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## Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (1 minute read)

**Bywater Investments Limited v Commissioner of Taxation; Hua Wang Bank Berhad v Commissioner of Taxation** (HCA) - taxation - appellants were residents of Australia for purposes of income tax - appeals dismissed (I B C G)

**Jewelsnloo Pty Ltd v Sengos** (NSWCA) - trade and commerce - contract - no misleading or deceptive conduct in sale of business - appeal dismissed (I B C G)

**Application by Craig-Bridges; The Estate of Ella Minnie Lillian Bush; The Estate of Ella Minnie Lillian Bush v NSW Trustee & Guardian** (NSWSC) - wills and estates - succession - family provision - deceased had testamentary capacity to make impugned wills - family provision order granted (B)

**Page v Healthscope Operations Pty Ltd** (NSWSC) - contract - accreditation agreement did not give rise to contract between anaesthetist and hospital - separate questions answered (I B)

**Director of Consumer Affairs Victoria v Donald (No 2)** (VSC) - consumer law - unsolicited agreements for provision of services - breaches of *Australian Consumer Law* established - decisions as to relief reserved (I G)

**Dream Money Pty Ltd v Bernhard** (WASCA) - corporations - statutory demand varied on basis of off-setting claim - appeal allowed (B)

**Coates v Classic Minerals Ltd** (WASC) - corporations - application for permission to inspect company books granted (B)

## Summaries With Link (Five Minute Read)

### **Bywater Investments Limited v Commissioner of Taxation; Hua Wang Bank Berhad v Commissioner of Taxation [2016] HCA 45**

High Court of Australia

French CJ; Kiefel, Bell, Nettle & Gordon JJ

Taxation - Full Court of the Federal Court of Australia upheld decision that appellant companies' central management and control was exercised in Australia and thus that each company was resident in Australia for income tax purposes - appellants contended that because Federal Court found directors of appellants resident abroad, and their meetings were held abroad, both it and Full Court were bound to hold each company's central management and control was exercised abroad and that appellants were thus not Australian residents for income tax purposes - whether each company had its central management and control in Australia within meaning of s6(1) *Income Tax Assessment Act 1936* (Cth) - s25A & Pt X *Income Tax Assessment Act 1936* (Cth) - ss6-5 & 995-1 *Income Tax Assessment Act 1997* (Cth) - Schedules 1, 15 *International Tax Agreements Act 1953* (Cth) - held: appellants were resident of Australia for purposes of income tax - appeals dismissed.

[Bywater](#) (I B C G)

### **Jewelsnloo Pty Ltd v Sengos [2016] NSWCA 309**

Court of Appeal of New South Wales

Beazley ACJ; Macfarlan & Payne JJA

Trade and commerce - contract - second respondent purchased business from company first respondent for \$300,000 - second respondent sold business for \$200,000 to appellant company - appellant sought orders declaring contract void and damages under Australian Consumer Law, alleging second respondent and third respondent wife of second respondent engaged in misleading and deceptive conduct concerning business's sales figures, and that first, second and third respondents engaged in misleading and deceptive conduct concerning first respondent's 'ability and intention to compete with the business' - primary judge dismissed proceedings except to grant injunction restraining passing off conduct - held: no error in primary judge's conclusion appellant did not rely on representations concerning sales figures, or error in conclusion there were no misrepresentations by silence made concerning first respondent's ability or intent to compete - appeal dismissed.

[Jewelsnloo](#) (I B C G)

### **Application by Craig-Bridges; The Estate of Ella Minnie Lillian Bush; The Estate of Ella Minnie Lillian Bush v NSW Trustee & Guardian [2016] NSWSC 1611**

Supreme Court of New South Wales

Stevenson J

Wills and estates - succession - family provision - plaintiff was adult grandchild of deceased - plaintiff contended deceased lacked testamentary capacity when she executed impugned wills - plaintiff sought grant of probate of 2011 will such that she and her sisters would share equally in deceased's estate - trustee sought grant of probate of 2013 will - held: deceased had testamentary capacity when she executed each of impugned, with result that plaintiff received no provision from deceased's estate - deceased, by making no provision for plaintiff, did not make adequate provision for plaintiff's maintenance and advancement in life under s59 *Succession Act 2006* (NSW) - provision order made for plaintiff equal to one fifth of estate.

[Craig-Bridges](#) (B)

### **Page v Healthscope Operations Pty Ltd [2016] NSWSC 1608**

Supreme Court of New South Wales

Wilson J

Contract - determination of separate questions - whether contract existed between plaintiff specialist anaesthetist and defendant owner and operator of private hospital arising from plaintiff's re-accreditation by defendant - whether contract included express terms pleaded in statement of claim - held: reaccreditation agreement was conditional license granted by defendant to plaintiff which did not give rise to a contract to effect pleaded in statement of claim - separate questions answered.

[Page](#) (I B)

### **Director of Consumer Affairs Victoria v Donald (No 2) [2016] VSC 683**

Supreme Court of Victoria

Robson J

Consumer law - defendant engaged in unsolicited agreements for provision of services - plaintiff sought declarations under Part 2.2 and s216 *Australian Consumer Law & Fair Trading Act 2012* (Vic) or s36 *Supreme Court Act 1986* (Vic) and relief against defendant for contraventions of *Australian Consumer Law* (Vic) - ss74(b), 74(c), 76(a)(i), 76(a)(ii), 76(b), 79(b)(i), 79(b)(ii), 79(c)(i), 79(e), 86(1)(a), & 86(1) *Australian Consumer Law* - held: allegations of breach of *Australian Consumer Law* made out - Director entitled to declarations sought - decisions as to relief reserved.

[Director of Consumer Affairs](#) (I G)

### **Dream Money Pty Ltd v Bernhard [2016] WASCA 193**

Court of Appeal of Western Australia

Newnes, Murphy & Mitchell JJA

Corporations - statutory demand - appeal arising from statutory demand which respondents served on appellant under s459E *Corporations Act 2001* (Cth) - statutory demand was for judgment debt from District Court proceedings - appellant sought to vary demand on basis of offsetting claim - offsetting claim was order for costs made in appellant's favour in District Court

proceedings - appellant contended Master erred by finding offsetting claim not quantified and varying statutory demand by reduction of nominal sum - held: Court satisfied amount of offsetting claim was to be determined by setting off costs allowed on respondents' claim against costs allowed on appellant's counterclaim - amount consisted of any excess in appellant's favour after setting off occurred - Court calculated amount of off-setting claim at \$68,168.25 - appeal allowed - statutory demand varied.

[Dream Money](#) (B)

## **Coates v Classic Minerals Ltd [2016] WASC 371**

Supreme Court of Western Australia

Acting Master Strk

Corporations - plaintiff sought orders under s247A *Corporations Act 2001* (Cth) to inspect books of defendant company - inspection sought on basis of concerns as to suspicious transactions and 'cash outflow' - held: Court satisfied application had been made in good faith and for proper purpose - terms of access sought narrowed - Schedule amended to reflect that books to be inspected were relevant to inspection's purpose.

[Coates](#) (B)

## CRIMINAL

### Executive Summary

**Younan v R** (NSWCCA) - criminal law - dealing in proceeds of crime - appeals against conviction and sentence dismissed

**Environment Protection Authority v Truegain Pty Ltd** (NSWCCA) - criminal law - judgments and orders - summons suffered from duplicity - costs orders set aside - appeal otherwise dismissed

### Summaries With Link

## **Younan v R [2016] NSWCCA 248**

Court of Criminal Appeal of New South Wales

Beazley P, RA Hulme J, RS Hulme AJ

Criminal law - appellant convicted of count of dealing in proceeds of crime contrary to s400.4(1) *Criminal Code* (Cth) - trial judge sentenced appellant to 6 years imprisonment with non-parole period of 4 years - appellant appealed against conviction and sentence - held: ground of appeal alleging failure to 'abort the trial' following prejudicial remarks about applicant failed - no substantial miscarriage of justice - no incompetence of counsel - appellant not unduly pressured

to sign agreed facts - appeal against conviction dismissed - trial judge erred in sentencing appellant - however Court would not, in independent exercise of discretion, impose different sentence than trial judge imposed - appeal against sentence dismissed.

[Younan](#)

## **Environment Protection Authority v Truegain Pty Ltd [2013] NSWCCA 204**

Court of Criminal Appeal of New South Wales

Leeming JA, RA Hulme J & Button J

Criminal law - judgments and orders - applicant Environment Protection Authority sought to appeal concerning interlocutory decisions - applicant contended primary judge erred in determining summons filed in Class 5 Land and Environment Court's jurisdiction 'suffered from duplicity' - applicant also challenged costs orders - held: summons was duplicitous - s68 *Land and Environment Court Act 1979* (NSW) did not authorise ordering of costs prior to prosecution's determination - costs order set aside - appeal otherwise dismissed.

[Environment Protection Authority](#)



# Benchmark

## The Owl and the Pussy-Cat

By [Edward Lear](#)

I

The Owl and the Pussy-cat went to sea  
In a beautiful pea-green boat,  
They took some honey, and plenty of money,  
Wrapped up in a five-pound note.  
The Owl looked up to the stars above,  
And sang to a small guitar,  
"O lovely Pussy! O Pussy, my love,  
What a beautiful Pussy you are,  
You are,  
You are!  
What a beautiful Pussy you are!"

II

Pussy said to the Owl, "You elegant fowl!  
How charmingly sweet you sing!  
O let us be married! too long we have tarried:  
But what shall we do for a ring?"  
They sailed away, for a year and a day,  
To the land where the Bong-Tree grows  
And there in a wood a Piggy-wig stood  
With a ring at the end of his nose,  
His nose,  
His nose,  
With a ring at the end of his nose.

III

"Dear Pig, are you willing to sell for one shilling  
Your ring?" Said the Piggy, "I will."  
So they took it away, and were married next day  
By the Turkey who lives on the hill.  
They dined on mince, and slices of quince,  
Which they ate with a runcible spoon;  
And hand in hand, on the edge of the sand,  
They danced by the light of the moon,  
The moon,  
The moon,  
They danced by the light of the moon.

# Benchmark



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