

Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2) - *Native Title Act 1993 (Cth)* - *Seas & Submerged Lands Act 1973 (Cth)* - *Torres Strait Fisheries Act 1984 (Cth)* - for the most part, claim established

Fabcot Pty Ltd & Woolworths Ltd v Port Macquarie-Hastings Council & Coles Group Property Developments Ltd - *Fair Trading Act 1987 (NSW)* - misleading & deceptive conduct - supermarket development site

Moraitis Fresh Packaging (NSW) Pty Ltd v Fresh Express Australia Pty Ltd - Damages enquiry - claim by defendant pursuant to an undertaking given to Court by plaintiff

Taylor v Port Macquarie-Hastings Council - *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* - rural land

Mietto v G4S Custodial Services Pty Ltd - Taxation of costs - unqualified costs consultant - allowance for attendance

Drew (resp.) v Makita (Australia) Pty Ltd (app.) - Personal injuries - product liability - *Trade Practices Act 1974 (Cth)* - serious injury to hand - appeal dismissed

Xstrata Coal Qld Pty Ltd & Ors v Council of the Shire of Bowen - Valuation of land - local government revenue - two coal mines - setting of differential rates - appeal allowed

Unimin Australia Ltd v State of Queensland - *Mineral Resources Act 1989* (Qld) - statutory interpretation - sand mining operations on North Stradbroke Island - appeal dismissed

Perpetual Trustee Company Ltd v Aspley Specialist Centre Pty Ltd & Anor - Commercial lease - shopping centre - bank guarantees

Sandbank Holdings Pty Ltd v Durkan - Commercial lease - restaurant business - failure to pay rent - clause prohibiting set-off or deduction

GRD Group (NT) Pty Ltd v K & J Burns Electrical Pty Ltd - *Construction Contracts (Security of Payment) Act* (NT) - subcontract – adjudication

Pennsylvania General Insurance Company v Park-Ohio Industries - case from USA - insurance - equitable contribution among multiple insurers – personal injuries - mesothelioma

Kathleen McNeel v Farm Bureau General Insurance Company of Michigan - case from USA - insurance policy - “increase in hazard” - “unoccupied” - fire destroyed farming house

Summaries with links (5 minute read)

Tuesday 6 July 2010

Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2) [2010] FCA 643

Federal Court of Australia

Finn J (in Cairns)

Native Title Act 1993 (Cth) - *Seas & Submerged Lands Act 1973* (Cth) - *Torres Strait Fisheries Act 1984* (Cth) - right to take marine resources for commercial purposes - extinguishment - “public work” - “adjacent waters” - for the most part, claim established - comprehensive review of legislation, text & case law.

[Akiba](#)

Fabcot Pty Ltd & Woolworths Ltd v Port Macquarie-Hastings Council & Coles Group Property Developments Ltd [2010] NSWSC 726

Supreme Court of New South Wales

Hammerschlag J

Fair Trading Act 1987 (NSW) - misleading & deceptive conduct - first defendant Council publically invited expressions of interest in purchasing & developing supermarket development site in Port Macquarie CBD - Woolworths & Coles short-listed - Council accepted a conditional offer from Woolworths - while negotiating with Woolworths Council also negotiated with Coles - Council's conduct was in the circumstances misleading or deceptive or likely to mislead or deceive - held that Woolworths had not established any loss by that conduct - held further that it was not established that Coles knowingly participated in the contravention - application & cross-claim dismissed.

[Fabcot](#)

Moraitis Fresh Packaging (NSW) Pty Ltd v Fresh Express Australia Pty Ltd [2010] NSWSC 704

Supreme Court of New South Wales

McLaughlin AsJ

Damages - enquiry as to damages claimed by defendant pursuant to an undertaking given to Court by plaintiff - damages of \$450,000 awarded.

[Moraitis Fresh Packaging \(NSW\)](#)

[Moraitis Fresh Packaging \(NSW\)](#) - judgment Court of Appeal 2 December 2008; see 'Benchmark' B & IBC Thursday 4 December 2008 - contract - right of first refusal - right to occupy stands at Sydney Markets - grant of right of first refusal in 1996 - whether void because an assignment forbidden by statute - whether right of first refusal was an encumbrance within the meaning of "encumbered" & "encumbrance" in s11(6) Sydney Market Authority - whether a right of first refusal void as a restraint on alienation - whether deemed offer - whether acceptance - extensive consideration of case law from United Kingdom, New Zealand & Australia.

Taylor v Port Macquarie-Hastings Council [2010] NSWLEC 113

Land & Environment Court of New South Wales

Biscoe J

Land Acquisition (Just Terms Compensation) Act 1991 (NSW) - rural land - whether potential for higher & better use - ecology - published planning strategies - whether other sales comparable - whether evidence of subjective intention of purchasers of other land is relevant to comparability - total compensation awarded \$1,525,000 comprising market value of \$1,495,000 & \$30,000 for loss attributable to disturbance.

[Taylor](#)

Mietto v G4S Custodial Services Pty Ltd [2010] VSC 304

Supreme Court of Victoria

Wood AsJ

Taxation of costs - unqualified costs consultant - allowance for attendance - distinction recognised between employees of a solicitor & independent third party contractors - plaintiff seeking review of decision made by Costs Registrar in a party & party taxation of defendant's costs.

[Mietto](#)

Drew (resp.) v Makita (Australia) Pty Ltd (app.) [2010] QCA 171

Court of Appeal of Queensland

de Jersey CJ, White JA & Atkinson J

Personal injuries - product liability - *Trade Practices Act 1974* (Cth) - serious injury to hand - circular saw - appellant contending primary judge should have made a finding of contributory negligence against respondent - whether primary judge justified in concluding that sheet of material fell from the workbench, & that the guard for the blade then jammed in the open position - costs - appeal dismissed.

[Drew](#)

[Drew](#) - District Court decision 29 August 2008 - judgment for plaintiff against defendant in sum of \$194,454.86

Xstrata Coal Qld Pty Ltd & Ors v Council of the Shire of Bowen [2010] QCA 170

Court of Appeal of Queensland

de Jersey CJ; Holmes & Chesterman JJA

Valuation of land - local government revenue - two coal mines - setting of differential rates - held that primary judge had erred in concluding that capacity of a landowner to pay, independent of any quality of subject land, was a relevant consideration in decision to set rates - appeal allowed.

[Xstrata Coal Qld](#)

[Xstrata Coal Qld](#) - decision Supreme Court 18 November 2009

Unimin Australia Ltd v State of Queensland [2010] QCA 169

Court of Appeal of Queensland

de Jersey CJ, Chesterman JA & Atkinson J

Mineral Resources Act 1989 (Qld) - statutory interpretation - sand mining operations on North Stradbroke Island under four mining leases granted under the *Mineral Resources Act 1989* (Qld) - extraction of silica sand from sand mined for use in manufacturing glass - primary judge had held

that lower grade silica sand was not a “mineral” within the meaning of the Act -whether primary judge erred in holding that appellant “mined” lower purity silica sand for use in mortars or renders - whether use of silica sand in mortars and renders is “use for chemical properties” as defined in s6 - appeal dismissed.

[Unimin Australia](#)

[Unimin Australia](#) - decision Supreme Court 30 November 2009

[Unimin Australia](#) - decision Supreme Court 8 February 2010

Perpetual Trustee Company Ltd v Aspley Specialist Centre Pty Ltd & Anor [2010] QSC 232

Supreme Court of Queensland

McMurdo J

Commercial lease - plaintiff owner of freehold shopping centre - bank guarantees - settlement agreement - whether provision whereby acknowledged debt would be paid in full if conditions not met was penal - whether proceedings should be consolidated.

[Perpetual Trustee Company](#)

Sandbank Holdings Pty Ltd v Durkan [2010] WASCA 122

Court of Appeal of Western Australia

Pullin & Newnes JJA; Murphy J

Commercial lease - restaurant business - failure to pay rent - clause prohibiting set-off or deduction - whether appellant tenant entitled to set off payments alleged to be void or made by mistake - onus of proof on tenant to prove conversion of tenant's fixtures - appeal allowed in part, on one of eight grounds, in relation to nominal damages claim for \$10.

[Sandbank Holdings](#)

[Sandbank Holdings](#) - Sandbank Holdings Pty Ltd v Durkan (as Administrator of the Estate of *Martin Durkan*) & Anor_[2009] WADC 11decision District Court 3 February 2009 - plaintiff's claim dismissed - defendant owners of premises awarded damages of \$47,801.40 in relation to some issues in counterclaim.

GRD Group (NT) Pty Ltd v K & J Burns Electrical Pty Ltd [2010] NTSC 34

Supreme Court of the Northern Territory

Mildren J

Construction Contracts (Security of Payment) Act (NT) - payment claims - subcontract - lump sum contract for electrical work - remedial works - late completion - in relation to summary invoice, adjudicator had lacked jurisdiction except for so much of the SI as related to the balance of the retention fund.

[GRD Group \(NT\)](#)

From the United States of America...

Pennsylvania General Insurance Company v Park-Ohio Industries, Slip Opinion No. 2010-Ohio-2745

Supreme Court of Ohio

Pfeifer, O'Connor, O'Donnell, Cupp, Lundberg & Stratton JJ

Insurance - equitable contribution among multiple insurers — personal injuries - mesothelioma - asbestos - insured's duty to cooperate with insurer targeted for full payment — failure to notify non-targeted insurers of claim - whether an "other insurer" can refuse claim for equitable contribution on grounds of prejudice suffered as a result of the insured failing to notify that insurer - no prejudice to appellants.

[Pennsylvania General Insurance Company](#)

Kathleen McNeel v Farm Bureau General Insurance Company of Michigan, No. 285008

Court of Appeals of Michigan

M.J. Kelly PJ; K. F. Kelly & Shapiro JJ

Insurance policy - "increase in hazard" - "unoccupied" - fire destroyed farming house - nobody living in the property for about 18 months - not disclosed to insurer - at trial, damages awarded - on appeal, jury's verdict affirmed but trial court's decision on attorney fees reversed.

[Kathleen McNeel](#) - majority judgment Shapiro J & M. J. Kelly PJ

[Kathleen McNeel](#) - dissenting judgment K. F. Kelly J - mandatory limitation period - plaintiffs failed to file suit within one year of defendant's formal denial of liability - summary disposition in defendant's favour should have been granted.

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