

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

### Today's Cases

**Client legal privilege** – application for production of documents – see *ACCC v Trading Post Australia* (I, B)

**Workers compensation** – whether serious injury established – see *Church v Echuca Regional Health* (I, B)

**Privilege against self-incrimination** – see *Eizenberg v Eizenberg* (I, B, C)

**Variation of community scheme** – specific performance of related contracts – see *Neighbourhood Association v Watson* (B, C)

**Costs** – will – application to restrain executor – *McCool v McCool* (B)

**Contract** – equitable estoppel – *Di Pietro v Basjo Catering* (B)

**THIS WEEK MARKS THE RETIREMENT OF GLEESON CJ FROM THE HIGH COURT AND THE COMMENCEMENT OF FRENCH CJ ON THE HIGH COURT:**

In *Benchmark* today, we highlight one of the last Judgments of French J (as His Honour once was): see *Gudjala People #2 v Native Title Registrar*. It is a very interesting Judgment and of value to all practitioners in the area of native title.

There have been a large number of speeches recently marking the retirement of Gleeson CJ. At *Benchmark*, we thought it appropriate to record His Honour's thoughts on case notes (in this a head note in the Commonwealth Law Reports).



From the transcript of the Special Leave hearing in *Zorom Enterprises Pty Limited (In Liquidation) v Zabow* [2007] HCA Trans 800 (14 December 2007):

MR WALKER: Your Honours, a glance at the headnote of this Court's decision in *State of New South Wales v Lepore* [2003] HCA 4; (2003) 212 CLR 511 makes good the proposition that there are strands which are not obviously all running in the same direction in this Court concerning the guidance to be applied for the equivalent of the jury decision in relation to vicarious liability for what is not likely to be reduced in frequency, namely, illegal outright brutal or criminal conduct by those who are employed.

GLEESON CJ: There are some cases where people who write headnotes deserve a medal, *Perre v Apand* is one that comes to mind. Even so, Mr Walker, overenthusiastic crowd control by security people has been referred to, has it not, as a case that is different from *Deatons v Flew*?



## Monday 1 September 2008

### **Gudjala People # 2 v Native Title Registrar [2008] FCAFC 157**

Full Federal Court of Australia

French, Moore & Lindgren JJ (in Sydney, heard in Brisbane)

Native title – expert evidence - west north west of Charters Towers - sufficiency of asserted factual basis for native title rights & interests claimed – – review of Registrar’s appeal allowed – detailed consideration of legislation & case law - an interesting joint judgment.

[Gudjala People #2](#) (I, B, C)

### **Australian Competition & Consumer Commission v Trading Post Australia Pty Limited (ACN 001 821 156) & Google Inc.**

[2008] FCA 1298

Federal Court of Australia

Tamberlin J (in Sydney)

Trade Practices Act 1974 (Cth) - production of documents under s157 – second respondent Google seeking production by the applicant of five letters written to the solicitors for the ACCC by solicitors for the first respondent Trading Post – first respondent has reached settlement with the ACCC & proceeding is no longer continued against it - relationship of s157 with principles of legal professional privilege – application for production dismissed - leave granted to ACCC to amend pleadings & file Second Further Amended Statement of Claim.

[Australian Competition and Consumer Commission](#) (I, B)

### **Neighbourhood Association DP 285249 v Watson [2008] NSWSC 876**

Supreme Court of New South Wales

Biscoe J

Access to Neighbouring Land Act 2000 (NSW) - Community Land Development Act 1989 (NSW) - claims for variation of a community development scheme & related development contracts - also for specific performance & damages for breach of those contracts – eighty-five berth houseboat marina on Deep Creek near Moama (in New South Wales) & Echuca (in Victoria) – installation of electrical connections - one of the proceedings in the Supreme Court, the other in Land & Environment Court – proceedings heard together by Biscoe J as an acting judge of former & judge of the latter.

[Neighbourhood Association DP 285249](#) (B, C)



**Pact Properties Pty Limited v APF Commercial Pty Limited [2008] NSWSC 889**

Supreme Court of New South Wales

McDougall J

Sales agreement - variation agreement - Property Stock & Business Agent Act 2002 (NSW) - plaintiff carrying on property management business - it agreed to sell that business to first defendant - agreement as varied provided for purchase price to be paid in two instalments - first instalment was paid - calculation of retention amount - calculation of purchase price - interest rate payable.

[Pact Properties](#) (B, C)

**McCool v McCool [2008] NSWSC 748**

Supreme Court of New South Wales

Gzell J

Costs – will – application by one of beneficiaries to restrain defendant executor taking any action in administration of estate & seeking that grant of probate be revoked – cricket memorabilia – issues between parties largely resolved, with costs only issue – plaintiff seeking order that executor pay his costs on indemnity basis & bear his own costs without recourse to estate assets – executor seeking order that plaintiff pay his costs & plaintiff's entitlement to any remaining assets of the estate be charged with those costs - statement of claim dismissed - plaintiff to pay defendant's costs of proceedings - plaintiff's remaining entitlement to part of estate be charged with the order as to costs – at par 24 of judgment:

“.... It is only a statement of legal principle that can constitute a precedent & it is inappropriate to rely upon statements in a judgment germane to a decision on fact ....”

[McCool](#) (B)

**Church v Echuca Regional Health [2008] VSCA 153**

Court of Appeal of Victoria

Buchanan & Ashley JJA; Pagone AJA

Accident Compensation Act 1985 (Vic) – whether serious injury established - appeal from County Court – power to remit in event that reasons inadequate – content of obligation that Court of Appeal decide serious injury question for itself - [Dwyer v Calco Timbers Pty Ltd \(2008\) 244 ALR 257](#) : see 'Benchmark' commentary in bulletin Thursday 17 April 2008 & link to case below – appeal allowed, judgment below set aside, leave granted to appellant to bring proceedings for damages in respect of serious injury. (I)

[Church](#)

[Dwyer v Calco Timbers](#) – High Court decision 16 April 2008 - 'Benchmark' Thursday 17 April 2008 - appellant injured by crane positioned on back of semi-trailer operated by appellant in course of employment with respondent.



**University of Melbourne v McKean [2008] VSC 325**

Supreme Court of Victoria

Kyrou J

Freedom of Information Act 1982 (Vic) – appeal from Victorian Civil & Administrative Tribunal – examination marking guide for subject ‘Investments’ & examination paper & marking guide for subject “Intermediate Personal Finance” - University had refused access – whether Tribunal had erred in law in deciding documents were not exempt under s34(4)(c) of the Act – held no error.

[University of Melbourne](#) (I, B)

**Eizenberg & Ors v Eizenberg [2008] VSC 322**

Supreme Court of Victoria

Hargrave J

Privilege against self-incrimination – held that valid claim to privilege established - no waiver of privilege established – principles & case law considered.

[Eizenberg](#) (I, B, C)

**Di Pietro & Anor v Basjo Catering Pty Ltd & Ors [2008] VSC 326**

Supreme Court of Victoria

Hargrave J

Contract – equitable estoppel - café, catering, conference & associated businesses at a number of hospitals in Melbourne metropolitan area – whether concluded contract for sale of businesses – whether dealings between parties, objectively considered, demonstrated concluded bargain – partnership dispute between vendors – whether plaintiff assumed binding contract of sale in existence – defendants not estopped from denying existence of contract.

[Di Pietro](#) (B)

**CAG v The Public Trustee of Qld (as personal representative of the estate of JM, dec'd) [2008] QCA 252**

Court of Appeal of Queensland

de Jersey CJ; Keane & Fraser JJA

Adjustment of property interests - whether a de facto partner may apply for a property adjustment order under Part 19 Property Law Act 1974 (Qld) after death of the other de facto partner - primary judge had held right to make such a claim was a statutory right which ceased on that de facto partner's death – appeal dismissed.

[CAG](#) (B)

## From the United States of America...

### Fidelity & Guaranty Insurance Underwriters Inc v Jasam Realty Corp. & Crotona Properties Inc., no. 06-4738-cv

United States Court of Appeals for the Second Circuit  
Cabranes, Pooler, & Sack JJ

General commercial liability insurance policy – brokers - binders – agency agreement – explicitly delegated authority - personal injury to construction site worker - appeal from District Court judgment following jury trial declaring that plaintiff insurer had no duty to defend or indemnify defendant insureds in the personal injury suit, because jury had found insureds had made material misrepresentations or fraudulently concealed facts in connection with their requests for insurance coverage; & that defendant broker was not liable to insureds for failing to procure insurance in question - because District Court's special verdict form permitted jury to consider incorrect dates on which veracity of alleged misrepresentations could be judged & the court did not correct the error when invited by the jury to clarify the matter, District Court judgment vacated & matter remanded to District Court.

[Fidelity & Guaranty Insurance Underwriters \(I\)](#)

## “Spring in the You Beaut Country”

..... is the name of a 1961 painting by the Australian artist

John Olsen (b. 1928 Newcastle, N.S.W.) – the painting belongs to his exuberant ‘You Beaut Country’ series – in 1973, he painted the Sydney Opera House Mural ‘Salute to Five Bells,’ based on Kenneth Slessor’s poem - in 2005 he won the Archibald Prize for his ‘Self Portrait Janus-faced’ - Dylan Thomas, in his play for voices ‘Under Milkwood,’ was able to convey the sounds, sights & smells of a small Welsh town in all its moods – instead of treating landscape as scenery, Olsen also seeks to capture the totality, to synthesise all the elements, of the environment he is depicting : ‘to get it all down.’

[Australian Art - Artist - Olsen, John Henry](#)

**Key: (I) Insurance, (B) Banking, (C) Construction**