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Benchmark

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Weekly Government Review

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

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Executive Summary (One Minute Read)

Australian News Channel Pty Ltd v Isentia Pty Limited (FCA) - media monitoring for government clients does not breach copyright as it is "for the services of the Commonwealth or State" within the meaning of s183(1) of the *Copyright Act 1968* (Cth)

The Owners - Strata Plan No 64757 v Sydney Remedial Builders Pty Ltd (NSWCA) - leave to appeal refused from the decision of the primary judge to reject the report of a referee in a building and construction case

Western Sydney Wanderers FC Pty Ltd v Football Australia Limited (NSWSC) - determination for the National Dispute Resolution Chamber established by Football Australia in favour of a player against a club held to be invalid for non-compliance with the contractual regulations governing the Chamber

Sayar v Health Care Complaints Commission (NSWSC) - appeal dismissed against the cancellation of registration to practise as a pharmacist and prohibition order for 3 years and 6 months

HABEAS CANEM

Country smile

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
www.arconolly.com.au

Summaries With Link (Five Minute Read)

Australian News Channel Pty Ltd v Isentia Pty Limited [2024] FCA 363
Federal Court of Australia
Burley J
Copyright - ACN provides Sky News television and online content - Isentia provides media monitoring services to government customers, which involves searching for and extracting parts of news and other media items, and the wholesale copying of published articles and broadcast content - s183(1) of the *Copyright Act 1968* (Cth) provides that acts that would otherwise infringe copyright do not do so if the Commonwealth or a State has authorised those acts, and they are done for the services of the Commonwealth or State - ACN sought a declaration that Isentia's media monitoring was not "for the services of the Commonwealth or State" within the meaning of s183(1) and that Isentia was therefore not entitled to the protection of s183(1) - held: there was no dispute that ACN was the owner of the copyright in the Sky content, that Isentia was authorised by the relevant government entities to perform the media monitoring, or that the media monitoring would, but for s183(1), infringe copyright in the Sky content - s 183(1) should be given a broad and facilitative purpose, as Part VII of the Act reflects a legislative intention to recompense copyright owners for use by the Crown of their works by the imposition of an ex post facto scheme for payment which obviates the need for the Crown to seek permission to use the works - this was also supported by the text of s183(1) - in normal parlance, "services", when understood in the context of governmental services, will include the supply of articles or services by the Commonwealth (or a State), which would encompass the broad sweep of activities in which government may engage - acts done "for" the supply of such services will include steps taken in connection with the work of the government entity concerned - the phrase "acts done for the services of the Commonwealth or State" provides no intrinsic connotation limiting the relevant acts to those done for the outward facing or end-use services provided by the Commonwealth or State - an otherwise infringing act is done for the services of the Commonwealth or State when the object or purpose of the act is to benefit the Government entity by assisting its employees or officers in the performance of their functions - the language of s183(1) did not support the notion that there must be a "direct" connection between the act comprised in the copyright and the provision of a governmental service to citizens - none of the cases ACN relied on as being in similar terms to s183(1) provided support for the limitations ACN proposed - s183(1) protected Isentia's media monitoring activities - application dismissed.
https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0363
[From Benchmark Wednesday, 24 April 2024]

The Owners - Strata Plan 64757 v Sydney Remedial Builders Pty Ltd [2024] NSWCA 85
Court of Appeal of New South Wales
Leeming & Payne JJA
Home building - the defendant builder was retained to remedy building defects caused by the original builder - the applicant owners corporation commenced proceedings under s48MA of the *Home Building Act 1989* (NSW), seeking damages in respect of defective building works - the

parties reached agreement on quantum - the only issue was whether the proceedings were commenced within time - this issue was referred to a referee for separate determination - the referee concluded that the date of practical completion of the works was 16 March 2012, and that the proceedings were therefore commenced within the time required by s18E of the *Home Building Act*, that is, before 16 March 2019 - the applicant contended that the Court should accept the referee's report under r20.24(a) of the *Uniform Civil Procedure Rules 2005* (NSW) - the defendant contended the Court should reject the referee's report - the primary judge dismissed the proceedings (see Benchmark 20 September 2023) - the applicant sought leave to appeal from the decision of the primary judge to reject the report of the referee - held: one reason for the requirement in UCPR r51.12(4) for the summary of argument filed with in relation to an application for leave to appeal to state the questions involved is to permit the Court to determine whether there should be a concurrent hearing or, as occurred in the present case, a hearing of the application for leave before the Court constituted by two Judges of Appeal - another reason is to permit the merits of the application for leave to be fully and fairly ventilated at a relatively short hearing for leave - a third reason is to enable the respondent to know the case it is called upon to meet, as well as to determine whether the White Folder filed in relation to the application for leave is to be supplemented - it should not be thought that it will invariably be possible to conduct the hearing as occurred in this case, based on materials supplied the preceding day, and on the basis of submissions advanced for the first time in any detail on the day of hearing - such a course was only adopted in this case as a consequence of the constructive approach adopted by both sides' counsel in their oral address - the primary judge had applied s3B of the *Home Building Act* in accordance with its terms, and had correctly identified that the terms "completion" of the building work and "practical completion" of the building work are deployed separately within the section - it was true that "completion" under s3B was not determined solely by the form of the contract, and, in principle, the parties could choose another word to define something which amounted to "completion" for the purposes of s3B(1), but that theoretical possibility was well removed from the facts of this case and did not assist the applicant - leave to appeal refused.
View Decision
[From Benchmark Tuesday, 23 April 2024]

Western Sydney Wanderers FC Pty Ltd v Football Australia Limited [2024] NSWSC 426
Supreme Court of New South Wales
Richmond J
Associations - the National Dispute Resolution Chamber (NDRC), a body established by Football Australia Limited, determined a grievance which a player, Lopar, had against Western Sydney Wanderers FC Pty Ltd in respect of his player salary payments - the NDRC determined that the player had succeeded in establishing that the club breached the Standard Playing Contract in a manner entitling him to terminate it, and was to pay the player damages of about $465.000 - the club sought orders from the Supreme Court declaring that the determination was null and void, that it was not made in accordance with the NDRC regulations and was therefore not binding on the club, and restraining Football Australia from requiring the club to pay the

damages as required by the determination - held: the defendants did not dispute that the NDRC Panel had not been properly constituted under the NDRC Regulations, nor that the determination was not signed by the Chair or Deputy Chair of the NDRC sitting on the panel as required by the NDRC Regulations 0 clause 25 of the NDRC Regulations provided that no proceedings before the NDRC in relation to a dispute would be invalidated for any defect whether of substance or of form in any notice or report or by reason of non-compliance with any term of the NDRC Regulations, unless the Chair so determines - the terms of the NDRC Regulations must be given the meaning that a reasonable businessperson would understand the words to mean, which required a consideration of the language used by the parties, the surrounding circumstances objectively known to them, and the commercial purpose or object to be secured by the contract - in the context in which "proceedings" appears in cl25, that term means a legal process which takes place for the resolution of a dispute commencing with the making of an application and continuing to the final determination by the making of a determination or a finalisation of any appeal from that determination - on this meaning of "proceedings", cl25 does not render valid a determination which has not been made in accordance with the requirements of the NDRC Regulations - what cl25 does is ensure that the proceedings as a whole are not rendered invalid by that non-compliance - where a domestic tribunal determines a dispute and founds the binding nature of its determination in contract (rather than in accordance with a statute or other instrument), that decision must be consonant with the terms of the contract - the decision of the NDRC here was not consonant with the terms of the contract - the determination was not final and binding because it was not made in accordance with the NDRC Regulations - orders made as sought by the club.
View Decision
[From Benchmark Tuesday, 23 April 2024]

Sayar v Health Care Complaints Commission [2024] NSWSC 418
Supreme Court of New South Wales
Campbell J
Administrative law - the Health Care Complaints Commission made seven complaints against the plaintiff, including complaints that he suffered an impairment that detrimentally affected or was likely to detrimentally affect his capacity to practise the profession of pharmacy and that he was not competent to practise as a pharmacist - the NSW Civil and Administrative Tribunal cancelled the registration of the plaintiff to practise as a pharmacist pursuant to s149C(1)(a),(b) and (c) of the *Health Practitioner Regulation National Law* (NSW) and made a prohibition order pursuant to s149C(7) of that law for a period of 3 years and 6 months - the plaintiff appealed to the Supreme Court - held: an appeal relating to a profession other than the legal profession may be brought as of right on any question of law, or with the leave of the court, on any other ground - where a ground asserting an infringement of the rules of natural justice is raised, it is appropriate for the Court to consider it first and in advance of other grounds because, if established, the ground may necessitate a remittal for rehearing in any event - the plaintiff's continued focus upon the question of his competence portrayed a lack of insight as to the seriousness of the professional misconduct found against him - properly understood, the

Tribunal did not reverse the onus of proof to require the plaintiff to prove his competence - the Tribunal had not erred by failing to require sufficient evidence to discharge the onus of proof having regard to the gravity of the matters alleged - the question of whether there was evidence to support the Tribunal's finding regarding competence was one for the Tribunal and not for an expert witness,, although opinion based wholly or substantially upon that witness's undoubted expertise as a psychiatrist was admissible - the reasons of the Tribunal adequately discharged its legal obligation - the Tribunal had not failed to respond to a clearly articulated argument that the availability of stringent conditions on the plaintiff's registration, which the plaintiff said he would comply with, meant that the plaintiff was not incompetent - leave refused to raise the factual aspects of the appeal - appeal dismissed.

View Decision

[From Benchmark Tuesday, 23 April 2024]

Executive Summary and (One Minute Read)

Kirkorov v Lithuania (Eur Ct HR) - Decision of Lithuania to deny entry to Russian entertainer on national security grounds did not amount to a violation of Article 10 (freedom of expression) of the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

Kirkorov v Lithuania, ECHR 096 (2024)
European Court of Human Rights
Bårdsen P, Ilievski, Kuris, Yüksel, Schembri Orland, Krenc, & Derencinovic JJ
Kirkorov was a popular singer from Russia who had been found by the Lithuanian Migration Department to have publicly supported Vladimir Putin and supported Russia's actions in Crimea. The government of Lithuania placed Kirkorov on a list of aliens barred from entering the country. Kirkorov unsuccessfully challenged this decision in the Lithuanian courts. Kirkorov then brought proceedings before the European Court of Human Rights alleging that the actions of Lithuania violated his right to freedom of expression guaranteed by Article 10 of the *European Convention of Human Rights*. Article 10 provides that everyone has the right to freedom of expression without interference by public authority and regardless of frontiers. However, these rights may be subject to such restrictions as are prescribed by law "and are necessary in a democratic society, in the interests of national security' or public safety. The European Court found that, while the right of a foreigner to remain in a country is not a Convention right, 'immigration controls must be exercised consistently with Convention obligations'. The Court ruled that the ban on entry was materially related to the right of expression because, under Article 10, no distinction can be drawn between nationals and foreigners. As entry to Lithuania was denied on the basis of Kirkorov's past statements, the Court found that there had been an interference with his Article 10 rights. The issue came down to whether Lithuania's actions were permissible as being prescribed by law and necessary in the interests of national security. The Court found that Lithuania's actions were prescribed by law that purported to be based on national security. Nevertheless, it was for the courts to determine whether the invocation of national security had a reasonable basis or was contrary to common sense. The Court concluded that there had not been a violation of Article 10 in light of the careful scrutiny by the Lithuanian courts to the claim that Kirkorov represented a threat to national security. Further, the European Court held that the measures taken by Lithuania were not disproportionate and that the national courts had properly weighed the interests of national security against the measures taken against Kirkorov.
Kirkorov

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
ww.arconolly.com.au

Poem for Friday

The Song of a Comet

By: Clark Ashton Smith (1893-1961)

A plummet of the changing universe,

Far-cast, I flare

Through gulfs the sun's uncharted orbits bind,

And spaces bare

That intermediate darks immerse

By road of sun nor world confined.

Upon my star-undominated gyre

I mark the systems vanish one by one;

Among the swarming worlds I lunge,

And sudden plunge

Close to the zones of solar fire;

Or 'mid the mighty wrack of stars undone,

Flash, and with momentary rays

Compel the dark to yield

Their aimless forms, whose once far-potent blaze

In ashes chill is now inurned.

A space revealed,

I see their planets turned,

Where holders of the heritage of breath

Exultant rose, and sank to barren death

Beneath the stars' unheeding eyes.

Adown contiguous skies

I pass the thickening brume

Of systems yet unshaped, that hang immense[67]

Along mysterious shores of gloom;

Or see—unimplicated in their doom—

The final and disastrous gyre

Of blinded suns that meet,

And from their mingled heat,

And battle-clouds intense,

O'erspread the deep with fire.

Through stellar labyrinths I thrid

Mine orbit placed amid

The multiple and irised stars, or hid,

Unsolved and intricate,

In many a planet-swinging sun's estate.

Ofttimes I steal in solitary flight

Along the rim of the exterior night

That grips the universe;

And then return,

Past outer footholds of sidereal light,

To where the systems gather and disperse;

And dip again into the web of things,

To watch it shift and burn,

Hearted with stars. On peaceless wings

I pierce, where deep-outstripping all surmise,

The nether heavens drop unsunned,

By stars and planets shunned.

And then I rise

Through vaulting gloom, to watch the dark

Snatch at the flame of failing suns;

Or mark

The heavy-dusked and silent skies,[68]

Strewn thick with wrecked and broken stars,

Where many a fated orbit runs.

An arrow sped from some eternal bow,

Through change of firmaments and systems sent,

And finding bourn nor bars,

I flee, nor know

For what eternal mark my flight is meant.

Clark Ashton Smith was born on 13 January, 1893, in Long Valley, Placer County, California. Largely self-taught, he began writing at a very young age, acquiring an exceptionally large vocabulary by reading the dictionary from cover to cover. A protégé of the San Francisco poet George Sterling, Smith achieved recognition at the age of 19 for his collection of poems The Star Treader (1912), influenced by Baudelaire, Poe and Sterling. Smith always considered himself a poet first and foremost, however, following the Great Depression, he later turned to writing short stories for pulp magazines such as Weird Tales as this was a more lucrative source of income to support himself and his aging parents. He wrote more than 100 short stories between 1929 and 1934, and it is this, along with his friendship with fellow Weird Tales contributor H. P. Lovecraft, for which he is remembered today. Smith lived most of his life in Auburn, California, and passed away in his sleep on 14 August 1961, at the age of 68. In addition to his literary activities, he created a large number of drawings, paintings and sculptures which reflected the otherworldly atmosphere of his tales.

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