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

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (1 minute read)

**Dallas Buyers Club LLC v iiNet Ltd (No 3)** (FCA) - costs - preliminary discovery - resolution of issues following principal judgment (I B)

**Warton v Yeo** (NSWCA) - Wills and estates - costs - 'children' in clause of Will referred both to biological child and step-children - appeal allowed (B)

**Australia & New Zealand Banking Group Ltd v Fink** (NSWSC) - contract - loans - no unjust contract - no breach by bank of National Credit Code - judgment for bank (I B)

**Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd** (NSWSC) - security of payments - no reference date in support of payment claim - adjudicator's determination void (C)

**OZ Minerals Holdings Pty Ltd v AIG Australia Ltd** (VSC) - insurance contract - major shareholder exclusion clause - insurer not obliged to indemnify plaintiffs - proceeding dismissed (I)

**El-Masri v Molloy** (SASCFC) - medical negligence - error in fact-finding process by primary judge - appeal allowed against finding of liability against doctor - matter remitted (I)

**Hammersley v National Transport Insurance** (TASFC) - motor vehicle accident insurance

policy - insurer could not rely in exclusion clauses - appeal allowed (I B C)

## Summaries With Link (Five Minute Read)

### **Dallas Buyers Club LLC v iiNet Ltd (No 3) [2015] FCA 422**

Federal Court of Australia

Perram J

Costs - preliminary discovery - issues requiring resolution following principal judgment - whether prospective applicant to bear costs of proceeding - whether security should be ordered for past and future costs - whether ISPs adopted adversarial position - whether appropriate to make orders regulating DPC's conduct - held: ISP's were adversarial - Dallas Buyers Club had less than complete victory - amount of time which Court spent on issue on which DBC was unsuccessful was relatively modest - ISPs to pay 75% of DPC's costs - ISPs to pay DBC's costs of flying witness to Australia, and accommodation and living expenses - discovery order stayed until security issue finalised - DPC to formulate draft letter to account holders for Court's consideration - not appropriate to make orders regulating DBC's general conduct - DBC not required indemnify ISPs for claims brought against them in relation to disclosure by them of account information - ISPs refused order that their costs include costs of communicating with clients in relation to preliminary discovery - orders made.

[DallasBuyersClub](#) (I B)

### **Warton v Yeo [2015] NSWCA 115**

Court of Appeal of New South Wales

Basten, Ward & Emmett JJ

Wills and estates - succession - costs - testator died in 2011 - probate of Will granted to first respondent - by clause of Will testator gave 25 % of residuary estate to sister with proviso that, should sister die before him, the share be given "to such one of her children as shall survive" testator - sister predeceased testator and was survived by second respondent only child - sister had been married to second respondent's father - second respondent's father had four children by first marriage - testator's sister raised the four children as step-children and to testator's knowledge treated them as her own children - primary judge declared that on proper construction of clause the whole of sister's share of deceased's residuary estate passed to her only natural child - two step-children appealed - appropriate construction to be given to clause of Will of testator - held: "children" referred both to sister's biological child and her four step-children - appeal allowed - first respondent's application for indemnity for costs of appeal proceedings rejected - costs of Will construction dispute were testamentary expenses - estate had been partially distributed - parties' costs of appeal to be paid out of proceeds of sale of testator's retirement village to extent indicated by Court.

[Warton](#) (B)

### **Australia & New Zealand Banking Group Ltd v Fink [2015] NSWSC 506**

Supreme Court of New South Wales

Adamson J

Contract - bank sought judgment against defendants for money they owed under two loans - loans secured by property - order for possession in respect of property previously made following bank's application for summary judgment - whether any basis other than that raised in summary judgment proceedings for relief to be granted under *Contracts Review Act 1980* (NSW) - whether interest provisions in Third Business Loan and Overdraft Facility void for uncertainty - whether defendants entitled to relief pursuant to National Credit Code (Code) or Act in respect of Third Business Loan and Overdraft Facility - whether Code was incorporated into Third Business Loan - whether bank breached Code and if so defendants suffered any damage - held: claim for relief under Act rejected - bank entitled to full amount of money owing under loans - relief under the Act in respect of Third Business Loan excluded by s6 - nothing unjust about Third Business Loan - interest provisions not void for uncertainty - defendants not entitled to relief under Code - Court not satisfied bank breached Code - defendants did not establish any loss - judgment for bank.

[ANZ](#) (I B)

## **Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd [2015] NSWSC 502**

Supreme Court of New South Wales

Ball J

Security of payments - plaintiff sought declaration that adjudication determination made by adjudicator under s22 *Building and Construction Industry Security of Payment Act 1999* in respect of payment claim made by first defendant was void - plaintiff submitted adjudicator made jurisdictional error because he wrongly determined that a reference date within meaning of s8 had arisen in respect of work subject of payment claim - plaintiff also submitted adjudicator denied it natural justice - ss8 & 13 - held: there was no reference date supporting payment claim - no denial of natural justice - plaintiff entitled to declaration sought.

[Southern](#) (C)

## **OZ Minerals Holdings Pty Ltd v AIG Australia Ltd [2015] VSC 185**

Supreme Court of Victoria

Hargrave J

Insurance contract - major shareholder exclusion clause - first plaintiff was company of which second to fifth plaintiffs were directors or officers - company and another company announced intention to merge mining businesses - merger implemented - Oxiana re-named OZ Minerals Ltd - OZ Minerals Ltd acquired all issued shares in first plaintiff company - first plaintiff company's shareholders were issued shares in OZ Minerals Ltd - first plaintiff company initially renamed OZ Minerals Holdings Pty Ltd but changed name to OZ Mineral Holdings Pty Ltd - representative proceeding commenced against OZ Minerals alleging breach of continuous disclosure requirements and misrepresentations - OZ Minerals commenced contribution proceeding against plaintiffs - plaintiffs claimed insurer obliged to indemnify them against any liability arising from contribution claims based on policy of insurance - point or points in time at which claimant was to be assessed against conditions in exclusion clause - construction of

# Benchmark

contract - held: insurer's construction preferred - plaintiffs' construction required a strained approach to find ambiguity in exclusion clause - it was also ungrammatical and inconsistent with policy's structure - proceeding dismissed.

[OZ](#) (I)

## **El-Masri v Molloy [2015] SASFC 63**

Full Court of the Supreme Court of South Australia

Kourakis CJ; Blue & Bampton JJ

Negligence - first respondent consulted doctor in 2005 regarding asthma - after receiving advice about asthma first respondent claimed she asked about menopause and told doctor her periods were changing - at time of consultation it was not known first respondent 13 weeks pregnant - first respondent alleged that as a result of doctor's negligence during consultation she did not know she was pregnant until 2006 - first respondents' son born with Trisomy 21 - primary judge found doctor negligent on basis of expert opinion in failing to obtain history, conduct examination and make diagnosis either at consultation or follow-up - s41 *Civil Liability Act 1936* - held: primary judge's reasons not underpinned by reasoning process which linked and justified findings - reasons did not explain primary judge's view that first respondent's evidence was so reliable - failure in fact-finding process by primary judge - finding of negligence set aside - failure to assess defence witnesses stymied Court from drawing its own inferences of fact, determining issues and correct - judgment - appeal allowed - matter remitted.

[El-Masri](#) (I)

## **Hammersley v National Transport Insurance [2015] TASFC 5**

Full Court of the Supreme Court of Tasmania

Blow CJ; Porter & Pearce JJ

Insurance - motor vehicle accident insurance policy - exclusion clauses - second appellant company operated fleet of trucks - Kellera held policy of insurance issued by respondent insurer - first appellant, in course of employment by Kellera, was driving one of its prime movers - prime mover was towing trailer on which there was an excavator - excavator was positioned in unusual way - top of excavator collided with railway overpass causing damage - State of Tasmania owned overpass - State sued first appellant and Kellera for damages for negligence - appellants instituted third party proceedings claiming indemnity from the insurer - drivers covered by policy - primary judge gave judgment for State against appellants - primary judge dismissed appellants' claim against insurer - appellants appealed - held: Court satisfied overloading of trailer was neither intended, foreseen, looked for, expected, nor brought about by design - overloading was accidental within meaning of policy - liability under policy not excluded - vehicle not 'being used in an unsafe or unroadworthy condition' within meaning of exclusion - Court satisfied there was not any recklessness or reckless failure by first appellant that would entitle insurer to rely upon exclusion - appeal allowed - order dismissing third party proceedings set aside - judgment for appellants against insurer.

[Hammersley](#) (I B C)

# Benchmark

## CRIMINAL

### Executive Summary

**Duncan v Regina** (NSWCCA) - criminal law - conduct of judge - judge not repeatedly asleep during trial - no miscarriage of justice - appeal against conviction dismissed

**LFG v The State of Western Australia** (WASCA) - criminal law - erroneous dismissal of application for trial judge alone - convictions quashed - retrial

### Summaries With Link

#### **Duncan v Regina [2015] NSWCCA 84**

Court of Criminal Appeal of New South Wales

Simpson, Hall & Campbell JJ

Criminal law - appellant appealed against conviction by jury in 2003 of maliciously inflicting grievous bodily harm and affray - appellant asserted that, within the meaning of s 6(1) *Criminal Appeal Act 1912*, there was miscarriage of justice because judge was asleep for significant periods during course of trial - 'substantially failed to discharge' - held: trial judge was not repeatedly asleep during trial - trial judge exercised appropriate superintendence and control of trial and conducted trial according to law - jurors not distracted by trial judge's alleged conduct - no basis for contention that appellant's legal representatives failed to in duty to raise trial judge's conduct - appeal dismissed.

[Duncan](#)

#### **LFG v The State of Western Australia [2015] WASCA 88**

Court of Appeal of Western Australia

Martin CJ; Buss & Mazza JJA

Criminal law - appellant appealed against conviction on counts of indecent dealing with children and counts of sexual penetration of child - appellant also appealed against sentence - appellant asserted Chief Judge erred in dismissing appellant's application for trial by judge alone, that Stevenson DCJ erred in ruling evidence of prior convictions admissible, and that appellant's convictions were unsafe and unsatisfactory - s118 *Criminal Procedure Act 2004* - held: first ground of appeal concerning dismissal of application for trial by judge alone upheld - convictions quashed - retrial ordered on ground appellant denied a trial quite different in character to the trial which he received - other grounds of appeal against conviction dismissed - appeal against sentence dismissed.

[LFG](#)



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## Interim

By Lola Ridge

The earth is motionless  
And poised in space ...  
A great bird resting in its flight  
Between the alleys of the stars.  
It is the wind's hour off ....  
The wind has nestled down among the corn ....  
The two speak privately together,  
Awaiting the whirr of wing

[LolaRidge](#)

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