

Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Commissioner of Police v Hughes - Subpoenas – objection to production – whether legitimate forensic purpose - personal injury proceedings in District Court brought by respondent former police officer - subpoena set aside (I)

University of New England v Attorney General of New South Wales & Ors - Trustees - their appointment (B)

Australian Style Pty Ltd v .au Domain Administration Limited - Contracts - domain name registrar agreement - whether 'security breach' of registrar's systems – judgment for defendant (I,B)

Grocon Constructors v Planit Cocciardi Joint Venture (No. 2) - *Building & Construction Industry Security of Payment Act 2002 (Vic)* – adjudications - judicial review – declaratory relief - certiorari – s85 *Constitution Act 1975 (Vic)* (I,C)

Phoenix International Group Pty Ltd v Resources Combined No. 2 Pty Ltd - *Building & Construction Industry Security of Payment Act 2002 (Vic)* – statutory construction - whether amending enactment can throw light on intention of an earlier enactment - entry of judgment (I,C)

Surfabear P/L v G J Drainage & Concrete Construction P/L - s31(4)(b) *Building & Construction Industry Act 2004 (Qld)* – residential building contract – held that adjudicator's decision void (I,C)

Totani & Anor. v. the State of South Australia - Constitutional law – statutory interpretation - declared organisation – control order (I,B,C)

The Cheltenham Park Residents Association Inc v Minister for Urban Development & Planning & ors - Development plan amendment - racecourse – flood plain mapping - application for judicial review dismissed (C)

Mona Haydon Maslen - *Wills Act 1936 (SA)* - document to be admitted to probate as a second codicil to the deceased's will (B)



Millcity Pty Ltd v West Coast Liquor Merchants WA Pty Ltd - Application to strike out proceedings - whether declaration sought by plaintiff constituted hypothetical question (B)

Hodder v Public Transport Authority - Criminal law - surveillance camera footage not available (I)

Byrne v Hulbert - Traffic offences - stop line at a red traffic light (I)

Killick v McPherson - *Home Building Act* 1989 (NSW) – repudiation – damages - appeal from Consumer Trader & Tenancy Tribunal (I)

Summaries with links (5 minute read)

Tuesday 29 September 2009

Commissioner of Police v Hughes [2009] NSWCA 306

Court of Appeal of New South Wales

Ipp, Young JJA, & Handley AJA

Subpoenas – discovery of documents - objection to production – whether legitimate forensic purpose - personal injury proceedings in District Court brought by respondent former police officer - allegation of psychological injury - respondent subpoenaed documents of applicant, which, because of *Crown Proceedings Act* 1988, is technically a third party to the litigation - applicant brought a motion to set aside the subpoena on basis it had no legitimate forensic purpose – applicant claimed statutory privilege over those documents – *Police Act* 1990 (NSW) – primary judge had ordered applicant to produce certain subpoenaed documents – appeal allowed – subpoena set aside – detailed examination of UK & Australian case law.

[Commissioner of Police](#)

University of New England v Attorney General of New South Wales & Ors [2009] NSWSC 1020

Supreme Court of New South Wales

Slattery J

Trustees - their appointment - assessment of fitness of new trustee - trust relating to the operation of a regional art gallery - trust created by deed made on 14 July 1933.

[University of New England](#)

Australian Style Pty Ltd v .au Domain Administration Limited [2009] VSC 422

Supreme Court of Victoria



Hargrave J

Contracts - domain name registrar agreement between registrar & regulator – plaintiff had been appointed by defendant as a registrar of internet domain names bearing the country code '.au' - whether 'security breach' of registrar's systems – obligation on registrar to give regulator immediate notice of security breach – defendant had terminated agreement & withdrawn plaintiff's accreditation as a registrar – judgment for defendant in proceeding.

[Australian Style Pty Ltd](#)

Grocon Constructors v Planit Cocciardi Joint Venture (No. 2) [2009] VSC 426

Supreme Court of Victoria

Vickery J

Building & Construction Industry Security of Payment Act 2002 (Vic) – adjudications - judicial review – declaratory relief - certiorari – s85 *Constitution Act 1975* (Vic) – proceedings dismissed – detailed consideration of case law.

[Grocon Constructors](#)

Phoenix International Group Pty Ltd v Resources Combined No. 2 Pty Ltd [2009] VSC 425

Supreme Court of Victoria

Vickery J

Building & Construction Industry Security of Payment Act 2002 (Vic.) – statutory construction - whether amending enactment can throw light on intention of an earlier enactment - entry of judgment – an interesting judgment with detailed consideration of legislation, including NSW legislation, & case law.

[Phoenix International Group Pty Ltd](#)

Surfabear P/L v G J Drainage & Concrete Construction P/L [2009] QSC 308

Supreme Court of Queensland

Martin J

s31(4)(b) *Building & Construction Industry Act 2004* (Qld) – residential building contract – property at Tallebudgera - adjudicator's decision in favour of respondent builder – held that adjudicator's decision void – case law considered included Brodyn Pty Ltd v Davenport & Anor (2004) NSWCA 394.

[Surfabear Pty Ltd](#)

Totani & Anor. v. the State of South Australia [2009] SASC 301

Full Court of the Supreme Court of South Australia

Bleby & Kelly JJ; White J (dissenting)

Constitutional law – statutory interpretation - declared organisation – control order – held, by Bleby & Kelly JJ, White J dissenting: s14(1) *Serious & Organised Crime (Control) Act 2008* (SA) invalid – control order made against first plaintiff void – not necessary to decide whether s10(1) a valid law –

extensive consideration of UK & Australian legislation & case law.

[Totani](#)

The Cheltenham Park Residents Association Inc v Minister for Urban Development & Planning & ors [2009] SASC 303

Supreme Court of South Australia

Bleby J

Development plan amendment - Cheltenham Park Racecourse – first defendant not required to take flood plain mapping into account – plaintiff had not established that first defendant failed to take flood plain mapping into account – decision not manifestly unreasonable – application for judicial review dismissed.

[The Cheltenham Park Residents Association Inc](#)

Mona Haydon Maslen [2009] SASC 304

Supreme Court of South Australia

White J

Wills Act 1936 (SA) - deceased had signed a letter of directions to her executors purporting to effect a change to her will - document witnessed by one witness only - application by the executors for document to be admitted to probate as second codicil to deceased's will – held that the document expressed testamentary intentions of deceased - document to be admitted to probate as a second codicil to the deceased's will.

[Mona Haydon Malsen](#)

Millcity Pty Ltd v West Coast Liquor Merchants WA Pty Ltd [2009] WASC 292

Supreme Court of Western Australia

Beech J

Application to strike out proceedings – proceedings involving lease - whether declaration sought by plaintiff constituted hypothetical question - whether plaintiff's claim for declaration reasonably arguable – defendant's application dismissed.

[Millcity Pty Ltd](#)

Hodder v Public Transport Authority [2009] WASC 293

Supreme Court of Western Australia

McKechnie J

Criminal law - surveillance camera footage wiped before trial - trial proceeding without video evidence was not relevantly unsafe or unsatisfactory – appeal dismissed.

[Hodder](#)

Byrne v Hulbert [2009] ACTSC 124

Supreme Court of the Australian Capital Territory

Penfold J



Traffic offences - appeals from convictions recorded in Magistrates Court in relation to two offences of failing to stop at stop line at a red traffic light, being offences arising under r56 Australian Road Rules – whether offence committed – vehicle must stop before reaching stop line – appeal upheld.

[Byrne](#)

From the District Court of New South Wales...

Killick v McPherson [2009] NSWDC 134

District Court of New South Wales

Murrell SC DCJ

Home Building Act 1989 (NSW) – repudiation – damages - appeal from Consumer Trader & Tenancy Tribunal - CTTT had found plaintiff owner had repudiated building contract on basis he had "refused to approve legitimate claims for variations" & had excluded the defendant builder from the site - before Tribunal defendant builder claimed \$57,671.50 as damages for breach of contract following repudiation by plaintiff owner & \$107,419.40 as damages for deceit – plaintiff owner claiming Tribunal made errors of law – no material to suggest CTTT misapplied law in relation to repudiation – procedural unfairness not established – some adjustment of damages awarded.

[Killick](#)

**And when from bondage we are liberated,
Our former sufferings will fade from mind."**

Frank the Poet

Francis MacNamara

(b. 1810?/11? – d. ?)

Convict poet – his creations, spirited, insubordinate, humorous & irrepressible in tone, showed influences of Jonathan Swift & Robert Burns – arrested & tried at Kilkenny in Ireland for stealing a plaid; Protestant, single, a miner by trade & a native of Wicklow. He may well have been a political agitator as well. Convicted of larceny on 15 January 1832 & sentenced to seven years' transportation, he sailed from Cork on the 'Eliza' II on 10 May, arriving in Sydney on 6 September 1832. Originally assigned as a servant to a resident of the town, in January 1833, he was sentenced to six months' gaol for an undisclosed offence – he served his sentence on Goat Island, & on 27 May was returned to Hyde Park Barracks, the principal depot of prisoners in the colony.

In the ensuing eight years, he became no stranger to punishments for recidivism & disciplinary breaches - the lash, the triangle, the treadmill, solitary confinement, to hard labour toiling on roads & in quarries wearing heavy leg-irons & chains.

Moreton Bay was a penal settlement from 1824 – 1839. Having arrived in Sydney in 1825, Captain Patrick Logan (circa 1791-1830) was detached with his company in March 1826, to take charge of the new settlement. On a journey of exploration in 1830, he rode away by himself, & did not return. Four days later, his body was found in a shallow grave; he had been beaten about the head. McNamara's ballad, '*A Convict's Lament on the Death of Capt. Logan*' bids him an ironic farewell. A link is provided below to the version of the lyrics sung today, the ballad known to us as '*Moreton Bay*.'*

In early 1838, Francis MacNamara was assigned to the Australian Agricultural Company around Newcastle & was then moved to Stroud, where he wrote '*A Convict's Tour to Hell*.' In late 1839, he was brought to Newcastle to work in the company's mines. A burlesque petitioning poem from this period: "*A Petition from the Chain Gang at Newcastle to Captain Furlong the Superintendent praying him to dismiss a scourger named Duffy from the cookhouse.*"

He served the last part of his sentence at Port Arthur, Tasmania, arriving at the settlement in 1842. Recherche Bay, South of the D'Entrecasteaux Channel, was the setting for the ballad, '*The Seizure of the Cyprus Brig*,' telling of a group of convicts wind-bound in gloomy Recherche Bay in 1829.

He was granted a ticket-of-leave on 19 January 1847, &, to borrow a phrase from the final lines of '*Moreton Bay*,' he was 'from bondage liberated' - given his certificate of freedom - on 12 July 1849, as announced in the '*Launceston Examiner*.' There is no record of his death – theories include that he went to the goldfields in Victoria, or settled around Bathurst & the Turon in New South Wales.

**The tune of 'Moreton Bay' – traditional Irish tune, best known as Boolavogue – the same tune used for other Irish ballads such as 'Yougal Harbour' & 'The Foot and Mouth Disease'; also, the very similar 'Father Murphy.'*

Note that much of the assembling of Frank the Poet's biography has been by way of researchers' diligent piecing together of information, detective work & deduction, reconstructing a chronology in the absence of any single reliable narrative record. Recommended reading: 'Studies in Australian Folklore: Frank the Poet' by John Meredith & Rex Whalan (1979.)

'A Convict's Tour to Hell.'

[Tour to Hell](#)

[Moreton Bay](#)

[Patrick Logan - Wikipedia, the free encyclopedia](#)