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LAWYERS

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)

Skycity Adelaide Pty Ltd v Treasurer of South Australia & Anor (No 2) (SASCA) - parties ought not assume that they will necessarily be given an opportunity to address costs in writing after the delivery of reasons for judgment - in this case, the costs order made at the time of delivery of judgment should stand

EFEX Group Pty Ltd v Bennett (FCAFC) - primary judge had erred in characterising a contractor as an employee under the most recent High Court authority

Aged Care Quality and Safety Commissioner v Double Bay Aged Care Pty Ltd (FCA) - Administrative Appeals Tribunal erred in exercising power under the *Aged Care Quality and Safety Commission Act 2018* (Cth)

Trinh v Medical Council of New South Wales (NSWCA) - Executive Officer of the Medical Council had validly delegated power to a disciplinary panel

Taphouse Investments Pty Limited v Independent Liquor and Gaming Authority (NSWSC) - NSW Civil and Administrative Tribunal had correctly dismissed as moot an appeal by a former licensee against a refusal to extend trading hours of a tavern

Carvana v State of New South Wales (NSWSC) - claims for false imprisonment, malicious prosecution, and trespass to goods by a person who had been arrested and charged failed

May v Commonwealth (ACTCA) - primary judge was correct to allow the Commonwealth's appeal against workplace safety convictions arising from a helicopter accident in the Antarctic,

and to dismiss a prosecution appeal against acquittal of a private company

HABEAS CANEM

The scent on the breeze

Summaries With Link (Five Minute Read)

Skycity Adelaide Pty Ltd v Treasurer of South Australia & Anor (No 2) [2024] SASCA 18
Court of Appeal of South Australia
Livesey P, Lovell, & Bleby JJA
Taxation - SkyCity operates the SkyCity Casino pursuant to a licence granted under the *Casino Act 1997* (SA) - s16 of the *Casino Act* provides for an Approved Licensing Agreement between the licensee and the Minister - s51 imposes liability on SkyCity, as licensee, to pay casino duty - duty is calculated under a Casino Duty Agreement ("CDA") that exists pursuant to s17 - there was a dispute as to the correct interpretation of the current CDA and the duty payable in accordance with it, and the parties agreed that SkyCity would commence proceedings in the Supreme Court - the Corut of Appeal answered three questions of law (see Benchmark 19 March 2024) - the Court intimated that Skycity should pay 75% of the Treasurer's costs of the hearing but granted Senior Counsel for Skycity further time to consider his position and, if so advised, to put a written submission on costs - Skycity put on further submissions, contending that 75% of the case could be attributed to issues raised by the first two questions, on which the Treasurer succeeded, and 25% could be attributed to the third question, on which Skycity succeeded, which would have the effect that the Skycity should pay 75% of the Treasurer's cost, but should recover 25% of its costs, and these orders should be set off with the result that Skycity should pay 50% of the Treasurer's costs - held: parties ought not assume that they will necessarily be given an opportunity to address costs in writing after the delivery of reasons for judgment, and, in most cases, the broad parameters of any costs dispute are likely to be clear and the Court expects the parties to be in a position to put submissions at the time reasons are delivered - while costs should be addressed in a manner that is both judicial and logical, it is necessary to address costs issues without undue expense or delay and, usually, in a broad way - in the Court's assessment, very much less than 25% of the time and costs of the hearing was required for the third question - success on an issue by an otherwise unsuccessful appellant does not necessarily translate into an order that the appellant recover costs on that issue - while acknowledging that there is now a greater preparedness to award costs by reference to issues, the Court may determine that justice will be done by denying a successful party a proportion of its costs on the issue on which it failed and without ordering that the unsuccessful party recover costs on the issue on which it succeeded - there is no need to disturb the costs order made by this Court at the time of delivery of judgment.
https://austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASCA/2024/18.html
[From Benchmark Monday, 25 March 2024]

EFEX Group Pty Ltd v Bennett [2024] FCAFC 35
Full Court of the Federal Court of Australia
Katzmann, Bromwich, & Lee JJ
Employment law - Bennet agreed to take up a position with EFEX as a contractor by a wholly oral contract - he later applied to the Fair Work Commission for unfair dismissal - a Commissioner found Bennett was an employee, and the Full Bench refused permission to

appeal, holding that the totality of the evidence weighed in favour of Bennett being an employee - EFEX sought prohibition in the Supreme Court to restrain the Commission from continuing to hear the claim - between trial and judgment, the High Court gave two judgments changing the approach in this area: *CFMEU v Personnel Contracting Pty Ltd* [2022] HCA 1; 275 CLR 165 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2; 275 CLR 254 - the primary judge held Bennet was an employee - EFEX appealed, contending that the primary judge had not properly applied *Personnel Contracting* - held: where rights and duties of the parties are "comprehensively committed to a written contract", and the contract is not a sham, varied, waived, or the subject of an estoppel, the obligations established by that contract are decisive of the character of the legal relationship - in the absence of a written contract and no evidence of a particular conversation during which the contract was made, evidence of the parties' conduct must necessarily be considered in order to draw inferences as to whether the meeting of minds necessary to create a contract has occurred and what obligations they have thereby undertaken - the primary judge had given too much weight to factors emerging from the way the contract was performed that evidenced only a limited degree of exercise of control, rather than the existence of a contractual right of control, such as the periodic requirement to attend meetings - the primary judge had given insufficient weight to the significance of the almost complete freedom that Bennett had by reason of the contractual arrangements themselves - most importantly, Bennett had held the fruits of the contract with EFEX in his capacity as trustee of his family trust, and had benefited from the tax arrangements attendant on that fact, and this was known and agreed to by EFEX - the establishment of the trust was not just an expression of the parties' opinion about Bennett's relationship with EFEX, but was a manifestation of the very nature of the contract that was agreed upon and entered into - appeal allowed and Commission prohibited from hearing Bennett's application.
EFEX Group Pty Ltd
[From Benchmark Wednesday, 27 March 2024]

Aged Care Quality and Safety Commissioner v Double Bay Aged Care Pty Ltd [2024] FCA 242
Federal Court of Australia
Raper J
Administrative law - Double Bay Aged Care applied to the Aged Care Quality and Safety>Commissioner under s63B of the *Aged Care Quality and Safety Commission Act 2018* (Cth) to become an approved provider of aged care - a delegate of the Commissioner decided not to approve Double Bay as a provider of home care - Double Bay sought reconsideration of the delegate's decision under s74K and provided further documents and submissions - a delegate found that Double Bay had not satisfied the criteria under s63D(2)(b) that Double Bay is suitable to provide aged care - the Administrative Appeals Tribunal set aside this decision and remitted the matter for reconsideration - the Commission sought certiorari quashing the Tribunal's decision and mandamus requiring the Tribunal to determine Double Bay's application according to law, under s 9B of the *Judiciary Act 1903* (Cth) - held: when the Tribunal conducts merits review under s74N of the Act, it "stands in the shoes" of the Commissioner's delegate,

and is to make the correct or preferable decision, at the time of the Tribunal's decision, on the material before it - the Tribunal misunderstood the nature of its review function and failed to carry out the review required of it - the Tribunal understood that it was for it to be satisfied as to the suitability of Double Bay (through its key personnel), but did not go on, consistently with the deficiencies it identified in Double Bay's application and find that it was not able to approve the application, but rather found that it "could not grant an approval to the applicant on the present evidence, even if it was minded to do so", and then, rather than discharge its statutory function and not approve the application, gave Double Bay an opportunity to put on more information and erroneously sought for the Commissioner, rather than itself, to perform its duty under s63D - decision set aside, and remitted for determination according to law.
https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0242
[From Benchmark Monday, 25 March 2024]

Trinh v Medical Council of New South Wales [2024] NSWCA 58
Court of Appeal of New South Wales
Mitchelmore JA; Basten, & Griffiths AJJA
Administrative law - the Medical Council of NSW received two complaints regarding the applicant, a registered medical practitioner - the Council's Executive Officer appointed a panel - the panel resolved to suspend the applicant's registration pursuant to s150 of the *Health Practitioner Regulation National Law (NSW) 2009* (NSW) - the applicant both sought judicial review and sought to appeal from the Tribunal's decision - there was no dispute that the Council had power to delegate to the Executive Officer, but, the applicant submitted the Council could not delegate in a way which permitted the Executive Officer to subdelegate the exercise of the power to the Panel - held: the Council conferred its functions under s150 and s150A to a person or group of persons, as was expressly permitted by the National Law - what the Council placed in the hands of its Executive Officer was the power of determining the individual composition of the group (or panel) when occasions arose requiring consideration of the exercise of the relevant functions - the terms of the delegations reflected the nature of the functions being delegated, the exercise of which could be required with some frequency and on short notice, and the role of the Executive Officer in administering the affairs of the Council - there was no complaint that the members of the panel were not appropriately qualified - the challenge to the validity of the delegations must be rejected - the contention that there was some incoherence between the step taken by a panel in imposing a suspension and the failure of the Council to refer the complaint to the Tribunal was misconceived - further, he state of mind of the panel was not that of the Council, and the nature and purpose of their respective functions differed - the summons seeking judicial review should be dismissed - the appeal should also be dismissed.
View Decision
[From Benchmark Wednesday, 27 March 2024]

Taphouse Investments Pty Limited v Independent Liquor and Gaming Authority [2024] NSWSC 240
Supreme Court of New South Wales

Schmidt AJ

Appeals - Taphouse was the licensee of the a tavern at Wetherill Park when it unsuccessfully applied for an extended trading authorisation under the *Liquor Act 2007* (NSW) - the application required the Authority to consider the "hotel primary purpose test", specified in s15, which concerns the keeping or operation of gaming machines not unduly detracting from the character of the hotel or the enjoyment of persons using the hotel other than for gambling - Taphouse was replaced as licensee but continued to pursue the application, both before the NSW Civil and Administrative Tribunal and before the Supreme Court - the Tribunal refused a review application, and an appeal panel of the Tribunal dismissed an internal appeal on the basis it was moot as Taphouse was no longer the licensee - Taphouse sought to appeal to the Supreme Court - held: it is only the current licensee who can sell liquor at the tavern - neither the current owner nor any of Taphouse's successor licensees had sought to pursue the application - the evidence was that Taphouse had an agreement with the current owner of the Tavern to continue pursuing its review of the Authority's refusal and any appeals - however, the current position was that Taphouse was no longer the licensee of the Tavern and has no other interest in it, the conditions of its licence, or its own unsuccessful extended trading hours application - the principal issue raised by the appeal is whether the internal appeal before the Tribunal was moot - the Appeal Panel had correctly recognised that what was raised by Taphouse's appeal could not result in any orders in its favour on a further review and so should not be further entertained - the appeal panel had not err in concluding that, in the circumstances, it was necessary for the new licensee to make a fresh application for extended trading hours, accepting that the Tribunal's decision was a judgment *in rem* - there remained Taphouse's contractual obligation to the current owner, to pursue a review of its failed application and later, to appeal the further failure of the review - however, the internal appeal did not turn on this obligation, which also had no impact on the Authority, and the internal appeal necessarily turned on the provisions of the statutory schemes - on the proper construction of s49 of the *Liquor Act*, Taphouse's rejected application was irrelevant to extended trading at the Tavern in the future - leave to appeal granted but appeal dismissed.

View Decision

[From Benchmark Thursday, 28 March 2024]

Carvana v State of New South Wales [2024] NSWSC 254

Supreme Court of New South Wales

Wright J

False imprisonment - the plaintiff's accountancy practice, and a company with which the plaintiff was associated, occupied premises behind the post office at Fairy Meadow - in the car parking area, there were signs stating, variously, that: it was private property and unauthorised parking was not permitted; parking was only available for "employees or visitors" of the plaintiff's companies; or, parking was "Restricted / Customer parking only" - Carvana had been annoyed by unauthorised parking in that parking area, and when Fawcett parked her black SUV in the parking area when she went to the post office, Carvana had photographed or videoed her vehicle in the parking area and told her not to park there, and had also posted on social media -

when Fawcett continued to park there, the plaintiff let the air out of her tires, and videoed himself doing so using his phone, stomped on Fawcett's car, and had a confrontation with Fawcett - Carvana later had a confrontation with police, and was arrested and charged - the plaintiff pled guilty to one charge and the other charges were withdrawn, and he was dealt with under s10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) without a conviction being recorded - the plaintiff sued, alleging false imprisonment, malicious prosecution, and trespass to goods (arising from the seizure of his phone) - held: the arrest of the plaintiff had been lawful - his claim for false imprisonment must therefore fail - the consequences which might flow from the fact that one charge was dismissed under s 10(1)(a) and that the withdrawal of the three other charges was conditional on the plaintiff pleading guilty to one charge were not the subject of specific submissions - the Court proceeded, without deciding, on the basis that the three withdrawn charges had terminated favourably to the plaintiff - the Court was not satisfied on the balance of probabilities that the police had acted with malice in instituting the criminal proceedings against the plaintiff - further, it was also not established that the criminal proceedings were brought without reasonable and probable cause - the claim in malicious prosecution must fail - the seizure of the plaintiff's phone had not been authorised by s21 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) - by virtue of s4(1)(a) of the that Act, common law principles continue to apply in NSW where Pt 6 of the Act does not apply, there is no warrant, a police investigation is being conducted but no one has yet been arrested or charged - the seizure of the phone had been authorised at common law and its seizure and retention had been lawful - the claim for trespass to goods failed - had the claims succeeded, the Court would have awarded $18,750 for false imprisonment, $25,000 for malicious prosecution (plus a further $10,750 if the damages for false imprisonment were not awarded), and $1,000 for trespass to goods.
View Decision
[From Benchmark Thursday, 28 March 2024]

May v Commonwealth [2024] ACTCA 6
Court of Appeal of the Australian Capital Territory
Mossop, McWilliam, & Wheelahan JJ
Workplace safety - during helicopter operations undertaken on behalf of the Australian government in Antarctica, a helicopter pilot deposited drums of aviation fuel at a fuel cache on the Western Ice Shelf, and then landed his helicopter with its skids across a snow-covered crevasse - when returning to his helicopter after unhitching the fuel drums, the snow over the crevasse gave way and he fell into the crevasse, was rescued, but died from the effects of hypothermia the next day - the Commonwealth authority responsible for investigating breaches of the *Work Health and Safety Act 2011* (Cth) brought proceedings against the Commonwealth and the helicopter company that employed the pilot - the charges were under s32 of the Act, which required the prosecution establish that the accused failed to take reasonably practicable measures to ensure the health and safety of the relevant helicopter pilots who landed on the West Ice Shelf - the prosecution succeeded on two of the three charges against the Commonwealth, and failed against the company - the Commonwealth successfully appealed,

and the prosecution's appeal against the acquittal of the company was dismissed - the prosecution appealed on both aspects - held: the prosecution put forward a detailed and interlinked package of six measures which it said should have been taken in relation to flights to fuel depot sites on the West Ice Shelf - the prosecution would fail unless it established beyond reasonable doubt that each of the measures was "reasonably practicable" - the appeal judge had been correct in allowing the Commonwealth's appeal against its conviction and dismissing the prosecution appeal against the acquittal of Helicopter Resources - appeal dismissed.

May

[From Benchmark Wednesday, 27 March 2024]

Executive Summary and (One Minute Read)

Lifestyle Equities v Amazon UK Services Ltd (UKSC) - In a cross-border sale of merchandise where the same trade mark was owned by different entities in USA and UK, Amazon was liable for trade mark infringement where UK customers were targeted by Amazon's US website

Summaries With Link (Five Minute Read)

Lifestyle Equities v Amazon UK Services Ltd [2024] UKSC 8,
Supreme Court of the United Kingdom
Lord Hodge, Lord Briggs, Lord Hamblen, Lord Burrows, & Lord Kitchin
The trade mark at issue was the 'Beverly Hills Polo Club' brand. The holder of the mark in the EU/UK was Lifestyle Equities which is unrelated to the brand owner in the USA. A UK resident ordered US sourced goods bearing the trade mark through Amazon's US website. The owner of the EU trade mark contended that Amazon was liable for trade mark infringement because it targeted consumers in the UK/EU. This matter concerned conduct that occurred before Brexit. Applying EU law, the Supreme Court said that Amazon could only be liable for trade mark infringement in a cross-border sale if it in fact targeted consumers in the UK. The mere fact that a foreign website is accessible to a UK resident is insufficient to establish targeting of a UK consumer. The question for the court was whether an average consumer within the UK, who is reasonably well-informed and observant, would consider the website targeted at that consumer. The Court found that targeting had occurred because Amazon offered to deliver to the UK, in a dialog box Amazon specified which goods could be shipped to the UK, and specified UK delivery times and featured the option to pay in British currency. The Supreme Court also stated that Amazon's subjective intent was not the key issue. Rather, the question was one of objective fact taken from the perspective of the average consumer. Intent may, however, be taken into account to the extent it is relevant to the objective assessment made by the court.
Lifestyle Equities

Poem for Friday

The Nightingale

By: Sara Coleridge (1802-1852)

In April comes the Nightingale,
That sings when day's departed;
The poets call her Philomel,
And vow she's broken-hearted.

To them her soft, sweet, ling'ring note
Is like the sound of sorrow;
But some aver, no need hath she
The voice of grief to borrow.

No, 'tis the merry Nightingale,
Her pipe is clear and thrilling;
No anxious care, no keen regret,
Her little breast is filling.

She grieves when boys have robb'd her nest,
But so would Stork or Starling;
What mother would not weep and cry
To lose her precious darling?

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