



## Insurance Banking & Construction

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

#### Today's Cases

**Freedom of Information Act (Cth)** – document prepared for purpose of submission to Federal Cabinet – whether exempt. See *Fisse v Secretary, Department of the Treasury* (I, B, C)

**Costs (Cth)** – whether Federal Court should depart from ordinary order that costs follow the event – applicant awarded only 50% costs. See *Phosphate Resources v Minister for the Environment Heritage & the Arts* (I, B, C)

**Stay of Proceedings (Cth)** – whether temporary stay of civil proceedings should be ordered in circumstances where criminal or civil penalty proceedings might eventuate. See *Wide Bay Conservation Council v Burnett Water P/L* (I, B, C)

**GST Liability** – whether liquidator personally liable for GST on sale of new residential premises owned by corporation where contract for sale entered into after order for winding up made. Answer: No. See *Deputy Commissioner of Taxation v PM Developments P/L* (B)

**Mining Law** – application for review of Ministerial Decision refusing application by corporation incorporated in British Columbia (Canada) to establish coal mine in Queensland. See *Waratah Coal Inc v Minister for the Environment Heritage & the Arts* (C)

**Limitation of Actions** – application to extend limitation period in claim for damages involving alleged sexual assault after passage of 38 years. See *The Salvation Army (South Australia Property Trust) v Rundle* (I)

**Solicitor's Retainer** – whether instructions given on behalf of corporation to solicitor were by a “disqualified person”. See *Multitecfbm (Asia Pacific) v Myeon & Anor* (I, B, C)

**Power of Attorney** – whether execution of mortgage was within scope of Power of



Attorney. See *Williams v Turner* (I, B, C)

**Limitation of Actions (ACT)** – application to extend limitation period where employee's claim was 17 months out of time against employer. Extension granted. See *Kershaw v Magnet Mart* (I)

**Limitation of Actions (ACT)** – application to extend limitation period where plaintiff's claim was 18 months out of time against occupier – where HIH the insurer and government relief package had lapsed within the limitation period. Extension refused – actual prejudice to defendant. See *Reid v Calvary Hospital* (I)



## Tuesday 16 December 2008

### **Fisse v Secretary, Department of the Treasury [2008] FCAFC 188**

Federal Court of Australia

Stone, Buchanan & Flick JJ (in Sydney)

*Freedom of Information Act* 1982 (Cth) – exempt documents - Cabinet documents – document prepared for purpose of submission to Cabinet – interdepartmental working party – public interest – onus of proof – findings of fact made by Administrative Appeals Tribunal – appeal dismissed – extensive consideration of text & case law.

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

### **Phosphate Resources Ltd v Minister for the Environment Heritage and the Arts (No 3) [2008] FCA 1899**

Federal Court of Australia

Buchanan J (in Sydney)

Costs – s43 *Federal Court of Australia Act* 1976 (Cth) - whether Court should depart from ordinary rule that costs follow result – special circumstances shown – applicant failed on issues originally argued – applicant ultimately successful on different grounds – applicant awarded only 50% of its costs.

[Phosphate Resources](#) (I, B, C)

### **Wide Bay Conservation Council Inc v Burnett Water Pty Ltd [2008] FCA 1900**

Federal Court of Australia

Logan J (in Brisbane)

*Environmental Protection & Biodiversity Conservation Act* 1999 (Cth) – respondent constructed, owns & operates Paradise Dam – lungfish - High Court & Federal Court Procedure – application for stay of proceedings – where criminal or civil penalty proceedings against respondent a contingency but not a real possibility – whether civil proceedings should be stayed temporarily – temporary stay refused – detailed consideration of legislation & case law.

[Wide Bay Conservation Council](#) (I, B, C)

### **Deputy Commissioner of Taxation v PM Developments Pty Ltd [2008] FCA 1886**

Federal Court of Australia

Logan J (in Brisbane)

Goods & Services Tax – personal liability of liquidator of corporation - Constitution s75 - whether liquidator personally liable for GST on sale of new residential premises owned by corporation where contract for sale of those premises entered into & completed after the winding up order – answer ‘no’ – detailed analysis of legislation & case law.

[Deputy Commissioner of Taxation](#) (B)

**Waratah Coal Inc v Minister for the Environment Heritage & the Arts [2008] FCA 1870**

Federal Court of Australia

Collier J (in Brisbane)

*Environmental Protection & Biodiversity Conservation Act 1999* (Cth) - construction of s74B EPBC Act - application for order for review & application under s39B *Judiciary Act 1903* (Cth) – review of purported decision by Minister under EPBC Act - applicant is incorporated in British Columbia – applicant intending to establish a new coal mine, railway & port to export high volatile, low sulphur, steaming coal to international markets - coal to be sourced from applicant's mining tenements near Alpha in the Galilee Basin, Central Queensland – application dismissed – detailed consideration of legislation, text & case law.

[Waratah Coal](#) (B, C)**The Salvation Army (South Australia Property Trust) v Graham Rundle [2008] NSWCA 347**

Court of Appeal of New South Wales

McColl, Basten &amp; Bell JJA

Personal injuries - s36 *Limitation of Actions Act 1969* (SA)– s5 *Choice of Law (Limitation Periods) Act 1993* (NSW) - construction - appellant appealing decision by primary judge granting respondent extension of time to commence proceedings against appellant : see link below – allegations of sexual assault while in applicant's care - whether primary judge erred in consideration of prejudice to appellant – absence of evidence due to lapse of thirty-eight years – statutory interpretation – purposive construction - appeal dismissed - whether costs should follow “the event” - “actions” – “damages” – “the event” – comprehensive review of legislation, text & case law from UK, Canada & Australia. (I)

[The Salvation Army \(South Australia Property Trust\)](#), and[Rundle v The Salvation Army \(South Australia Property Trust\) & Anor](#) – decision 7 May 2007**Multitecfbm (Asia Pacific) Pty Ltd v Seong Myeon (Chris) Han & Anor [2008] NSWSC 1339**

Supreme Court of New South Wales

Sackville AJ

Solicitor's retainer – instructions given on behalf of a corporation by a disqualified person – defendant's challenge to validity of retainer – separate determination - plaintiff an importer of print finishing & mailing equipment – plaintiff alleging diversion of funds – defendant alleging first defendant authorised to transfer funds - whether proceedings against a former employee of a corporation are “tainted” because instructions were given by a disqualified person allegedly in breach of *Corporations Act 2001* (Cth) – defendant's application dismissed.

[Multitecfbm \(Asia Pacific\)](#) (I, B, C)



**Williams v Turner [2008] QSC 327**

Supreme Court of Queensland

Wilson J

Powers of attorney – held that execution of mortgage was outside scope of authority granted by the power of attorney - mortgage was void – an interesting judgment.

[Williams](#) (I, B, C)**Kershaw v Magnet Mart Pty Limited [2008] ACTSC 135**

Supreme Court of the Australian Capital Territory

Master Harper

*Limitation Act 1985 (ACT)* - personal injury – claim against employer – workers' compensation claim previously accepted – action commenced seventeen months out of time – extension granted.

[Kershaw](#) (I)**Reid v Calvary Hospital ACT Incorporated [2008] ACTSC 134**

Supreme Court of the Australian Capital Territory

Master Harper

*Limitation of Actions Act 1985 (ACT)* - personal injury – claim against occupier of land – at time of accident alleged, defendant had been insured by HIH Casualty & General Insurance Limited - failure of defendant's insurer within limitation period – lapsing of government relief package following that failure within limitation period – action commenced eighteen months out of time – actual prejudice to defendant – extension refused.

[Reid](#) (I)

## Birth Day\* of Ludwig the Great

**Ludwig van Beethoven**

(baptised 17 December 1770 in Bonn – d. Monday 25 March 1827 in Vienna)

He experienced the first, intermittent symptoms of his approaching deafness at age twenty-eight in 1799. In April 1800 his First Symphony had its first performance. In July 1801, in a letter to his friend, the violinist & music teacher Karl Amenda, he wrote: "Know that my noblest faculty, *my hearing*, has greatly deteriorated .... I beg of you to keep the matter of my deafness a profound secret to be confided to nobody no matter whom."

In a letter 29 June 1801 to Franz Wegeler, a childhood friend, he wrote: " ..... my hearing has grown steadily worse in the last three years ..... my ears sing & buzz continually day & night."

On 6 October, 1802 he wrote the letter known as the Heiligenstadt Testament to his brothers Carl & Johann (see link below) – it was found among his papers after his death. It begins: “Oh you men who think or say that I am hostile, obstinate or misanthropic, how greatly do you wrong me.” He writes of being brought to “the brink of despair” by his affliction, “but it seemed to me impossible to quit the world before I had produced all that I felt myself called to accomplish.”

In 1802 he completed the Second Symphony, the Third (“the Eroica”) in 1803, & the Fourth in 1806, as well as the Violin Concerto in D Major. Symphony No. 5 was composed in 1807-8 : it was the subject of a famous review by the writer & composer E.T.A. Hoffmann, published in July 1810. The Sixth Symphony (“the Pastoral”) had its first performance in 1808, as did the Choral Fantasia. Because of his deafness, Beethoven’s last concert performance as a piano virtuoso was in December 1808. In 1809 he composed Piano Concerto no. 5 (“the Emperor.”) In the period 1808-9, he recorded: “Cotton in my ears at the pianoforte frees my hearing from the unpleasant ringing (‘rauschende’) .... Resignation, what a wretched refuge, & yet the only one remaining to me.”

Symphony no. 7, described by Wagner as ‘the apotheosis of the dance’ was completed in 1812, as was Symphony no. 8.

The earliest surviving Conversation Book is dated March-April 1818 – recourse to writing was required because his hearing had become too poor for conversation even with the help of an ear trumpet.

In rehearsals for “Fidelio” in 1822, while seated at the piano directing the orchestra, he created confusion by conducting out of time. He worked on the Ninth (“Choral”) Symphony between 1822 – 1824. By March 1825, at rehearsals for the A minor Quartet, the violinist Joseph Böhm records : “ He was so deaf he could no longer hear the heavenly sound of his own compositions.”

\*Thayer in his “Life of Beethoven” states : “ *Since it was the custom at the time in the Catholic Rhine Country not to postpone the baptism beyond twenty-four hours after the birth of a child, it is in the highest degree probable that Beethoven was born on December 16, 1770.*”

[Heiligenstadt Testament - Wikipedia, the free encyclopedia](#)

“Von Herzen – möge es wieder – zu Herzen gehn !”  
 (“From the heart – may it in turn, go to the heart.”)  
*The dedication Beethoven wrote on the first page of the*  
*Missa Solemnis, composed between 1819-1823, before*  
*the first part of the Mass, the ‘Kyrie Eleison’*  
 (‘Lord, have mercy.’)

[Beethoven: The Magnificent Master](#)

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