

## Insurance Banking & Construction

# A Daily Bulletin listing Decisions of Superior Courts of Australia

### Executive Summary (1 minute read)

**Allphones Retail Pty Limited v Australian Competition & Consumer Commission** - Applicant seeking order for preliminary discovery against respondent – identity discovery - s155AAA *Trade Practices Act 1974* (Cth): protection of certain information - equitable duty of confidence - application dismissed (I,B,C)

**Deputy Commissioner of Taxation v Vintage Gold Investments Pty Ltd (in liq'n)** - s564 *Corporations Act 2001* (Cth) - application by liquidator for order in relation to distribution of a settlement fund - indemnity provided by Deputy Commissioner of Taxation as unsecured creditor in winding up (B)

**Cape Australia Holdings Pty Ltd v Modern Industries Australia Pty Ltd** - Preliminary discovery - Order 15A Federal Court Rules - application dismissed (C)

**Sheehan v SRA; Wicks v SRA** - Personal injuries – rescuers - police officers - psychiatric injury - *Civil Liability Act 2002* (NSW) Pt 3 – Waterfall train disaster – appeals dismissed (I)

**Paino v MDN Mortgages Pty Ltd** - Applicant seeking order restraining a solicitor from acting on behalf of first defendant (B)

**Du Bray v McIlwraith** - Stay of proceedings - one party to terminated de facto relationship suing in New South Wales - other party suing in New Zealand - NSW proceedings permanently stayed (B)

**Gwandalan Summerland Point Action Group Inc v Minister for Planning** - *Environmental Planning & Assessment Act 1979* - decisions made by Minister for Planning - consideration of what the appropriate test for apprehended bias where decision-maker is a minister (I,B,C)

**Keogh v James** - Standards required of expert medical witness – respondent forensic pathologist had given evidence at criminal trial of appellant - appeal against primary judge's finding that there



had been no unprofessional conduct - appeal dismissed (I)

**Kekes v Police; Kekes v Registrar of Motor Vehicles** - Alcohol interlock scheme – *Road Traffic Act 1961* (SA) (I)

**Launceston City Council v Shepherd** - *Land Acquisition Act 1993* (Tas) – assessment of compensation payable (C)

**Febray v Equititour; Hutchinson v Equititour** - Limitation of actions - *Trade Practices Act 1974* (Cth) - *Fair Trading Act 1989* (Qld) – defendant seeking summary judgment on basis plaintiffs' claims statute-barred – plaintiffs purchasers of units for investment purposes – judgment for defendants (I,B,C)

## Summaries with links (5 minute read)

### Wednesday 2 September 2009

#### **Allphones Retail Pty Limited v Australian Competition & Consumer Commission [2009] FCA 980**

Federal Court of Australia

Foster J (in Sydney)

Applicant seeking order for preliminary discovery against respondent – identity discovery - s155AAA *Trade Practices Act* 1974 (Cth): protection of certain information - equitable duty of confidence - application dismissed -detailed examination of legislation & case law.

[Allphones Retail Pty Limited](#)

#### **Deputy Commissioner of Taxation v Vintage Gold Investments Pty Ltd (in liq'n) [2009] FCA 967**

Federal Court of Australia

Greenwood J (in Brisbane)

s564 *Corporations Act* 2001 (Cth) - application by liquidator for order in relation to distribution of a settlement fund having regard to an indemnity provided by Deputy Commissioner of Taxation as unsecured creditor in the winding up - Indemnity Agreement – detailed consideration of legislation - orders made for payment to Deputy Commissioner of an amount of \$7,800.00 in priority to claim of liquidator.

[Deputy Commissioner of Taxation](#)

#### **Cape Australia Holdings Pty Ltd v Modern Industries Australia Pty Ltd [2009] FCA 976**

Federal Court of Australia

Siopis J (in Perth)

Preliminary discovery - Order 15A Federal Court Rules – applicants & respondents carrying on competing businesses in scaffolding industry – applicants contending they required preliminary discovery as to possible copyright infringement & to determine whether to commence a proceeding against respondents in respect of misuse of confidential information – application dismissed.

[Cape Australia Holdings Pty Ltd](#)

#### **Sheehan v SRA; Wicks v SRA [2009] NSWCA 261**

Court of Appeal of New South Wales

Beazley, Giles, & McColl JJA at 82

Personal injuries – rescuers - psychiatric injury - appellants were both serving police officers who attended scene of train derailment at Waterfall, south of Sydney, in which seven people were killed

& many were injured – for decision appealed from, see ‘Benchmark’ I & IBC Wednesday 5 December 2007 & link below - whether defendant owed a rescuer a common law duty of care - whether a rescuer is entitled to damages pursuant to the *Civil Liability Act* 2002 (NSW) Pt 3 – primary judge had held that that neither appellant satisfied s30(2)(a) & s32(2)(b) & that neither was entitled to damages for pure mental harm - each appeal dismissed - comprehensive consideration of legislation, text & case law from UK & Australia.

#### [Sheehan](#)

[Wicks](#) – decision 30 November 2007 - nervous shock – *Civil Liability Act* 2002 (NSW) - Second Reading Speech considered – at para 90 of judgment: neither plaintiff had been able to demonstrate pure mental harm in connection with another person being killed, injured or put in peril by the act or omission of the defendant – verdict for defendant in both actions.

#### **Paino v MDN Mortgages Pty Ltd [2009] NSWSC 898**

Supreme Court of New South Wales

Simpson J

Applicant seeking order restraining a solicitor from acting on behalf of first defendant company in the substantive proceedings – likely to be material witness - application granted.

#### [Paino](#)

#### **Du Bray v McIlwraith [2009] NSWSC 888**

Supreme Court of New South Wales

Barrett J

Stay of proceedings - one party to terminated de facto relationship sued in New South Wales under property adjustment legislation; other party sued in New Zealand - each seeking to halt progress of the other's litigation - New South Wales proceedings in the particular circumstances oppressive – NSW proceedings permanently stayed - application for anti-suit injunction dismissed.

#### [Du Bray](#)

#### **Gwandalan Summerland Point Action Group Inc v Minister for Planning [2009] NSWLEC 140**

Land & Environment Court of New South Wales

Lloyd J

*Environmental Planning & Assessment Act* 1979 - decisions made by Minister for Planning - apprehended bias – consideration of what the appropriate test for apprehended bias is where the decision-maker is a minister - bias by prejudgment - statutory context - rezoning of land owned by second & third respondents at Gwandalan & Catherine Hill Bay -approvals under Pt 3A of the Act - concept plan approval - project approval -actions of Minister & pre-existing agreements with developers regarding environmental land offset scheme held to give rise to reasonable apprehension of bias – comprehensive examination of case law from UK, Canada, New Zealand & Australia in an interesting judgment.

#### [Gwandalan](#)

**Keogh v James [2009] SASC 258**

Full Court of the Supreme Court of South Australia

Doyle CJ; White & Layton JJ

Standards required of expert medical witness – respondent forensic pathologist had given evidence at criminal trial of appellant - Medical Board had found respondent guilty of unprofessional conduct – primary judge had allowed appeal against decision of Medical Board – for decision 13 June 2008, see ‘Benchmark’ I & IBC Tuesday 17 June 2008 & link below - primary judge’s finding that there had been no unprofessional conduct correct – appeal dismissed.

**Keogh**

**James** – decision 13 June 2008 - expert witnesses – duties & responsibilities – forensic pathologist had given evidence at murder trial - haemolytic staining- appeal from decision of Medical Board of South Australia finding appellant guilty of unprofessional conduct – appeal upheld- cross-appeal dismissed.

**Kekes v Police; Kekes v Registrar of Motor Vehicles [2009] SASC 250**

Supreme Court of South Australia

Gray J

Alcohol interlock scheme – appellant had been sentenced by magistrate for offence of driving with prescribed concentration of alcohol in bloodstream contrary to s47B(1)(a) *Road Traffic Act* 1961 (SA) - licence disqualification for eight months & twenty-five days was imposed – at time of sentencing, magistrate had declined to order that alcohol interlock scheme should apply to period of licence disqualification imposed : appeal against that decision allowed - defendant entitled to be issued with a driver’s licence subject to alcohol interlock scheme.

**Kekes****Launceston City Council v Shepherd [2009] TASSC 71**

Supreme Court of Tasmania

Evans J

*Land Acquisition Act* 1993 (Tas) – assessment of compensation payable – valuation evidence – capitalisation rate - real prospect that in foreseeable future site could cease to be viable as service station - hypothetical seller would have been willing to sell at a discount - hypothetical buyer would only have been prepared to purchase at discount.

**Launceston City Council****From the District Court of Queensland...****Febray v Equititour; Hutchinson v Equititour [2009] QDC 281**

District Court of Queensland

Rackemann DCJ

Limitation of actions - *Trade Practices Act* 1974 (Cth) - *Fair Trading Act* 1989 (Qld) – defendant



seeking summary judgment on the basis plaintiffs' claims statute-barred – plaintiffs purchasers of units in Radisson Palm Meadows Resort acquired for investment purposes – investments underperformed - plaintiffs claiming fraudulent or negligent misrepresentation & breaches of Trade Practices Act & Fair Trading Act – promotional brochure – projections in key fact sheet – claims for loss & damage relating to both capital & income - defendants contending causes of action accrued once damage was first suffered, upon purchase of the units – plaintiffs contending causes of action did not accrue till fact of actual loss was first ascertainable - valuation – judgment for defendants – an interesting review of case law.

[Febray](#)

## A celebration of Spring in Australia – Part Two

Grey winter hath gone, like a wearisome guest,  
And, behold, for repayment,  
September comes in with the wind of the West  
And the Spring in her raiment!  
The ways of the frost have been filled of the flowers,  
While the forest discovers  
Wild wings, with a halo of hyaline hours,  
And a music of lovers.

September, the maid with the swift, silver feet !  
She glides, & she graces  
The valleys of coolness, the slopes of the heat,  
With her blossomy traces;  
Sweet month, with a mouth that is made of a rose,  
She lightens & lingers  
In spots where the harp of the evening glows,  
Attuned by her fingers .....

..... Oh, season of changes - of shadow & shine -  
September the splendid !  
My song hath no music to mingle with thine,  
And its burden is ended;  
But thou, being born of the winds & the sun,  
By mountain, by river,  
Mayst lighten & listen, and loiter & run,  
With thy voices for ever !

*From 'September in Australia' in the poetry collection 'Leaves from Australian Forests' (1869)*



*Henry Kendall*

*(b. 18 April 1839 at Kirmington, near Ulladulla on the South Coast of NSW – d. 1 August 1882)*

[Henry Kendall \(poet\) - Wikipedia, the free encyclopedia](#)

[SEPTEMBER IN AUSTRALIA by Henry Kendall \(1839 - 1882\)](#)

*'Hyaline,' from a Greek word meaning 'glassy' - substance with glass-like app*

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