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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)

The Hunger Project Australia v Commissioner of Taxation (FCA) - fringe benefits tax - fund raising entity was a *public benevolent institution* (B, G)

Swan & Baker Pty Ltd v Marando (NSWCA) - professional negligence - financial advice - accountants breached duty of care to investors (I, B)

Rana v Survery (NSWCA) - associations and clubs - minutes of meeting were conclusive evidence - persons not validly admitted to association (I, B)

Tre Cavalli Pty Ltd v The Berry Rural Co Operative Society Ltd (NSWCA) - contract - sale of goods - vaccine not of unmerchantable quality at time of sale - appeal dismissed (I, B)

Oswal v Carson (VSC) – subpoena to produce - order narrowing scope of subpoena - appeal and cross-appeal dismissed (I, B, C)

Payne v Dwyer (WASC) - dispute over co-ownership of minerals - plaintiff's interest not extinguished - no adverse possession or conversion (I, B, C)



Hansen v Hansen (WASC) - probate - executor's attempt to prove lost will discontinued - widower granted letters of administration (B)

Summaries with links (5 minute read)

The Hunger Project Australia v Commissioner of Taxation [2013] FCA 693

Federal Court of Australia

Perram J

Taxation - applicant was part of worldwide collaboration of organisations whose principal aim was relief of hunger - applicant's purposes were charitable but it was principally a fund raising entity - applicant appealed from Commissioner's refusal to endorse it as a *public benevolent institution* under s123C *Fringe Benefits Tax Assessment Act 1986* (Cth) - extent to which applicant directly performed charitable activities and whether organisation which carried out charitable activities indirectly as fund raiser qualified as a *public benevolent institution* within meaning of s57A(1) of the Act - held: applicant did not pursue relief of hunger in any substantive way beyond fund raising - court did not accept Commissioner's contention that applicant could not be a *public benevolent institution* unless it engaged directly in charitable activities itself - appeal allowed.

[The Hunger Project Australia](#) (B, G)

Swan & Baker Pty Ltd v Marando [2013] NSWCA 233

Court of Appeal of New South Wales

McColl & Leeming JJA; Sackville AJA

Professional negligence - financial advice - duty of care - appellants were firm of accountants and director of firm - appeal from judgment awarding damages to respondents for losses sustained as result of investing money in fund on director's advice - s5B *Civil Liability Act 2002* (Cth) - held: appellants owed respondents a duty of care when advising them to invest in fund - appellants breached duty of care for failing to advise respondents of entitlement to withdraw investment from fund during cooling off period - primary judge's assessment of damages not excessive - appeal dismissed.

[Swan & Baker](#) (I, B)

**Rana v Survery [2013] NSWCA 234**

Court of Appeal of New South Wales

Bathurst CJ; Macfarlan & Hoeben JJA

Associations and clubs - appeal from dismissal of claim that a number of persons were validly admitted to membership of association - appellants ultimately contended there were 175 persons admitted - held: power to admit members was vested in executive council and implicit in association's constitution - exercise of power required approval of nominees - appellants conceded the 175 persons purportedly admitted could not be determined so primary judge not in error in rejecting claim - same result would have been reached without concession - nothing in minutes to suggest nominees approved - constitution provided that minutes, once confirmed and signed, were conclusive evidence of matters set out in them - minutes were conclusive evidence - inference to be drawn from minutes was that meeting went no further than approving in principle admission of 175 members - appeal dismissed.

[Rana](#) (I, B)**Tre Cavalli Pty Ltd v The Berry Rural Co Operative Society Ltd [2013] NSWCA 235**

Court of Appeal of New South Wales

McColl, Gleeson & Leeming JJA

Contract - sale of goods - conditions and warranties - appellant alleged cattle vaccine purchased from respondent was contaminated at time of sale thus constituting a supply of goods of unmerchantable quality - ss18(1), 19(1) & 19(2) *Sale of Goods Act 1923* (NSW) - expert evidence - circumstantial evidence - held: primary judge did not err in concluding appellant failed to discharge onus of proof of unmerchantable quality at time of sale - having failed on unmerchantable quality claim appellant could not prove vaccine was not fit for purpose - primary judge erred in relation to some aspects of damages claim but unnecessary to determine consequences of failure.

[Tre Cavalli](#) (I, B)**Oswal v Carson [2013] VSC 355**

Supreme Court of Victoria

Ferguson J

Subpoena to produce - plaintiff claimed he owned shares which he mortgaged to bank then sold to receivers - plaintiff alleged bank and receivers breached their duties resulting in sale price obtained for shares being less than it should have been - plaintiff served subpoena for production of documents on company in context of alleged conditional offer by company which implied



market value of shares - plaintiff appealed from order narrowing scope of subpoena and sought production of all documents - company contended subpoena be set aside - test for setting aside subpoena - principle in *McDonald v Deputy Federal Commissioner of Land Tax (NSW)* - legitimate forensic purpose - relevance - admissibility - adequacy of judge's reasons - abuse of process - held: grounds of appeal and cross-appeal failed - appeal and cross-appeal dismissed.

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

Payne v Dwyer [2013] WASC 271

Supreme Court of Western Australia

Pritchard J

Adverse possession - conversion - plaintiffs and defendant owned undivided half shares in minerals located in land owned by defendant - dispute arose as to whether plaintiffs' title in minerals had been extinguished as result of adverse possession by defendant and whether defendant engaged in tort of conversion as result of extracting gravel from land and selling it to third parties - issues tried as separate issues in advance of trial - ss5 & 14 *Limitation Act 1935 (WA)* - *actual possession* - held: plaintiff's claim that mineral interest not extinguished upheld - defendant's counter-claim of adverse possession dismissed - plaintiffs' claim in conversion dismissed - unnecessary for further trial on question of damages.

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

Hansen v Hansen [2013] WASC 268

Supreme Court of Western Australia

EM Heenan J

Probate - contentious proceedings - plaintiff son of deceased and sole executor applied for grant of probate in common form of alleged lost will - first defendant widower of deceased lodged caveat against grant and applied for grant of letters of administration - plaintiff sought to prove lost will - plaintiff alleged will never revoked or destroyed but could not be found - widower alleged deceased destroyed will with intention of revoking it producing an intestacy - evidence - presumption of revocation in case of lost will - held: deceased died intestate - leave granted to plaintiff to discontinue claim for proof of will - letters of administration granted to widower - need for administrator's guarantee dispensed with.

[Hansen](#) (B)



Fragment 1: Sea-ward, white gleaming thro' the busy scud

By Samuel Taylor Coleridge

Sea-ward, white gleaming thro' the busy scud
With arching Wings, the sea-mew o'er my head
Posts on, as bent on speed, now passaging
Edges the stiffer Breeze, now, yielding, drifts,
Now floats upon the air, and sends from far
A wildly-wailing Note.

[Samuel Taylor Coleridge](#)

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