

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

### Executive Summary (1 minute read)

**Wallaby Grip Ltd v QBE Insurance (Australia) Ltd** - Insurance - lost policy - burden of proof regarding limit of indemnity - held: once the insured has discharged its initial burden of showing there is a promise to indemnify, the insurer bears the burden of proving the existence of any limit on indemnity (I)

**Commissioner of Taxation v Bamford** - Income tax - trusts - proper construction of s97 of the *Income Tax Assessment Act 1936* - distinction between "the income of a trust estate" (a real world concept) and "the net income of the trust estate" (a taxation concept) - held: "that share" means "that proportion" not "that amount" (B, C)

**Australian Competition and Consumer Commission v Cement Australia Pty Ltd** - *Trade Practices Act 1974* (Cth) - competition law - proposed amendment of pleadings allowed (I, B, C)

**Thompson v Dr Haasbroek** - Medical negligence - causation - assessment of damages where multiple causes (I)

**Harris v Bellemore** - Medical negligence - duty of care - causation - whether proposed surgery cosmetic - duty to warn (I)

**The Estate of the late Sir Donald Bradman v Allens Arthur Robinson** - *Limitation of Actions Act 1936* (SA) - by majority, appeal against summary judgment allowed (I, B)

**Godden & Anor v MTS Pacific Pty Ltd** - Inspection of property in legal proceedings - terms on which defendant's experts should have access to land for an inspection - vineyard owned by defendant & leased to plaintiff (I, B, C)

## Summaries with links (5 minute read)

**Thursday 1 April 2010**

**Wallaby Grip Ltd v QBE Insurance (Australia) Ltd [2010] HCA 9**

High Court of Australia

French CJ; Gummow, Hayne, Heydon & Kiefel JJ

Insurance - worker sued employer's insurer for damages alleging he was exposed to asbestos dust and fibre during his employment between 1964 and 1967 - worker died after commencing proceedings - Judgment entered in favour of legal personal representative of estate of deceased worker for \$356,510 - whether the Act or the policy provided a limit on the indemnity of \$40,000 - construction of statutory policy - *Workers Compensation Act 1926 (NSW)*, *Workers Compensation (Amendment) Act 1953 (NSW)* & *Workers Compensation (Amendment) Act 1958 (NSW)* and regulations considered - insurance policy lost - no evidence as to level of indemnity under policy - onus of proof - held: policy was one of indemnity - indemnity policies are for unlimited liability cover unless there is a sum insured which limits the indemnity available under the policy - a limit of indemnity is not inherently part of the insurer's promise to indemnify, such as to make that limit an essential part of the contract of insurance - once the insured has discharged its initial burden of showing that there was a promise to indemnify, any limitation on indemnity is distinct from, and is properly characterised as an exception to, the promise to indemnify - the insurer bears the burden of proving the existence of such an exception - on their proper construction, the regulations did not prevent an insurer from giving a higher level of cover than that provided by the regulatory terms. Insurer ordered to pay the full amount of the Judgment.

[Wallaby Grip](#) (I)

**Commissioner of Taxation v Bamford [2010] HCA 10**

High Court of Australia

French CJ; Gummow, Hayne, Heydon & Crennan JJ

Income tax - trusts - s97 of the *Income Tax Assessment Act 1936 (Cth)* provided that, where the beneficiary of a trust was presently entitled to a share of "the income of a trust estate", "that share" of "the net income of the trust estate" formed part of the beneficiary's assessable income - held: "the income of a trust estate" is a real-world concept, being the distributable income of the trust calculated by reference to the trust instrument, appropriate accounting principles, and

general trust law - "the net income of the trust estate", on the other hand, is an abstract taxation law concept defined in s95 of the *Income Tax Assessment Act 1936* (Cth) - "that share" means "that proportion" not "that amount" - whatever proportion of "the income of a trust estate" to which the beneficiary was actually entitled in the real world, that same proportion is applied to "the net income of the trust estate" to calculate the amount that is added to the beneficiary's assessable income for taxation purposes - it was irrelevant that, in this case, the amount so calculated was greater than the maximum amount actually distributable to the beneficiary under the trust instrument.

[Commissioner of Taxation](#) (B, C)

**Australian Competition and Consumer Commission v Cement Australia Pty Ltd [2010] FCA 294**

Federal Court of Australia

Dowsett J (in Brisbane)

*Trade Practices Act 1974* (Cth) - applicant alleging breaches of ss45, 46 & 47 - competition law - supply of flyash - proposed amendment of pleadings allowed - public interest.

[Australian Competition and Consumer Commission](#) (I, B, C)

**Thompson v Dr Haasbroek [2010] NSWSC 111**

Supreme Court of New South Wales

Davies J

Medical negligence - causation - general practitioner - failure to detect & diagnose cervical radiculopathy - incomplete quadriplegia - whether if diagnosed in due time plaintiff would have avoided permanent injury - earlier treatment would have avoided some permanent disabilities - multiple causes of plaintiff's disabilities - assessment of damages where multiple causes - judgment for plaintiff in sum of \$290,542.

[Thompson](#) (I)

**Harris v Bellemore [2010] NSWSC 176**

Supreme Court of New South Wales

McCallum J

Medical negligence - duty of care - causation - whether proposed surgery cosmetic - lengthening of right femur - duty to warn - whether warnings given - whether plaintiff would have chosen to undergo surgery in any event - assessment of damages.

[Harris](#) (I)

**The Estate of the late Sir Donald Bradman v Allens Arthur Robinson [2010] SASC 71**

Full Court of the Supreme Court of South Australia

Sulan, Layton & Vanstone JJ

*Limitation of Actions Act 1936 (SA)* - respondent had sought & obtained summary judgment in respect of claims of negligence & breach of contract - meaning of "the plaintiff" for the purposes of s48(3)(b)(i) - by majority, Vanstone J dissenting, appeal allowed.

[The Estate of the late Sir Donald Bradman](#) (I, B)

[Bradman & Ors](#) - decision 27 March 2010: see 'Benchmark' I, B & IBC Thursday 2 April 2010 - limitation of actions - defendant's application for summary judgment dismissing common law claims for negligence & breach of retainer brought against them by executors of the late Sir Donald George Bradman - Bradman Trust - securing & assigning intellectual property - summary judgment sought on ground that application for an extension of time bound to fail - whether admission that the defendant acted as Sir Donald's legal adviser was a "material fact" for the purposes of s48(3)(b)(i) - whether Sir Donald, or alternatively John Bradman, knew the alleged material fact before 2 August 2007 - whether the plaintiff's application to extend time is bound to fail - application for summary judgment allowed.

**Godden & Anor v MTS Pacific Pty Ltd [2010] SASC 63**

Supreme Court of South Australia

Judge Lunn a Master of the Supreme Court

Inspection of property in legal proceedings - terms on which defendant's experts should have access to land for an inspection - vineyard owned by defendant & leased to plaintiff - lease required defendant to make a continuing supply of water available to plaintiffs' vineyard from adjoining land owned by defendant - dispute about amounts of water which have been so supplied & which defendant is obliged to supply - whether condition should be imposed that plaintiffs not be permitted to observe process of inspection by defendant's experts - answer 'no.'

[Godden & Anor](#) (I, B, C)