



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Search Engine

[Click here](#) to access our search engine facility to do a search of particular legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (1 minute read)

Commissioner of Taxation v Ashwick (Qld) No 127 Pty Ltd - s25-35(1)(b), s8-1 *Income Tax Assessment Act 1997* (Cth) - *Income Tax Assessment Act 1936* (Cth) Part IVA: "scheme" - appeal dismissed (B)

Stewart v The Deputy Commissioner of Taxation [2011] FCA 336 - Accountants' concession - procedural fairness (B)

7Steel Building Solutions Pty Ltd v Wright - s58(3)(b) *Bankruptcy Act 1966* (Cth) - leave to continue Supreme Court proceedings (B)

Factory 5 Pty Ltd (in liq'n) v State of Victoria (No 2) - Costs (I, B)

Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd - *Fair Work Act 2009* (Cth) - "workplace instruments" - contraventions of s340 & s346 established (I, B, C)

Pharm-A-Care Laboratories Pty Limited v Commonwealth of Australia - Representative proceedings (I)



Despot v Registrar General of New South Wales & Ors; Sky v Despot - Contracts - *Home Building Act 1989* (NSW) - quantum meruit - Powers of Attorney Act 2003 (NSW (I, B, C)

Director of Public Prosecutions (NSW) v Strang - *Inclosed Lands Protection Act 1901* (NSW) - retail premises (I)

Victorian WorkCover Authority v Kagan Bros Consolidated Pty Ltd - Costs - Bullock orders - leave to appeal refused (I)

Pearl Hill Pty Ltd v Concorp Construction Group (Vic) Pty Ltd - *Building & Construction Industry Security of Payment Act 2002* (Vic) - costs (C)

Deputy Commissioner of Taxation v Haritos - *Income Tax Assessment Act 1936* (Cth) - *Taxation Administration Act 1953* (Cth) (B)

Tomasevic & Anor v Jovetic & Ors - Trusts - standing (B)

Evans v Miller - Restrictive covenants - appeal dismissed (I, B, C)

Smith v McCusker QC [No 7] - Torts - legal advice - claim dismissed (I)

Chitasing v Lennox Phillip Pty Ltd - *Limitation Act 1985* (ACT) - personal injuries (I)

Summaries with links (5 minute read)

Tuesday 12 April 2011

Commissioner of Taxation v Ashwick (Old) No 127 Pty Ltd [2011] FCAFC 49 Full Court of the Federal Court of Australia

Bennett, Edmonds & Middleton JJ - Sydney (heard in Melbourne)

s25-35(1)(b), s8-1 *Income Tax Assessment Act 1997* (Cth) - Part IVA *Income Tax Assessment Act 1936* (Cth): "scheme" - group of companies - appeal dismissed - extensive consideration of case law from the United Kingdom, Australia & New Zealand.



Commissioner of Taxation (B)

Ashwick - decision 26 November 2009: see 'Benchmark' B & IBC Tuesday 1 December 2009 - income tax - deductibility of bad debts written off - deductibility of interest expenses incurred by borrower companies within the Foster's Group - a lengthy decision with detailed consideration of legislation & case law.

Stewart, Hogan & Cornell v Deputy Commissioner of Taxation, Zdjelar & Commissioner of Taxation [2011] FCA 336

Federal Court of Australia

Perram J (in Sydney)

Income tax - accountants' concession - procedural fairness - whether audit teams at ATO should have access to confidential accounting advices prepared for applicants - ATO had determined answer to that question was "yes" - challenge to that determination dismissed.

Stewart (B)

7Steel Building Solutions Pty Ltd v Wright [2011] FCA 328

Federal Court of Australia

Flick J (in Sydney)

s58(3)(b) *Bankruptcy Act* 1966 (Cth) - leave to continue Supreme Court proceedings granted - detailed examination of legislation & case law.

7Steel Building Solutions (B)

Factory 5 Pty Ltd (in liq'n) v State of Victoria (No 2) [2011] FCA 323

Federal Court of Australia

Bromberg J (in Melbourne)

Costs - whether costs should follow the event where respondent failed on some issues but ultimately successfully resisted applicant's cause of action - indemnity costs - non-party costs orders - no costs order against liquidators - applicant to pay costs of first respondent on party-party basis.

Factory 5 (I, B)

Factory 5 - decision 11 November 2010: see 'Benchmark' B & IBC Tuesday 16 November 2010 - contracts - Melbourne Commonwealth Games - souvenirs, memorabilia & apparel - whether there was a legally binding contract between applicant & M2006, the statutory corporation formed to manage & conduct the Games - also for consideration: were there such a contract, what were the agreed terms of the clause in the contract which, in their negotiations, the parties called the "concessionaire as manufacturer" clause? - s47 *Trade Practices Act* 1974 (Cth) - applicant succeeded in establishing that a legally binding contract was made, however it failed on its construction of the "concessionaire as manufacturer" clause - application dismissed - extensive consideration of the United Kingdom & Australian case law.



Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd [2011] FCA 333

Federal Court of Australia

Barker J (in Perth)

Fair Work Act 2009 (Cth) & other legislation - termination of employment of union member - alleges breaches by IASA of the general protection provisions of Pt 3-1 - whether adverse action taken against employee by employer in breach of s340(1) & s346(1) - s361 reverse onus not discharged - admissibility of evidence - jurisdictional issues including as to "workplace instruments" - contraventions of s340 & s346 established - compensation order - costs - "regulate" - extensive examination of legislation & Australian case law.

[Australian Licenced Aircraft Engineers Association](#) (I, B, C)

Pharm-A-Care Laboratories Pty Limited v Commonwealth of Australia [2011] NSWSC 277

Supreme Court of New South Wales

Price J

Representative proceedings - settlement approved in Federal Court of Australia - substantially the same proceedings in Supreme Court - transitional provisions - requirement for approval of settlement dispensed with.

[Pharm-A-Care Laboratories](#) (I)

[Pharm-a-Care Laboratories](#) - Federal Court decision 25 March 2011 - approval of settlement

Despot v Registrar General of New South Wales & Ors; Sky v Despot [2011] NSWSC 273

Supreme Court of New South Wales

Macready AsJ

Contracts - negligence - misleading & deceptive conduct - rectification - specific performance - two proceedings - plaintiff in first proceedings owner of unit at Double Bay - renovations - declarations sought that purported sale of plaintiff's property pursuant to power of attorney & deed of security & indemnity fraudulent & should be set aside - defendant builder had sold property to recover amount owing under purported building contract - *Home Building Act* 1989 (NSW) - claim for a quantum meruit for building work performed - *Powers of Attorney Act* 2003 (NSW): detailed consideration of legislation - *Real Property Act* 1900 (NSW) - case law from the United Kingdom, New Zealand & Australia considered.

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



Director of Public Prosecutions (NSW) v Strang [2011] NSWSC 259

Supreme Court of New South Wales

Johnson J

Inclosed Lands Protection Act 1901 (NSW) - offence of entering upon inclosed lands without lawful excuse - retail premises - order made in Local Court dismissing proceedings set aside - matter remitted - an interesting review of case law & legislation.

[Director of Public Prosecutions \(I\)](#)

Victorian WorkCover Authority v Kagan Bros Consolidated Pty Ltd [2011] VSCA 91

Court of Appeal of Victoria

Redlich & Bongiorno JJA

Costs - application for leave to appeal from a refusal by trial judge to grant the Victorian Workcover Authority ('VWA') a Bullock order as against the respondent - apportionment proceeding under s138 *Accident & Compensation Act 1985 (Vic)* - leave to appeal refused.

[Victorian WorkCover Authority \(I\)](#)

[PDF version](#) - decision County Court 4 February 2011: *VWA v Playcorp Pty Ltd & Kagan Bros Consolidated Pty Ltd (No 2)* [2011] VCC 139

Pearl Hill Pty Ltd v Concorp Construction Group (Vic) Pty Ltd [2011] VSCA 99

Court of Appeal of Victoria

Tate JA & Hargrave AJA

Building & Construction Industry Security of Payment Act 2002 (Vic) - construction project at Box Hill - discontinuance of appeal - indemnity costs.

[Pearl Hill \(C\)](#)

Deputy Commissioner of Taxation v Haritos [2011] VSC 129

Supreme Court of Victoria

Williams J

Income Tax Assessment Act 1936 (Cth) - *Taxation Administration Act 1953 (Cth)* - appeal by defendant against grant of summary judgment to Commissioner dismissed.

[Deputy Commissioner of Taxation \(B\)](#)

[Deputy Commissioner of Taxation](#) - decision 21 June 2010: see 'Benchmark' B & IBC Thursday 24 June 2010 - application for summary judgment - contracts - agreement with taxpayer - time stipulation for performance of action - breach - summary judgment granted to Commissioner.



Tomasevic & Anor v Jovetic & Ors [2011] VSC 131

Supreme Court of Victoria

Pagone J

Trusts - defendants contending plaintiffs lack standing to maintain the proceeding without a fiat of Attorney-General - whether Attorney-General the proper plaintiff - proceedings stayed pending further order.

[Tomasevic](#) (B)

Evans v Miller [2011] WASCA 89

Court of Appeal of Western Australia

Martin CJ, Murphy JA, Murray J

Restrictive covenants - appeal against primary judge's decision to grant mandatory injunction requiring appellants to remove certain structures on their property built knowingly in breach of a restrictive covenant - appellants' contraventions of restrictive covenant impeded respondent's views of the Swan River - appeal dismissed.

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

[Miller](#) - *Miller v Evans* [2010] WASC 127 - see 'Benchmark' Friday 11 June 2010

restrictive covenants - plaintiff & defendants neighbours - both properties burdened by a restrictive covenant limiting what could be built near rear boundaries of the properties - defendants built retaining walls, an above ground spa & surrounding fences on their rear boundary adjacent to plaintiff's land - whether defendants had wrongfully deprived plaintiff of her views (of the Swan River) - meaning of 'building' - dividing fence a building within the terms of the restrictive covenant - defences - delay - acquiescence - disproportion - unclean hands - oppressive or vindictive conduct - whether damages in lieu a proper remedy held that defendant had breached restrictive covenant - mandatory injunction to be ordered requiring defendants to lower the structures to the maximum levels allowed by the restrictive covenant - detailed consideration of United Kingdom & Australian case law in an interesting decision.

Smith v McCusker QC [No 7] [2011] WASC 88

Supreme Court of Western Australia

Martin CJ

Torts - legal advice - whether defendant negligent in preparation of advice regarding plaintiffs' prospects of successful claim against bank for alleged breach of contract & negligence - whether defendant negligent in failing to deliver opinion in a timely fashion - whether plaintiffs suffered any loss - claim dismissed.

[Smith](#) (I)



Chitasing v Lennock Phillip Pty Ltd [2011] ACTSC 57

Supreme Court of the Australian Capital Territory

Master Harper

Limitation Act 1985 (ACT) - personal injuries - workplace injury - discretion - extension granted.

[Chitasing \(I\)](#)

[Click Here to access our Benchmark Search Engine](#)