

Friday 9 August 2013

## Insurance, Banking, Construction & Government

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

#### Important Announcement



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#### Executive Summary (1 minute read)

**Fortescue Metals Group Ltd v The Commonwealth** (HCA) - constitutional law - mineral resources rent tax not invalid or beyond legislative power of Commonwealth (B, G)

**Commonwealth Bank of Australia v Barker** (FCAFC) - contract - employer breached implied term of confidence and trust - appeal and cross-appeal dismissed (B)

**Selig v Wealthsure Pty Ltd (No 2)** (FCA) - costs - leave to enter judgment refused - *Bullock* order refused - indemnity costs granted - stay of orders refused (I, B)



**Aughey v Poynter** (NSWSC) - freezing order in aid of execution of Local Court judgment refused - indemnity costs granted (I, B, C)

**In the matter of Ashington Bayswater Pty Ltd (in liq)** (NSWSC) - corporations - transactions liable to be set aside (B)

**Re Gateway Credit Union Pty Ltd; Hodges v Turley** (NSWSC) - mortgages - directions as to disposition of balance of proceeds of sale of property by mortgagee in possession (B)

**Hancock Prospecting Pty Ltd v Hancock** (WASC) - commercial arbitration - subpoena set aside except in respect of documents containing information published in newspaper (I, B, C)

**Electro Optic Systems Pty Ltd v State of NSW** (ACTSC) - costs - *Calderbank* offer - public interest litigation - costs of separate issues - successful defendant awarded 50% of costs (I, B, C, G)

## Summaries with links (5 minute read)

### **Fortescue Metals Group Ltd v The Commonwealth [2013] HCA 34**

High Court of Australia

French CJ; Hayne, Crennan, Kiefel, Bell & Keane JJ

Constitutional law - plaintiff companies which mined iron ore in Western Australia challenged validity of minerals resource rent tax imposed by *Minerals Resource Rent Tax (Imposition—Customs) Act 2012* (Cth), *Minerals Resource Rent Tax (Imposition—Excise) Act 2012* (Cth) and *Minerals Resource Rent Tax (Imposition—General) Act 2012* (Cth) (Imposition Acts) - assessment of tax provided for by *Minerals Resource Rent Tax Act 2012* (Cth) (MMRT Act) - held: Imposition Acts did not discriminate between States and Commonwealth or give preference to one State over another in contravention of s51(ii) or s99 *Constitution* - Imposition Acts did not discriminate between States or place particular disability or burden on States' operations or activities so as to be beyond legislative power of Commonwealth - Imposition Acts and MMRT Act not contrary to s91 *Constitution* concerning exceptions as to bounties - plaintiffs to pay costs of reserved questions.

[Fortescue Metals Group](#) (B, G)

**Commonwealth Bank of Australia v Barker [2013] FCAFC 83**

Full Court of the Federal Court of Australia

Jacobson, Lander & Jessup JJ

Contract - appeal from award of damages to employee from employer for loss suffered by employer's breach of employment contract - contract had subsisted between parties until terminated by employer because employee's position became redundant - primary judge found employer, by failing to take necessary steps to redeploy employee to another position before terminating employment, had breached implied term of confidence and trust referred to in *Malik v Bank of Credit and Commerce International SA (in liq)* [1997] UKHL 23; [1998] AC 20 - nature and content of implied term - held (by majority, Jessup J dissenting): term was implied by law into contract - bank's obligations to take positive steps to consult with employee and inform him of suitable employment options fell within content of implied term - employer breached implied term - breach gave rise to damages for loss of a chance - appeal dismissed.

[Commonwealth Bank of Australia](#) (B)

**Selig v Wealthsure Pty Ltd (No 2) [2013] FCA 770**

Federal Court of Australia

Lander J

Costs - plaintiffs succeeded in claim against investment advisers - applications to enter judgment against certain defendants, a *Bullock* order indemnifying them against orders to pay certain defendants' costs, and order pursuant to r25.14(3) *Federal Court Rules 2011* (Cth) that first and second defendants pay costs on indemnity basis - in second application plaintiffs sought stay of orders in their favour - offer of settlement - held: leave to enter judgment refused - *Bullock* order refused - plaintiffs entitled to costs on indemnity basis offset against costs incurred by first and second defendants in defending abandoned personal injury claim - stay application misconceived, unnecessary and refused.

[Selig](#) (I, B)

**Aughey v Poynter [2013] NSWSC 1052**

Supreme Court of New South Wales

White J

Freezing orders - application for freezing order in aid of execution of judgment given in Local Court - held: court accepted contempt application could be a mode of enforcement of judgment which was conceptually capable of coming within r25.14(2) *Uniform Civil Procedure Rules 2005* (NSW) - court not satisfied r25.14(2) of the Rules was engaged - Local Court had jurisdiction to



deal with application for freezing order - court declined to exercise jurisdiction sought to be invoked - court would have refused relief if it had decided to exercise jurisdiction - plaintiff should have appreciated application had no prospects of success - delinquency in bringing claim exacerbated by serious, unsubstantiated allegations of fraud - plaintiff to pay defendant's costs on indemnity basis.

[Aughey](#) (I, B, C)

**In the matter of Ashington Bayswater Pty Ltd (in liq) [2013] NSWSC 1008**

Supreme Court of New South Wales

Black J

Corporations - voidable transactions - liquidator sought orders under s588FF *Corporations Act 2001* (Cth) - first order sought was for discharge of fixed and floating charge granted by company to defendant by deed or, alternatively, a declaration that charge was void or unenforceable - second order sought was direction to defendant to assign to company certain property, rights and interests assigned to defendant by company under assignment deed or, alternatively, a declaration that assignment was void - third order sought was direction to defendant to pay amount to company equal to amount paid by company in eight payments (payments) - Pt5.7B of the Act - presumption of solvency - held: grant of charge was a preference, an uncommercial transaction and an insolvent, voidable transaction - entry into assignment and payments were preferences and insolvent, voidable transactions under the Act - parties to bring in short minutes of order to give effect to judgment.

[In the matter of Ashington Bayswater \(in liq\)](#) (B)

**Re Gateway Credit Union Pty Ltd; Hodges v Turley [2013] NSWSC 1058**

Supreme Court of New South Wales

Kunc J

Loans and mortgages - applicant and respondent were registered proprietors of unit which was sold by mortgagee in possession - balance of sale proceeds paid into court engaging provisions of r55.9 *Uniform Civil Procedure Rules 2005* (NSW) - applicant sought directions as to disposition of balance in accordance with r55.11 of the Rules - evidence - parties' respective contributions towards mortgage, costs and expenses - applicant's calculations concerning parties' arrangements - held: court satisfied respondent on notice of proceedings - directions given on basis of material put before court - order stayed in order to afford respondent final chance to participate in proceedings.

[Hodges](#) (B)



**Hancock Prospecting Pty Ltd v Hancock [2013] WASC 290**

Supreme Court of Western Australia

Pritchard J

Subpoenas - newspaper company sought to set aside subpoena issued to it in course of arbitration under *Commercial Arbitration Act 1985* (WA) between applicant and respondents - subpoena sought production of documents provided by first respondent to journalist and details of conversations between first respondent and journalist - principles in relation to objection to production of documents under subpoena - legitimate forensic purpose - oppression - abuse of process - s17(2) of the Act - *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* (WA) - *Shield Laws* - held: subpoena set aside, save to extent it sought production of documents containing information that identified an informant or informants, which information had been publicly disclosed in articles published by journalist in newspaper.

[Hancock Prospecting](#) (I, B, C)

**Electro Optic Systems Pty Ltd v State of NSW [2013] ACTSC 155**

Supreme Court of Australian Capital Territory

Higgins CJ

Costs - Canberra bushfires litigation - Court found defendant negligent but defendant succeeded on statutory defences - major part of hearing focussed on negligence - defendant not to recover costs in respect of case brought by or against parties who have settled - *Calderbank* offer - rejection was not unreasonable - success of statutory defences not capable of being determined before all evidence presented - public interest considerations - plaintiffs seeking to vindicate private right to compensation - order that defendant recover 50% of costs on party/party basis.

[Electro Optic Systems](#) (I, B, C, G)



## **You are now entering**

By Ashleigh Young

It must be nearly empty,  
it must begin at a one-way railway station.

A carriage rolls through the construction sites  
past the moth-coloured buildings with the half-  
hearted mural of men hacking trees.

The carriage climbs the long slope to the bridge.  
Here passengers may turn their heads to the left  
to view the river stuck in the ground like an IV line.

It must be the past or the future  
because the Northerner no longer runs at this time,  
beaming through paddocks of headstones

past houses left out like milk tokens  
towards a light that isn't day, only an older, frailer night.

The town rolls on its back.  
Its eyes open, one by one,  
unconvinced of light's relevance  
or why anyone should wait for it.

Ashleigh Young is a writer and editor who lives in Wellington, New Zealand. "You Are Now Entering" is from her first collection of poetry, *Magnificent Moon* (Victoria University Press, 2012).

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