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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 Industry Group v Fair Work Australia - industrial law - jurisdiction of Fair Work Australia - no jurisdictional error - application dismissed (G)

Pearson v HRX Holdings Pty Ltd - employment contracts - restraint of trade - former employee was in a position of influence over employer's customers - two-year restraint valid (I, B, C, G)

Australian Postal Corporation v Digital Post Australia (No 2) - intellectual property - whether trade mark deceptively similar (I, B)

Tawil v Western Sydney Local Area Health District - application for cross-vesting of proceedings (I, B, C, G)

Application of Solomons & Tayeh - trusts - application for judicial advice regarding interpretation of deed of company arrangement and trust deed (B)



Mickovski v Financial Ombudsman Service Ltd & Anor - application for judicial review of decision of Financial Ombudsman Service (I, B, G)

Murison & Anor v Nominal Defendant - insurance - rights of recourse of nominal defendant against deceased owner of uninsured vehicle (I, G)

Orchard Holdings Pty Ltd v Paxhill Pty Ltd as Trustee for Paxhill Trust trading as Property People - multiple causes of action - misleading and deceptive conduct by real estate sales representative (I, B, C)

Astral Land Pty Ltd v Golden Commercial Pty Ltd - summary judgment application - strike out application (I, B)

Summaries with links (5 minute read)

Australian Industry Group v Fair Work Australia [2012] FCAFC 108

Full Court of the Federal Court of Australia

North, McKerracher & Reeves JJ

Industrial law - Fair Work Australia (FWA) approved an Enterprise Agreement - employers applied for judicial review - application referred to Full Court - held: FWA's jurisdiction was not conditional on the absence of unlawful terms in that Enterprise Agreement, but on FWA being satisfied of the absence of unlawful terms in that Enterprise Agreement - on the proper construction of the *Fair Work Act 2009* (Cth), even if FWA's satisfaction was based on wrong facts or errors of law, this would not invalidate FWA's jurisdiction - even if FWA had made the errors of law alleged by the applicants, it had not committed jurisdictional error - in any event, FWA had not committed errors of law - application dismissed.

[Australian Industry Group](#) (G)



Pearson v HRX Holdings Pty Ltd [2012] FCAFC 111

Full Court of the Federal Court of Australia

Keane CJ, Foster & Griffiths JJ

Employment contracts - restraint of trade - HRX sued to prevent former employee taking up employment with competitor - held: HRX had an evident interest in preserving customer connections - the employee's principal function had been development and retention of customer base - employee was in a position of influence over HRX's customers - non-solicitation and confidentiality provisions in the employee's contract would not afford adequate practical protection of HRX's interests - two-year restraint reasonably accommodated HRX's contractual cycle with its customers - two-year restraint was valid.

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

Australian Postal Corporation v Digital Post Australia (No 2) [2012] FCA 862

Federal Court of Australia

Marshall J

Intellectual property - whether trade mark DIGITAL POST AUSTRALIA deceptively similar to AUSTRALIA POST in breach of s120(1) *Trade Marks Act* 1995 (Cth) - whether real tangible danger of deception or confusion - whether ordinary customer would entertain reasonable doubt - whether marks convey different ideas to consumer - relevance of surrounding circumstances to issue of deceptive similarity - relevance of expert evidence - whether breach of s18 *Australian Consumer Law* - whether likelihood of claim under tort of passing off.

[Australian Postal Corporation](#) (I, B)

Tawil v Western Sydney Local Area Health District [2012] NSWSC 891

Supreme Court of New South Wales

Garling J

Courts and Jurisdiction - application for cross-vesting of personal injury proceedings to Supreme Court of Queensland - court's power to make cross-vesting order: s5(2) *Jurisdiction of Courts (Cross Vesting) Act* 1987 (NSW) - test as to which court in the pursuit of the interests of justice more appropriate to hear and determine substantive dispute: *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 - factors relevant to determination of more appropriate forum.

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



Application of Solomons & Tayeh [2012] NSWSC 923

Supreme Court of New South Wales

White J

Trusts - application for judicial advice under s63 *Trustee Act* 1925 (NSW) regarding interpretation of trust deed and administration of trust property - members of GST Group jointly and severally liable to pay GST payable by representative member - representative member and group members subject of deed of company arrangement and trust deed - whether trustees justified in treating multiple proofs of debt lodged with trustees by Australian Taxation Office (ATO) for the purposes of a distribution under trust deed as a single liability of the trust - whether ATO entitled to lodge multiple proofs for several debts.

[Solomons & Tayeh](#) (B)

Mickovski v Financial Ombudsman Service Ltd & Anor [2012] VSCA 185

Court of Appeal of Victoria

Buchanan & Nettle JJA; Beach AJA

Administrative law - whether decision by Financial Ombudsman Service (FOS) amenable to judicial review - whether decision reviewable on basis of application of the *Datafin* principle: *R v Panel on Take-overs and Mergers; ex parte Datafin plc* [1986] EWCA Civ 8 - whether FOS breached tripartite contract - whether decision reviewable as matter of contract: *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 - whether final decision susceptible to contractual review - meaning of *final*: *Commonwealth v Limerick Steamship Co Ltd* [1924] HCA 50.

[Mickovski](#) (I, B, G)

Murison & Anor v Nominal Defendant [2012] QSC 221

Supreme Court of Queensland

MA Wilson J

Insurance - compulsory third party insurance - right of recovery by nominal defendant against owner of uninsured motor vehicle - where owner of vehicle is deceased - claim for damages brought by relatives of deceased against nominal defendant - deceased a passenger in an uninsured motor vehicle which he owned and which was involved in a motor vehicle accident - whether deceased could have maintained an action had he lived pursuant to s17 *Supreme Court Act* 1995 (Qld) if nominal defendant were entitled to an equitable set-off under s60 *Motor Accident Insurance Act* 1994 (Qld) - Held: No - whether nominal defendant entitled to such an equitable set-off - Held: Yes - *Forsyth & Anor v Gibbs* [2008] QCA 103 considered.

[Murison](#) (I, G)



Orchard Holdings Pty Ltd v Paxhill Pty Ltd as Trustee for Paxhill Trust trading as Property People [2012] WASC 271

Supreme Court of Western Australia

Allanson J

Real estate transactions - misleading or deceptive conduct in breach of s52 *Trade Practices Act* 1974 (Cth) and s9 *Fair Trading Act* 1987 (WA) - breach of contract - negligence - breach of fiduciary duty - whether real estate sales representative presented false offers to vendor - plaintiffs' reliance on belief in genuine contracts - whether reliance reasonable - actions taken and losses suffered as result of reliance - whether breach of contractual duties by presentation of false offers - whether agent owed duty to exercise reasonable skill and care - liability of agent for conduct of sales representative - apportionment of liability - assessment of damages.

[Orchard Holdings](#) (I, B, C)

Astral Land Pty Ltd v Golden Commercial Pty Ltd [2012] WASC 274

Supreme Court of Western Australia

K Martin J

Summary dismissal - application for summary judgment on basis of release and barring clauses in three deeds favouring corporate defendants - strike out application in respect of plaintiff's pleadings - onus on applicant to show claim should not proceed to trial: *Alcoa of Australia Ltd v Apache Energy Ltd* [2012] WASC 209 - pleas of statutory unconscionability and misleading and deceptive conduct in relation to deeds - whether unconscionability plea constitutes abuse of process or embarrassing pleading - whether misleading and deceptive conduct plea raises arguable claim to withstand summary judgment application.

[Astral Land](#) (I, B)

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