

Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Australian Workers' Union of Employees, Queensland v Etheridge Shire Council - s824 Costs – *Workplace Relations Act 1996* (Cth) – constitutional law – by majority, appeal dismissed (I,B,C)

Harrison v P & T Tube Mills Pty Ltd - Employment law – termination of employment - whether primary judge had erred in being satisfied that respondent had rebutted presumption created by s809 *Workplace Relations Act 1996* (Cth) - appeal dismissed (I,B,C)

Australian Competition & Consumer Commission v Craftmatic Australia Pty Ltd - Purpose of pleadings & particulars generally – applicant alleging contraventions of *Trade Practices Act 1974* (Cth) (I,B,C)

Helicopters Pty Ltd v Bankstown Airport Limited - *Land Tax Act 1956* (NSW) - *Land Tax Management Act 1956* (NSW) - rent review clause in sub-lease (B)

Primebrokers Securities Ltd (recs & m'gers app'td) (in liq) v Fortis Clearing Sydney Pty Ltd - Contract – borrowed securities – rights of borrower - default powers – construction of documents – dealing loan facility - applicability of netting provisions – estoppel by convention (B)

Australian Capital Territory v JT - Medical treatment – capacity - plaintiff's application for declaration that it was lawful for medical practitioners employed by plaintiff to desist from affording other than palliative care to patient - application dismissed (I)

Zilio v Lane - Personal injuries – motor accident - contributory negligence assessed at 100% – judgment for defendant (I)

"H" v State of New South Wales - Personal injuries – negligence – schools – duty of care owed to school student – liability & damages – causation – plaintiff injured when attacked in school playground (I)



Mercy Health & Aged Care Central Queensland Ltd v Steele - *Personal Injuries Proceedings Act 2002 (Qld)* – medical negligence – claimant ordered to provide hospital with amended Part 1 Notice of Claim & medical report (I)

Summaries with links (5 minute read)

Tuesday 1 September 2009

[Australian Workers' Union of Employees, Queensland v Etheridge Shire Council \[2009\] FCAFC 95](#)

Full Federal Court of Australia

Ryan & Marshall JJ; Logan J (dissenting)

Costs – *Workplace Relations Act* 1996 (Cth) – constitutional law – appeal from costs judgment of primary judge 6 February 2009 : see link below – in the primary judgment, the primary judge had held respondent Council was not an employer within the meaning of the Act - whether proceedings in which appellants had sought declarations to that effect were "in a matter arising under this Act" for purposes of s824(1) – Council contended primary judgment necessarily involved an analysis of relevant provisions of the Act so that the proceeding was in a matter "arising under" it. thereby bringing into play s824 as to costs – for primary judgment, see 'Benchmark' Friday 22 August 2008 & link below ; also link to costs judgment appealed from - Council's contention upheld, Logan J. dissenting – by majority, appeal dismissed – detailed consideration of case law.

[Australian Workers' Union of Employees, Queensland](#)

[Australian Workers' Union of Employees, Queensland](#) – decision 20 August 2008 - *Workplace Relations Act* 1996 - workplace agreement purported to be lodged by Council - whether Council an 'employer' pursuant to s6 - whether Council a corporation to which s51(xx) Constitution applies – corporations power – 'trading or financial corporations' – test for characterising nature of corporation - where the predominant & characteristic activity of the Council was that of a local government – Council held not to be a "trading corporation" or a "financial corporation" – held that Council therefore not "employer" & ineligible to lodge the relevant workplace agreement – an interesting judgment with extensive consideration of case law;

[Australian Workers' Union of Employees, Queensland](#) - decision on costs 6 February 2009

[Harrison v P & T Tube Mills Pty Ltd \[2009\] FCAFC 102](#)

Full Federal Court of Australia

Ryan, Marshall & Logan JJ

Employment law – termination of employment - dismissal occurred after first appellant's refusal to comply with what respondent considered to be a lawful & reasonable direction to remove a pro-union sticker from his neck – for decision appealed from, see 'Benchmark' Thursday 19 March 2009 & link below - whether primary judge had erred in being satisfied that respondent had rebutted presumption created by s809 *Workplace Relations Act* 1996 (Cth) that dismissal had occurred for the reason, or reasons that included the reason, that first appellant was a delegate or member of the AMWU - appeal dismissed.

[Harrison](#)

Harrison - decision 17 March 2009 - *Workplace Relations Act 1996* (Cth) – whether lawful & reasonable direction by employer - alleged breaches of s792 – first applicant worked at tube-making factory at Acacia Ridge - extent of employee's obligation to comply with directions given by employer - whether breach of employment contract – application dismissed – detailed consideration of case law in an interesting decision.

Australian Competition & Consumer Commission v Craftmatic Australia Pty Ltd [2009] FCA 972

Federal Court of Australia

Logan J (in Brisbane)

Purpose of pleadings & particulars generally – applicant alleging contraventions of *Trade Practices Act 1974* (Cth) – supply or possible supply in trade or commerce of adjustable beds - application to strike out amended defence & for an order that there be no further opportunity to replead - cross-application that applicant had not furnished adequate particulars of statement of claim : that application stood over - “at all material times” – application that amended defence by struck out dismissed – an interesting review of legislation, text & case law.

[Australian Competition & Consumer Commission](#)

Helicopters Pty Ltd v Bankstown Airport Limited [2009] NSWSC 889

Supreme Court of New South Wales

White J

Land Tax Act 1956 (NSW) - *Land Tax Management Act 1956* (NSW) - plaintiff a sublessee of property known as site 564 at Bankstown airport - defendant the sublessor – rent review clause in sub-lease – appointment of valuer - whether contractual obligation on plaintiff sublessee to contribute to ex gratia land tax payments payable by defendant sublessor under head lease – calculation of amounts payable - consideration of doctrine of waiver - no estoppel or waiver - plaintiff to pay defendant rental arrears & arrears of ex gratia payments in lieu of land tax.

[Helicopters Pty Ltd](#)

Primebrokers Securities Ltd (recs & m'gers app'td) (in liq) v Fortis Clearing Sydney Pty Ltd [2009] VSC 364

Supreme Court of Victoria

Judd J

Contract – plaintiff carried on business as share trader, then went into voluntary administration - defendant company a specialist broker & third party clearer with membership of Australian Stock Exchange & Sydney Futures Exchange – Standard Client Agreement - borrowed securities – rights of borrower - default powers – construction of documents – dealing loan facility - applicability of netting provisions – estoppel by convention – U.K., Australian & New Zealand case law considered.

[Primebrokers Securities Ltd](#)

Australian Capital Territory v JT [2009] ACTSC 105

Supreme Court of the Australian Capital Territory

Higgins CJ

Parens patriae jurisdiction of the Court - medical treatment – capacity - advisory opinion - plaintiff's application for declaration that it was lawful for medical practitioners employed by plaintiff to desist from affording other than palliative care to patient suffering mental illness – patient resistant to continuing medication voluntarily – patient refusing to take food - whether lawful for plaintiff not to administer nutrition & hydration other than that necessary for provision of palliative care – application refused – detailed consideration of legislation, including *New Zealand Bill of Rights Act 1990* – detailed consideration of case law from UK, New Zealand & Australia, including Brightwater Care Group (Inc) v Rossiter [2009] WASC 229 (see 'Benchmark' I & IBC Tuesday 25 August 2009 & link below.)

[Australian Capital Territory](#)

Brightwater Care Group (Inc) - Brightwater Care Group (Inc) v Rossiter [2009] WASC 229 - decision 14 August 2009 – legal obligations of medical service provider which has assumed responsibility for care of a patient – palliative care - consent to medical treatment - informed consent - right of patient to determine whether or not they will continue to receive medical treatment – patient a quadriplegic - patient mentally competent - patient had directed medical service provider to discontinue provision of nutrition & general hydration – patient had also requested prescription of analgesics for purposes of sedation & pain relief - *Criminal Code (WA)*: duty to provide necessities of life pursuant to s262 - provision of declaratory relief in respect of criminality - principle of autonomy or self-determination - 'having charge' of

Another – grant of declaratory relief – case law considered from U.K., Australia, USA & Canada.

A 2006 case from the United States...

[Gonzales Gonzales, Attorney General, et al v. Oregon et al, October Term 2005, no.04-623](#)

Supreme Court of the United States – decision 17 January 2006

Kennedy J delivered the opinion of the Court, in which Stevens, O'Connor, Souter, Ginsberg & Breyer JJ joined; Scalia J filed a dissenting opinion, in which Roberts CJ & Thomas J joined; Thomas J. filed a dissenting opinion

Constitutional law - statutory interpretation – whether *Controlled Substances Act 1970* ('CSA'), a federal statute, allowed the US Attorney-General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure – Oregon the first state to legalise assisted suicide in 1994 - Oregon Death with Dignity Act ('ODWDA') exempts from civil or criminal liability state-licensed physicians who, in accordance with the Act's specific safeguards, dispense or prescribe lethal dose of drugs at request of terminally ill patient - diagnosis of disease causing death within six months – controlled substances in Schedule II of federal Act, substances generally available only pursuant to a written, nonrefillable prescription by a physician – in 2001, Attorney-General issued Interpretative Rule to address implementation & enforcement of CSA with respect to ODWDA, declaring that using controlled substances to assist suicide is not a legitimate medical practice, & that dispensing or prescribing them for that purpose is unlawful under CSA – by majority, judgment of Court of Appeal affirmed - held that Controlled Substances Act did not allow Attorney-General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide under state law permitting the procedure.

[Gonzales Gonzales, Attorney General](#)



From the District Court of New South Wales...

Zilio v Lane [2009] NSWDC 226

District Court of New South Wales
Gibson DCJ

Personal injuries – plaintiff rendered wheelchair-dependant by accident in which his motorcycle collided with parked car – liability - contributory negligence assessed at 100% – judgment for defendant, but Her Honour considered the assessment of damages.

[Zilio](#)

“H” v State of New South Wales [2009] NSWDC 193

District Court of New South Wales
Levy SC DCJ

Personal injuries – negligence – schools – duty of care owed to school student – liability & damages – causation – plaintiff injured when attacked in school playground – chronic post-traumatic stress disorder – plaintiff has moved overseas – finding as to inevitability of plaintiff returning to Australia - expert evidence - breach of duty by school authorities established – plaintiff’s damages assessed at \$627,468.

[“H”](#)

A celebration of Spring in Australia – Part One

Lightly the breath of the spring wind blows
Though laden with faint perfume,
'Tis the fragrance rare that the bushman knows,
The scent of the wattle bloom.
Two-thirds of our journey at least are done,
Old horse! let us take a spell
In the shade from the glare of the noonday sun,
Thus far we have travelled well;
Your bridle I'll slip, your saddle ungirth,
And lay them beside this log,
For you'll roll in that track of reddish earth,
And shake like a water-dog.

Upon yonder rise there's a clump of trees –
Their shadows look cool & broad –
You can crop the grass as fast as you please,



Benchmark

While I stretch my limbs on the sward;
'Tis pleasant, I ween, with a leafy screen
O'er the weary head, to lie
On the mossy carpet of emerald green,
'Neath the vault of the azure sky;
Thus all alone by the wood & wold,
I yield myself once again
To the memories old that, like tales fresh told,
Come flitting across the brain.

*From "Ye Wearie Wayfarer" in "Sea Spray & Smoke Drift" (1867), the first poetry collection of
Adam Lindsay Gordon*

(19 October 1833, the Azores – d. 24 June 1879, Brighton, Melbourne)

Horseman poet, son of a retired officer from the Bengal cavalry, educated in England where he rode steeplechase & boxed, arrived in Adelaide in 1853, enlisting as a mounted trooper, then worked as a horse-breaker, moving from station to station, riding in races, camping in the bush. He was briefly a member of the South Australian parliament. He won three races in a single day at Flemington. His second book of collected verse, 'Bush Ballads & Galloping Rhymes' was published in the year he shot himself. At a ceremony in 1934, a memorial to Adam Lindsay Gordon was unveiled in the Poets' Corner of Westminster Abbey. On his tombstone at Brighton Cemetery:

*Question not, but live & labour
Till yon goal be won;
Helping every feeble neighbour,
Seeking help from none.
Life is mainly froth & bubble
Two things stand like stone –
Kindness in another's trouble.
Courage in your own.*

Ye Wearie Wayfarer

[Adam Lindsay Gordon - Wikipedia, the free encyclopedia](#)

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