



## Insurance Banking & Construction

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

#### Executive Summary (1 minute read)

**Zheng v Cai** - High Court of Australia - personal injuries - motor vehicle accident - appeal allowed (I)

**ICM Agriculture Pty Ltd v the Commonwealth** - High Court of Australia - *Commonwealth of Australia Constitution Act* - acquisition of property on just terms - *National Water Commission Act 2004 (Cth)* (I, B, C)

**Euroceanica (UK) Ltd v The Ship "Gem of Safaga"** - *Admiralty Act 1988 (Cth)* - cargo ship arrested at Port Kembla (I)

**Ace-Semi Trailer Sales Pty Ltd v Zurich Australia Insurance Ltd** - Costs - proceedings involving s151Z *Workers Compensation Act 1987 (NSW)* (I)

**Pratap v Motor Accidents Authority of NSW & Ors** - s63(3) *Motor Accidents Compensation Act 1999 (NSW)* (I)

**Chami v Motor Accidents Authority of NSW & Anor** - *Motor Accidents Compensation Act 1999 (NSW)* - appeal from decision of CARS assessor (I)

**South West Helicopters Pty Ltd v Country Energy** - Personal injuries - application to transfer several proceedings from District to Supreme Court granted (I)

**Spotless Services Australia Ltd v Herbath & Anor** - Personal injuries - contribution - contributory negligence - costs - statutory interpretation - s134AB(28) *Accident Compensation Act 1985 (Vic)* (I)

**Curwen & Ors v Vanbreck Pty Ltd** - Trusts - deed of appointment (B)

**Hausman & Anor v Abigroup Contractors Pty Ltd** - Building contract - development at St. Kilda Road - summary judgment (B, C)

**Port of Portland Pty Ltd v State of Victoria** - *Land Tax Act 1958* (Vic) (B, C)

**Re AWB Ltd (No 10)** - *Corporations Act 2001* (Cth) - civil penalty proceedings - application to permanently stay second proceeding (B)

**Viridian Noosa Pty Ltd v Neumann Contractors Pty Ltd** - *Commercial Arbitration Act 1990* (Qld) (C)

**Quick v Dodd & Anor; Sheppard's Diesel Service Pty Ltd v Barber & Ors** - Personal injuries - plaintiff attacked by dog during course of employment - assessment of damages (I)

**Abu-Ali v Rubino Holdings Pty Ltd t/as Inbloom Florist** - Personal injuries - agency - whether relationship between two defendants that of employment, agency or independent contract - contributory negligence - assessment of damages (I)



## Summaries with links (5 minute read)

### Friday 11 December 2009

#### **Zheng v Cai [2009] HCA 52**

High Court of Australia

French CJ; Gummow, Crennan, Kiefel & Bell JJ

Personal injuries - motor vehicle accident at Chatswood - for decision NSW Court of Appeal 25 February 2009, see 'Benchmark' I & IBC Monday 2 March 2009 & link below - appeal allowed - "assessment of damages", "benevolent payment", "gift", "intention", "public policy", "volunteer work".

[Zheng](#) (I)

[Cai](#) - decision NSW Court of Appeal 25 February 2009 - s128(3) *Motor Accidents Compensation Act* 1999 (NSW) as amended by *Civil Liability Legislation Amendment Act* 2008 (NSW) - 151Z(1) *Workers Compensation Act* 1987 (NSW) - indemnity - liability had been admitted in proceedings in District Court - "proceedings determined before that commencement" - costs - damages - assessment of gratuitous care - correct approach to characterising payments from church: case law considered - appeal allowed - judgment in favour of respondent for \$300,681 set aside & in substitution: judgment entered for respondent in sum of \$17,447.91.

#### **ICM Agriculture Pty Ltd v the Commonwealth [2009] HCA 51**

High Court of Australia

French CJ; Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ

*Commonwealth of Australia Constitution Act* - acquisition of property on just terms - action commenced in the original jurisdiction of the High Court - five questions for determination - *National Water Commission Act* 2004 (Cth) - whether CEO of National Water Commission authorised to enter into funding agreement with State for purpose of State acquiring property on other than just terms - "abstraction", "acquisition", "coercive & non-coercive power", "control", "just terms", "property", "the use & flow".

[ICM Agriculture](#) (I, B, C)

**Euroceanica (UK) Ltd v The Ship "Gem of Safaga" [2009] FCA 1467**

Federal Court of Australia

Rares J (in Sydney)

*Admiralty Act 1988* (Cth) - cargo ship arrested at Port Kembla - plaintiff arresting ship as sister ship for general maritime claim - arrest within jurisdiction - challenge to jurisdiction failed - "the owner", "charterer", "in control of."

[Euroceanica \(UK\)](#) (I)

**Ace-Semi Trailer Sales Pty Ltd v Zurich Australia Insurance Ltd [2009] NSWCA 381**

Court of Appeal of New South Wales

Hodgson, Basten & Macfarlan JJA

Costs - proceedings involving *s151Z Workers Compensation Act 1987* (NSW) - appropriate costs orders on cross-claim by third party against employer for joint tortfeasor contribution.

[Ace-Semi Trailer Sales](#) (I)

[Miles](#) - decision 20 February 2009 - costs - personal injury claim - liability had been determined at 65% against Zurich (insurer for PJS) & 35% against Ace - consequential orders - *s151Z Workers Compensation Act 1987* (NSW) - whether Offer of Compromise effective - cross-claim - whether cross-defendant should contribute to plaintiff's costs;

[Miles](#) - decision 11 February 2008 - industrial accident - apportionment of liability between contractor and employer - contributory negligence.

**Pratap v Motor Accidents Authority of NSW & Ors [2009] NSWSC 1325**

Supreme Court of New South Wales

R A Hulme J

*s63(3) Motor Accidents Compensation Act 1999* (NSW) - issue as to degree of whole person impairment plaintiff had suffered & whether entitled to recover for non-economic loss - assessment made that the degree of such impairment was not greater than ten percent - plaintiff sought referral of that assessment to a review panel of medical assessors but second defendant, Acting Proper Officer of Motor Accidents Authority of NSW, refused that application - plaintiff seeking orders in nature of certiorari & mandamus [or pursuant to *s65 Supreme Court Act 1970* (NSW)] in respect of that refusal - application dismissed.

[Pratap](#) (I)

**Chami v Motor Accidents Authority of NSW & Anor [2009] NSWSC 1358**

Supreme Court of New South Wales

Harrison AsJ

*Motor Accidents Compensation Act 1999* (NSW) - appeal from decision of CARS assessor - whether an assessor can take into account procedural fairness when making a determination under s62(1)(b) - decision of assessor quashed - matter remitted to Motor Accidents Authority - detailed consideration of Australian case law.

[Chami v Motor Accidents Authority of NSW \[2009\] NSWSC 1358](#) (I)

**South West Helicopters Pty Ltd v Country Energy [2009] NSWSC 1376**

Supreme Court of New South Wales

Harrison J

Personal injuries - fatal accident - application to transfer several proceedings from the District Court to the Supreme Court granted.

[South West Helicopters](#) (I)

**Spotless Services Australia Ltd v Herbath & Anor [2009] VSCA 285**

Court of Appeal of Victoria

Buchanan & Mandie JJA; Byrne AJA

Personal injuries - contribution - contributory negligence - costs - statutory interpretation - s134AB(28) *Accident Compensation Act 1985* (Vic) - appeals arising from County Court proceedings against respondent's employer, the appellant Spotless & against occupier of the premises in Tottenham where accident happened, the appellant Feltex.

[Spotless Services Australia](#) (I)

**Curwen & Ors v Vanbreck Pty Ltd [2009] VSCA 284**

Court of Appeal of Victoria

Redlich & Bongiorno JJA; Hansen AJA

Trusts - deed of appointment - for decision appealed from, see 'Benchmark' B & IBC Wednesday 17 September 2008 & link below - appeal dismissed.

[Curwen](#) (B)

[Curwen](#) - decision 11 September 2008 - trusts - application to inspect trust documents - trustee's removal of certain beneficiaries by exercise of exclusion power in trust deed - whether power exercised for improper purpose - application dismissed - at para 54 of judgment:

“ ... although a trustee’s reasons for exercising a discretionary power are not examinable for the purpose of challenging the way in which the discretion was exercised, they are examinable to enable an enquiry as to whether the trustee had an ulterior or improper purpose and as to whether the trustee gave real and genuine consideration to the exercise of the discretion.”

**Hausman & Anor v Abigroup Contractors Pty Ltd [2009] VSCA 288**

Court of Appeal of Victoria

Weinberg & Bongiorno JJA; Williams AJA

Building contract - development at St. Kilda Road - Master had declined application for summary judgment - on appeal from Master’s decision, judge had allowed appeal & had granted summary judgment - appeal against judge’s decision to grant summary judgment application dismissed.

[Hausman](#) (B, C)

[Abigroup Contractors](#) - decision Supreme Court of Victoria 7 October 2008

**Port of Portland Pty Ltd v State of Victoria [2009] VSCA 282**

Court of Appeal of Victoria

Maxwell P, Buchanan JA & Nettle JJA

*Land Tax Act* 1958 (Vic) - whether an agreement by executive government to refund to landowner amount of land tax payable by landowner was unenforceable as an unlawful dispensation from obligations imposed by statute - for decision appealed from, see ‘Benchmark’ B Friday 7 December 2007 & link below.

[Port of Portland](#) (B, C)

[Port of Portland](#) - decision 30 November 2007 - statutory corporation - agreement by State with plaintiff to effect amendments to legislation so as to ensure that site value for purposes of land tax excluded port improvements & to refund or allow to plaintiff amount of any land tax payable as a result of any failure to pass the required legislative amendments - agreement not sanctioned by Parliament - whether agreement unenforceable as an unlawful dispensation of the requirements of the land tax legislation - whether certain legislative amendments fulfilled the requirements of an agreement between the State & plaintiff.

**Re AWB Ltd (No 10) [2009] VSC 566**

Supreme Court of Victoria

Robson J

*Corporations Act* 2001 (Cth) - civil penalty proceedings - application to permanently stay second proceeding - stay ordered as second proceeding constitutes an abuse of process.

[Re AWB](#) (B)

**Viridian Noosa Pty Ltd v Neumann Contractors Pty Ltd [2009] QSC 398**

Supreme Court of Queensland

Byrne SJA

*Commercial Arbitration Act* 1990 (Qld) - application to stay proceedings under s53 - whether parties entitled to litigate despite arbitration clause in contract - application dismissed.

[Viridian Noosa](#) (C)

**In the District Court of New South Wales...****Quick v Dodd & Anor; Sheppard's Diesel Service Pty Ltd v Barber & Ors [2009] NSWDC 323**

District Court of New South Wales

Levy SC DCJ

Personal injuries - plaintiff attacked by a Rottweiler dog during course of employment - assessment of damages - *Civil Liability Act* 2002 (NSW) - employer's subrogated claim under s151Z(1)(d) *Workers' Compensation Act* 1987 (NSW) for recovery of payments of workers' compensation paid to victim of dog attack - in proceedings no. 2331/2009 verdict for plaintiff in sum of \$242,989.60 - in proceedings no. 5416/2008 verdict for plaintiff Shepherd's Diesel Service in sum of \$47,024.18.

[Quick](#) (I)

**Abu-Ali v Rubino Holdings Pty Ltd t/as Inbloom Florist [2009] NSWDC 321**

District Court of New South Wales

Hungerford ADCJ

Personal injuries - agency - customer struck by trolley loaded with flowers at shopping centre - trolley pushed by shopkeeper - vicarious liability - whether relationship between two defendants that of employment, agency or independent contract - contributory negligence - assessment of damages - detailed examination of case law.

[Abu-Ali](#) (I)