

Friday, 10 May 2019

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

Parkes Shire Council v South West Helicopters Pty Limited (HCA) - aviation - negligence - 'psychiatric harm' - limitations - helicopter crash - claims by family of deceased officer of appellant - entitlement to claim under s28 *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (CACL Act) extinguished by s34 CACL Act - appeal dismissed

Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart (HCA) - contract - arbitration - appellants' "validity claims" in respect of deeds were within scope of deeds' 'arbitral clauses' - appeal dismissed - cross-appeal allowed

CPB Contractors Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union (FCAFC) - industrial law - enterprise agreement - 'coverage clause' was not an 'unlawful term' and not 'inconsistent with or repugnant to' s58(2) *Fair Work Act 2009* (Cth) - declaration

Bauer Consumer Media Ltd v Evergreen Television Pty Ltd (FCAFC) - trade marks - opposition to registration of trade mark - argument under s59(a) *Trade Marks Act 1995* (Cth) upheld - appeal allowed

Kraft Foods Group Brands LLC v Bega Cheese Limited (No 8) (FCA) - contract - intellectual property - 'trade dress' - trade mark - copyright - passing off - consumer law - ownership of "Peanut Butter Trade Dress" - issues determined - further hearing to be fixed on agreed date

Williams v Metcash Trading Ltd (NSWCA) - negligence - appellant 'picker packer' injured while working at centre occupied by respondent - erroneous failure to find causation established - appeal allowed - cross-appeal dismissed

Officeworks Ltd v Christopher (NSWCA) - damages - negligence - occupier's liability - appellant challenged assessment of damages - respondent sought retrial on damages - appeal allowed - judgment set aside - no retrial - directions made

ABALink Early Intervention Services Pty Ltd v Danford (NSWCA) - workers compensation - primary judge granted leave to respondent to seek damages from applicant - leave to appeal refused

Liprini v McIntyre (NSWSC) - negligence - professional negligence - solicitors' duties - 'risk of harm' - risk of harm not identified - breach of duty not established - statement of claim dismissed - judgment for defendants

Block v Powercor Australia Ltd (VSC) - negligence - group proceeding arising from bushfire - defendant sought proceeding's summary dismissal or to strike out paragraphs of statement of claim - proceedings summarily dismissed

Yilmaz v Specialty Fashion Group Pty Ltd (VSCA) - accident compensation - 'serious injury' - dismissal of application under s134AB(16)(b) *Accident Compensation Act 1985* (Vic) - failure to establish compensable injury - leave to appeal refused

Corbin v State of Queensland (QSC) - negligence - plaintiff prison officer suffered psychiatric and physical injuries in assault by prisoner - defendant not liable - judgment for defendant

Thomson v State of Queensland & Anor (No 2) (QSC) - costs - negligence - indemnity costs order against first defendant to include costs of plaintiff's pursuit of second defendant

Shahin Enterprises Pty Ltd v Development Assessment Commission (SASCFC) - planning and environment - refusal of planning consent for 'proposed development' of 'service station complex' - appeal dismissed

Summaries With Link (Five Minute Read)

Parke Shire Council v South West Helicopters Pty Limited [2019] HCA 14

High Court of Australia

Kiefel CJ; Bell, Keane, Gordon & Edelman JJ

Aviation - negligence - 'psychiatric harm' - limitations - appellant engaged respondent to assist appellant in carrying out weed survey - helicopter operated by respondent crashed - all helicopter's occupants killed, including Mr Stephenson, who was an officer of appellant - appeal concerned claims brought against appellant and respondent by 'widow, daughter and son'

(Stephensons) of Mr Stephenson - claims were for 'negligently inflicted psychiatric harm resulting from the death of Mr Stephenson' - Stephensons' proceedings were not commenced within two year limitation period under s34 *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (CACL Act) - Supreme Court of New South Wales found s34 CACL Act did not extinguish Stephensons' claims - Stephensons succeeded against appellant - appellant obtained contribution against respondent 'as co-tortfeasor' under s37(b) CACL Act - respondent succeeded on appeal - appeal concerned whether Stephensons' claim against respondent precluded by CACL Act - whether entitlement to claim under s28 of CACL Act extinguished by s34 CACL Act - whether s35(2) CACL Act precluded Stephensons from claiming other than within two year limitation period under s34 CACL Act - held: s34 CACL Act extinguished Stephensons' entitlement to claim under s28 CACL Act - held: appeal dismissed.

[Parkes](#)

[From Benchmark Thursday, 9 May 2019]

Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart [2019] HCA 13

High Court of Australia

Kiefel CJ; Gageler, Nettle, Gordon & Edelman JJ

Contract - arbitration - appeal concerned three deeds: 'Deed of Obligation and Release', 'Hope Downs Deed' and 'April 2007 Deed' - deeds contained 'releases or abandonment of claims' and 'promises not to make further claims' - deeds contained 'arbitral clauses' - appellants contended they were not bound by deeds' terms because appellants' assent to deeds 'procured by misconduct' by 'Mrs Rinehart, HPPL and others' - appellants sought declarations deeds void against them ("validity claims") - appeals concerned whether validity claims were subject to deeds' 'arbitral clauses' - sixth, seventh and eighth respondents, who were not parties to deed, cross-appealed, seeking stay of appellants' claims against them - ss2 & 8 *Commercial Arbitration Act 2010* (NSW) - held: no error in decision of Full Court of the Federal Court that validity claims were within arbitral clauses' scope - appeals dismissed - cross-appeal allowed.

[Rinehart](#)

[From Benchmark Friday, 10 May 2019]

CPB Contractors Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union [2019] FCAFC 70

Full Court of the Federal Court of Australia

Flick, O'Callaghan & Wheelahan JJ

Industrial law - Commissioner of Fair Work Commission approved enterprise agreement (agreement) - Full Bench of Fair Work Commission quashed Commissioner's decision, finding clause of agreement ('coverage clause') was 'unlawful term' for purposes of s194(ba) *Fair Work Act 2009* (Cth) (Fair Work Act) - applicant sought to quash Full Bench's decision - whether coverage clause was unlawful term - whether coverage clause's last paragraph 'purported to exclude' agreement's coverage 'in favour of a later agreement for a specific project or site' - whether clause's last paragraph 'inconsistent with or repugnant to' s58(2) Fair Work Act - whether clause provided for 'method of election' - held: last paragraph of coverage clause was

not an unlawful term and was not inconsistent with or repugnant to s58(2) Fair Work Act - declaration made.

[CPB](#)

[From Benchmark Monday, 6 May 2019]

Bauer Consumer Media Ltd v Evergreen Television Pty Ltd [2019] FCAFC 71

Full Court of the Federal Court of Australia

Greenwood, Rangiah & Burley JJ

Trade marks - respondent sought registration of 'Trade Mark Application No. 1324177 for the words DISCOVER DOWNUNDER' ('mark') - application made in respect of certain services - appellants ('Bauer') opposed registration - delegate of Registrar of Trade Marks dismissed Bauer's opposition - Bauer appealed against delegate's decision and also sought application's removal from Register for non-use - primary judge dismissed proceedings - Bauer appealed, seeking leave to appeal in respect of delegate's decision - whether erroneous refusal by primary judge to permit Bauer to 'advance an argument' based on s59(a) *Trade Marks Act 1995* (Cth) (Trade Marks Act) - whether Bauer established 'lack of intention to use' services - ss92(4)(a) & 92(4)(b) Trade Marks Act - held: appeal allowed - delegate's decision set aside - registration of mark refused.

[Bauer](#)

[From Benchmark Thursday, 9 May 2019]

Kraft Foods Group Brands LLC v Bega Cheese Limited (No 8) [2019] FCA 593

Federal Court of Australia

O'Callaghan J

Contract - intellectual property - 'trade dress' - trade mark - copyright - passing off - consumer law - proceedings principally concerned ownership of "Peanut Butter Trade Dress" - 'six inter-related issues' - twelve 'additional questions' - goodwill - 'legal nature' of Peanut Butter Trade Dress as 'unregistered trade mark' - what Peanut Butter Trade Dress designates/designated 'to consumers' - how goodwill inured 'to an entity' - how an unregistered trade mark 'assigned or transferred' - 'to whom' 'relevant goodwill' had inured immediately before date of restructure of 'Kraft Foods Inc' and after restructure - Master Trade Mark Agreement (MTA) - whether respondent (Bega) precluded by 'Mondelez Licence' from claiming "ownership" of Peanut Butter Trade Dress - whether Bega had breached (MTA) - whether Australian Consumer Law issues and passing off issues could be determined without ascertainment of whether trade dress rights had accrued to first applicant (Kraft Food Brands) - whether Bega breached Australian Consumer Law - whether Kraft Food Brands infringed Bega's copyright - whether use of Kraft Food Brands' shippers by Bega was unlawful - *Competition and Consumer Act 2010* (Cth) - *Trade Marks Act 1995* (Cth) - *Trademark Act of 1946* (USA) - held: issues determined - further hearing of proceeding to be fixed on agreed date.

[Kraft](#)

[From Benchmark Tuesday, 7 May 2019]

Williams v Metcash Trading Ltd [2019] NSWCA 94

Court of Appeal of New South Wales

Meagher & White JJA; Simpson AJA

Negligence - appellant contended he was injured while working as 'picker packer' at 'product distribution centre' (centre) occupied by respondent - respondent was employed by labour-hire company (JW Workforce Solutions) - appellant alleged he was injured on two dates: 30/5/12 and 1/6/12 - appellant contended that, on 1/6/12, he was injured while lifting boxes of dog food - primary judge found appellant was injured on 1/6/12 and that respondent had breached duty of care by placing dog food cartons food 'in pick slots with a height of 1.4 metres' - primary judge found causation not established under s5D *Civil Liability Act 2002* (NSW) - primary judge instead found that injury's 'single cause' was appellant 'lifting two boxes of dog food at once' - primary judge gave judgment for respondent - appellant appealed against finding causation established and against finding of contributory negligence - and respondent cross-appealed against finding of breach of duty and against damages - held: primary judge's finding of breach of duty of care upheld - primary judge erred in finding causation not established - no error in finding of 20% contributory negligence - no error in primary judge's finding concerning 'psychiatric injury' - challenge to damages 'predicated' on successful challenge to finding concerning 'psychiatric injury' - appeal allowed - cross-appeal dismissed.

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[From Benchmark Monday, 6 May 2019]

Officeworks Ltd v Christopher [2019] NSWCA 96

Court of Appeal of New South Wales

Meagher, Gleeson & Leeming JJA

Damages - negligence - occupier's liability - respondent, while at premises occupied by appellant, was struck by object when it fell from shelf - primary judge awarded \$215,203.40 against appellant in respondent's favour - appellant did not challenge finding of liability - appellant challenged assessment of damages - respondent accepted 'she could not defend all aspects' of damages - respondent accepted appeal should be allowed - respondent sought retrial on damages - causation - whether to order retrial in order to resolve 'factual matters' which primary judge had not determined - whether to 're-determine damages' - quantification - *Civil Liability Act 2002* (NSW) - held: appeal allowed - judgments set aside - Court not satisfied to order retrial - directions.

[View Decision](#)

[From Benchmark Wednesday, 8 May 2019]

ABALink Early Intervention Services Pty Ltd v Danford [2019] NSWCA 97

Court of Appeal of New South Wales

Leeming & Payne JJA

Workers compensation - applicant was 'former employer' of respondent - primary judge granted respondent leave to seek damages against applicant 'more than three years' after date on which applicant alleged he was injured - applicant sought to appeal - consideration of proposed appeal

grounds - delay - prejudice - whether basis to grant leave on new ground of appeal - Pt 6 *Workcover Guidelines for Claiming Compensation Benefits* - s151D *Workers Compensation Act 1987* (NSW) - held: no basis for grant of leave to appeal established - leave to appeal refused.

[View Decision](#)

[From Benchmark Wednesday, 8 May 2019]

Liprini v McIntyre [2019] NSWSC 355

Supreme Court of New South Wales

Simpson AJ

Negligence - professional negligence - solicitors' duties - wills and estates - plaintiff sued 'former solicitors' in relation to their 'performance of legal services' - defendants were partners of firm - whether failure 'to discharge' duty of care by failure to bring proceedings prior to date of mediation - whether breach of duty by failure to make proposals in relation to content of orders agreed on at mediation - 'duty to take reasonable precautions against a risk of harm' - 'negligent formulation of orders' - advocates' immunity - s5B(1) *Civil Liability Act 2002* (NSW) - held: plaintiff failed to identify any risk of harm arising from failure to bring proceedings before mediation - even if risk identified, breach of duty not established - no breach of duty established in respect of formulation of agreement's terms and orders - judgment for defendants.

[View Decision](#)

[From Benchmark Tuesday, 7 May 2019]

Block v Powercor Australia Ltd [2019] VSC 15

Supreme Court of Victoria

John Dixon J

Negligence - group proceeding arising from bushfire - tree had fallen on 'powerline conductor' causing ground vegetation to ignite - plaintiffs contended that defendant, by its breach of duty, caused fire - plaintiff alleged defendant's 'principal breach' was its failure 'to remove or prune the tree' prior to 'fire danger period' - defendant sought summary dismissal of proceedings or to strike out paragraphs of statement of claim - ss62 & 63 *Civil Procedure Act 2010* (Vic) - *Electrical Safety Act 1998* (Vic) - *Electrical Safety (Electric Line Clearance) Regulations 2015* (Vic) - prospects of success - whether statutory duty of care - whether common law duty of care - held: proceedings summarily dismissed.

[Block](#)

[From Benchmark Tuesday, 7 May 2019]

Yilmaz v Specialty Fashion Group Pty Ltd [2019] VSCA 100

Court of Appeal of Victoria

Beach & Niall JJA

Accident compensation - 'serious injury' - applicant employed by respondent - applicant, pursuant to s134AB(16)(b) *Accident Compensation Act 1985* (Vic), sought to claim damages for injuries allegedly suffered in course of employment - applicant sought to claim damages for 'pain and suffering' and for 'pecuniary loss' - primary judge dismissed application, finding

applicant had not suffered compensable injury in course of employment - credibility - absence of any complaint by applicant in medical consultation history concerning alleged injury - held: applicant's proposed appeal grounds did not have prospects of success - leave to appeal refused.

[Yilmaz](#)

[From Benchmark Friday, 10 May 2019]

Corbin v State of Queensland [2019] QSC 110

Supreme Court of Queensland

Ryan J

Negligence - plaintiff 'prison officer' suffered 'physical and psychiatric injuries' as result of assault by prisoner - plaintiff sued defendant for alleged negligent management of prisoner - plaintiff contended prisoner should have been subject of "Intensive Management Plan" (plan) and that, if prisoner was subject of plan, 'it was probable' prisoner would not have assaulted plaintiff - whether breach of duty established - whether assault 'reasonably foreseeable' - held: breach of duty by defendant not established - judgment for defendant.

[Corbin](#)

[From Benchmark Thursday, 9 May 2019]

Thomson v State of Queensland & Anor (No 2) [2019] QSC 115

Supreme Court of Queensland

Applegarth J

Costs - negligence - plaintiff obtained judgment and against second defendant - judgment against first defendant exceeded plaintiff's offers of settlement to first defendant - 'no contest' first defendant should pay plaintiff's costs on indemnity basis - whether costs order in plaintiff's favour against first defendant should include costs of pursuit of second defendant - whether *Paskins v Hail Creek Coal Pty Ltd (No 2)* [2017] QSC 213 distinguishable - s316 *Workers' Compensation and Rehabilitation Act 2003* (Qld) - held: Court satisfied indemnity costs order against first defendant should include costs of plaintiff's pursuit of second defendant.

[Thomson](#)

[From Benchmark Friday, 10 May 2019]

Shahin Enterprises Pty Ltd v Development Assessment Commission [2019] SASFC 44

Full Court of the Supreme Court of South Australia

Vanstone, Kelly & Blue JJ

Environment and planning - Environment Resources and Development Court (ERDC) dismissed appellant's appeal against first respondent's refusal of planning consent for 'proposed development' of 'service station complex' - 'principal issue' was whether proposed development would breach 'Principle 1' - ERDC had concluded that the proposed development was 'not small-scale' and was non-compliant with Principle 1 - appellant contended ERDC erred in findings concerning impacts of proposed development - appellant sought to amend appeal grounds - whether to grant leave to amend - prejudice - construction of Principle 1 - "the

amenity of residential premises within the locality” - impact on ‘free flow of traffic’ - whether errors of law in ERDC’s conclusions - whether to grant leave to appeal on ‘factual grounds’ - held: leave to amend appeal grounds granted - grounds of appeal not established - appeal dismissed.

[Shahin](#)

[From Benchmark Wednesday, 8 May 2019]



Benchmark

Dream-Time

By: Ella Higginson

It is the time when crimson stars
 Weary of heaven's cold delight,
And take, like petals from a rose,
 Their soft and hesitating flight
Upon the cool wings of the air
 Across the purple night.

It is the time when silver sails
 Go drifting down the violet sea,
And every poppy's crimson mouth
 Kisses to sleep a lovesick bee;
The fireweed waves her rosy plumes
 On pasture, hill and lea.

It is the time to dream—and feel
 The languid rocking of a boat,
The pushing ripple round the keel
 Where cool, deep-hearted lilies float,
And hear thro' wild syringas steal
 Some songster's drowsy note.

It is the time, at eve, to lie
 And in a hammock faintly sway,
To watch the golds and crimsons die
 Across the blue stretch of the bay;
To hear the sweet dusk tiptoe by
 In the footsteps of the day.

[Ella Higginson](#)

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