

Friday 19 October 2012

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**The State of Victoria v Sportsbet Pty Ltd** - constitutional law - trade and commerce between Territory and State - discrimination against out-of-state trade - protectionism (I, B, C, G)

**Kraus v Menzie** - human rights - sexual harassment and discrimination in employment - particularisation of sexual relationship - credibility (I, G)

**Elkington v Farsands Solutions Pty Ltd** - corporations - contract - option to subscribe for shares - implied term (B)

**Rix v Mahony (No 2)** - real property - trusts - joint tenancy - entitlement to gross proceeds of sale of property (B)

**Ward v Allies and Morrison Architects** - tort - damages - whether correct basis for award of damages for loss of future earnings and loss of past earnings - whether erroneous determination in respect of psychiatric injury (I)



**Simmons v Castle** - tort - damages - application to reconsider aspects of judgment announcing increase of 10% in general damages in tort cases (I)

**Body Corporate No. 207624 v North Shore City Council** - tort - duties of care of territorial authorities - whether council owed duty of care when inspecting a mixed-use building (I, C, G)

## Summaries with links (5 minute read)

### **The State of Victoria v Sportsbet Pty Ltd [2012] FCAFC 143**

Full Court of the Federal Court of Australia

Emmett, Kenny & Middleton JJ

Constitutional law - trade and commerce between territory and state - dispute between two corporate bookmakers arising from seizure of *Betbox* device - Northern Territory (**Territory**) bookmaker installed *Betbox* device in hotel in Victoria (**State**) - *Betbox* device seized by officers of the Victorian Commission for Gambling Regulation under s10.5.9(1)(c) *Gambling Regulation Act* 2003 (Vic) - *whether*: respondent engaged in trade and commerce between Territory and State: s49 *Northern Territory (Self-Government) Act* 1978 (Cth) (**Act**), *Betfair v Racing NSW* (2012) 286 ALR 221; placement and acceptance of wagers via electronic transmissions (and associated financial transactions) constituted trade between Territory and State; impugned provisions **in their terms or practical operation** discriminated against trade or commerce between Territory and State: *Castlemaine Tooheys Limited v South Australia* [1990] HCA 1; statutory monopoly was *per se* discrimination against out-of-state trade; impugned provisions constituted discrimination against out-of-state trade of a protectionist character: s92 *Constitution*, s49 of the Act; provisions enacted in pursuit of legitimate objective and were appropriate and adapted, or reasonably necessary, to achieve that objective: *Cole v Whitfield* [1988] HCA 18.

[State of Victoria](#) (I, B, C, G)

**Kraus v Menzie [2012] FCAFC 144**

Full Court of the Federal Court of Australia

Rares, McKerracher & Murphy JJ

Human rights - sexual harassment - discrimination - appellant alleged sexual harassment and unlawful discrimination in employment contrary to ss28B & 14(2) *Sex Discrimination Act 1984* (Cth) (**Act**) - *whether*: primary judge erred in not ordering first respondent to particularise asserted sexual relationship with result that appellant prejudiced in the trial; erroneous finding of fact against weight of the evidence; erroneous findings in relation to credibility; erroneous rejection of appellant's evidence not challenged in cross-examination; failure to properly assess psychiatric evidence; erroneous application of s14 of the Act by failure to find that conduct constituting sexual harassment also constituted discriminatory conduct: s14(2) of the Act.

[Kraus](#) (I, G)

**Elkington v Farsands Solutions Pty Ltd [2012] NSWCA 334**

Court of Appeal of New South Wales

Barrett JA & Tobias AJA

Corporations - contract - implied terms - appeal from order dismissing statement of claim under r13.4 *Uniform Civil Procedure Rules 2005* (NSW) on the ground that no reasonable cause of action disclosed - applicants held options to subscribe for shares in capital of respondent - applicants sued respondent for breach of contract by which applicant's option to subscribe for unissued shares in respondent were created - *whether*: scope for implication of any term into option contract: *Forsyth Oil & Gas NL v Livia Pty Ltd (No 2)* (1985) 59 ALJR 746; implication of particular term by which respondent undertook to every holder of outstanding options over unissued shares that its board of directors (and other decision-making bodies) would never include any person who has an obligation *in conflict with* the obligation the person owes to the respondent: *Bell v Lever Bros Ltd* [1932] AC 161 - objections of principle to any contractual promise by a company as to the way in which its board of directors will be constituted because company has no capacity to decide who will or will not be a member of its board of directors: *Re MIA Group Ltd* [2004] NSWSC 712 - risk taken by holder of option to subscribe for shares: *Hirsch & Co Ltd v Burns* (1897) 77 LT 377.

[Elkington](#) (B)

**Rix v Mahony (No 2) [2012] NSWCA 332**

Court of Appeal of New South Wales

Campbell, Meagher & Barrett JJA

Real property - transfer of property - trusts - joint tenancy - appellant and his wife transferred property to daughter and son-in-law - appellant claimed entitlement to 50% of gross proceeds of sale of property pursuant to order under s66G *Conveyancing Act* 1919 (Cth) - *whether*: primary judge erred in decision that first respondent did not hold a one-half share in the property on trust for the appellant and his wife as joint tenants; respondents were prevented by *res judicata* or issue estoppel from raising question whether joint tenancy severed; erroneous application of authorities; erroneous finding that at time of transfer appellant and his wife intended to hold interests in property separately; counsel for appellant failed to act in accordance with instructions.

[Rix](#) (B)

**From the United Kingdom...****Ward v Allies and Morrison Architects [2012] EWCA Civ 1287**

Court of Appeal of England and Wales

Aikins & Kitchin LJ; Sir R Buxton

Tort - appeal from award made after trial on damages only - appellant's finger cut off while appellant using a circular saw as part of work performed in placement at architect's offices *whether*: - judge awarded damages for loss of future earnings on correct basis; basis should be on broad brush *Blamire* approach: *Blamire v South Cumbria Health Authority* [1993] PIQR Q1, or on conventional multiplicand/multiplier approach using the *Ogden tables* 6th edition; erroneous determination of nature and extent of appellant's psychiatric injury and appropriate award for pain and suffering and loss of amenity in respect of that injury; use of correct basis for loss of past earnings.

[Ward](#) (I)

**Simmons v Castle [2012] EWCA Civ 1288**

Court of Appeal of England and Wales

Judge LCJ; Dyson MR & Sir M Kay

Tort - damages - court gave judgment announcing that general damages in tort cases would be increased by 10% from current levels; *Simmons v Castle* [2012] EWCA Civ 1039- application for





court to reconsider *whether*: 10% increase should only apply to cases where claimant's funding arrangements for legal costs had been agreed after 1 April 2013; 10% increase should be extended to cases in contract and claims for general damages more widely - relevant statutory provisions relating to costs - reason for 10% increase in damages - consideration of proposed substantive solutions to question of extent to which 10% increase should apply in cases where judgment given after 1 April 2013 - types of damages covered by the 10% increase: Chapter 3 *McGregor on Damages* (18th edition) - whether cases where either cause of action or nature of damages is such that it is not clear whether 10% increase should apply.

[Simmons](#) (I)

## From New Zealand...

### **Body Corporate No. 207624 v North Shore City Council [2012] NZSC 83**

Supreme Court of New Zealand

Elias CJ; Tipping, McGrath, W Young & Chambers JJ

Tort - duties of care of territorial authorities - inspection and certification - building code compliance - council passed plans and construction of building comprising hotel and apartments as compliant with building code - building leaked - plaintiff owners and body corporate sued council for negligence in its inspection of the plans and construction - Court of Appeal struck out statement of claim and entered summary judgment for council on basis that council owed duty of care only in respect of residential buildings - *whether*: duty of care confirmed in *North Shore City Council v Body Corporate 188529* [2010] NZSC 158 that councils owe duty of care to building owners when inspecting residential buildings applied in respect of commercial buildings and other non-residential premises; recognition of duty of care in respect of mixed-use or commercial buildings consistent with the *Building Act* 1991 (NZ); duty of care should be restricted to residential homes for policy reasons.

[Body Corporate](#) (I, C, G)



## **One am, First January, 2006**

By Carol Jenkins

Each boat's white light, paired with red,  
glides towards The Spit,  
some have high lamps so their decks  
are magnified in a frail wash of white.  
The voices and engines vibrating,  
carry clear across Middle Harbour.  
Returning after midnight fireworks,  
they add themselves together, like days,  
until a chain of light plots the stillness  
of dark water from Wyargine Point to where  
they are, again, nothing behind the trees.

Carol Jenkins is an Australian poet. Her first book of poetry *Fishing in the Devonian* (Puncher & Wattmann, 2008) was short listed for the 2009 Victorian Premier's Literary Awards.

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