

Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Personal Injuries – motorcyclist injured due to collision with fence – failure to erect warning sign – consideration of essential elements of negligence and causation – consideration of photographic evidence. See *Warren v Gittoes* (I)

Practice & Procedure – application by ASIC to proceed with penalty and costs hearing in absence of defendant where defendant had been given notice of hearing. See *ASIC v Sydney Investment House Equities* (I, B)

Apprehended Bias – application for judge to disqualify herself – familial association with partner at firm acting for the defendant – application dismissed – consideration of case law. See *Dixon v Cargill Meat Processors & Ors* (I)

Planning Law – appeal from decision of Council to refuse development application for mixed use development of thirty-six storey building in North Sydney. See *Castle Constructions v North Sydney Council* (C)

Freedom of Information – application to obtain document withheld by Department of Justice successful at first instance – appeal by Department of Justice upheld – matter remitted to Victorian Civil & Administrative Tribunal. See *Secretary to the Department of Justice v Western Suburbs Legal Service* (I, B, C)

Equal Opportunity – complaint by student alleging impairment discrimination and denial of access to education – appeal from decision of Victorian Civil & Administrative Tribunal which held that discrimination had occurred – whether Victorian Charter of Human Rights & Responsibilities relevant – appeal allowed in part. See *State of Victoria v Turner* (I)



Conveyancing (Qld) – Contract for Sale conditional on lodging development application with Council – whether purchaser lodge development application within time – whether defendant entitled to terminate contract. See *Wall Street Enterprises v Spooner & Anor* (C)

Evidence – whether affidavits of witnesses to conversations between the parties were admissible – where the affidavits were consistent with one party's evidence and inconsistent with the other party's evidence. See *Oakton Services v Tessari & Ors* (B)

Thursday 5 March 2009

Milbourn v Repatriation Commission [2009] FCA 176

Federal Court of Australia

Graham J (in Sydney)

Veterans' Entitlements Act 1986 (Cth) – widow's pension – whether husband's death was 'war-caused' – appeal from Administrative Appeals Tribunal – Tribunal not reasonably satisfied on balance of probabilities that veteran's death was attributable to or arose out of a war-caused smoking habit – application dismissed.

[Milbourn](#) (I)

Warren v Gittoes [2009] NSWCA 24

Court of Appeal of New South Wales

Hodgson, Tobias & Macfarlan JJA

Personal injuries - damage – causation – appellant's injury due to collision with fence while he was riding his motorcycle – respondents failed to erect a sign warning of the fence – primary judge had not been persuaded that respondents' actions in failing to give proper warning of presence of the fence were causative of appellant's injuries – use of photographic evidence – appeal dismissed.

[Warren](#) (I)

ASIC v Sydney Investment House Equities Pty Ltd [2009] NSWSC 107

Supreme Court of New South Wales

Hamilton J

Application to proceed with penalty & costs hearing in absence of defendant who has had notice of hearing – for decision 21 November 2008 see 'Benchmark' I, B & IBC Wednesday 3 December 2008 & link below - application granted.

[ASIC](#) (I, B)

[ASIC](#) - decision 21 November 2008 - duties & liabilities of officers of corporations – fiduciary & related statutory duties – of care, skill & diligence – to act honestly – conflicts of interest - trade practices – consumer protection - misleading, deceptive or unconscionable conduct – evidentiary burden on representor to prove reasonable grounds for making representations - extensive consideration of case law.

Dixon v Cargill Meat Processors Pty Limited & Ors [2009] NSWSC 101

Supreme Court of New South Wales

Schmidt AJ

Apprehension of bias - familial association – personal injury proceedings - no basis for disqualification - application dismissed – detailed consideration of case law.

[Dixon](#) (I)

Castle Constructions Pty Limited v North Sydney Council [2009] NSWLEC 18

Land & Environment Court

Pain J

North Sydney Local Environmental Plan (2001) - building height - primary judge had refused development consent for applicant's proposal for mixed use development of thirty-six storeys in Walker Street, North Sydney: see link below for judgment 12 November 2008 – appeal dismissed.

[Castle Constructions](#) (C)[Castle Constructions](#) – decision 12 November 2008**Secretary to the Department of Justice v Western Suburbs Legal Service Inc [2009] VSC 68**

Supreme Court of Victoria

Beach J

s38 *Freedom of Information Act* 1982 (Cth) - applicant seeking leave to appeal from decision of Victorian Civil & Administrative Tribunal - respondent had made application under the FOI Act for access to thematic & systemic reviews, investigations & audits undertaken by the former Corrections Inspectorate from July 2003 - Department of Justice denied access to a report by the Corrections Inspectorate – respondent's application for a review of the decision denying access was upheld by Victorian Civil & Administrative Tribunal on 25 June 2008 & Tribunal was ordered to release the report to respondent - s30 *Corrections Act* 1986 (Vic) - leave to appeal granted - appeal allowed - matter to be remitted to the Tribunal for reconsideration in accordance with these reasons.

[Secretary to the Department of Justice](#) (I, B, C)**State of Victoria v Turner [2009] VSC 66**

Supreme Court of Victoria

Kyrou J

Equal opportunity - complaint alleging indirect impairment discrimination – access to education – respondent a school student - whether order for provision of full-time teacher's aide within power – whether monetary compensation awarded for depression within power – whether order for provision of remedial tuition uncertain & involved impermissible delegation to a third party - *Charter of Human Rights & Responsibilities Act* 2006 (Vic) not relevant to issues to be determined – appeal allowed in part.

[State of Victoria](#) (I)**Re AWB Limited (No 2) [2009] VSC 70**

Supreme Court of Victoria

Robson J

Application for stay until further order or alternatively for an order extending date by which ASIC must give discovery - application for stay refused – application for extension of time for providing full discovery granted.

[Re AWB](#) (B)

Donovan v Donovan [2009] QSC 026

Supreme Court of Queensland

Fryberg J

Superannuation Industry (Supervision) Regulations 1994 (Cth) – payment of benefit upon death – non-binding death nomination.

[Donovan](#) (B)

Wall Street Enterprises Pty Ltd v Spooner & Anor [2009] QSC 028

Supreme Court of Queensland

Philippides J

Contract for sale - contract conditional on lodging development application with Council – whether plaintiff purchaser lodged application with Council within time – meaning of term ‘lodge’ - whether vendor defendants entitled to terminate contract – order made that defendants had lawfully terminated the contract of sale.

[Wall Street Enterprises](#) (C)

Danielsen v Onesteel [2009] SASC 55

Full Court of the Supreme Court of South Australia

Gray, Sulan & David JJ

s54 *Workers Rehabilitation & Compensation Act 1986 (SA)* – constitutional law – reasons in [Danielsen v Onesteel Manufacturing Pty Ltd & Anor \[2009\] SASC 56](#) (see summary & link below) incorporated - appeal from decision of District Court Judge upholding order of a Master striking out plaintiff’s claim - plaintiff asserting work-related injuries sustained while in employ of wholly owned subsidiary of OneSteel Ltd in circumstances in which OneSteel Ltd had breached an alleged common law duty of care - District Court Judge had concluded plaintiff’s claim bound to fail due to provisions of s54 - plaintiff asserting that OneSteel Ltd, as holding company of his employer, was not protected by s54 - plaintiff further submitted that s54 conflicted with *Corporations Act 2001 (Cth)* & was inoperative by reason of s109 of Constitution - plaintiff failed to serve s78B notices as required by *Judiciary Act 1903 (Cth)* - whether s54 inoperative by virtue of s109 of the Constitution - appeal dismissed – s54 provides that no common law liability arises on part of OneSteel Ltd – s54 not inoperative by virtue of section 109 Constitution.

[Danielsen](#) (I)

Danielsen v Onesteel Manufacturing Pty Ltd & Anor [2009] SASC 56

Full Court of the Supreme Court of South Australia

Gray, Sulan & David JJ

s54 *Workers Rehabilitation & Compensation Act 1986 (SA)* - constitutional law - s78A & s78B *Judiciary Act 1903 (Cth)* - appeal from decision of District Court Judge upholding order of Master striking out plaintiff’s claim - appeal dismissed – s54 not inoperative by virtue of s109 of Constitution - no direct

inconsistency arises between s54 & various provisions of *Corporations Act* 2001 (Cth) & *Trade Practices Act* 1974 (Cth) - *Safety Rehabilitation & Compensation Act* 1988 (Cth) not applicable - s72 *Civil Liability Act* 1936 (SA) – detailed consideration of legislation & case law.

[Danielsen](#) (I)

Edwards v Stocks [2009] TASSC 11

Full Court of the Supreme Court of Tasmania

Crawford CJ; Slicer & Blow JJ

Costs – departing from general rule – costs of third parties – action in tort – landlord, tenant & agent - conduct tending to litigation – financial position of party - exercise of discretion – case law considered.

[Edwards](#) (I)

Oakton Services Pty Ltd v Tessari & Ors [2009] ACTSC 15

Supreme Court of the Australian Capital Territory

Refshauge J

s64(3) *Evidence Act* 1995 (Cth) - plaintiff had formerly employed first defendant under a written contract which included a restraint of trade clause - first defendant deposed in an affidavit to conversation with officers of plaintiff – admissibility of affidavits by other people consistent with version of conversation deposed to by first defendant & inconsistent with accounts deposed to by plaintiff's officers – affidavits admitted into evidence.

[Oakton Services](#) (B)

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