

DECEMBER 2021

The Authorised Reports of the Supreme Court of the
Northern Territory of Australia

THE
NORTHERN
TERRITORY
LAW REPORTS
2019

EDITOR
CAMERON FORD

VOL 42 — PART 1

PAGES 1-79

PUBLISHED FOR THE NORTHERN TERRITORY COUNCIL OF LAW REPORTING INC BY LAWBOOK CO.
FUNDED BY THE LAW SOCIETY PUBLIC PURPOSE TRUST

The mode of citation of this part will be:
42 NTLR

TABLE OF CASES REPORTED

Part 1 — Pages 1-79

ABB Australia Pty Ltd; James Engineering Pty Ltd v	51
Civmec Constructions and Engineering Pty Ltd; Jemena	
Northern Gas Pipeline Pty Ltd v	37
Cumberland; R v	1
Ferguson v The Queen	31
Ichthys LNG Pty Ltd v JKC Australia LNG Pty Ltd	72
James Engineering Pty Ltd v ABB Australia Pty Ltd	51
Jemena Northern Gas Pipeline Pty Ltd v Civmec	
Constructions and Engineering Pty Ltd	37
JKC Australia LNG Pty Ltd; Ichthys LNG Pty Ltd v	72
JL v The Queen	17
R v Cumberland	1
R; Ferguson v	31
R; JL v	17

(Cases in **bold** reported in this part)

Published in Sydney



THOMSON REUTERS

© 2021 Thomson Reuters (Professional) Australia Limited

ABN 64 058 914 668

Lawbook Co.

Published in Sydney

© Northern Territory Council of Law Reporting Inc

ISSN 1038-9237

TABLE OF CASES JUDICIALLY CONSIDERED IN THIS PART

<i>AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd</i> (2009) 25 NTLR 14	
Cited. James Engineering Pty Ltd v ABB Australia Pty Ltd and Another	51
<i>Alliance Contracting Pty Ltd v James</i> [2014] WASC 212	
Cited. James Engineering Pty Ltd v ABB Australia Pty Ltd and Another	51
<i>Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd</i> [2005] NSWSC 362	
Referred to. Jemena Northern Gas Pipeline Pty Ltd v Civmec Constructions and Engineering Pty Ltd and Another	37
<i>Bara v The Queen</i> [2016] NTCCA 5	
Cited. JL v The Queen	17
<i>Beckwith v The Queen</i> (1976) 135 CLR 569	
Cited. R v Cumberland	1
<i>Betts v The Queen</i> (2016) 258 CLR 420	
Cited. Ferguson v The Queen	31
<i>Bristol and North Somerset Railway Co, Re</i> (1877) 3 QBD 10	
Cited. Jemena Northern Gas Pipeline Pty Ltd v Civmec Constructions and Engineering Pty Ltd and Another	37
<i>Brodyn Pty Ltd v Davenport</i> (2004) 61 NSWLR 421	
Cited. James Engineering Pty Ltd v ABB Australia Pty Ltd and Another	51
<i>CH2M Hill Australia Pty Ltd v ABB Australia Pty Ltd</i> (2016) 41 NTLR 1	
Followed. Jemena Northern Gas Pipeline Pty Ltd v Civmec Constructions and Engineering Pty Ltd and Another	37
Referred to. Jemena Northern Gas Pipeline Pty Ltd v Civmec Constructions and Engineering Pty Ltd and Another	37
<i>Commonwealth v SCI Operations Pty Ltd</i> (1998) 192 CLR 285	
Cited. R v Cumberland	1
<i>Cooper & Oxley Builders Pty Ltd v Steensma</i> [2016] WASC 386	
Cited. James Engineering Pty Ltd v ABB Australia Pty Ltd and Another	51
<i>Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd</i> (1983) 155 CLR 129	
Cited. R v Cumberland	1

TABLE OF CASES JUDICIALLY CONSIDERED

<i>Emitja v The Queen</i> (2016) 39 NTLR 159	
Cited. <i>JL v The Queen</i>	17
Cited. <i>R v Cumberland</i>	1
<i>FAI General Insurance Co Ltd v Southern Cross Exploration NL</i> (1988) 165 CLR 268	
Cited. <i>R v Cumberland</i>	1
<i>Gallagher v The Queen</i> (1986) 160 CLR 392	
Cited. <i>Ferguson v The Queen</i>	31
<i>Green v The Queen</i> (2006) 19 NTLR 1	
Cited. <i>JL v The Queen</i>	17
<i>Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd</i> (2014) 34 NTLR 17	
Cited. <i>James Engineering Pty Ltd v ABB Australia Pty Ltd and Another</i>	51
<i>Hossain v Minister for Immigration and Border Protection</i> (2018) 264 CLR 123	
Cited. <i>James Engineering Pty Ltd v ABB Australia Pty Ltd and Another</i>	51
<i>Immigration and Multicultural Affairs, Minister for v Yusuf</i> (2001) 206 CLR 323	
Cited. <i>James Engineering Pty Ltd v ABB Australia Pty Ltd and Another</i>	51
<i>Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd</i> (2008) 24 NTLR 15	
Cited. <i>James Engineering Pty Ltd v ABB Australia Pty Ltd and Another</i>	51
<i>JL v The Queen</i> (2019) 42 NTLR 17	
Cited. <i>R v Cumberland</i>	1
<i>Mill v The Queen</i> (1988) 166 CLR 59	
Cited. <i>Ferguson v The Queen</i>	31
<i>Morrow v The Queen</i> [2013] NTCCA 7	
Cited. <i>JL v The Queen</i>	17
<i>Multiplex Constructions Pty Ltd v Luikens</i> [2003] NSWSC 1140	
Cited. <i>Jemena Northern Gas Pipeline Pty Ltd v Civmec Constructions and Engineering Pty Ltd and Another</i>	37
<i>Northern Territory v Woodhill and Sons Pty Ltd</i> (2018) 41 NTLR 115	
Followed. <i>Ichthys LNG Pty Ltd and Another v JKC Australia LNG Pty Ltd and Another</i>	72
<i>Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd</i> (2018) 264 CLR 1	
Distinguished. <i>Jemena Northern Gas Pipeline Pty Ltd v Civmec Constructions and Engineering Pty Ltd and</i>	

TABLE OF CASES JUDICIALLY CONSIDERED

Another	37
<i>R v Brisbane Justices; Ex parte Treasurer of Queensland</i> (1901) 11 QLJ 77	
Cited. Jemena Northern Gas Pipeline Pty Ltd v Cvmec Constructions and Engineering Pty Ltd and Another	37
<i>R v Lavender</i> (2005) 222 CLR 67	
Cited. <i>R v Cumberland</i>	1
<i>R v Smith</i> (1873) 8 QB 146	
Cited. Jemena Northern Gas Pipeline Pty Ltd v Cvmec Constructions and Engineering Pty Ltd and Another	37
<i>R v Tennyson</i> [2013] NTCCA 2	
Referred to. <i>JL v The Queen</i>	17
<i>R v Vachalec</i> [1981] 1 NSWLR 351	
Cited. <i>Ferguson v The Queen</i>	31
<i>Shin Kobe Maru, Owners of v Empire Shipping Co Inc</i> (1994) 181 CLR 404	
Cited. <i>R v Cumberland</i>	1
<i>Siganto v The Queen</i> (1997) 97 A Crim R 60	
Cited. <i>R v Cumberland</i>	1
<i>Snedden v Minister for Justice (Cth)</i> (2013) 306 ALR 452	
Cited. <i>Ichthys LNG Pty Ltd and Another v JKC Australia LNG Pty Ltd and Another</i>	72
<i>Stuart v The Queen</i> [2010] NTCCA 16	
Referred to. <i>JL v The Queen</i>	17
<i>Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd</i> (2008) 23 NTLR 123	
Cited. <i>James Engineering Pty Ltd v ABB Australia Pty Ltd and Another</i>	51
<i>TRH v The Queen</i> [2018] NTCCA 14	
Cited. <i>JL v The Queen</i>	17
Distinguished. <i>R v Cumberland</i>	1
<i>Undershaft (No 1) Ltd v Federal Commissioner of Taxation</i> (2009) 175 FCR 150	
Cited. <i>Ichthys LNG Pty Ltd and Another v JKC Australia LNG Pty Ltd and Another</i>	72
<i>Weinstock v Beck</i> (2013) 251 CLR 396	
Cited. <i>R v Cumberland</i>	1
<i>Whitehurst v The Queen</i> [2011] NTCCA 11	
Cited. <i>R v Cumberland</i>	1
<i>Whitlock v The Queen</i> [2018] NTCCA 7	
Cited. <i>JL v The Queen</i>	17

STATUTES, RULES, ETC JUDICIALLY CONSIDERED IN THIS PART

NEW SOUTH WALES

Building and Construction Industry Security of Payment Act 1999 51

NORTHERN TERRITORY

Construction Contracts (Security of Payments) Act 2004

s 4	37, 51, 72
s 7A	37
s 8	37, 51
s 27	37, 51
s 28	37, 51
s 29	51
s 33	37, 51, 72
s 33(1)	37, 51, 72
s 33(1)(a)	37
s 33(1)(b)	37, 51
s 34	37, 51, 72
s 34(1)	51
s 34(1)(a)	51
s 34(2)	37
s 34(2)(a)	37
s 34(3)	37, 72
s 34(3)(a)	37
s 34(3)(b)	72
s 47	37
s 48	37, 51
s 48(3)	37, 51

Criminal Code 1983

s 14	1
s 130	17
s 130(1)	17
s 132	17
s 188	17
s 188(1)	17
s 188(2)	17
s 192	17
s 192(3)	17
s 411	31

Criminal Law Consolidation Act and Ordinance

s 60	17
s 66	17

Misuse of Drugs Act 1990

s 5	1
-----------	---

STATUTES, RULES, ETC JUDICIALLY CONSIDERED

s 5(1)	1
s 5A	1
s 5B	1
s 5C	1
s 6	1
s 6C	1
s 6D	1
s 6E	1
s 6G	1
s 7C	1
s 7D	1
s 8	1

Sentencing Act 1995

s 52	1
s 53	1, 17
s 53(1)	1, 17
s 53(2)	1
s 53A	1
s 54	1, 17
s 54(1)	17
s 55	1, 17
s 55(1)	1, 17
s 55(3)	1
s 55A	1, 17
s 55A(1)	17
s 78C	17
s 121	1
s 130	1

QUEENSLAND

Building Industry Fairness (Security of Payment) Act 2017

s 69	51
s 76	51
s 77	51
s 82	51

VICTORIA

Building and Construction Industry Security of Payment Act 2002	51
--	-----------

WESTERN AUSTRALIA

Construction Contracts Act 2004

s 27	51
s 31	51
s 32	51
s 32(3)	51
s 32(3)(b)	51

INDEX

Part 1 — Pages 1-79

ADMINISTRATIVE LAW

- Building and Construction — Security of payment — Adjudication — Mandamus to prevent determination — Discretionary — Available but rarely granted — Adjudicators primary deciders — No jurisdictional error anticipated — Respondent participating substantively in adjudication — Review available after determination — Construction Contracts (Security of Payments) Act 2004 (NT), ss 4, 7A, 8, 27, 28, 33, 33(1), 33(1)(a), 33(1)(b), 34, 34(2), 34(2)(a), 34(3), 34(3)(a), 47, 48, 48(3).
Jemena Northern Gas Pipeline Pty Ltd v Civmec
Constructions and Engineering Pty Ltd and Another 37
- Prerogative relief — Discretionary — Considerations — Availability of other remedies, appeal, statutory procedure, judicial review — Mandamus — Enforcement of public duty — Necessity for demand and refusal — No necessity where improper exercise of discretion — Mandamus to prevent final determination — Considerations — Adjudicators primary deciders — No jurisdictional error anticipated — Respondent participating substantively in adjudication — Review available after determination — Construction Contracts (Security of Payments) Act 2004 (NT), ss 4, 7A, 8, 27, 28, 33, 33(1), 33(1)(a), 33(1)(b), 34, 34(2), 34(2)(a), 34(3), 34(3)(a), 47, 48, 48(3).
Jemena Northern Gas Pipeline Pty Ltd v Civmec
Constructions and Engineering Pty Ltd and Another 37

BUILDING AND CONSTRUCTION

- Adjudication — Duty of adjudicator — Duty to consider set-off defence — Failure to consider — Material non-compliance — Misconstrue functions — Error of law — Jurisdictional error — Separate payment claim not required — Construction Contracts (Security of Payments) Act 2004 (NT), ss 33, 33(1), 33(1)(b).
James Engineering Pty Ltd v ABB Australia Pty Ltd and Another 51
- Adjudication — Simultaneous adjudication — Meaning of — Temporal nature — Burden of proof — On party challenging determination — Standard of proof — Balance of probabilities that adjudicated simultaneously — Commencement of adjudication — Not before receipt of application — Actual commencement — Construction Contracts (Security of Payments) Act 2004 (NT), ss 4, 34, 34(3), 34(3)(b).
Ichthys LNG Pty Ltd and Another v JKC Australia LNG Pty Ltd and Another 72
- Security of payment — Adjudication — Mandamus to prevent determination — Discretionary — Available but rarely granted — Adjudicators primary deciders — No jurisdictional error anticipated — Respondent participating substantively in adjudication — Review available after determination — Construction Contracts (Security of Payments) Act 2004 (NT), ss 4, 7A, 8, 27, 28, 33, 33(1), 33(1)(a), 33(1)(b), 34, 34(2), 34(2)(a), 34(3), 34(3)(a), 47, 48, 48(3).
Jemena Northern Gas Pipeline Pty Ltd v Civmec
Constructions and Engineering Pty Ltd and Another 37

INDEX

BUILDING AND CONSTRUCTION — *continued*

- Security of payment — Adjudication — Payment claim — Characteristics of —
More than causal link with contract — Objectively determined — Parties’
conduct relevant — Respondent’s participation in adjudication — Evidence that
is payment claim — Extension of time, waiver, estoppel, election,
unconscionable conduct, misleading or deceptive conduct, quantum meruit —
Adjudicator has jurisdiction to consider — May be payment claim — May
create payment dispute — Construction Contracts (Security of Payments) Act
2004 (NT), ss 4, 7A, 8, 27, 28, 33, 33(1), 33(1)(a), 33(1)(b), 34, 34(2), 34(2)(a),
34(3), 34(3)(a), 47, 48, 48(3).
Jemena Northern Gas Pipeline Pty Ltd v Civmec
Constructions and Engineering Pty Ltd and Another 37

COURTS AND JUDGES

- Comity — Single judge of same court — Follow other single judge unless plainly
wrong.
Ichthys LNG Pty Ltd and Another v JKC Australia LNG Pty
Ltd and Another 72

INTERPRETATION

- “Adjudicate” — “Simultaneously”.
Ichthys LNG Pty Ltd and Another v JKC Australia LNG Pty
Ltd and Another 72
“Irrespective of when the offence was committed” — “Specified offence” — “The
offence”.
JL v The Queen 17
“Payment claim” — “Payment dispute” — “Prescribed time”.
Jemena Northern Gas Pipeline Pty Ltd v Civmec
Constructions and Engineering Pty Ltd and Another 37
“Specified offence” — Sentencing Act 1995 (NT), ss 55, 55(3).
R v Cumberland 1

LEGISLATION

- Building and Construction Industry Security of Payment Act 1999 (NSW) —
Building and Construction Industry Security of Payment Act 2002 (Vic) —
Building Industry Fairness (Security of Payment) Act 2017 (Qld), ss 69, 76, 77,
82 — Construction Contracts (Security of Payments) Act 2004 (NT), ss 4, 8, 27,
28, 29, 33, 33(1), 33(1)(b), 34, 34(1), 34(1)(a), 48, 48(3) — Construction
Contracts Act 2004 (WA), ss 27, 31, 32, 32(3), 32(3)(b).
James Engineering Pty Ltd v ABB Australia Pty Ltd and
Another 51
Construction Contracts (Security of Payments) Act 2004 (NT), ss 4, 33, 33(1), 34,
34(3), 34(3)(b).
Ichthys LNG Pty Ltd and Another v JKC Australia LNG Pty
Ltd and Another 72

INDEX

LEGISLATION — *continued*

- Construction Contracts (Security of Payments) Act 2004 (NT), ss 4, 7A, 8, 27, 28, 33, 33(1), 33(1)(a), 33(1)(b), 34, 34(2), 34(2)(a), 34(3), 34(3)(a), 47, 48, 48(3).
Jemena Northern Gas Pipeline Pty Ltd v Civmec
Constructions and Engineering Pty Ltd and Another 37
- Criminal Code 1983 (NT), ss 130, 130(1), 132, 188, 188(1), 188(2), 192, 192(3) — Criminal Law Consolidation Act and Ordinance (NT), ss 60, 66 — Sentencing Act 1995 (NT), ss 53, 53(1), 54, 54(1), 55, 55(1), 55A, 55A(1), 78C.
JL v The Queen 17
- Criminal Code 1983 (NT), s 14 — Misuse of Drugs Act 1990 (NT), ss 5, 5(1), 5A, 5B, 5C, 6, 6C, 6D, 6E, 6G, 7C, 7D, 8 — Sentencing Act 1995 (NT), ss 52, 53, 53(1), 53A, 54, 55, 55(3), 55A, 121, 130.
R v Cumberland 1
- Criminal Code 1983 (NT), s 411.
Ferguson v The Queen 31

SENTENCING

- Appeal against sentence — Powers of Court — Territory and interstate sentences — Offender in detention interstate — Commencement of Territory sentence — Power to fix — No statutory power while in detention interstate.
Ferguson v The Queen 31
- Appeal against sentence — Sentence manifestly excessive — Presumption of no error — Historical offences — Change of sentencing standards — Rape, indecent assault of children — Whether to apply historical or current sentencing standards — Principles — Historical standards if identifiable, if reasonably practicable and delay not offender's fault — Effect of statutory intervention — Criminal Law Consolidation Act and Ordinance (NT), ss 60, 66 — Criminal Code 1983 (NT), ss 130, 130(1), 132, 188, 188(1), 188(2), 192, 192(3).
JL v The Queen 17
- Appeal against sentence — Severity — Sentence manifestly excessive — Territory and interstate sentences — Territory sentence imposed first, served last — Combined sentences crushing — Totality — How accommodated — Power of Court — Broad power to prevent miscarriage of justice — Resentence as if sentencing together — Discretion to reduce head sentence.
Ferguson v The Queen 31
- Non-parole period — Mandatory minimum non-parole period — Historical offences — Committed before mandatory minimum imposed — Subject offences identified by Criminal Code section numbers — Identical in substance to historical offences — Not applicable to offences against other legislation — Sentencing Act 1995 (NT), ss 53, 53(1), 54, 54(1), 55, 55(1), 55A, 55A(1) — Criminal Law Consolidation Act and Ordinance (NT), ss 60, 66 — Criminal Code 1983 (NT), ss 130, 130(1), 132, 188, 188(1), 188(2), 192, 192(3).
JL v The Queen 17
- Non-parole period — “Specified offences” — Minimum non-parole period — Increase of — After offence — Application of — Higher minimum for “specified offences” — Aggregate sentence — “Specified offences” and non-specified — Appropriate minimum non-parole period — Higher period only for sentence for “specified offences” — Sentencing Act 1995 (NT), ss 55, 55A — Misuse of Drugs Act 1990 (NT), ss 5, 5(1), 8.
R v Cumberland 1

INDEX

SENTENCING — *continued*

Retrospectivity — Removal of benefit — Not increase in term — Sentencing Act
1995 (NT), ss 55, 55A — Misuse of Drugs Act 1990 (NT), ss 5, 5(1), 8.
R v Cumberland 1

STATUTORY INTERPRETATION

Legal presumption — Court powers — Express limitations only — Penal provisions
— Ambiguity — Resolved in favour of accused — Sentencing Act 1995 (NT),
ss 55, 55(1), 53, 53(2).
R v Cumberland 1