

## Insurance Banking & Construction A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Hogan v Australian Crime Commission** - *Federal Court of Australia Act 1976 (Cth)* - s50 orders - appeal dismissed (I, B, C)

**Betfair Pty Ltd v Racing New South Wales** - *Commonwealth of Australia Constitution Act s92* - freedom of interstate trade - protectionism - discrimination - application dismissed (I, B, C)

**Sportsbet Pty Ltd v New South Wales** - ss92 & 109 *Commonwealth of Australia Constitution Act* - applicant contending impost protectionist & infringement of s49 *Northern Territory (Self-Government) Act 1978 (Cth)* as to free trade between states & territories (I, B, C)

**El Hayek v Vasic** - Insurance - personal injury claim - entitlement of cross-claimants to indemnity under policy - whether breach of condition of policy (I)

**Thambiappah v Commonwealth Bank of Australia** - Mortgagees - where mortgagee had disposed of chattels on mortgaged premises prior to exercise of power of sale - service of notice of default (B)

**Tap (Harriet) Pty Ltd v Burrup Fertilisers Pty Ltd** - Application for separate trial of issues - gas sale & purchase agreement - determination of force majeure issues (I, B, C)

**Great Southern Managers Australia Ltd (in liq) in its capacity as Responsible Entity of the**

**Managed Investment Schemes listed in Schedule 1 v Thackray** - Application by liquidators for directions - managed investment scheme - olive properties (B)

**Norris v Zimmer** - Personal injuries - motor vehicle accident - whiplash injury - judgment for plaintiff in sum of \$154,964.60 (I)

## Summaries with links (5 minute read)

**Friday 18 June 2010**

### **Hogan v Australian Crime Commission [2010] HCA 21**

High Court of Australia

French CJ; Gummow, Hayne, Heydon & Kiefel JJ

s50 *Federal Court of Australia Act 1976* (Cth) - production of documents - for decision appealed from, see 'Benchmark' B & IBC Tuesday 23 June 2009 & link below - confidentiality - appellant seeking relief which would have effect of reinstating s50 order with respect to certain documents & dismissing O 46 r 6(3) application by newspapers - appeal dismissed.

[Hogan](#) (I, B, C)

[Hogan](#) - decision Full Court of the Federal Court 19 June 2009 - application for leave to appeal - leave sought to appeal from interlocutory orders made by the primary judge vacating all then current orders made under s50 *Federal Court of Australia Act 1976* - s50 relevantly provides that the Court may make such order forbidding or restricting publication of particular evidence as appears to the Court necessary in order to prevent prejudice to the administration of justice - leave to appeal granted - by majority, appeal dismissed - detailed examination of case law;

[Australian Crime Commission](#) - decision Federal Court 29 August 2008: reported at (2008) 250 ALR 66 - revocation of s50 orders

### **Betfair Pty Ltd v Racing New South Wales [2010] FCA 603**

Federal Court of Australia

Perram J (in Sydney)

s92 *Commonwealth of Australia Constitution Act* - freedom of interstate trade - protectionism - discrimination - applicant conducts business from Hobart in Tasmania - its complaint against regulators of thoroughbred racing & harness racing in New South Wales, the first & second respondents - applicant contending that particular fee imposed by first and second respondents for right to use "race fields information" discriminates against it & in favour of a New South

Wales trader, TAB Ltd, & that the fee does so in a way which is properly to be characterised as protectionist - applicant seeking relief from obligation to pay the fee & the return to it of so much of the fee as it has already paid - whether intentions of officials of first & second respondents who made the decision to impose the fee relevant to questions posed by s92 - race fields fee imposed by respondents discriminates in favour of TAB & against Betfair but Betfair has failed to prove that fee was protectionist in nature - application dismissed - comprehensive consideration of legislation, text & Australian case law.

[Betfair](#) (I, B, C)

### **Sportsbet Pty Ltd v New South Wales [2010] FCA 604**

Federal Court of Australia

Perram J (in Sydney)

ss92 & 109 *Commonwealth of Australia Constitution Act* - applicant a bookmaker conducting business from the Northern Territory via internet & telephone - thoroughbred horse races and harness races conducted in New South Wales - imposition of 1.5% of the total of all bets placed with any wagering operator on New South Wales thoroughbred & harness races regardless of the domicile of operator - applicant contending impost interferes with freedom of trade between New South Wales & Northern Territory by placing a burden on interstate trade from which almost all NSW wagering operators are exempted, in substance, by rebating of impost - applicant contending impost protectionist & infringement of s49 *Northern Territory (Self-Government) Act 1978* (Cth) as to free trade between states & territories - applicant's contention well-founded - impost protectionist burden which discriminates against traders in the Northern Territory & unlawful - judgment against second respondent for \$2,061,000 together with interest - declarations made - comprehensive consideration of legislation, text & case law.

[Sportsbet](#) (I, B, C)

### **El Hayek v Vasic [2010] NSWSC 634**

Supreme Court of New South Wales

Garling J

Insurance - property owned by first cross-claimant & managed by second cross-claimant - personal injury claim by plaintiff, a minor; father attended for the purposes of hunting feral animals - determination of separate questions - what document or documents constituted insurance policy - whether upon true construction of policy, cross-claimants entitled to indemnity in respect of plaintiff's claim & to indemnity in respect of the costs of cross-claimants reasonably

incurred in defending plaintiff's claim - answer 'yes' - whether cross-claimants were in breach of condition 4.10(b) of policy - answer 'no.'

[El Hayek](#) (I)

**Thambiappah v Commonwealth Bank of Australia [2010] NSWSC 520**

Supreme Court of New South Wales

Harrison J

Mortgagees - where mortgagee had disposed of chattels on mortgaged premises prior to exercise of power of sale - whether authorised by terms of mortgage - whether power to dispose of chattels limited to power to sell - whether plaintiff established title to sue - whether exclusion of liability operated to defeat claim for loss of chattels - service of notice of default - s57(2)(b) *Real Property Act* 1900 (NSW) - "last known residential address" - notice not properly served - whether mortgagee liable in damages for "wrongful sale" - no cause of action shown - mortgagor limited to suit for accounts - no casual connection between alleged breach and loss in any event - no evidence of loss or damage - mortgagor's claims dismissed.

[Thambiappah](#) (B)

**Tap (Harriet) Pty Ltd v Burrup Fertilisers Pty Ltd [2010] WASC 137**

Supreme Court of Western Australia

Le Miere J

Application for separate trial of issues - gas sale & purchase agreement - determination of *force majeure* issues - whether the Court would be determining issues on a hypothetical basis - parties agreed on determination of one issue, but not as to *force majeure* - orders made for determination of issue parties agreed should be determined separately, but not as to other issues, including construction of *force majeure* provision.

[Tap \(Harriet\)](#) (I, B, C)

**Great Southern Managers Australia Ltd (in liq) in its capacity as Responsible Entity of the Managed Investment Schemes listed in Schedule 1 v Thackray [2010] WASC 138**

Supreme Court of Western Australia

Le Miere J

Application by liquidators for directions - managed investment scheme - olive properties - termination of head lease - unconscionability - orders made for asset sale agreements to proceed and for sale proceeds to be held on trust pending determination of rights proceedings.

[Great Southern Managers Australia](#) (B)



## **Norris v Zimmer [2010] ACTSC 51**

Supreme Court of the Australian Capital Territory

Master Harper

Personal injuries - motor vehicle accident - plaintiff driving home from work when her car struck from behind - whiplash injury to neck and back - impairment of earning capacity - reduced likelihood of promotion - judgment for plaintiff in sum of \$154,964.60.

[Norris](#) (I)

## **Today is Benchmark's Third Birthday, by George !**

And to celebrate, we're putting the spotlight on Three Georges from the literary & theatrical world of the Victorian era:

### **George Alexander**

(b. Reading 19 June 1858 - d. Chorleywood, Hertfordshire 16 March 1918)

Actor/manager - born George Alexander Gibb Samson - he signed the lease on the St. James's Theatre in London in November 1890 after eleven years' professional experience as an actor. He remained at the helm of the Theatre until his death twenty-eight years later. He was sure Oscar Wilde could write a first-rate play, and gave him one hundred pounds in advance of royalties. In Hesketh Pearson's "*The Life of Oscar Wilde*" Alexander - known as Alec - recalled for the biographer his conversation with Wilde on the subject:

*"When am I going to see that play?"*

*"My dear Alec, you may see any play you wish to see. You have only to go to the theatre where it is being performed, and I am sure they will give you admirable seats."*

*"You know perfectly well the play I mean."*

*"How can I know if you keep it secret?"*

*"The play you are writing for me."*

*"Oh, that! My dear Alec, it isn't written yet, so how can you possibly see it?"*

*"May I ask if you have started to write it?"*

*"Not with pen and ink ... no... but it is all written in my head, and there I think we must leave it for the present."*

*"But don't you want to make money?"*

"I much prefer money that is made for me ... Ah, I was forgetting,... yes ... I suppose I shall have to do something. I owe you a hundred pounds."

"Oh, don't worry about that ! "

"I don't."

"Lady Windermere's Fan" was produced at the St. James's Theatre on 20 February 1892 with Alexander as Lord Windermere and Marion Terry as Mrs. Erlynne. The first performance of "The Importance of Being Earnest" took place at the Theatre on 14 February 1895 with Alexander as Jack Worthing & Allan Aynesworth as Algernon Moncrieff.

[George Alexander \(actor\) - Wikipedia, the free encyclopedia](#)

### George Grossmith

(b. Islington, London 9 December 1847 - d. Folkstone, Kent 1 March 1912)

Singer/comedian/actor/author/composer of six hundred songs & sketches which he also performed - the first full-length Gilbert & Sullivan opera commissioned by Richard D'Oyly Carte, *'The Sorcerer'* opened in London on 17 November 1877 - making their Gilbert & Sullivan débuts were Rutland Barrington, Richard Temple & George Grossmith. The latter was a member of the Company from 1877 to 1889 - Sir Joseph Porter in *'HMS Pinafore'* & Jack Point in *'The Yeomen of the Guard'* were just two of the roles he performed. On 10 October 1881, the Savoy Theatre, built to stage Gilbert & Sullivan operas (& the first public building in the world to be lit throughout by electricity) opened with a gala performance of *'Patience,'* with Grossmith in the role of Reginald Bunthorne. Before joining the D'Oyly Carte Company, Grossmith had been a solo performer & after leaving the Company, he resumed his solo career, in which he was very successful. His autobiography *'A Society Clown'* was published in 1888 & in 1892, he & his brother Weedon completed *'The Diary of a Nobody.'*

[George Grossmith - Wikipedia, the free encyclopedia](#)

recommended reading: *'Gilbert & Sullivan - the D'Oyly Carte Years'* - Robin Wilson & Frederic Lloyd (1984) - plentiful photographs

[The Diary of a Nobody \(by George and Weedon Grossmith\)](#)

### George Gissing

(b. Wakefield 22 November 1857, Wakefield - d. France 28 December 1903)

Novelist/short story writer - a brilliant student, he was expelled from university in 1876 & prosecuted for theft - he was sentenced to one month's hard labour - he went to America after his release from prison, returning to England in 1877. He settled in London & began a life of constant



literary activity; he wrote more than twenty novels, starting with 'Workers of the Dawn' in 1880. In 1891, he published 'New Grub Street,' & in 1893 'The Odd Women.'

[George Gissing - Wikipedia, the free encyclopedia](#)

Recommended reading - biography of Gissing by Paul Delany

[George Orwell: George Gissing](#)

In this essay from the 1940s, George Orwell wrote of Gissing:

*"... merely on the strength of "New Grub Street," "Demos" & "The Odd Women" I am ready to maintain that England has produced very few better novelists..."*

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