

Friday 17 May 2013

## Insurance, Banking, Construction & Government

### A Daily Bulletin listing Decisions of Superior Courts of Australia

#### Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

#### Executive Summary (1 minute read)

**SCCASP Holdings Pty Ltd as trustee for the H&R Super Fund v Commissioner of Taxation** (FCAFC) - income tax - derived income not actually received by superannuation fund was *special income* - appeal dismissed (B)

**Carnemolla v Adelaide Bank** (NSWCA) - mortgage - fraud - fresh evidence on appeal - order for possession - appeal dismissed (I, B, C)

**QBE Insurance (Australia) Ltd v Motor Accidents Authority of New South Wales** (NSWSC) - administrative law - motor accidents compensation - permanent impairment - no jurisdictional error in decision of proper officer - summons dismissed (I, G)

**Ell v Milne (No 5)** (NSWSC) - defamation - contextual truth - certain of plaintiff's imputations and defendant's contextual imputation conveyed (I)

**Ultrasonic Slimming Pty Ltd & Ors v Fairfax Media Publications Pty Ltd & Ors** (NSWSC) - defamation - journalists' privilege - substituted service on informant - service of statement of claim to be effected by service on solicitor for journalist and publisher (I)



**Barrett Burston Malting Co Pty Ltd v Kotzman & Ors** (VSC) - workers compensation - opinion of medical panel - denial of procedural fairness - opinion quashed (I, G)

**Cameron v RACQ Insurance Ltd** (QSC) - insurance - motor vehicle accident - insurer's statutory duty to cooperate with claimant's request for information (I)

## Summaries with links (5 minute read)

### **SCCASP Holdings Pty Ltd as trustee for the H&R Super Fund v Commissioner of Taxation** **[2013] FCAFC 45**

Full Court of the Federal Court of Australia

Lander, Siopis & Gilmour JJ

Income tax - Commissioner amended assessment of trustee of superannuation fund - objection dismissed - appeal to Federal Court - statutory construction - held: *special income* within the meaning of s273(6) *Income Tax Assessment Act 1936* (Cth) did not actually have to be received by the fund - appeal dismissed.

[SCCASP Holdings](#) (B)

### **Carnemolla v Adelaide Bank** [2013] NSWCA 122

Court of Appeal of New South Wales

McColl & Barrett JJA; Tobias AJA

Mortgage - fraud - appeal from order for possession of appellants' home due to default in repayment of loan - appellants sought to join parties as respondents to appeal and to adduce fresh evidence pursuant to s75A(7) *Supreme Court Act 1970* (NSW) being medical reports concerning health of first appellant and reports obtained for purpose of establishing that signatures on loan application were forgeries - evidence was or could have been available at time of trial - held: no justification for joinder of one party - other party consented - appellants had not made out *special grounds* to justify receipt of fresh evidence - challenge to findings of primary judge unsuccessful - appeal dismissed.

[Carnemolla](#) (I, B, C)



**QBE Insurance (Australia) Ltd v Motor Accidents Authority of New South Wales [2013] NSWSC 549**

Supreme Court of New South Wales

Rothman J

Administrative law - motor accidents compensation - plaintiff insurer sought to quash decision of Proper Officer of MAA declining to refer issue of claimant's permanent impairment for further assessment - whether MAA erred when not satisfied that material provided by plaintiff was additional relevant information capable of having material effect on outcome of previous assessment - if it erred whether error was jurisdictional or reviewable for error of law - construction of ss62(1)(a) & 62(1A) *Motor Accidents Compensation Act 1999* (NSW) in light of *Rodger v De Gelder* [2011] NSWCA 97 - held: criteria in ss62(1)(a) & 62(1A) were not jurisdictional facts - no jurisdictional error - error of law as to whether there was ground of relevant additional information about injury not determinative or operative - summons dismissed.

[QBE Insurance \(Australia\)](#) (I, G)

**Ell v Milne (No 5) [2013] NSWSC 246**

Supreme Court of New South Wales

McCallum J

Defamation - imputations - action brought by property developer against councillor arising out of email sent by councillor to newspapers and special interest groups - councillor raised defence of contextual truth under s26 *Defamation Act 2005* (NSW) - held: certain imputations relied upon by plaintiff in statement of claim and defendant's contextual imputation were conveyed by matter complained of.

[Ell](#) (I)

**Ultrasonic Slimming Pty Ltd & Ors v Fairfax Media Publications Pty Ltd & Ors [2013] NSWSC 547**

Supreme Court of New South Wales

Nicholas J

Defamation - substituted service - journalists' privilege - plaintiffs unable to locate informant - plaintiffs sought order under r10.14 *Uniform Civil Procedure Rules 2005* (NSW) that service of amended statement of claim on informant be effected by service on solicitor for publisher and journalist - scope of journalist's privilege relating to identity of informant under ss126J, 126K(1) & 131A *Evidence Act 1995* (NSW) - held: fact that publisher and journalist not compellable to disclose informant's identity did not preclude plaintiff from bringing proceedings against informant -

interests of justice required order for substituted service - order involved no disclosure of informant's true identity - order made.

[Ultrasonic Slimming](#) (I)

**Barrett Burston Malting Co Pty Ltd v Kotzman & Ors [2013] VSC 248**

Supreme Court of Victoria

Cavanough J

Administrative law - workers compensation - employer sought judicial review under s56 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) - medical panel's opinion given under s68 *Accident Compensation Act 1985* (Vic) - held: panel's psychiatric diagnosis of *factitious disorder* was unexpected, came out of the blue and could not reasonably have been anticipated - employer was denied a fair opportunity to address matter - application succeeded on grounds of procedural fairness - panel's opinion quashed - medical question to be determined by differently constituted panel.

[Barrett Burston Malting Co](#) (I, G)

**Cameron v RACQ Insurance Ltd [2013] QSC 124**

Supreme Court of Queensland

Applegarth J

Insurance - motor vehicle accident - applicant suffered traumatic brain injury in collision with truck when cycling to work - light at time of collision was critical issue - applicant sought information from insurer of vehicle pursuant to s47 *Motor Accident Insurance Act 1994* (Qld) which would assist in identifying time of collision - insurer declined request - applicant sought orders enforcing insurer's statutory duty to cooperate with claimant under s47 of the Act - held: applicant had established grounds for order - applicant's proposed form reflected order in *Faraji v Dambarage* [2012] QDC 137 - order made.

[Cameron](#) (I)





## After Apple-Picking

By Robert Frost

My long two-pointed ladder's sticking through a tree  
Toward heaven still,  
And there's a barrel that I didn't fill  
Beside it, and there may be two or three  
Apples I didn't pick upon some bough.  
But I am done with apple-picking now.  
Essence of winter sleep is on the night,  
The scent of apples: I am drowsing off.  
I cannot rub the strangeness from my sight  
I got from looking through a pane of glass  
I skimmed this morning from the drinking trough  
And held against the world of hoary grass.  
It melted, and I let it fall and break.  
But I was well  
Upon my way to sleep before it fell,  
And I could tell  
What form my dreaming was about to take.  
Magnified apples appear and disappear,  
Stem end and blossom end,  
And every fleck of russet showing clear.  
My instep arch not only keeps the ache,  
It keeps the pressure of a ladder-round.  
I feel the ladder sway as the boughs bend.  
And I keep hearing from the cellar bin  
The rumbling sound  
Of load on load of apples coming in.  
For I have had too much  
Of apple-picking: I am overtired  
Of the great harvest I myself desired.  
There were ten thousand thousand fruit to touch,  
Cherish in hand, lift down, and not let fall.  
For all



That struck the earth,  
No matter if not bruised or spiked with stubble,  
Went surely to the cider-apple heap  
As of no worth.  
One can see what will trouble  
This sleep of mine, whatever sleep it is.  
Were he not gone,  
The woodchuck could say whether it's like his  
Long sleep, as I describe its coming on,  
Or just some human sleep.

[Click Here to access our Benchmark Search Engine](#)