



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Australian Securities & Investments Commission v Fortescue Metals Group (No 2) - s1317E *Corporations Act* 2001 (Cth) (I, B, C)

Bovaird v the Trustee of the Bankrupt Estate of Frost (No 2) - Costs (I, B)

Stephens v Giovenco; Dick v Giovenco - Personal injuries - duty of care - apportionment - contributory negligence - causation - s5F, 5G, 5H *Civil Liability Act* 2002 (NSW) (I, C)

Day v Rogers - Professional negligence - causation - s5D *Civil Liability Act* 2002 (NSW) - appeal allowed (I)

Davinski Nominees Pty Ltd v I & A Bowler Holdings Pty Ltd & Ors - Tax implications - awards of damages (I, B, C)

Wheelahan & Anor v City of Casey & Ors - Application for approval of settlement of group proceeding - migration of landfill gas (I, C)

Irwin v Alderman & Ors (No 2) - Subpoenas (I, B)



Summaries with links (5 minute read)

Wednesday 25 May 2011

Australian Securities & Investments Commission v Fortescue Metals Group (No 2) [2011] FCAFC 68

Full Court of the Federal Court of Australia

Keane CJ; Emmett & Finkelstein JJ (in Perth)

s1317E *Corporations Act* 2001 (Cth) - ASIC seeking greater specificity in relation to declarations made & to have order 2 of 18 February 2011 varied.

[Fortescue Metals Group](#) (I, B, C)

[Fortescue Metals Group](#) - decision Full Court 18 February 2011: see 'Benchmark' Wednesday 23 February 2011 - s674(2) & s1041H *Corporations Act* 2001 (Cth); s180(1) & s674(2A - continuous disclosure - misleading and deceptive conduct - listed company made announcements that it had entered binding agreements - agreements were merely agreements to negotiate - whether continuous disclosure obligations had been breached - whether obligation not to engage in misleading or deceptive conduct had been breached - appeal allowed - extensive consideration of United Kingdom, New Zealand & Australian case law;

[Fortescue Metals Group](#) - decision Federal Court 23 December 2009: see 'Benchmark' Monday 1 February 2010 - *Corporations Act* 2001 (Cth) - continuous disclosure - obligation to disclose information to ASX under Chapter 6CA - directors' duties - whether director had breached duty to exercise reasonable care & diligence required by s180(1) - misleading or deceptive conduct under s1041H - relevance of belief or opinion - relevance of context at time disclosures made to market - "information", "aware", "not generally available."

Bovaird v the Trustee of the Bankrupt Estate of Frost (No 2) [2011] FCA 465

Federal Court of Australia

Perram J (in Sydney)

Costs - for decision 27 October 2010, see 'Benchmark' I, B & IBC Friday 5 November 2010 & link below - form of costs orders - costs orders stayed pending determination of proceedings in New South Wales Court of Appeal.

[Bovaird](#) (I, B)

[Bovaird](#) - decision 27 October 2010 - application by creditors for leave to pursue appeal in New South Wales Court of Appeal - proceedings against executors of bankrupt deceased estate - since estate bankrupt appeal cannot proceed without leave of a bankruptcy court - tort of *devastavit* - creditors should have leave to proceed with the Court of



Appeal proceedings other than so much of their appeal as would increase the quantum of damages - creditors should have leave to proceed with their devastavit claims subject to certain conditions & limitations - the trustee should not meet executors' legal expenses in any of the four sets of the proceedings at this stage.

Stephens v Giovenco; Dick v Giovenco [2011] NSWCA 53

Court of Appeal of New South Wales

Allsop P; Hodgson JA & Tobias JJA

Personal injuries - duty of care - foreseeability - apportionment - contributory negligence - causation - s5F, 5G, 5H *Civil Liability Act 2002* (NSW) - live electrical connection to redundant hot water system - whether first appellant plumber owed duty of care to handyman - second appellant owner of residential property - extensive consideration of United Kingdom & Australian case law.

[Stephens](#) (I, C)

[Giovenco](#) - decision District Court 4 March 2010: see 'Benchmark' I & IBC Monday 8 March 2010 - *Compensation to Relatives Act 1897* (NSW) - occupier's liability - unwitnessed electrocution death of self-employed handyman in course of repairing roof leak - liability - whether contributory negligence - apportionment of liability between defendants - damages agreed pursuant to *Compensation to Relatives Act 1897* (NSW)

Day v Rogers [2011] NSWCA 124

Court of Appeal of New South Wales

Allsop P, Giles JA, Sackville AJA

Professional negligence - respondent had obtained judgment in District Court against appellant as costs wasted when proceedings claiming under *Property Relationships Act 1984* (NSW) were dismissed on an interlocutory application & further proceedings had to be brought - advocate's immunity - causation - s5D *Civil Liability Act 2002* (NSW) - appeal allowed.

[Day](#) (I)

Davinski Nominees Pty Ltd v I & A Bowler Holdings Pty Ltd & Ors [2011] VSC 220

Supreme Court of Victoria

Kaye J

Tax implications - awards of damages - appeal from decision of Victorian Civil & Administrative Tribunal - retail tenancy lease - appeal dismissed - awards of compensation to defendants should be assessed without taking into account the liability to taxation of the lost earnings on which the awards were based, or the liability of the three awards of compensation to taxation - detailed consideration of case law including *Daniels & Ors v Anderson* (1995) 37 NSWLR 438 in an interesting decision.

[Davinski Nominees](#) (I, B, C)

**Wheelahan & Anor v City of Casey & Ors [2011] VSC 215**

Supreme Court of Victoria

Emerton J

Application for approval of settlement of group proceeding - residents & former residents of Brookland Greens Estate who had been affected by migration of landfill gas from an adjacent former municipal landfill - settlement fair & reasonable.

[Wheelahan](#) (I, C)

Irwin v Alderman & Ors (No 2) [2011] SASC 86

Supreme Court of South Australia

Judge Lunn a Master of the Supreme Court

Subpoenas - proceedings in which executor & beneficiary in a deceased estate suing his co-executors, the other beneficiaries & the solicitors for the estate - first & second defendants have requested Registrar to issue subpoena for documents against an accounting firm - Registrar had formed opinion subpoena an abuse of process because its breadth was such that it was impermissibly seeking disclosure of documents & referred the matter to the Master for a direction whether the subpoena was to be rejected - proposed subpoena in the nature of an attempt to obtain general disclosure of documents from accounting firm - it would be oppressive to require accounting firm to respond to the subpoena by differentiating between those documents in the classes sought which are relevant & those which are not - direction to Registrar to refuse the issue of the subpoena.

[Irwin](#) (I, B)

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