

Monday 23 April 2012

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Australian Competition & Consumer Commission v MSY Technology Pty Ltd** - *Trade Practice Act 1974 (Cth)* - declaratory relief - appeal allowed (I, B, C, G)

**Ergon Energy Corporation Ltd v Australian Energy Regulator** - *National Electricity (Queensland) Regulations* - distribution service (C)

**Comcare v Pantic** - *s23 Safety, Rehabilitation & Compensation Act 1988 (Cth)* - transitional provisions of Part X - appeal allowed (I)

**Shaw v State of New South Wales** - Employment contracts - ss56 & 58 *Civil Liability Act 2002 (NSW)* - appeal from orders striking out parts of pleadings allowed (I)

**Willett v Thomas** - s51A *Trade Practices Act 1974 (Cth)* - s41 *Fair Trading Act 1987 (NSW)* (I)

**Old v McInnes and Hodgkinson** - Partnership - dissolution - two appeals (I, B, C, G)

**Perpetual Trustee Company Ltd v Milanex Pty Ltd (in liq'n) (No 2)** - Costs - final orders (I, B)



**Harvey & Anor v Mutsaers & Ors** - *Planning & Environment Act 1987* (Vic) - appeal dismissed (C)

**Legal Services Board v Gillespie-Jones** - *Trusts* - appeal dismissed (I, B)

**Parlin Pty Ltd v Choiceone Pty Ltd** - *Costs* - personal injuries - final orders (I)

**CGU Workers Compensation v Panoy Pty Ltd** - *Workers compensation insurance policy* - s34 *Work Health Act* (NT) - action dismissed (I)

**Green v The Nominal Defendant; Campbell v The Nominal Defendant; James Golding v The Nominal Defendant** - *Personal injuries* - *Motor Accidents Compensation Act 1999* (NSW) - decision on liability - contributory negligence (I)

**Balaji v the Government of India & Ors** - *Indian case* - *Advocates Act 1961* (India) (I, B, C, G)

## Summaries with links (5 minute read)

**[Australian Competition & Consumer Commission v MSY Technology Pty Ltd \[2012\] FCAFC 56](#)**

Full Court of the Federal Court of Australia

Greenwood, Logan & Yates JJ

*Trade Practice Act 1974* (Cth) - ACCC appealing against so much of the orders made by primary judge as dismissed its claim for declaratory relief - appeal allowed - order refusing grant of declaratory relief to be set aside & in lieu, declarations in the terms proposed by the parties - an interesting review of text & case law from UK & Australia.

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

[ACCC](#) - decision Federal Court of Australia 15 April 2011: see Benchmark Tuesday 19 April 2011 - *Trade Practices Act 1974* (Cth) - penalties for contraventions - power of Court to make declarations by consent - whether party who consents is a "proper contradictor" - statement of agreed facts - Schedule 2, ss232 & 233 *Competition & Consumer Act 2010* (Cth) - case law from UK, Australia, Singapore & USA considered.

**Ergon Energy Corporation Ltd v Australian Energy Regulator [2012] FCA 393**

Federal Court of Australia

Logan J

*National Electricity (Queensland) Regulations* - whether the term "distribution service," defined to mean "a service provided by means of, or in connection with, a distribution system", applied to the service provided via street lighting system of applicant - applicant seeking judicial review of classification & control mechanism constituent decisions - applicant's street lighting service fell within definition of distribution service - application dismissed.

[Ergon Energy](#) (C)**Comcare v Pantic [2012] FCA 388**

Federal Court of Australia

Finn J

S23 *Safety, Rehabilitation & Compensation Act 1988* (Cth) - transitional provisions of Part X - permanent impairment occurring before 1988 Act - *Hoyle v Telstra Corporation Ltd* (1997) 145 ALR 148 applied - appeal allowed - decision of Administrative Appeals Tribunal set aside - matter remitted.

[Comcare](#) (I)

[Pantic and Comcare](#) - decision Administrative Appeals Tribunal 23 May 2011 - decision under review set aside - matter remitted to Comcare to assess the amount of lump sum compensation, if any, payable in accordance with s50 *Compensation (Commonwealth Government Employees) Act 1971* (Cth)

**Shaw v State of New South Wales [2012] NSWCA 102**

Court of Appeal of New South Wales

Beazley, McColl, Macfarlan, Barrett JJA; McClellan CJ

Employment contracts - probationary teachers - ss56 & 58 *Civil Liability Act 2002* (NSW) - implied term of mutual trust & confidence - appeal from orders striking out certain paragraphs of third further amended statement of claim filed by appellants as plaintiffs in their District Court action - in District Court, appellants as plaintiffs alleging against the State breach of contract, negligence & breach of statutory duty - comprehensive consideration of text & case law from Western Samoa, Hong Kong, UK, Canada, New Zealand & Australia - notice of motion filed by respondent dismissed - appeal allowed.

[Shaw](#) (I)[Addis](#) - decision House of Lords 26 July 1909[General Steel Industries](#) - decision High Court of Australia 9 November 1964



## **Willett v Thomas [2012] NSWCA 97**

Court of Appeal of New South Wales

Basten, Macfarlan & Young JJA

S51A *Trade Practices Act* 1974 (Cth) – s41 *Fair Trading Act* 1987 (NSW) - fiduciary obligations - causation of loss - appellant challenging findings by primary judge against appellant concerning breach of fiduciary duty, & decisions to award compound interest & to make a *Sanderson* order - cross-appeal in which first respondent appealing against primary judge's decision in favour of fourth respondent & against primary judge's decision not to enter judgment against a person associated with the company in which first & second respondents had invested - challenge by fourth respondent to *Sanderson* order.

[Willett](#) (I)

[Thomas](#) - decision 22 September 2010: see Benchmark I, B & IBC Friday 24 September 2010 - fiduciary duty - business investment - breach of duty - accountant - equitable compensation - compound interest - appropriate case for *Sanderson* order;

[Thomas](#) - decision Supreme Court of NSW 6 October 2010 - costs;

[Thomas](#) - decision Supreme Court of NSW 16 November 2010: see Benchmark Thursday 18 November 2010 - interest - compound interest - appropriate rate - breach of fiduciary duty - equitable jurisdiction to award compound interest - Reserve Bank of Australia cash rate.

## **Old v McInnes and Hodgkinson [2011] NSWCA 410**

Court of Appeal of New South Wales

Beazley, Giles & Meagher JJA

Partnership - dissolution - two appeals - contracts - referee's report - goodwill - fiduciary duty - costs orders - *Calderbank* offer - extensive consideration of UK & Australian case law.

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

[Old](#) - decision 9 July 2008 Supreme Court of NSW: see Benchmark B & IBCG Tuesday 15 July 2008 - partnership . patent attorneys - whether goodwill ought to be considered in settling accounts of dissolved partnership - former partners continuing to trade, but now as two separate firms . whether referee correctly considered aspect of goodwill when making his report to the Court on the accounts between the parties . His Honour did not adopt the referee's approach to question of goodwill;

[Old](#) - decision Supreme Court of NSW 3 November 2009;

[Old](#) - decision 23 November 2010 Supreme Court of NSW



## **Perpetual Trustee Company Ltd v Milanex Pty Ltd (in liq'n) (No 2) [2012] NSWCA 93**

Court of Appeal of New South Wales

Campbell, Macfarlan & Young JJA

Costs - final orders - *Law Reform (Miscellaneous Provision) Act 1946* (NSW) - judgment for plaintiff in sum of \$180,026.30.

[Perpetual Trustee Company](#) (I, B)

[Perpetual Trustee Company](#) - decision Court of Appeal of NSW 28 November 2011: see Benchmark Wednesday 30 November 2011 - *Fair Trading Act 1987* (NSW) - loan contract - mortgage - appeal against dismissal of cross-claim - misleading & deceptive conduct - reliance - causation - mortgage origination & management agreement - respondent not entitled to rely on proportionate liability provisions of *Civil Liability Act 2002* (NSW) - concurrent wrongdoer - appeal allowed - see par 99 & 107 of Macfarlan JA's judgment: appellant's claim against respondent limited to an amount reflecting respondent's sixty-five percent share of responsibility as between it & solicitor for appellant's loss - see par 127 to 132 of judgment of Young JA as to issue of share of responsibility.

[Perpetual Trustee Company](#) - decision Supreme Court of NSW 16 November 2009 - loan agreement secured by first mortgage over unit owned by defendant - plaintiff seeking possession - *Contracts Review Act 1980* (NSW) - cross-claim by Perpetual against mortgage broker Milanex - *Trade Practices Act 1974* (Cth) - *Fair Trading Act 1987* (NSW) - Perpetual had not established reliance on representations - cross-claim against Milanex dismissed - two actions: in each, verdict for defendant.

## **Harvey & Anor v Mutsaers & Ors [2012] VSCA 69**

Court of Appeal of Victoria

Nettle, Redlich & Hansen JJA

*Planning & Environment Act 1987* (Vic) - whether, on an application to Victorian Civil & Administrative Tribunal for review of a decision of a relevant authority to refuse an extension of a planning permit under s69(1), VCAT is empowered by cl 62 of Schedule 1 to *Victorian Civil & Administrative Appeals Tribunal Act 1998* (Vic) to extend the permit notwithstanding that the time in which appellant was permitted to apply to the relevant authority for extension of the permit expired before the application for extension was made - appeal dismissed.

[Harvey](#) (C)

[Harvey](#) - decision 16 February 2011: see Benchmark C & IBC Thursday 17 February 2011 - s69(1) *Planning & Environment Act 1987* (Vic) - application for leave to appeal from Victorian Civil & Administrative Tribunal - extension of planning permit for construction of a dwelling — application for extension made out of time — power of Tribunal to disregard failure to comply with time limit - leave to appeal Tribunal's decision refused.



## **Legal Services Board v Gillespie-Jones [2012] VSCA 68**

Court of Appeal of Victoria

Nettle, Redlich & Hansen JJA

Trusts - *Legal Profession Act 2004* (Vic) - whether monies paid to solicitor for purpose of paying Counsel's fees held on *Quistclose* trust: *Barclays Bank v Quistclose* [1970] AC 567 - actual pecuniary loss, interests, on behalf of - appeal dismissed.

[Legal Services Board](#) (I, B)

## **Parlin Pty Ltd v Choicene Pty Ltd [2012] WASCA 19 (S)**

Supreme Court of Western Australia

Newnes, Murphy & Mazza JJA

Costs - final orders - judgment for appellant in the sum of \$170,699.70 - application for indemnity costs dismissed.

[Parlin](#) (I)

[Parlin](#) - decision Court of Appeal of Western Australia 31 January 2012: see Benchmark I & IBCG Thursday 2 February 2012 - personal injuries - claim for contribution by appellant drilling contractor against respondent hire company - accident on appellant's drilling rig in which workman provided by the respondent injured - appeal allowed - respondent ordered to make contribution of twenty percent to damages payable by appellant;

[Barns](#) - *Barns v Parlin Pty Ltd & Ors.* - decision District Court of Western Australia 18 June 2010

## **CGU Workers Compensation v Panoy Pty Ltd [2012] NTSC 26**

Supreme Court of the Northern Territory

Mildren J

Workers compensation insurance policy - death of worker on cattle station - restitution - limitation of actions - breach of condition in policy providing that employer take all reasonable precautions to prevent injuries - admissibility of evidence - s34 *Work Health Act* (NT) - action dismissed.

[CGU Workers Compensation](#) (I)

[CGU Workers Compensation](#)

[Booksan](#) - decision NSW Court of Appeal 21 February 2006: (2006) 14 ANZ Ins. Cas. 61-678; (2006) Aust. Torts Reps 81-830



## In the District Court of New South Wales...

### Green v The Nominal Defendant; Campbell v The Nominal Defendant; James Golding v The Nominal Defendant [2012] NSWDC 37

District Court of New South Wales

Sidis DCJ

Personal injuries - *Motor Accidents Compensation Act 1999* (NSW) - decision on liability - car unregistered at time of accident - duty of care - contributory negligence - seat belts not worn - passengers in rear cargo compartment of station wagon.

[Green](#) (I)

## From India...

### Balaji v the Government of India & ors

High Court of Madras

Eqbal CJ, Sivagnananan J - decision 21 February 2012

*Advocates Act 1961* (India) - *Arbitration & Conciliation Act 1996* (India) - UNCITRAL: Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law - UNCITRAL Conciliation Rules - foreign law firms or foreign lawyers practising law in India - petition filed under Article 226 of the Constitution of India for writ of mandamus directing respondents 1 to 8 to take appropriate action against respondents 9 to 40 - respondents 36 and 37 Australian law firms - at par 39, consideration of Bombay High Court decision of *Lawyers Collective v Bar Council of India* 2010 (112) Bom LR 32: Reserve Bank of India, Foreign Exchange Regulation Act 1971 (FERA) - at par 45: whether a foreign law firm visiting India for a temporary period to advise their client on foreign law can be barred under the provisions of the Advocates Act - see par 63 of judgment setting out the Court's conclusions.

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

[Advocates Act 1961 \(India\)](#)

[Arbitration & Conciliation Act 1996 \(India\)](#)



## And on St George's Day 2012...

### Home-Thoughts, from Abroad

by Robert Browning

(b. London 1812 - d. Italy 1889)

*In 1846, Browning married the poet Elizabeth Barrett (1806-1861) & lived with her in Italy until her death - after she died, he returned to England, but made frequent trips to Italy, & died in Venice*

Oh, to be in England,  
Now that April's there,  
And whoever wakes in England  
Sees, some morning, unaware,  
That the lowest boughs and the brushwood sheaf  
Round the elm-tree bole are in tiny leaf,  
While the chaffinch sings on the orchard bough  
In England - now !

And after April, when May follows,  
And the whitethroat builds, and all the swallows -  
Hark ! where my blossomed pear-tree in the hedge  
Leans to the field and scatters on the clover  
Blossoms and dewdrops - at the bent spray's edge -  
That's the wise thrush; he sings each song twice over,  
Lest you should think he never could recapture  
The first fine careless rapture !

And though the fields look rough with hoary dew,  
All will be gay when noontide wakes anew  
The buttercups, the little children's dower, -  
Far brighter than this gaudy melon-flower !

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