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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Ensham Resources Pty Ltd v AIOI Insurance Company Ltd - legal professional privilege - reports by loss adjuster privileged (I)

Technology Leasing Ltd v Lenmar Pty Ltd - contracts - aiding and abetting misleading or deceptive statements and third line forcing by third party (B)

Binetter v Deputy Commissioner of Taxation (No 3) - privilege - notice under s264 *Income Tax Assessment Act 1936* (Cth) - no privilege against self-incrimination (B, G)

Application by Perpetual Trust Services Ltd as responsible entity of the Momentum AllWeather (A\$) Absolute Return Fund - trusts - judicial advice on questions of construction, but not on commercial matters (B)

Napier Constructions Pty Ltd (subject to DOCA)(Receivers & Managers Appointed) v Honey - contracts - litigation funding deed - construction (B)

Al Khaled v Jacaranda Property Developments Pty Ltd - personal injuries - s500(2) *Corporations Act 2001* (Cth) - leave granted to continue proceedings (I, C)



In the matter of Kala Capital Pty Ltd (in liq) - notices to produce - some paragraphs set aside and liquidator's application to set aside otherwise dismissed (I)

Hunter v Minister for Planning - administrative law - Minister amended planning instrument to allow works to occur - evidence not capable of supporting inference of improper purpose (C, G)

Commonwealth Bank of Australia v Groves - misleading or deceptive conduct - alleged misrepresentations not made (B)

Argos Pty Ltd v Minister for the Environment and Sustainable Development - administrative law - s5 *Administrative Decisions (Judicial Review) Act 1989* (ACT) - plaintiffs' economic interests threatened by threat of competition from approved development - plaintiffs had no standing (C, G)

Summaries with links (5 minute read)

Ensham Resources Pty Ltd v AIOI Insurance Company Ltd [2012] FCA 710

Federal Court of Australia

Cowdroy J

Legal professional privilege - Ensham claimed under industrial special risk insurance policy - indemnity declined - Ensham sued insurer - insurer engaged solicitors and loss adjustor - loss adjustor's retainer withdrawn by Ensham - loss adjustor then retained directly by solicitors - Ensham sought production of loss adjustor's reports - claim of legal professional privilege - held: when loss adjustor's reports were made, there was a real prospect of litigation, which was foreseen by insurer's solicitors - reports were prepared with the dominant purpose of providing advice in relation to litigation - reports privileged.

[Ensham Resources](#) (I)



Technology Leasing Ltd v Lenmar Pty Ltd [2012] FCA 709

Federal Court of Australia

Cowdroy J

Contracts - Freshtel told Lenmar it could provide it with telecommunications services - Lenmar signed contract with Freshtel, which included telephone system rental agreement with Technology Leasing Ltd (TLL) - Freshtel became insolvent and stopped providing services to Lenmar - Lenmar eventually stopped paying rent to TLL - TLL sued - held: TLL and Lenmar had valid contract - contract was not frustrated by Freshtel's insolvency - Freshtel made misleading or deceptive statements and engaged in third line forcing - TLL not Freshtel's agent, but aided and abetted Freshtel's conduct - TLL jointly and severally liable for that conduct - relief under s7 *Contracts Review Act 1980* (NSW).

[Technology Leasing](#) (B)

Binetter v Deputy Commissioner of Taxation (No 3) [2012] FCA 704

Federal Court of Australia

Robertson J

Privilege - Commissioner issued notice under s264 *Income Tax Assessment Act 1936* (Cth) - notice required provision of information and documents - applicant sought judicial review of decision to issue notice - held: recipient of s264 notice may not refuse to comply on basis of privilege against self-incrimination - an incorrect decision by the Commissioner to allow non-production of certain documents would not affect the validity of the notice - notice was not misleading, confusing, or incomplete - time for compliance was not unreasonable - notice was not issued for an improper purpose - application dismissed.

[Binetter](#) (B, G)

Application by Perpetual Trust Services Ltd as responsible entity of the Momentum AllWeather (A\$) Absolute Return Fund [2012] NSWSC 758

Supreme Court of New South Wales

Stevenson J

Trusts - Perpetual winding up a trust - sought judicial advice as to whether it would be justified in realising certain trust assets by way of a particular share sale facility - s63 *Trustee Act 1925* (NSW) - held: no implied limitations on power to give advice, or on discretionary factors relevant to giving advice - court not bound to give advice - trustee was in doubt as to questions of construction of trust instrument and commercial matters - normally inappropriate for court to give advice about a



substantially commercial matter - court ill-equipped to form any view - questions of construction answered, but questions dealing with commercial matters not answered.

[Perpetual Trust Services](#) (B)

Napier Constructions Pty Ltd (subject to DOCA)(Receivers & Managers Appointed) v Honey [2012] NSWSC 762

Supreme Court of New South Wales

Hammerschlag J

Contracts - litigation funding deed between companies, their receivers, bank who appointed receivers, and proposed funders - companies and bank in dispute about construction of deed - order of distribution of recovered monies - held: commercial contract should have business like construction - commercial aims and purposes part of essential background circumstances - instrument as a whole to be considered - bank's proposed construction correct on one issue, but not on another.

[Napier Constructions](#) (B)

Al Khaled v Jacaranda Property Developments Pty Ltd [2012] NSWSC 755

Supreme Court of New South Wales

SG Campbell J

Personal injuries - worker electrocuted on building site - alleged duty of care to de-energise power line, or to place scaffolding so that equipment would not contact power line - defendants cross-claimed against company that provided worker's labour - that company in liquidation under voluntary winding up - dispute between company's public liability and workers compensation insurers - defendants sought leave to continue cross-claims - public liability insurer said Court should grant leave for defendants to institute fresh proceedings under *s6 Law Reform (Miscellaneous Provisions) Act 1946 (NSW)* - held: *s500(2) Corporations Act 2001 (Cth)* gives court wide discretion to grant leave to proceed against company in voluntary winding up - leave more readily granted where claim is likely covered by insurance - court should not impose on defendants additional cost of redrafting pleadings to sue insurers directly - court should not try to protect parties from themselves - leave granted to continue proceedings.

[Al Khaled](#) (I, C)



In the matter of Kala Capital Pty Ltd (in liq) [2012] NSWSC 721

Supreme Court of New South Wales

Black J

Notices to produce - court issued examination summonses - subject of examination applied to court to set aside summonses - issued notice to produce to liquidator - liquidator sought to have notice set aside - r33.4 *Uniform Civil Procedure Rules* 2005 (NSW) - held: power to set aside notice an instance of court's power to regulate its own processes and prevent abuse - some paragraphs of notice substantially wider than necessary to address relevant issue - some paragraphs sought documents that would be subject to legal professional privilege - liquidator did not contend compliance with notice would be burdensome - some paragraphs set aside and liquidator's application otherwise dismissed - no order as to costs.

[Kala Capital](#) (I)

Hunter v Minister for Planning [2012] WASC 247

Supreme Court of Western Australia

Martin CJ

Administrative law - traditional owner of land sued Shire of Broome and others to prevent construction of LNG facility - Minister amended planning instrument to allow works to occur - traditional owner sought order *nisi* requiring Minister to show cause why writ of *certiorari* should not issue to quash amendment - amendment allegedly for improper purpose of thwarting legal proceedings - held: an ulterior purpose need only be a substantial purpose in order for exercise of power to be impugned - purposes for which statutory power has been conferred derived from construction of legislation - evidence not capable of supporting inference that Minister's purpose was improper.

[Hunter](#) (C, G)

Commonwealth Bank of Australia v Groves [2012] SASC 110

Supreme Court of South Australia

Blue J

Misleading or deceptive conduct - Bank gave defendant unsecured loan to purchase Adelaide Dome - defendant later lost his other substantial assets - agreed Bank could take security over the Dome pending its sale - Dome not sold - Bank sued - defendant alleged misrepresentations that he could have a longer facility if he could not sell the Dome - held: alleged misrepresentations not made - even if they had been made, defendant failed to show that, but for those



misrepresentations, he would have obtained long term finance with another lender - judgment for Bank.

[Commonwealth Bank of Australia](#) (B)

Argos Pty Ltd v Minister for the Environment and Sustainable Development [2012] ACTSC 102
Supreme Court of the Australian Capital Territory

Burns J

Administrative law - Minister approved development application for residential/commercial development - plaintiffs challenged Minister's decision - held: s5 *Administrative Decisions (Judicial Review) Act 1989* (ACT) allows judicial review applications by persons aggrieved by decisions - plaintiffs would suffer economic disadvantage because of competition from the proposed commercial development - plaintiffs were not persons aggrieved - plaintiffs had no standing - Minister took all relevant considerations into account - Minister's decision was reasonable - Minister did not breach rules of natural justice - no error of law by Minister - application for review refused.

[Argos](#) (C, G)

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