



Friday 7 October 2011

Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Westport Insurance Corporation & Ors v Gordian Runoff Ltd - High Court of Australia - *Commercial Arbitration Act 1984* (Cth) - *s18B Insurance Act 1902* (NSW) - by majority, appeal allowed (I, B, C)

Queanbeyan City Council v ACTEW Corporation Ltd - High Court of Australia - ss90 & 122 *Commonwealth of Australia Constitution Act* - water licence fees & utilities tax - *Territory-owned Corporations Act 1990* (ACT) - whether first respondent identified with government of ACT - whether imposes duties of excise (B)

Shoalhaven City Council v Firedam Civil Engineering Pty Ltd - High Court of Australia - construction contracts - appeal allowed - "expert determination", "inconsistency", "issue", "valid & sufficient reasons" (I, C)

Tasty Chicks Pty Ltd & Ors v Chief Commissioner of State Revenue - High Court of Australia - *s97 Taxation Administration Act 1996* (NSW) - *Pay-roll Tax Act 1971* (NSW) - "appeal," "review" - appeal allowed (I, B, C)

Higgins v Hancock as Liquidator of 246 Arabella Investments Pty Ltd (in liq) - Application for judicial review dismissed (B)



Friends of Turrumurra Inc v Minister for Planning (No 2) – Apportionment of costs (I, B, C)

Summaries with links (5 minute read)

Westport Insurance Corporation & Ors v Gordian Runoff Ltd [2011] HCA 37

High Court of Australia

French CJ; Gummow, Crennan, Bell, Kiefel & Heydon JJ (dissenting)

Commercial Arbitration Act 1984 (Cth) – s18B Insurance Act 1902 (NSW) – professional indemnity insurance - directors & officers liability insurance – runoff policy - statutory limitation on exclusion clauses – reinsurance treaties between Gordian & appellant reinsurers - NSW Court of Appeal had allowed an appeal against order of primary judge setting aside arbitral award - by majority, appeal allowed - "appeal", "arbitration agreement", "award", "considerations of general justice & fairness", "exclusion clause", "judicial standard", "manifest error of law on the face of the award", "question of law", "reasons", "reinsurance treaty."

[Westport Insurance](#) (I, B, C)

[Gordian Runoff](#) - decision Court of Appeal of New South Wales 1 April 2010: see 'Benchmark' I & IBC Wednesday 7 April 2010 – reported at (2010) 267 ALR 74 - cross-appeal dismissed – appeal allowed – leave to appeal from arbitrator's award refused.

[Westport Insurance](#) - decision Supreme Court of New South Wales 8 April 2009: see 'Benchmark' I & IBC Tuesday 14 April 2009 – reported at (2009) 15 ANZ Insurance Cases 61-798 - *Commercial Arbitration Act 1984 (NSW) - reinsurance treaties - application for leave to appeal on questions of law arising out of award - arbitration concerned the scope and operation of certain contracts of reinsurance issued by plaintiffs & the entitlement of defendant (as reinsured) to recovery from plaintiffs in respect of claims made on defendant by its original insured, FAI Insurances Limited - case management regime - jurisdiction to grant leave to appeal from an arbitral award - s18(B) Insurance Act 1902 (NSW) – Second Reading Speech considered - leave to appeal from arbitral award granted - appeal upheld - award to be set aside.*

Queanbeyan City Council v ACTEW Corporation Ltd [2011] HCA 40

High Court of Australia

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

ss90 & 122 Commonwealth of Australia Constitution Act - water licence fees & utilities tax - *Territory-owned Corporations Act 1990 (ACT) - whether first respondent identified with government of ACT – whether imposes duties of excise – whether imposes financial arrangements internal to government of ACT – appeals dismissed; position as to costs as sought by appellant - "compulsory exaction", "duties of excise", "extensive control", "identified with the Territory", "tax'.*

[Queanbeyan City Council](#) (B)



[ACT](#) – decision Full Court of the Federal Court of Australia 24 September 2010: see ‘Benchmark’ B,C & IBC Wednesday 29 September 2010 - Constitutional law - validity of two charges levied by ACT relating to water – whether price for licence must bear a "discernible relationship" to value of the water derived;

[Queanbeyan City Council](#) – decision Federal Court 24 August 2009: see ‘Benchmark’ B, C & IBC Friday 28 August 2009 - s90 Constitution - water abstraction charge - whether the ACT invalidly imposed duties of excise on a statutory corporation - declaration made that *Utilities (Network Facilities Tax) Act 2006* (ACT) invalid so far as it purports to impose a tax on the water network facility operated by first respondent.

Shoalhaven City Council v Firedam Civil Engineering Pty Ltd [2011] HCA 38

High Court of Australia

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

Construction contracts - expert's refusal to allow certain extensions of time which contractor claimed as of right arising out of variations to works - expert's use of principal's discretion to extend time as device for allocating responsibility for delay caused by principal was adequately explained & not inconsistent with his refusal to allow contractor's claimed extensions of time - appeal allowed - "expert determination", "inconsistency", "issue", "valid & sufficient reasons".

[Shoalhaven City Council](#) (I, C)

[Firedam Civil Engineering](#) – decision Court of Appeal of New South Wales 19 April 2010: see ‘Benchmark’ Wednesday 21 April 2010 - building contracts – expert determination - design & construction of wastewater collection & transportation system for Conjola Regional Sewage Scheme – scope of obligation of expert – giving reasons - appeal allowed - orders of primary judge set aside – declaration that expert determination not binding on parties.

[Firedam Civil Engineering](#) – decision Supreme Court of New South Wales 12 August 2009 : see ‘Benchmark’ Thursday 20 April 2009 - application by plaintiff contractor for declarations that an expert determination arising from a dispute with defendant as principal was not binding on it & that, on the proper construction of the contract between the parties, plaintiff was entitled to commence legal proceedings against defendant - principles concerning adoption of expert determination – plaintiff's application dismissed – United Kingdom & Australian case law considered as to circumstances in which a party may challenge the determination of an expert.

Tasty Chicks Pty Ltd & Ors v Chief Commissioner of State Revenue [2011] HCA 41

High Court of Australia

French CJ; Gummow, Crennan, Kiefel & Bell JJ

s97 *Taxation Administration Act 1996* (NSW) - *Pay-roll Tax Act 1971* (NSW) - "appeal", "review" – appeal allowed.

[Tasty Chicks](#) (I, B, C)

[Chief Commissioner of State Revenue](#) – decision Court of Appeal of New South Wales 21 December 2010: see ‘Benchmark’ B, C & IBC Friday 24 December 2010 - *Payroll Tax Act 1971* & *Taxation Administration Act 1996* as in force



at relevant times between 1 July 2001 & 30 June 2007 – grouping & de-grouping provisions – tax threshold – appeal allowed;

[Tasty Chicks Pty Ltd & Ors](#) – decision 25 September 2009: see ‘Benchmark’ B & IBC Monday 28 September 2009 - pay-roll tax – Chief Commissioner had grouped a partnership with first plaintiff, second plaintiff & third plaintiff companies, for the purposes of now repealed *Pay-roll Tax Act 1971* (NSW) & for purposes of *Taxation Administration Act 1996* (Cth) - Chief Commissioner's decisions replaced by decision that prior to *Pay-roll Tax Legislation Amendment (Avoidance) Act 2002* service providers did not form part of a group & by a decision that following the amendments the service providers be determined not to be members of a group.

Higgins v Hancock as Liquidator of 246 Arabella Investments Pty Ltd (in liq) [2011] FCA 1119

Federal Court of Australia

Edmonds J

Application for judicial review of decision of Administrative Appeals Tribunal refusing an application to adjourn proceedings part-heard in the Tribunal – application for judicial review dismissed.

[Higgins](#) (B)

Friends of Turramurra Inc v Minister for Planning (No 2) [2011] NSWLEC 170

Land & Environment Court of New South Wales

Craig J

Costs - *Uniform Civil Procedure Rules* r42.1 - whether costs should be apportioned - whether apportionment should be adjusted on the basis of "public interest" - first respondent to pay fifty percent of applicant's costs of proceedings (with each party to pay its own costs of applicant's notice of motion filed 4 August 2011).

[Friends of Turramurra](#) (C)

[Friends of Turramurra](#) – decision 28 July 2011: see ‘Benchmark’ C & IBC Monday 1 August 2011 - *Environmental Planning & Assessment Act 1979* – judicial review - declaration that Ku-ring-gai Local Environmental Plan (Town Centres) 2010 published on New South Wales legislation website on 25 May 2010 had been made contrary to provisions of Division 4 of Part 3 & was thereby of no legal force or effect.

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