

Friday 16 November 2012

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Mills v Commissioner of Taxation** - income tax - whether: bank's purpose in issuing *PERLS V* securities was to enable holders to obtain franking credits; purpose was incidental to bank's purpose of raising *Tier 1* capital

**Mansfield v The Queen; Kizon v The Queen** - insider trading - possession of inside information - whether information included false information

**Wollongong City Council v Legal Business Centre Pty Ltd (No 2)** - security for costs - application for extension of time to comply with order - manner of filing and content of submissions - abuse of process

**Waterhouse v The Age Company Ltd & Ors; Waterhouse v Fairfax Media Publications Pty Ltd & Anor; Waterhouse v Fairfax Digital Australia & New Zealand Pty Ltd** - defamation - application for jury of 12 persons - interests of justice



**Setka v Abbott & Anor** - defamation - words spoken at conference and published on television - *Polly Peck* defence - contextual truth defence - Lange qualified privilege defence

**Levy v Watt** - limitation of actions - proprietary rights in valuable painting - whether claims extinguished by limitations provisions

## Summaries with links (5 minute read)

### **Mills v Commissioner of Taxation [2012] HCA 51**

High Court of Australia

French CJ; Hayne, Kiefel, Bell & Gageler JJ

Taxation - income tax - equity interests - imputation system - appeal from proceedings in the Federal Court under PtIVC *Taxation Administration Act* 1953 (Cth) brought by taxpayer who held *PERLS V* securities issued by Commonwealth Bank of Australia (**Bank**) - test case to determine if circumstances of the issue of *PERLS V* were such that the Commissioner of Taxation could make determination under s177EA(5)(b) *Income Tax Assessment Act* 1936 (Cth) (**Act**) that no franking credit was to arise in respect of payment of interest on part of those securities - *whether: having regard to the relevant circumstances* of the arrangements for the issue of *PERLS V* a reasonable person would conclude that the Bank entered into and carried out those arrangements for a purpose of enabling a taxpayer to obtain an imputation benefit within the meaning of s177EA(3)(e) of the Act; purpose was subordinate to or in subsidiary conjunction with some other purpose; purpose was incidental to Bank's purpose of raising *Tier 1* capital; proposed franking of distributions was disclosed in prospectus and integral to calculations of distribution on the notes, calculation of yield to investors, and calculation by Bank of its tax costs of capital - s177EA(3)(e) of the Act an exhaustive statement of jurisdictional facts necessary and sufficient for s177EA of the Act to apply so as to found an exercise of power by the Commissioner to deny a franking credit under s177EA(5)(b) - importance of purposive construction of s177EA(3)(e) of the Act.

[Mills](#)

**Mansfield v The Queen; Kizon v The Queen [2012] HCA 49**

High Court of Australia

Hayne, Heydon, Crennan, Kiefel & Bell JJ

Corporations law - insider trading - false information - appellants tried in District Court of Western Australia for conspiracy to commit offences in relation to possession of *inside information* in contravention of s1002G *Corporations Act* 2001 (Cth) (**Act**) - *whether*: appellants possessed information that was not generally available; in order to establish contravention of the Act it was necessary to prove information possessed by appellants was a factual reality; the fact that knowledge communicated was not true denied that it was information - construction of *information* under provisions of the Act - *whether*: information took its ordinary meaning; ordinary usage of information excluded false information; excluding false information more consistent with the purpose of prohibiting insider trading than including it; international regulatory approach to insider trading consistent only with submission that meant a matter of fact or precise circumstances as opposed to falsity; court should construe Australian legislation by reference to international practice.

[Mansfield](#)

**Wollongong City Council v Legal Business Centre Pty Ltd (No 2) [2012] NSWCA 366**

Court of Appeal of New South Wales

Beazley, Meagher & Barrett JJA

Security for costs - application for extension of time to comply with order to provide security - *whether*: respondents' submissions dealt with attempt to satisfy order or explained why further time required; appropriate exercise of liberty to apply; content of submissions and accompanying material was abuse of process; whether submissions were delivered to court without direction that further submissions be filed - Court will not have regard to submissions filed other than in accordance with directions: *Carr v Finance Corporation of Australia Ltd (No 1)* (1981) HCA 20, *Singh v Secretary, Department of Employment and Workplace Relations* (2009) FCAFC 59.

[Wollongong City Council](#)



**Waterhouse v The Age Company Ltd & Ors; Waterhouse v Fairfax Media Publications Pty Ltd & Anor; Waterhouse v Fairfax Digital Australia & New Zealand Pty Ltd [2012] NSWSC 1349**

Supreme Court of New South Wales

Nicholas J

Defamation - application under s20 *Jury Act* 1977 (NSW) (**Act**) for jury of 12 in three actions for defamation to be heard together - plaintiff sued in respect of publication in newspaper and for relief for breaches of ss51AA & 52 *Trade Practices Act* 1974 (Cth) and s42 *Fair Trading Act* 1987 (NSW) - jury's task in defamation proceedings: s22(2) *Defamation Act* 2005 (NSW) - number of jurors in civil proceedings: s20 of the Act - whether court satisfied that case was proper one to be tried by jury of 12: *Hawke v Tamworth Newspaper Co Ltd* (1983) 1 NSWLR 699, *Lang v Australian Consolidated Press Ltd* (1967) 1 NSWLR 157 - relevance of public prominence of plaintiff: *Hawke v Tamworth Newspaper Co Ltd* (1983) 1 NSWLR 699, *Ra v Nationwide News Pty Ltd* (2009) FCA 1308 - requirement of administration of justice in proceedings that trial by jury be dispassionate and fair - whether interests of justice better served in trial by 12 jurors than 4.

[Waterhouse](#)

**Setka v Abbott & Anor [2012] VSC 534**

Supreme Court of Victoria

Beach J

Defamation - plaintiff sued in respect of words alleged to have been spoken at conference and published on subscription television service - defendants pleaded *Polly Peck* defence: *Polly Peck (Holdings) Plc v Trelford* (1986) 1 QB 1000, contextual truth defence: s26 *Defamation Act* 2005 (Vic) (**Act**) and *Lange* qualified privilege defence: *Lange v Australian Broadcasting Corporation* (1997) HCA 25 - whether: *Polly Peck* imputations incapable of arising; *Polly Peck* imputations permissible variants of plaintiff's pleaded meanings; particulars of truth incapable of supporting relevant justification plea; jury could not reasonably conclude that plaintiff's meanings did not further harm his reputation because of the substantial truth of the defendants' meanings: s26(b) of the Act - boundaries of *Lange* defence not yet delineated: *Theophanous v Herald & Weekly Times Ltd & Anor* (1994) HCA 46 - whether arguable that words constituted government or political matters as encompassed by the *Lange* defence.

[Setka](#)



**Levy v Watt [2012] VSC 539**

Supreme Court of Victoria

Habersberger J

Limitation of actions - painting by Rupert Bunny left by client to plaintiff solicitor in will - painting was stolen from owner in 1991 by unknown thief and seized by police in 2010 - defendant executors and residuary beneficiaries of owner's estate were unaware of painting until it was seized - application to Magistrates' Court under s125 *Police Regulation Act* 1958 (**Police Regulation Act**) resulted in order that painting be returned to defendants pending determination of ownership - plaintiff sought declaration that defendants' proprietary rights in painting had been extinguished and that he was owner of painting - plaintiff also sought that painting be returned to him - *whether*: any claim by defendants in relation to painting had been extinguished by operation of ss5(1)(a) & 6 *Limitation of Actions Act* 1958 (Vic) (**Limitation Act**); s6 of the *Limitation Act* did not apply by operation of s27 of the *Limitation Act* to prevent time running if right of action concealed by fraud; policy considerations underlying the Act supported plaintiff's claims - object of s125 of the *Police Regulation Act*: *Thompson v Coloe* (Supreme Court of Victoria, Nathan J, 20 March 1992, unreported) - whether defendants' documentary title continued to subsist at law and was superior to plaintiff's possessory title - whether s27(b) of the *Limitation Act* prevented time from beginning to run when painting stolen; thief had fraudulently concealed right of action by concealing his identity; plaintiff had discharged onus to show that client who was given painting was a bona fide purchaser for value without notice: *Di Sante v Camando Nominees Pty Ltd* (2000) VSC 211.

[Levy](#)**To the Roaring Wind**

by Wallace Stevens

What syllable are you seeking,  
Vocalissimus,  
In the distances of sleep?  
Speak it.

<http://www.poetryfoundation.org/bio/wallace-stevens>**[Click Here to access our Benchmark Search Engine](#)**