



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Seafood Innovations Pty Ltd v Richard Bass Pty Ltd - *Patents Act 1990* (Cth) - innovation patents - fish stunning apparatus (C)

Construction, Forestry, Mining & Energy Union v Deputy President Hamberger - *Fair Work Act 2009* (Cth) - opt-out sub-clause - jurisdictional error in decision to approve enterprise agreement (I, B, C)

ADJ Contracting Pty Ltd re ADJ Contracting Pty Ltd Enterprise Agreement 2010-2014 - *Fair Work Act 2009* (Cth) - application for approval of single-enterprise agreement (I, B, C)

Cypjayne Pty Ltd v Babcock & Brown International Pty Ltd - *Trade Practices Act 1974* (Cth) - Pt 2.2 *Aged Care Act 1997* (Cth) - contracts - sale of retirement village & business - reasonable commercial endeavours (I, B, C)

Dean v Phung - Personal injuries - dental treatment - assessment of damages (I)

Jantom Construction Pty Ltd v S&V Quality Interiors (NSW) Pty Ltd - *s17 Building & Construction Industry Security of Payment Act 1999* (NSW) - application to set aside second defendant's adjudication determination successful (C)



Rogers v State of Victoria - Personal injuries - occupiers liability - compensation under *Juries Act* 2000 (Vic) - trial of preliminary question - s134AB *Accident Compensation Act* (I)

Giroto v Phillips Fox (a firm) & Anor - Professional negligence claim failed (I, B)

Public Guardian v Guardianship & Administration Board - *Guardianship & Administration Act* 1995 (Tas) - appeal from order of respondent giving standard directions allowed (B)

GIO General Ltd v Insurance Australia Ltd t/as NRMA Insurance - Double insurance - workplace injury - no crystallisation of common law liability - plaintiff's claim dismissed (I)

Bellevarde Constructions Pty Ltd & Anor v CPC Energy Pty Ltd - *Legal Profession Act* 2004 (NSW) - appeal from an assessment of party/party costs made by costs assessor (I, C)

Summaries with links (5 minute read)

Monday 4 July 2011

Seafood Innovations Pty Ltd v Richard Bass Pty Ltd [2011] FCAFC 83

Full Court of the Federal Court of Australia

Dowsett, Bennett & Greenwood JJ

Patents Act 1990 (Cth) - innovation patents - fish stunning apparatus - "allow" - infringement - appeal allowed.

[Seafood Innovations](#) (C)

[Seafood Innovations](#) - decision 12 July 2010

Construction, Forestry, Mining & Energy Union v Deputy President Hamberger [2011] FCA 719

Federal Court of Australia

Katzmann J (in Sydney)

Fair Work Act 2009 (Cth) - whether an employer may lawfully provide in an enterprise agreement for employees who are covered by the agreement at the time it is made to later choose not to be covered by it - coverage clause with opt-out sub-clause - meaning of "[employees] who will be



covered by the agreement" in Part 2-4 - at para. 105 Full Bench of Fair Work Australia had fallen into jurisdictional error in deciding to approve the agreement.

[Construction, Forestry, Mining & Energy Union](#) (I, B, C)

[Newlands Coal](#) - decision Full Bench of Fair Work Australia 1 November 2010: judgment of Senior Deputy President Hamberger and Deputy President McCarthy at 1 - Commissioner Blair's judgment at 80 - Newlands Coal Surface Operations Enterprise Agreement 2010 - BOOT: Better Off Overall Test - by majority, appeal against Commissioner's decision allowed.

ADJ Contracting Pty Ltd re ADJ Contracting Pty Ltd Enterprise Agreement 2010-2014 [2011] FWA 2380

Fair Work Australia

Senior Deputy President Acton in Melbourne - 28 April 2011

Fair Work Act 2009 (Cth) - application for approval of single-enterprise agreement - Australian Industry Group (AIG) had been given permission to intervene - Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia (CEPU) had given written notice stating that it wants the ADJ Agreement to cover it - Australian Building & Construction Commissioner (ABCC) also appeared - with certain written undertakings, requirements for approval of agreement would be met.

[ADJ Contracting](#) (I, B, C)

Cypjayne Pty Ltd v Babcock & Brown International Pty Ltd [2011] NSWCA 173

Court of Appeal of New South Wales

Bathurst CJ; Macfarlan & Young JJA

Trade Practices Act 1974 (Cth) - Pt 2.2 *Aged Care Act* 1997 (Cth) - contracts - sale of retirement village & business - execution of Allocated Places Purchase Agreement ("the APPA") - performance guarantee - clause in APPA imposed obligation on parties to use reasonable commercial endeavours to ensure the conditions precedent were satisfied as quickly as possible - whether clause prevented second respondent from withdrawing from transaction when it formed view that it was not in its commercial interests to go ahead - appeal dismissed.

[Cypjayne](#) (I, B, C)

[Cypjayne](#) - decision 12 March 2010: see 'Benchmark' Tuesday 16 March 2010 - *Trade Practices Act* 1974 (Cth) - contracts - reasonable commercial endeavour - misleading & deceptive conduct - extended negotiation for sale of retirement village - judgment for defendants.

**Dean v Phung [2011] NSWSC 653**

Supreme Court of New South Wales

Hislop J

Personal injuries - assessment of damages - dental treatment - claim in negligence, breach of contract & trespass to the person - claim for exemplary damages - preliminary question as to whether damages to be assessed at common law or under *Civil Liability Act 2002* (NSW) - damages to be assessed under the Act - exemplary damages not available - judgment for plaintiff in sum of \$1,388,615.20.

[Dean](#) (I)**Jantom Construction Pty Ltd v S&V Quality Interiors (NSW) Pty Ltd [2011] NSWSC 670**

Supreme Court of New South Wales

Hammerschlag J

s17 *Building & Construction Industry Security of Payment Act 1999* (NSW) - first defendant gave notice of intention to apply for adjudication prematurely - plaintiff's application to set aside second defendant's adjudication determination successful.

[Jantom Construction](#) (C)**Rogers v State of Victoria [2011] VSC 298**

Supreme Court of Victoria

Beach J

Personal injuries - occupiers liability - injury arising out of or in the course of jury service - fall off ramp - compensation under *Juries Act 2000* (Vic) - trial of preliminary question: whether plaintiff needed to comply with the serious injury requirements of s134AB *Accident Compensation Act* in order to be entitled to recover damages in this proceeding - answer 'no.'

[Rogers](#) (I)**Giroto v Phillips Fox (a firm) & Anor [2011] VSC 293**

Supreme Court of Victoria

Hollingworth J

Professional negligence claim - solicitor's retainer - fiduciary duties - defendant had provided professional services in relation to restructure of business - trust money paid into overseas bank account under direction - no retainer - no relevant contractual, tortious or fiduciary duty, as pleaded - plaintiff's claim failed.

[Giroto](#) (I, B)



Public Guardian v Guardianship & Administration Board [2011] TASSC 31

Supreme Court of Tasmania

Blow J

Guardianship & Administration Act 1995 (Tas) - appeal from decision of respondent - Board had ordered that the Public Guardian be appointed as that person's guardian, with limited powers, and made other orders, including an order "That the Standard Directions to a Guardian issued 2 November 2010 shall apply with respect to this order." - appeal from order giving standard directions allowed.

[Public Guardian](#) (B)

GIO General Ltd v Insurance Australia Ltd t/as NRMA Insurance [2011] ACTSC 91

Supreme Court of the Australian Capital Territory

Ryan J

Double insurance - workplace injury - worker injured when unloading bag of freshly laundered linen from light truck at Australian Defence Force Academy - worker entitled to workers compensation under the *Workers Compensation Act 1951* (ACT) - employer held insurance policy issued by plaintiff - defendant was insurer of employer against its liability as owner of truck to claims for common law damages to which *Road Transport (General) Act 1999* (ACT) applied - Deed of Release - no crystallisation of common law liability - plaintiff's claim dismissed - detailed examination of legislation & case law.

[GIO General](#) (I)

In the District Court of New South Wales...

Bellevarde Constructions Pty Ltd & Anor v CPC Energy Pty Ltd [2011] NSWDC 55

District Court of New South Wales

Johnstone J

Legal Profession Act 2004 (NSW) - plaintiff's appeal from an assessment of party/party costs made by a costs assessor - defendant had become entitled to recover party/party costs from plaintiffs as a result of orders made by Supreme Court & Court of Appeal of New South Wales - misapplication, in the assessment, of the indemnity principle - appeal allowed in part.

[Bellevarde Constructions](#) (I, C)



The fourth of July...

Chief Joseph

b. 3 March 1840 - d. 21 September 1904

Given name: *Hinmatóowyahtq'it*: "Thunder Rolling Down the Mountain" - Chief of the *Wal-lam-wat-kain* band of *Nez Percés* tribe of Native American Indians - the last fight of the *Nez Percés* War, The Battle of Bear Paw, took place between 30 September & 5 October 1877, near Snake Creek in Blaine County, Montana - the famous words below are those attributed to Chief Joseph as the message he sent the U.S. army leaders before his surrender; when he subsequently met with General Howard & General Miles, U.S. Army Indian scouts acted as interpreters:

"Tell General Howard I know his heart. What he told me before I have in my heart. I am tired of fighting. Our chiefs are killed. Looking Glass is dead. Tu-hul-hul-sote is dead. The old men are all dead. It is the young men who say yes or no. He who led on the young men is dead. It is cold and we have no blankets. The little children are freezing to death. My people, some of them, have run away to the hills, and have no blankets, no food; no one knows where they are - perhaps freezing to death. I want to have time to look for my children and see how many of them I can find. Maybe I shall find them among the dead. Hear me, my chiefs. I am tired; my heart is sick and sad. From where the sun now stands I will fight no more forever."

[Battle of Bear Paw | 7th Cavalry | Chief Joseph](#)

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