

Friday, 12 April 2019

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (1 minute read)

Clubb v Edwards; Preston v Avery (HCA) - constitutional law - 'implied constitutional freedom of political communication' - challenges to validity of *Reproductive Health (Access to Terminations) Act 2013* (Tas) and *Public Health and Wellbeing Act 2008* (Vic) rejected

CXXXVIII v Commonwealth of Australia (FCAFC) - administrative law - officers of Australian Crime Commission served summonses and notices to produce on appellant - respondents conceded one summons and notice invalid - challenge to validity of other summons and notice rejected - appeal dismissed

R & B Directional Drilling Pty Ltd (in liq) v CGU Insurance Limited (No 2) (FCA) - insurance - construction - 'business insurance policy' - liability arising from sub-contract's performance - first applicant not entitled to payment under policy - application dismissed

Yuen v Chan (NSWCA) - defamation - qualified privilege - malice - primary judge found defendant made defamatory imputations - 'common law qualified privilege' defence upheld - leave to appeal refused

Cando Management and Maintenance Pty Ltd v Cumberland Council (NSWCA) - environment and planning - erroneous finding that development consent had lapsed - appeal allowed in part

Commissioner for Fair Trading v Digital Marketing and Solutions Pty Ltd (ACN 614 430 983) trading as Android Enjoyed and Camerasky & Anor (NSWSC) - consumer law - fair trading - breaches of Australian Consumer Law - breach of *Electricity (Consumer Safety) Act*

2004 (NSW) - breach of 'Undertaking' - declarations and orders

Boss Constructions (NSW) Pty Ltd v Rohrig (NSW) Pty Ltd (NSWSC) - contract - parties claimed against each other for breach of an 'asserted contract' - neither party established contract it contended for - claim and cross-claim dismissed

IAG Limited t/as NRMA Insurance v Qianxia Lou (NSWSC) - motor accidents compensation - refusal to grant insurer's 'exemption application' - Claims Assessor's decision quashed - matter remitted

Hampshire Automotive Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd (VSCA) - real property - easements - trespass - 'easement by prescription by long user' - appeal allowed - retrial

Midland Metals Overseas Pte Ltd v Powercor Network Services Pty Ltd (VSCA) - corporations - statutory demand - contract - three statutory demands set aside - genuine dispute - leave to appeal refused

Traspunt No 4 Pty Ltd v Moreton Bay Regional Council (QCA) - environment and planning - development permit - clearing of vegetation - whether work 'assessable development' - respondent's appeal allowed - applicant's appeal dismissed

Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor (QSC) - security of payments - service - jurisdiction - adjudicator found lack of jurisdiction to determine claims - challenge to adjudicator's decisions failed - application dismissed

Thomson v State of Queensland & Anor (QSC) - damages - negligence - plaintiff employed by second defendant contracted Q Fever while working on farm operated by first defendant - liability admitted - assessment of damages

Stokes v Ragless (SASCFC) - costs - defamation - procedural fairness - obligations to unrepresented litigants - offers of settlement - refusal to award indemnity costs - appeal allowed

Summaries With Link (Five Minute Read)

Clubb v Edwards; Preston v Avery [2019] HCA 11

High Court of Australia

Kiefel CJ; Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ

Constitutional law - Tasmanian Parliament enacted *Reproductive Health (Access to Terminations) Act 2013* (Tas) (RHAT Act) - Victorian Parliament enacted *Public Health and*

Wellbeing Act 2008 (Vic) (PHW Act) - s185B(1) PHW Act prohibited, 'in certain circumstances', 'communicating by any means in relation to abortions' - s9(2) RHAT Act prohibited 'in certain circumstances', "a protest in relation to terminations" - appellant (Clubb) convicted of offence under s185B(1) PHW Act - appellant (Preston) convicted of offence under s9(2) RHAT Act - whether provisions of RHAT Act and PHW Act were contrary to 'implied constitutional freedom of political communication' - 'test for invalidity' in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 - held: Court not satisfied provisions of RHAT Act and PHW were invalid.

[Clubb](#)

[From Benchmark Friday, 12 April 2019]

CXXXVIII v Commonwealth of Australia [2019] FCAFC 54

Full Court of the Federal Court of Australia

Logan, Bromwich & Charlesworth JJ

Administrative law - officers of Australian Crime Commission served 'two summonses and two notices to produce' on appellant - respondents conceded 'first summons' and 'first notice' invalid - primary judge rejected challenge to validity of 'second summons' and 'second notice' - whether erroneous failure by primary judge to find first notice and first summons invalid and grant declaratory relief - whether erroneous failure by primary judge to find determination of Board of Australian Crime Commission was not capable of supporting issue of second summons and second notice - whether erroneous failure by primary judge to find second notice invalid due to its imposition on appellant of obligations 'with which it was impossible to comply' - *Australian Crime Commission Act 2002* (Cth) - held: appeal dismissed.

[CXXXVIII](#)

[From Benchmark Monday, 8 April 2019]

R & B Directional Drilling Pty Ltd (in liq) v CGU Insurance Limited (No 2) [2019] FCA 458

Federal Court of Australia

Allsop CJ

Insurance - construction - first applicant provided 'specialist drilling services' - respondent issued 'business insurance policy' (policy) to first applicant - first applicant entered sub-contract with second applicant - applicants contended first applicant's liability to second applicant arising from sub-contract's performance entitled first applicant to payment under policy - construction of policy - 'coverage clause' - whether "physical injury to tangible property" - exclusions - held: application dismissed.

[R & B](#)

[From Benchmark Tuesday, 9 April 2019]

Yuen v Chan [2019] NSWCA 63

Court of Appeal of New South Wales

Gleeson JA & Emmett AJA

Defamation - primary judge found defendant had published four defamatory imputations -

primary judge upheld 'common law qualified privilege' defence - plaintiff sought to appeal - whether erroneous failure to find additional defamatory imputations carried - whether erroneous failure to finding imputation 'relevant to the occasion of qualified privilege' - whether erroneous finding that applicant had not demonstrated respondent 'actuated by malice' - whether misapplication of principles concerning malice - s6(2) *Defamation Act 2005* (NSW) - held: leave to appeal refused - summons dismissed.

[View Decision](#)

[From Benchmark Monday, 8 April 2019]

Cando Management and Maintenance Pty Ltd v Cumberland Council [2019] NSWCA 26

Court of Appeal of New South Wales

Beazley P; Meagher & White JJA

Environment and planning - respondent sought declaration appellant, in breach of s4.3 *Environmental Planning and Assessment Act 1979* (EPA), 'carried out prohibited development for which no development consent was in force' - respondent also sought declaration appellant breached ss81A(2)(a) & s81A(2)(b) EPA - no dispute appellant breached ss81A(2)(a) & 81A(2)(b) - respondent also sought injunction to restrain appellant from use of premises - appeal concerned two issues - whether primary judge erred in finding lapse of development consent - whether Land and Environment Court could and should have ordered breaches of EPA 'should be sanctioned and authorised' if certain 'rectification works' performed - held: development consent had not lapsed - injunction against property's 'use and occupation' to continue until appellant obtained construction certificate, appointed 'principal certifying authority' and obtained occupation certificate - appeal allowed in part.

[View Decision](#)

[From Benchmark Thursday, 11 April 2019]

Commissioner for Fair Trading v Digital Marketing and Solutions Pty Ltd (ACN 614 430 983) trading as Android Enjoyed and Camerasky & Anor [2019] NSWSC 370

Supreme Court of New South Wales

Fullerton J

Consumer law - fair trading - first defendant was supplier of 'electronics and electrical goods' - second defendant was first defendant's 'director and secretary' - goods purchased from 'Websites' - plaintiff contended first defendant contravened ss18, 29(1)(a), 33, 36(3) & 36(4) Australian Consumer Law - plaintiff also contended first defendant 'sold electrical articles' which did not meet requirements of *Electricity (Consumer Safety) Act 2004* (NSW) (ECSA Act) in breach of ECSA Act and in breach of 'Undertaking' - held: plaintiff established claims - first defendant contravened Australian Consumer Law - second defendant involved in first defendant's contraventions - defendants breached Undertaking and ECSA - declarations and orders made, including orders for payment of pecuniary penalties and for second defendant's disqualification.

[View Decision](#)

[From Benchmark Monday, 8 April 2019]

Boss Constructions (NSW) Pty Ltd v Rohrig (NSW) Pty Ltd [2019] NSWSC 374

Supreme Court of New South Wales

Hammerschlag J

Contract - parties sued each other for breach of an 'asserted contract' - 'lengthy commercial dealings' - whether 'binding contract' concluded - 'objective assessment' of behaviour of parties - *Building and Construction Industry Security of Payment Act 1997* (NSW) - held: neither party established contract which it contended for - no binding contract between parties - claim and cross-claim dismissed.

[View Decision](#)

[From Benchmark Tuesday, 9 April 2019]

IAG Limited t/as NRMA Insurance v Qianxia Lou [2019] NSWSC 382

Supreme Court of New South Wales

Wilson J

Motor accidents compensation - first defendant injured in motor vehicle accident - first defendant, under Pt 4.4 *Motor Accidents Compensation Act 1999* (NSW) (MAC Act), claimed 'personal injury damages' against plaintiff insurer with State Insurance Regulatory Authority (SIRA) - plaintiff, under s92(1)(b) MAC Act, sought that claim be exempted from being assessed by SIRA - plaintiff contended claim "not suitable for assessment" because first defendant 'made false or misleading statements' concerning injuries and damage, and due to matter's factual complexity - whether Claims Assessor erred in refusing plaintiff's application - whether misunderstanding or misconstrual of power in s92(1)(b) MAC Act - whether absence of evidence to support 'critical finding' - whether failure to ask 'correct question' - held: Claims Assessor's decision quashed - matter remitted.

[View Decision](#)

[From Benchmark Wednesday, 10 April 2019]

Hampshire Automotive Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd [2019] VSCA 77

Court of Appeal of Victoria

Tate, Niall & Emerton JJA

Real property - easements - trespass - applicant and first respondent were 'tenants of neighbouring commercial properties' - applicant breached fence which separated properties - applicant used property of first respondent 'for access and ingress' and to store vehicles - first respondent sued applicant in trespass - applicant counterclaimed on basis it used land under easement 'created by prescription based on long user' - primary judge found owner's consent was necessary for counterclaim, dismissed counterclaim and found in favour of first respondent - whether easement could be created by tenant's use independent of consent of landlord and enforced by person in land's possession - held: judge incorrectly concluded owner's consent was required for tenant to enforce easement - dominant's owner's 'knowledge or consent' not required to create 'easement by prescription by long user' - appeal allowed - retrial.

[Hampshire](#)

[From Benchmark Thursday, 11 April 2019]

Midland Metals Overseas Pte Ltd v Powercor Network Services Pty Ltd [2019] VSCA 76

Court of Appeal of Victoria

Tate & Whelan JJA; Almond AJA

Corporations - statutory demand - contract - parties entered contract for electrical cables' supply - applicant sought payment of invoices in relation to orders for cables - applicant served three statutory demands on respondent - respondent sought to set aside demands on basis there was genuine dispute in relation to debts underlying them - associate judge found existence of genuine disputes concerning compliance of cables with specification under contract - associate judge set demands aside - applicant sought to appeal - construction of contract - whether erroneous finding of genuine dispute - whether associate judge decided or purported to decide 'any ultimate question' on construction issue - ss459G & 459H *Corporations Act 2001* (Cth) - held: leave to appeal refused.

[Midland](#)

[From Benchmark Thursday, 11 April 2019]

Traspunt No 4 Pty Ltd v Moreton Bay Regional Council [2019] QCA 51

Court of Appeal of Queensland

Gotterson and McMurdo JJA; David J

Environment and planning - applicant owned land within area of respondent - applicant sought development permit for clearing of vegetation - respondent refused permit - Planning and Environment Court found applicant entitled 'to clear firebreaks' along two boundaries (northern and eastern boundaries) - applicant was refused permission to clear firebreaks along two boundaries (southern and western boundaries) - appeal allowed to extent of declaration that firebreaks' clearing along northern and eastern boundaries was 'not an assessable development' - parties each sought to appeal - respondent's position changed - respondent did not oppose work on northern and eastern boundaries but contended it should be 'pursuant to a different order' than that which judge made - whether erroneous finding that work was not assessable development - *Sustainable Planning Act 2009* (Qld) - held: respondent's appeal allowed - primary judge erred in finding work was not assessable development - order set aside - matter remitted - respondent's appeal otherwise dismissed - applicant's appeal dismissed.

[Traspunt](#)

[From Benchmark Thursday, 11 April 2019]

Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor [2019] QSC 91

Supreme Court of Queensland

Ryan J

Security of payments - applicant sought orders concerning 'adjudication applications' which it made under *Building and Construction Industry Payments Act 2004* (Qld) - in three of four applications, adjudicator found lack of jurisdiction to determine the claims on basis claims not served on respondent in accordance with the Act - applicant sought to quash adjudicator's

decision - adjudicator had not yet made decision in respect of fourth application but 'same argument' concerning jurisdiction had been raised - whether service on respondent of 'adjudication application form' was necessary for conferral of jurisdiction on adjudicator - time within which service was required to be made - whether service on respondent 'well after service of the submissions' was sufficient for conferral of jurisdiction - held: challenge to adjudicator's decisions failed - application dismissed.

[Niclin](#)

[From Benchmark Wednesday, 10 April 2019]

Thomson v State of Queensland & Anor [2019] QSC 95

Supreme Court of Queensland

Applegarth J

Damages - negligence - plaintiff employed by second defendant - plaintiff contracted Q Fever on farm in course of employment and Q Fever Debility Syndrome as a result of Q fever - plaintiff subsequently developed depressive disorder and adjustment disorder - plaintiff sued first defendant operator of farm second defendant employer - liability admitted by both defendants - defendants agreed first defendant was 80 per cent responsible and second defendant is 20 per cent responsible - assessment of damages - general damages - 'likely employment and income' if plaintiff had not contracted Q Fever - special damages - 'future medical and other expenses' - 'past and future care' - held: damages assessed - judgment against first defendant in sum of \$1,179,872 - judgment against second defendant in sum of \$240,975.

[Thomson](#)

[From Benchmark Friday, 12 April 2019]

Stokes v Ragless [2019] SASFCFC 31

Full Court of the Supreme Court of South Australia

Blue, Parker & Lovell JJ

Costs - defamation - procedural fairness - obligations to unrepresented litigants - appellant succeeded in proceedings against unrepresented respondent - appellant had filed settlement offers before trial - respondent did not accept offers - appellant sought indemnity costs under s38(2)(a) *Defamation Act 2005* (SA) - primary judge found respondent not informed by solicitors for appellant of 'consequences of accepting or rejecting filed settlement offers' - primary judge awarded appellant costs on party/party basis, finding it was not in interests of justice to grant appellant costs on indemnity basis - whether denial of procedural fairness to appellant - whether 'represented party' obliged 'to inform an unrepresented party' of implications of failure to accept settlement offer - held: appeal allowed.

[Stokes](#)

[From Benchmark Tuesday, 9 April 2019]

Benchmark

A Midsummer Night's Dream, Act II, Scene I [Over hill, over dale]

By: William Shakespeare, 1564 - 1616

A wood near Athens. A Fairy speaks.

Over hill, over dale,
Thorough bush, thorough brier,
Over park, over pale,
Thorough flood, thorough fire,
I do wander every where,
Swifter than the moon's sphere;
And I serve the fairy queen,
To dew her orbs upon the green:
The cowslips tall her pensioners be;
In their gold coats spots you see;
Those be rubies, fairy favours,
In those freckles live their savours:
I must go seek some dew-drops here
And hang a pearl in every cowslip's ear.
Farewell, thou lob of spirits: I'll be gone;
Our queen and all her elves come here anon.

https://en.wikipedia.org/wiki/William_Shakespeare

[Click Here to access our Benchmark Search Engine](#)