

Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Partnerships – appeal from decision of Federal Court Judge who ordered a receiver be appointed to a partnership her Honour held had been terminated – whether a partnership – consideration of the assets of the business. See *Momentum Productions v Lewarne (I, B, C)*

Taxation – subsidiary company of BHP Billiton (BHPB) financed two projects for two other subsidiary companies of BHPB – first subsidiary company wrote off bad debts owed by the two other subsidiaries – whether first subsidiary entitled to claim tax deductions – whether it was in the “business of lending money” – whether BHPB entitled to claim capital allowance deductions. See *BHP Billiton Finance Limited v Commissioner of Taxation (B)*

Indemnity Proceedings (NSW) – s.151Z Workers Compensation Act 1987 (NSW) – employer of worker injured in a motor vehicle accident claimed indemnity from tortfeasor for compensation payments to worker – employer ordered to provide particulars pursuant to rule 15.12 *Uniform Civil Procedure Rules* (NSW) – employer sought leave to appeal – leave granted and appeal allowed – held: rule 15.12 has no application to s.151Z proceedings for indemnity – further held the employer in indemnity proceedings bears the onus of proving loss, not the tortfeasor. See *State of NSW v McKittrick (I)*

Practice & Procedure (NSW) – claim for damages – economic loss by reason of alleged negligence in design and construction of block of residential units – proceedings referred to a referee – reference proceeded over 19 days – whether Court should adopt referee’s report – held: part of report adopted. See *Eko Investments v Austruc Constructions (I, B, C)*

Foreign Judgments – whether arbitration award made in China enforceable in NSW. Held: Yes. See *Yang v S & L Consulting (I, B, C)*

Evidence – whether affidavits and witness statements filed and served in previous Federal Court proceedings privileged. Held: No. See *Buzzle Operations v Apple Computer Australia (I, B, C)*

Corporations – application by Protective Commissioner as tutor for shareholder of company to inspect the books of the company – allegation the shareholder had not been paid dividends for a number of years. Application granted. See *Haines v Altarcoo Pastoral Company (B)*

Workers Compensation (Vic) – appeal from decision of County Court Judge who held an injured bricklayer was not a “worker” but a worker in “the extended” sense however his injury was not caused by the work incident upon which he relied – appeal upheld – matter remitted to County Court for redetermination of whether the injured worker sustained an injury in the work incident upon which he relied. See *Kovacic v Henley Arch (I)*

Security for Costs – application by defendant for security for costs – where plaintiff company impecunious – where sole shareholder of company offers personal irrevocable guarantee to pay costs – where shareholder also impecunious – application adjourned for 28 days and shareholder ordered to lodge with the registrar a personal irrevocable guarantee within 14 days. See *Specialised Explosives Blasting & Training v Huddy’s Plant Hire (I, C)*

Costs – application that a non-party to the proceedings pay the applicant’s costs – allegation the non-party being a Local Council was interested in the decision even though it had not sought to intervene – held: order for costs made against Local Council. See *Howlin v Brinckman; Howlin v Clarence City Council (C)*

Pre-Trial Procedure (Qld) – “PIPA” legislation – notice of claim lodged against tavern alleging failure to prevent assault upon claimant – claimant sought particulars from tavern concerning prior incidents – tavern refused to provide the particulars – application by claimant compelling tavern to provide the particulars. Held: tavern ordered to provide the particulars. See *Hill v Kirsten Bay (I)*

Wednesday 1 April March 2009

Momentum Productions Pty Limited v Lewarne [2009] FCAFC 30

Full Federal Court of Australia

Spender, Jessup & Middleton JJ (Melbourne - heard in Sydney)

Partnership Act 1892 (NSW) - partnership – what constitutes – intention of parties - agreement to share profits – whether sufficient to sustain proposition of partnership – valuation – pending court proceedings seeking compensation for damage to business – whether an asset of business – whether value could be placed on pending proceedings. - whether breach of fiduciary obligation by managing partner - dispute concerning East Village Hotel in Palmer Street, East Sydney – for decision 9 October 2007, see 'Benchmark' Thursday 11 October 2007 & link below - for decision 7 August, 2007 see 'Benchmark' Tuesday 14 August 2007 & link below – variation to first order made by primary judge – appeal otherwise dismissed.

Momentum Productions

Lewarne – decision 7 August 2007 - trade practices – misleading & deceptive conduct – operation of s51A *Trade Practices Act 1974* (Cth) – purchase of hotel - representations made that were influential in applicant's decision to invest in the business including representations as to ownership of building next door & as to development approval - representations as to existing fact & representations as to future matters – representation by silence – where representation as to future matters, party making representation must establish reasonable grounds on balance of probabilities pursuant to s51(2) - representation of ownership without legal or equitable interest or prospect of acquiring such interest misleading – damages and causation – carelessness of representee no basis for excluding relief - words and phrases – "evidence to the contrary"; "owns;"

Lewarne – decision 9 October 2007 - trade practices – misleading & deceptive conduct - remedies – damages - orders under s87 *Trade Practices Act 1974* (Cth) & s72 *Fair Trading Act 1987* (NSW) – distribution of assets of partnership – proposal to allow successful applicant to retain any profits of partnership entered into as result of contravening conduct – costs – Calderbank offer – necessary to look at circumstances surrounding offer – refusal of offers before & after issues in case had crystallised.

BHP Billiton Finance Limited v Commissioner of Taxation [2009] FCA 276

Federal Court of Australia

Gordon J (in Melbourne)

Income Tax Assessment Act 1997 (Cth) - *Income Tax Assessment Act 1936* (Cth) – writing off of part of two debts – whether Finance, internal financier to the BHPB Group, was in the business of lending money &, if so, whether each loan was made by Finance in the course of that business - allowable deductions - comprehensive consideration of case law.

BHP Billiton Finance

**State of New South Wales (Ambulance Service of NSW) v McKittrick [2009] NSWCA 63**

Court of Appeal of New South Wales

Beazley & Basten

Workers' compensation – interlocutory practice & procedure in District Court - order for further & better particulars in s151Z(1)(d) indemnification proceedings - plaintiff State of NSW making workers compensation payments to former ambulance officer who suffered injury when motor vehicle collided with rear of ambulance – plaintiff claimed indemnity against driver of motor vehicle - nature of indemnification proceedings – burden of proving damages payable by putative tortfeasor — appeal allowed.

[State of New South Wales](#)**Eko Investments Pty Limited v Austruc Constructions Limited & Ors; The Owners Strata Plan No 64970 v Austruc Constructions Limited & Ors [2009] NSWSC 208**

Supreme Court of New South Wales

Bergin CJ in Eq.

Negligence – claim for economic loss - referees & referees' reports – challenge to adoption of report - challenge to conclusions reached as to architect's responsibility - principles applicable to review of referees' reports in which errors of law are alleged - design & construction of eight-storey block of thirty-two home units on the Central Coast – rainwater penetration – vulnerability of a plaintiff - Home Building Act 1989 (NSW) – Strata Schemes Management Act 1996 (NSW) - duty of care – limitation defence - some parts of report adopted, others not – an interesting decision.

[Eko Investments](#)**Yang v S & L Consulting & Anor [2009] NSWSC 223**

Supreme Court of New South Wales

White J

International Arbitration Act 1974 (Cth) – recognition of foreign awards - plaintiff sought to enforce Chinese arbitral award against defendants – defendants contended that to enforce award would be contrary to public policy – enforcement not contrary to public policy.

[Yang](#)**Buzzle Operations v Apple Computer Australia [2009] NSWSC 225**

Supreme Court of New South Wales

White J

Client legal privilege – affidavits & witness statements filed & served in previous Federal Court proceedings – plaintiff claimed privilege under *Evidence Act* 1995 (NSW) – confidentiality – documents not privileged - documents not prepared for the dominant purpose of the client being provided with professional legal services as required by s119 of the Act – interesting & detailed review of case law.

[Buzzle Operations](#)

Haines v Altarcoo Pastoral Co. Pty. Ltd. [2009] NSWSC 214

Supreme Court of New South Wales

White J

Corporations Act 2001 (Cth) – plaintiff shareholder, by her tutor, the Protective Commissioner, seeking orders under s247A for inspection of certain books of the defendant company – application made in good faith & for proper purposes – order for inspection made.

[Haines](#)**Kovacic v Henley Arch Pty Ltd [2009] VSCA 56**

Court of Appeal of Victoria

Warren CJ, Buchanan & Ashley JJA

s8(1) *Accident Compensation Act 1985* – “worker” - plaintiff working as bricklayer – lower back injury - whether contract of service or contract of services - whether work ‘incidental’ to appellant’s trade - appeal allowed & matter remitted – at para. 17 of judgment of Ashley JA:

“Section 8, like its predecessor & comparable provisions, uses language which is imprecise. It conveys an idea, which the Courts have attempted to explain.....”

[Kovacic](#)**Dolheguy v Becker & Anor [2009] VSC 106**

Supreme Court of Victoria

Kyrrou J

Principles of statutory interpretation – succinct summary - *Road Safety Act 1986 (Vic)* – speeding conviction – application for judicial review dismissed.

[Dolheguy](#)**Specialised Explosives Blasting & Training P/L v Huddy’s Plant Hire P/L [2009] QSC 55**

Supreme Court of Queensland

Martin J

Security for costs - plaintiff & defendant parties to a contract whereby defendant used services of the plaintiff as a shot-firer at Trekelano mine near Mount Isa – plaintiff alleging breach of contract as a result of which plaintiff’s business has been destroyed and it claims loss of profits in sum of \$1.5 million - defendant alleging plaintiff’s claim for loss excluded by a clause of contract & counterclaims for approximately \$1.25 million – defendant’s counterclaim based on allegations of misrepresentations as to quality of plaintiff’s services & as to quality of explosives – plaintiff to lodge irrevocable guarantee with Court.

[Specialised Explosives Blasting and Training](#)

**Howlin v Resource Management and Planning Appeal Tribunal (No 2) [2009] TASSC 20**

Supreme Court of Tasmania

Blow J

Appeal Costs Fund Act 1968 (Tas.) – Council applying for indemnity certificate - “respondent” – proceedings for prerogative relief - whether Council was a respondent to an application within the meaning of s8(1) – answer ‘yes.’

[Howlin](#)**Howlin v Brinckman; Howlin v Clarence City Council [2009] TASSC 18**

Supreme Court of Tasmania

Blow J

Costs – persons not parties to proceedings - municipal & planning authority with direct interest in outcome of proceedings – highways – creation & extinction – what constitutes dedication – public duty – public interest.

[Howlin](#)**Omari v Omari, Omari & Guardianship & Management of Property Tribunal [2009] ACTSC 28**

Supreme Court of the Australian Capital Territory

Refshauge J

Guardianship & Management of Property Act 1991 (ACT) - powers of the Guardianship & Management of Property Tribunal – directions to guardian - rights of protected person – protected person a resident in retirement village – visiting arrangements - s4 obliges each “person” to comply where the “person” exercises a function under the Act – whether Tribunal a “person”: no formal finding made on this ground of appeal – directions of Tribunal set aside – interesting & detailed review of case law.

[Omari](#)**From the District Court of Queensland...****Hill v Kirsten Bay Pty Ltd [2009] QDC 68**

District Court of Queensland

Everson DCJ

s27 *Personal Injuries Proceedings Act 2002 (Qld)* – applicant has issued notice of claim alleging failure by respondent to prevent assault committed upon him by other patrons - request from applicant’s solicitors to respondent’s for information as to any physical altercations between patrons at the tavern in the twelve months prior to the incident alleged by applicant, & if there were any such altercations, information as to date & nature of such incident – held that information to be supplied.

[Hill](#)**Key: (I) Insurance, (B) Banking, (C) Construction**