



# Benchmark

## Insurance Banking & Construction A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Australian Capital Territory v Queanbeyan City Council** - Constitutional law - validity of two charges levied by Australian Capital Territory relating to water (B, C)

**Hogno v Repatriation Commission** - *Veterans' Entitlements Act 1986 (Cth)* - s44(1) *Administrative Appeals Tribunal Act 1975 (Cth)* - standard of proof - reasonable hypothesis that incapacity war-caused (I)

**Australian Securities & Investments Commission v Letten (No 5)** - *Corporations Act 2001 (Cth)* - unregistered managed investment scheme - whether property constitutes "scheme property" for purposes of s9 (B)

**Employment Services Australia Pty Ltd v Poniatowska** - Employment law - applicant seeking stay of execution of orders made by the Full Court (I)

**Fitzgerald v Dianna Smith t/as Escape Hair Design** - *Fair Work Act 2009* - unfair dismissal (I, B)

**Rhodes v Lake Macquarie City Council & another** - Personal injuries - plaintiff injured by branch falling from tree (I)



**Rich v Lennox Palms Estate Pty Ltd** - *Environmental Planning & Assessment Act 1979 (NSW)* - development consent (C)

**Edelman v Badower & Ors** - Costs - taxation of costs - meaning & ramifications of court order requiring a party to pay costs "thrown away" (I)

**Iris Management Pty Ltd & Anor v Formula Uno Pty Ltd & Ors** - Terms of settlement not met - application by first plaintiff for judgment (B)

**Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd (No 2)** – Costs (I)

**Papa v Sullivan Nicolaides Pty Ltd** - Medical negligence - Warfarin testing - judgment for plaintiff in sum of \$2,201,982.00 (I)

**Sunbay Projects Pty Ltd v PR Wieland Holdings Pty Ltd & Anor** - *Property Agents & Motor Dealers Act 2000 (Qld)* - contract for sale & purchase of proposed lot in a development (C)

**Commissioner for ACT Revenue v Dataflex Pty Ltd & Anor** - *Taxation Administration Act 1999 (ACT)* - payroll tax liability (B)

**Twining v Curtis** - Torts - causes of action in misfeasance in public office & in injurious falsehood - unrepresented plaintiff seeking leave to file further amended statement of claim (I)

**Piast Enterprises Pty Ltd v Toorallie Holdings Pty Ltd** - *Corporations Act 2001 (Cth)* - application to set aside statutory demand (B)



## Summaries with links (5 minute read)

**Wednesday 29 September 2010**

**Australian Capital Territory v Queanbeyan City Council [2010] FCAFC 124**

Full Court of the Federal Court of Australia

Keane CJ; Stone & Perram JJ (in Sydney)

Constitutional law - validity of two charges levied by Australian Capital Territory relating to water - whether price for licence must bear a "discernible relationship" to value of the water derived - detailed consideration of United Kingdom & Australian case law including *Air Caledonie International v the Commonwealth* [1988] HCA 61 in an interesting decision.

[Australian Capital Territory](#) (B, C)

[Queanbeyan City Council](#) - decision 24 August 2009: see 'Benchmark' B, C & IBC Friday 28 August 2009 - s90 *Constitution* - water abstraction charge - whether the ACT invalidly imposed duties of excise on a statutory corporation - declaration made that *Utilities (Network Facilities Tax) Act* 2006 (ACT) is invalid so far as it purports to impose a tax on the water network facility operated by first respondent;

[Queanbeyan City Council](#) - decision 19 November 2009 - costs;

[Air Caledonie International](#) - decision High Court of Australia 24 November 1988 - s7 *Migration Amendment Act* 1987 (Cth) purporting to impose liability for what was described as a "fee for immigration clearance" - s7 ineffective to amend *Migration Act* by adding s34A to its provisions.

**Hogno v Repatriation Commission [2010] FCA 1044**

Federal Court of Australia

Flick J (in Sydney)

*Veterans' Entitlements Act* 1986 (Cth) - s44(1) *Administrative Appeals Tribunal Act* 1975 (Cth) - standard of proof - reasonable hypothesis that incapacity war-caused - need for satisfaction beyond reasonable doubt that hypothesis to be rejected - appeal dismissed - comprehensive consideration of Australian case law in an interesting decision.

[Hogno](#) (I)

**Australian Securities & Investments Commission v Letten (No 5) [2010] FCA 1047**

Federal Court of Australia

Gordon J (in Melbourne)

*Corporations Act* 2001 (Cth) - unregistered managed investment scheme - whether property constitutes "scheme property" for purposes of s9 - whether funds for purchase of property were



funds contributed by investors of scheme - attribution of knowledge - identity of responsible entity for a scheme - extensive consideration of Australian case law.

[Australian Securities and Investments Commission](#) (B)

[Australian Securities and Investments Commission](#) - another decision dated 24 September 2010 - application by Receivers under ss1323(5) & 601EE *Corporations Act* 2001 (Cth)

## **Employment Services Australia Pty Ltd v Poniatowska [2010] FCA 1043**

Federal Court of Australia

Besanko J (in Adelaide)

Employment law - applicant seeking stay of execution of orders made by the Full Court - whether stay, partial stay or stay on conditions should be granted pending application for special leave to appeal to the High Court - stay granted subject to conditions that appellant pay to respondent an amount of \$100,000 in addition to an amount already paid, pursue special leave application expeditiously, & provide bank guarantee for remainder of judgment monies.

[Employment Services Australia](#) (I)

[Employment Services Australia](#) - decision Full Court 27 July 2010: see 'Benchmark' Friday 30 July 2010 - *Human Rights & Equal Opportunity Commission Act* 1986 (Cth) - *Sex Discrimination Act* 1984 (Cth) - damages - first respondent's employment had been terminated - she had made a complaint to the Human Rights & Equal Opportunity Commission - for decision appealed from, see 'Benchmark' Thursday 25 June 2009 & link below - appeal dismissed - cross-appeal be dismissed.

[Poniatowska](#) - decision 23 June 2009 - ss14(2) & 28B *Sex Discrimination Act* 1984 (Cth) - s46PO *Human Rights & Equal Opportunity Commission Act* 1986 (Cth) - vicarious liability - termination of employment of applicant with seventh respondent - applicant employed as building consultant, engaged in selling house & land packages on behalf of sixth respondent - order that seventh respondent pay compensation for unlawful discrimination in sum of \$466,000 including interest - in the event that that amount is not paid by seventh respondent, for whatever reason, liberty to apply reserved to applicant to apply for orders to be made, to the extent that it is appropriate, against each of the other respondents (other than sixth respondent).

## **Fitzgerald v Dianna Smith t/as Escape Hair Design [2010] FWA 7358**

Fair Work Australia

Commissioner Bissett

*Fair Work Act* 2009 - allegation of unfair dismissal - in employer's letter of termination, several reasons given for termination of employment including public display of dissatisfaction - 'Facebook' - applicant awarded compensation for her unfair dismissal of \$2,340.48 less tax.

[Fitzgerald](#) (I, B)

**Rhodes v Lake Macquarie City Council & another [2010] NSWCA 235**

Court of Appeal of New South Wales

Hodgson & Macfarlan JJA; Handley AJA

Personal injuries - plaintiff injured by branch falling from tree - claim for damages against second defendant Housing Commission, the lessor, & against first defendant Council which had refused consent to remove tree - s5B *Civil Liability Act* 2002 (NSW) - whether breach of duty by Council in adopting tree preservation policy, or by Council officer in refusing consent to removal of tree - whether breach of duty by lessor in not informing Council of history of property damage & injury from tree - at paragraphs. 51 & 57 of Hodgson JA's judgment: breach of Housing Corporation's duty of care in not providing Council with the information it had concerning damage & injury previously caused by the tree, but while Housing Corporation was negligent in this respect, not causative of injury to appellant; not shown that Council would have come to any different decision; & without Council consent, the tree could not lawfully be removed - appeal dismissed.

[Rhodes](#) (I)

**Rich v Lennox Palms Estate Pty Ltd [2010] NSWCA 242**

Court of Appeal of New South Wales

McColl & Young JJA; Lindgren AJA

*Environmental Planning & Assessment Act* 1979 (NSW) - whether on true construction of development consent, the three stage release of the subdivided land was in accordance with development consent - appeal dismissed.

[Rich](#) (C)

[Rich](#) - decision Land & Environment Court 25 September 2009 - applicants owners of land adjacent to land owned by first respondent at Lennox Head - applicants seeking declaration pursuant to s123 of the *Environmental Planning and Assessment Act* 1979 (the EP&A Act) that development consent issued by second respondent Ballina Shire Council had not been complied with by first respondent - applicants' summons dismissed.

**Edelman v Badower & Ors [2010] VSC 427**

Supreme Court of Victoria

Mukhtar AsJ

Costs - taxation of costs - amendment to statement of claim by leave - dispute involving joint ownership of land - settlement reached, but on terms preserving order for costs thrown away by reason of the amendment - meaning & ramifications of court order requiring a party to pay costs "thrown away."

[Edelman](#) (I)

**Iris Management Pty Ltd & Anor v Formula Uno Pty Ltd & Ors [2010] VSC 434**

Supreme Court of Victoria

Beach J

Terms of settlement not complied with - no mortgage entered into as contemplated by terms of settlement - application by first plaintiff for judgment - judgment for first plaintiff.

[Iris Management](#) (B)**Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd (No 2) [2010] QSC 365**

Supreme Court of Queensland

Daubney J

Costs - for decision 27 August 2010, see 'Benchmark' I & IBC Tuesday 31 August 2010 & link below - indemnity costs.

[Cape York Airlines](#) (I)

[Cape York Airlines](#) - decision 27 August 2010 - insurance contracts - damage to aircraft - construction of policy - election - *Civil Aviation Act 1988* (Cth) - *Civil Aviation Regulations 1988* (Cth) - plaintiff's Cessna 208 Caravan Aircraft VH-CYC suffered engine failure & ditched in the sea off Green Island, near Cairns - whether three letters on which defendant relied constituted evidence of the making of & communication of an unequivocal election to repair - defendant did not make an election to repair under the policy - judgment for plaintiff in sum of \$1,942,367.88 plus interest to date of judgment of \$1,229,519, being a total judgment of \$3,171,886.88.

**Papa v Sullivan Nicolaides Pty Ltd [2010] QSC 364**

Supreme Court of Queensland

Daubney J

Medical negligence - Warfarin testing - defendant a firm of specialist medical pathologists - mitral valve replacement, in which artificial mechanical valve was inserted in heart - plaintiff prescribed anti-coagulant Warfarin - analysis of blood samples for current Warfarin level - plaintiff suffered stroke - judgment for plaintiff against defendant in sum of \$2,201,982.00.

[Papa](#) (I)**Sunbay Projects Pty Ltd v PR Wieland Holdings Pty Ltd & Anor [2010] QSC 368**

Supreme Court of Queensland

Ann Lyons J

*Property Agents & Motor Dealers Act 2000* (Qld) - contracts - plaintiff vendor & first defendant purchaser entered into contract for the sale & purchase of proposed lot in a development - second defendant was guarantor - where defendants requested extension of date for settlement of contract - where first defendant later advised plaintiff it was exercising its right to terminate the



contract pursuant to s367 - order that contract between plaintiff & first defendant be specifically performed - detailed examination of Australian case law.

[Sunbay](#) (C)

**Commissioner for ACT Revenue v Dataflex Pty Ltd & Anor [2010] ACTSC 117**

Supreme Court of the Australian Capital Territory

Higgins CJ

*Taxation Administration Act 1999* (ACT) - appeal from ACT Civil & Administrative Tribunal - payroll tax liability - penalty for non-compliance - reduction in penalty tax - voluntary disclosure - disclosure before investigation - meaning of 'investigation' in s32 - appeal dismissed.

[Commissioner for ACT Revenue](#) (B)

**Twining v Curtis [2010] ACTSC 115**

Supreme Court of the Australian Capital Territory

Master Harper

Torts - causes of action in misfeasance in public office & in injurious falsehood - unrepresented plaintiff seeking leave to file further amended statement of claim - whether pleading shows good causes of action - leave refused - plaintiff given further opportunity to redraft pleading.

[Twining](#) (I)

**Piast Enterprises Pty Ltd v Toorallie Holdings Pty Ltd [2010] ACTSC 116**

Supreme Court of the Australian Capital Territory

Master Harper

*Corporations Act 2001* (Cth) - application to set aside statutory demand - power of Court to set aside statutory demand under s459J if it is satisfied that "there is some other reason why the demand should be set aside." - held that the Court had power to set aside the demand under section 459J despite the fact the application was not made within twenty-one days of service of the demand - *Joe Mangraviti Pty Ltd v Lumley Finance Ltd* [2010] NSWSC 61 considered - *Woodgate v Garard Pty Ltd* [2010] NSWSC 508 (24 May 2010, unreported),

[Piast Enterprises](#) (B)

[Mangraviti](#) - decision 5 February 2010

[Woodgate](#) - decision 24 March 2010 reported at 78 ACSR 468

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