

# BENCHMARK

## Insurance, Banking & Construction

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

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**Thursday 10 January 2008**

**Adultshop.Com Ltd v Members of the Classification Review Board (No 2)**  
**[2007] FCA 1872**

Federal Court of Australia

Jacobson J

Confidentiality orders – exercise of judicial discretion – balancing competing considerations - His Honour had made interlocutory orders under s50 Federal Court of Australia Act (Cth) restricting publication of certain evidence in proceedings – application made for orders to be revoked or vacated – evidence consisted of extracts of certain meetings of Standing Committee of Attorneys-General dealing with censorship – whether order under s50 was necessary to prevent prejudice to administration of justice warranting a departure from principle of open justice – analogy with public interest immunity not apt: considerations different (see par 45-48 of judgment) – at par 49 of judgment:

“In weighing the balance between the principle of open justice and the prejudice to the administration of justice flowing from full disclosure of the subject material, I have come to the view that there is a strong basis for departing from the principle of full transparency...” [Adultshop.Com Ltd](#) (I,B,C)

**Faheem Khalid Lodhi v Regina** [2007] NSWCCA 360

Court of Appeal of New South Wales

Spigelman CJ, Barr & Price JJ

Constitutional law – criminal law - statutory interpretation – public interest immunity – exercise of judicial discretion – balancing competing considerations – where legislation requires more weight to be given to one matter over another – National Security (Criminal & Civil Proceedings) Act

2004 (Cth) ['NSI' Act] – appellant charged with collecting documents connected with preparation for a terrorist act – NSI Act empowers judges to make non-disclosure orders – if Attorney-General considers that disclosure of information is likely to prejudice national security, the Attorney-General may issue a certificate describing the information & prohibiting disclosure except in certain circumstances – by s31(7), a court, in deciding whether to make an order, must consider, having regard to the certificate, whether there would be a risk of prejudice to national security if information disclosed or witness called & whether the order would have a substantial adverse effect on a defendant's right to fair trial – by s31(8), the Court is to give 'greatest' weight to the assessed risk of prejudice to national security – challenge on appeal to validity of s31(8) on grounds it breached Australian Constitution by usurping judicial power of Commonwealth which is vested solely in the judiciary – by requiring Court to give 'greatest' weight to risk of prejudice to national security, Parliament had usurped judicial function by directing the judge hearing the case how it must be decided – held that s31(8) did not impinge on integrity of judicial process. [Faheem Khalid Lodhi](#) (I,B,C)

**Holcon Australia Pty Ltd & Ors v Corporation of the Town of Walkerville & Anor [2007] SASC 437**

Supreme Court of South Australia

White J

Pleadings – striking out application - proposed redevelopment project at Walkerville was to include a village square with adjacent retail, commercial and café/restaurant premises - plaintiffs four companies involved in the redevelopment - second defendant Commissioner of Highways – plaintiffs seeking equitable compensation & compensation under Fair Trading Act against Commissioner also damages - as against Council, plaintiffs seeking damages for breach of contract & under either Trade Practices Act 1974 (Cth) or FTA - agreements said to have been breached by Council were Development Agreement, Back-up Sale Agreement & Consultancy Agreement – Council applied to strike out whole of plaintiffs' statement of claim or, in the alternative, specified portions of it - Commissioner supported the application – held that deficiencies in statement of claim did not prejudice proper conduct of action - application refused. [Holcon Australia](#) (I,B,C)

**C B & M Design Solutions Pty Ltd v Pumpteck Tasmania Pty Ltd [2007] TASSC 103**

Supreme Court of Tasmania

Crawford J

Discovery & interrogatories – plaintiff suing defendant for monies owing for equipment & materials supplied & work & labour done – Kentish Council’s sewage treatment plant at Sheffield – defence alleged joint venture agreement with plaintiff for upgrading of council’s plant & that in event joint tender successful, plaintiff would be responsible for overall design - plaintiff’s interrogatories – defendant objected to some of interrogatories – the Master ordered they be answered & defendant appealed – consideration of whether interrogatories too wide, oppressive, vague or unclear, or whether premature – principles & case law considered: see par 17 & 18 of judgment – held that interrogatories should be answered. [C B & M Design Solutions](#) (I,B,C)

**One from the District Court of New South Wales...**

**Harcroft Lighting Pty Ltd v Simon & Igor Galpern [2007] NSWDC 269**

District Court of New South Wales

Rolfe DCJ

Contract of suretyship - claim under guarantee - plaintiff supplier of lighting & electrical goods & equipment - plaintiff owed \$160,892.10 by Galpern Electrics Pty Limited, (the Debtor) for goods supplied – first & second defendant brothers & sole directors & shareholders of debtor - extension of credit provided by plaintiff to debtor - terms & conditions of contract between plaintiff & debtor varied - surety discharge rule - Contracts Review Act 1980 (NSW) – held that no pressure was placed on defendants to provide guarantee - verdict for plaintiff against defendants for \$160,892.10. [Harcroft Lighting](#) (B)

**& Four cases from Canada...**

**Bruker v Marcovitz 2007 SCC 54**

Supreme Court of Canada

McLachlin CJ, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron & Rothstein JJ

Contracts – human rights – action for damages against husband for breach of contract – husband refused to provide wife with Jewish religious divorce after civil divorce, despite agreement to do so – husband refused for fifteen years – whether husband entitled to immunity from damages for his breach of

contract by invoking freedom of religion – held that wife’s claim enforceable by the courts. [Bruker](#) (I)

**Topgro Greenhouses Ltd v Houweling 2007 BCCA 599**

Court of Appeal of British Columbia

Donald J

Judges - reasonable apprehension of bias – test as to when judges should disqualify themselves set out at par 26 of judgment – dispute over share purchase agreement. [Topgro Greenhouses](#) (I,B,C)

**Danylchuk et al v Wolinsky et al 2007 MBCA 132**

Court of Appeal of Manitoba

Scott CJ, Monnin & Chartier JJA

Corporations – directors - oppressive conduct defined in legislation – s241 Canadian Business Corporations Act - shareholder remedies in Canada – extensive consideration of case law – in an interesting judgment, Monnin JA at par 57 & 58 considers the judgment of Doherty JA in [Budd v Gentra Inc et al](#) (1998), 111 OAC 288 – after reviewing principles of limited liability of directors at common law, Doherty JA went on to distinguish between remedies available at common law with remedies provided for under Ontario oppression statute & said:

“This broader perspective is entirely consistent with the purpose of the section which is aptly described by D Peterson in ‘Shareholder Remedies in Canada’ (loose leaf), at p18.1:

‘The oppression remedy may be considered the Charter of Rights and Freedoms of corporate law. It is a relatively new creature of statute, so it is little developed. It is broad and flexible, allowing any type of corporate activity to be the subject of judicial scrutiny. The potential protection it offers corporate stakeholders is awesome. Nevertheless, the legislative intent of the oppression remedy is to balance the interests of those claiming rights from the corporation against the ability of management to conduct business in an efficient manner. The remedy is appropriate only where as a result of corporate activity, there is some discrimination or unfair dealing amongst corporate stakeholders, a breach of a legal or equitable right, or appropriation of corporate property.’” [Danylchuk](#) (I,B,C)

**Baig v The Guarantee Company of North America 2007 ONCA 847**

Court of Appeal for Ontario

Rosenberg, Armstrong & Juriansz JJA

Motor vehicle insurance – statutory condition - property damage – insured required by regulations under Insurance Act to submit to examination under oath & to produce documents relating to matters in question – primary judge found insurance company had no right to compel respondent to attend for examination – held on appeal that the statutory condition did not cease to operate once litigation was commenced – scope of examination extended to all matters material to insurer’s liability which insurer had objective & reasonable basis to explore. [Baig](#) (I)

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