

Monday 23 June 2014

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Williams v Commonwealth of Australia** (HCA) - 23 Constitutional law - legislation for agreements about payment for school chaplaincy services was invalid (G)

**Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd** (FCA) - consumer law - words used to market bread were misleading and deceptive (G)

**In the application of Roderick Mackay Sutherland and Sule Arnautovic** (NSWSC) - equity - estoppel by deed - competing unregistered equitable interests in land (B)

**Monster Tyson Pty Ltd v Harbinson** (VSC) - corporations - fiduciary duties - oppression - rectification of register refused (B)

**Chivers v State of Queensland (Queensland Health)** (QCA) - discrimination - employer entitled to exemption for *genuine occupations* requirements - appeal dismissed (I)

**Alliance Contracting Pty Ltd v James** (WASC) - security of payments - no power to order payment to contractor on adjudication of principal's payment claim (C)



**Steel Contracts Pty Ltd v Simons** (ACTSC) - security of payments - dry hire contract - leave to appeal - prerogative relief - applications dismissed (C)

**Masters v Dobson Mitchell & Allport** (TASSC) - solicitors' duties - no negligence or breach of retainer in advice to settle action against bank - client's claim failed (I)

## Summaries with links (5 minute read)

### **Williams v Commonwealth of Australia [2014] HCA 23**

High Court Australia

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

Constitutional law - father of four children at state school challenged payment by Commonwealth for school chaplaincy services - High Court held payments were not valid exercise of executive power under s61 *Constitution: Williams (No 1) [2012] HCA 23* - Commonwealth then amended *Financial Management and Accountability Act 1997(Cth)* to support payments - father brought second proceedings - held: legislation not supported by a power under the Constitution, school chaplain was not *provision of benefits to students* under s51(xxiiiA) and not supported by executive power - legislation invalid. (G)

[Williams](#)

### **Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 634**

Federal Court of Australia

Allsop CJ

Consumer law - ACCC alleged supermarket engaged in misleading and deceptive conduct in advertisement and sale of bread - ACCC contended consumers likely to form erroneous impression that preparation of bread was a single process done in-the store on the day - *dominant message - baked today, sold today - freshly baked - freshly baked in-store - baked fresh - Coles bakery - ss78, 79, 191(2) Evidence Act 1995 (Cth)* - held: ss18(1), 29(1)(a) & 33 *Australian Consumer Law* contravened - use of words on packaging and signs was misleading or deceptive, likely to mislead or deceive and liable to mislead public when baking process had been of par-baked frozen product - there had been misleading representation that goods had been baked on day of sale or baked in fresh process.

[Australian Competition and Consumer Commission](#) (G)

### **In the application of Roderick Mackay Sutherland and Sule Arnautovic [2014] NSWSC 821**

Supreme Court of New South Wales

Kunc J

Equity - estoppel - competition between unregistered equitable interests in land - entitlement to proceeds of sale of unit owned by wife and husband - deed acknowledging loans owing to



companies associated with accountant - deed granted charge and mortgage to trustee company - no mortgage or caveat registered - husband and wife separated - property sold - wife's solicitor claimed fees under costs agreement from fund - wife claimed balance - wife denied signing deed - whether signature forged - whether failure to lodge caveat resulted in loss of priority - held: wife signed deed - deed raised estoppel as to amount wife owed - trustee entitled to assert priority of its rights under deed - trustee entitled to fund in priority to solicitor and wife.

[In the application of Roderick Mackay Sutherland and Sule Arnautovic](#) (B)

## **Monster Tyson Pty Ltd v Harbinson [2014] VSC 278**

Supreme Court of Victoria

Ferguson J

Corporations - rectification of register - brothers (operated company - one managed creative aspects and the other financial - trust with respect to management of financial matters disintegrated creative brother sought that company correct its register of members to show he was only shareholder because his brother breached fiduciary obligations and directors duties and engaged in misleading and deceptive conduct - held: share register reflected shareholding to which creative brother agreed - no fiduciary obligation owed by financial brother - no misleading, deceptive or oppressive conduct - financial brother had ensured creative brother received benefit roughly equal to 50% of dividends declared by company - claims dismissed.

[Monster Tyson Pty Ltd](#) (B)

## **Chivers v State of Queensland (Queensland Health) [2014] QCA 141**

Court of Appeal of Queensland

Muir & Gotterson JJA; Douglas J

Human rights - discrimination - graduate nurse alleged State breached s15(1) *Anti-Discrimination Act 1991* (Qld) by discriminating against her - unable to work night shift due to consequences of head injury- Queensland Civil and Administrative Tribunal held State engaged in indirect discrimination and rejected exemption for *genuine occupational requirements* under s25(1) - employee appealed to court from Appeal Tribunal's decision that QCAT erred in failing to find State established exemption - held: QCAT did not apply wrong test or draw conclusions in direct contrast to senior member's findings - no error in application of s25(1) or in concluding *not reasonable* test in s11(1)(c) was satisfied - appeal dismissed.

[Chivers](#) (I)

## **Alliance Contracting Pty Ltd v James [2014] WASC 212**

Supreme Court of Western Australia

Beech J

Security of payments - principal made an adjudication application under *Construction Contracts Act 2004* (WA) - contractor contended principal owed money to it - adjudicator determined there was balance in contractor's favour of over \$6 million but that he did not have power to order payment of it - adjudicator determined there was nothing payable by principal to contractor -



contractor argued adjudicator had power to order payment by principal - s31 *Construction Contracts Act 2004* (WA) - held: -adjudicator only has power to determine the payment dispute before him - application dismissed.

[Alliance Contracting Pty Ltd](#) (C)

### **Steel Contracts Pty Ltd v Simons [2014] ACTSC 146**

Supreme Court of the Australian Capital Territory

Refshauge J

Security of payments - respondent hired crane to company using a business name - payment dispute arose under *Building and Construction Industry (Security of Payment) Act 2009* (ACT) - adjudicator found company was liable to pay respondent - company changed name - adjudicator amended determination to reflect change in name - company sought extension of time to challenge determination - company contended adjudicator erred in finding contract between parties - high bar for leave to appeal under s43(4) - risk to respondent's substantive rights - delay - held: no prospects of success on appeal - some prospects of success in application for prerogative relief on the basis that contract may have been with another company but company had allowed its rights to lapse - application dismissed.

[Steel Contracts Pty Ltd](#) (C)

### **Masters v Dobson Mitchell & Allport [2014] TASSC 31**

Supreme Court of Tasmania

Pearce J

Negligence - solicitors' duties - client claimed former solicitor was negligent and breached retainer in settlement of litigation - client claimed her instructions to solicitor to settle were not informed by legal advice about merits of claim, that she was pressed to settle and she had lost opportunity as result to pursue greater claim - strength of claim - circumstances of settlement - held: solicitor's recommendation to settle was not negligent or in breach of retainer - client had given instruction to settle - instruction to settle was not sought negligently - lawyer should have obtained written instructions - judgment for defendants.

[Masters](#) (I)

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