

Dr David H Denton, RFD QC

BA, LLB, LLM (Monash) CtBLaw (Cornell) PhD (UWA) CUniv (VU Melb)

Professional Profile



Dr David H Denton, RFD QC is a Queen's Counsel and Senior Counsel at the Australian Bar and the Singapore International Commercial Court. He practises as a barrister in the High Court of Australia and the trial and appellate divisions of the Federal Court of Australia; the Supreme Courts in Victoria, New South Wales, Queensland and Tasmania; the Planning & Environment Court of Queensland and the Victorian Civil & Administrative Tribunal.

Over recent years he has been retained to appear in both the High Court and the Court of Appeal in the Fiji Islands and for commercial clients involved in property disputes in the Family Court of Australia.

Dr Denton, QC is one of the few Australian Queen's Counsel admitted to practice as an accredited foreign lawyer with rights of appearance in the **Singapore International Commercial Court**. He holds undergraduate and graduate degrees in Law from Monash University in Melbourne, a certificate in US Business Law from Cornell University and a Doctorate of Philosophy (constitutional law) from the University of Western Australia in Perth. He has been recognised by Victoria University Melbourne for outstanding contributions to the law with the award of Companion of the University (CUniv).

He has been Chairman of the Conflicts Committee and a Member of the Advisory Board of a listed public company engaged in litigation funding in Australia and New Zealand.

He has long held a keen interest in class actions, commercial arbitration and in all aspects of company law, especially insolvency and shareholder disputes; environmental torts concentrating on defence work and planning matters. He has been regularly retained for leading Australian banks and financial institutions and otherwise appeared in several notable insolvency administrations following significant corporate collapses, including: Duke Group, Tricontinental Corporation, Pyramid Building Society, Primelife, Opes Prime, Willmott Forests and the Westpoint Group.

His early practice at the Bar was one heavily involved in the practice of criminal law, courts-martial and criminal jury trials in particular. This early grounding has shaped his litigation practice in commercial law.

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MACROSSAN CHAMBERS
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Dr Denton, QC's principal practice areas are in:

- Commercial, Equity & Trade Practices Law
- Corporations, Insolvency & Securities Law
- Banking, Finance & Property Law
- Trusts & Family Law
- Commercial Arbitration & Mediation
- Administrative & Constitutional Law
- Planning & Environment Law

He is a member of chambers:-

- in Melbourne and Cairns at **Macrossan Chambers**; and
- in Brisbane at **Sir Harry Gibbs Chambers**.

Qualifications

Education

- **Xavier College, Kew**
- **Royal Military College, Duntroon**
- **Monash University, Victoria** - B.A. LL.B. LL.M.
- **Cornell University, New York, USA** - CtBLaw (US)
- **University of Western Australia** – PhD
- **Victoria University Melbourne** - CUniv

Admission to Practice

- High Court of Australia
- Supreme Court of Victoria
- Supreme Court of New South Wales
- Supreme Court of Queensland
- Supreme Court of South Australia
- Superior Courts of Fiji (*pro tem*)
- Singapore International Commercial Court

Barrister

- Roll of Counsel - **Victorian Bar**
- Appointed a **Queen's Counsel & Senior Counsel** for the State of Victoria – 2001
- President, **Commercial Bar Association**: 2001-2005

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Arbitrator

- Fellow of the **Australian Institute for Commercial Arbitration (FAICA)** – 2004
- Certified Arbitrator - Australian Institute for Commercial Arbitration – 2004
- President of the Australian Institute for Commercial Arbitration: 2004 – 2011

Mediator

- National Accreditation as a Mediator – 2008

Academic

- Adjunct Professor - Victoria Law School, **College of Law and Justice, Victoria University, Melbourne** – since 2005
- Course Director, Graduate Diploma in Commercial Arbitration, Sir Zelman Cowen Centre, Victoria Law School, College of Law and Justice, Victoria University, Melbourne – since 2004

Practice Profile

Commercial, Equity & Trade Practices Law

These cases cover every instance of commercial disputation arising out of trade and commerce from contractual disputes to passing off applications to protection of intellectual property rights.

Corporations, Insolvency & Securities Law

He maintains a strong interest in Securities, Corporate Governance and Insolvency Law issues and has appeared in many cases under the Corporations Law/Act and especially so in the Corporate Insolvency area which have provided significant case development in cases under Part 5.3A Corporations Act in respect of administrations and insolvencies.

Banking, Finance & Property Law

These cases involve the application of securities and suretyship law with emphasis on banking documentation covering debentures, mortgages, charges, cross-deeds of covenant, guarantees and indemnities. The corresponding rights of parties to rely upon equitable and statutory defences principally trade practices law and unconscionable conduct are closely examined. All aspects of land law covered including compensation due to compulsory acquisition.

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Trusts & Property - Family Law

This practice area has involved the consideration and application of family law principally in the corporate and trusts areas of property dispositions under the *Family Law Act 1975* and in the Family Court's accrued jurisdiction.

Commercial Arbitration & Mediation

He has developed a significant practice in commercial arbitration and mediations over 20 years, both in Australia and overseas. Arbitrations have involved consideration of private international law; advice on international treaties concerning International Sale of Goods, International Air Law, UNCITRAL Model Law on International Commercial Arbitration. In Australia, arbitrations have also involved large contractual construction disputes and commercial tenancy arbitrations, flowing through to arbitral awards.

Administrative & Constitutional Law

This practice area has involved the consideration and application of constitutional law (state and federal) and the operation of human rights legislation. These matters have been pursued in opinions and in High Court and Appellate courts. This area of practice has involved consideration of the application of constitutional conventions and administrative law principles to high level government decision-making and policy development.

Planning & Environment Law

Additionally, he has developed a specialist practice in Queensland in Planning & Environment Law matters and in Victoria in VCAT. He maintains an active interest in defence work involving environmental offences. This practice has also involved matters and appeals under the *Sustainable Planning Act 2009* (Qld); *Integrated Planning Act 1997* (Qld); environmental prosecutions under the *Local Government Act 1990* and Local Laws; and the Cairns Regional Council, Eacham Shire Council and Johnstone Shire Council Planning Schemes in Far North Queensland and in South East Queensland before the Planning & Environment Court (Queensland).

Publications & Seminars in Law

- **A Proposed New Military Justice Regime for the Australian Defence Force during Peacetime and in time of War** (2019) [SSRN 3551788](#)
- **The Australian Military Justice System: History, Organisation and Disciplinary Structure** (2016) [6\(1\) VULJ 26](#)
- **Commercial Arbitration - Does It Really Have A Future?** (2014) [4 VULJ 117](#)

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- **Occasional Address - Conferring of Degrees Ceremony - Victoria University Melbourne - Law & Justice** (2016) LinkedIn Posting On-Line ("LIP")
- **The 20 Most Notable Australian High Court Cases since 1981** (2016) LIP
- **OK, so you are entitled to damages for breach of contract. You have mitigated your loss. Do you still lose out to the defaulting party?** (2015) LIP
- **Litigation Funding - Established Players v New Idea: Crowd Funding?** (2015) LIP
- **Whose standard terms and conditions of contract trump the other as between a buyer and a seller?** (2015) LIP
- **Magna Carta: in reality - too much myth but wonderful history** (2015) LIP
- **Death Sentences and the 21st Century - Think** (2015) LIP
- **Commercial Arbitration – Does It Really Have A Future?** (2014) 4 VULJ 117
- **Proportionate Liability – Where to from here?** - (2014 Leo Cussen Centre for Law - "LCC")
- **Civil Procedure - Case & Statute Law Update** – 2014 LCC
- **Directors' Duties – Some Observations – USA – UK – Australia** (2012 Law Institute of Victoria – "LIV")
- *Hard Lessons in a Tumultuous Year - Centro and James Hardie - What Next?* (2012 Institute of Chartered Accountants in Australia)
- **Understanding the Proportionate Liability Regime** (2011 Legalwise Seminars "LS")
- **Liquidated Damages and Penalties - Ensuring Enforceability** (2010 LexisNexis)
- *The Civil Procedure Act Reforms – Ready for the Changes?* (2010 LCC)
- **Misconduct of Insolvency Practitioners** (2009 Insolvency Practitioners Association)
- *The Accountability of 'Corporate Undertakers' for their Misconduct in Office* (2009 LS)
- *Litigation Intensive - A Practical Session On Preparing for and Conducting a Commercial Trial* (2007 LCC)
- *Re Wakim – Cross-Vesting - Quo Vadis?* (1999 LIV)
- *Voluntary Administration - Framework and Principles* (1995 LCC)
- *Issues and Decisions for Lenders Arising from Company Administration* (1994 LCC)
- *External Administration - Receivers and Managers* (1994 LCC)
- *Liquidation of Corporations* (1993 LCC)
- *Liquidation of Companies* (1988 and 1989 revised, LCC)
- *Winding Up Law and Procedure under the Companies Code* (1983 and 1984 LCC revised)

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- *Australian Corporation Law, Principles and Practice*, Butterworths, (contributor)
- *Australian Corporations and Securities Reports*, Butterworths (law reporter)
- *Australian Company Law Reports*, Butterworths (law reporter)

Professional Positions

Commercial Bar Association

- President of the **Commercial Bar Association – Melbourne** (*CommBar*) (2001 – 2005)
- Senior Vice President of *CommBar* (1999 – 2001)
- Chairman of the Corporations and Securities Law Section of *CommBar* (1998 – 2005)
- Deputy Chair Corporations and Securities Law Section of *CommBar* (2005 – 2010)
- Vice President (Convenor) of *CommBar* (1994 – 1998)

The Bar

- **Victorian Bar Representative, Programs Advisory Committee, Victoria Law School, College of Law & Justice, Victoria University Melbourne** (2004 – present)
- Member of the Supreme Court of Victoria Corporations & Commercial Court Users' Group (2010 – 2014)
- Member of the Supreme Court of Victoria Commercial List Users' Group (2003 – 2010)
- Member Independent Chambers Committee (2008 – 2011)
- Member Continuing Legal Education Committee (2001 – 2007)
- Member Aboriginal Law Student Mentoring Support Group (2000 – 2001)
- Member Litigation Procedure Review Committee for Commercial Law (1999 – 2001)
- Member Legal Education Committee (1998 – 2000)
- Member Academic and Continuing Legal Education Committee (1995 – 1997)
- Founding Director, List Committee Member and Member Of List A Barristers (1990 – 2010)
- Member Bar Library Committee (1987 – 1989)
- Member Victorian Bar (1982 – 1985; 1987 - present)
- Mentor to the following Barristers:

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(Victorian Bar) Joanne Piggott, Peter G Lovell, Margaret Lodge, Alan Herskope, David L Bailey, Richard W Short; (now Queensland Bar) Picha Djohan

Academic

- Companion of the University - **Victoria University Melbourne**, 2020
- Adjunct Professor & Professorial Associate, Sir Zelman Cowen Centre, **Victoria Law School, College of Law and Justice, Victoria University, Melbourne** – since 2005
- Convenor, Adjunct Professoriate, College of Law & Justice, Victoria University – since 2014
- Inaugural Fellow in Residence, Victoria Law School, Victoria University, Melbourne – since 2012
- Editorial Advisory Board, **Victoria University Law & Justice Journal** – since 2011
- Course Director, Graduate Diploma in Commercial Arbitration, Sir Zelman Cowen Centre, Victoria Law School, College of Law and Justice, Victoria University, Melbourne – since 2004
- Chair of the Faculty of Business & Law Review Committee into the Sir Zelman Cowen Centre, Victoria Law School 2009 – 2010
- Victorian Bar Council Representative, Programs Advisory Committee, Victoria Law School, College of Law and Justice, Victoria University, Melbourne – since 2004
- Advisory member of Head of Law School's Building and Accommodation Committee for the Victoria Law School – since 2008
- Occasional Lecturer, The Law of Commercial Arbitration, and International Commercial Arbitration, Victoria Law School, College of Law and Justice – since 2005
- Moot Master, Victoria Law School Mooting Competition 2005 - 2011
- Advisory member *pro tem* to Provost, Sir Zelman Cowen Centre, Victoria Law School, Professor the Hon J H Phillips AC QC, 2004 – 2008

Australian Institute for Commercial Arbitration, Inc.

- President of the **Australian Institute for Commercial Arbitration** (2004 – 2011)
- Councillor (2011 – present)

Other Appointments

- Chairman, **Law Hawks, Legal Coterie, Hawthorn Football Club** (2007 – 2011)
- Member, **Macrossan Chambers**, Melbourne and Cairns - since 2010

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- Member, **Sir Harry Gibbs Chambers**, Brisbane - since 2010
- Head of Chambers, **Chancery Chambers**, Melbourne (1997 – 1999, 2003 – 2005, 2006 – 2008)
- *Rapporteur* and member of the Papers Committee, **13th Commonwealth Law Conference, Melbourne** (2002-2003)
- Committee member of the Executive of the **Commercial Law Association of Australia Limited** (1995-1998)
- Honorary Secretary of the **International Commission of Jurists (Australian Section) in Victoria** and a member of its Executive Committee (1995 – 1996)
- Fellow of the **Australian Institute of Company Directors (FAICD)** (1992)
- Corporate Lawyer (1986 - 1987)
- Official Observer, **Australian Constitutional Convention, Brisbane (1985)**
- President, Senior Common Room, **Newman College, University of Melbourne** (1984 – 1985)
- Senior Resident Tutor in Law, Newman College, University of Melbourne (1982 – 1985)
- Commissioned Officer: **Australian Army Legal Corps (Reserve)**. Decorated with the **Reserve Force Decoration (RFD)** (1979 – 2002)

Bar Association Memberships

- **Victorian Bar** - since 1982
- **Bar Association of Queensland** - since 2005

Association Memberships

- **Commercial Bar Association – Melbourne**
- **Australian Institute for Commercial Arbitration (FAICA)**
- **Australian Institute of Company Directors (FAICD)**

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List of Significant Cases¹

Administrative & Constitutional
Arbitration
Banking & Real Property
Bankruptcy
Contract
Corporations & Securities
Equity
Insolvency
Legal practitioners
Planning & Environment
Practice & Procedure
Torts
Trade Practices

Administrative & Constitutional

Coutts v Leonard (1991) VSC; BC9100683

Statutory interpretation - Statutes – amendment – construction - whether amendment retrospective

Endresz v Whitehouse (1999) 21(1) LegRep SL1a

High Court - Application for civil special leave to High Court - Takeovers - Acquisition of more than prescribed percentage of shares in company - Exception to prohibition

Tracey, Re; ex parte Ryan (1989) 166 CLR 518; (1989) 63 ALJR 250; (1989) 84 ALR 1; (1989) 16 ALD 730; [1989] HCA 12

High Court - Constitutional law – Courts - Chapter III - Courts-martial – Defence power of the Commonwealth - Judicial power of the Commonwealth - *Defence Force Discipline Act 1982* (Cth) - Constitutional validity of Act – Exception to Chapter III of the *Constitution*

¹ 1/2020

Arbitration

Perth Freight Lines Pty Ltd & Ors v BM2008 Pty Ltd (in liq) & Ors [2011] VSCA 218

Arbitration – Award – Enforcement by court order – Application for leave to appeal out of time against making of order – Order not in terms of award – Notwithstanding possible error in order no material prejudice to applicants – Leave refused – *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 1)* [2005] 2 Qd R 174 – *Commercial Arbitration Act 1984* s 33.

Banking & Real Property

Australia & New Zealand Banking Group Limited v Costikidis [1994] VSC 823; BC9401304

Real property - Mortgages and securities - Guarantee mortgage given as security for financial accommodation - Claim for relief based on allegations of unconscionable conduct, negligent statement and misleading or deceptive conduct – Bank entitled to be subrogated

Australia & New Zealand Banking Group Limited v Dunosa Pty Ltd [1994] VSC 347; BC9406147

Real property - Mortgages and securities - Whether liability under mortgage and cross deed to be understood as that of a surety - Whether security documents should be set aside on basis of principle in *Yerkey v Jones*.

Australia & New Zealand Banking Group Limited v Pham & Ors [1999] VSC 503; BC9908203

Real property - Mortgages and securities - Loan secured by mortgages and guarantees - Unconscionable conduct and non-disclosure alleged against the bank - 'married woman's defence' - Whether common mistake or *non est factum*.

Beatty v Australia & New Zealand Banking Group Ltd [1995] 2 VR 301; (1995) VConvR 54-517; [1995] ANZConvR 478; [1995] VicRp 57; BC9503272

Real property – Mortgages - Registration - Torrens system – Indefeasibility principles – Fraud of bank officer – consequences – Mortgage removed from Register

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Irani v St George Bank Ltd [2004] VSC 260; BC200405547

Banking - Guarantee and Surety - construction of Bank Fully Drawn Advance facility - whether Bank entitled to sell security - whether sale by Bank a breach of facility -whether material variation of facility so as to discharge surety - whether repudiation by Bank - whether common mistake.

Zorita Nominees Pty Ltd ATF Wise Family Trust v Australia & New Zealand Banking Group Limited (1994) VSC 784; BC9406463

Real property - Mortgages and securities - Mortgages - Power of sale – Application for interlocutory injunction to restrain exercise – Whether bank knew mortgagor trustee so implicated in breach of trust – Whether cross deed of covenant limited liability of parties to it - Whether bank acted unconscionably in not explaining effect of cross deed – Whether effect should be given to belief that liability limited notwithstanding no outward expression of agreement.

Bankruptcy

BM2008 Pty Ltd (in liq) v Iliopoulos [2010] FMCA 203

Bankruptcy – Creditor’s Petition – matters required by s.309(2) of the Bankruptcy Act – personal service of creditor’s petition be dispensed with.

BM2008 Pty Ltd (in liq) v Iliopoulos (No 2) [2010] FMCA 249

Bankruptcy – Creditor’s Petition – matters required by s.52(1) of the Bankruptcy Act proved – no assertion by debtor of solvency – application to dismiss or adjourn petition until after related Supreme Court appeal and/or related proceeding in Federal Court WA Registry.

Cook v Benson [2000] FCA 1777; BC200007577

Bankruptcy - application by trustee of bankrupt estate for declarations and orders in respect of payments made by bankrupt to respondents prior to date of commission of act of bankruptcy - whether each such payment was void against the trustee by force of ss120 or 121 of the *Bankruptcy Act 1966* (Cth) - whether there was a disposition of property of the bankrupt within two years before the commencement of the bankruptcy and if so, whether that disposition was not in favour of a purchaser for valuable

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consideration - whether s116(2)(d) of the *Bankruptcy Act 1966* (Cth) applied so that payments were excluded from the operation of ss120 and 121

Hicks, Re; ex p. Lamb (1994) 217 ALR 195; [1994] FCA; BC9406120

Bankruptcy – Trustee – review of decision of trustee refusing consent to bankrupt to leave Australia – Bankruptcy Act 1966 s 178 – relevant considerations

Iliopoulos v BM2008 Pty Ltd (in liq) [2010] FMCA 376; BC201003637

Bankruptcy – Application to set aside bankruptcy notice – asserted cross-demand – consideration of matters raised by cross-demand

Iliopoulos v BM2008 Pty Ltd (in liq) [2010] FCA 787

Bankruptcy - Appeal – Application to extend time for compliance with a bankruptcy notice – alleged cross-claim, set-off cross-demand arising by virtue of entitlement to share in the distribution of company surplus upon completion of a voluntary winding up – assets of corporation said to include causes of action against directors, former directors and a related company – uncertainty as to existence and potential value of causes of action – whether cross-claim, set-off, cross-demand is equal to or exceeds the judgment debt

Sheehan v Abeyratne (as trustee of the deed of arrangement of Sheehan) [1993] FCA 200; BC9304783

Bankruptcy - application by liquidator for invalidation of Part X deed of arrangement - guarantee by debtor of liability of third party mortgagor - mortgagor's liability doubtful or not proved - liquidator not permitted to vote although claiming to be a creditor - unascertained or doubtful debt - time for determining status of debt - inadequate documentation and particularisation of debt - duty of chairman - role of court - whether demand is a precondition of liability. Bankruptcy Act 1966 ss 5, 198(2), 198(4), 201, 222(1), 222(2), 236(1), 236

Sheehan, Re; ex parte Farrow Mortgage Services Pty Ltd & Ors [Pyramid Building Society][1991] FCA No 256

Bankruptcy - order under section 222(1) or 236(1)(c) of the Bankruptcy Act declaring void a deed of arrangement accepted by the creditors.

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Skalkos v Australia & New Zealand Banking Group Ltd [1994] FCA 909; BC9406488
Bankruptcy - order under section 222(1) or 236(1)(c) of the Bankruptcy Act declaring void a deed of arrangement accepted by the creditors

Contract

Barnes v Hance & Muir [2001] VSC 238; BC200104190

Contract - enforcement of option agreements by plaintiff - whether alleged act of default entitled defendants to terminate option agreements - act of default constituted by breach of provision in associated agreements between plaintiff and former employer - whether provision in associated agreements was an unreasonable restraint of trade - severance - estoppel

Chariah Resources NL v Tricontinental Corporation Limited [1990] VSC 666; BC9102925

Contract – mining leases – banking & finance – misleading and deceptive conduct – gold bullion loan documentation – representation by managing director to borrowers.

Civoken Pty Ltd & Anor v Madden Grove Developments Pty Ltd & Ors [Primelife] [2006] VSC 283; BC200606000

Contract – contract for the sale of land and construction of retirement village – interpretation – whether parties to contract agreed to variation of terms – breach of express terms; – *Rescission* of contract of sale – conditions 5 and 6(2) of Table A of the Seventh Schedule of the *Transfer of Land Act 1958 (Vic)* – operation vis-à-vis contractual rights to terminate – absence of notice does not preclude termination where conduct repudiatory or breach incapable of remedy; – *Repudiation* – persistent and pervasive disregard of contractual provisions – inference contracting party not prepared to take primary obligations seriously – promisee unaware of conduct; – *Intermediate terms* – requirement of sufficiently serious breach to permit termination by non-breaching party – terminating party permitted to rely on breaches unknown at the time of termination. *Estoppel* – silence or failure to complain – requirement of reliance upon assumption induced by representor’s conduct – absence of relevant assumption – absence of conduct inducing adoption of any assumption. *Misleading And Deceptive Conduct* – *Trade Practices Act 1974 (Cth)* ss.51A and 52 – misleading representations – effect of disclaimers – reliance by representee – representor as "conduit" – representations as to "intention, expectation and anticipation" – continuing representations – liability for aiding, abetting, counseling or procuring contravention – knowledge required to

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establish accessory liability. *Sale Of Land – Sale of Land Act 1962 (Vic)*, ss.2(4), 32(5) and 32(7) – failure to comply with s.32 – meaning of "terms contract". *Fiduciary Relationship* – whether plaintiffs akin to "investors" or "promoters" – no relevant fiduciary duty established.

CMG Equity Investments Pty Ltd v Australia and New Zealand Banking Group Ltd [Opes Prime] (2008) 65 ACSR 650; [2008] FCA 455; BC200802288

Contract – contract to lend shares – rectification – rights of innocent third parties intervening – whether rectification is available - Practice And Procedure – interlocutory injunction – application to restrain sale of shares by legal owner – requirement to support undertaking in damages – no irreparable harm

Command Energy Pty Ltd v Nauru Phosphate Royalties Trust [2003] VSC 261; BC200303814 {assoc - *Sogelease Australia Limited v Nauru Phosphate Royalties Trust* [2003] VSC 262; BC200303812 below}

Contract - Contracts for installation and maintenance of equipment in a major city building - Alleged failure to maintain equipment - Alleged falsified reports - Repudiation - Whether breach of essential term - Alleged repeated breaches - Whether wrongful termination.

Jonit Nominees Pty Ltd v Newton [1997] VSC 410; [1997] CJV 44,562; BC9704603

Insurance - General insurance – Allegations of arson, fraud and unlawful acts of insured - Refusal to indemnify – onus of proof – standard of proof – insufficient evidence – insured entitled to indemnity under policy of insurance

MLW Technology Pty Ltd v May (No. 2) [2003] VSC 199; BC200302985

Contract - consideration - whether past consideration - whether total failure of consideration - whether repudiatory breach of contract - whether acceptance.

MLW Technology Pty Ltd v May (No. 3) [2003] VSC 254; BC200303552

Contract - Damages - breach of warranty as to future value of shares issued for consideration - shares worth less than warranted value - shares retained by promisee - no loss suffered - nominal damages.

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Sogelease Australia Limited v Nauru Phosphate Royalties Trust [2003] VSC 262; BC200303812 {assoc - *Command Energy Pty Ltd v Nauru Phosphate Royalties Trust* [2003] VSC 261; BC200303814}

Contract - Finance agreement - Equipment purchased pursuant to third party contract - Assignment to financier of hirer's rights there under - Whether notice to third party binds that party.

Corporations & Securities

Ballantyne Suites Pty Ltd v Ballantyne Chambers Pty Ltd [2013] VSC 662

Corporations – Appeal from Associate Judge - Leave granted by Associate Judge to commence proceedings against company in liquidation – New trustee seeking leave to bring proceeding for transfer of trust assets from company in liquidation which was the former trustee - Relief sought by proposed plaintiff otherwise unavailable - Evidence as to existence of a serious matter for investigation – Liquidator opposed the granting of leave unless conditions imposed in relation to payment of his fees and expenses – Appeal dismissed - *Corporations Act 2001 (Cth) s 471B* – Assets held by company in liquidation as bare trustee - Liquidator seeking to be appointed as receiver of trust assets – Liquidator having no real interest - Trust assets not at risk – No evidence of mismanagement of trust property – No undertaking as to damages proffered - Application dismissed.

Cran (Administrator of Sher Furniture Pty Ltd) v Taylor [1996] VSC 196; CJV 33,445; BC9601711

Corporations – debentures – sale of shares – rectification of debenture – distinction between debenture and guarantee intended

Endresz v Whitehouse [1998] 3 VR 461; (1997) 139 FLR 359; (1997) 24 ACSR 208; (1997) 15 ACLC 936; [1997] VSC 23; BC9702797

Corporations - Takeovers - Acquisition of more than prescribed percentage of shares in company - Exception to prohibition - Charges under s11 and s53 of Companies (Acquisition of Shares) (Vic.) Code — Acquisition of more shares than permitted under "creep" provision (s15) — Time at which acquiring company became "entitled" to original 50.18% holding of shares — When company "proposes to enter into an agreement" etc. within meaning of para(b) of subs7(4) — Charges under Securities Industry (Vic) Code — Whether person causing company selling and buying to itself shares at above market price, with deferred delivery, creates false and misleading

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appearance of active trading in securities, within s124 of Code — Whether letter giving only partially accurate version of "clearing the market" before the said exchange of shares amounts to false and misleading statement likely to maintain market price of securities within s125 of Code — Whether director of controlled subsidiary able to claim information is "confidential".

Huon Valley Springs Pty Ltd, Re [1986] TasR 112; (1986) 10 ACLR 883; (1986) 4 ACLC 575; [1986] TASSC 45

Corporations – receivership – scheme of arrangement – proxies – form of - whether admissible – statutory majority and value – Companies Code ss 315(1), (4)(a)(i)

Immunosearch Pty Ltd, Re (1990) 2 ACSR 455; (1990) 8 ACLC 1031; [1990] VSC 406; BC9000686

Corporations – Registration – reinstatement application – former director – standing – discretion of the court – relevant considerations – Companies Code s 459(6) – Appeal from Master adjourning case – appeal competent

Jervois Mining Limited; Campbell v Jervois Mining Limited [2009] FCA 316; BC200902215

Corporations – Application to inspect books of a company – s 247A and s 198F of the *Corporations Act 2001* (Cth) – common law rights of inspection for directors – Company Register maintained electronically by agent – Register features live proxy count – good faith and proper purpose – company purpose and personal purpose – whether lobbying proxies proper purpose. *Corporations Act 2001* (Cth): ss 9, 174, 198F, 233, 247, 320

Jervois Mining Limited; Campbell v Jervois Mining Limited [2009] FCA 401; BC200903150

Corporations – Extraordinary General Meeting – Appointment of proxy – whether Chairman in breach of direction given by proxy-givers – validity of resolutions – s 250A(4)(c) of the *Corporations Act 2001* (Cth) – proxy form and contract construction – whether Chairman's intention construed as direction – Company Constitution – Common law duty of agency.

Lew v Coles Myer Limited & Anor (2002) 43 ACSR 432; [2002] VSC 535; BC200207302

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Corporations – annual general meeting – proxies – director seeking to inspect proxy votes – conditions of such inspection

Milburn v Pivot Limited (1997) 78 FCR 472; (1997) 149 ALR 439; (1997) 25 ACSR 237; (1997) 15 ACLC 1520; [1997] FCA 1039; BC9705076

Corporations - Corporate finance - Giving of financial assistance for acquisition of own shares - Application opposing giving of financial assistance - Whether company gave financial assistance in connection with purchase of shares in company by entering into dividend reinvestment plan under which provided undertaking that purchaser obtain certain value of shares.

Strategic Management Australia AFL Pty Ltd & Anor v Precision Sports & Entertainment Group Pty Ltd & Ors [2016] VSC 303

Corporations – Whether directors and officers of corporation had duty to ensure that income received from managing AFL players extended to the expiry of the player’s contract with the football club – Whether duty to ensure that Representation Agreements were co-terminus with Player Contracts - Duty of care and diligence s 180(1) *Corporations Act 2001 (Cth)* – Whether director and officer in breach of duty by failing to secure income stream - Duty of good faith s 181(1) *Corporations Act 2001 (Cth)* – Whether director and officer in breach of duty by failing to secure income stream - Use of position and information s 182(1) and 183(1) *Corporations Act 2001 (Cth)* – Whether director and officer used their position and information in breach of the sections - Fiduciary duty – Whether director and officer in breach of fiduciary duty – Whether compensation payable -

Oppression – Whether capital raising to fund litigation with consequent dilution of shareholding oppressive – Whether capital raising contrary to interests of members as a whole or unfairly prejudicial or unfairly discriminatory against a member – Sections 232(d) & 232(e) *Corporations Act 2001 (Cth)*

Contract – Representation Agreement – Construction – Whether agent entitled to Fee only during the Term of the Representation Agreement or for the entire duration of the Player Contract if it is longer - Employment Contract – Oral – Terms to be implied – Whether a term to use reasonable care and skill – Whether a term to act honestly and in good faith – Whether terms breached by employees by failing to secure income stream

Equity

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Acropol Stars Pty Ltd v Rysal-One Pty Ltd [1999] VSC 87; BC9901658

Equity - Injunctions – interim injunctions – principles – serious question to be tried – balance of convenience

Cherry Print Pty Ltd and Ors v Chateau Court Pty Ltd and Ors [2002] VSC 167; BC200202273

Equity - Injunctions – interlocutory – unpaid vendor holding securities – balance of convenience – injunction to restrain receiver and manager.

Commonwealth Bank of Australia v Milder Elfman Szmerling & Krycer [1998] CJV 45,410; BC9800411

Equity - Equitable estoppel - Whether bank estopped from making demand for repayment - Whether use by bank of letter outlining defendants' financial problems unconscionable conduct within meaning of s 51BA Trade Practices Act 1974 (Cth) – Receivers - Powers and duties - Duty to act in good faith - Whether receivers acted in good faith

Digicel (Fiji) Limited v Dickson International Trading Company Limited [2009] FJHC 278; HBC184.2009L

Equity – Interlocutory injunction application - Mandatory Injunction – principles – Fair Trading Decree (Fiji) – application to restrain unlocking of mobile phones – allegation of intentional interference with third party contracts – balance of convenience - whether damages sufficient remedy – *American Cyanide* the test in Fiji not *ABC v O'Neill*

Earth Synergy Pty Ltd and Anor v Red Earth Licensing Ltd [2002] VSC 325; BC200204886

Equity - Injunction - interlocutory injunction - balance of convenience - undertaking as to damages - inability of plaintiffs to secure undertaking as to damages.

Jewel Group Pty Ltd & Ors v Farrow Mortgage Services Pty Ltd & Ors [Pyramid Building Society] [1993] FCA 588; BC9305101

Equity - Specific performance of a number of agreements, declarations under provisions of the Trade Practices Act 1974 (Cth) as well as under the Fair Trading Act 1985 (Vic), relief under s87 of the Trade Practices Act and s41 of the Fair Trading Act - orders under a number of the provisions of the Corporations Law - interlocutory and final orders restraining a number of the respondents from entering into possession of or assuming control of the assets, property or undertakings of some of the applicants, and from

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interfering in the management of some of the resorts being developed in Queensland. Other relief sought includes an order for an enquiry pursuant to s536 and/or s538 of the Corporations Law into the administration

Lofts Property Developments Pty Ltd v Optus Vision Pty Ltd [1997] VSC 623; CJV 42,377; BC9707345

Equity - Equitable estoppel - Whether defendant induced plaintiff developer's false assumption - Plaintiff claimed defendant was estopped from denying it was bound to take a lease from plaintiff - Where plaintiff incorrectly assumed agreement for lease existed between it and defendant - Whether defendant encouraged plaintiff to maintain or to continue to hold assumption.

New Zealand Pacific Training Centre Limited v Training & Productivity Authority of Fiji [2008] FJCA 19 Nov 08

Appeal – Equity - Estoppel – Misleading and deceptive conduct – Fair Trading Decree 1995 (Fiji) – Administrative law – Alleged breaches by government authority – Appeal dismissed.

Pudney & Anor v Man GHH Logistics GMBH [1993] VSC 726; BC9304139

Equity - Equitable charge – consideration – promise to pay debt from a specified fund – sufficiency of evidence to support finding of the creation of a charge – corporation – control by non-director.

Robmatjus Pty Ltd & Anor v Violet Home Loans Australia Pty Ltd [2007] VSC 165; BC200704112

Equity - Injunctions – Application for freezing orders against defendant and non-parties – Relief, including ancillary orders, granted – Standard of proof - 'real case to be investigated' – Balance of convenience – Whether impecunious corporate plaintiffs should be required to support undertaking as to damages with security – *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*, Order 37A.

Sands Print Group Limited (Receiver & Manager Appointed) v. Jackson [2000] VSC 346; BC200005198

Equity - Equitable estoppel - Where alleged representation made that bank agreed to permit continued trading if companies placed in voluntary administration - Whether proceedings erroneous without consent of administrators or leave of court pursuant to s 440D(1) Corporations Law.

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The Big Four Pty Ltd v DaimlerChrysler Australia/Pacific Pty Ltd & Ors [2002] FCA 783

Equity - Injunctions – Trade Practices Act 1974 ss 51AC, 51ACA, 51AD, 51AE, 80, 82 - Franchise Code – failure to engage dispute resolution procedure in Code – serious question to be tried – balance of convenience

Insolvency

Anscorp Pty Ltd v GRS Nominees Pty Ltd [1994] FCA 963; BC9405668

Insolvency – Corporations Law - statutory demand - application to set aside demand - form of demand - substantial compliance with statutory form - application filed and served out of time - whether Court has power to extend time for making application - Corporations Law, ss 1094, 1095, 1322, Chapter 5, Pat 5.4, (ss 459 - 459 T) - Corporations Regulations, r 104, Form 509H

Avram Investments Pty Ltd, Re (1992) 8 ACSR 574; (1992) 10 ACLC 1583; [1992] FCA 467

Insolvency - Scheme of arrangement — Winding up — Resolution of question whether company should be wound up or whether order for meeting of creditors Consideration of relevant matters — Public policy and commercial morality considerations — Use of tax losses — *Corporations Law* ss 411(1), (2), 412

Avram Investments Pty Ltd (No 2), Re (1992) 10 ACLC 1747; [1992] FCA 538

Insolvency – scheme of arrangement – - classes of creditors - financial benefits of scheme compared with winding up - discounting of creditors' votes - s.411 – applicable considerations

Avram Investments Pty Ltd, Re (1992) 11 ACLC 224; (1992) 24 ATR 553

Insolvency - Recovery - Appeal against order for winding up - Scheme of arrangement in place - Relevant matters in exercise of court's discretion.

BM2008 Pty Ltd (in liq); Re [2010] VSC 337

Insolvency – Transfer of shares after resolution for the voluntary winding up of a company – Request for liquidator's consent to transfer – Liquidator gives conditional consent – Application to set aside condition of consent to transfer – Court's power to set aside condition where the condition is “not in the best interest of the company's creditors as a whole” – *Corporations Act 2001* (Cth) s 493A – Member's voluntary

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winding up – Declaration of solvency – Surplus of assets available for distribution after payment of debts in full – Whether a shareholder who is entitled to share in the surplus rateably is a “creditor” of the company for the purposes of section 493A – *Corporations Act 2001*(Cth), ss 493A, 501, 553A, 563A - Words and Phrases – Meaning of “creditors” in s 493A of the *Corporations Act 2001*

Brashs Limited, Re (1994) 15 ACSR 477; (1995) 13 ACLC 110; BC9406167

Insolvency - Deed of company arrangement - Application for court order that company not required to have words “subject to deed of company arrangement” after its name in public documents - Whether discretion of court to grant order under s 447A should be exercised.

Central Spring Works Australia Pty Ltd, Re: Tubemakers of Australia Ltd v McLellan (as Administrator) (2000) 34 ACSR 169; [2000] VSC 145; BC200002311

Insolvency - Removal of administrators - Whether reasonable apprehension of lack of independence of administrators such that they should be removed – Corporations Law s.447A, 448C

D'Aloia (as administrator of Smarter Way (Aust) Pty Ltd) v Jarvie (2000) 18 ACLC 289; [2000] VSC 16; BC200000630

Insolvency - Appointment of administrator - Appointment pursuant to charge - Whether applicants duly appointed as administrators pursuant to charge under s 436C(1) Corporations Law - Whether applicants established existence of charge within meaning of s 436C(1) Corporations Law

Deputy Commissioner of Taxation v Avram Investments Pty Ltd (1992) 9 ACSR 580; (1993) 11 ACLC 224; (1992) 24 ATR 553

Insolvency – winding up – scheme of arrangement in place – court’s discretion to refuse DCT application – balance between prima facie entitlement of petitioning creditor for winding up and supporting creditors for scheme of arrangement – interests of majority of creditors to be favoured – irrelevance of tax losses

Egankarra Pty Ltd v Vince (1990) 2 ACSR 463; [1990] VSC 163; BC9000846

Insolvency - Liquidators – costs – application against liquidator personally – meaning of ‘creditor’ – discretion of court to make order – Companies Code ss 377(5), 420(1)(b)

GF & GM Balsillie Pty Ltd v GF & GM Balsillie Pty Ltd [2001] FCA 1872; BC200108169

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Insolvency - administration - meeting of creditors irregularly convened - meeting of creditors irregularly adjourned - termination of administration - order made to regularise - Corporations Act 2001 (Cth) ss 435C, 436E, 437A, 439A, 443A, 443D, 443F, 447A, 471B

Iliopoulos v BM2008 Pty Ltd (in liq) [2010] HCATrans 326

Insolvency – High Court – Special leave application - does a shareholder, or a person capable of being a shareholder, lose the right to bring a derivative action under Part 2F.1A of the Corporations Act once a company is placed in liquidation, or should that be considered to be the ordinary rule, subject to exceptional and appropriate cases? - an unsuitable vehicle for the grant of special leave

Interbanca Pty Ltd, Re [1990] VSC 22; BC9000925

Insolvency - Winding up application – opposed – whether a bona fide dispute – relevant principles – threshold – profit and loss test and review of assets against liabilities

Java 452 Pty Ltd (Administrators Appointed) (No.2), Re [1999] VSC 273; BC9905371

Insolvency - Voluntary administration under Pt 5.3A Corporations Law - Taking possession of leased property - Whether to grant leave under s 440C Corporations Law to take possession of leased premises.

Java 452 Pty Ltd (Administrators Appointed), Re; ex parte Permanent Trustee Australia Limited v Stout (1999) 32 ACSR 507; [2000] ANZConvR 555; (1999) VConvR 54-606; [1999] VSC 252; BC9904116; [(2000) 8 InsolvLJ 43]

Insolvency – Administration – Property – Lease determined after beginning of administration – Whether s 440C application equivalent to re-entry – whether leave to take possession should be granted – Corporations Law ss 440C, 441F, 444F(4). Landlord and Tenant – Lease – Termination of lease – re-entry – whether s 440C application equivalent of re-entry – Re-entry by demand for possession – Corporations Law s 440C – Property Law Act 1958 s 146

Konica Australia Pty Ltd v Arolab Flashpoint (Australia) Pty Ltd (DCA) (1999) 17 ACLC 1651; [1999] VSC 257; BC9904418

Insolvency - Arrangements and reconstructions - Deed of company arrangement - Prejudice - Notion of motion by creditor of company seeking to set aside resolution passed at meeting of creditors of company and seeking consequential relief pursuant to s 600A(2) Corporations Law - Whether passing of resolution contrary to interests of creditors as whole.

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Lin Creations Pty Ltd; Lin Creations Pty Ltd v Morton, Re [1999] VSC 490; BC9908234
Insolvency - Administration - Fraudulent charge - Whether court should interfere in administration of company

Marlan Financial Services Pty Ltd, Re; Marlan Financial Services Pty Ltd v New England Agricultural Traders Pty Ltd (1999) 33 ACSR 259; [1999] VSC 435; BC9907709
Insolvency - Application to set aside statutory demand - Whether effective service of notice of motion and supporting affidavit - Appeal against Master's decision dismissing appellant's motion to set aside statutory demand on basis of appellant's failure to comply with provisions of Service and Execution Process Act 1992 (Cth) (SEPA).

Object Design Inc v Object Design Australia Pty Ltd (1997) 78 FCR 60; (1997) 24 ACSR 678; (1997) 15 ACLC 1356; [1997] FCA 917; BC9704183
Insolvency - Whether administrator able to be appointed to company to which provisional liquidator appointed.

Perth Freight Lines Pty Ltd v BM2008 Pty Ltd (in liq) [2011] VSCA 62
Insolvency – Statutory demand – Application to set aside – Whether ‘offsetting claim’ – Whether ‘some other reason’ – ‘Offsetting claim’ arising from alleged entitlement to proportionate share of distributable surplus of creditor company upon completion of voluntary winding up – Alleged entitlement said to arise from transfer of equitable interest in shares of creditor company – No transfer of equitable interest in shares where transfer void by operation of s 493A(1) of the Corporations Act 2001 (Cth) – Decision below not shown to be attended with any doubt – Corporations Act 2001 (Cth) ss 459G, 459H, 459J, 493A.

Rodgers v CJS Panels Pty Ltd [2001] VSC 470; BC200108008
Insolvency - appeal against winding up order - standing to bring appeal. *Corporations Act 2001* - ss.471A, 482 - Costs - application hopeless and high-handed - costs sought against both solicitor and client - indemnity costs against client.

SpaCorp Australia Pty Ltd v Myer Stores Ltd (2001) 19 ACLC 1270; [2001] VSCA 89; BC200103084
Insolvency - Statutory demand - Genuine dispute - Appeal against decision of trial judge refusing application to set aside statutory demand - Advance to company setting up

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business in department store - Construction of agreement - Whether moneys owing on termination of agreement - Whether genuine dispute as to existence or extent of debt.

SpaCorp Australia Pty Ltd v Myer Stores Ltd (No 2) [2000] VSC 484; BC200007178

Insolvency - dispute between parties resulting in defendant serving statutory demand on plaintiff claiming entitlement to repayment of monies provided to plaintiff - Plaintiff disputed defendant's entitlement to repayment - Master set aside statutory demand - Whether genuine dispute about debt existed.

SpaCorp Australia Pty Ltd v Myer Stores Ltd [2000] VSC 469; BC200006748

Insolvency - Corporations Law, ss.459E, 459G and 459H - setting aside statutory demand - construction of agreement - whether monies owed - arguable case.

Stout & Scales v Permanent Trustee Australia Limited [1999] VSCA 168; BC9906563

Insolvency - Administration - Execution of deed of company arrangement - Discretion to extend time - Application for extension of time to appeal against refusal of restraining order, and for extension of time for execution of deed of company arrangement - Whether execution of deed of company arrangement subject to time limits of Corporations Law.

Thirteenth Corp Pty Ltd v State & ors (2004) 50 ACSR 425; [2004] VSC 320; BC200405683

Insolvency - insolvent trading - creditor's claim - application to summarily dismiss proceeding - whether creditor had arguable case that its debt was wholly or partly unsecured - Practice and Procedure - application for security for costs - delay - nature of case - circumstances justifying order

VFS Group Pty Ltd; Re (& Re Perth Freightlines Pty Ltd) [2010] VSC 396 (appealed)

Insolvency – Application to set aside statutory demand – Offsetting claim – Order by Associate Judge varying the statutory demand and extending time for compliance with the demand for a period of 3 weeks – Appeal against orders – Time for compliance with the demand expired before appeal due to be heard – Orders not authenticated – Orders recalled by the Associate Judge - Associate Judge made a new order extending time for compliance with the demand to a date after the appeal was to be heard – Whether the Associate Judge had the power to extend the time for compliance after the period for compliance had expired – Whether new order the “last order” for the purposes of s 459F(2)(a)(i) of *Corporations Act 2001* (Cth) – Whether new order “finally

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determined” the application to set aside the statutory demand for the purposes of s 459F(2)(a)(ii) of *Corporations Act 2001* (Cth) – Associate Judge had no power to make the new order – *Supreme Court (General Civil Procedure) Rules* r 59.02 – *Corporations Act 2001* (Cth) ss 459C, 459F, 459G, 459J.

VFS Group Pty Ltd v BM2008 Pty Ltd [2010] VSCA 277

Insolvency - statutory demand – setting aside – Orders by Associate Judge varying statutory demand and compliance with the demand expired before appeal due to be heard – Orders not authenticated – extending time for compliance with the demand by 3 weeks – appeal against orders – Time for Orders recalled by Associate Judge – New orders made extending time for compliance with the demand to a date after the appeal was to be heard – Whether Associate Judge acted within power in extending time for compliance – Whether erroneous assumption made by Associate Judge as to legal consequences of first set of orders – Inherent jurisdiction of Court to recall and replace orders – *Supreme Court (General Civil Procedure) Rules* 2005, rr 36.07, 59.02(1), 60.01(1), 77.01(1), 77.06(8) – *Corporations Act 2001* (Cth) ss 459F(2), 459G, 459J.

VFS Group Pty Ltd v BM2008 Pty Ltd (no 2) [2010] VSC 593

Insolvency – Application to set aside a statutory demand — Whether offsetting claim – Whether “some other reason” - Alleged cross-claim arising by virtue of an entitlement to share in a distribution of company surplus upon completion of a voluntary winding up – Entitlement accruing under a transfer of shares - Whether transfer of shares void under s 493A of the *Corporations Act 2001* (Cth) – Whether equitable interest in distributable surplus– Assets of company said to include causes of action against former directors and related company – *Corporations Act 2001* (Cth) ss 459G, 459J, 493A – *Supreme Court (Corporations) Rules* 2003 r 16.5(1) – *Supreme Court (General Civil Procedure) Rules* 2005 r 77.06(7) – *Corporations Regulations 2001* (Cth) 5.6.70

Willmott Forests Ltd [2012] VSC 29

Insolvency – Liquidation – Disclaimer of Onerous Property – Where the plaintiff is in liquidation – Where the plaintiff acts as the responsible entity and manager of registered and unregistered managed investment schemes operated on freehold land and land leased by the plaintiffs to the members of the schemes – Liquidator of the plaintiff wants to sell the freehold unencumbered by the leases – Whether the liquidators disclaimer of the leases would have the effect of extinguishing the Growers’ leasehold estate or interest in the subject land – *Corporations Act 2001* (Cth) ss 477, 511, 568

Willmott Forests Ltd (No 2) [2012] VSC 125

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Insolvency – Managed Investment Schemes – Winding up - Application under section 511 of the corporations act for judicial advice - Where the company in liquidation is the responsible entity and manager of registered and unregistered managed investment schemes Where the schemes are forestry operations conducted on land which is either freehold land owned by the company or leasehold land that the company leases to the members of the schemes Where the liquidators are realising the assets of WFL in the course of winding up the company - Where the liquidators have entered into sale contracts for the land with the trees grown on the land which are the property of the members of the schemes where the contracts are conditional upon the giving of clear title to the land unencumbered by the rights of the members of the scheme, including their rights with respect to the trees application by the liquidators under s 511 of the *Corporations Act 2001 (Cth)* for approval for entering into and completing the contracts Whether the liquidators acted properly and reasonably in conducting the sale process Whether the liquidators are justified in terminating and disclaiming the agreements that govern the schemes conducted on the land to be sold Where the sale contracts provide for the allocation of the sale proceeds between the liquidators and receivers appointed over the land to be sold Whether the liquidators are justified in allocating the sale proceeds in the manner proposed between themselves and the receivers based on the value of the land to be sold (excluding the trees) Whether the liquidators are justified in allocating the sale proceeds amongst the growers based on the value of the trees sold with the land on a scheme-by-scheme basis in the manner proposed - *Corporations Act 2001 (Cth)* s 511

Jurisdiction And Powers Of Court Under Section 511 of the Corporations Act - Where substantive rights of third parties affected by the orders and directions sought under s 511 Whether the Court has the power under s 511 of the Corporations Act to determine third party rights Whether the third parties must be joined as parties to the proceeding Factors relevant to the exercise of power to give judicial advice under s 511 Whether the determination of the questions in the winding up of WFL will be just and beneficial *Corporations Act 2001 (Cth)* ss 479(3), 511(1),(2) *Trustee Act 1925 (NSW)* s 63 *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*, r 16.01

Managed Investment Schemes - Whether any of the land owned by or leased by WFL that was used by the schemes is scheme property Whether the land is held on trust by WFL for the Growers in any of the schemes *Corporations Act 2001 (Cth)* ss 601FC, 601FC(2), 601EB, 601EE

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McVeigh & Anor v Linen House Pty Ltd & Rugs Galore Australia Pty Ltd & Ors [1999] 3 VR 394; [1999] VSCA 138; BC9905821

Legal practitioners - Ethics - Conflict of duty - Restraint from acting - Whether firm of solicitors should be restrained for acting against former client - Whether Court of Appeal had jurisdiction to restrain solicitors from acting in appeal - Whether court could be satisfied that breach of duty real, not merely fanciful possibility.

Planning & Environment

Beach Club Port Douglas Pty Ltd v Douglas Shire Council [2005] QP&E Cairns 16 May 2005

Planning and Environment - Declarations – Douglas Shire Planning Scheme – meaning and calculation of gross floor area – s. 4.1.21(1)(b) *Integrated Planning Act*

Cairns City Council v Xontan Pty Ltd [2001] QSC 192; BC200103515

Planning and Environment - practice and procedure - Judgments – declarations – principles to be applied on evidence led by consent of parties

Carwoode Pty Ltd v Cardinia SC (2008) 31 VPR 247; [2008] VCAT 1334

Planning and Environment - EPBC Act and Tribunal jurisdiction, futility, Ministerial call-in powers, Freeway service centres, excision of lot in Farming Zone, access to land in a public acquisition overlay, Casey-Cardinia Growth Area, interpretation of Clause 52.30, rural v urban freeway, Freeway Service Centre- Design Guidelines, Growling Grass Frog, natural justice, Tribunal inspection procedures, *Charter of Human Rights and Responsibilities Act 2006*.

Cohen v Macefield Pty Ltd & Ors [2010] QCA 95; BC201002563

Environmental prosecution - Appeal - Magistrates – Jurisdiction And Procedure Generally – Procedure – Information And Complaint – Form And Sufficiency – *Duplicity And Uncertainty* – In General And Power Of Amendment – where first and second respondent charged in the same count of damaging and permitting to be damaged protected vegetation – where first and second respondent found guilty as charged – where first and second respondent agreed to the formulation of the charge – where first and second respondent suffered no unfairness in the way the matter proceeded – where first and second respondent claimed, on appeal, that the charge and convictions were duplicitous – whether an objection based on duplicity can be raised for the first time on appeal – whether the section on which the charge relied created two separate offences

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or one offence with several characteristics – whether applicant’s complaint duplicitous – whether the *Justices Act 1886* (Qld) operated to save the *duplicitous complaint* – whether the first and second respondents’ convictions duplicitous – *whether Court of Appeal should order the amendment of the convictions*. Local Government – Legal Relationships And Proceedings – Procedure Relating To Legal Proceedings By And Against Councils – *Authority To Prosecute Or Commence Proceedings* – where first and second respondent found guilty of damaging and permitting to be damaged protected vegetation – where the *Local Government Act 1993* (Qld) provided that the act of damaging protected vegetation had to occur within one year of the complaint – where damage meant the destruction of vegetation or interference with its natural growth – where no findings were made by the Magistrate that damage occurred within the limitation period – whether damage occurred within the limitation period – whether the matter should be remitted to the Magistrates Court for further hearing. Magistrates – Jurisdiction And Procedure Generally – Procedure – Orders And Convictions – Particular Orders – Orders For Costs – *Costs Against Prosecutor* – Informant Or Complainant – Discretion Of Court – where proceedings against the third respondent in the Magistrates Court were unsuccessful – where third respondent sought a costs order in her favour – where Magistrate found that the third respondent’s conduct had precluded the availability of such an order – where third respondent successfully appealed this order – whether District Court judge on appeal erred in substituting a costs order in favour of the third respondent

Curtain v Eacham Shire Council [2006] QPEC Cairns 164

Planning and Environment – Reconfiguration and refusal by local council – *Integrated Planning Act 1997* Qld – Eacham Shire Council Planning Scheme – conflict – sufficient planning grounds

Debray v Cohen [2008] QDC 276

Planning and Environment - Environmental offences - Appeal – Magistrates Court – prosecution by local authority – defendant successful – costs – whether defendant unreasonably declined an opportunity before charge was laid to explain defendant’s version of events – whether explanation could have avoided prosecution – whether defendant brought suspicion on herself – whether defendant should have been deprived of costs. *Justices Act 1886* Sections 158(1) and 158A

Macefield Pty Ltd v Cohen [2008] QDC 275

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Environmental prosecution - Appeal – Magistrates Court – prosecution by local authority – individual and corporate defendants – separate consideration of case against each required – limitation period for prosecution – within 1 year after the commission of the offence – whether evidence established offence within limitation period – duplicity – damaged or permitted damage to protected vegetation – corporate liability – power to amend complaints at summary hearing – proof of local law. *Local Government Act 1993* Sections 874, 898, 1080, 1117 *Justices Act 1886* Sections 43, 47, 48, *Local Law 6* (Vegetation Management) (Gold Coast City Council) Sections 3, 24, *Interim Local Law 6* (Gold Coast City Council) Sections 5, 30, *Statutory Instruments Act 1992* Section 7, *Evidence Act 1977* Section 43

Page v Douglas Shire Council [2005] QPEC 40

Planning and Environment - Appeals - Queensland - Hearing de novo - principles - grounds of appeal stand as pleadings - must identify issues to be tried with particularity - procedural fairness

Silverpeach Pty Ltd & anor v Cairns City Council & Buchans Point Pty Ltd [2009] QPELR 306; [2008] QPEC 109

Planning and Environment – objector appeal against development approval – Douglas Shire Council Superseded Planning Scheme – conflict – whether sufficient planning grounds justified approval over objection – grounds satisfied – appeal dismissed.

Simmons v Yarra CC [2014] VCAT 15

Planning and Environment – Section 77 of the *Planning and Environment Act 1987* - Yarra Planning Scheme - Mixed Use Zone - Heritage Overlay - Environmental Audit Overlay - Sale and consumption of liquor - Increase patron numbers and hours of operation - Dispersal of commercial activities from Brunswick Street; Amenity of nearby dwellings – Noise – Traffic – Parking - Public safety

Strasburger Enterprises (Properties) P/L V Gold Coast City Council [2010] QCA 153; BC201004103

Planning and Environment – Environmental Planning – Development Control – Consents, Approvals And Permits – Validity – Other Matters – where second applicant is the owner and first applicant the lessee and operator of a service station – where service station has been conducted pursuant to a Town Planning Permit issued in 1987 under the now repealed *Local Government Act 1936* (Qld) – where no other permit or

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approval for the storage of large amounts of petroleum on the site was ever issued – where respondent sent an enforcement notice to first applicant in 2005 requiring it to apply for a development permit under the Integrated Planning Act 1997 (Qld) in order to carry out assessable development – where respondent issued a decision notice in 2007 approving first applicant’s application subject to conditions – where cost of complying with the conditions would be considerable – where applicants applied for declarations in the Planning & Environment Court against the development permit – where applicants now appeal against the dismissal of that application – whether the 1987 permit operates as a development approval for the environmentally relevant activity in the form of a development permit for the purposes of the Integrated Planning Act 1997 (Qld) and the Environmental Protection Act 1994 (Qld) – whether the primary judge misconstrued the relevant legislation – whether the operation of the service station constitutes a material change of use under s 1.3.5 of the Integrated Planning Act 1997 (Qld) and so amounts to assessable development – whether the 2007 development permit is valid. Acts Interpretation Act 1954 (Qld), s 20A Environmental Protection Act 1994 (Qld), s 40, s 624, s 624(2)(b), sch 4 Environmental Protection (Interim) Regulation 1995 (Qld), s 4.1(1), s 63 Environmental Protection Regulation 1998 (Qld), s 5, s 5(2), s 64 Integrated Planning Act 1997 (Qld), s 1.3.5(c), s 4.3.1, s 6.1.23, s 6.1.23(2), s 6.1.23(2), s 6.1.24, sch 8, sch 10 Local Government (Planning and Environment) Act 1990 (Qld), s 8.10(8)

Practice & Procedure (inc Criminal & Family)

Blondell & Assoc Pty Ltd v Ilouri Nominees Pty Ltd [2008] VSC 358; BC200808073
Practice and procedure – leave to appeal against a costs order of the Master – principles to be applied

Brown v AEP Belgium SA [2004] VSC 255; BC200404636
Practice and procedure - Leave to appeal - stay and injunctive relief pending application - principles to be considered - *Victorian Civil and Administrative Tribunal Act* s 148 - *Transfer of Land Act* ss 76 and 78

Cha Van Pham & Ors v Australia & New Zealand Banking Group Limited [2002] VSCA 206; BC200207647

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Appeal - Late application to amend Notice of Appeal - Discretionary considerations - Fresh evidence - Costs thrown away - Application refused. Fresh evidence - Availability at trial and character of evidence - Reasons for non-production at trial - Credibility of fresh evidence - Findings of fact - When challengeable on appeal - Inferences available from non-calling of witness. Guarantee and indemnity - Contract of guarantee - Nature of disclosure necessary to surety - Whether non-disclosure.

Chariah Resources Limited v Tricontinental Corporation Limited & Johns (1991) VSC; BC91000686

Practice and procedure – Criminal law -- Trial - application to stay civil trial whilst criminal charges yet to be heard – applicable principles

Commercial Credit Co-Operative Limited v Jedan Pty Ltd & Ors (1993) VSC; BC9300952

Practice and procedure - Judgments and orders – amending, varying setting aside – substitution of plaintiff by statute – slip rule r.36.07 – r.36.01

Glowtide Pty Ltd v Oceanic Life Ltd [Pyramid] (1996) 19 ACSR 471; [1996] FCA 1390; BC9601287

Practice and procedure - Courts and Judges - cross-vesting legislation - separate proceeding in Supreme Court of New South Wales - application to transfer proceeding and matter in the Federal Court to Supreme Court of New South Wales - whether the "rival" proceedings in the two courts constitute one "matter" - consideration of whether the matter in the Federal Court is the defence to the proceeding in the Supreme Court - consideration of whether the matter is essentially a contractual dispute with intermingled but incidental and ancillary Trade Practices Act claims - it is in the interests of justice that the matter be heard in the Supreme Court of New South Wales.

Hoddinott v Willmott Forests Limited [2012] VSC 282

Practice and procedure - Costs – Orders agreed without adjudication on the merits – Relevant principles for an award of costs in a compromised proceeding – Costs order made – *Corporations Act 2001 (Cth)*, s 601ND

Insolvency Litigation Fund Pty Ltd v Advanced Communications Technologies (Aust) Pty Ltd [2004] VSC 228; BC200404524

Practice and Procedure - receiver to protect property at risk - whether sufficient in the property - present disposal of future rights - whether receiver and manager can confer on creditor priority over debenture holder

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Iphostrou & Iphostrou and Ors (No. 2) [2011] FamCA 84

Practice and procedure – Courts and Judges – Perceived bias - Recusal – application dismissed

Iphostrou & Iphostrou and Ors (No. 3) [2011] FamCA 138

Practice and procedure - Family Law – Costs - Costs against legal practitioner - Indemnity costs refused - Family Law Act 1975 (Cth)

Iphostrou & Iphostrou and Ors (No. 4) [2011] FamCA 220

Practice and procedure - Family Law - Courts and Judges – Bias – Disqualification – Where the applicants requested that the primary judge recuse himself on the ground of apprehended bias in the form of prejudgment – Where prior to the application separate applicants had brought an application for disqualification – Whether the primary judge should recuse himself due to apprehended bias - Family Law Act 1975 (Cth), ss 79, 80, 106B

Jianshe Southern Pty Ltd (ACN 007 031 905) v Turnbull Cooktown Pty Ltd (ACN 069 894 275) (No 1) [2007] FCA 489; BC200705883

Practice and procedure - Application for summary judgment – applicant alleges breaches of *Trade Practices Act 1974* (Cth) and breach of contract – applicant seeks summary judgment for damages to be assessed on part of claim only – where applicant alleges an oral agreement between applicant and first respondent – where respondents allege oral agreement with different terms – whether relevant part of claim can be determined with certainty without determination of factual issues at trial – where applicant makes alternative claim for declaratory relief – whether declaratory relief should be granted in the circumstances – whether application for summary judgment should be brought pursuant to O 20 r 1 of the *Federal Court Rules* or s 31A of the *Federal Court of Australia Act 1976* (Cth).

Jianshe Southern Pty Ltd (ACN 007 031 905) v Turnbull Cooktown Pty Ltd (ACN 069 894 275) (No2) [2007] FCA 903; BC200704540

Practice and procedure - Costs – indemnity costs – application by respondent for indemnity costs – where applicant failed to comply with orders of Court requiring applicant to file certain documents in preparation for trial – where respondents brought notice of motion seeking orders in relation to applicant's non-compliance – where commencement of trial adjourned – where applicant's failure to file documents the principal reason for adjournment of trial – circumstances in which Court may vary

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ordinary rule as to costs – whether applicant’s conduct warrants special order as to costs. Costs – application for costs to be paid before conclusion of principal proceeding – whether appropriate to depart from general rule in O 62, r 3(3) – guillotine orders – where respondents seek order pursuant to O 35A that proceedings be stayed or dismissed if applicant does not comply with another order of Court – whether such order appropriate in circumstances – relevant principles.

Jianshe Southern Pty Ltd (ACN 007 031 905) v Turnbull Cooktown Pty Ltd (ACN 069 894 275) (No3) [2007] FCA 903; BC200704540

Practice and procedure - costs – security for costs – where respondents seek security for costs against applicant company – where significant and avoidable delay in bringing application for security – where trial imminent – whether delay in bringing application will prejudice applicant if security is ordered – where applicant is impecunious company – where no evidence put forward about assets or liabilities of persons standing behind applicant company – where cross-claim on foot – where respondents indicate that if security is ordered cross-claim will be abandoned – whether estimate by respondents’ solicitor of respondents’ future costs admissible – relevant principles on application for security for costs.

KC Parksafe Pty Ltd v SEAA Enterprises Pty Ltd ([1994] VSC 519; BC9406264

Practice and procedure – third party discovery application – costs of compliance

MLW Technology Pty Ltd v May (No. 4) [2003] VSC 293; BC200304423

Practice and procedure - Costs - where nominal damages only are obtained by the plaintiff - where defendants' defences and counterclaims substantially failed.

Nguyen v DPP [2014] VSC 633

Criminal Law – Bail application – Exceptional circumstances – Considerations - Bail Act 1997, ss 4(2)(aa)(i), 4(2)(d)(i)

Platt v Morris Appel [1998] VSCA 48; BC9805375

Practice and procedure - Discovery of documents - Application for discovery refused - Further application after amendment of statement of claim - Documents discoverable by reason of amendment Supreme Court Rules, R.29.08

PSL Industries Ltd & Ors v Simplot Australia Pty Ltd (2003) 7 VR 106; [2003] VSCA 7; BC200300607 {assocd -*Agtrack (NT) Pty Ltd v Hatfield* (2003) 7 VR 63; [2003] VSCA 6}

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Practice and procedure - Pleadings - Amendment to pleadings - Amendment claiming breach of s.52 of the Trade Practices Act 1974 after expiration of limitation period in s.82(2) of the Act - Whether inconsistency for purpose of s.109 of the Constitution between s.82(2) and s.34 of the Limitation of Actions Act 1958 and r.36.01(6) of the Rules of Court - Whether s.82(2) provides "otherwise" for the purposes of s.79(2) of the Judiciary Act 1903 - Whether repeal of Fair Trading Act 1985 (Vic.) by Fair Trading Act 1999 abolished potential claims through breach of s.11 of Fair Trading Act 1985 - Whether potential claim for breach of s.11 of Fair Trading Act 1985 prosecutes "accrued rights" at time of its repeal for the purposes of s.14(2)(e) of the Interpretation of Legislation Act 1984 - Constitution Act, s.109, Judiciary Act 1903 (Cth) ss.39(2), 79, Trade Practices Act 1974 (Cth) ss.82(1)(2), Limitation of Actions Act 1958 (Vic.) s.34, Rules of Court, r.36.01(6).

REMM Construction (SA) Pty Ltd v Allco Newsteel Pty Ltd [1991] SASC 3100

Practice and procedure - application by plaintiff for order for early trial and separate trials of causes of action - plaintiff not having provided security for costs of fifth, sixth and seventh defendants pursuant to order of Master - all defendants apart from first defendant joined in proceedings pursuant to order under R.27 - preliminary objection that proceedings against all defendants stayed by virtue of R.100.03.

Sartori v BM2008 Pty Ltd (in liq) & Ors [2010] FCA 1160

Practice and procedure – assignment of choses in action – joinder of assignees with assignor -joinder of parties – principles to be applied – amendment of application and statement of claim– s 175 Corporations Act 2001 – costs.

Strategic Management Australia APL Pty Ltd & Anor v Precision Sports & Entertainment Group Pty Ltd & Anor [2015] VSC 717

Practice and procedure - Open justice principle - Exceptions - Privacy and Confidentiality - Countervailing considerations - Administration of Justice - Inherent jurisdiction of the Court - *Open Courts Act 2013*

The Beach Club Port Douglas Pty Ltd v Page [2005] QSC 195; BC200505051

Practice and procedure - Pleadings - Negligence – duty of care – reasonable foreseeability of damage – where economic or financial loss – where claim made for damages for negligent commencement of appeal by applicant – where respondent asserts applicant owed it a duty of care regarding commencement of appeal - where respondent asserts appeal had no reasonable prospects of success – whether duty of

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care exists between parties contemplating commencement of civil proceedings – whether damages recoverable from a party for loss suffered due to commencement of claim – where finality in litigation an issue

Timbercorp Finance Pty Ltd (In Liq) v Allan [2016] VSC 481

Practice and procedure– Service of originating process by agreement – Service interstate – Whether notice under *Service and Execution of Process Act 1992* (Cth) ('SEPA') required – Whether writ validly served – Whether agreement for service constitutes a waiver of SEPA notice requirement – Service not effective.

Extending validity of writ – Whether good reason shown to extend validity of writ for service – Technical deficiency due to oversight in omitting SEPA notice – Plaintiff made reasonable but unsuccessful efforts to serve the Defendant – Good reason to extend writ shown.

Twenty-First Larena Pty Ltd, Re: Maximova v Goodin [2010] VSC 84; BC201001471

Practice and procedure – exercise of power to dismiss summarily where plea of *res judicata* substantiated – estoppel – *res judicata* – settlement of earlier proceeding – action struck out with a right of reinstatement in the event of failure to pay settlement sum – compliance with settlement terms – conclusive determination of rights and liabilities in earlier proceeding – finality of order for the purposes of *res judicata* – application of principles of *res judicata* to consent order – where different causes of action in later proceedings – whether cause of action is substantially the same in subsequent proceeding.

Zorita Nominees Pty Ltd & Ors v Australia & New Zealand Banking Group Limited [1995] VSC 396; BC9503849

Practice and procedure - Whether claim for damages based on duty owed by defendant to plaintiff constitutes a new claim barred by effluxion of time – Whether damages claim authorised by the notice of contribution.

Torts

The Beach Club Port Douglas Pty Ltd v Page [2005] QCA 475; [2006] 1 Qd R 307; (2005) 143 LGERA 180; (2005) Aust Torts Reports 81-823; BC200510860

Appeal - Torts – where economic or financial loss – defendant objected to development application of plaintiff developer and lodged appeal in the Planning and Environment

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Court against the council decision granting the development permit – plaintiff claimed damages for ‘negligence’ – plaintiff alleged that defendant had breached duty of care not to appeal without properly or reasonably assessing whether the development qualified for a permit – circumstances where person may lawfully and deliberately cause economic harm to another – whether, apart from malicious prosecution, a duty of care in negligence is owed by a litigant for negligent conduct of litigation that causes loss to the plaintiff - *Integrated Planning Act 1997* (Qld), s 4.1.10, s 4.1.11, s 4.1.23, s 4.1.28(1) (b), *Planning and Environment Court Rules 1999* (Qld), r 3(2) r 20(2)(b) *Uniform Civil Procedure Rules 1999* (Qld), r 149(1)(b), r 171(1)(a), r 293.

Trade Practices

Energy Conservation Systems Pty Ltd & Lighting Technology Pty Ltd v Kelstrom Pty Ltd & ors [1992] FCA 623; BC9203896

Trade Practices - misleading and deceptive conduct - s 52 Trade Practices Act 1974 - statements as to extent of installation of lighting control systems - whether untrue - whether misleading - understanding of reasonable reader - use of formula to estimate extent of respondents' installations — absence of empirical evidence — onus of proof of falsity of statement. Trade Practices Act 1974 s 52

Freeman Cosmetic Corporation v Jenola Trial Pty Ltd [1993] FCA 505; (1993) ATPR 41-270; BC9305088

Trade practices - Misleading or deceptive conduct - Strikingly similar get-up of products - Products sold at different outlets - Whether consumers would be misled - Entitlement to injunctive relief - Tort - Passing off - Strikingly similar get-up of products - Entitlement to injunctive relief.

Simplot Australia Pty Ltd v PSL Industries Ltd & Ors [2001] VSC 419; BC200107200

Trade Practices - Sale of business - claims under Trade Practices Act 1974 (Cth), Fair Trading Act 1985, in contract and at common law - application for leave to amend to rely upon pre-contractual conduct of defendants - whether statement of claim in original form sufficiently raised the claim the subject of application - whether the court should consider if the claim the subject of application would be statute-barred - whether leave to amend could be granted in light of s. 82(2) Trade Practices Act and s. 37(2) Fair Trading Act - application of R. 36.01(6) of Chapter 1 - whether plaintiff had an acquired or accrued right under the Fair Trading Act 1985 at the time of its repeal on 1 September 1999 - Interpretation of Legislation Act 1984, s. 14(2)(e).

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The Big Four Pty Ltd v DaimlerChrysler Australia/Pacific Pty Ltd & Ors [2002] FCA 783

Trade Practices - Injunctions – Trade Practices Act 1974 ss 51AC, 51ACA, 51AD, 51AE, 80, 82 - Franchise Code – failure to engage dispute resolution procedure in Code – serious question to be tried – balance of convenience

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