

BENCHMARK

Insurance, Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Wednesday 2 April 2008

Hansen Beverage Company v Bickfords (Australia) Pty Ltd [2008] FCA 406

Federal Court of Australia

Middleton J (at Melbourne)

Tort – passing off - trade practices - misleading and deceptive conduct - hearsay – business records exception - applicant sells & promotes energy drink overseas using certain mark - Monster Energy - respondent commenced using that mark without licence to sell energy drink in Australia - applicant does not conduct business in Australia but alleges that it has reputation amongst target market in Australia on basis of exposure of its mark & that consumers would be misled or deceived - cross-claim by respondent that it has established requisite reputation - whether either party has established sufficient reputation - establishment of date at which reputation should be assessed - television ratings data sought to be tendered - whether data is hearsay - whether data should be otherwise admitted under discretion in s190(3) Evidence Act 1995 (Cth.) [Hansen Beverage Company](#) (I,B)

Australian Competition & Consumer Commission v Hobie Cat Australasia Pty Ltd (ACN 095 150 413) [2008] FCA 402

Federal Court of Australia

Finn J (at Adelaide)

Trade Practices Act - resale price maintenance – recreational watercraft - contraventions admitted – proposed consent orders – court’s function in such circumstances. [Hobie Cat Australasia](#) (B)

Brown v Harding [2008] NSWCA 51

Court of Appeal of New South Wales

Hodgson JA, Hidden & Hislop JJ

Motor vehicle accident - personal injury - liability - appellant injured as passenger in stolen vehicle which collided with power pole - primary judge had concluded appellant had taken part in theft of vehicle - appeal allowed - case remitted to District Court for hearing – an interesting joint judgment – case law considered. [Brown](#) (I)

J C Equipment Hire Pty Ltd v The Registrar of the Workers Compensation Commission of NSW [2008] NSWCA 43

Court of Appeal of New South Wales

Tobias, Campbell & Bell JJA

Workers Compensation - lump sum compensation – whole person impairment – permanent impairment – whether acceptance of degree of whole person impairment for purposes of s66 claim constituted acceptance for purposes of work injury damages claim – legislative history of claims by injured workers in NSW – dichotomy between statutory compensation & work injury or common law damages – estoppel by conduct – whether party estopped from denying degree of whole person impairment in respect of one claim when it agreed in respect of another – appeal allowed. [J C Equipment Hire](#) (I)

B & B Budget Forklifts Pty Ltd v CBFC Ltd & 2 Ors [2008] NSWSC 271

Supreme Court of New South Wales

Barrett J

Mortgages - competing security interests - distinction between floating charge & fixed charge - nature of "purchase money security" - corporate finance - competing registered charges - whether priority according to time of registration displaced. [B & B Budget Forklifts](#) (B,C)

Trajkovski v R K Findlay Pty Ltd [2008] NSWSC 273

Supreme Court of New South Wales

Harrison J

Contract – tort – duty of care - scope & content of duty coextensive with terms of agreement – not possible to determine whether breach occurred - agreement to provide engineering advice for obtaining full volume approval to import Porsche motor vehicles complying with Australian design rules & compliance plate approval – whether agreement extended to scheme to import motor vehicles in parts. [Trajkovski](#) (I,C)

Al Mousawy bht Khamis v JA Byatt Pty Limited & Others [2008] NSWSC 264

Supreme Court of New South Wales

Hoeben J

Application for costs – personal injury - vacation of mediation date - application of s30(4) Civil Procedure Act 2005 - whether facsimile advising intention to cancel mediation admissible - Stonewall Hotel in Darlinghurst – allegation that consultant engaged to assist with planning advice in relation to the hotel – allegation that structural & civil engineers retained to inspect hotel including top dance floor – floor collapsed causing injury to a number of people including the plaintiff – allegation of faulty assessment. [Al Mousawy bht Khamis](#) (I,C)

Haque v Commissioner of Corrective Services [2008] NSWSC 253

Supreme Court of New South Wales

Fullerton J

Constitutional law - implied freedom of communication concerning government or political matters - right to freedom of communication - review of Commissioner's decision to refuse distribution of newsletter for prisoners - admissibility of business records – standing to sue not made out. [Haque](#) (I)

Callan v Healthscope Limited & Anor [2008] VSC 88

Supreme Court of Victoria

Williams J

Limitation of actions - negligence – hospital – medical practitioner – personal injury - applicant a person under a disability – alleged injury at birth – effect of reduction of limitation period by statutory amendment – whether limitation periods had expired – when causes of action discoverable under s27E(2)(a) Limitation of Actions Act 1958. [Callan](#) (I)

Makrenos & Anor v Papaioannou & Ors [2008] VSC 83

Supreme Court of Victoria

Kaye J

Trade practices – building contract - misleading or deceptive conduct – causation of damages – appeal from decision of Victorian Civil & Administration Tribunal – decision of Tribunal refusing leave to appellants to amend claim to allege loss caused by misrepresentation made to third party – whether claim arguable. [Makrenos](#) (I,C)

Byrne v Transport Accident Commission [2008] VSC 92

Supreme Court of Victoria

Cavanough J

Accident compensation – transport accident – damages – serious injury – common law claim – compensation claim statute barred – whether common law claim barred – whether particular decision of Transport Accident Commission in relation to threshold test reviewable by Victorian Civil & Administrative Tribunal. [Byrne](#) (I)

Re Minister for Resources; ex parte Cazaly Iron Pty Ltd [2007] WASCA 175

Court of Appeal of Western Australia

Wheeler, Pullin & Buss JJA

Application for writ of certiorari & declaratory relief - Minister exercised power under s111A(1)(c) Mining Act 1978 (WA) & terminated applicant's application for exploration licence whether the Minister took into account irrelevant matters - whether State's Iron Ore Policy is inconsistent with the Mining Act or an irrelevant consideration – special leave application in High Court to be heard in April, 2008. [Cazaly Iron - Part I](#); [Cazaly Iron - Part II](#); [Cazaly Iron - Part III](#) (I,B,C)

Mass (Australia) Pty Limited v R & B Crane & Rigging Pty Ltd [2008] ACTSC 23

Supreme Court of the Australian Capital Territory

Harrison J

Procedure - statutory demand – application to set aside – error in name of plaintiff – application to amend name – whether substitution or amendment – amendment after limitation period error in name of plaintiff – whether mere misnomer – whether substitution or amendment – leave to amend granted in exercise of discretion. [Mass \(Australia\)](#) (I,B,C)

Trustees of the Daughters of Our Lady of the Sacred Heart v The Registrar-General [2008] NTSC 13

Supreme Court of the Northern Territory

Mildren J

Trusts – appointment of new trustee – trustees members of a religious congregation – trustees long deceased – expedient for Court to appoint trustee – whether land registered in names of religious sisters of Catholic Church held upon trust – whether declaration of trust should be made – applicant incorporated pursuant to s4 Roman Catholic Church Communities' Land Act 1942 (NSW) - corporation acts as trustee – land held in Northern Territory by sisters upon trust – whether held on trust for corporation – whether

corporation could own land outside of New South Wales – admissibility of canon law - sisters belonging to religious order bound by vows of poverty – whether admissible to prove land registered in names of sisters held upon trust for religious order. [Trustees Of The Daughters Of Our Lady Of The Sacred Heart](#) (B)

& from Canada...

Neste Canada Inc v Allianz Insurance Company of Canada 2008 ABCA 71

Court of Appeal of Alberta

Fraser CJ, Côté & O'Brien JJ

Insurance policy – deductibles – explosion at refinery – plant closed down - insurer appealed against trial judgment finding insured entitled to insurance coverage for contingent business interruption - insured cross-appealed the commencement date of the waiting period, constituting a deductible under the policy - policy included coverage for losses and expenses arising from business interruption & contingent business interruption - policy also provided for fifteen-day waiting period for these claims - waiting period operated as a deductible - insured covered its own losses for first fifteen days up to a stated maximum, after which insurer covered further losses – on appeal, respondent insured won all issues on appeal except its cross-appeal about waiting period. [Neste Canada](#) (I)

Key: (I) Insurance; (B) Banking; (C) Construction