



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Taxation – double taxation agreements. See *Undershaft (No 1) Limited v Commissioner of Taxation* (B)

Corporations law – oppression of minority shareholder. See *Szencorp Pty Ltd v Clean Energy Council Limited* (B)

Contracts – sale of domestic property – whether requirement of a second instalment of a deposit was void as a penalty. See *Boyarsky v Taylor* (B)

Builder's insurance – some of builder's work defective – all defects not rectified – whether successor in title to the developer was entitled to indemnification under the policy. See *Waterbrook at Yowie Bay Pty Limited v Allianz Australia Insurance Limited* (I, C)

Professional indemnity insurance – failure to report known circumstance. See *Aussie Tax Pty Ltd v Markel Capital Limited* (I, B)

Personal injury (Vic) – assault and battery – reasonableness and use of reasonable force – psychiatric injury. See *Walker v Hamm* (I)

Personal injury (Canada) – safety measures at railway level crossing – whether measures sufficient. See *Zsoldos v. Canadian Pacific Railway Company* (I)



Thursday 5 February 2009

Undershaft (No 1) Limited v Commissioner of Taxation [2009] FCA 41

Federal Court of Australia

Lindgren J

Double taxation agreements – judicial comity - one DTA between Australia & United Kingdom – the other between Australia & Netherlands – capital gains - Vienna Convention on the Law of Treaties – consideration of Virgin Holdings SA v Commissioner of Taxation [2008] FCA 1503 involving DTA between Switzerland & Australia: see 'Benchmark' Banking & IBC Tuesday 14 October 2008 & link below - an interesting judgment in which at pars 66 to 68, Lindgren J considers principles & case law as to judicial comity – both appeals upheld.

[Undershaft \(No 1\) \(B\)](#)

[Virgin Holdings SA](#) - decision Edmonds J in Sydney 10 October 2008 - Part 3-1 of the *Income Tax Assessment Act 1997* (Cth) – capital gain on sale by Swiss resident company of shares in Australian company – whether Australia denied right to tax gain by Swiss-Australia double taxation agreement – Sch 15 to *International Tax Agreements Act 1953* (Cth) – general principles of interpretation of double tax treaties – whether 'the Australian income tax' covers taxation of capital gains (Art 2) – ambit of business profits (Art 7) & alienation of capital assets (Art 13) provisions - held that Australia denied the right to tax gain – texts considered - Second Reading Speech, *Income Tax Assessment Amendment (Capital Gains) Bill 1986* (Cth) considered – Irish, Canadian & Australian case law considered in an interesting decision.

Australian Trade Commission v Isaac Jewellery Pty Ltd [2009] FCA 37

Federal Court of Australia

Cowdroy J (in Sydney)

s94(1)(b)(i) *Export Markets Development Grants Act 1997* (Cth) - Export Market Development Grants (Change in Ownership of Business) Guidelines 2006 (Cth) - Austrade had rejected respondent's application for grant, & on a review of its decision, had concluded business ineligible – respondent appealed to Administrative Appeals Tribunal which held business entitled to receive grants – appeal from AAT allowed.

[Australian Trade Commission](#) (B)

Szencorp Pty Ltd v Clean Energy Council Limited [2009] FCA 40

Federal Court of Australia

Goldberg J (in Melbourne)

s233 *Corporations Act 2001* (Cth) – oppression claim brought by member of not-for-profit company – held that conduct of defendant's affairs did not constitute oppression within meaning of s233 – case law considered as to interpretation & application of oppression provisions of the Act.

[Szencorp](#) (B)

**Boyarsky v Taylor [2008] NSWSC 1415**

Supreme Court of New South Wales

Adams J

Contract for sale – domestic property - specific performance ordered - neither impossibility nor hardship made out - whether a provision in contract requiring payment of second instalment of deposit upon completion date void as a penalty – answer ‘yes.’

[Boyarsky](#) (B)**Waterbrook at Yowie Bay Pty Limited v Allianz Australia Insurance Limited [2008] NSWSC 1407**

Supreme Court of New South Wales

McDougall J

Builder's home warranty insurance policy - *Home Building Act 1989* (NSW) - *The Home Building Regulation 1997* (NSW) – determination of separate questions - plaintiff the owner of retirement village at Yowie Bay – builder in liquidation – some of builder's work defective - not all defects rectified – whether plaintiff, as successor in title to the developer, entitled to indemnity under policy for reasonable cost of proper repairs – separate questions for determination included whether plaintiff fell within exclusion, from definition of “Building Owner” of companies [or persons or companies] related within the meaning of the Corporations Law, to [the developer] – answer ‘no’ - whether words ‘persons or’ in policy exclusion void by reason of non-compliance &/or inconsistency with the Act & the Home Building Regulations made thereunder at time policy was issued – answer ‘yes’ - consequential loss – measure of damages – detailed consideration of legislative scheme.

[Waterbrook](#) (I, C)**Aussie Tax Pty Ltd & Anor v Markel Capital Limited [2008] VSC 592**

Supreme Court of Victoria

Byrne J

Professional indemnity insurance policy – accounting practice - continuity extension clause – trial of preliminary issue - whether insured plaintiffs under the 1999 policy or under the 2000 policy, or both of them, were “not entitled to indemnity under that policy” as a result of their failure to report the known circumstances to relevant insurer under the earlier policy prior to 30 September 2001, being the commencement of the period of insurance under the 2001 policy – held that insured entitled to indemnity under 1999 policy & under 2000 policy - continuity extension did not engage.

[Aussie Tax](#) (I, B)**Walker & Anor v Hamm & Ors, Walker & Anor v Carter & Anor [2008] VSC 596**

Supreme Court of Victoria

Smith J

Personal injuries – assault & battery – police powers to prevent breach of peace - test of reasonableness & use of reasonable force - psychiatric injury – assessment of damages – extensive consideration of case law in an interesting judgment, including [Battista v Cooper](#) (1976) 14 SASR 225. [Walker](#) (I)

From Canada...

Shafron v. KRG Insurance Brokers (Western) Inc., 2009 SCC 6

Supreme Court of Canada

McLachlin CJ; Binnie, LeBel, Deschamps, Abella, Charron & Rothstein JJ

Employment contract – non-competition clause – fiduciary & equitable obligations – employee leaving his employment in insurance agency to work for another agency as insurance salesman – former employer alleging that employee breached fiduciary duty not to use confidential information & solicit its clients – primary judge had dismissed action – on appeal, the Court of Appeal had set aside that decision, finding that while there was no fiduciary duty, the restrictive covenant was enforceable – whether, in an employment contract, the doctrine of severance may be invoked to resolve an ambiguous term in a restrictive covenant or render an unreasonable restriction in the covenant reasonable – on appeal from Court of Appeal, appeal allowed: held that doctrine of notional severance did not apply in respect of restrictive covenants in employment contracts.

[Shafron](#) (I, B)

Zsoldos v. Canadian Pacific Railway Company, 2009 ONCA 55

Court of Appeal for Ontario

Rosenberg, Gillese & Blair JJA

Personal injuries – railway level crossing – safety measures – standard of care – industry practice – accident between train & motorcycle at about 9.15 pm – advance warning sign advising motorists of presence of crossing & to reduce speed – fifty eight carriage train – thirty fifth carriage, with which respondent collided, travelling at 20-25 miles per hour at the time – primary judge had found appellants Canadian Pacific & the engineer seventy five percent negligent – whether Canadian Pacific fell below standard of care in the manner in which it maintained the crossing – appellants disputing primary judge's finding of only twenty five percent negligence by respondent – appeal dismissed.

[Zsoldos](#) (I)

And remembering 'Banjo' Paterson, who died on this day in 1941...

Andrew Barton Paterson

17 February, 1864 – 5 February, 1941

Born near Orange, New South Wales – in 1869, the family moved to Illalong in the Yass District – 'Banjo' was the name of a racehorse at Illalong owned by his family – he was sent to Sydney in 1874 to complete his schooling & lived with his grandmother at Gladesville – attended Sydney Grammar School with holidays spent back at home with his family – he became a skilful rider, shooter & bushman, sometimes camping in the Snowy country – in 1880, he began working in a solicitor's office in Sydney – he was admitted as a solicitor in N.S.W. in 1886 – 'The Man from Snowy River' published in 'The Bulletin' in 1890 – in 1895, wrote 'Waltzing Matilda' (the expression means 'to carry a swag') – travel journalist in the Northern Territory – 1898-1900 Boer war correspondent – married Alice Walker in 1903 : they had two children – served in World War One acquiring rank



of Major – in 1919, settled for the remainder of his days in Sydney's eastern suburbs.

From 'The Travelling Post Office'

The roving breezes come & go, the reed-beds sweep & sway,
The sleepy river murmurs low, & loiters on its way,
It is the land of lots o' time along the Castlereagh.

The old man's son had left the farm, he found it dull & slow,
He drifted to the great North-west, where all the rovers go.
"He's gone so long," the old man said; "he's dropped right out of mind,
But if you'd write a line to him I'd take it very kind;
He's shearing here & fencing there, a kind of waif & stray –
He's droving now with Conroy's sheep along the Castlereagh

Beneath a sky of deepest blue, where never cloud abides,
A speck upon the waste of plain the lonely mailman rides.
Where hot fierce winds have set the pine & myall boughs asweep
He hails the shearers passing by for news of Conroy's sheep.
By big lagoons where wildfowl play & crested pigeons flock,
By camp-fires where the drovers ride around their restless stock,
And past the teamster toiling down to fetch the wool away
My letter chases Conroy's sheep along the Castlereagh.

'The Bulletin' 10 March, 1894

[THE TRAVELLING POST OFFICE by A.B. "Banjo" Paterson \(1864 - 1941\)](#)

[Paterson, Andrew Barton \(Banjo\) \(1864 - 1941\) Biographical Entry](#)

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