

Friday 2 March 2012

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Waller v Hargraves Secured Investments Ltd - decision High Court of Australia - *Farm Debt Mediation Act 1994* (NSW) - appeal allowed (B)

Australian Education Union v Department of Education & Children's Services - decision High Court of Australia - *Education Act 1972* (SA) - appeal allowed (I, B)

Wotton v Queensland - decision High Court of Australia - constitutional law - *Corrective Services Act 2006* (Qld) (I, B, C, G)

Thomson v STX Pan Ocean Co Ltd - Damages - torts (I, B, C, G)

Construction, Forestry, Mining & Energy Union v Mammoet Australia Pty Ltd - s25(1AA)(b) *Federal Court Act 1976* (Cth) - appeal from magistrate's court - application that appeal be heard by a Full Court dismissed (I)

Lane v Dive Two Pty Ltd - Insurance - interpretation of insurance policy - judgment in relation to cross-claim (I)



Allianz Australia Insurance Ltd & Anor v Lo-Giudice - Tort of conversion - fraud - mistake - damages (I)

Lew & Ors v Priester & Ors - Joinder - *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (I, B, C, G)

Wheelahan & Anor v City of Casey & Ors - Particulars - discovery of documents (I)

Sunland Group Ltd v Townsville City Council & Anor - Planning Schemes - appeal allowed (C)

Haureluik v Furler - *Road Transport (Third-Party Insurance) Act 2008* (ACT) - *Road Transport (Third-Party Insurance) Regulation 2008* (ACT) (I)

Summaries with links (5 minute read)

Waller v Hargraves Secured Investments Ltd [2012] HCA 4

High Court of Australia

French CJ; Hayne, Heydon, Crennan & Kiefel JJ

Farm Debt Mediation Act 1994 (NSW) - whether certificate issued under s11 lifted bar on enforceability of mortgage as security for advances made under third loan agreement - answer "no" - whether bar on enforceability of mortgage precluded recovery of money judgment framed on basis of covenants in mortgage - answer "yes" - appeal allowed - "enforcement action", "farm debt", "farm mortgage", "in respect of the farm debt involved", "in respect of the farm mortgage concerned."

[Waller](#) (B)

[Waller](#) (2010) 15 BPR 28,765 - decision Court of Appeal of New South Wales 11 November 2010: see Benchmark B & IBC Friday 12 November 2010 - appeal dismissed;

[Hargraves Secured Investments](#) - decision Supreme Court of NSW 12 November 2009: see Benchmark B & IC Tuesday 17 November 2009 - proceedings for recovery of possession by mortgagee - unjust contracts - *Contracts Review Act 1980* (NSW)



Australian Education Union v Department of Education & Children's Services [2012] HCA 3

High Court of Australia

French CJ; Heydon, Hayne, Kiefel & Bell JJ

Education Act 1972 (SA) - statutory interpretation - whether it was ever open to Minister of Education of South Australia to appoint persons as teachers under s9(4), which subsection was repealed in 2007 - long service leave entitlements of officers & employees appointed under s9(4) less favourable than entitlements enjoyed by officers of teaching service appointed under s15 - appeal allowed - "in addition to", "officers & employees", "officers of the teaching service".

[Australian Education Union](#) (I, B)

[Australian Education Union](#) - decision Full Court of the Supreme Court of South Australia 28 May 2010 reported at (2010) 270 LSJS 47;

[Australian Education Union](#) - decision of the Full Court of the South Australian Industrial Relations Court 29 May 2009

Wotton v Queensland [2012] HCA 2

High Court of Australia

French CJ; Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ

Constitutional law (Cth) - *Corrective Services Act 2006 (Qld)* - Special Case - whether ss132 & 200(2) impermissibly burden the freedom of political communication - "constitutionally prescribed system of representative & responsible government", "effectively burdens freedom of communication", "impermissibly burdening", "implied freedoms", "political communication".

[Wotton](#) (I, B, C, G)

Thomson v STX Pan Ocean Co Ltd [2012] FCAFC 15

Full Court of the Federal Court of Australia

Greenwood, McKerracher & Reeves JJ

Damages - torts - whether respondent had proved representations as pleaded - measuring damages for loss of use of a ship - appeal allowed in part: respondent's damages claim to be remitted to primary judge to receive evidence on loss of profit caused by breach.

[Thomson](#) (I, B, C, G)

[STX Pan Ocean](#) - decision Federal Court of Australia 26 November 2010 - quantification of STX's damages for charter hire & bunkering - costs;

[STX Pan Ocean](#) - decision Federal Court of Australia 12 November 2010: see Benchmark Tuesday 16 November 2010 - *Trade Practices Act 1974 (Cth)* - contract of affreightment between plaintiff & first defendant - representations - post-contractual representations - damages - two voyage charters for carriage of cargoes, each of 42,000 tonnes of coal, 10% more or less, from Kwinana, Western Australia, to ports in People's Republic of China - first defendant defaulted



in payment of hire and demurrage to STX - judgment against first defendant for USD2,483,296.25 on the first day of the trial, representing outstanding freight demurrage & other monies owing under the charterparty - plaintiff proceeding against second defendant, sole shareholder and director of first defendant, seeking to make him liable directly, & also as an accessory to conduct of first defendant under s75B, 52 & 82 - plaintiff's case that first or second defendant made ready, willing & able representation as pleaded at or before entry into charterparty rejected; case in relation to post-contractual representations accepted - ready, willing & able - "within five banking days"

Construction, Forestry, Mining & Energy Union v Mammoet Australia Pty Ltd [2012] FCA 141

Federal Court of Australia

Gilmour J

S25(1AA)(b) *Federal Court Act* 1976 (Cth) - application by appellant seeking that appellate jurisdiction of the Court in relation to the appeal be exercised by a Full Court rather than a single Judge - appeal from magistrate's court - s470 *Fair Work Act* 2009 (Cth) - "payment" - application that the appeal be heard by a Full Court dismissed.

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

Lane v Dive Two Pty Ltd [2012] NSWSC 104

Supreme Court of New South Wales

Adamson J

Insurance - interpretation of insurance policy - judgment in relation to defendants' cross-claim against first cross-defendant & second cross-defendant arising out of plaintiff's personal injuries claim - collision between boats - in the event second cross-defendant insurer not obliged to indemnify them in respect of plaintiff's claim, defendants claiming damages against first cross-defendant broker who arranged their insurance, for negligence & breach of contract - exclusion clause - duty of insurance broker to insured - judgment for second cross-defendant Liberty Mutual Insurance Co on cross-claim - "in connection with the Insured's Business" - extensive consideration of text & case law from UK & Australia.

[Lane](#) (I)

Allianz Australia Insurance Ltd & Anor v Lo-Giudice [2012] NSWSC 145

Supreme Court of New South Wales

Pembroke J

Tort of conversion - fraud - mistake - damages - proprietary remedies - stolen funds held on trust - judgment against defendant in sum of \$509,466.05 plus interest.

[Allianz Australia Insurance](#) (I)



Lew & Ors v Priester & Ors [2012] VSC 57

Supreme Court of Victoria

Pagone J

Joinder - *Supreme Court (General Civil Procedure) Rules 2005* (Vic) - "in respect of or arising out of the same transaction or series of transactions" – s5 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic) - "proceeding," "more appropriate" - extensive examination of Australian case law.

[Lew](#) (I, B, C, G)

Wheelahan & Anor v City of Casey & Ors [2012] VSC 10

Supreme Court of Victoria

Kaye J

Particulars - discovery of documents - applications relating to claim by first defendant against three of its co-defendants - whether first defendant had to plead, or provide particulars, to effect that settlement of claim against it by plaintiffs was reasonable - detailed examination of Australian case law

[Wheelahan](#) (I)

[Unity Insurance Brokers](#) - decision High Court of Australia 20 May 1998;

[BHP Billiton](#) - decision Supreme Court of Victoria 16 December 2011

[BHP Billiton](#) - decision 7 August 2009: see Benchmark Wednesday 12 August 2009 - *Trade Practices Act 1974* (Cth) - negligence - Olympic Dam mine in South Australia - misleading or deceptive conduct - causation - loss & damage - engineering evidence - pursuant to court order, an Experts' Conference had held in late January early February 2006 - representation by supplier that a particular lining material was suitable for use as a long term containment membrane for concrete solvent extraction tanks at the project - other representations about the lining - reliance - which company entered into contract bearing name of one entity & ACN of another - each plaintiff entitled to succeed in respect of their misleading or deceptive representation claim under *Trade Practices Act* - as to alternative common law claims, findings of negligence in making of representations - issues of quantum still outstanding - extensive consideration of UK & Australian case law.

Sunland Group Ltd v Townsville City Council & Anor [2012] QCA 30

Court of Appeal of Queensland

Muir and Fraser JJA; Wilson AJA

Planning Schemes - first respondent had approved applicant's application for material change of use to develop Neighbourhood Centre - appeal by second respondent to Planning & Environment Court had been successful - primary judge had concluded proposal conflicted with planning scheme - appeal allowed - matter remitted.

[Sunland Group](#) (C)



[Bushland Grove](#) - decision of Planning & Environment Court of Queensland on 23 June 2011 - appeal allowed against decision of first respondent approving application by Sunland for a material change of use to facilitate development of a 'Neighbourhood Centre' within the meaning of that term in the City of Thuringowa Planning Scheme.

Haureluik v Furler [2012] ACTCA 11

Court of Appeal of the Australian Capital Territory

Refshauge, Burns & Besanko JJ

Road Transport (Third-Party Insurance) Act 2008 (ACT) - Road Transport (Third-Party Insurance) Regulation 2008 (ACT) - detailed examination of case law as to principles of statutory construction & use of extrinsic material - appeal dismissed.

[Haureluik \(I\)](#)

& as Autumn begins...

*'Tis the last rose of summer
 Left blooming alone;
 All her lovely companions
 Are faded & gone;
 No flower of her kindred,
 No rosebud is nigh,
 To reflect back her blushes,
 To give sigh for sigh.*

*I'll not leave thee, thou lone one!
 To pine on the stem;
 Since the lovely are sleeping,
 Go, sleep thou with them.
 Thus kindly I scatter
 Thy leaves o'er the bed,
 Where thy mates of the garden
 Lie scentless & dead ...*

Thomas Moore

(b. Dublin 28 May 1779 - d. Wiltshire 25 February 1852)

“'Tis the Last Rose of Summer” was written in 1805

['Tis the Last Rose of Summer - Moore](#)

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