



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

Today's Cases

Australia

Workers' Compensation – jurisdiction of commission to hear appeals/reviews – claim for psychological injury. See *Tan v National Australia Bank* (I)

Bankruptcy – property valuation – whether real estate agent's estimate of bankrupt's interest sufficient – where trustee in bankruptcy obtains subsequent valuation lower than initial estimate. See *Sutherland v Vale* (B)

Equitable Compensation – appropriate date upon which to make assessment. See *McNally v Harris (No 3)* (B)

Costs – ASIC investigation into corporation under s.1323: *Corporations Act*. Liability of ASIC to pay costs. See *ASIC v Krecichwost* (B)

Payment Claim – *Security of Payment Act* claim – whether sufficiently particularised. See *Protectavale v K2K* (C)

Payment Schedule – *Security of Payment Act* claim – appeal from adjudicator. See *Perform v Mev-Aus t/as Novatec Construction* (C)

United States of America

Insurance – operation of exclusion clause for "flooding" in claim involving property damage resulting from Hurricane Katrina. See *Northorp Grumman v Factory Mutual Insurance* (I)



Friday 22 August 2008

Sutherland v Vale [2008] FCAFC 148

Full Federal Court of Australia

Gray, Lindgren & Tracey JJ (in Melbourne, heard in Sydney)

Bankruptcy Act 1966 (Cth) – property valuation - appeal from Federal Magistrates Court setting aside notice issued pursuant to s139ZQ & dismissing application by appellant trustee for orders granting him (as trustee of bankrupt estate of Mrs. Vale) possession of three properties & for judgment against respondent Mr. Vale in sum of \$270,000.00 plus interest – three properties owned by husband & wife as joint tenants - notice alleged value of bankrupt's interest \$270,000, being half of real estate agent's estimate of reasonable asking price – subsequent lower valuation for stamp duty purposes - whether value in issue – whether transfer of property more than two years before bankruptcy – appeal dismissed. (I,B)

[Sutherland](#)

[S139ZQ Bankruptcy Act 1966 \(Cth\)](#)

Donald Financial Enterprises Pty Ltd v APIR Systems Ltd (No. 2) [2008] FCA 1269

Federal Court of Australia

Edmonds J (in Sydney)

Interest – costs – application for variation of orders – see link below for decision 30 July 2008 & 'Benchmark' Banking & IBC Tuesday 5 August 2008. (B)

[Donald Financial Enterprises](#), and

[Donald Financial Enterprises](#) - decision 30 July 2008 - share subscription deed declared void ab initio – cross-claim dismissed.

Great Artesian Oil and Gas Limited, in the matter of Great Artesian Oil and Gas Limited (No 2) [2008] FCA 1169

Federal Court of Australia

Emmett J (in Sydney)

Scheme of arrangement – Drillsearch – see link below for 19 June 2008 decision – scheme approved. (B)

[Great Artesian Oil and Gas](#), and

[Great Artesian Oil and Gas](#) – decision 19 June 2008 – order made pursuant to s411(1) Corporations Act 2001 (Cth) that plaintiff, Great Artesian Oil & Gas Limited convene a meeting of holders of its ordinary shares, other than holders of what are defined as excluded shares in respect of those excluded shares, to consider scheme of arrangement.



Protectavale Pty Ltd v K2K Pty Ltd [2008] FCA 1248

Federal Court of Australia

Finkelstein J (in Melbourne)

Building & Construction Industry Security of Payment Act 2002 (Vic) – residential & retail development known as "Chadstone Gate" at Hughesdale - payment claim – whether construction work sufficiently identified – whether claim was for progress payment or final payment – payment schedule – whether several documents in aggregate can satisfy the requirement when not intended to be schedule – whether disputed points of law may be finally resolved on motion for summary judgment - payment of retention monies into separate account – conditional trust.

[Protectavale](#) (C)

Australian Workers' Union of Employees, Queensland v Etheridge Shire Council [2008] FCA 1268

Federal Court of Australia

Spender J (in Brisbane)

Workplace Relations Act 1996 (Cth) - whether Council an 'employer' pursuant to s6 - workplace agreement purported to be lodged by Council - whether Council a corporation to which s51(xx) Constitution applies – corporations power – 'trading or financial corporations' – test for characterising nature of corporation - where the predominant and characteristic activity of the Council was that of a local government – Council held not to be a "trading corporation" or a "financial corporation" – held that Council therefore not "employer" & ineligible to lodge the relevant workplace agreement – an interesting judgment with extensive consideration of case law.

[Australian Workers' Union of Employees, Queensland](#) (I, B, C)

Tan v National Australia Bank Ltd [2008] NSWCA 198

Court of Appeal of New South Wales

Basten & Bell JJA; Young CJ in Eq

Workers compensation - ss352, 353 & 354 Workplace Injury Management & Workers Compensation Act 1998 (NSW) – claim for psychological injury - "appeal" - review" - "in point of law" – "claim" - jurisdiction of Workers Compensation Commission to resolve dispute.

[Tan](#) (I)

J & Q Investments Pty Ltd v ZS Constructions (NSW) Pty Ltd [2008] NSWCA 203

Court of Appeal of New South Wales

Bell JA

Building & Construction Industry Security of Payment Act 1999 (NSW) – residential home unit complex at Lindfield - application for stay pending appeal – stay application refused. (C)

[J & Q Investments](#), and

[J & Q Investments](#) – decision 30 July 2008 - see 'Benchmark' Construction & IBC Friday 15 August 2008 - claim that adjudicator's determination flawed - adjudicator's valuation of contract works' portion of payment claim – proceedings dismissed.

Perform (NSW) Pty Limited v Mev-Aus Pty Limited trading as Novatec Construction Systems & Anor [2008] NSWSC 858

Supreme Court of New South Wales

Einstein J

ss14(3) & (4) Building & Construction Industry Security of Payment Act 1999 (NSW) – payment schedules – Sydney Airport Car Park - Sydney Airport Car Park Columns - City North Sub-Station - whether s14 (3) does or does not permit incorporation by reference – appeal from Adjudicator – case law considered – an interesting judgment.

[Perform \(NSW\)](#) (C)

Rayscan Management Pty Ltd & Ors v Siv Nandan Moodliar [2008] NSWSC 857

Supreme Court of New South Wales

Einstein J

Commercial List - Civil Procedure Act 2005 (NSW) ("the CPA") : overriding purpose rule – self-executing orders - extension of time periods provided in self-executing orders - time for compliance with self-executing orders extended subject to conditions – detailed considered of case law - at par 23 of an interesting judgment :

“The CPA sections certainly operate to permit the courts to walk the unstable line between handling the mega-litigation of our time without compromising the courts’ capacity to deal with litigation of a somewhat lesser scale [often equally requiring very urgent treatment].”

[Rayscan Management](#) (B)

McNally v Harris (No. 3) [2008] NSWSC 861

Supreme Court of New South Wales

White J

Equitable compensation – assessment of quantum - value of Oxiana shares – appropriate date for assessing equitable compensation – detailed consideration of texts & case law from UK & Australia. (I, B)

[McNally](#), and

[McNally](#) - decision 30 June 2008 – see ‘Benchmark’ Wednesday 2 July 2008.

Barrington Tops Developments Pty Ltd v Low [2008] NSWSC 859

Supreme Court of New South Wales

Hamilton J

Stay of proceedings – appeal contemplated - successful party able to repay judgment if appeal successful – stay application refused. (B, C)

[Barrington Tops Developments](#), and

[Barrington Tops Developments](#) – decision 14 August 2008 – see ‘Benchmark’ Banking, Construction & IBC Monday 18 August 2008 - whether breach by plaintiff purchaser of term of a contract for sale of land near Dungog - ‘The Meadows’ – absolute obligation.



Australian Securities & Investments Commission v Krecichwost & Ors [2008] NSWSC 855

Supreme Court of New South Wales

Young CJ in Eq

Costs – Corporations Act 2001 (Cth) - plaintiff was conducting investigation into Fincorp Group Holdings Pty Ltd - how costs are to be borne where a s1323 order is obtained ex parte, later extended by consent & subsequently lapses – held that ASIC to pay costs of eighth defendant. (B)

[Australian Securities & Investments Commission](#), and

[s1323 Corporations Act 2001 \(Cth\)](#) - power of Court to prohibit payment or transfer of money, financial products or other property

[Australian Securities & Investments Commission](#) - judgment 14 August 2007 reported at 213 FLR 314 & (2007) 25 ACLC 1,304 – freezing order.

R v Tjanara Goreng-Goreng [2008] ACTSC 74

Supreme Court of the Australian Capital Territory

Refshauge J

Constitutional law – criminal law - regulation of conduct of public servants – duty not to disclose information - legitimate interests of government – constitutional guarantee of freedom of political communication - application to exclude evidence of Regulation 2.1 of Public Service Regulations 1999 (Cth) dismissed - extensive consideration of texts, legislation & case law from UK & Australia – an interesting judgment.

[Tjanara Goreng-Goreng](#) (I, B, C)

And from the United States of America...

Northrop Grumman v Factory Mutual Ins.No. 07-56760

United States Court of Appeals for the Ninth Circuit

Hall, Rymer & McNamee JJ

Property Insurance - “all risk” – Flood Exclusion in excess policy - appeal by Factory Mutual Insurance Company – District Court had granted summary judgment in favor of Northrop - water damage at Northrop’s Mississippi subsidiary caused by Hurricane Katrina - shipyards – District Court had held exclusion was ambiguous & construed it in favor of Northrop – on appeal, Court reversed District Court’s grant of summary judgment in favor of Northrop, & remanded for determination: whether California’s efficient proximate cause doctrine mandates coverage of the damage notwithstanding the Court’s interpretation of the contractual language.

[Northrop Grumman](#) (I, C)

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