

Friday 14 September 2012

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Sheather v Staples Waste Removals Pty Ltd - appeals - applications for security for costs and stay of execution (I, B, C, G)

Onesteel Reinforcing Pty Ltd v Sutton - workers compensation - appeal from arbitrator's decision - whether failure to find no evidence - whether wrong question answered (I)

Kounnas v Citywide Civil Engineering Pty Ltd - application for extension of time for leave to appeal - whether erroneous refusal of application for security for costs (I, B, C)

Allianz Australia Insurance Ltd v Sprod - administrative law - motor accidents compensation - insurer's appeal from first instance determination of challenge to claims assessor's assessment of damages (I, G)

Nair-Smith v Perisher Blue Pty Ltd - admissibility of expert evidence (I, B, C, G)



Prasad v AMP Life Ltd; Printer Ribbon Products Pty Ltd v AMP Life Ltd - exemption from service of evidence prior to trial - *Markus* orders

Victorian WorkCover Authority v Lasalle - workers compensation - application for indemnity for compensation paid (I)

Almonds Investors Ltd v Emanouel - managed investment schemes - alleged failure to disclose commission fees and risks - notices to suspend obligations (B)

McPhail Investments Pty Ltd v Stumer - application for indemnity costs against plaintiff and non-party (I, B, C, G)

Summaries with links (5 minute read)

Sheather v Staples Waste Removals Pty Ltd [2012] FCA 998

Federal Court of Australia

Nicholas J

Appeals - applications for security for costs and stay of execution - court's power to make order for security for costs: s56 *Federal Court of Australia Act 1976* (Cth), r36.09 *Federal Court Rules 2011* (Cth) - factors relevant to decision whether to make order in respect of appeal: *Equity Access v Westpac Banking Corporation* (1989) ATPR 40-972 - *prospects of success* in context of appeal: *J & M O'Brien Enterprises Pty Ltd v The Shell Co of Australia Ltd (No 2)* [1983] FCA 96 - whether order will stultify appeal - quantum of security - principles applicable to grant of stay of execution: *Powerflex Services Pty Ltd v Data Access Corporation* (1996) 35 IPR 193 - *prima facie* entitlement of respondent to benefit of judgment obtained below - whether significant doubts as to respondent's ability to repay amount of judgment debt if appeal successful - whether prejudice.

[Sheather](#) (I, B, C, G)



Onesteel Reinforcing Pty Ltd v Sutton [2012] NSWCA 282

Court of Appeal of New South Wales

Allsop P; McColl & Basten JJA

Worker's compensation - whether Deputy President erred by failing to find there was no evidence that respondent suffered injury in course of employment by appellant - whether error of law - whether arbitrator answered wrong question - whether arbitrator entitled to rely on expert reports containing a different medical history to that accepted by the arbitrator - no evidence ground of appeal may be characterised as a question of law: *Kostas v HIA Insurance Services Pty Ltd t/as Home Owners Warranty* [2010] HCA 32 - Workers Compensation Commission (**Commission**) not bound by rules of evidence: s354 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - requirements of evidence from which Commission to draw conclusions: r15.2 *Workers Compensation Commission Rules 2010* (NSW) - error of law based on absence of evidence requires absence of material - whether expert evidence ought to have been rejected or given no weight.

[Onesteel Reinforcing](#) (I)

Kounnas v Citywide Civil Engineering Pty Ltd [2012] NSWCA 287

Court of Appeal of New South Wales

Bathurst CJ & Allsop P

Appeals - application for extension of time for leave to appeal - matters to be taken into account in deciding whether to grant extension of time for leave to appeal - requirement of *fairly arguable case*: *Tomko v Palasty (No.2)* [2007] NSWCA 369 - whether adequate explanation for substantial delay - whether injustice: *Carolann v AMF Bowling Pty Limited* [1995] NSWCA 69 - whether primary judge erred in denying application for security for costs - discretionary judgment - necessity for error in *House v R* sense.

[Kounnas](#) (I, B, C)

Allianz Australia Insurance Ltd v Sprod [2012] NSWCA 281

Court of Appeal of New South Wales

Campbell & Barrett JJA; Sackville AJA

Administrative law - claim for prerogative relief - assessment of damages by claims assessor under Pt 4.4 *Motor Accidents Compensation Act 1999* (NSW) (**Act**) - whether assessor complied with statutory obligations under s126 of the Act to be satisfied of and to state assumptions as to future



earning capacity - purpose of s126: *Nominal Defendant v Livaja* [2011] NSWCA 121 - whether assessor fell into jurisdictional error or error of law on face of the record - whether reasons of assessor should be tested in same way as those of judge - principles relevant to award of *buffer*: *Penrith City Council v Parks* [2004] NSWCA 201.

[Allianz Australia Insurance](#) (I, G)

Nair-Smith v Perisher Blue Pty Ltd [2012] NSWSC 1070

Supreme Court of New South Wales

Beech-Jones J

Evidence - admissibility of opinion evidence - personal injury proceedings - plaintiff suing defendant in negligence as owner and operator of ski lift - evidence of mechanical engineer and ergonomist - requirements for admissibility of evidence tendered as expert opinion: *Makita (Aust) Pty Ltd v Sprowles* [2001] NSWCA 305 - whether disclosure of facts and reasoning process asserted by expert to justify opinion expressed - whether possession of *specialised knowledge* based on *training, study or experience* - whether opinions wholly or substantially based on *specialised knowledge*.

[Nair-Smith](#) (I, B, C, G)

Prasad v AMP Life Ltd; Printer Ribbon Products Pty Ltd v AMP Life Ltd [2012] NSWSC 1076

Supreme Court of New South Wales

Stevenson J

Evidence - exemption from service prior to trial - claims for indemnity under insurance policies - alleged fraudulent non-disclosure of information - defendant sought *Markus* orders: *Markus v Provincial Insurance Co Ltd* (1983) 25 NSWCCR 1 - whether defendant required to serve documents on plaintiff - consideration of interests of justice and just, quick, speedy determination of proceedings.

[Prasad](#) (I, B, C, G)

Victorian WorkCover Authority v Lasalle (Vic) Pty Ltd [2012] VSC 412

Supreme Court of Victoria

Beach J

Workers compensation - worker claimed compensation under the *Accident Compensation Act 1985* (Vic) (**Compensation Act**) - plaintiff sought indemnity from defendant under s138 of the Act for compensation paid in relation to injuries - whether defendant negligent - *Factor X* - percentage



extent to which defendant's act, default or negligence caused or contributed to injury - whether circumstances of injury create liability in defendant for damages: s138(1) of the Compensation Act - whether necessary to take into account Pt X of the *Wrongs Act* 1958 (Vic) (**Wrongs Act**) in determining liability - causation: ss51 and 52 of the *Wrongs Act* - factual causation - *but for* test - whether amounts paid or payable under the Compensation Act - entitlement to compensation: s82 of the Compensation Act - whether injury arose out of or in course of employment - whether *journey* accident.

[Victorian WorkCover Authority](#) (I)

Almonds Investors Ltd v Emanouel [2012] VSC 413

Supreme Court of Victoria

Sifris J

Corporations - managed investment scheme - financier and responsible entity -alleged failure to disclose commission fees and risks in product disclosure statement - alleged breaches of Div 2 Pt 2.9 *Corporations Act* 2001 (Cth) (Act) - service of notice to suspend obligations pursuant to s601MB(1) of the Act - disclosure requirements: s1013 of the Act, Pt 7.9 Div 4C *Corporations Regulations* 2001 (Cth) - practical effect of disclosure requirements: *Woodcroft-Brown v Timbercorp Securities Ltd (in liq) & Ors* (2011) 85 ACSR 354 - whether notice valid - whether notice just - whether notices deficient as matter of substance - whether failure to specify basis of allegations - whether notices of no effect and should be set aside.

[Almonds Investors](#) (B)

McPhail Investments Pty Ltd v Stumer [2012] QSC 242

Supreme Court of Queensland

P McMurdo J

Costs - defendant sought indemnity costs against plaintiff and non-party - stay of proceedings after plaintiff failed to pay security for costs - non-party sole director and shareholder of plaintiff company - non-party's law firm acted for plaintiff company in proceedings - whether costs should be awarded against non-party and on what basis - whether in interests of justice to make order sought: *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 - whether non-party played active role in litigation - whether clear interest of non-party in outcome of matter - whether plaintiff company of financial substance.

[McPhail Investments](#) (I, B, C, G)



XCVII

By Emily Dickinson

TO make a prairie it takes a clover and one bee, —
One clover, and a bee,
And revery.
The revery alone will do
If bees are few.

(from Part Two: Nature, Complete Poems, 1924)

<http://www.poetryfoundation.org/bio/emily-dickinson>

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