

Friday 30 May 2014

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Commonwealth Bank of Australia v Goater** (NSWSC) - real property - possession of land - application to set aside default judgment refused (B)

**Apparel Group Pty Ltd v Bettina Liano Pty Ltd** (NSWSC) - contract - guarantor liable for company's debts to supplier (B)

**Wales v Wales** (VSCA) - costs - costs orders against trustees following their removal - denial of procedural fairness - appeal allowed (B)

**Re Metrobore Australia Pty Ltd** (VSC) - trusts and trustees - trustee in administration - sale of trust assets by administrators - directions and orders (B C)

**Sibelco Australia Ltd v Magistrate Graham C Lee** (QCA) - administrative law - judicial review refused of decision there was case to answer in respect of complaints - no miscarriage of discretion - appeal dismissed (C G)

**Pro Teeth Whitening (Aust) Pty Limited v Commonwealth of Australia** (QSC) - limitation of actions - defamation - extension of limitation period refused (I)



**Marsh v Baxter** (WASC) - negligence - private nuisance - pure economic loss - claim by organic farmer against neighbouring farmer who grew genetically modified crop - claims dismissed - injunction refused (I)

## Summaries with links (5 minute read)

### **Commonwealth Bank of Australia v Goater [2014] NSWSC 652**

Supreme Court of New South Wales

Davies J

Real property - possession of land - second defendant was proprietor of properties mortgaged to secure loan agreements - first agreement was overdraft provided to first defendant - second agreement was loan to both defendants - bank's demand for repayment not met - bank brought proceedings for possession of properties - default judgment entered - writ of execution issued and executed - defendants sought that default judgment be set aside, that they have 28 days to file defence and that Court grant stay of enforcement until motion to set aside judgment determined - principle of finality - held: writ of execution executed and defendants had been put out of property - once judgment executed matter was at an end - it was not possible for defendants to contest basis of judgment whether given by default or otherwise - Court unable make order enabling defendants to challenge judgment - no explanation for defendants' delay in acting after service of the Statement of Claim - notice of motion dismissed.

[Commonwealth Bank of Australia](#) (B)

### **Apparel Group Pty Ltd v Bettina Liano Pty Ltd [2014] NSWSC 670**

Supreme Court of New South Wales

Ball J

Contract - guarantee - plaintiff sought judgment against second defendant on guarantees allegedly given of debts owed by first defendant company to plaintiff - company wound up after commencement of proceeding - proceeding against it stayed - company marketed fashion products designed by second defendant - plaintiff, company and second defendant entered into Heads of Agreement by which plaintiff agreed to be responsible for sourcing and the supply chain management of company product range - second defendant agreed to guarantee company's obligations - parties executed Terms of Trading in which guarantor also guaranteed company's obligations - parties executed design and licence agreement contemplated by Heads of Agreement - plaintiffs supplied stock and fabric to company - plaintiff demanded payment from second defendant pursuant to Terms of Trading - construction of agreements - held: Court did not accept defence that neither Heads of Agreement nor Terms of Trading contained enforceable guarantees given by second defendant - plaintiff entitled to amount claimed - judgment for plaintiff against second defendant.

[Apparel Group Pty Ltd](#) (B)

**Wales v Wales [2014] VSCA 101**

Court of Appeal of Victoria

Ashley JA &amp; Almond AJA

Costs - trusts and trustees - appellants removed as trustees of trusts - appellants sought leave to appeal from costs orders which obliged them to meet own costs, personally pay costs of first and second respondents and repay to trusts any money expended by them out of trust funds in defending removal application - held: primary judge's failure to alert counsel to prospect she would rest her decision on appellants' failure to seek Court's advice whether to contest removal application constituted denial of procedural fairness - error was vitiating error - had trustees sought advice they would have been advised to accede to their removal, that they would have been indemnified for costs of advice application, that costs incurred in that application would have been somewhat less than costs of removal application and that trustee should have part indemnification but otherwise pay costs of first and second respondents and own costs - appeal allowed - orders in lieu made.

[Wales](#) (B)**Re Metrobore Australia Pty Ltd [2014] VSC 247**

Supreme Court of Victoria

Ferguson J

Corporations - trustee company operated underground services business in civil construction industry - following death of one director the two other directors did not wish to continue business - trustee went into administration - administrators sought directions pursuant to s447D *Corporations Act 2001* (Cth) in respect of sale of trust assets - express power of sale conferred by trust deed - held: administrators justified in proceeding on basis that trustee, and therefore administrators, had power to sell plant and equipment in circumstances where trust deed did not provide for automatic termination of trustee's appointment, there was no immediate prospect of replacement trustee being appointed, trust was likely insolvent, administrators were concerned to minimise risk to trust assets and further depletion of them, trustee had a right of indemnity in respect of liabilities incurred in role of trustee, there was an express power of sale conferred on trustee under trust deed and there was no opposition to course proposed by any interested person - orders made.

[Re Metrobore Australia Pty Ltd](#) (B C)**Sibelco Australia Ltd v Magistrate Graham C Lee [2014] QCA 113**

Court of Appeal of Queensland

Fraser &amp; Gotterson JJA; Atkinson J

Administrative law - appeal from dismissal of application for review of Magistrate's decision which found there was a case for appellant to answer in respect of complaints made by second respondent based on s427 *Environmental Protection Act 1994* (Qld) - s427 provided that a person must not carry out a Chapter 4 activity unless person was a registered operator for activity or acting under a registered certificate for activity - appellant contended he was engaging in a *mining*





activity, which could not be regarded as a *Chapter 4 activity* and sought declarations concerning construction and application of statutory provisions which might resolve question whether or not offence could be established - s127 - collateral attack on criminal proceedings - held: no miscarriage of discretion by primary judge - no error in finding that there were facts not disclosed on record which were essential to establishing asserted error of law - it could not be contended that offence alleged against defendant was not alleged in originating proceeding - no error in conclusion that asserted error of law was not jurisdictional error - appeal dismissed.

[Sibelco Australia Ltd](#) (C G)

## **Pro Teeth Whitening (Aust) Pty Limited v Commonwealth of Australia [2014] QSC 107**

Supreme Court of Queensland

Mullins J

Limitation of actions - defamation - plaintiff sold teeth whitening products - plaintiff claimed damages for defamation pursuant to *Defamation Act 2005* (Qld) in respect of publications made by second and third defendants of compulsory recall notice issued pursuant to *Competition and Consumer Act 2004* (Cth) - s10AA *Limitation of Actions Act 1974* (Qld) (Limitations Act) provided action for defamation must not be brought after end of one year from date of publication - plaintiff sought extension of limitation period - s32A(2) Limitation Act - held: plaintiff may have been distracted by waiting for Federal Circuit Court to decide judicial review application in respect of second defendant's decisions to issue recall notice but objectively that was not a reason not to start action for defamation before expiry of limitation period - fact that defendants may have been notified of allegations by plaintiff's application under CDDA Scheme or that plaintiff was endeavouring to resolve dispute by that course did not justify delay - irrelevant that plaintiff endeavoured to make amends by acting quickly after limitation period expired - not unreasonable for plaintiff to have commenced action within limitation period - extension of time refused.

[Pro Teeth Whitening \(Aust\) Pty Limited](#) (I)

## **Marsh v Baxter [2014] WASC 187**

Supreme Court of Western Australia

K Martin J

Negligence - nuisance - pure economic loss - land use dispute between rural neighbours - claim by organic farmer for wholly financial injury against neighbouring farmer who lawfully worked land to grow and swathe a genetically modified vegetable seed crop in 2010 - organic farmer held contract with organic certifying body - swathes blew onto organic farmer's land - organic farming body decertified neighbour's land - novel negligence case - no identifiable physical injury to persons, animals or property arising from conduct of defendant farmer - private nuisance - examination of contractual relationship between organic farmer and certifying body - causation - ss5B & 5C *Civil Liability Act 2002* (WA) - held: no unreasonable interference with use and enjoyment of farm by swathings - common law duty of care conceptually misconceived and could not be made out - injunction against swathings refused.

[Marsh](#) (I)



## A Crossing

By Paul Kane

What is it about  
form that lets the life within  
find its expression  
without even uttering  
a word or marking a page?

Winter's frozen stream  
affords us a step across  
to the other side,  
while in spring, a flowing stream  
corrugates in the shallows.

Questions of crossing  
cross the mind like shadows or  
scorings on a wall.  
Every face is emphatic  
with the form that life has led.

This is what woke me  
in the pale light this morning,  
a mere strand of words  
chasing after a form to  
give them life, and life a form.

Paul Kane has published five collections of poems, including *Work Life* (Turtle Point Press, 2007), and a poetry and music CD with sound artist Katie O'Looney, *Seven Catastrophes in Four Movements* (Farpoint Recordings, 2013). His awards include fellowships from the NEH, the Guggenheim Foundation, and the Bogliasco Foundation. He is poetry editor of *Antipodes* and general editor of the *Braziller* Series of Australian Poets. He teaches at Vassar College.

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