



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

Today's Cases

Cross-vesting – Breach of employment contract – See *Professional Advantage v Smart* (I, B);

Industrial Special Risks Policy – interpretation of clause indemnify joint venturers – See *Allstate Exploration v QBE* (I, B, C);

Negligent manslaughter – Alleged failure to supervise workers – See *R v Pace & Conduit* (I);

2003 Canberra bushfires – Leave to file Second Further Amended Statement of Claim – Costs – See *AON Risk Services v ANU* (I, C);

Costs – Award of damages significantly less than that sought – See *Suthern v Unilever Australia* (I);

Income Tax – Deductions for negotiating professional football contracts – See *FCT v Spriggs* (B);



Tuesday 26 August 2008

Commissioner of Taxation v Spriggs [2008] FCAFC 150

Full Federal Court of Australia

Goldberg, Bennett & Edmonds JJ

Income Tax Assessment Act 1997 (Cth) – AFL – NRL - professional footballers playing as employees of their clubs – incidental activities - endorsements, media & personal appearances carried on as a business – fee paid to manager for negotiating playing contract – whether allowable deduction - answer ‘no.’

[Commissioner of Taxation](#) (B)

Professional Advantage Pty Ltd v Smart [2008] NSWSC 873

Supreme Court of New South Wales

Barrett J

Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) – whether in interests of justice that proceedings be determined by Supreme Court of Queensland – action for breach of employment contract - case law considered – proceedings transferred to Queensland Supreme Court.

[Professional Advantage](#) (I, B)

Allstate Exploration NL v QBE Insurance (Australia) Ltd [2008] VSCA 148

Court of Appeal of Victoria

Buchanan & Dodds-Streeton JJA; Pagone AJA

Industrial Special Risks Insurance Policy – interpretation of clause indemnifying specified joint venturers in respect of their mining operations at the Beaconsfield gold mine in Tasmania – joint venturers contended that mine closure engaged the operation of the clause & that mine closure was an insured event which was ‘due to the operation of a peril insured against’ within the meaning of the policy – primary judge had found for QBE – for decision 10 October 2007 see ‘Benchmark’ Friday 12 October 2007 & link below - appeal dismissed. (I, B, C)

[Allstate Exploration NL](#), and

[Allstate Exploration](#) – decision Hargrave J 10 October 2007

R v Pace & Conduit (Ruling no 2) [2008] VSC 308

Supreme Court of Victoria

Lasry J

Negligent manslaughter – criminal law – no case submission - causation - consumption of methyl salicylate mixture the medical cause of death – two accused direct care workers at a community residential unit - alleged failure to adequately supervise - jury directed to bring in verdicts of not guilty. [R v Pace & Conduit \(Ruling no 2\)](#) (I)



Cottle v Smith (first respondent/not a party to the application) & RACQ Insurance Limited (second respondent/applicant) [2008] QCA 244

Court of Appeal of Queensland

Keane JA; Wilson & Dutney JJ

Motor Accident Insurance Act 1994 (Qld) - third-party liability insurance -compulsory insurance legislation – respondent applied under s57(2)(b) of the Act for an extension of time within which to commence proceedings in respect of her claim – respondent's delay in bringing the claim was not related to any need to comply with pre-proceeding provisions of the Act – whether primary judge erred in exercising discretion in favour of respondent & granting an extension of time within which to bring the proceedings – answer ‘no’ – application for leave to appeal dismissed.

[Cottle](#) (I)

Cook's Constructions P/L v Stork Food Systems Aust P/L [2008] QSC 186

Supreme Court of Queensland

Martin J

Civil engineering works – application to amend statement of claim once trial had commenced - method of calculation of quantities alleged – whether an issue estoppel can arise out of an interlocutory decision – detailed consideration of case law from UK, New Zealand & Australia - State of Queensland v J L Holdings Pty Ltd considered – leave granted to plaintiff to amend pleading - plaintiff to pay defendant's costs thrown away assessed on indemnity basis. (I, C)

[Cook's Constructions](#), and

[Cook's Constructions](#) – decision 16 March 2004 - defendant had contracted to construct a plant to produce ammonium nitrate - defendant had subcontracted aspects of the work to the plaintiff - excavation for roads & buildings, road construction, construction of evaporation ponds, foundations, buildings & fixtures for plant used to produce ammonium nitrate.

Drewitt v Resource Management & Planning Appeal Tribunal (No 2) [2008] TASSC 43

Supreme Court of Tasmania

Blow J

Environment & Planning – respondent Tribunal had rejected application made by applicant for orders for enforcement of a planning scheme to prevent upper level of a building in Glenorchy being used for medical consulting rooms – tribunal held that applicant did not have sufficient interest in the subject matter of the proceedings before it, & declined to issue a summons under s64(2) Land Use Planning & Approvals Act 1993 (Tas) - detailed consideration of case law as to standing to bring proceedings – Tribunal's decision to decline to issue a summons be set aside - application to be referred to the respondent for further consideration by a differently constituted tribunal.

[Drewitt](#) (C)

**AON Risk Services Australia Ltd v Australian National University [2008] ACTCA 13**

Court of Appeal of the Australian Capital Territory

Higgins CJ; Penfold & Lander JJ

Canberra bushfire 18 January 2003 - application for leave to appeal from interlocutory decision of trial judge as to practice & procedure – leave granted to respondent to file second further amended statement of claim – costs – proceedings commenced by respondent for loss or damage suffered when its buildings at Mount Stromlo were damaged or destroyed as a result of the bushfire – separate judgments by each member of the Court - tactical decisions - State of New South Wales v Mulcahy & State of Queensland v J L Holdings Pty Ltd considered – by majority Penfold J & Higgins CJ : amendment properly allowed – Penfold J held that appeal should be upheld, but only to extent necessary to replace costs order made by trial judge – Lander J dissenting, held that appeal should be allowed, orders of trial judge set aside & order made dismissing respondent's application to amend its statement of claim.

[AON Risk Services Australia](#) (I, C)

Suthern v Unilever Australia Ltd [2008] ACTSC 75

Supreme Court of the Australian Capital Territory

Higgins CJ

Costs – personal injury – Trade Practices Act 1974 (Cth) – lengthy trial – for decision 28 September 2007, see 'Benchmark' Insurance Wednesday 3 October 2007 & link below - plaintiff had claimed damages for personal injury arising from ingestion of liquid mercury contained in ice cream manufactured by defendant – primary judge had found defendant liable but was satisfied that only temporary disability was caused by the initial ingestion of mercury contained in the ice cream - award of \$10,000 damages significantly less than those sought – pre-proceeding offer of settlement - whether any costs should be disallowed by reason of plaintiff's failure to establish a connection between his ongoing symptoms & defendant's wrongful conduct – UK & Australian case law considered - public interest in product safety - defendant to pay plaintiff's costs, necessarily and reasonably incurred in these proceedings, save & except those costs relating to issue of toxicity of liquid mercury & the ongoing injury to plaintiff upon which issues defendant succeeded. (I)

[Suthern](#), and

[Suthern](#) – decision 28 September 2007

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