

Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Australian Competition & Consumer Commission v Telstra Corporation Ltd - Trade Practices Act 1974 (Cth) – statutory interpretation – model terms & conditions - dispute concerning access to Unconditioned Local Loop Service (B, C)

IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq'n) (No 2) - Costs – offer of compromise - indemnity costs - Federal Court Rules Order 23 r11 - s511 *Corporations Act* 2001 (Cth) (B)

Australian Competition & Consumer Commission v AMV Holding Ltd - Power of Court to make declarations by consent - s21 *Federal Court of Australia Act* 1976 (Cth) – advertisements in magazine – contraventions of *Trade Practices Act* 1974 (Cth) (I, B)

Strategic Financial & Project Services Pty Ltd v Bank of China Ltd & Commonwealth Bank of Australia - Security for costs - order made that security of \$250,000 be provided by applicants in relation to first respondent, & \$200,000 in relation to second respondent (B)

Van Efferen v CMA Corporation Ltd - Contracts of employment – basis for calculating damages for breach of Australian workplace agreement (C)

Futuris Corporation Limited v Commissioner of Taxation - Application for further & better particulars refused – s177C(1) of Part IVA *Income Tax Assessment Act* 1936 (Cth) (B)

Ashmere Cove Pty Ltd v Beekink - Insurance policy – exclusion clauses – managed investment scheme - determination of two separate questions - whether insurance policy responds to claims - *Trade Practices Act* 1974 (Cth), *Fair Trading Act* 1987 (NSW), *Fair Trading Act* 1985 (Vic) & similar legislation in other states - *Corporations Law* s995(2) (I, B)



Rowlands v State of New South Wales - Personal injuries claim - medical examination – whether order requiring plaintiff to submit to drug screening the day before appointment within power – privilege against self-incrimination - scope of powers conferred by Part 23 Rule 1 Uniform Civil Procedure Rules 2005 (I)

Northern Residential Pty Limited v Newcastle City Council - *Environmental Planning & Assessment Act 1979* (NSW) - development consent for subdivision of land - primary judge had held subdivision certificates invalid – appeal allowed (C)

BMW Australia Finance Limited v Miller & Associates Insurance Broking Pty Ltd - *Trade Practices Act 1974* (Cth) – negligence – causation – apportionment - misleading or deceptive conduct - insurance premium funding loan – policy issued by HIH Casualty & General Insurance Ltd - by majority, appeal allowed (I)

Ogden v Bells Hotel Pty Ltd - Personal injuries – negligence - plaintiff employee victim of robbery at hotel – psychiatric injury – breach of duty by employer established (I)

Clifford & Anor v Solid Investments Australia Pty Ltd - *s49 Property Law Act 1958* (Vic) – held that purchasers of two lots on plan of subdivision of multistorey development had lawfully rescinded contracts (C)

Marchesi v Vasiliou - Indemnity costs - misuse of caveat procedure (B, C)

Shane Michael Laws v Web Scaffolding Pty Ltd - Personal injury - extension of limitation period granted (I)

From the District Court of New South Wales:

Vasilikopoulos v New South Wales Department of Housing - Personal injuries - fall in bathroom of rented premises - liability of landlord - verdict for defendant, but assessment made of damages (I)

Corby v State of New South Wales - Personal injuries – plaintiff in custody at police station - application by defendant to strike out plaintiff's claim for aggravated & exemplary damages refused (I)

Summaries with links (5 minute read)

Wednesday 10 June 2009

Australian Competition & Consumer Commission v Telstra Corporation Ltd [2009] FCAFC 68

Full Federal Court of Australia

Ryan, Jacobson & Foster JJ (in Sydney)

Trade Practices Act 1974 (Cth) – statutory interpretation – model terms & conditions - dispute concerning access to Unconditioned Local Loop Service – ACCC's written determination - ACCC & Optus disputing correctness of primary judge's interpretation of s152AQB(2) - appeals allowed & matters remitted to ACCC.

[Australian Competition and Consumer Commission](#) (B, C)

IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd (in liq'n) (No 2) [2009] FCAFC 69

Full Federal Court of Australia

North, Emmett & Rares JJ (in Perth)

Costs – disputes in connection with proposed orders following decision of Full Federal Court 6 February 2009 – for decision 6.2.09, see 'Benchmark' B & IBC Tuesday 10 February 2009 & link below – IMF's offer of compromise - presumption of entitlement to indemnity costs under Federal Court Rules Order 23 r 11 - s511 *Corporations Act 2001* (Cth).

[IMF](#) (B)

[IMF](#) - corporate insolvency - winding up – litigation funding agreement – agreement providing that a proportion of any settlement or judgment received by company be paid to funder in addition to repaying it all moneys it had outlaid – competing claims & priorities to funds – competing equitable interests - appeal allowed.

Australian Competition & Consumer Commission v AMV Holding Ltd [2009] FCA 605

Federal Court of Australia

Moore J (in Sydney)

Power of Court to make declarations by consent - s21 *Federal Court of Australia Act 1976* (Cth) – agreed facts – "BliNG" advertisements in magazine – contraventions of *Trade Practices Act 1974* (Cth) – an interesting review of case law.

[Australian Competition and Consumer Commission](#) (I, B)

Strategic Financial & Project Services Pty Ltd v Bank of China Ltd & Commonwealth Bank of Australia [2009] FCA 604

Federal Court of Australia

Moore J (in Sydney)

Application for security for costs – s56 *Federal Court of Australia Act 1976* (Cth) - s1335 *Corporations Act 2001* (Cth) – promissory note – negligence – *Trade Practices Act 1974* (Cth) - order made that

security of \$250,000 be provided by applicants in relation to first respondent, & \$200,000 in relation to second respondent – succinct consideration of principles & case law.

[Strategic Financial and Project Services](#) (B)

Van Efferen v CMA Corporation Ltd [2009] FCA 597

Federal Court of Australia

Tracey J (in Melbourne)

Contracts of employment – implied terms - Australian workplace agreement – termination of applicant’s employment with ‘Dolphin Project’: demolition of wharf at Port Hedland & construction of new one - whether grievance procedure was a mandatory obligation – whether employer breached grievance procedure in agreement – mutual trust & confidence - good faith - basis for calculating damages for breach of Australian workplace agreement - judgment for applicant.

[Van Efferen](#) (C)

Futuris Corporation Limited v Commissioner of Taxation [2009] FCA 600 Federal Court of Australia

Mansfield J (in Adelaide)

Income Tax Assessment Act 1936 (Cth) – application by applicant for further & better particulars – hearing listed for 13 July :objection to assessment under Part IVA - assessment made that applicant obtained a tax benefit in connection with a scheme within s177C(1) of Part IVA – “tax benefit” - application refused – respondent not required to provide particulars sought.

[Futuris Corporation](#) (B)

Ashmere Cove Pty Ltd v Beekink [2009] FCA 564

Federal Court of Australia

Barker J (in Perth)

Insurance policy – exclusion clauses – managed investment scheme - determination of two separate questions - preliminary issue as to whether an insurance policy issued by sixth & seventh respondents Suncorp Metway Insurance Ltd & Employers Reinsurance Corporation responds to claims applicants have made against fifth respondent Knightsbridge Managed Funds Ltd (in liq’n) - *Trade Practices Act 1974* (Cth), *Fair Trading Act 1987* (NSW), *Fair Trading Act 1985* (Vic) & similar legislation in other states - misleading & deceptive conduct - Corporations Law s995(2) – both separate questions answered ‘yes’ – ‘arising from’ - succinct & detailed consideration of cases & principles relating to construing policies of insurance including exclusion clauses.

[Ashmere Cove](#) (I, B)

Rowlands v State of New South Wales [2009] NSWCA 136

Court of Appeal of New South Wales

Allsop P; Hodgson & Tobias JJA

Personal injuries claim - medical examination – neuropsychological testing –respondents claim

assessment of applicant's present cognitive abilities would be affected by drug-taking by applicant in days preceding assessment - respondents had applied in District Court for orders that applicant submit to drug screening test the day before proposed appointment - primary judge had made orders including that if appellant failed or refused to submit to screening, proceedings be stayed until further order – scope of powers conferred by Part 23 Rule 1 Uniform Civil Procedure Rules 2005 - whether orders were within power - whether orders infringed applicant's privilege against self-incrimination - relevance of power to stay proceedings – an interesting decision – some divergence of opinion but appeal allowed.

[Rowlands \(I\)](#)

Northern Residential Pty Limited v Newcastle City Council [2009] NSWCA 141

Court of Appeal of New South Wales

Hodgson & Tobias JJA; Simpson J

Environmental Planning & Assessment Act 1979 (NSW) - development consent for subdivision of land – requirements for inspections of stages of subdivision works – inspections carried out by person other than certifying authority – whether s109E(3) breached – Council had commenced proceedings in Land & Environment Court seeking declarations that four subdivision certificates invalid – in proceedings brought originally in Supreme Court & transferred to LEC, order sought restraining Registrar-General from registering relevant plans – primary judge had held certificates invalid – appeal allowed.

[Northern Residential \(C\)](#)

BMW Australia Finance Limited v Miller & Associates Insurance Broking Pty Ltd [2009] VSCA 117

Court of Appeal of Victoria

Neave & Ashley JJA (Ashley JA dissenting); Robson AJA

Trade Practices Act 1974 (Cth) – negligence – causation – apportionment - misleading or deceptive conduct - insurance premium funding loan – policy issued by HIH Casualty & General Insurance Ltd - representation by insurance broker to insurance premium funder on nature of insurance policy to be funded – officers of insurance premium funder failed to take reasonable care to ascertain true nature of the policy – relevance of negligent behaviour of officers misled into believing insurance was property insurance – representation by silence or omission – broker requested to provide details of nature of policy – broker failed to inform premium funder of true nature of the policy - whether insurance broker owed insurance premium lender a duty of care to provide accurate information on nature of the policy to be funded – whether duty of care breached – whether premium funder suffered loss and damage as a result of breach of duty of insurance broker – contributory negligence of officers of premium funder - comprehensive review of case law – by majority, appeal allowed – Ashley JA dissented, finding that BMW had not established its claim under *Trade Practices Act 1974* (Cth) & that nor had it established causation on negligence claim.

[BMW Australia Finance \(I\)](#)

[BMW Australia Finance](#) – decision 5 October 2007

Ogden v Bells Hotel Pty Ltd [2009] VSC 219

Supreme Court of Victoria

Williams J

Personal injuries – negligence - duty to prevent harm from criminal activity –plaintiff employee victim of robbery at hotel – psychiatric injury – whether breach of employer’s duty - failure to take reasonable security measures - subsequent police raid of victim’s home – inappropriate police behaviour - causation - whether police raid a novus actus interveniens – whether damages for loss of earning capacity should include compensation for loss of benefit of investment of employer’s superannuation contribution – breach of duty established – no contributory negligence – noting potential for overlap between the various heads of damage, Her Honour considered an award of \$825,000 reasonable.

[Ogden](#) (I)**Clifford & Anor v Solid Investments Australia Pty Ltd [2009] VSC 223**

Supreme Court of Victoria

Bongiorno J

s49 *Property Law Act* 1958 (Vic) - dispute as to whether plaintiff purchasers of two lots on plan of subdivision of multistorey development on Eastern Beach, Geelong, had lawfully rescinded contracts by which they bought those lots – held that both contracts lawfully rescinded.

[Clifford](#) (C)**Marchesi v Vasiliou [2009] VSC 213**

Supreme Court of Victoria

Hansen J

Costs – high-handed conduct in lodging caveat – misuse of caveat procedure – indemnity costs.

[Marchesi](#) (B, C)**Shane Michael Laws v Web Scaffolding Pty Limited [2009] ACTSC 65**

Supreme Court of Australian Capital Territory

Master Harper

Limitation of actions – personal injury – claim against employer – workers’ compensation claim previously accepted – extension granted.

[Shane Michael Laws](#) (I)**From the District Court of New South Wales...****Vasilikopoulos v New South Wales Department of Housing [2009] NSWDC 114**

District Court of New South Wales

Hungerford ADCJ



Personal injuries - rented residential premises - injury to member of tenant's household - fall in bathroom - plaintiff aged fifty-eight at time of accident - unsuitability of bathroom facilities due to resultant condition from two total knee replacements - liability of landlord - contributory negligence - verdict for defendant, but assessment made of damages.

[Vasilikopoulos](#) (I)

Corby v State of New South Wales [2009] NSWDC 117

District Court of New South Wales

Murrell SC DCJ

Personal injuries - plaintiff in custody at police station - intentional torts - assault - defendant accepted vicarious liability for actions of alleged assailants - application by defendant to strike out plaintiff's claim for aggravated & exemplary damages, relying on 2008 amendments to *Civil Liability Act* 2002 (NSW) - application refused - detailed consideration of case law.

[Corby](#) (I)

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