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

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### Executive Summary (1 minute read)

**Alcan Gove Pty Ltd v Zabic** (HCA) - limitations - negligence - claim for damages for mesothelioma caused by inhalation of asbestos fibres - cause of action accrued before provisions of *Workers Rehabilitation and Compensation Act* (NT) came into force - respondent's cause of action not statute-barred - appeal dismissed

**McCloy v New South Wales** (HCA) - constitutional law - special case - implied freedom of communication on governmental and political matters - validity of provisions of *Election Funding, Expenditure and Disclosures Act 1981* (NSW) upheld

**Fabre v Lui (No 2)** (NSWCA) - costs - offer did not contain element of compromise - even if elements of compromise Court would "otherwise order" - indemnity costs refused

**Ghougassian v Fairfax Community Newspapers Pty Ltd** (NSWCA) - costs - defamation - proceedings abandoned on eve of hearing - non-compliance with *Uniform Civil Procedure Rules 2005* (NSW) - indemnity costs ordered

**Lowery v Insurance Australia Ltd** (NSWCA) - subpoenas - refusal to set aside subpoenas issued by respondent insurer - suspicious circumstances - scope of subpoenas - leave to appeal granted - appeal allowed - subpoenas set aside in full

**Wang v Kaymet Corporation Pty Ltd** (NSWSC) - contract - purchase of units "off the plan" - draft Strata Documents not registered by date for Registration - vendors did not fail to use "reasonable endeavours"- vendors entitled to rescind contracts - proceedings dismissed

# Benchmark

## Summaries With Link (Five Minute Read)

### **Alcan Gove Pty Ltd v Zabic [2015] HCA 33**

High Court of Australia

French CJ; Keifel, Bell, Keane & Nettle JJ

Limitations - respondent claimed damages in negligence for mesothelioma caused by inhalation of asbestos fibres in course of employment with appellant between 1974 and 1977 -- substantive provisions of *Workers Rehabilitation and Compensation Act (NT)*, which abolished common law actions in negligence for workplace injuries and provided limited statutory rights to compensation, came into force on 1 January 1987 - if respondent's cause of action accrued on or after 1 January 1987 it would be statute-barred - judge at first instance found cause of action did not accrue until after 1 January 1987 - Court of Appeal of the Northern Territory reversed decision - hindsight - nature of trigger - whether risk of mesothelioma sufficient to constitute compensable damage - held: Court of Appeal correct to find it was possible to say with benefit of hindsight that respondent's mesothelial cells so damaged shortly after respondent inhaled asbestos fibres between 1974 and 1977 as to lead to onset of malignant mesothelioma "inevitably and inexorably" - Court of Appeal correct to find damage done to the mesothelial cells shortly after inhalation was non-negligible compensable damage sufficient to found cause of action and malignant mesothelioma was part of damage arising in accrued cause of action - appeal dismissed.

[Alcan](#)

### **McCloy v New South Wales [2015] HCA 34**

High Court of Australia

French CJ; Kiefel, Bell, Gageler, Keane, Nettle & Gordon JJ

Constitutional law - special case - implied freedom of communication on governmental and political matters - plaintiffs contended provisions of *Election Funding, Expenditure and Disclosures Act 1981 (NSW)* which imposed cap on political donations, prohibited property developers from making donations, and restricted indirect campaign contributions, were invalid because they infringed freedom of political communication on governmental and political matters implied by Australian Constitution - Pt 6, Divs 2A, 4A, s96E- ss7, 24, 62, 64, 128 Constitution - held: Court upheld provisions' validity - challenged provisions did not impose impermissible burden on the implied constitutional freedom - burdens imposed by donation caps in Div 2A not impermissible - anti-avoidance provision in s96E upheld on basis its validity depended on validity of Div 2A - prohibition on donations by property developers in Div 4A valid.

[McCloy](#)

### **Fabre v Lui (No 2) [2015] NSWCA 312**

Court of Appeal of New South Wales

Basten, Macfarlan & Meagher JJA

Costs - Court dismissed appeal - respondent sought indemnity costs on basis she and daughter offered to compromise appeal - Pt 42, rr20.26, 42.13, 42.15A, 51.37 & 51.47 *Uniform Civil*

*Procedure Rules 2005 (NSW)* - held: offer complied with r20.26 however offer only offered to forego costs that had not been incurred in return for capitulation - no element of compromise to attract operation of r42.15A - even if r42.15A attracted, in circumstances Court would have ben led to "order otherwise" in accordance with r 42.15A(2) - motion dismissed.

[Fabre](#)

## **Ghougassian v Fairfax Community Newspapers Pty Ltd [2015] NSWCA 307**

Court of Appeal of New South Wales

Emmett JA

Costs - applicant sought to appeal from dismissal of defamation proceedings - on eve of hearing applicant discontinued proceedings - respondents sought indemnity costs on basis of applicant's failure to comply with *Uniform Civil Procedure Rules 2005 (NSW)* and Court's directions, conduct in abandoning proceedings and absence of any merit in applicant's arguments in proceedings - s98(1)(c) *Civil Procedure Act 2005 (NSW)* - rr28.2, 28.3, 28.4, 42.19, 42.26, 51.22, 51.32, 51.37 & 51.56 - held: primary judge did not err in dismissing proceedings - applicant's arguments had no substance - appeal doomed to failure - there had been non-compliance with Rules - respondents established basis upon for order that applicant pay respondents' costs on indemnity basis - appropriate course was to order payment of gross sums for costs.

[Ghougassian](#)

## **Lowery v Insurance Australia Ltd [2015] NSWCA 303**

Court of Appeal of New South Wales

Basten & Emmett JJA; Adamson J

Subpoena - applicants owned vehicle which was stolen and destroyed by fire - vehicle insured by respondent - respondent declined to make payments under policy - applicant sued respondent - applicants sought leave to appeal against interlocutory judgment which declined to set aside five subpoenas issued by respondent - subpoenas sought documents relating to applicants, their son and person who controlled car park from which vehicle taken - scope of subpoenas - legitimate forensic purpose - "fishing expedition" - whether terms of subpoenas went beyond investigating suspicious circumstances - ss296-299D *Criminal Procedure Act 1986 (NSW)* - *District Court Act 1973 (NSW)* - ss102, 103, 106 *Evidence Act 1995 (NSW)* - r15.3 *Uniform Civil Procedure Rules 2005 (NSW)* - held (by majority): leave to appeal granted - appeal allowed - subpoenas set aside in full.

[Lowery](#)

## **Wang v Kaymet Corporation Pty Ltd [2015] NSWSC 145**

Supreme Court of New South Wales

Stevenson J

Contract - plaintiff purchasers exchanged contracts with defendant vendors for purchase of units "off the plan" - contracts contained clause requiring completion 21 days after date on which defendants served notice of registration of strata plan on purchaser's solicitors - contracts also contained condition that defendants use "reasonable endeavours" to register



"draft Strata Documents" by the "Date for Registration" - contracts provided that either party could rescind if "for any reason" draft Strata Documents not registered by the Date for Registration - draft Strata Documents not registered by the Date for Registration or at all - defendants purported to rescind contracts - whether defendants were entitled to rescind - whether defendants used their reasonable endeavours to register draft Strata Documents by Date for Registration - held: plaintiffs established development delayed for want of reasonable endeavours by defendants' in certain period in relation to piling but delay did not cause defendants to fail to register draft Strata Documents by Dates for Registration - plaintiffs failed to establish relevant breach of clause of contracts, nor that defendants were not entitled to rescind contracts - proceedings dismissed

[Wang](#)

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