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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)

Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4) (FCA) - trade practices – misleading and deceptive conduct - use of *free to roam* (I, B, C, G)

Fonterra Brands (Australia) Pty Ltd v Viropoulos (FCA) - contract – law firm not restrained from acting - final opportunity granted to plead case (I, B, C)

Cox v Fellows (NSWCA) - medical negligence – surgeon liable to patient for breach of duty of care (I)

Neale v Ancher Mortlock and Woolley Pty Ltd; Ancher Mortlock and Woolley Pty Ltd v Neale (NSWCA) - contract – negligence - leave to amend notice of appeal – no order for security for costs (I, B, C)

Cartwright v Bluescope Steel Ltd (NSWSC) - negligence – worker injured in motor vehicle accident while transporting steel coils – breaches of duty of care – apportionment of liability (I)



Kissane Family v Laface (NSWSC) - production and inspection - delivery of files from former solicitors to new solicitors - unnecessary litigation – no order as to costs (I)

Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd (VSC) - *Dental Services* – leases and tenancies – lease was a lease of *retail premises* (B)

Summaries with links (5 minute read)

Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4) [2013] FCA 665

Federal Court of Australia

Tracey J

Trade practices – misleading and deceptive conduct - case concerning accuracy of representations made by producers and industry association about conditions under which chickens were raised – applicant maintained respondents’ use of *free to roam* on packaging in advertising and in publications was misleading or deceptive under *Trade Practices Act 1974* (Cth) – ordinary and natural meaning of *free to roam* - held: applicant entitled to declarations in relation to contraventions by respondents of ss52 & 53(a) of the Act – association not entitled to rely on *media safe harbour defence* in s65A of the Act.

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

Fonterra Brands (Australia) Pty Ltd v Viropoulos [2013] FCA 657

Federal Court of Australia

Robertson J

Contract - applicant brought proceedings against first and second defendants for amount owing for purchase by company of its dairy products - applicant sought to restrain law firm from acting for first, second and seventh respondents in proceedings and to amend pleadings - held: applicant was not and is not a former client of firm - no breach of fiduciary duty of loyalty arose - court not prepared to restrain firm on basis of exercise of inherent jurisdiction - no evidence of misuse of confidential information - applicant’s pleadings were defective - material allegations were missing - application to amend refused - applicant given final opportunity to properly plead case.

[Fonterra Brands \(Australia\)](#) (I, B, C)

**Cox v Fellows [2013] NSWCA 206**

Court of Appeal of New South Wales

Basten, Ward & Gleeson JJA

Negligence – medical negligence - appeal from decision in which appellant general surgeon was found liable in damages to respondent for injury resulting from breach of duty of care in course of surgical procedure involving removal of respondent's gallbladder – evidence - medical evidence – causation - materialisation of inherent risk – ss5B, 5C, 5D & 5E *Civil Liability Act 2002* (NSW) – held: appellant failed to show error in trial judge's conclusions on either cause of respondent's injury or appellant's breach of duty of care – appeal dismissed.

[Cox](#) (I)**Neale v Ancher Mortlock and Woolley Pty Ltd; Ancher Mortlock and Woolley Pty Ltd v Neale [2013] NSWCA 209**

Court of Appeal of New South Wales

McColl JA

Appeal - costs – respondent architect sought to recover fees following termination of agreement for provision of services - judge found for respondent and dismissed appellant's cross-claim for damages for breach of contract and/or negligence - appellant sought leave to amend notice of appeal - respondent applied for security for costs - held: despite his impecuniosity, appellant demonstrated he had bona fide and reasonably arguable appeal which would be stifled by an order for security - appellant granted leave to amend notice of appeal - order for security for costs refused.

[Neale](#) (I, B, C)**Cartwright v Bluescope Steel Ltd [2013] NSWSC 900**

Supreme Court of New South Wales

Simpson J

Work injury damages – workers compensation - motor vehicle accident – apportionment – second defendant was workers compensation nominal insurer – employer contracted with first defendant steel manufacturer for transport of steel in containers – plaintiff was driving prime mover with attached trailer containing heavy container – plaintiff claimed damages in negligence for injuries sustained when trailer lurched and rolled – principal issue was cause of accident – evidence – provisions of *Civil Liability Act 2002* (NSW) and *Workers Compensation Act 1987* (NSW) – held: accident was caused by tipping of unstable load - both manufacturer and employer breached duty of care to plaintiff – manufacturer had primary liability due to its inadequate packing system,



which employer was contractually required to follow – plaintiff was not driving at unsafe speed – no contributory negligence – verdict for plaintiff - liability apportioned at 85% for first defendant, 15% for employer.

[Cartwright \(I\)](#)

Kissane Family v Laface [2013] NSWSC 905

Supreme Court of New South Wales

McDougall J

Production and inspection – costs – plaintiffs retained defendants as solicitors to act in litigation - plaintiffs terminated retainer and engaged new solicitors – new solicitors required defendants to deliver up files concerning relevant litigation – defendants asserted costs were owing and that they would not deliver up the files until costs had been paid – proceedings commenced for delivery of files – parties reached agreement after discussion of counsel – held: result should have been reached without involvement of court – both parties achieved substantial success – no order as to costs.

[Kissane Family \(I\)](#)

Fitzroy Dental Pty Ltd v Metropole Management Pty Ltd [2013] VSC 344

Supreme Court of Victoria

Croft J

Leases and tenancies – defendants sought declaration that lease was a *retail lease* and that dispute between parties was a *retail tenancy dispute* under *Retail Leases Act 2003 (Vic)* – whether premises was *retail premises* – held: premises were used or to be used under terms of lease for retail provision of services, thus lease was a lease of *retail premises* for purposes of the Act – *retail tenancy dispute* existed so that the jurisdiction of VCAT is enlivened.

[Fitzroy Dental \(B\)](#)

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