

## **Insurance Banking & Construction**

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

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### **Executive Summary (1 minute read)**

**Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd** - *Trade Practices Act 1974 (Cth)* - s5 *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)* - international airfreight services - concept of a market - applications for leave to appeal relating to separate judgments given on 11 December 2009 (I, B)

**Cortem SpA v Controlmatic Pty Ltd** - Torts - passing off - *Trade Practices Act 1974 (Cth)* - Sched 1 *Sale of Goods (Vienna Convention) Act 1986 (NSW)* (I, B, C)

**Wilson v State Rail Authority of New South Wales** - *Workers Compensation Act 1987 (NSW)* - *Workplace Injury Management & Workers Compensation Act 1998 (NSW)* - statutory interpretation - claim for damages at common law - injury received prior to 30 June 1987 (I)

**Helicopters Pty Ltd v Bankstown Airport Ltd** - Contracts - penalty - landlord & tenant - election - estoppel - appeal dismissed (B)

**Gigi Entertainment Pty Ltd v Schmidt** - Referee's report - lease of hotel - procedural fairness - parts of Referee's report rejected, otherwise adopted (I, B, C)

**Challenger Managed Investments Ltd v Milan Samardic & Stoyan Kiceec** - Guarantee & indemnity (B)



**S & D International (in liq) & Anor v MIG Property Services Pty Ltd & Ors** - *Corporations Act* 2001 (Cth) - liquidators - application to court for approval to compromise claim (B)

## Summaries with links (5 minute read)

**Wednesday 18 August 2010**

### **Auskey International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd [2010] FCAFC 96**

Full Court of the Federal Court of Australia

Moore, Jessup & Dodds-Streeton JJ

*Trade Practices Act* 1974 (Cth) - s5 *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) - international airfreight services - concept of a market - representative proceedings - group definition - two applications for leave to appeal relating to separate judgments given on 11 December 2009 in the same proceeding: see links below - in relation to striking out decision: distinction between a service provided to customer & route followed by an aircraft; primary judge in error in two related respects in approach taken to applicant's allegation that there was a global market (at para. 45 of Jessup J's judgment) - in relation to refusal to transfer proceeding: proceedings should not be transferred.

[Auskey International Manufacturing & Trade](#) (I, B)

[Auskey International Manufacturing & Trade](#) - decision 11 December 2009: see 'Benchmark' I, B & IBC Friday 18 December 2009 - *Trade Practices Act* 1974 (Cth) - whether a 'market' has been pleaded adequately for the purposes of s45 - application to amend definition of group members - for decision 29 September 2008, see 'Benchmark' Wednesday 1 October 2008 & link below - further amended statement of claim struck out - detailed consideration of case law as to what constitutes a 'market in Australia.'

[Auskey International Manufacturing & Trade](#) - decision 11 December 2009 - applicant's application seeking transfer of proceeding to New South Wales District Registry of the Court refused;

[Auskey International Manufacturing & Trade](#) - decision 29 September 2008 - *Trade Practices Act* - application to strike out amended statement of claim - whether allegations appropriately pleaded - representative proceedings - Ministerial consent for commencement of proceedings - applicant's central allegation that respondents were members of a cartel which had agreed to & did fix charges for international airfreight moving into & out of Australia - war-risk surcharge - requirements when pleading loss & damage - detailed consideration of case law including from U.S. & U.K - at para. 41:

"It has yet to be determined authoritatively whether a respondent who is facing a loss & damages claim under s82 has a defence if it is shown that the applicant has passed on to customers or clients all additional costs occasioned by the implementation of an agreement made in contravention of a provision of the Act."

**Cortem SpA v Controlmatic Pty Ltd [2010] FCA 852**

Federal Court of Australia

Jessup J (in Melbourne)

Torts - passing off - Sched 1 *Trade Practices Act 1974* (Cth) - *Sale of Goods (Vienna Convention) Act 1986* (NSW) - applicant Italian company distributes & sells explosion-proof junction boxes adapted to house electrical switches, connections - it appointed second respondent as its Australian distributor - second respondent sole shareholder/director of first respondent - applicant contending respondents have held up their own products as applicant's, & have made sales of those products under the applicant's name & logo - alleging misleading & deceptive conduct in trade or commerce - cross-claim in which respondents claiming payments in nature of remuneration &/or compensation, for expenses incurred, & for second respondent's time spent, in securing safety certification of applicant's products with relevant Australian regulatory authority "TestSafe Australia" - permanent injunction restraining second respondent from kind of involvement as contemplated by s80(1) *Trade Practices Act*, relevantly reflecting terms of s75B, in relation to any trading corporation - applicant awarded damages under s82 TPA in sum of \$222,558.18, with its application otherwise dismissed - second respondent awarded damages in sum of \$12,775.29 with cross-claim otherwise dismissed.

[Cortem SpA](#) (I, B, C)

**Wilson v State Rail Authority of New South Wales [2010] NSWCA 198**

Court of Appeal of New South Wales

Allsop P; Giles, Hodgson, Tobias, Macfarlan JJA

*Workers Compensation Act 1987* (NSW) - *Workplace Injury Management & Workers Compensation Act 1998* (NSW) - statutory interpretation - claim for damages at common law - injury received prior to 30 June 1987 - for decision appealed from, see 'Benchmark' I & IBC Friday 19 June 2009 & link below - "existing claim", "new claim", "new claim matter" & "work injury damages" - "work injury damages" - appeal allowed - questions reformulated & answered as follows: (a) Do provisions of Part 5 WC Act (including s151G & 151H) apply to plaintiff's claim for damages? A: No. (b) Do the provisions of Chapter 7 WIM Act require plaintiff to demonstrate that he has suffered a fifteen per cent permanent impairment before he is entitled to commence proceedings for damages?: A: No. (c) Are the plaintiff's proceedings maintainable?: Yes.

[Wilson](#) (I)

[Wilson](#) - decision 17 June 2009 - determination of separate questions - while in employ of first defendant, plaintiff assaulted by second defendant, who was also an employee of first defendant - as to separate question (b), provisions of Division 2 of Part 2 of Chapter 7 of the WIM Act required plaintiff to demonstrate 15 % Whole Person Impairment



(WPI) before he was entitled to commence proceedings for damages - His Honour not required to answer question (a) as to whether Part 5 Division 3 Workers Compensation Act 1987, including ss151G & 151H, applied to plaintiff's claim - proceedings against first defendant dismissed.

## **Helicopters Pty Ltd v Bankstown Airport Ltd [2010] NSWCA 178**

Court of Appeal of New South Wales

McColl & Basten JJA; Handley AJA

Contracts - penalty - landlord & tenant - election - estoppel - appeal by subtenant from primary judge's decision that sub-lessor's rent review notice of 10 March 2006 operated by default to fix contractual rent for two-year period commencing on 1 April 2006 - for decision appealed from, see 'Benchmark' B & IBC Tuesday 1 September 2009 - appeal dismissed.

[Helicopters](#) (B)

[Helicopters](#) - decision 31 August 2009 - *Land Tax Act* 1956 (NSW) - *Land Tax Management Act* 1956 (NSW) - plaintiff a sublessee of property known as site 564 at Bankstown airport - defendant the sublessor - rent review clause in sub-lease - appointment of valuer - whether contractual obligation on plaintiff sublessee to contribute to ex gratia land tax payments payable by defendant sublessor under head lease - calculation of amounts payable - consideration of doctrine of waiver - no estoppel or waiver - plaintiff to pay defendant rental arrears & arrears of ex gratia payments in lieu of land tax.

## **Gigi Entertainment Pty Ltd v Schmidt [2010] NSWSC 906**

Supreme Court of New South Wales

Hall J

Referee's report - plaintiff's application for adoption of report - adoption of the report opposed by defendant on a number of bases - defendant had served notice it was proposing to rely on application for partial adoption of Referee's report - procedural fairness - claim by plaintiff against defendant for damages in respect of obligations imposed on defendant under lease of Tattersall Hotel, Lithgow - Scott Schedule - cross-claim seeking damages for alleged wrongful repudiation of lease & loss of business conducted at the hotel - obligation of Referee to "determine" quantum of liability of lessee under a repair & maintenance provision - defendant had made good challenge to 11 items; parts of Referee's report rejected, otherwise adopted.

[Gigi Entertainment](#) (I, B, C)



**Challenger Managed Investments Ltd v Samardic & Kiceec [2010] NSWSC 908**

Supreme Court of New South Wales

Garling J

Guarantee & indemnity - personal guarantees on commercial loan - judgment for plaintiff creditor.

[Challenger Managed Investments](#) (B)

**S & D International (in liq) & Anor v MIG Property Services Pty Ltd & Ors [2010] VSC 336**

Supreme Court of Victoria

Warren CJ

*Corporations Act* 2001 (Cth) - liquidators - application to court for approval to compromise claim - jurisdiction of court to direct voluntary liquidator - application granted.

[S & D International](#) (B)

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