



## Insurance Banking & Construction

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

#### Today's Cases

**Costs** – Case Management – Time for trial & number of witnesses disproportionate to subject matter – See *Tobin v Ezekiel – Ezekiel Estate* (I, B)

**Entitlement to interest** – Period & rate of interest – Indemnity costs – See *King v Scalise; King v Kemal* (I)

**Defamation** – Whether damages manifestly inadequate – Consideration of case law from Australia, NZ and UK – See *Coull v Nationwide News* (I)

**Winding up** – Recovery by liquidator – Preferences received by the FCT – State of knowledge of officers of the FCT – See *Dean-Willcocks v FCT* (B, C)

**Land Tax Act (Vic)** – Exemption – Whether land was used for outdoor sporting purposes – See *Sandhurst Holdings v Commissioner of State Revenue* (B, C)

#### And from the United States of America:

**Torts** – Asbestos litigation – Whether legislation was unconstitutionally retrospective – See *Ackison v Anchor Packing Co* (I)

**Class action** – Plaintiff bought NAB shares – Plaintiff sought to represent class – See *In Re NAB Securities* (I, B, C)

## Monday 27 October 2008

### Anzon Energy Limited, in the matter of Anzon Energy Limited (No 2) [2008] FCA 1579

Federal Court of Australia

### Campus Group Pty Ltd v Daylesford Pty Ltd [2008] NSWCA 252

Court of Appeal of New South Wales

Giles and Bell JJ; Sackville AJA

Loan facility – authority to enter loan agreement – implied actual authority – on appeal, challenge to credit based fact-finding - appeal dismissed. (I)

[Campus Group](#)

### Gillespie v NSW Self Insurance Corporation [2008] NSWSC 1111

Supreme Court of New South Wales

Michael Grove J

Indemnity costs – 1986 motor accident in which plaintiff, then aged seventeen, suffered injury - offer of compromise in District Court - transfer to Supreme Court - damages agreed fourteen years later - significant change in ingredients of damage – indemnity costs refused. (I)

[Gillespie](#)

### S v State of New South Wales (No 2) [2008] NSWSC 1116

Supreme Court of New South Wales

Harrison J

Costs – personal injuries - for substantive decision 9 September 2008, see ‘Benchmark’ Insurance & IBC Wednesday 1 October 2008 & link below – verdict for defendant - plaintiff had been undercover police officer - offers of compromise – indemnity costs – plaintiff to pay defendant's costs after certain time on an indemnity basis with exception of separate costs orders in favour of plaintiff on discrete issues – damages – care component unassessed -assessment postponed pending outcome of plaintiff's appeal to Court of Appeal limited to issues of liability. (I)

[S](#)

&

**S v State of New South Wales [2008] NSWSC 933** – negligence - whether causal connection between plaintiff's psychiatric injury & any breach of duty – no breach of duty - injury caused absent the allegedly tortious conduct – extension of limitation period by reason of psychiatric condition – verdict for defendant.

[S](#)

**Tobin v Ezekiel - Ezekiel Estate [2008] NSWSC 1108**

Supreme Court of New South Wales

Palmer J

Costs – case management – siblings in dispute over mother’s will - excessive legal costs – time for trial & number of witnesses disproportionate to subject matter – defendants executed mortgage over sole asset of estate to obtain loan for legal fees - purported exercise of powers of executors - interlocutory injunction granted in 2006 restraining defendants from mortgaging property for an amount in excess of \$300,000 – application by defendants for order varying terms of injunction so as to permit them to mortgage the property to secure an amount of \$650,000 – application refused - duty of Court to ensure its resources not disproportionately engaged in one litigation to detriment of other litigants – Court’s power to make orders to curb litigious excess. (I,B)

[Tobin](#)**Dean-Willcocks v Commissioner of Taxation [2008] NSWSC 1113**

Supreme Court of New South Wales

Barrett J

*Corporations Act* 2001 (Cth) s588FG(2) - winding up - recovery proceedings by liquidator - preferences received by Commissioner of Taxation - Commissioner asserts defence under s 588FG(2) - existence of reasonable grounds for suspecting insolvency - examination of state of knowledge of relevant officers of Australian Taxation Office. (B,C)

[Dean](#)**King v Scalise; King v Kemal [2008] VSC 440**

Supreme Court of Victoria

Beach J

Entitlement to interest – period & rate of interest - costs – indemnity costs – Sanderson order - appeal from Magistrates Court, where appellant had sued two defendants for \$75,000 plus interest & costs – real estate business - appellant successful against one of defendants, with action against the other defendant dismissed – one of grounds of appeal that interest should have been awarded under s 58 Supreme Court Act, rather than s 60 – case law considered. (I)

[King](#)**Sandhurst Holdings (Australia) Ltd v Commissioner of State Revenue [2008] VSC 439**

Supreme Court of Victoria

Mandie J

*Land Tax Act* 1958 (Vic) – exemption – construction of golf courses on land owned by golf club – whether land was “used for out-door sporting purposes” during period of construction – held that land was not as yet used for a golf course & was not used for any other of the out-door purposes or activities required by s.9(1)(g) of the *Act* & was therefore not exempt from land tax. (B,C)

[Sandhurst](#)

**Australian Property Custodian Holdings Pty Ltd v Commissioner of State Revenue [2008] VSC 429**

Supreme Court of Victoria

Mandie J

*Duties Act 2000* (Vic) – ‘dutiable property’ – ‘dutiable value’ - taxpayer had purchased a property in Geelong containing retirement facility known as “Tannoch Brae Retirement Village” – property sold to the taxpayer by Primelife (Geelong) Pty Ltd under contract of sale – appeal allowed - decision of Victorian Civil & Administrative Tribunal set aside - Commissioner’s determination and assessment varied by substituting dutiable value of \$3.07M [cf: \$5.5M (subsequently reduced to \$5.25M)] - assessment of duty be reduced accordingly. (B,C)

[Australian Property Custodian Holdings](#)**Rockett v Moneycorp Securities P/L & Anor [2008] QSC 258**

Supreme Court of Queensland

Wilson J

Recovery of costs – *Property Law Act 1974* Qld s.88(1) – case law considered - sale of two units at ‘The Sands’ on The Esplanade, Surfers Paradise - second registered mortgagee had exercised its power of sale over properties – purchase prices paid by plaintiff on settlement of contracts to be applied firstly to discharge first registered mortgage, with balance to be held in trust pending assessment or agreement of amount of costs payable to plaintiff – whether agent’s commission payable out of sale proceeds had priority over payment of amount secured by first registered mortgage to third defendant – answer ‘no’ - sale proceeds should be applied first in discharge of monies secured by mortgage to third defendant & then in reimbursing first defendant the amount of commission it pays to agent. (B)

[Rockett](#)**Coull v Nationwide New Pty Ltd [2008] NTCA 10**

Court of Appeal of the Northern Territory

Angel ACJ; Mildren and Southwood JJ

Defamation – appeal & cross-appeal – appellant contending award of damages manifestly inadequate – respondent contending fair & accurate reporting of legal proceedings - extensive consideration of case law from U.K., New Zealand & Australia – appeal allowed – award of \$80,000 substituted for award by primary court (of \$13,344 being \$12,000 plus interest) - cross-appeal dismissed. (I)

[Coull](#)



## From the United States of America...

### **In Re: National Australia Bank Securities, No. 07-0583-cv**

United States Court of Appeals for the Second Circuit

Parker J

*Securities & Exchange Act* of 1934 US - extraterritorial application of U.S. securities law – National Australia Bank founded in 1858 & headquartered in Melbourne - its American Depositary Receipts (“ADRs”) trade on New York Stock Exchange – it acquired HomeSide Lending Inc., an American mortgage service provider headquartered in Jacksonville, Florida, for \$1.22 billion in 1998 – plaintiff purchased NAB shares – three of plaintiffs sought to represent class of plaintiffs who bought their shares abroad as non-American purchasers – one of plaintiffs sought to represent a class of American shareholders during a specified class period - legal action by plaintiffs alleging false & misleading statements made as to Homeside’s profitability, economic health & its contribution to NAB – primary court had dismissed the claims of the foreign plaintiffs for lack of subject matter jurisdiction & those of the domestic plaintiff for failure to state a claim – judgment of primary court affirmed. (I,B,C)

[National Australia Bank Securities](#)

### **Ackison v. Anchor Packing Co., Slip Opinion No. 2008-Ohio-5243.]**

Supreme Court of Ohio

Moyer CJ and Lundberg Stratton, O’Connor, O’Donnell, Lanzinger & Pfeifer JJ

Torts - claim for nonmalignant asbestosis – retrospective/prospective legislation – test as to whether statute unconstitutionally retroactive - threshold requirements for making asbestos-related claims – filing of medical evidence – whether legislative amendments could validly be applied to claim or whether they were unconstitutionally retroactive – judgment of trial court reinstated – trial court had determined that the revised asbestos legislation applied to claim & that the legislation did not impair any substantive rights so as to violate Ohio Constitution – trial court had also administratively dismissed claims because widow claimant had failed to file statutorily required documentation - interesting dissenting judgment by Pfeifer J. (I)

[Ackison](#)

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