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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Australian Competition and Consumer Commission v Cathay Pacific Airways Ltd - legal professional privilege - inadvertent disclosure - waiver (I, B, C, G)

Twynam Agricultural Group Pty Ltd v Williams - negligence - fact-finding - evidence of witnesses - use of photographic evidence (I, B, C, G)

Tsoukaris v Royal Motor Yacht Club of New South Wales Ltd - expulsion from club - whether denial of procedural fairness or oppressive or unfairly prejudicial conduct (I, B, C, G)

Waterfall v Antony (No 2) - costs - offer of compromise - whether offer uncertain (I, B, C, G)

Hogno & Lee v Racing Queensland Ltd & Ors - disqualification - negligence - quasi-judicial functions - immunity (I, B)



Permanent Mortgages Pty Ltd v Tran - mortgages - compromised application for summary judgment - breach of settlement agreement (B)

Haroon and Verrocchi v Lindisfarne (Health) Pharmacy Pty Ltd - interlocutory injunction - application of principles - whether serious question to be tried (I, B, C, G)

Summaries with links (5 minute read)

Australian Competition and Consumer Commission v Cathay Pacific Airways Ltd **[2012] FCA 1101**

Federal Court of Australia

Buchanan J

Legal professional privilege - waiver - applicants sought to maintain common law claim for legal professional privilege over communications in documents inadvertently disclosed during discovery - trial processes to which the *Evidence Act* 1995 (Cth) applied had not yet commenced - principles applicable to waiver of legal professional privilege: *Mann v Carnell* [1999] HCA 66, *DSE* [(2002) [2003] FCA 384 - *whether*: inadvertent disclosure sufficient for waiver of privilege in present case; test for waiver met by mere availability for inspection or acquisition of knowledge of a privileged communication - conduct of party entitled to claim privilege and practical significance of disclosure - consequences which might flow from upholding claim - confidentiality of evidence and debate about question of privilege - permanent confidentiality orders

[ACCC](#) (I, B, C, G)

Twynam Agricultural Group Pty Ltd v Williams [2012] NSWCA 326

Court of Appeal of New South Wales

Allsop P; Beazley & Campbell JJA

Torts - evidence of witnesses - photographic evidence - first respondent employed by contractor retained to irrigate appellant's property - first respondent seriously injured when motor vehicle overturned on an internal road of property - primary judge found accident arose from negligence of appellant and second respondent - principles applicable to whether court should overturn decision of primary judge who relied on impression of witnesses: *Fox v Percy* [2003] HCA 22 - *whether*: primary judge erred in making factual finding that warning flags (which could be seen in photographic evidence) were not in position at time of accident; use of photographic evidence in

accordance with limitations on use in fact-finding: *Blacktown City Council v Hocking* [2008] NSWCA 144; reliance on other indicia in concluding that flags were not present; decision influenced by impressions of witnesses; failure to answer relevant questions: *Waterways Authority v Fitzgibbon* [2005] HCA 57; incontrovertible evidence that evidence of witness in relation to photographs should not be accepted.

[Twynam Agricultural Group](#) (I, B, C, G)

Tsoukaris v Royal Motor Yacht Club of New South Wales Ltd [2012] NSWSC 1190

Supreme Court of New South Wales

McCallum J

Administrative law - procedural fairness - plaintiff expelled as member of yacht club - plaintiff alleged disciplinary process flawed and denial of procedural fairness - court's discretionary power at common law to intervene in affairs of voluntary tribunal: *Mitchell v Royal New South Wales Canine Council Limited* [2001] NSWCA 162 - requirements of procedural fairness: *McNab v Auburn Soccer Sports Club Limited* [1975] 1 NSWLR 54 - scope of inquiry - *whether*: breach of the hearing rule; breach of the bias rule; apprehended bias as distinct from actual bias sufficient to disqualify member from participating in decision: *Maloney v New South Wales National Coursing Association Ltd* [1978] 1 NSWLR 161; breach of procedural fairness or any oppressive or unfairly prejudicial conduct within the meaning of s232 of the *Corporations Act* 2001 (Cth).

[Tsoukaris](#) (I, B, C, G)

Waterfall v Antony (No 2) [2012] VSC 467

Supreme Court of Victoria

Beach J

Costs - offer of compromise - plaintiff awarded damages for injuries suffered in motor vehicle accident in Western Australia - defendant offered sum of money and retention of benefits under *Transport Accident Act* 1986 (Vic) (**Act**) - *whether*: plaintiff obtained judgment not more favourable than terms of offer of compromise: r26.08(3) *Supreme Court (General Civil Procedure) Rules* 2005 (Vic); offer of compromise defective; defendant had power to permit plaintiff to retain amounts otherwise liable to pay to Transport Accident Commission pursuant to s42 of the *Act*; offer of compromise uncertain: *Duncan & Weller v Mendelson* [1989] VicRp 36.

[Waterfall](#) (I, B, C, G)

**Hogno & Lee v Racing Queensland Ltd & Ors [2012] QSC 303**

Supreme Court of Queensland

Martin J

Negligence – negligent misstatement - defendants disqualified plaintiff from certain activities under the *rules of racing*: s5 *Racing and Betting Act* 1980 (Qld) (**Act**) - disqualification found to be unlawful - plaintiffs sought damages for loss as a result of disqualification - plaintiffs alleged negligence on part of defendants in making disqualification decision and for negligent misstatement in giving effect to and publishing decision - *whether*: defendants entitled to immunity when acting judicially: *Partridge v The General Council of Medical Education and Registration of the United Kingdom* (1890) 25 QBD 90; defendants acting in quasi-judicial sense and in good faith; circumstances indicative of judicial proceeding; defendants acted in excess of power conferred under the Act and *rules of racing*; defendants as statutory decision makers owed duty of care: *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22; duty of care should be imposed; defendants were performing statutory duty in publishing disqualification; defendants were protected from liability by the operation of AR197 & AR198 of the *rules of racing*.

[Hogno & Lee](#) (I, B)**Permanent Mortgages Pty Ltd v Tran [2012] WASC 372**

Supreme Court of Western Australia

Corboy J

Mortgages - compromise of application for summary judgment by consent judgment - settlement between parties at mediation - respondent defaulted on settlement agreement - applicant sought judgment in terms of settlement agreement following breach - *whether*: applicant waived its rights on breach of settlement agreement by not taking steps following defaults and/or by accepting further instalments: *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; 238 CLR 570; applicant elected between inconsistent rights when it accepted late payments and further instalments; variation to loan and settlement agreements; applicant estopped from exercising rights under loan and settlement agreements; forbearance to rely on, abandon or renounce rights under loan and settlement agreements; waiver of right to enforce settlement agreement.

[Permanent Mortgages](#) (B)

Haroon and Verrocchi v Lindisfarne (Health) Pharmacy Pty Ltd [2012] TASSC 65

Supreme Court of Tasmania

Holt AsJ

Interlocutory injunction - plaintiffs claimed specific performance of contract for sale of business after landlord refused assignment of lease to them- plaintiffs sought interlocutory injunction preventing first defendant from selling business pending determination of action - principles applicable to application for interlocutory injunction: *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 - nature of right claimed - practical consequences which would follow depending on whether injunction granted or refused: *Baker v Mercker* [1960] 1 QB 657, s71A *Conveyancing and Law of Property Act 1884* (Tas), cl28(12) *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (Tas) - whether failure to meet required standard of proof to establish seriousness of question to be tried.

[Haroon and Verrocchi](#) (I, B, C, G)

Flowers by the Sea

By William Carlos Williams

When over the flowery, sharp pasture's
edge, unseen, the salt ocean

lifts its form—chicory and daisies
tied, released, seem hardly flowers alone

but color and the movement—or the shape
perhaps—of relentlessness, whereas

the sea is circled and sways
peacefully upon its plantlike stem

<http://www.poetryfoundation.org/bio/william-carlos-williams>

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