



## Banking

### A Daily Bulletin listing Decisions of Superior Courts of Australia

#### Executive Summary (1 minute read)

**Mbakwe v Sarkis** - Negligent misrepresentation – financial adviser – duty of care in utterance

**Urban Traders v Paul Michael** - *Building & Construction Industry Security of Payment Act 1999* (NSW)

**Gunns Limited v Alishah (No 2)** - Privilege against self-incrimination - objection taken by defendants to answering interrogatories

**Centennial Coal Company Ltd v Xstrata Coal Pty Ltd** - Contracts - sale of coal mining project – novation – “reasonable endeavours” – appeal dismissed



## Summaries with links (5 minute read)

### Tuesday 20 October 2009

#### **Centennial Coal Company Ltd v Xstrata Coal Pty Ltd [2009] NSWCA 341**

Court of Appeal of New South Wales

Hodgson, Tobias & Campbell JJA

Contracts - sale of coal mining project – novation – for decision appealed from, see ‘Benchmark’ B & IBC Thursday 13 August 2009 & link below - agreement that parties use reasonable endeavours to novate for benefit of purchaser rights in relation to coal loading facility – “reasonable endeavours” – appeal dismissed.

[Centennial Coal Company Ltd](#)

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[Centennial Coal Company Ltd](#) – decision 11 August 2009 - Anvil Hill Asset Sale Deed - obligation to use “all reasonable endeavours” to transfer shares & contractual rights to defendant – “best endeavours” – remedies – plaintiff seeking declaration that defendants precluded from bringing action against plaintiff for breach of provisions in deed because of limitations provisions contained in deed – inappropriate to grant negative declaration in respect of claims that have been formulated, if at all, only in general terms – plaintiff’s claim failed.

#### **Mbakwe v Sarkis [2009] NSWCA 330**

Court of Appeal of New South Wales

Allsop P, Ipp JA & Handley AJA

Negligent misrepresentation – appellant was respondent’s financial adviser – for decision appealed from, see ‘Benchmark’ Friday 10 October 2008 & link below - duty of care in utterance – breach of duty – causation - need not be sole cause of respondent’s change of position - appeal dismissed.

[Mbakwe](#)

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[Sam George Sarkis](#) – decision 11 September 2008 - torts - negligent misstatement - defendant as financial adviser recommended plaintiff make loans to third party - plaintiff acted on advice & suffered loss - case law considered including *Esanda Finance Corporation Limited v Peat Marwick Hungerfords* (1995-1997) 188 CLR 241 – plaintiff awarded damages in sum of \$245,000 plus \$145,376 so judgment for plaintiff in sum of \$390,376 – plaintiff awarded indemnity costs from date after day on which defendant rejected second offer from plaintiff.

**Urban Traders v Paul Michael [2009] NSWSC 1072**

Supreme Court of New South Wales

McDougall J

*Building & Construction Industry Security of Payment Act 1999* (NSW) – payment claim sought to reargue a number of items that had been dealt with by adjudicator in his determination of the dispute arising from earlier payment claim - whether attempt by defendant builder to engage mechanisms of the Act was an abuse of process, or otherwise liable to be restrained at suit of plaintiff owners – building at Bayview – issue estoppel - claim for loss of profits – claim for interest – claim for cost of repricing – detailed examination of legislation & Australian case law in an interesting decision.

[Urban Traders](#)**Gunns Limited v Alishah (No 2) [2009] TASSC 93**

Supreme Court of Tasmania

Holt AsJ

Privilege against self-incrimination - objection taken by defendants to answering interrogatories - one of grounds to objection that answers might tend to incriminate them – penalty privilege – plaintiffs seeking order compelling answers to interrogatories - claim for damages due to disruption to plaintiffs' business – plaintiff alleging defendants entered plaintiffs' woodchip facility at Triabunna without permission - claim for exemplary damages – defendants' exposure to risk of prosecution for breach of *Workplace Health & Safety Act 1995* (Tas) – case law from UK & Australia considered in an interesting decision.

[Gunns Limited](#)



*'And down by Kosciuszko, where the pine-clad ridges raise  
Their torn & rugged battlements on high  
Where the air is clear as crystal, & the white stars fairly blaze  
At midnight in the cold & frosty sky .....'* \*

On 7 July 1949, the *Snowy Mountains Hydro-Electric Power Act 1949* (Cth) was passed in Federal Parliament. On 17 October 1949, a ceremony to mark the beginning of work on the Snowy Mountains Scheme took place near the Eucumbene River. At the time, Australia's population was eight million. About 100,000 people were to work on the Scheme between 1949 & 1974, many from post-war Europe, arriving in Australia either as assisted migrants or from refugee camps in Europe.

The project involved the diversion of the waters of the Snowy River and its tributary the Eucumbene from their path to the sea by tunnels under the Great Dividing Range, thus providing electric power & additional waters for the Murray and the Murrumbidgee Rivers, the Snowy-Tumut Development diverting waters to the Murrumbidgee, and the Snowy Murray Development to the Murray.

One hundred and forty-five kilometres (90 miles) of trans-mountain tunnels were driven & eighty kilometres (50 miles) of aqueducts; sixteen major dams were constructed, and seven power stations – of these, Tumut 1 was built 366 m. below the surface, & Tumut 2 two hundred and forty-four metres underground.

[Snowy Mountains Scheme - Wikipedia, the free encyclopedia](#)

[The Snowy River](#)

*\*opening of the final verse of 'The Man from Snowy River' by A.B. Paterson (1890.)*