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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

SPAR Licensing Pty Ltd v MIS QLD Pty Ltd (FCAFC) - trade practices - franchise agreement - failure to provide current disclosure document - no misleading and deceptive conduct - appeal upheld in part (B C)

Gold Coast City Council v Satellite & Wireless Pty Ltd (FCAFC) - statutory interpretation - telecommunications carrier authorised to install low-impact facility on water tower - appeal dismissed (C G)

Phillips v James (No 2) (NSWCA) - succession - family provision - designation of notional estate - how provision order to be borne - costs (B)

McGlashan v QBE Insurance (Australia) Ltd (No 2) (NSWSC) - workplace injury to independent contractor injured in fall from ladder - principal not liable (I C)

Warton v Yeo (NSWSC) - wills and estates - construction of will - *children* in will did not include *step-children* - estate passed to biological child of deceased's sister (B)



Macmahon Mining Services v Cobar Management (NSWSC) - contract - termination - clause limiting liability defeated claim for loss of opportunity to earn profit - claim dismissed (B C)

Varga v Mandapati (TASSC) - writ - negligence - no good reason to order renewal of writ - application dismissed (I)

Summaries with links (5 minute read)

SPAR Licensing Pty Ltd v MIS QLD Pty Ltd [2014] FCAFC 50

Full Court of the Federal Court of Australia

Buchanan, Foster & Farrell JJ

Trade practices - misleading and deceptive conduct - appellant franchisors supplied groceries to independent retail grocery outlets - first respondent franchisee owned and operated supermarket on island in Queensland - other respondents were directors and shareholders of franchisee - whether supplier engaged in misleading and deceptive conduct and/or breached Franchising Code of Conduct established by *Trade Practices (Industry Codes - Franchising) Regulations 1998* (Cth) by not providing current disclosure document to respondents prior to entering into franchise agreement - senior executive of franchisor had made representation prior to agreement that franchisee could be released from agreement earlier than 5 years - representation not reflected in agreement - held: franchisor did not engage in misleading and deceptive conduct in respect of *representations as to future matters* within meaning of s51A *Trade Practices Act 1974* (Cth) - franchisor failed to comply with obligation to give *current disclosure document* to franchisee at least 14 days before franchise agreement was made - disclosure document did not comply with cl6B of the Code - trial judge correct to conclude franchisor contravened s51AD - franchise agreement set aside from date of judgment on appeal - appeal upheld in part.

[SPAR Licensing Pty Ltd](#) (B C)

Gold Coast City Council v Satellite & Wireless Pty Ltd [2014] FCAFC 51

Full Court of the Federal Court of Australia

North, Siopis & Besanko JJ

Statutory interpretation - licensed telecommunications carrier under *Telecommunications Act 1997* (Cth) (TA) sought to enter appellant's land to install low-impact facility on a water tower pursuant to Sch 3 TA - carrier commenced proceedings against then owner of tower seeking to prevent it from interfering with carrier's statutory rights to enter land and install its facility - proceedings amended to substitute Council for company - Council claimed Sch 3 did not authorise installation of facility - trial judge found in favour of carrier - proper construction of s192(1) *Water Supply (Safety and Reliability) Act 2008* (Qld) (WSA) and cls36 & 37 in Div 7 Pt 1 Sch 3 TA - held:



installation of facility would *interfere with* the water tower within s192(1) - however carrier was authorised to engage in activity despite s192(1) WSA because WSA was a State law *about* the use of land and activity thus exempt from WSA under *use of land* exemption identified in cl37(2)(f), Sch 3 TA - appeal dismissed.

[Gold Coast City Council](#) (C G)

Phillips v James (No 2) [2014] NSWCA 135

Court of Appeal of New South Wales

Beazley P; Basten & Meagher JJA

Succession - family provision - costs - Court held primary judge did not err in making provision order in favour of appellant but erred in refusing to make notional estate order - Court ordered provision be made for appellant out of notional estate - how provision order should be borne as between property to be designated as notional estate - which of respondents' property ought to be designated as notional estate - costs - held: respondents' jointly held bank accounts should not be designated as notional estate without evidence of spouse's consent - each respondent liable to contribute equally to property designated as notional estate for satisfaction of provision ordered by Court - liberty to apply granted - respondents argued that costs should be reduced for appellant's delay in bringing proceedings - respondents acted precipitously in distributing estate - respondents to pay appellants' costs on appeal and at first instance.

[Phillips](#) (B)

McGlashan v QBE Insurance (Australia) Ltd (No 2) [2014] NSWSC 486

Supreme Court of New South Wales

Campbell J

Tort - duty of care - workplace injury to contractor - plaintiff responded to company's advertisement offering sub-contract work to applicants with own insurance - plaintiff and son lent labour to company at hourly rate - plaintiff injured - controversy about how accident happened - plaintiff claimed damages from insurer under s6 *Law Reform (Miscellaneous Provisions Act) 1946* (NSW) - separate questions - whether company liable to pay damages and, if so, amount of damages - held: relationship between company and plaintiff was that of principal and independent contractor - plaintiff injured when wind blew over ladder and he jumped to ground - principal under duty to use reasonable care to avoid or minimise risk but duty did not extend to obligation to exercise reasonable care for plaintiff's safety by instituting and maintaining safe system for performance of work including safe means of roof access - company entitled to leave it to judgment of an experienced tradesman like plaintiff as to whether particular job could be undertaken safely - company not liable.

[McGlashan](#) (I C)

**Warton v Yeo [2014] NSWSC 494**

Supreme Court of New South Wales

Hallen J

Wills - succession - plaintiffs' step mother was deceased's sister - second defendant was biological son of sister - first defendant was solicitor and executor - sister died in 2010 - deceased died in 2011 leaving residuary bequest to sister or her children who survive her - plaintiffs sought declaration that plaintiffs and second defendant were the *children* of deceased's sister and that they were entitled to share in 25% of residue of estate to which deceased's sister would have been entitled - plaintiffs also sought order that first defendant account to plaintiffs for 9.76% equal share of estate as a result of the death of another beneficiary - whether *children* extended to *stepchildren* - no definition of *stepchild* in *Succession Act 2006* (NSW) but definition in s40A *Succession Act 1981* (Qld) considered - held: plaintiffs were stepchildren of deceased's sister for purpose of construction of will - deceased clearly distinguished between child of his sister and stepchildren - plaintiffs identified as step-niece and step-nephew in will - deceased did not intend stepchildren to be included within meaning of *children* - Court not satisfied deceased intended plaintiffs to be included in bequest made in clause - whole of share of estate passed to second defendant absolutely - declaration made.

[Warton](#) (B)**Macmahon Mining Services v Cobar Management [2014] NSWSC 502**

Supreme Court of New South Wales

McDougall J

Contract - summary dismissal - plaintiff contractor and defendant principal made written agreement under which contractor undertook to design and construct works for principal's copper mine - principal gave notice of termination of contract - contractor alleged termination invalid and amounted to repudiation - contractor sought damages including for loss of opportunity to earn profit - principal sought summary dismissal of claim for loss of profit in reliance on clause of contract excluding liability for *Consequential Loss* - construction of clauses limiting or excluding liability - held: construction for which principal contended would give either party ability to act in a way that might deprive the other of future benefit of contract without having any liability for loss of that benefit - in principal's case, it would enable it to act in this way without being liable to pay compensation for loss of profit under contract - practical likelihood was that principal would not side-step obligations - clear words of clause should not be read down - clause was answer to contractor's claim - claim for loss of profit dismissed pursuant to r13.4 *Uniform Civil Procedure Rules 2005* (NSW).

[Macmahon Mining Services](#) (B C)

**Varga v Mandapati [2014] TASSC 25**

Supreme Court of Tasmania

Holt AsJ

Procedure - renewal of writ - negligence - plaintiff filed writ endorsed with claim against doctor and operator of hospital seeking damages for injury resulting from negligent medical treatment - decision made not to serve operator of hospital - no attempt to serve writ was made until about a week before it would become ineffective for service - day before writ became ineffective process server discovered doctor had vacated rooms and that he did not know doctor's whereabouts - plaintiff sought to renew writ - delay - prejudice - whether applicant discharged onus of demonstrating that good reason existed to order renewal of writ - r107 *Supreme Court Rules 2000* (Tas) - held: plaintiff failed to explain delay - delay in making attempts to serve writ not great - fair trial could still occur - refusing renewal may result in plaintiff's claim being statute-barred but allowing service could deprive defendant of limitation defence - case finely balanced - Court ultimately unpersuaded there was good reason to order renewal - application dismissed.

[Varga](#) (I)

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