

Friday 1 March 2013

## Insurance, Banking, Construction & Government

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

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#### Executive Summary (1 minute read)

**Weeks v Commissioner of Taxation (No 2)** - costs - industrial law - application by successful respondents for costs of appeal - whether appeal instituted without reasonable cause (I, B, C, G)

**Perisher Blue Pty Ltd v Harris** - tort - negligence - student injured in skiing accident on school excursion - appeal from decision awarding damages to student and ordering ski resort operator to indemnify trustees of school (I, B, C, G)

**Resource Pacific Pty Ltd v Wilkinson** - workers compensation - total incapacity - appeal from decision upholding claim against employer for psychiatric disorder - duty to give reasons - functions of appellate court (I, B, C, G)

**Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd** - application for extension of time to appeal - lost opportunity - finality of litigation - delay (I, B, C, G)

**Daya v CX Reinsurance Company Ltd** - evidence - objections to evidence - provisional relevance - authenticity and provenance - discretion to exclude evidence (I, B, C, G)



**LPD Holdings (Aust) Pty Ltd & Anor v Phillips, Hickey and Toigo & Ors** - costs - indemnity costs - whether to award costs on standard or indemnity basis - discretion - conduct of parties (I, B, C, G)

**Partridge v Hobart City Council (No 2)** - costs - costs of action, appeal and cross-appeals - solicitor/client basis or party/party basis - offer of compromise - *Calderbank* offer - conduct of parties (I, B, C, G)

## Summaries with links (5 minute read)

### **Weeks v Commissioner of Taxation (No 2) [2013] FCAFC 22**

Full Court of the Federal Court of Australia

Dowsett, Besanko & Robertson JJ

Costs - industrial law - successful respondent sought costs of appeal on basis that it was instituted without reasonable cause within meaning of s824(1) *Workplace Relations Act 1996* (Cth) (**Act**) and that appeal constituted an unreasonable act within meaning of s824(2) of the Act - meaning of *without reasonable cause* - *whether*: appeal had no substance in fact and law; failure of appeal necessarily meant it had been commenced without reasonable cause: *The Queen v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* [1978] HCA 51 - held: appeal not instituted without reasonable clause - respondent's application did not fit within circumstances of s824 - court had no power to grant order sought.

[Weeks](#) (I, B, C, G)

### **Perisher Blue Pty Ltd v Harris [2013] NSWCA 38**

Court of Appeal of New South Wales

Beazley JA; Sackville & Young AJJA

Torts - negligence - personal injury - damages - student injured in skiing accident on excursion - student sued resort operator for negligence and trustees of school for breach of non-delegable duty - primary judge upheld student's claims, awarded damages to student and ordered ski resort operator to indemnify school - resort operator appealed decision - student filed cross-appeal challenging costs order - *whether*: conclusions unsupported by evidence; erroneous reliance on inferences; mischaracterisation of risk; risk reasonably foreseeable; failure to consider s5B(2) *Civil Liability Act 2005* (NSW) (**Act**); insufficient reasoning on causation; ss5D and 5E the Act; sum of



award for future economic loss inconsistent with findings of fact; student should have paid resort operator's costs of wasted time during trial - appeal and cross-appeal dismissed with costs.

[Perisher Blue](#) (I, B, C, G)

## **Resource Pacific Pty Ltd v Wilkinson [2013] NSWCA 33**

Court of Appeal of New South Wales

Beazley, Basten & Macfarlan JJA

Workers compensation - total incapacity - appeal pursuant to s142N *District Court Act 1973* (NSW) from decision upholding claim for compensation for psychiatric disorder arising out of course of employment - *whether*: inadequate reasoning or explanation with respect to causation; procedural unfairness; court had fulfilled constitutional function by resolving factual disputes; constructive failure to exercise jurisdiction by failure to consider *material and uncontested* evidence - variable nature of the duty to give reasons - function of appellate court to determine whether reasons had reached a minimum acceptable level to constitute proper exercise of judicial power - held: no error of law established - appeal dismissed.

[Resource Pacific](#) (I, B, C, G)

## **Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd [2013] NSWCA 35**

Court of Appeal of New South Wales

Allsop P

Extension of time - lost opportunity - finality of litigation - complex underlying proceedings concerning development of mining site into golf resort - applicants unsuccessfully sought that agreements to settle be set aside because they were induced by fraud or misleading or deceptive conduct - application for extension of time to file and serve notice of appeal against fundamental factual findings - *whether*: any real or significant prospects of overturning fundamental elements of reasons; submissions disclosed any error; advantage of appeal court to received detailed submissions reinforced conclusion that it would take painstaking analysis to illuminate any error, if it existed - fundamental consideration of finality of litigation - whether appropriate to extend time in circumstances - delay with knowledge of grounds of appeal - held: unjust to allow extension - application dismissed.

[Land Enviro Corp](#) (I, B, C, G)



## **Daya v CX Reinsurance Company Ltd [2012] NSWSC 1616**

Supreme Court of New South Wales

Brereton J

Evidence - interlocutory application - objections to evidence - plaintiff sought declaration of right to indemnity under insurance policy - insurer sought to avoid policy on basis of plaintiff's failure to disclose certain matters - insurer sought to tender transcripts of recordings of telephone conversations - whether material relevant: s55(1) *Evidence Act 2005* (NSW) (Act) - provisional relevance: s57(2) of the Act - authenticity and provenance objections - *whether*: transcript evidence was business record, or audio recording proved by a transcript: s48(1)(c) of the Act; evidence should be rejected under s135 of the Act on basis prejudicial value outweighed probative value - objections to evidence of internal communications, due diligence material and evidence in relation to claim of material non-disclosure.

[Daya](#) (I, B, C, G)

## **LPD Holdings (Aust) Pty Ltd & Anor v Phillips, Hickey and Toigo & Ors [2013] QSC 30**

Supreme Court of Queensland

Phillipides J

Costs - indemnity costs - applicants sought relief for damages for oppression under ss233 and 1324(10) *Corporations Act 2001* (Cth) (Act), declarations of wrongdoing, an order that respondent company be wound up pursuant to s461 of the Act and order for correction of company's register of members - proceedings dismissed - directors and company sought that applicants pay costs on indemnity basis - whether to award costs on standard or indemnity basis - circumstances warranting exercise of discretion to award indemnity costs: *Colgate Palmolive Co v Cussons Pty Ltd* [1993] FCA 536 - *whether*: applicants' conduct unreasonable and improper; applicants continued flawed proceedings despite knowledge of lack of standing; proceedings hopeless - respondents awarded costs on indemnity basis.

[LPD Holdings](#) (I, B, C, G)

## **Partridge v Hobart City Council (No 2) [2013] TASFC 1**

Full Court of the Supreme Court of Tasmania

Crawford CJ; Blow & Wood JJ

Costs - offer of compromise - *Calderbank* offer - appellant sued for damages for personal injury - appellant succeeded in relation to one issue on appeal - respondents succeeded on all other issues - appellant applied for costs orders in respect of action, appeal and cross-appeals - respondents



conceded they should pay some of appellant's costs, but submitted court should make orders less favourable to appellant than those she sought - whether to order costs of action and appeal on solicitor/client basis or party/party basis - appellant's offer of compromise to consent to reduction for contributory negligence - appellant's *Calderbank* offer when appeal pending - conduct of parties - whether substantial costs needlessly incurred - special costs order made - indemnity certificates granted to respondents in respect of appeal: s8 *Appeal Costs Funds Act 1968* (Tas).

[Partridge](#) (I, B, C, G)

### Extract from *Auguries of Innocence*

By William Blake

TO see a World in a grain of sand,  
And a Heaven in a wild flower,  
Hold Infinity in the palm of your hand,  
And Eternity in an hour....

<http://www.poetryfoundation.org/bio/william-blake>

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