



## Insurance, Banking & Construction

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

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#### Executive Summary (1 minute read)

**New South Wales Lotteries Corporation Pty Ltd v Kuzmanovski** - Contracts - *Public Lotteries Act 1996* (NSW) & Rules (I, B)

**Australian Competition & Consumer Commission v TF Woollam & Son Pty Ltd** - *Trade Practices Act 1974* (Cth) - anti-competitive arrangements (I, B, C)

**Thornton v Sweeney** - Personal injuries - motor vehicle accident - content of duty of care owed by voluntary supervisor to learner driver - appeal allowed (I)

**Channel Seven Sydney Pty Ltd v Senator Concetta Fierravanti-Wells** - *Defamation Act 2005* - appeal allowed - orders that trial of action proceed without a jury set aside (I)

**Landmark Group Pty Ltd v Lane Cove Council** - Development applications - designated bushfire prone area - appeal allowed - development consent granted subject to conditions (I, C)

**Hamilton v Parish** - Driving offences - whether magistrate's finding of preoccupation in rear view mirror open on the evidence - appeal dismissed (I)



**Lashko v Lashko** - Non-Contentious Probate Rules 1967 (WA) - application for leave to swear to the death of a person (I, B)

**Appellants v Council of the Law Society of the ACT & the Legal Practitioner** - Costs - *Legal Profession Act 2006 (ACT)* - *ACT Civil & Administrative Tribunal Act 2008 (ACT)* - appeal upheld (I)

**Capitol Records, Inc. et al v MP3tunes** - United States case - copyright - online access to music (I, B, C)

**Bakalar v Vavra & Fischer** – United States case - property law - acquisition of good title - 1917 drawing by Egon Schiele - laches - judgment for plaintiff - defendants' counterclaims for declaratory judgment, conversion & replevin denied (I, B, C)

## Summaries with links (5 minute read)

### Monday 29 August 2011

#### **New South Wales Lotteries Corporation Pty Ltd v Kuzmanovski [2011] FCAFC 106**

Full Court of the Federal Court of Australia

Siopis, Cowdroy & Tracey JJ

Contracts - on a proper construction of contract, provisions of *Public Lotteries Act 1996 (NSW)* & Rules made thereunder were paramount - playing instructions were wholly subverted to the Act & Rules - respondents' notice of contention concerning constitutional validity of *Public Lotteries Act 1996 (NSW)* in consequence of Commonwealth of Australia Constitution s109 unsuccessful.

[NSW Lotteries](#) (I, B)

[Kuzmanovski](#) - decision 17 August 2010: see 'Benchmark' Friday 20 August 2010 - contracts - \$5 instant scratchie lottery ticket given as birthday present to husband - use of dictionaries to construe words used in contract - whether any one dictionary authoritative - whether statutory licensee engaged in conduct in contravention of ss51A, 52 & 53 *Trade Practices Act 1974 (Cth)* in the creation for sale & sale of lottery ticket - applicants entitled to recover prize in contract;

[Kuzmanovski](#) - decision 17 September 2010: see 'Benchmark' Tuesday 21 September 2010 - costs - application for indemnity costs - interest on judgment sum: Practice Note CM 16 issued by the Chief Justice on 28 June 2010.



## **Australian Competition & Consumer Commission v TF Woollam & Son Pty Ltd [2011] FCA 973**

Federal Court of Australia

Logan J

*Trade Practices Act 1974* (Cth) - contravening conduct - anti-competitive arrangements - accessorial liability - degree of knowledge of contraventions required in order to attract liability - representations - misleading or deceptive conduct - ACCC alleging that, in relation to tenders for various Queensland & local government public works projects, respondents variously engaged in or were a party to conduct which contravened s45(2)(a)(ii) & s45(2)(b)(ii) &, further or alternatively, s52 within Pt V of what was then known as *Trade Practices Act 1974* (Cth) - each element of substantially lessening competition made out by virtue of operation of s45A(1) - ACCC had made out its s52 case as alleged as against each of the corporate respondents - extensive & detailed analysis of text & United Kingdom & Australian case law - "fixing, controlling or maintaining".

[ACCC](#) (I, B, C)

## **Thornton v Sweeney [2011] NSWCA 244**

Court of Appeal of New South Wales

Campbell JA, Sackville & Tobias AJJA

Personal injuries - motor vehicle accident - learner driver - content of duty of care owed by voluntary supervisor (as distinct from a licensed instructor) to learner driver - respondent had driven along the stretch of road where accident occurred three times in the previous twelve hours or so - evidence did not support a finding that the appellant breached his duty of care to the respondent by failing to instruct or guide her to reduce the speed of the vehicle below seventy kph when entering or traversing a bend - s5B(1)(c) *Civil Liability Act 2002* (NSW) not satisfied - appeal allowed - verdict for appellant/defendant.

[Thornton](#) (I)

[Sweeney](#) - decision 10 September 2010: see 'Benchmark' I & IBC Thursday 7 October 2010 - judgment on liability - damages agreed, save as to issue of contributory negligence - plaintiff, then sixteen years of age, was a learner driver, who drove under the supervision of the respondent then twenty-one - the plaintiff lost control of the vehicle on a bend and hit a tree, and suffered severe injuries - held: on the balance of probabilities, the plaintiff approached and entered the bend at a speed that was not reasonable or safe, having regard to her level of experience & the wet condition of the roadway - there was no evidence that the defendant took any steps to instruct, direct, or guide the plaintiff as to an appropriate speed to enter & negotiate the bend in the wet - the defendant could have taken steps to defuse the plaintiff's panic, pacify the situation, & bring the vehicle into control - there was no contributory negligence - verdict for plaintiff.

**Channel Seven Sydney Pty Ltd v Senator Concetta Fierravanti-Wells [2011] NSWCA 246**

Court of Appeal of New South Wales

Giles & McColl JJA & Handley AJA

*Defamation Act 2005* - election for trial by jury - appeal allowed - orders of primary judge that trial of action proceed without a jury set aside.

[Channel Seven](#) (I)

**Landmark Group Pty Ltd v Lane Cove Council [2011] NSWLEC 1245**

Land & Environment Court of New South Wales

Hussey J

Development applications - appeal against Council's refusal of development application - designated bushfire prone area - to the south, bushland area known as Batten Reserve - Lane Cove LEP 2009 - bushfire access issue - Bush Fire Prone Land-Vegetation Buffer 100m & 30m - evacuation procedure - appeal allowed - development consent granted for demolition of four dwellings & construction of four storey residential flat building containing fifty-eight dwellings on Mowbray Road at Lane Cove subject to conditions.

[Landmark](#) (I, C)

**Hamilton v Parish [2011] WASC 213**

Supreme Court of Western Australia

McKechnie J

Driving offences - charge of dangerous driving causing bodily harm - driver briefly distracted because he was concerned about the movement of a fast approaching Volkswagen behind him - whether magistrate's finding of preoccupation in rear view mirror open on the evidence - contributory negligence not a concept which sits with dangerous driving - appeal from magistrate dismissed.

[Hamilton](#) (I)

**Lashko v Lashko [2011] WASC 214**

Supreme Court of Western Australia

Heenan J

Non-Contentious Probate Rules 1967 (WA) - presumptions of life & death - an application for leave to swear to the death of a person - r34 provides that such application to be supported by an affidavit setting out the grounds of the application & particulars of all policies of insurance on the



life of the person the subject of the application - plaintiff applying for declaration that his father presumed to be dead and for Court to give such further directions as may be necessary to effectuate that declaration - for the purpose of enabling son to apply for a grant of probate of the will of his father, leave granted to swear that father died on an unknown date in or about 1968 or since - father presumed to have died at some time between 1968 & the date of this order - Australian & United Kingdom case law considered.

[Lashko](#) (I, B)

## **Appellants v Council of the Law Society of the ACT & the Legal Practitioner [2011] ACTSC 133**

Supreme Court of the Australian Capital Territory

Refshauge ACJ

Costs - *Legal Profession Act* 2006 (ACT) - *ACT Civil & Administrative Tribunal Act* 2008 (ACT) - appellants contending ACT Civil & Administrative Tribunal had no power to order costs against appellants & in the alternative, the ACAT erred in exercising its discretion so to order - at par 140 of judgment: ACAT has no power under s416(3) *Legal Profession Act* to make an order for costs - appeal upheld - orders of ACT Civil & Administrative Tribunal 30 July 2010 set aside & in lieu, applications for costs to be dismissed - a lengthy decision with detailed analysis of text, legislation & Australian case law.

[Appellants](#) (I)

[B & B S Pty Ltd](#) - decision 30 July 2010 ACT Civil & Administrative Tribunal;

[B & B S Pty Ltd](#) - decision 8 January 2010 ACT Civil & Administrative Tribunal

## **From the United States ...**

### **Capitol Records, Inc. et al v MP3tunes, LLC et al, 07 Civ. 9931 (WHP)**

United States District Court, Southern District of New York

William H. Pauley III, District Judge

Copyright - online access to music - plaintiffs EMI Inc & fourteen record companies & music publishers bringing copyright infringement action against MP3tunes & Michael Robertson, founder of MP3.com - standard algorithm known as a Content-Addressable Storage system - MP3tunes locker - hash tag - another website (sideload) - Sideload Plug-in software - whether MP3tunes eligible for protection under the safe harbors created by Digital Millennium Copyright Act ("DMCA"), 17 USC 512 - an internet service provider does not qualify for safe harbor



protection under a subsection of the Act (see p.16 of judgment, heading "C") if it had actual knowledge that the material on its websites infringed another's copyrights, or saw "red flags" that made such infringement apparent - benefit & control of infringing activity - conclusion as to question of 'safe harbor' at page 20 of judgment - whether MP3tunes secondarily liable for storing material at the direction of its users - EMI contending MP3tunes either contributorily or vicarious liable for that activity - knowledge of unauthorised use of infringing sideloaded material - doctrine of *respondeat superior* (see p.26 of judgment) - public performance rights - cover art - MP3tunes applying for summary judgment dismissing EMI's claim of unfair competition - conclusions as to summary judgment applications by EMI, and by MP3tunes & Mr. Robertson at p.29 of judgment.

[Capitol Records](#) (I, B, C)

### **Bakalar v Vavra & Fischer, 05 Civ. 3037 (WHP)**

United States District Court, Southern District of New York

William H. Pauley III, District Judge

Property law - acquisition of good title - 1917 drawing by Egon Schiele in crayon & gouache known as "Seated Woman with bent left leg" - whether the drawing was stolen - voidable title - intestacy - laches - plaintiff sought a declaratory judgment action seeking a ruling that he is the lawful owner of the drawing - defendant counterclaimed for conversion & replevin - the Court had applied Swiss law to the issue of whether plaintiff had acquired title to the drawing & awarded judgment to plaintiff - in September 2010, the Court of Appeals vacated & remanded for consideration of that issue under New York law - defendants could not meet their burden to establish drawing transferred under duress - the United States District Court again awarded judgment for plaintiff - defendants' counterclaims for declaratory judgment, conversion & replevin denied, barred by laches.

[Bakalar](#) (I, B, C)

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