

# Insurance Banking & Construction

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

### Executive Summary (1 minute read)

**Leighton Contractors Pty Ltd v Fox; Calliden Insurance Limited v Fox** - High Court of Australia - personal injuries – health & safety training - first respondent independent contractor suffered injury working on Hilton Hotel construction site in Sydney – appeal allowed – orders 1 & 5 of NSW Court of Appeal decision set aside & in lieu thereof order made that appeals to that Court be dismissed (I,C)

**Visscher v the Honourable President Justice Giudice** - High Court of Australia - employment law – appeal allowed - "at the initiative of the employer", "contract of employment", "employment relationship", "repudiation", "termination." (I,B,C)

**Clarke v Commissioner of Taxation** - High Court of Australia - constitutional law - *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997 (Cth)* - *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment & Collection Act 1997 (Cth)* - powers of Commonwealth Parliament - State parliamentary pensions (B)

**Satchithanatham v National Australia Bank Ltd** - *Contracts Review Act 1980 (NSW)* - undue influence - appeal dismissed (B)

**Anthony v Vaclav** - Contract for sale of property - order made for specific performance of contract subject to conditions - case law considered as to equitable doctrine of unconscionable dealing, special disability & undue influence (B)

**Roads Corporation v Schembri & Ors** - *Land Acquisition & Compensation Act 1986 (Vic)* – ‘losses attributable to disturbance’ – causal link – principles of statutory construction (B,C)

**Melbourne Health & Ors v Lloyd & Ors** - *Wrongs Act 1958 (Vic)* – judicial review -determination of medical panel set aside (I)



**Lunt v Briggs [No 2]** - Interest on judgment - *Supreme Court Act 1935 (WA)* (B,C)

**Marron v City of Nedlands** - Interlocutory injunctions - plaintiff contending defendant had not given adequate notice of proposed works on road verge adjacent to plaintiff's property – interlocutory injunction granted (C)

**Twining v Curtis** - Tort of misfeasance in public office – elements of tort - appeal from Master's decision to strike out pleadings on grounds of failing to disclose reasonable cause of action - whether conduct complained of breached a public duty (I)

## Summaries with links (5 minute read)

### Friday 4 September 2009

#### **Leighton Contractors Pty Ltd v Fox; Calliden Insurance Limited v Fox [2009] HCA 35**

High Court of Australia

French CJ, Gummow, Hayne, Heydon & Bell JJ

Personal injuries – health & safety training - first respondent independent contractor suffered injury working on Hilton Hotel construction site in Sydney – injury resulting from negligent conduct of co-subcontractor – for NSW Court of Appeal decision 7 March 2008, see ‘Benchmark’ I, C & IBC Tuesday 11 March 2008 & link below - whether induction training in industry approved code of practice would have avoided cause of injury – whether principal contractor for construction work owed duty to provide, or be satisfied of prior provision of, training in safe work methods to independent contractors working on construction site – whether contractor retained to carry out concreting owed duty to provide training in safe work methods to independent subcontractor engaged by it to carry out concrete pumping – whether obligations imposed on principal contractor & contractor under *Occupational Health & Safety Act 2000 (NSW)* & *Occupational Health & Safety Regulation 2001 (NSW)* gave rise to common law duty requiring provision of training in respect of safe work methods of carrying out specialised tasks – appeal allowed – orders 1 & 5 of Court of Appeal decision set aside & in lieu thereof order made that appeals to that Court be dismissed.

#### **Leighton Contractors Pty Ltd**

**Fox** – NSW Court of Appeal decision 7 March 2008 - occupational health & safety – negligence – contributory negligence – contribution between tortfeasors - duty of care of principal contractor to subcontractors – building & construction work – duty of principal contractor to maintain safe workplace – duty to take reasonable care to ensure safety of subcontractor – whether non-delegable duty – failure to ensure subcontractor underwent safety induction training – extent of direct supervision of sub-contractors – order (1) (a) Allow the appeal & set aside order 2 of trial judge dated 14 December 2006 dismissing claims made by plaintiff, Mr Fox, against first defendant, Leighton Contractors Pty Ltd & third defendant, Downview Pty Ltd; (b) in lieu thereof, give judgment for the plaintiff against first & third defendants in sum of \$472,562 – order (5) On the cross-appeal: (a) set aside orders 4 & 6 below dismissing the cross-claim & awarding costs in respect thereof; (b) order that Downview Pty Ltd pay 80% of the judgment debt incurred by Leighton Contractors Pty Ltd to Mr Fox, & (c) order that Downview Pty Ltd pay Leighton Contractors Pty Ltd’s costs of cross-appeal.

#### **Visscher v the Honourable President Justice Giudice [2009] HCA 34**

High Court of Australia

Gummow, Heydon, Crennan, Kiefel & Bell JJ

Employment law – employee promoted to Chief Officer but promotion later sought to be rescinded by employer – appeal allowed - "at the initiative of the employer", "contract of employment",

"employment relationship", "repudiation", "termination."

[Visscher](#)

[Visscher](#) – decision Full Federal Court 21 December 2007 – proceedings dismissed.

### **Clarke v Commissioner of Taxation [2009] HCA 33**

High Court of Australia

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

Constitutional law – *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997 (Cth) - Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment & Collection Act 1997 (Cth)* - powers of Commonwealth Parliament - State parliamentary pensions – for decision appealed from, see 'Benchmark' B & IBC Wednesday 25 June 2008 & link below - Melbourne Corporation doctrine – appellant former member of South Australian Parliament – appeal allowed - "curtailment of capacity of the States to function as governments", "discrimination", "special burden."

[Clarke](#)

[Clarke](#) – decision Full Federal Court 13 June 2008 - *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment & Collection Act 1997 (Cth)* :whether the Act imposes a tax on property belonging to the State contrary to s114 of Constitution – [Austin v The Commonwealth of Australia](#) (2003) 215 CLR 185 followed.

### **Satchithanatham v National Australia Bank Ltd [2009] NSWCA 268**

Court of Appeal of New South Wales

Giles, Hodgson, & Young JJA

**Contracts Review Act 1980 (NSW)** - whether to set aside or vary loan agreement – for decision appealed from, see 'Benchmark' B & IBC Tuesday 10 February 2009 & link below - [Yerkey v Jones](#) - limited availability of undue influence where party seeking to set aside the transaction obtained some benefit from it – appeal dismissed.

[Satchithanatham](#)

[National Australia Bank](#) – decision 6 February 2009 - defences to claim for possession of house at Westmead - undue influence by husband - second limb of *Yerkey v Jones* - whether unconscionable conduct on part of the bank - whether contract unjust - partial volunteer - inferences to be drawn in the absence of a witness - pure asset lending – order for possession made.

### **Anthony v Vaclav [2009] VSC 357**

Supreme Court of Victoria

Vickery J

Contract for sale - plaintiff, an elderly widow entered contract for sale of property to plaintiff, who was seeking to enforce contract – defendant contending sale at undervalue - defendant contending she was entitled not to proceed because transaction was not fair, just or reasonable, she was unduly influenced by plaintiff to sign the contract & she was not of sound mind when she did - independent legal advice – not a sale at undervalue – contract not set aside – order made for specific



performance of contract subject to conditions - thorough examination of case law including as to equitable doctrine of unconscionable dealing, special disability & undue influence in an interesting decision.

[Anthony](#)

## **Roads Corporation v Schembri & Ors [2009] VSC 369**

Supreme Court of Victoria

Osborn J

*Land Acquisition & Compensation Act 1986 (Vic)* – ‘losses attributable to disturbance’ – causal link – principles of statutory construction - plaintiff Corporation had undertaken construction of a link between Western Ring Road & Western Freeway & compulsorily acquired a portion of a 42.64 hectare parcel of land owned by the defendant developers at Derrimut – defendants had claimed compensation - Corporation’s challenge to Victorian Civil & Administrative Tribunal’s findings with respect to replacement land expenses failed – bank interest - Corporation granted leave to appeal with respect to the Tribunal’s decision in relation to quantum of claim for loss of use of money, on ground that it was not open to conclude quantum of such claim was greater than \$67,731: appeal allowed & decision of Tribunal in this respect set aside – a lengthy, interesting decision with comprehensive examination of case law.

[Roads Corporation](#)

## **Melbourne Health & Ors v Lloyd & Ors [2009] VSC 370**

Supreme Court of Victoria

Pagone J

*Wrongs Act 1958 (Vic)* – judicial review – question referred to medical panel as to whether degree of impairment resulting from injury to second defendant alleged in her claim satisfied threshold level - plaintiffs contending panel’s determination failure to identify a potentially compensable injury caused by a potential tortfeasor- determination of medical panel set aside.

[Melbourne Health](#)

## **Lunt v Briggs [No 2] [2009] WASC 243**

Supreme Court of Western Australia

EM Heenan J

Interest on judgment - *Supreme Court Act 1935 (WA)* - maximum rate in claims in contract where no specific interest rate agreed – for decision 18 May 2009, see ‘Benchmark’ B,C & IBC Tuesday 26 May 2009 & link below - dates for computation of interest - potential effect of taxation liability – limitation issues

[Lunt](#)

[Lunt](#) - decision 18 May 2009 - contracts – remuneration for services – debt – novation – company accounts - development of enterprise for manufacture & sale of technology & associated franchises for a fertilizer product - whether consultancy agreement validly executed – handwriting evidence - legal entitlement to payment of consultancy



fees established.

**Marron v City of Nedlands [2009] WASC 242**

Supreme Court of Western Australia

Johnson J

Interlocutory injunctions - plaintiff contending defendant had not given adequate notice of proposed works on road verge adjacent to plaintiff's property in Dalkeith – preliminary issue: defendant contending that at ex parte hearing for interim injunction, there had been a lack of disclosure to the Court by plaintiff – case law considered – Her Honour concluded at para. 181 that there was no substance to the preliminary issue raised by defendant – consultation with residents – interlocutory injunction granted.

[Marron](#) - part one of judgment

[Maron](#) – part two of judgment

**Twining v Curtis [2009] ACTSC 106**

Supreme Court of the Australian Capital Territory

Penfold J

Tort of misfeasance in public office – elements of tort - appeal from interlocutory order of Master to a single judge – for decision appealed from, see 'Benchmark' I & IBC Friday 1 February 2008 & link below - appeal from Master's decision to strike out pleadings on grounds of failing to disclose a reasonable cause of action - whether conduct complained of breached a public duty - act must be done maliciously – act done in valid exercise of power, such as termination of employment, not sufficient irrespective of harm caused - need to plead causal link between defendant's conduct & alleged harm – whether defendant breached public duty by forwarding email sent to her by plaintiff without plaintiff's consent – operation of s16 *Public Service Act 1999* (Cth) & s14 *Privacy Act 1988* (Cth) - operation of "whistleblower" legislation - appeal against Master's decision upheld in part - amended statement of claim struck out, but for the reasons given by Master as varied by this judgment – leave will be required to file a further statement of claim – "office" – Australian case law considered.

[Twining](#)

[Twining](#) – decision 29 January 2008 - misfeasance in public office – ingredients of tort – principles & case law considered in detail – dispute relating to termination of employment - whether plaintiff must be "a member of the public" to whom officeholder owes a duty - statement of claim failed to disclose cause of action – facts asserted not capable of establishing cause of action pleaded – statement of claim struck out.

## For Father's Day on Sunday 6 September 2009

### Dedicatory Sonnet to S.T. Coleridge by Hartley Coleridge

Father, & Bard revered! To whom I owe,  
Whate'er it be, my little art of numbers,



Thou, in thy night-watch o'er my cradled slumbers  
 Didst meditate the verse that lives to shew,  
 (And long shall live, when we alike are low)  
 Thy prayer how ardent, & thy hope how strong,  
 That I should learn of Nature's self the song.  
 The lore which none but Nature's pupils know.

The prayer was heard: I "wandered like a breeze",  
 By mountain brooks & solitary meres,  
 And gather'd there the shapes & phantasies  
 Which, mixt with passions of my sadder years,  
 Compose this book. If good therein there be,  
 That good, my sire, I dedicate to thee.

Hartley Coleridge

(born 19 September 1796, Bristol - died 6 January 1849, Grasmere, the Lakes District)

The eldest son of Samuel Taylor Coleridge, Hartley Coleridge published a collection of poetry in 1833; the poem above, the first poem in the collection, refers to his father's poem 'Frost at Midnight' (from February 1798):

From S.T. Coleridge's 'Frost at Midnight'

..... For I was reared  
 In the great city, pent 'mid cloisters dim,  
 And saw nought lovely but the sky & stars.  
 But thou, my babe! shalt wander like a breeze  
 By lakes & sandy shores, beneath the crags  
 Of ancient mountain, & beneath the clouds,  
 Which image in their bulk both lakes & shores  
 And mountain crags .....

Samuel Taylor Coleridge

(b. 21 October 1772 in Devon – d. 25 July 1834, Highgate, London)

When his father, a well-respected vicar & headmaster died in 1781, the eight year old Samuel was sent to Christ's Hospital School, a charity school in Greyfriars, London, where he remained for the rest of his childhood & adolescence, rarely returning home.