

Insurance Banking & Construction A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Roy Morgan Research Pty Ltd v Commissioner of Taxation - *Superannuation Guarantee (Administration) Act 1992* (Cth) - constitutional law power of Commonwealth Parliament to make laws relating to taxation & invalid and old-age pensions (B)

Talacko v Talacko - *Bankruptcy Act 1966* (Cth) - restraints on leaving jurisdiction - delivery up of passports (B)

Fkiaras v Fkiaras - *Motor Accidents Compensation Act 1999* (NSW) - assessment of damages - appeal against calculation of economic loss (I)

Jones v The Registrar Workers Compensation Commission - *Workplace Injury Management & Workers Compensation Act 1998* (NSW) - challenges to Medical Assessment Certificate failed (I)

Banksia Mortgages Ltd v Croker & Ors - Legal professional privilege - waiver - advice given by plaintiff's in-house solicitor (I, B, C)

Australian & New Zealand Banking Group Ltd v Liebmann - Banking - powers of attorney - estoppel - misleading or deceptive conduct - fiduciary duties - laches - mitigation - unconscionability (B)

Fast Funds v Coppola; Coppola v Hall - Consumer Credit Code - *Contracts Review Act* 1980 (NSW) - equitable remedies (B)

BI Constructions Pty Ltd v George Shad & Chikal Pty Ltd; Samir Bayeh v BI Constructions Pty Ltd - *Corporations Act* 2001 (Cth) - *Legal Profession Act* 2004 (NSW) - whether valid retainer of solicitors (B)

Chateau Constructions (Aust) Ltd v Zepinic & Anor [No 6] - Procedure - leave sought to file cross-claim - whether Anshun estoppel - costs (C)

Adam v Sara - Application for transfer of proceedings from District Court to Supreme Court - whether relief available in District Court (B)

Mazzone v James & Anor - Partition - sale of land owned by three parties under *Conveyancing Act* 1919 (NSW) - disposition of proceeds (B, C)

Snowy Hydro Ltd v Commissioner of State Revenue - *s74 Duties Act* 2000 (Vic) - statutory interpretation - no liability for duty - "linked entity" - "land rich" (B, C)

Friends of Mallacoota Inc v Minister of Planning & Minister for Environment & Climate Change - *Environment Effects Act* 1978 (Vic) - ocean access ramp - whether Minister's assessment was an assessment within the meaning of the Act - proceeding dismissed (C)

Bevan v the State of Western Australia - Criminal law - evidence obtained by way of a scientific or technical process - admissibility of mobile phone data downloaded by a computer software programme (I)

Albany v Albany - Action for specific performance of alleged terms of settlement of a contract following a mediation - Family Provisions Act matter (I, B, C)

Drazina v De Martin & Gasparini Pty Ltd - *s151Z Workers Compensation Act* 1987 (NSW) - *s5R Civil Liability Act* 2002 (NSW) - no contributory negligence - damages of \$467,207 (I)



Allen v Lloyd-Jones (No 4) - Defamation proceedings - application for joinder of party to proceedings after expiration of limitation period (I)

Summaries with links (5 minute read)

Monday 31 May 2010

Roy Morgan Research Pty Ltd v Commissioner of Taxation [2010] FCAFC 52

Full Court of the Federal Court of Australia

Keane CJ; Sundberg & Kenny JJ (in Melbourne)

Superannuation Guarantee (Administration) Act 1992 (Cth) - constitutional law - appeal from Administrative Appeals Tribunal - people paid by applicant to conduct market research by telephone - whether the interviewers were employees, other than exempt employees, of applicant within meaning of s12 - power of Commonwealth Parliament to make laws relating to taxation & invalid and old-age pensions - held: the superannuation guarantee charge is a tax within the meaning of section 51(ii) of the Constitution - section 51(xxiii) gives the Commonwealth Parliament power to make laws with respect to invalid & old-age pensions generally, including those that are not provided by the Commonwealth - the laws imposing the superannuation guarantee charge & providing for the administration of the superannuation guarantee scheme are therefore valid - appeal dismissed - extensive consideration of case law.

[Roy Morgan Research](#) (B)

Talacko v Talacko [2010] FCAFC 54

Full Court of the Federal Court of Australia

Gray, Mansfield & McKerracher JJ (in Melbourne)

Bankruptcy Act 1966 (Cth) - question stated for consideration: whether the provisions of s30(1) empower the Court to order that a person in respect of whom a bankruptcy notice has been issued pursuant to the provisions of the Act - (a) be restrained from leaving the jurisdiction: answer 'yes' - (b) be required to deliver up his or her passport or passports to the Court or to any other person? - answer 'yes.'

[Talacko](#) (B)

Fkiaras v Fkiaras [2010] NSWCA 116

Court of Appeal of New South Wales

Hodgson, Tobias & Macfarlan JJA

Motor Accidents Compensation Act 1999 (NSW) - assessment of damages - appeal against calculation of economic loss - respondent passenger in motor vehicle being driven by first appellant, his wife, on Hume Highway near Sutton Forrest - vehicle had overturned - respondent sustained serious injuries including brain damage - respondent had alleged unidentified vehicle drove into lane in which first appellant was travelling, forcing her to swerve & lose control of her vehicle - second appellant, the Nominal Defendant, had been joined as a defendant - ultimately, liability on the part of both appellants admitted - respondent & wife controlled properties & businesses - earnings received by respondent post-injury exceeded s125 cap - "earnings" - no error in calculation of economic loss - appeal dismissed.

[Fkiaras](#) (I)

Jones v The Registrar Workers Compensation Commission [2010] NSWSC 481

Supreme Court of New South Wales

James J

Workplace Injury Management & Workers Compensation Act 1998 (NSW) - plaintiff seeking orders including order in nature of certiorari setting aside Medical Assessment Certificate ("MAC") given by second defendant pursuant to s325 & order in the nature of certiorari setting aside decision of third defendant confirming the Medical Assessment Certificate given by second defendant - whether failure by approved medical specialist to give reasons - whether constructive failure to exercise jurisdiction - both challenges to MAC failed - application dismissed.

[Jones](#) (I)

Banksia Mortgages Ltd v Croker & Ors [2010] NSWSC 535

Supreme Court of New South Wales

Schmidt J

Legal professional privilege - waiver - advice given by plaintiff's in-house solicitor - emails - legal advice privileged, commercial advice & comment not privileged - detailed consideration of legislation & case law.

[Banksia Mortgages](#) (I, B, C)

Australian & New Zealand Banking Group Ltd v Liebmann [2010] NSWSC 545

Supreme Court of New South Wales

Einstein J

Banking - powers of attorney - estoppel - misleading or deceptive conduct - fiduciary duties - laches - mitigation - unconscionability - whether or not enforceable loan contracts came into existence between ANZ & defendant equity partner of Coudert Brothers Australia & later equity partner of Coudert Brothers LLP, then a limited liability partnership registered under Partnership Law of State of New York - defendant claiming that power of attorney pursuant to which a partner of the firm purported to sign transaction documents on defendants behalf was invalid - defendant liable to plaintiff for repayment of loans with interest & costs.

[Australian and New Zealand Banking Group](#) (B)

Fast Funds v Coppola; Coppola v Hall [2010] NSWSC 470

Supreme Court of New South Wales

Slattery J

Consumer Credit Code - *Contracts Review Act* 1980 (NSW) - equitable remedies - whether a series of loan & mortgage transactions should be set aside - business purpose declaration executed under power of attorney - loans not for business or investment purposes - Code applied - lender breached Code - mortgage unjust within Code s70 & *Contracts Review Act* 1980 (NSW) s7.

[Fast Funds](#) (B)

BI Constructions Pty Ltd v George Shad & Chikal Pty Ltd; Samir Bayeh v BI Constructions Pty Ltd [2010] NSWSC 484

Supreme Court of New South Wales

Slattery J

Corporations Act 2001 (Cth) - *Legal Profession Act* 2004 (NSW) - BI Constructions & Chikal Pty Ltd equal joint venturers in residential & retail property development at Bankstown - sale of development units now settled - whether BI Constructions now validly retains firm of solicitors in trust proceedings - validity of a resolution of board of BI Constructions to commence trust proceedings & to retain those solicitors - trust proceedings stayed.

[BI Constructions](#) (B)

Chateau Constructions (Aust) Ltd v Zepinic & Anor [No 6] [2010] NSWSC 538

Supreme Court of New South Wales

Slattery J

Procedure - dispute between plaintiff builder & defendant owners of residential property at Turramurra - leave sought to file cross-claim - whether prosecution of cross-claim barred by *Anshun* estoppel - costs - no estoppel - extension of time to permit filing of cross-claim should not be granted.

[Chateau Constructions](#) (C)

Adam v Sara [2010] NSWSC 530

Supreme Court of New South Wales

Buddin J

Application for transfer of proceedings from District Court to Supreme Court - whether relief available in District Court - *Fair Trading Act* 1987 (NSW) - *Contracts Review Act* 1980 (Cth) - application dismissed.

[Adam](#) (B)

Mazzone v James & Anor [2010] NSWSC 437

Supreme Court of New South Wales

Bryson AJ

Partition - sale of land owned by three parties under *Conveyancing Act* 1919 (NSW) - house in Fairy Meadow - disposition of proceeds - parties bought house property in partnership or joint venture to renovate, resell & share profits - project reached stalemate - Public Trustee appointed under s66G, sold land, paid mortgage & charges and produced small surplus - decision on entitlements to distribution according to oral terms of joint venture.

[Mazzone](#) (B, C)

Snowy Hydro Ltd v Commissioner of State Revenue [2010] VSC 221

Supreme Court of Victoria

Davies J

s74 *Duties Act* 2000 (Vic) - statutory interpretation - gas turbine power plant Peaker Facility located adjacent to Loy Yang B power station in La Trobe Valley - joint venture parties owned joint venture assets as tenants in common in proportion to their interests in the joint venture - joint venture not a "linked entity" - "landholder" holds only the percentage interest in land & other

property held by the "linked entity" under the joint venture - unencumbered value of that interest - no liability for duty - "land rich" - whether electricity generator units & ancillary plant chattels or fixtures - plant held to be fixtures - appeal allowed - objection decision set aside - objection should be allowed in full.

[Snowy Hydro](#) (B, C)

Friends of Mallecoota Inc v Minister of Planning & Minister for Environment & Climate Change [2010] VSC 222

Supreme Court of Victoria

Osborn J

Environment Effects Act 1978 (Vic) - municipal council required Ministerial permission & planning permit for replacement of ocean access ramp - panel appointed to conduct inquiry - Panel recommendations rejected new ramp options - Minister did not accept the panel's principal recommendation and took a different view in relation to safety benefits & drawbacks - whether Minister's assessment was an assessment within the meaning of the Act - statutory definition of 'environment' a flexible concept - Minister did not take irrelevant considerations into account - proceeding dismissed.

[Friends of Mallecoota](#) (C)

Bevan v the State of Western Australia [2010] WASCA 101

Court of Appeal of Western Australia

Owen & Buss JJA; Blaxell J

Criminal law - evidence obtained by way of a scientific or technical process - admissibility of mobile phone data downloaded by a computer software programme - appellant contending trial judge had erred in admitting evidence at trial of text messages allegedly found on a mobile phone in his vehicle - appellant refused leave in respect of his first ground of appeal; leave granted in respect of second ground, but appeal dismissed: [trial judge had erred in law in admitting text messages into evidence pursuant to s30(3) Criminal Appeals Act 2004 (W.A.) the Court must allow the appeal if it is of the opinion (inter alia) that the conviction should be set aside because of that error of law, or that there was a miscarriage of justice - if the court comes to that opinion, it may nevertheless dismiss the appeal [pursuant to proviso in s30(4)] if it considers that no substantial miscarriage of justice has occurred.

[Bevan](#) (I)

Albany v Albany [2010] NTSC 25

Supreme Court of the Northern Territory

Mildren J

Action for specific performance of alleged terms of settlement of a contract following a mediation - Family Provisions Act matter - plaintiff contending binding agreement entered with first defendant to settle his claim in the consolidated action - defendants deny any binding agreement was reached - first defendant contending any agreement vitiated by mistake - first defendant submitting that what occurred during course of mediation privileged and that privilege had not been waived - His Honour concluded that there was an intention by plaintiff & first defendant to enter binding agreement between those parties only; that the agreement reached was subject to approval of the Court, but not conditional upon entry into a formal deed - contract specifically enforceable subject to implied conditions.

[Albany](#) (I)

In the District Court of New South Wales...**Drazina v De Martin & Gasparini Pty Ltd [2010] NSWDC 26**

District Court of New South Wales

Murrell SC DCJ

s151Z *Workers Compensation Act* 1987 (NSW) - s5R *Civil Liability Act* 2002 (NSW) - plaintiff concretor employed by Vamugo Concreting Pty Ltd - Vamugo told him to attend a construction site at Rhodes, report to De Martin & Gasparini Pty Ltd (DMG) concretors, & follow their directions - DMG asked plaintiff to hold a hose during a "blowout", a procedure designed to clean out a concreting hose by forcing the concrete out using an air compressor, a task not part of normal work of a concretor - blast of air jolted hose, which flicked up & struck plaintiff on the right temple - plaintiff sued DMG which admitted it had breached its duty of care to plaintiff - whether & to what extent damages to be reduced because DMG entitled to recover a contribution from Vamugo - whether Vamugo had breached its duty of care to plaintiff - whether plaintiff had suffered a whole person impairment of at least fifteen percent - in the absence of proceeding against Vamugo, onus of establishing that Vamugo breached its duty of care fell on DMG - that onus not discharged - no contributory negligence - damages of \$467,207 awarded.

[Drazina](#) (I)



Allen v Lloyd-Jones (No 4) [2010] NSWDC 93

District Court of New South Wales

Gibson DCJ

Defamation proceedings - application for joinder of party to proceedings after expiration of limitation period - ss64 & 65 *Civil Procedure Act 2005* (NSW) - application dismissed.

[Allen](#) (I)

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