

Tuesday 24 April 2012

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Roadshow Films Pty Ltd v iiNet Ltd - High Court of Australia decision - *Copyright Act 1968* (Cth) - appeal dismissed (I, B, C, G)

Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2) - *Workplace Relations Act 1996* (Cth) - monetary penalties (I)

Dye v Commonwealth Securities Ltd (No 2) - Costs (I)

Great Australian Operations Pty Ltd (Receivers & Managers app'd) v CopperChem Ltd - Contracts - contractual interpretation - dilution mechanism - proceedings dismissed (B)

Buzzacott v Minister for Sustainability, Environment, Water, Population & Communities (No 2) - ss21, 22 & 22A *Environment Protection & Biodiversity Conservation Act 1999* (Cth) - application dismissed (C)

Miljus v Watpow Constructions Pty Ltd - Personal injuries - appellant injured on public roadway leading to building site - appeal dismissed (I, C)



Grosso v Deaton - *Compensation to Relatives Act 1897* (NSW) - assessment of damages - appeal allowed (I)

Current Images Pty Ltd v Dupack Pty Ltd - Contracts - contractual interpretation - appeal allowed (B)

Hanshaw v National Australia Bank Ltd - s58(5) *Bankruptcy Act 1966* (Cth) (B)

QBE Insurance (Australia) Ltd v CGU Workers Compensation (NSW) Ltd - Double insurance - compulsory third party insurance - *Workers Compensation Act 1987* (NSW) - plaintiff had established entitlement to contribution from defendant (I)

Samaan v Kentucky Fried Chicken Pty Ltd - Personal injuries - contracts - salmonella poisoning - liability established (I)

Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd - Contracts - *Trade Practices Act 1974* (Cth) - *Fair Trading Act 1987* (NSW) (B)

Trans-It Freighters Pty Ltd & Ors v Billy Baxters (Franchising) Pty Ltd - ss51A(1) & 52 *Trade Practices Act 1974* (Cth) - franchise agreement (B)

Arndt v Horwood & Anor - Personal injuries - *Limitations of Actions Act 1974* (Qld) (I)



Summaries with links (5 minute read)

Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16

High Court of Australia

French CJ; Gummow, Hayne, Crennan & Kiefel JJ

Copyright Act 1968 (Cth) – 34 appellants Australian & US companies which either own or exclusively license copyright in commercially released films & television programs - respondent an internet service provider - whether respondent had authorised its customers' infringing acts by making films available online using peer-to-peer file-sharing system – Answer: no - appeal dismissed.

[Roadshow Films](#) (I, B, C, G)

[Roadshow Films](#) - decision Full Court of the Federal Court of Australia 24 February 2011: see Benchmark I, B & IBC Monday 28 February 2011 - reported at (2011) 194 FCR 285 - breach of copyright - the appellants, who included all the major motion picture studios, owned copyright in a number of films - the respondent, iiNet, was an internet service provider (ISP) - it was common ground that a number of iiNet's customers had used iiNet's services to infringe the copyright in the appellants' films - the appellants alleged that iiNet had authorised its customers' infringements, and had therefore itself breached copyright - the trial judge held iiNet had not infringed the appellants' copyright - held (by, majority, Jagot J dissenting): the circumstances in which the failure of an ISP to prevent copyright infringement would constitute authorisation of that infringement did not exist - iiNet's policy of dealing with alleged infringements was not sufficient to allow iiNet the benefit of the safe harbour provisions in the *Copyright Act 1968* (Cth), and so those provisions would not have saved iiNet, if it had authorised its customers' infringements - appeal dismissed;

[Roadshow Films](#) - decision Federal Court of Australia 4 February 2010: see Benchmark Friday 5 February 2010 - copyright - whether an internet service provider or ISP authorises infringement of copyright of its users or subscribers when they download cinematograph films in a manner which infringes copyright - whether iiNet, by failing to take any steps to stop infringing conduct, authorised the copyright infringement of certain iiNet users - costs - amended application dismissed.

Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2) [2012] FCA 408

Federal Court of Australia

Buchanan J

Workplace Relations Act 1996 (Cth) - failures to make certain payments to employees at the time their employment was terminated - monetary penalties.

[Fair Work Ombudsman](#) (I)



[Fair Work Ombudsman](#) - decision Federal Court of Australia: see Benchmark I & IBCG Friday 21 October 2011 - employment law - *Workplace Relations Act 1966* (Cth) - independent contracting - labour hire - intra-group arrangements - whether first respondent was employer of complainant employees or whether, as respondents were contending, those persons were employed by a company inter-positioned between first respondent & employees - whether first respondent failed to pay them amounts of money due on account of termination of their employment - payment in lieu of notice - severance pay - untaken annual leave - whether second respondent knowingly concerned in conduct of first respondent - extensive consideration of UK & Australian case law.

Dye v Commonwealth Securities Ltd (No 2) [2012] FCA 407

Federal Court of Australia

Buchanan J

Costs - offer of compromise - *Calderbank* letter - indemnity costs - respondents seeking lump sum order for payment of their costs.

[Dye \(I\)](#)

[Dye](#) - decision 16 March 2012: see Benchmark I, B & IBCG Tuesday 20 March 2012 - employment contracts - *Defamation Act 2005* (NSW) - qualified privilege - *Sex Discrimination Act 1984* (Cth) - vicarious liability - torts - injurious falsehood - proceedings dismissed - a long judgment with Australian case law considered.

Great Australian Operations Pty Ltd (Receivers & Managers app'd) v CopperChem Ltd [2012] FCA 391

Federal Court of Australia

Jacobson J

Contracts - contractual interpretation - dilution mechanism - earnings before interest, taxes, depreciation & amortisation (EBITDA) - proceedings dismissed.

[Great Australian Operations \(B\)](#)

Buzzacott v Minister for Sustainability, Environment, Water, Population & Communities (No 2) [2012] FCA 403

Federal Court of Australia

Besanko J

Ss21, 22 & 22A *Environment Protection & Biodiversity Conservation Act 1999* (Cth) - Olympic Dam copper, uranium, gold & silver mine & processing plant - application dismissed.

[Buzzacott \(C\)](#)

**Miljus v Watpow Constructions Pty Ltd [2012] NSWCA 96**

Court of Appeal of New South Wales

Bathurst CJ, McColl & Whealy JJA

Personal injuries - primary judge had entered verdict for defendant but had contingently assessed damages in the event that his findings on liability were overturned - appellant seeking new trial on issue of damages - appeal dismissed.

[Miljus](#) (I, C)

[Miljus](#) - decision 14 December 2010: see Benchmark I, C & IBC Wednesday 15 December 2010 - personal injuries - *Civil Liability Act* 2002 (NSW) - plaintiff injured delivering concrete to property at Seaforth where swimming pool being constructed - plaintiff's truck overturned on public roadway leading to site - whether builder owed duty of care to plaintiff in respect of roadway - verdict for defendant.

Grosso v Deaton [2012] NSWCA 101

Court of Appeal of New South Wales

McColl, Basten & Young JJA

Compensation to Relatives Act 1897 (NSW) - fatal motor accident - appeal from District Court - liability had been admitted - appeal from assessment of damages - on appeal, plaintiff asserted the damages award was manifestly inadequate - appeal allowed.

[Grosso](#) (I)

[Nguyen](#) - decision High Court of Australia 8 March 1990 reported at (1990) 169 CLR 245

[De Sales](#) - decision High Court of Australia 14 November 2002 reported at (2002) 212 CLR 338; (2002) 193 ALR 130; (2002) 77 ALJR 99

Current Images Pty Ltd v Dupack Pty Ltd [2012] NSWCA 99

Court of Appeal of New South Wales

Bathurst CJ, Macfarlan JA, Sackville AJA

Contracts - contractual interpretation - purchase agreement - maintenance agreement - loss of bargain - loss of use of money - appeal allowed.

[Current Images](#) (B)

Hanshaw v National Australia Bank Ltd [2012] NSWCA 100

Court of Appeal of New South Wales

Young JA

S58(5) *Bankruptcy Act* 1966 (Cth) - application for interim relief by mortgagor after application for stay of execution of a writ of possession refused - application dismissed.

[Hanshaw](#) (B)



OBE Insurance (Australia) Ltd v CGU Workers Compensation (NSW) Ltd [2012] NSWSC 377

Supreme Court of New South Wales

Beech-Jones J

Double insurance - plaintiff had provided compulsory third party insurance for forklift in accordance with *Motor Accidents Compensation Act 1999* (NSW) - plaintiff seeking contribution from defendant contending they both insured the employer of injured worker, in respect of same loss - employer had obtained policy of insurance from defendant in accordance with its obligation under *Workers Compensation Act 1987* (NSW) - in the alternative to seeking contribution from defendant, plaintiff seeking recovery from defendant by invoking concept of recoupment: *Limit (No 3) Ltd v ACE Insurance Ltd* [2009] NSWSC 514 - reasonable compromise - owner - injury - conclusion on double insurance claim set out at par 132 of judgment - plaintiff had established an entitlement to contribution from defendant - extensive consideration of UK & Australian case law.

[QBE Insurance \(I\)](#)

[Zurich Australian Insurance](#) - [2011] NSWCA 47 - decision Court of Appeal of NSW 10 March 2011: see Benchmark I & IBC Friday 1 April 2011 - appeal against dismissal of claim for contribution allowed;

[Limit \(No 3\)](#) - decision 4 June 2009: see Benchmark I, C & IBC Monday 15 June 2009 - insurance - negligence - damage to property - causation - reasonable precautions - contribution in insurance law - Lloyds seeking recoupment indemnity or contribution` from defendant ACE on basis that payments to joint venture totalling Sing.\$13 million ,operated to relieve ACE of its liability` to the joint venture: par 5 of judgment - plaintiff had acted as lead underwriter for Lloyds - ACE denying it was liable to indemnify the joint venture - ACE also denying that Lloyds had any liability to indemnify the joint venture for damage to property during tunnelling - defendant had issued policy to a joint venture engaged by PowerGrid Singapore Ltd to design & construct two power transmission cable tunnels in Singapore - creation of shafts with diaphragm walls & extensive tunnelling - damage was caused to the property of third parties, including that of PowerGrid - ACE did not indemnify the joint venture - Lloyds indemnified the joint venture - whether Lloyds had established that the joint venture had incurred requisite ,legal liability` within the meaning of the insuring clause, i.e. whether judgment, arbitral award or settlement required - Wayne Tank rule - whether or not damage arose out of more than one `occurrence` as defined in insurance policies - construction of Difference in Conditions clause of excess insurer's policy - requirements of reasonable precautions clause considered - whether excess insurer entitled to contribution or recoupment from underlying insurer - consideration of requirements for contribution and recoupment and whether met - whether approach to contribution in insurance law relevant to claim for recoupment.

**Samaan v Kentucky Fried Chicken Pty Ltd [2012] NSWSC 381**

Supreme Court of New South Wales

Rothman J

Personal injuries - contracts - *Trade Practices Act 1974* (Cth) - *Fair Trading Act 1987* (NSW) - *Sale of Goods Act 1923* (NSW) - whether plaintiff had established, on balance of probabilities, that source of salmonella poisoning was a food item purchased from one of defendant's stores – s140 *Evidence Act 1995* (NSW) - expert evidence - liability established - extensive consideration of UK & Australian case law.

[Samaan](#) (I)

Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd [2012] NSWSC 382

Supreme Court of New South Wales

Stevenson J

Contracts - *Trade Practices Act 1974* (Cth) - *Fair Trading Act 1987* (NSW) - fiduciary duties - agency - whether plaintiffs had rescinded or were entitled to have set aside agreements entitled Heads of Agreement & Deed of Non-Dilution & Merger - third amended statement of claim & first & second cross-claims dismissed - comprehensive consideration of text & case law from UK & Australia.

[Land Enviro Corp](#) (B)

Trans-It Freighters Pty Ltd & Ors v Billy Baxters (Franchising) Pty Ltd [2012] VSCA 71

Court of Appeal of Victoria

Bongiorno & Hansen JJA, Kyrou AJA

Ss51A(1) & 52 *Trade Practices Act 1974* (Cth) - franchise agreement - appeal allowed - Notice of Contention dismissed - appellants entitled to judgment on the claim and on their counterclaim.

[Trans-It Freighters](#) (B)

[Billy Baxters](#) - decision Supreme Court of Victoria 28 May 2009

Arndt v Horwood & Anor [2012] QSC 104

Supreme Court of Queensland

North J

Personal injuries - *Limitations of Actions Act 1974* (Qld) - order made extending limitation period.

[Arndt](#) (I)



For Anzac Day Wednesday 25 April 2012

"AT THE GOING DOWN OF THE SUN"

I crouched in a shallow trench on that hell of exposed beaches ... Steeply rising foothills bare of cover ... a landscape pockmarked with war's inevitable litter ... piles of stores ... equipment ... ammunition ... and the weird contortions of death sculptured in Australian flesh I saw the going down of the sun on that first ANZAC Day ... the chaotic maelstrom of Australia's bleeding.

I fought in the frozen mud of the Somme ... in a blazing destroyer exploding in the North Sea ... I fought on the perimeter at Tobruk ... crashed in the flaming wreckage of a fighter in New Guinea ... lived with the damned in the place named Changi.

I was your mate ... the kid across the street ... the med student at graduation ... the mechanic at the corner garage ... the baker who brought you bread ... the gardener who cut your lawn ... the clerk who sent your phone bill.

I was an Army private ... a Naval commander ... an Air Force bombardier. No man knows me ... no name marks my tomb, for I am every Australian serviceman ... I am the Unknown Soldier.

I died for a cause I held just in the service of my land ... that you and yours may say in freedom ... I am proud to be an Australian.

The heading "At the going down of the sun" is from the poem "For the Fallen" by the English poet Laurence Binyon ("They shall not grow old") - after some research, "Benchmark" has been unable to establish the name of the writer of the text beginning "I crouched in a shallow trench" - one possibility is that these powerful words were written for a plaque or notice in which an Australian corporation sought to acknowledge the significance of Anzac Day to the Australian people in the aftermath of the Second World War - if any of our readers have any information as to the writer's identity, we would be very interested to hear from them.

[Poems | Australian War Memorial](#)

John McCrae

(b. Canada 1872- d.28 January 1918)

Poet, physician & soldier



Laurence Binyon
(1869-1943)

[Pozières, The Windmill - Australians on the Western Front 1914-1918](#)

Because of the observance of Anzac Day tomorrow, the next bulletin will be dated
Thursday 26 April 2012

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