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## Insurance, Banking, Construction & Government

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

#### Important Announcement



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#### Executive Summary (1 minute read)

**The Change Group International PLC v City Exchange Mart Pty Ltd** (FCA) - trade practices - passing off - contract - fiduciary duties - application dismissed (B)

**AAI Ltd v Josipovic** (NSWSC) - administrative law - motor accidents compensation - no error in decision of claims assessor - proceedings dismissed (I G)

**Johnson Controls v Webb** (NSWSC) - contract - rectification costs - misleading or deceptive conduct - damages - concurrent wrongdoers - apportionment (I C)



**Noonan v The State of Victoria** (VSCA) - accident compensation - dismissal of serious injury application - no error in decision of trial judge - leave to appeal refused (I G)

**Director of Consumer Affairs Victoria v Scully** (VSCA) - trade practices - unconscionability requires moral taint - appeal dismissed (I B G)

**Matthews v SPI Electricity Pty Ltd (No 7)** (VSC) - discovery - subpoena - no waiver of privilege by delivery of expert's reports (I B C G)

**McCarthy v State of Queensland** (QCA) - security of payments - claim for interest on overdue payments - orders varied (C)

*From the Court of Appeal of New Zealand*

**University of Canterbury v The Insurance Council of New Zealand Incorporated** (NZCA) - judicial review - council not empowered to require building owners to strengthen buildings to level greater than 34% of new building standard - appeal dismissed (I C G)

## Summaries with links (5 minute read)

### **The Change Group International PLC v City Exchange Mart Pty Ltd [2013] FCA 1048**

Federal Court of Australia

Edmonds J

Trade practices - misleading or deceptive conduct - passing off - contract - fiduciary duties - applicants sought relief and damages or account of profits against respondents for misleading or deceptive conduct in contravention of *Trade Practices Act 1974* (Cth) and/or *Australian Consumer Law* and for passing off in provision of currency exchange services by company set up by former employees of applicant - applicants also sought relief and damages, account of profits or equitable compensation against second and third respondents for breaches of fiduciary duty and contract of employment - delay - evidence - held: applicants' case on passing off failed for failure to establish goodwill or reputation attached to goods or services - applicants' case on statutory basis failed for failure to discharge relevant onus - claim of breach of employment agreements failed - no breach of fiduciary duties - application dismissed.

[The Change Group International PLC](#) (B)

**AAI Ltd v Josipovic [2013] NSWSC 1524**

Supreme Court of New South Wales

Campbell J

Administrative law - motor accidents compensation - plaintiff insurer challenged validity of certificate of claims assessor issued under s94(4) *Motor Accidents Compensation Act 1999* (NSW) in respect of first defendant's claim for damages - insurer claimed assessor failed to identify or apply principles in *Miller v Galderisi* [2009] NSWCA 353 to claim for future commercial care failed to provide adequate reasons and failed to consider merits of case concerning future care as discussed in *Lafu v Minister for Immigration & Citizenship (2009)* [2009] FCAFC 140 - evidence - ss104, 69(4) & 69(6) of the Act - cl18.4 Claims Assessment Guidelines - held: no inadequacy of reasons - claims assessor entitled to find future care would be provided on commercial basis - claims assessor complied with obligation to give serious consideration to issue about future care on commercial basis - proceedings dismissed.

[AAI Ltd](#) (I G)**Johnson Controls v Webb [2013] NSWSC 1511**

Supreme Court of New South Wales

McDougall J

Contract - misleading or deceptive conduct - damages - apportionment - parties involved in project for installation of backup generator at data processing centre - generator unsuitable for task - rectification costs incurred - plaintiff project manager and head contractor sued contractors - question was who was responsible for cost of rectification work and in what proportions - formation - acceptance by conduct - construction of contract - implied term - s35(1)(a) *Civil Liability Act 2002* (NSW) - s19(1) *Sale of Goods Act 1923* (NSW) - ss52 & 82 *Trade Practices Act 1974* (Cth) - direct reliance - causation - held: plaintiff's case against first defendant consultant failed both in contract and alleged misleading and deceptive conduct - plaintiff succeeded in claim against second defendant for breach of contract and against third defendant in claim for misleading or deceptive conduct - second and third defendant suppliers were concurrent wrongdoers - ultimate responsibility attributed to third defendant - third defendant responsible for whole of loss.

[Johnson Controls](#) (I B C)



## **Noonan v The State of Victoria [2013] VSCA 289**

Court of Appeal of Victoria

Osborn & Santamaria JJA

Accident compensation - serious injury application - applicant police officer sought extension of time to apply for leave to appeal from orders of County Court dismissing application for leave to bring proceedings for damages for personal injuries under s135A(4)(b) *Accident Compensation Act 1985* (Vic) - *serious injury* - s135A(19) - medical evidence - held: open to trial judge to conclude applicant's post-traumatic stress disorder did not meet relevant narrative test having regard to evidence - path of reasoning substantiating overall conclusions was abundantly clear from trial judge's reasons - proposed appeal not reasonably arguable - leave to appeal refused.

[Noonan](#) (I G)

## **Director of Consumer Affairs Victoria v Scully [2013] VSCA 292**

Court of Appeal of Victoria

Neave, Osborn & Santamaria JJA

Trade practices - respondents operated companies which offered programs to allow people who could not obtain bank finance to purchase homes - appellant commenced proceedings against respondents contending they had engaged in unconscionable conduct in contravention of s8(1) *Fair Trading Act 1999* (Vic) and trial judge dismissed part of claim - appellant appealed in respect of general claim of unconscionability - appellant sought that court apply formulation for test of statutory unconscionability - statutory interpretation - held: trial judge did not substitute *moral obloquy* for *unconscionable* - trial judge applied existing tests for determination whether conduct was unconscionable within s8(1) of the Act - court not convinced tests were plainly wrong - appeal dismissed.

[Director of Consumer Affairs Victoria](#) (I B G)

## **Matthews v SPI Electricity Pty Ltd (No 7) [2013] VSC 553**

Supreme Court of Victoria

Derham AsJ

Discovery – Black Saturday bushfires - subpoena - privilege - waiver - civil engineer retained by plaintiff as expert witness provided reports in proceedings, gave confidential advice to plaintiff and participated in conclave which produced joint report - defendant sought to inspect certain communications and advice documents which related to matters which underpinned reports or contained information necessary for proper understanding - plaintiff claimed privilege - ss119, 122, 126 & 133 *Evidence Act 2008* (Vic) - held: none of the disputed documents influenced expert's





reports or underpinned them - no waiver of privilege in disputed documents by delivery of expert's reports.

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

### **McCarthy v State of Queensland [2013] QCA 313**

Court of Appeal of Queensland

Muir, Gotterson & Morrison JJA

Security of payments - applicant served payment claim on respondent under s17 *Building and Construction Industry Payments Act 2004* (Qld) - respondent ordered to pay unpaid portion of amount paid in accordance with s19 - applicant, in reliance on s15, sought interest on overdue payments calculated at rate specified in contract - ss17, 18, 19 & 20 of the Act - s59(3) *Civil Proceedings Act 2011* (Qld) - held: no valid reason why summary judgment should not have been granted in respect of interest as well as principal - no debate about quantification of applicant's interest claim - orders varied.

[McCarthy](#) (C)

*From the Court of Appeal of New Zealand*

### **University of Canterbury v The Insurance Council of New Zealand Incorporated**

[2013] NZCA 471

Court of Appeal of New Zealand

Harrison, White & Asher JJ

Judicial review - building and construction - insurance - respondent sought judicial review of council's policy enabling it to require building owners to strengthen existing buildings to capacity of up to 67% of current building code requirements - primary judge declared council could not require building owner to take steps to strengthen building to that extent - decision challenged by building owners - held: definition of moderate earthquake set out in reg7 *Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005* (NZ) must be applied to any earthquake policy and failure to meet standard needed to be shown before notice under s124 *Building Act 2004* (NZ) requiring work on a building could issue - two linked gateways pursuant to s122(1) of the Act that must be passed - council not given power to require work to a higher standard than 34% of new building standard in Sch1 *Building Regulations 1992* (NZ) - appeal dismissed.

[University of Canterbury](#) (I C G)

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