

## Insurance Banking & Construction

### A Daily Bulletin listing Decisions of Superior Courts of Australia

#### Today's Cases

**Passing Off** – whether registered trademark infringed, whether restaurant engaged in misleading and deceptive conduct. See *Anakin v Chatswood BBQ King* (I, B)

**Liability** – order that liability be heard separately before damages in case involving damage caused by bushfires. See *Andrews v NSW* (I)

**Joint Tenancy** – application to restrain registrar-general from registering a transfer severing joint tenancy. See *McCoy v Estate of Caelli* (B)

**Crown Lands** – whether lands in question not lawfully used or occupied. See *Minister Administering Crown Lands Act v NSW Aboriginal Land Council* (C)

## Friday 3 October 2008

### **Minister Administering the Crown Lands Act v NSW Aboriginal Land Council [2008] HCA 48**

High Court of Australia

Kirby, Hayne, Heydon, Crennan & Kiefel JJ

Statutory interpretation - claim had been made under Aboriginal Land Rights Act 1983 (NSW) to some land at Wagga Wagga - Minister for Lands had refused the claim - Minister had concluded that "when the claim was made the land was not claimable Crown land" within Land Rights Act because "the land was lawfully used and occupied by the Department of Lands in preparing the land for sale" - Land & Environment Court of NSW had dismissed appeal - appeal to NSW Court of Appeal, which allowed appeal & ordered Minister to transfer land to Wagga Land Council - whether lands in question not lawfully used or occupied - "claimable Crown lands", "lawfully used or occupied", "use", "occupied" - appeal dismissed.

[Minister Administering the Crown Lands Act](#) (C)

### **Anakin Pty Ltd v Chatswood BBQ King Pty Ltd [2008] FCA 1467**

Federal Court of Australia

Branson J (in Sydney)

ss52 & 53 Trade Practices Act 1974 (Cth) - tort of passing off - Duties Act 1997 (NSW) - Stamp Duties Act 1920 (NSW) s35, Part 3 - applicants claiming respondents infringed first applicant's registered trademark, engaged in misleading & deceptive conduct & tortiously passed off its restaurant in Chatswood as a restaurant associated with the BBQ King restaurant in Goulburn Street, Sydney - applicants seeking damages & declaratory & injunctive relief - respondent's cross-claim alleges first applicant is not owner of the trademark & that, in any event, trade mark ought not to have been registered - consideration of provisions of Duties Act - discretion not to order rectification - good faith defence - claim for damages for trademark infringement failed but claims for damages for passing-off & pursuant to s82 Trade Practice Act 1974 (Cth) succeeded : award of \$20,000 damages - an interesting judgment with extensive consideration of case law from UK & Australia.

[Anakin](#) (I, B)

### **Fesl v Delegate of the Native Title Registrar [2008] FCA 1469**

Federal Court of Australia

Logan J (in Brisbane)

Native title - application for judicial review of decision by a delegate of Native Title Registrar to register an Indigenous Land Use Agreement - statutory scheme considered - water supplies project for development of Traveston Crossing Dam Stage One a "future act" for purposes of s233 Native Title Act 1993 (Cth) - second respondent Queensland Water Infrastructure Pty Ltd (QWI) a company responsible for development of the Dam - Stage One of that development involves construction of new dam in

Mary River, about 100 km north of Brisbane - QWI obliged under Queensland subordinate legislation made under Water Act 2000 (Qld) to "take all necessary steps to prepare for, and construct, the Traveston Crossing Dam Stage One" by 31 December 2011 - whether agreement did not make lawful provision for cultural heritage duty of care – Traveston Dam agreement not contrary to law - application dismissed.

[Fesl](#) (C)

**James Spittles v Michael's Appliance Services Pty Ltd & Ors [No 2] [2008] NSWCA 232**

Court of Appeal of New South Wales

Bell JA, Handley AJA & Barr J

Costs – for substantive judgment 14 April 2008 see 'Benchmark' Insurance & IBC Thursday 1 May 2008 & link below - appellant to pay second & third respondents' costs. (I, C)

[James Spittles](#), and

[James Spittles](#) – decision 14 April 2008 - bailment - tort – s75AD Trade Practices Act 1974 (Cth) - statutory liability for supply of defective goods – appellant had injured his hand on razor sharp metal protruding from stainless steel panels on door of his refrigerator - held that first respondent had not supplied the refrigerator - appeal dismissed.

[High Court refused application for Special Leave on 26 August 2008.]

**Andrews v State of New South Wales [2008] NSWSC 1034**

Supreme Court of New South Wales

Harrison J

Case management – tort – duty of care - Rural Fire Service - New South Wales Fire Brigade Commissioner - Christmas Eve 2001 Mt. Hall fire - Sydney Catchment Authority - National Parks & Wildlife Service – Warragamba fire - application by several plaintiffs in related proceedings to further amend statements of claim – various orders made, including that decision on question of liability be heard separately from & before decision on question of assessment of plaintiffs' damages.

[Andrews](#) (I)

**McCoy v Estate Peter Anthony Caelli [2008] NSWSC 986**

Supreme Court of New South Wales

Brereton J

Severance of joint tenancy – plaintiff seeking injunction restraining Registrar-General from registering a transfer unilaterally severing joint tenancy signed by her late son in July 2008 but not lodged until after his death in August 2008, in respect of property at Port Macquarie of which she & deceased registered joint tenants, the Registrar-General having given notice under s12A Real Property Act 1900 (NSW) of his intention to register the transfer unless restrained from doing so - held that joint tenancy remained on foot up to moment of deceased's death, & the other joint tenant was entitled to become registered by survivorship pursuant to s101 Real Property Act 1900 (NSW) – an interesting judgment with detailed consideration of case law.

[McCoy](#) (B)

**Treacy v Newlands & Ors [2008] VSC 395**

Supreme Court of Victoria

Beach J

Accident Compensation Act 1985 (Vic) - review of Medical Panel decision - answers to referred medical questions – fall at work when stepping out of a caravan kitchen at Melbourne Airport - no failure to take into account relevant considerations – case law as to principles relevant to application of this kind - decision of Medical Panel quashed - questions be referred back to Convenor of Medical Panels for determination by a differently constituted panel.

[Treacy \(I\)](#)**Re Yates ; ex parte the Public Trustee [2008] WASC 211**

Supreme Court of Western Australia

Registrar C Boyle

Succession - probate - later informal document June 2005; handwritten & typed versions - whether provable under pt X Wills Act 1970 (WA) - whether deceased intended later document to constitute her will – held that deceased did not have testamentary capacity as at June 2005 & that even if she did at that date, she did not intend the handwritten document to constitute her last will - it was therefore not capable of proof under Wills Act – probate granted of will made in 1974.

[Re Yates \(B\)](#)**Re Carpenter; ex parte Gorman [2008] WASC 210**

Supreme Court of Western Australia

Registrar C Boyle

Succession – two codicils to a will - complex trusts - whether deceased knew & approved contents of the two codicils – case law considered as to doctrine of suspicious circumstances – whether codicils should be admitted to probate - grant of probate of the will only – application refused in relation to the codicils – an interesting judgment with consideration of UK & Australian case law.

[Re Carpenter \(B\)](#)

## From the District Court of South Australia...

**Turner v Newport Stage 2A Pty Ltd & Ors [2008] SADC 125**

District Court of South Australia

David Smith DCJ

Application for interlocutory injunction – equitable remedies – contract - rescission – election - plaintiff seeking orders that first & second defendants be restrained until final determination of action from appropriating two deposits given by him by way of bank guarantees - plaintiff had entered into contracts with respectively first & second defendants to purchase a villa & lease a marina berth in Newport Quays Marina Development – plaintiff alleging that agents of defendants represented that a



lift could be provided to service the three-storey villa – plaintiff alleging he entered contracts on that basis & paid deposits by way of bank guarantees – defendants notified plaintiff that a lift could not be installed – plaintiff purported to rescind contracts – defendant denied alleged representation about the lift & refused to accept the rescission – whether plaintiff had elected to affirm contracts & was thereby precluded from right of rescission – extent of knowledge required for an election – whether serious issue to be tried - thorough consideration of case law in an interesting judgment - application for interlocutory injunction granted.

[Turner](#) (B)

## One hour forward – daylight saving starts this Sunday

(in New South Wales, Victoria, South Australia, Tasmania, & the ACT)

### The Australian Sunrise

by

James Lister Cuthbertson (1851-1910)

The Morning Star paled slowly, the Cross hung low to the sea,  
And down the shadowy reaches the tide came swirling free,  
The lustrous purple blackness of the soft Australian night,  
Waned in the gray awakening that heralded the light;  
Still in the dying darkness, still in the forest dim  
The pearly dew of the dawning clung to each giant limb,  
Till the sun came up from ocean, red with the cold sea mist,  
And smote on the limestone ridges, & the shining tree-tops kissed;  
Then the fiery Scorpion vanished, the magpie's note was heard,  
And the wind in the she-oak wavered, & the honeysuckles stirred,  
The airy golden vapour rose from the river breast,  
The kingfisher came darting out of his crannied nest,  
And the bulrushes & reed-beds put off their sallow gray  
And burnt with cloudy crimson at dawning of the day.

### James Lister Cuthbertson

Scottish born, emigrated to Australia in 1874 - Senior Classics Master at Geelong Grammar School in Victoria 1875-1896 – published 'Barwon Ballads' (Melbourne 1893) - 'the Australian Sunrise' was written in 1880.

[Australian writer James Lister Cuthbertson](#)

The Southern Cross appears to become lower in the sky towards morning.  
'The fiery Scorpion' - the constellation of Scorpio containing Antares, a star which shines with a reddish light.

**Because of the Labour Day public holiday on Monday 6 October, the next edition of 'Benchmark' will be published on Tuesday 7 October 2008**

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