellant challenged 'power to grant' permit in reliance on limitations on foreshore reserve's use allegedly arising from *An Act to vest land in the Mayor Councillors and Burgesses of the Borough of Brighton for purposes of Public Recreation 1877* (Vic) - appeal dismissed

**Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd** (QCA) - security of payments - appellant sought to recover amount outstanding under payment claim - primary judge found payment claim was in respect of 'two separate contracts' and thus was void - appellant appealed - appeal allowed

## Summaries With Link (Five Minute Read)

### **Mineralogy Pty Ltd v Western Australia [2021] HCA 30**

High Court of Australia

Kiefel CJ; Gageler, Keane, Gordon, Edelman, Steward & Gleeson JJ

Constitutional law - special case - questions of law for Full Court's opinion - plaintiffs sought declaration that *The Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ('Amending Act') was invalid - plaintiffs alternatively sought declarations 'that the whole or each of numerous specified provisions' inserted by Amending Act was invalid - plaintiffs principally alleged that Amending Act's 'manner of enactment' contravened s6 *Australia Act 1986* (Cth) - plaintiffs also alleged Amending Act exceeded 'one or more asserted limitations' on scope of Parliament of Western Australia's legislative power - held: Amending Act not 'invalid or inoperative in its entirety' - ss9(1), 9(2), 10(4) & 10(7) *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) 'not invalid or inoperative to any extent'.

[Mineralogy](#)

[From Benchmark Monday, 18 October 2021]

### **Palmer v Western Australia [2021] HCA 31**

High Court of Australia

Kiefel CJ; Gageler, Keane, Gordon, Edelman, Steward & Gleeson JJ

# Benchmark

Constitutional law - special case - questions of law for Full Court's opinion - plaintiff sought declaratory relief 'in terms almost identical to that' which plaintiffs sought in *Mineralogy Pty Ltd v Western Australia* [2021] HCA 30 ('principal proceeding') - parties stated questions of law 'almost identical to those' which parties stated in principal proceeding - consideration of 'additional bases on which' plaintiff argued that *The Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) ('Amending Act') was invalid - held: Amending Act not 'invalid or inoperative in its entirety' - ss9(1), 9(2), 10(4) & 10(7) *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) 'not invalid or inoperative to any extent'.

[Palmer](#)

[From Benchmark Monday, 18 October 2021]

## **Swiss Re International Se v LCA Marrickville Pty Limited (Second COVID-19 insurance test cases) [2021] FCA 1206**

Federal Court of Australia

Jagot J

Insurance - 'business interruption' - COVID-19 pandemic - 'second test case' authorised by Australian Financial Complaints Authority (AFCA) under clause of AFCA's Complaint Resolution Scheme Rules - proceedings concerned 'proper construction and application of provisions in business interruption insurance policies' - whether policies applied to losses claimed by businesses due to COVID - determination of separate questions - whether 'insuring clauses' in policies applied - held: with exception of one proceeding, insuring clauses did not apply and insurers not liable in respect of claims - declarations made.

[Swiss](#)

[From Benchmark Tuesday, 19 October 2021]

## **Kassam v Hazzard; Henry v Hazzard [2021] NSWSC 1320**

Supreme Court of New South Wales

Beech-Jones CJ at CL

Public health - administrative law - constitutional law - COVID-19 - 'Kazzam plaintiffs' contended *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) and s7 *Public Health Act 2010* (NSW) were invalid - impugned orders' effect on 'rights and freedoms of' persons 'who chose not to be vaccinated' - whether orders and directions unauthorised and/or unreasonable - whether make of order 'not a genuine exercise of power' - whether inconsistency of order with *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) - whether order effected 'civil conscription' under in s51(xxiiiA) Constitution - whether 'civil conscription' prohibition applied to NSW laws - whether inconsistency of order with *Australian Immunisation Register Act 2015* (Cth) - held: proceedings dismissed.

[View Decision](#)

[From Benchmark Tuesday, 19 October 2021]

## **Miles v Doyle (No 2) [2021] NSWSC 1312**

Supreme Court of New South Wales

Cavanagh J

Sexual assault - psychiatric injury - trespass to the person - plaintiff claimed \$7 million damages against defendant - defendant was in prison, having been convicted of 'historical sexual assault charges including in respect of' plaintiff - plaintiff claimed psychiatric injury and loss - onus - whether assaults occurred - whether plaintiff's career in military ended due to sexual assaults - assessment of damages - held: - judgment for plaintiff in sum of \$1,273,125.

[View Decision](#)

[From Benchmark Wednesday, 20 October 2021]

## **Taylor Construction Group Pty Ltd v Strata Plan 92888 t/as The Owners Strata Plan 92888 [2021] NSWSC 1315**

Supreme Court of New South Wales

Henry J

Planning and development - Appeal Panel upheld decision of Tribunal that 'use of "Biowood" combustible cladding' was not compliant with Building Code of Australia and was in breach of implied statutory warranties - appellants sought to appeal - s18B(1) *Home Building Act 1989* (NSW) - whether erroneous formulation of test in determination of 'undue risk' - whether erroneous application of 'proper test' to facts - whether erroneous application of Building Code of Australia to facts - adequacy of reasons - cl 98(1)(a) *Environmental Planning and Assessment Regulation 2000* (NSW) - held: leave to appeal granted - appeal dismissed.

[View Decision](#)

[From Benchmark Thursday, 21 October 2021]

## **Brighton Foreshore Association Inc v Bayside City Council [2021] VSCA 284**

Court of Appeal of Victoria

Emerton, Sifris & Osborn JJA

Planning and development - Tribunal granted planning permit - appellant challenged 'power to grant' permit - appellant relied on limitations on foreshore reserve's use allegedly arising from *An Act to vest land in the Mayor Councillors and Burgesses of the Borough of Brighton for purposes of Public Recreation 1877* (Vic) (Vesting Act) - whether Tribunal 'was required to give effect to' Vesting Act - whether Tribunal's conclusions concerning proposed uses 'public recreational character' were open to it - whether trial judge erred concerning Vesting Act's applicability - held: no error in primary judge's decision - appeal dismissed.

[Brighton Foreshore](#)

[From Benchmark Thursday, 21 October 2021]

## **Auspile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd [2021] QCA 223**

Court of Appeal of Queensland

Fraser & Morrison JJA; North J

Security of payments - appellant, pursuant to s78(2)(a) *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (BIFSPA), sought to recover amount outstanding under payment claim - primary judge found payment claim was in respect of 'two separate contracts' and thus was





void - appellant appealed - whether payment claim was compliant with s75(1) BIFSPA - whether payment claim claimed 'amounts due under the one contract' - held: appeal allowed.

[Auspile](#)

[From Benchmark Tuesday, 19 October 2021]



## At a Solemn Music

**By:** John Milton

Blest pair of Sirens, pledges of Heav'ns joy,  
Sphear-born harmonious Sisters, Voice, and Vers,  
Wed your divine sounds, and mixt power employ  
Dead things with inbreath'd sense able to pierce,  
And to our high-rais'd phantasie present,  
That undisturbèd Song of pure content,  
Ay sung before the saphire-colour'd throne  
To him that sits theron  
With Saintly shout, and solemn Jubily,  
Where the bright Seraphim in burning row  
Their loud up-lifted Angel trumpets blow,  
And the Cherubick host in thousand quires  
Touch their immortal Harps of golden wires,  
With those just Spirits that wear victorious Palms,  
Hymns devout and holy Psalms  
Singing everlastingly;  
That we on Earth with undiscording voice  
May rightly answer that melodious noise;  
As once we did, till disproportion'd sin  
Jarr'd against natures chime, and with harsh din  
Broke the fair musick that all creatures made  
To their great Lord, whose love their motion sway'd  
In perfect Diapason, whilst they stood  
In first obedience, and their state of good.  
O may we soon again renew that Song  
And keep in tune with Heav'n, till God ere long  
To his celestial consort us unite,  
To live with him, and sing in endles morn of light.

[https://en.wikipedia.org/wiki/John\\_Milton](https://en.wikipedia.org/wiki/John_Milton)



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