



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Trade Practices – whether misleading and deceptive conduct – whether serious issue for trial – application for expedition granted – application for summary judgment refused. See *Oxygen8 Communications Australia v Telstra Corporation* (B)

Torts – misfeasance in public office – claim by person granted temporary protection visa against lawyers acting for Minister and Minister for damages allegedly arising from conduct during application for visa whilst person was detained – whether “in public office” – lawyers applied for summary judgment – refused at first instance – held: lawyers’ appeal successful – no cause of action. See *Leerdam & Anor v Noori & Ors* (I)

Torts – misfeasance in public office – application by defendant for summary judgment – whether Department of Youth & Community Services owed a duty to the plaintiff to report matters of sexual misconduct to the police – held: no duty arose – proceedings dismissed. See *TB v State of NSW* (I)

Security of Payment Legislation (NSW) – application to review determination of adjudicator – application dismissed. See *Olbourne v Excell Building Corp* (B, C)

Practice & Procedure – application by director of companies involved as defendants in litigation to bring cross-claim in the name of one of those companies – conflict of duties – application refused. See *Transmetro Corp v Kol Tov* (B)

Trusts & Trustees – proceedings for declaratory relief concerning ownership of real estate – whether express trust – whether resulting trust – operation of *Foreign Acquisitions and Takeovers Act 1975 (Cth)*. See *Menezes v Salmon* (B)

Environmental Law – EPA prosecution for alleged breaches of EPA licence involving escape of grit blast dust onto surrounding waters, land and other premises – held: conviction

recorded – penalties including payment of fine imposed. See *EPA v Forgacs Engineering* (I, C)

Town Planning – classification of buildings – whether a “shed” – whether *Building Code of Australia* a written law for purpose of *Interpretation Act* (WA) – appeal dismissed. See *Shire of East Pilbara v FMG Pilbara* (I, B, C)

From the District Court of NSW

Personal Injuries – claim for damages in relation to conduct of police officers during crowd control duties at a sporting event – use of capsicum spray – whether in self-defence – whether conduct justified. Held: Verdict for Defendant. See *Broughton v State of NSW* (I)

From the United Kingdom

Torts – injurious falsehood – elections – one candidate alleging false and inaccurate statements contained in another candidate’s election leaflet – held: no malice – proceedings dismissed. See *Quinton v Peirce & Anor* (I)

From the United States of America

Insurance – City of Flint began a construction project to replace footpath outside premises occupied by commercial tenants with trees – resulting water damage to building – claim by plaintiffs against their insurer for indemnity under insurance policy – at first instance – claim dismissed by reason of policy exclusion for “construction works” - plaintiffs appeal dismissed. See *Legal Services Plan of Eastern Michigan v Citizens Insurance Company of America* (I, C)



Wednesday 6 May 2009

Oxygen8 Communications Australia Pty Ltd v Telstra Corporation Limited [2009] FCA 426

Federal Court of Australia

Flick J (in Sydney)

Contracts - service provider agreement – provision in agreement for termination by Telstra - *Trade Practices Act 1974* (Cth) – allegation of misleading & deceptive conduct - short message service SMS - two applications : applicant seeking interlocutory relief, respondent applying for judgment under s31A *Federal Court of Australia Act 1976* (Cth) - applicant in business as “Premium SMS services aggregator” - whether prima facie case – duty of good faith - question as to jurisdiction - whether damages an adequate remedy - interlocutory relief granted – hearing expedited.

[Oxygen 8 Communications Australia](#) (B)

Leerdam & Anor v Noori & Ors [2009] NSWCA 90

Court of Appeal of New South Wales

Spigelman CJ; Allsop P; Macfarlan JA

Tort of misfeasance in public office – first respondent took proceedings in Administrative Appeals Tribunal relating to Protection Visa under *Migration Act 1958* (Cth) – respondent in detention between 2001 and 2006 – damages claim – for decision appealed from, see ‘Benchmark’ I, B & IBC Wednesday 4 June 2008 & link below - whether solicitor acting on behalf of the Minister in the Tribunal proceedings held a public office for purposes of the tort – held solicitor did not occupy a position within the scope of the tort of misfeasance in public office - tort of collateral abuse of process - whether tort capable of being committed by a non-party to proceedings - advocate's immunity from suit - whether applicable to intentional torts - whether applicable to the torts of misfeasance in public office & collateral abuse of process – appeal allowed - proceedings so far as they relate to appellants to be summarily dismissed - detailed review of legislation - comprehensive review of text & case law from USA, UK, New Zealand & Australia.

[Leerdam](#) (I)

[Noori](#)

TB v State of New South Wales [2009] NSWSC 326

Supreme Court of New South Wales

Mathews AJ

Negligence - application for summary dismissal - obligations of Department of Youth & Community Services in 1983 on learning of child sexual abuse – allegations of misfeasance in public office ; breach of fiduciary duty; criminal misconduct on part of defendants - any duty owed by defendants to plaintiffs did not extend to a duty to report the abuse to police – proceedings dismissed.

[TB](#) (I)

Olbourne v Excell Building Corp Pty Limited [2009] NSWSC 349

Supreme Court of New South Wales

Rein J

Building & Construction Industry Security of Payment Act 1999 (NSW) –development of site at Seaforth for residential units – joint venture agreement - second defendant Adjudicator had found in favour of first defendant Excell & against plaintiff - grounds upon which an adjudication determination can be reviewed -meaning of 'arrangement' in s4 – summons dismissed.

[Olbourne](#) (B, C)**Transmetro Corp Ltd v Kol Tov Pty Ltd [2009] NSWSC 350**

Supreme Court of New South Wales

Barrett J

s237 *Corporations Act 2001* (Cth) - statutory derivative action - application for leave to bring on company's behalf second cross-claim in existing proceedings - management agreement of a city hotel - company a defendant in those proceedings & applicant for leave a director of the plaintiffs - conflict of duties - not in best interests of company that applicant should have leave - application not objectively in good faith - application for leave to bring derivative action refused.

[Transmetro](#) (B)**Menezes v Salmon [2009] NSWSC 2**

Supreme Court of New South Wales

Macready AsJ

Trusts - express trust created inter vivos - three properties, two at Quakers Hill, one at Kurrajong, purchased in name of another with purchasers executing a mortgage to secure borrowings - two properties held to be subject of an express trust notwithstanding lack of writing required by s23C *Conveyancing Act 1919* (NSW) - third property the subject of a resulting trust in proportion to the contributions - operation of *Foreign Acquisitions & Takeovers Act 1975* (Cth) - illegal and void contracts - contract not prohibited under Act - held that the failure to give notice did not make contract void.

[Menezes](#) (B)**Environment Protection Authority v Forgacs Engineering Pty Limited [2009] NSWLEC 64**

Land & Environment Court of New South Wales

Pain J

s64(1) *Protection of the Environment Operations Act 1997* - prosecution - breach of environment protection licence condition - failure to prevent emission of particles from ship repair business at port of Newcastle in breach of licence condition - potential harm - actual harm - steps taken to mitigate & prevent further harm - one of two causes of the harm foreseeable - whether loss of business after offence should be considered as extra-curial punishment - mitigating factors - publication order & order for contribution to environmental project.

[Environment Protection Authority](#) (I, C)

Shire of East Pilbara v FMG Pilbara Pty Ltd [2009] WASC 110

Supreme Court of Western Australia

Templeman J

Building Code of Australia, pt A3 - Building Code of Australia Guide - whether Code & Guide a written law for purposes of *Interpretation Act 1984 (WA)* - statutory interpretation - appeal arising from dispute between appellant Shire & respondent over the proper classification of two buildings erected by FMG on mining tenements - Shire appeal against State Administrative Tribunal decision that buildings be classified as sheds - appeal dismissed – held that Tribunal had been justified in concluding that the buildings should be classified as sheds - at para. 6 of judgment:

“This evokes a picture of what is perhaps an Australian icon: the backyard shed to which men of a certain age retreat in order to pursue blameless activities of infinite variety. And perhaps where a whole range of items are stored against the possibility that one day, they might be useful.”

[Shire of East Pilbara](#) (I, B, C)

From the District Court of New South Wales...**Broughton v The State of New South Wales [2009] NSWDC 5**

District Court of New South Wales

Levy SC DCJ

Personal injuries - claim for damages for alleged assault by police officer in execution of crowd control duties at a football match – use of capsicum spray – whether in self-defence – whether use of capsicum spray was justified or whether it amounted to an assault in the circumstances – verdict for defendant.

[Broughton](#) (I)

From the United Kingdom...**Quinton v Peirce & Anor [2009] EWHC 912 (QB)**

High Court of England & Wales, Queen’s Bench

Eady J

Tort of injurious falsehood - *Data Protection Act 1998 (UK)* – first defendant Liberal Democrat Party candidate being sued in respect of election leaflet said to contain a number of untrue factual statements about claimant Conservative Party candidate - claimant alleging leaflet infringed two of the principles in the statute, namely requirements for fairness & accuracy - statutory interpretation — no malice - action dismissed.

[Quinton](#) (I)



From the United States of America...

Legal Services Plan of Eastern Michigan (pl-app) v Citizens Insurance Company of America, no. 278110

State of Michigan Court of Appeals

Wilder PJ; Markey & Talbot JJ

Insurance policy – coverage of plaintiff's business premises – City of Flint began a construction project that involved replacing footpath & planting trees near plaintiff's building – water flowing into basement – plaintiff contended primary court erred in finding that exclusions in insurance policy precluded coverage of damage to plaintiff's building caused by water & "construction activity" – primary judge had granted summary disposition in favour of Citizens – decision of primary court affirmed.

[Legal Services Plan of Eastern Michigan](#) (I, C)

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