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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)

Comcare v Post Logistics Australasia Pty Ltd - occupational health and safety - deterrence - civil pecuniary penalties (I, C, G)

Spencer v Commonwealth of Australia - evidence - public interest immunity - class claim (I, B, C, G)

Asafuji (in his capacity as the Foreign Representative of the Sanko Steamship Co., Ltd) v The Sanko Steamship Co., Ltd (No 2) - corporations - cross border insolvency - recognition of *foreign proceedings* (I, B, C, G)

Stoker v Picken - lien - *quantum meruit* (B, C)

Williamson v Carneys Lawyers Pty Ltd - professional negligence - application to strike out statement of claim - unjust contract (I, B, C, G)

Bis Industries Ltd v Toll Holdings Ltd & Anors - contract - validity of restraint clauses contained in employment contract and confidentiality deed (B)

Kuek v Devflan Pty Ltd & Anor - costs - taxation of costs - appeal from order setting aside notice of application to review order of costs judge filed out of time (I, B, C, G)

Perdaman Chemicals and Fertilisers Pty Ltd v The Griffin Coal Mining Company Pty Ltd [No 6] - subpoena - application for amendment to subpoena for production of documents - ambiguity - oppression - subject-matter jurisdiction (I, B, C, G)

Kidd v Resource Management and Planning Appeal Tribunal (No 2) - environment and planning - application for remittal of appeal from decision of Tasmanian Heritage Council to Resource Management and Planning Tribunal (C, G)

Summaries with links (5 minute read)

Comcare v Post Logistics Australasia Pty Ltd [2012] FCAFC 168

Full Court of the Federal Court of Australia

Rares, Cowdroy & Griffiths JJ

Occupational health and safety - penalties - respondent's employee injured in accident involving forklift operated by contractor *whether*: primary judge erred in holding that it was unnecessary to refer to deterrence when imposing and fixing civil pecuniary for breach of the *Occupational Health and Safety Act 1991* (Cth) (**Act**); erroneous assessment of foreseeability of risk and the relevance to that assessment of respondent's earlier breach of the Act; erroneous failure to act on respondent's admission that it failed to provide adequate supervision to employee and contractor; failure to notify parties of proposed rejection of their suggested penalty ranges; penalty manifestly inadequate - relevance of deterrence in determining civil pecuniary penalties under the Act generally and in the circumstances - relevance of the 2004 amendments to the Act: *Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Act 2004* (Cth) - reassessment of penalty.

[Comcare](#) (I, C, G)

**Spencer v Commonwealth of Australia [2012] FCAFC 169**

Full Court of the Federal Court of Australia

Keane CJ; Dowsett & Jagot JJ

Evidence - public interest immunity - class claim - application for leave to appeal order of primary judge upholding claim of first respondent for public interest immunity in relation to documents containing deliberations of Cabinet - principles relevant to consideration of application: *State of New South Wales v Ryan* (1998) 101 LGERA 246 - position on inspection of documents subject to claim: *Young v Quin* (1985) 4 FCR 483 - *whether*: primary judge's approach to inspection of documents was consistent with authority; failure to distinguish between a class claim and contents claim for public interest immunity; documents had sufficient importance to applicant's case to outweigh public interest in protection from disclosure; decision attended by sufficient doubt to warrant grant of leave; documents were of anything other than marginally relevance to applicant's case.

[Spencer](#) (B, G)

Asafuji (in his capacity as the Foreign Representative of the Sanko Steamship Co., Ltd) v The Sanko Steamship Co., Ltd (No 2) [2012] FCA 1314

Federal Court of Australia

Bromberg J

Corporations - bankruptcy and insolvency - recognition of foreign proceeding - stay - plaintiff was appointed trustee of defendant in corporate reorganisation proceedings in Japan (**Tokyo proceeding**) - unopposed application by plaintiff for final relief under Art15, Sch1 *Cross-Border Insolvency Act 2008* (Cth) (**Act**) seeking recognition of Tokyo proceeding - *whether*: requirements in Art17, Sch1 of the Act were made out; Tokyo proceeding was a *foreign proceeding* and plaintiff a *foreign representative* within meaning of Art2, Sch1 of the Act; Tokyo proceeding was a *foreign main proceeding* or *foreign non-main proceeding*: Art17(2) of the Act; interests of creditors and other interested persons including defendant debtor were adequately protected - stays of proceedings against defendant and suspension of actions to dispose of debtor's assets upon recognition of Tokyo proceeding as *foreign main proceeding*: Art20(1) of the Act - scope of relief flowing from recognition of *foreign main proceeding*: Art20 & s16 of the Act - relevance of Ch5.3A *Corporations Act* 2001 (Cth).

[Asafuji](#) (B, G)



Stoker v Picken [2012] FCA 1315

Federal Court of Australia

Dowsett J

Lien - *quantum meruit* - dispute arising from agreement by which respondent agreed to perform repairs on appellant's motor vessel - appeal from decision of Federal Magistrates Court that respondent held lien over vessel - *whether*: respondent entitled to lien; primary judge erred by not awarding damages to appellant in detinue or conversion in respect of vessel; primary judge erred in awarding respondent *quantum meruit* for engine repair services of third party; failure to give adequate reasons; erroneous disregard of evidence of value of vessel; primary judge erred in not awarding costs to appellant in relation to professional witness costs as costs thrown away; lien discharged by respondent's claim to storage charges in respect of vessel - *particular* or *special* lien - entitlement to lien and circumstances in which lien may be lost: *Sykes and Walker, The Law of Securities (The LawBook Co Ltd, 5th ed), Donald v Suckling* (1866) LR 1 QB 585 - attempted sale of vessel: *Disposal of Uncollected Goods Act* 1967 (Qld) - vicarious performance of work on vessel - evidence of value of vessel: *Evidence Act* 1995 (Cth).

[Stroker](#) (B, C)

Williamson v Carneys Lawyers Pty Ltd [2012] NSWSC 1411

Supreme Court of New South Wales

Latham J

Pleadings - application to strike out statement of claim pursuant to r14.28 *Uniform Civil Procedure Rules* (**Rules**) - misleading and deceptive conduct - unjust contract - plaintiff alleged first defendant breached s52 *Trade Practices Act* (Cth) 1974 and/or s42 *Fair Trading Act* 1987 (NSW) by failing to carry out searches on property purchased by plaintiff which would have revealed the existence of proposed developments on adjoining land or to advise the plaintiff to carry out searches - plaintiff alleged that second defendant lender knew or ought to have known about proposed development and that loan agreement between plaintiff and second defendant was unjust - *whether*: statement of claim disclosed a reasonable cause of action: r14.28(a) of the Rules; facts set out in statement of claim established essential ingredients of a claim under the *Contracts Review Act* 1980 (NSW) (**Act**); contract was unjust: *West v AGC (Advances) Ltd.* (1986) 5 NSWLR 610; court should exercise powers conferred on it by s7(1) of the Act; plaintiff was a party to mortgage who was under special disability or disadvantage in dealing with second defendant; *prima facie* unfair or unconscientious for second defendant to accept plaintiff's



execution of mortgage; if it knew of proposed development, second defendant was under duty to inform plaintiff: *Drury v Stone* (2000) NSWCA 45.

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

Bis Industries Ltd v Toll Holdings Ltd & Anor [2012] NSWSC 1427

Supreme Court of New South Wales

Bergin CJ in Eq

Contract - restraint of trade - employee restraint - plaintiff and first defendant large commercial organisations negotiating for equity investment or purchase - plaintiff commenced proceedings to restrain first defendant from employing second defendant and restraining second defendant from commencing employment - *whether*: restraint clauses contained in employment contract between plaintiff and second defendant, and confidentiality deed between plaintiff and first defendant, were unreasonable and unenforceable - prerequisites to a valid restraint: *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* (1894) AC 535 - time of assessment of reasonableness of restraint - importance in maintaining faith in enforceability of promise: *Justice JD Heydon, The Restraint of Trade Doctrine* (LexisNexis Butterworths, 3rd ed., 2008) - unreasonable impact on employee of restraint between two large commercial organisations may render restraint unenforceable: *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* (1968) AC 269 - whether restraint and confidentiality provisions offended public policy.

[Bis Industries](#) (B)

Kuek v Devflan Pty Ltd & Anor [2012] VSC 571

Supreme Court of Victoria

Kyrou J

Costs - taxation of costs - appeal from order setting aside notice of application to review an order of a costs judge that plaintiff filed pursuant to r63.57 *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) (**Rules**) out of time - *whether*: plaintiff provided acceptable explanation for lateness; lateness caused any prejudice to defendants: *Aon Risk Services Australia Ltd v Australian National University* (2009) HCA 27; notice had any prospects of success of review under r63.57 of the Rules; setting aside of notice was supported by the *Civil Procedure Act* 2010 (Vic) (**Act**) - principles relevant to granting of extensions of time: *Komba v National Australia Bank Ltd* (2010) VSCA 232, *Jackamarra v Krakouer* (1998) HCA 27 - overarching purpose of the Act to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute: s7(1) of the Act.

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



Perdaman Chemicals and Fertilisers Pty Ltd v The Griffin Coal Mining Company Pty Ltd [No 6] [2012] WASC 450

Supreme Court of Western Australia

Edelman J

Subpoena for production - ambiguity - application to amend subpoena for production of documents for alleged ambiguity in naming of company after documents produced - *whether*: amendment sought was preferable to any ambiguity; amendment would be oppressive or exceed subject-matter jurisdiction; appropriate for court to exercise discretion to issue fresh subpoena - court's power to amend subpoena upon application of party who obtained its issue: *Santos Ltd v Pipelines Authority of SA* (1996) 66 SASR 38 - construction of words in subpoena.

[Perdaman Chemicals and Fertilisers](#) (I, B, C, G)

Kidd v Resource Management and Planning Appeal Tribunal (No 2) [2012] TASSC 79

Supreme Court of Tasmania

Blow J

Environment and planning - demolition of former Government Printing Office - appellant sought that appeal from decision of Tasmanian Heritage Council (THC) be remitted to Resource Management and Planning Tribunal (**Tribunal**) for reconsideration, that Tribunal be differently constituted for purposes of reconsideration, and that costs be paid by two respondents in matter below: including members of THC - Tribunal failed to give adequate reasons - *whether*: to set aside Tribunal's decision; to order Tribunal to provide third set of reasons; to make direction for reconstitution of Tribunal; to grant certificate to members of THC under the *Appeals Costs Fund Act* 1968 (Tas) - court's power to make order it considers just when asserted that tribunal has made decision which erred in law: s25 *Resource Management and Planning Appeal Tribunal Act* 1993 (Tas) - discretionary factors - court's power to vacate or vary order after it has been made orally and before it is perfected: *Dietz v Lennig Chemicals Ltd* (1969) 1 AC 170.

[Kidd](#) (C, G)



The Darkling Thrush

By Thomas Hardy

I leant upon a coppice gate
When Frost was spectre-grey,
And Winter's dregs made desolate
The weakening eye of day.
The tangled bine-stems scored the sky
Like strings of broken lyres,
And all mankind that haunted nigh
Had sought their household fires.

The land's sharp features seemed to be
The Century's corpse outleant,
His crypt the cloudy canopy,
The wind his death-lament.
The ancient pulse of germ and birth
Was shrunken hard and dry,
And every spirit upon earth
Seemed fervourless as I.

At once a voice arose among
The bleak twigs overhead
In a full-hearted evensong
Of joy illimited;
An aged thrush, frail, gaunt, and small,
In blast-beruffled plume,
Had chosen thus to fling his soul
Upon the growing gloom.

So little cause for carolings
Of such ecstatic sound
Was written on terrestrial things
Afar or nigh around,



That I could think there trembled through
His happy good-night air
Some blessed Hope, whereof he knew
And I was unaware.

<http://www.poetryfoundation.org/bio/thomas-hardy>

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