



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Suntory (Aust) Pty Ltd v Commissioner of Taxation - *Excise Act 1901* (Cth) s61C, s114 – statutory interpretation - alcopops - leave sought to appeal from interlocutory order - leave to appeal granted – appeal dismissed (B)

Comcare v Commonwealth of Australia - *Occupational Health & Safety Act 1991* (Cth) s16(1) - death of cadet with peanut allergy due to consumption of food with peanuts – pecuniary penalty of \$210,100 (I)

Markethaven Pty Ltd (subject to Deed of Company Arrangement) v Commonwealth of Australia - Application for transfer of proceeding to other Registry of Court granted (B)

Port Kembla Coal Terminal Ltd v Industrial Court of New South Wales (1st resp); Construction, Forestry, Mining & Energy Union (NSW Branch) (2nd resp); Attorney General (intervening) - *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) - Constitution s109: inconsistency of laws - superannuation – no direct inconsistency – summons dismissed (I,B,C)

Deputy Commissioner of Taxation v Lesley Frances Robertson - *Income Tax Assessment Act 1936* (Cth) – recovery of penalty from director of company (I,B,C)

In the matter of Chameleon Mining NL; Chameleon Mining NL v Atanaskovic Hartnell - Costs – *Legal Profession Act 2004* (NSW) – itemised bills – statutory demand set aside (I,B,C)

Bodikian v Sproule - *Corporations Act 2001* (Cth) - estoppel in pais - promissory or equitable estoppel - case law considered as to the *Duomatic* principle (I,B,C)

Wood v Inglis - Trust deed - whether controlling director had implied actual authority in respect of all relevant affairs of company (I,B)



Howlett v Dobson Mitchell & Allport (No 2) - *Limitation Act 1974* (Tas) – professional negligence action - consideration of difference between conjecture & inference (I)

Summaries with links (5 minute read)

Thursday 2 July 2009

Suntory (Aust) Pty Ltd v Commissioner of Taxation [2009] FCAFC 80

Full Federal Court of Australia

Finn, Emmett & Stone J (in Sydney)

Excise Act 1901 (Cth) s61C, s114 – statutory interpretation - alcopops - leave sought to appeal from interlocutory order - for decision 15 April 2009, see 'Benchmark' B & IBC Friday 17 April 2009 & link below - whether s114 ceases to operate when Bill giving retrospective effect to an Excise Tariff alteration is rejected by Senate – whether s61C an exercise of the power incidental to the power to impose a tax – protection of the revenue - leave to appeal granted – appeal dismissed.

[Suntory \(B\)](#)

[Suntory](#) – decision 15 April 2009 - Commissioner had published notice of intention to propose an Excise Tariff alteration increasing duty payable on “other excisable beverages” [the Excise Tariff Proposal (No 1) 2008] - *Excise Tariff Amendment (2009 Measures No 1) Bill 2009* (Cth) rejected in Senate – whether excise duties could continue to be collected at increased rate – Suntory’s submissions rejected & those of the Commissioner accepted - proceeding stayed till end of 13 May.

Comcare v Commonwealth of Australia [2009] FCA 700

Federal Court of Australia

North J (in Melbourne)

Occupational Health & Safety Act 1991 (Cth) s16(1) - camp for cadets organised by Scotch College Cadet Unit – in 1999, Minister for Employment, Workplace Relations & Small Business had made a declaration under s9(5) of the Act that the Commonwealth was employer of members of the Australian Army Cadets for all acts performed in connection with cadet activities – 2007 death of cadet with peanut allergy due to consumption of food with peanuts – civil proceedings – use of victim impact statements - pecuniary penalty of \$210,100 – recommendation from His Honour that Coroner conduct an enquiry into this matter - other part of proceedings relates to other cadets being lost in bush overnight : that section adjourned till 1 April 2010.

[Comcare \(I\)](#)

Markethaven Pty Ltd (subject to Deed of Company Arrangement) v Commonwealth of Australia [2009] FCA 694

Federal Court of Australia

Besanko J (in Adelaide)

Application for transfer of proceeding to other Registry of Court – Therapeutic Goods Administration – Pan Pharmaceuticals – proceeding to be conducted & continued in New South Wales District Registry of the Federal Court.

[Markethaven](#) (B)

Port Kembla Coal Terminal Ltd v Industrial Court of New South Wales (1st resp); Construction, Forestry, Mining & Energy Union (NSW Branch) (2nd resp); Attorney General (intervening) [2009] NSWCA 70

Court of Appeal of New South Wales

Spigelman CJ; Beazley JA & Handley AJ

Workplace Relations Amendment (Work Choices) Act 2005 (Cth) - Preserved Collective State Agreement - Constitution s109: inconsistency of laws - to what extent Commonwealth law covers the field – superannuation – no direct inconsistency – summons dismissed.

[Port Kembla Coal Terminal](#) (4)

[Construction, Forestry, Mining and Energy Union](#) – decision Industrial Relations Court of NSW 6 December 2007

Deputy Commissioner of Taxation v Lesley Frances Robertson [2009] NSWSC 597

Supreme Court of New South Wales

Harrison J

Income Tax Assessment Act 1936 (Cth) – recovery of penalty from director of company – whether notice pursuant to s222AOE had been given to the defendant prior to commencement of proceedings – whether defendant was a director at the relevant time so that she became liable for a penalty under s222AOC – whether defendant had a defence under s222AOJ(2) on basis that she thought that she had resigned – whether her belief could amount to "some other good reason" for purposes of the section – held that defendant liable to pay plaintiff for the amount claimed.

[Deputy Commissioner of Taxation](#) (I,B,C)

In the matter of Chameleon Mining NL; Chameleon Mining NL v Atanaskovic Hartnell [2009] NSWSC 602

Supreme Court of New South Wales

Austin J

Costs – *Legal Profession Act 2004* (NSW) – itemised bills – whether statutory demand had been withdrawn : answer 'no,' still in place – statutory demand set aside – defendant to pay plaintiff's costs.

[In the matter of Chameleon Mining NL](#) (I,B,C)

**Bodikian v Sproule [2009] NSWSC 599**

Supreme Court of New South Wales

Austin J

Corporations Act 2001 (Cth) - whether informal unanimous assent of shareholders is sufficient for appointment of directors & issue of shares - joint venture for purchase, development & sale of property - summary judgment - estoppel in pais - promissory or equitable estoppel - case law considered as to the *Duomatic* principle: *Re Duomatic Ltd* [1969] 2 Ch 365 - see paras 28 to 35 of judgment.

[Bodikian](#) (I,B,C)**Wood v Inglis [2009] NSWSC 601**

Supreme Court of New South Wales

Brereton J

Trustees - directors - Trust deed - whether trustee of discretionary trust entitled to treat as income unrealised capital gain on investments - where other directors leave conduct of affairs of corporation entirely to controlling director - whether controlling director has implied actual authority in respect of all relevant affairs of company - whether enforceable obligation owed by company to deceased in the amount in question as at the date of his death - if so, whether that obligation had been subsequently released or otherwise extinguished or modified.

[Wood v Inglis \[2009\] NSWSC 601](#) (I,B)**Howlett v Dobson Mitchell & Allport (No 2) [2009] TASSC 47**

Supreme Court of Tasmania

Holt AsJ

Limitation Act 1974 (Tas) - professional negligence action against firm of solicitors - plaintiffs' Reply alleging their failure to sue in time was due to a misrepresentation made by member of the firm - plaintiffs contending defendants estopped from relying on limitation defence - estoppel plea struck out - *Fair Trading Act* 1990 (Tas.) plea struck out - whether facts alleged in the Reply capable of supporting a finding that representation caused limitation problem - causative link - Reply struck out - consideration of difference between conjecture & inference - an interesting judgment.

[Howlett](#) (I)**Key: (I) Insurance, (B) Banking, (C) Construction**