

Friday, 11 March 2016

## 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)

**Moreton Bay Regional Council v Mekpine Pty Ltd** (HCA) - real property - resumption of land - leases and tenancies - sub-division of land - extent of tenant's interest in land under lease of premises - appeal allowed (I B C G)

**R v Independent Broad-based Anti-corruption Commissioner** (HCA) - statutory interpretation - *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) authorised Independent Broad-based Anti-corruption Commission to examine police officers in relation to "Operation Ross" investigation into police officers' conduct - appeal dismissed (I B C G)

**Anchorage Capital Partners Pty Ltd v ACPA Pty Ltd (No 4)** (FCA) - costs - trademarks - offer of compromise - applicant failed on claim for infringement - respondent succeeded on cross-claim for expungement - indemnity costs orders made in respondents' favour (I B)

**Allianz Australia Insurance Ltd v Zein** (NSWSC) - motor accidents compensation - challenges to claims assessor's assessment of damages failed - amended summons dismissed (I G)

**Re Funds in Court; Application of Mango Credit Pty Ltd** (NSWSC) - funds in court - mortgagee's application for payment of funds in court deferred to allow parties to address principles and effect of default judgment (B C)

**Walsh v Boys** (VSC) - judicial review - opinion of medical panel affected by jurisdictional error

and quashed - questions referred for determination by differently constituted Tribunal (I G)

**Mundey v Westpac Banking Corporation** (QCA) - substituted service - summary judgment - no error in decision of primary judge - appeal dismissed (B)

## Summaries With Link (Five Minute Read)

### **Moreton Bay Regional Council v Mekpine Pty Ltd [2016] HCA 7**

High Court of Australia

French CJ; Kiefel, Bell, Gageler & Nettle JJ

Real property - resumption of land - leases and tenancies - respondent was tenant in shopping centre - respondent's lease was over premises on land (former lot 6) - lessor registered plan of subdivision under *Land Title Act 1994* (Qld) (LTA) to amalgamate former lot 6 and an adjacent lot (former lot 1) to form a new lot (new lot 1) - appellant Council resumed part of land - respondent claimed compensation under *Acquisition of Land Act 1967* (Qld) (ALA) - extent of respondent's interest in land under lease of premises - ss2 & 12(5). ALA - Sched 2, ss12, 49, 49A, 50, 64, 65, 182, 183 & 184 LTA (Qld) - Pt 3 Div 2, ss 3, 5, 6, 7(1), 8, 19, 20, 38(2) & 40(1) *Retail Shop Leases Act 1994* (Qld) held: respondent's interest was confined to part of new Lot 1 which previously was within former lot 6 - appeal allowed.

[Moreton](#) (I B C G)

### **R v Independent Broad-based Anti-corruption Commissioner [2016] HCA 8**

High Court of Australia

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

Statutory interpretation - appellant police officers summonsed to give evidence at public examination concerning "Operation Ross", an investigation into conduct of police officers - appellants contended *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (IBAC Act) did not authorise Independent Broad-based Anti-corruption Commission to conduct examination or compel answers to questions which might incriminate an examinee where reasonable grounds to suspect examinee guilty - whether Commission empowered by IBAC Act to conduct examination of persons who had not been, but might subsequently be, charged and put on trial for offence relating to examination - whether s144 IBAC Act abrogated examinee's privilege against self-incrimination - held: appellants' contentions failed - Commission authorised by IBAC Act to examine police officers - appeal dismissed.

[IBAC](#) (I B C G)

### **Anchorage Capital Partners Pty Ltd v ACPA Pty Ltd (No 4) [2016] FCA 218**

Federal Court of Australia

Perram J

Costs - indemnity costs - offer of compromise - Court found respondents did not infringe applicant's trade marks - respondents succeeded on cross-claim for expungement -

determination of costs - whether respondents should be awarded indemnity costs on basis of offers of compromise - held: no issue that applicant should pay respondents' costs - applicant should pay defendants' costs of estoppel case on indemnity basis - respondents' offer involved genuine compromise - offer of compromise reflected strength of respondents' case - applicant unreasonably failed to accept offer of compromise - unnecessary to consider remaining offers of compromise - indemnity costs orders made.

[Anchorage](#) (I B)

## **Allianz Australia Insurance Ltd v Zein [2016] NSWSC 196**

Supreme Court of New South Wales

Adamson J

Motor accidents compensation - plaintiff sought relief in respect of certificate issued by claims assessor who assessed claimant's damages for injuries sustained in motor vehicle accident - challenges related to assessment of future economic loss - s13(1) *Civil Liability Act 2002* (NSW) - ss90, 94, 95, 99, 106, 122(3), 123(1) & 126 *Motor Accidents Compensation Act 1999* (NSW) - cl 18.4 *Motor Accidents Claims Assessment Guidelines* - ss69 & 75A *Supreme Court Act 1970* (NSW) - whether erroneous failure to award buffer, failure to give reasons, no evidence for findings, illogicality or irrationality - held: plaintiff failed to make out grounds for judicial review - amended summons dismissed.

[Allianz](#) (I G)

## **Re Funds in Court; Application of Mango Credit Pty Ltd [2016] NSWSC 199**

Supreme Court of New South Wales

Lindsay J

Funds in court - mortgages - equity - mortgagee sought payment out of funds court following mortgagee sale of land - respondents were former registered proprietor and estranged former wife - held: upon consideration of contract documentation, "principles governing penalties and clogs on equity of redemption", and implications of mortgagee's default judgment, Court not satisfied mortgagee entitled to funds in court - deferred to allow parties to address questions relating to the principles and effect of default judgment.

[Re Funds in Court](#) (B C)

## **Walsh v Boys [2016] VSC 74**

Supreme Court of Victoria

Ginnane J

Judicial review - plaintiff and first defendant sought to quash opinion of medical panel that worker was incapacitated for work and concerning nature of worker's medical condition - whether Court satisfied it should make consent orders sought - whether jurisdictional error due to misconstruction or misapplication of s93 *Accident Compensation Act 1985* (Vic) and definition of 'incapacity' in s5 - held: it was appropriate to quashing Medical Panel's decision - questions to be referred to differently constituted panel.

[Walsh](#) (I G)

## **Munday v Westpac Banking Corporation [2016] QCA 046**

Court of Appeal of Queensland

M McMurdo P; Morrison JA & Martin J

Summary judgment - substituted service - District Court gave summary judgment in respondent's favour - appellants contended service of summary judgment application not made in accordance with substituted service order, rendering District Court proceeding invalid - held: appellants had misunderstood requirements of *Uniform Civil Procedure Rules 1999* (Qld) - no error in manner in which primary judge dealt with application - no arguable defence to claim - appeal dismissed.

[Munday](#) (B)

## CRIMINAL

### Executive Summary

**DPP v Garrett (a Pseudonym)** (VSCA) - criminal law - refusal of application for advance ruling seeking leave under s38(1)(a) *Evidence Act 2008* (Vic) to cross-examine own witness - appeal allowed

**R v Coss** (QCA) - criminal law - rape - failure to adequately direct jury resulting in miscarriage of justice - appeal allowed - convictions set aside - retrial

### Summaries With Link

## **DPP v Garrett (a Pseudonym) [2016] VSCA 31**

Court of Appeal of Victoria

Maxwell P; Redlich & Beach JJA

Criminal law - respondent charged with intentionally causing injury - Crown sought leave to appeal against judge's refusal of its application for advance ruling seeking leave under s 38(1)(a) *Evidence Act 2008* (Vic) to cross-examine one of its witnesses - 'unfavourable' - held: trial judge erred in interpreting meaning of evidence 'unfavourable' to party who called witness - trial judge took incorrect approach to evaluating whether witness's evidence was unfavourable - leave to appeal granted - appeal allowed - ruling set aside.

[Garrett](#)

## **R v Coss [2016] QCA 44**

Court of Appeal of Queensland

M McMurdo P; Gotterson & Morrison JJA



Criminal law - appellant convicted of two counts of rape - appellant appealed against conviction - appellant contended trial judge did not adequately direct jury in relation to crown prosecutor's comments in closing address resulting in miscarriage of justice - held: judge made error of law under s668E(1) *Criminal Code* 1899 (Qld) by failing to give comprehensive direction of kind in *Van Der Zyden* [2012] 2 Qd R 568 - there had been substantial miscarriage of justice under s668E(1A) - appeal allowed - convictions set aside - re-trial ordered.

[Coss](#)



# Benchmark

## **Aspens**

BY EDWARD THOMAS

All day and night, save winter, every weather,  
Above the inn, the smithy, and the shop,  
The aspens at the cross-roads talk together  
Of rain, until their last leaves fall from the top.

Out of the blacksmith's cavern comes the ringing  
Of hammer, shoe, and anvil; out of the inn  
The clink, the hum, the roar, the random singing—  
The sounds that for these fifty years have been.

The whisper of the aspens is not drowned,  
And over lightless pane and footless road,  
Empty as sky, with every other sound  
Not ceasing, calls their ghosts from their abode,

A silent smithy, a silent inn, nor fails  
In the bare moonlight or the thick-furred gloom,  
In tempest or the night of nightingales,  
To turn the cross-roads to a ghostly room.

And it would be the same were no house near.  
Over all sorts of weather, men, and times,  
Aspens must shake their leaves and men may hear  
But need not listen, more than to my rhymes.

Whatever wind blows, while they and I have leaves  
We cannot other than an aspen be  
That ceaselessly, unreasonably grieves,  
Or so men think who like a different tree.

[BY EDWARD THOMAS](#)

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