



Friday, 7 February 2025

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

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (One Minute Read)

**United Petroleum Pty Ltd v Perth Airport Pty Ltd (2025)** - trial judge recused himself after becoming aware applicants intended to call a witness with whom he had had a personal and professional relationship (I B)

**Zilic v QBE Insurance (Australia) Ltd (NSWSC)** - review panel constructively failed to exercise jurisdiction and error on the face of the record was shown in its reasons for decision (I)

**Eade v St Barbara & Anor (VSC)** - Court refused to stay proceedings arising from accident in Papua New Guinea on the basis Victoria was a clearly inappropriate forum or that trial in Victoria would be vexatious or oppressive (I B)

**Taringa Property Group Pty Ltd v Kenik Pty Ltd (QSC)** - Court stayed enforcement of adjudicated debt to a contractor under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) due to the contractor's precarious financial condition (I B C)

**Doble v Chaffey Services Pty Ltd (WASCA)** - appeal dismissed against finding former employee had breached his fiduciary duty, duty of confidence, and s182 and s183 of the *Corporations Act 2001* (Cth) by establishing a competing business while still employed (I B)

## HABEAS CANEM

McGregor falls in love at the pub



## Summaries With Link (Five Minute Read)

### **United Petroleum Pty Ltd v Perth Airport Pty Ltd [2025] FCA 40**

Federal Court of Australia

O'Callaghan J

Procedural fairness - about two weeks before proceedings were set down for trial, trial judge became aware that one of the applicants' witnesses was someone with whom he had had a personal and professional relationship - the judge convened a case management hearing - held: a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide - where there is real doubt as to whether the circumstances require judicial disqualification, it is preferable for judicial officers to err on the side of caution by electing to recuse themselves - the High Court has noted that it is not improper for a judge to decline to sit unless affirmatively satisfied he or she is disqualified - the conclusion there is a reasonable apprehension of bias does not involve any prediction by the court as to whether a judge might not bring an impartial mind to bear or any question as to the understanding or motivation of the particular judge - except perhaps in an emergency situation, it is clearly undesirable for a judge to hear a case in which a person well-known to him or her is to give important and controversial evidence, especially if the witnesses' credit may be in issue - the judge was satisfied that a fair-minded lay observer might reasonably apprehend that he might not bring an impartial mind to my consideration of the evidence provided by the witness - judge recused himself.

[United Petroleum Pty Ltd](#) (I B)

### **Zilic v QBE Insurance (Australia) Ltd [2025] NSWSC 11**

Supreme Court of New South Wales

McNaughton J

Motor accidents - plaintiff injured when her motor scooter collided with a motor bike - she sued the CTP insurer of the vehicle at fault pursuant to the *Motor Accidents Compensation Act 1999* (NSW) - total permanent impairment greater than 10% required for damages for non-economic loss to be available - assessor certified total permanent impairment at 19% - review panel certified it at 0% - plaintiff sought judicial review - held: constructive failure to exercise jurisdiction arises where decision-maker purports to exercise jurisdiction but in substance has not undertaken or completed that task because of failure to address some essential matter - by limiting itself to the primary diagnosis and entirely failing to consider the critical issue of the secondary diagnosis, review panel constructively failed to exercise jurisdiction - review panel also constructively failed to exercise jurisdiction by limiting itself to whether the primary injury was caused by the accident, rather than considering whether the accident contributed to the occurrence of a subsequent medical condition or conditions - s69(4) of the *Supreme Court Act 1970* (NSW) provides that 'the record' includes the review panel's reasons, so that an error in the reasons will be error on the face of the record and susceptible to judicial review - Court could see no explanation or reasoning in the review panel's reasons underpinning its conclusory statement that the examination caused it to disagree with the assessor's assessment - review

panel's certificate set aside and matter remitted to a differently constituted review panel for determination according to law.

[View Decision](#) (I)

## **Eade v St Barbara & Anor [2025] VSC 21**

Supreme Court of Victoria

Ierodiaconou AsJ

Civil procedure - plaintiff resided in Victoria and was a fly-in, fly-out worker at a mine in PNG when he fell and fractured his leg and ankle - he sued his employer and its parent company - defendants applied for the proceeding to be dismissed, stayed, or struck out - held: *forum non conveniens* is an international private law doctrine that provides that an Australian court may decline to exercise its jurisdiction if satisfied that it is a clearly inappropriate forum - a plaintiff who has regularly invoked the jurisdiction of the court has a prima facie right to insist on its exercise - the mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify a court declining to exercise its jurisdiction - no basis for the Court to find that the possible applicability of PNG law was a relevant factor - the Court could not make a finding about the applicable law - the accident occurred in PNG, but the parent company's alleged tortious acts and omissions in the management and control of the employer and the mine occurred in Victoria - the governing law clause in the contract of employment was not an exclusive forum clause - no evidence of the differences between the laws of PNG and Victoria - avoiding a limitation bar imposed by a foreign jurisdiction is a legitimate jurisdictional advantage - defendants could not rely on their decisions about insurance as a relevant factor - defendants had not shown Victoria was a clearly inappropriate forum, or that trial in Victoria would be oppressive or vexatious - application dismissed.

[Eade](#) (I B)

## **Taringa Property Group Pty Ltd v Kenik Pty Ltd [2024] QSC 327**

Supreme Court of Queensland

Hindman j

Security of payments - TPG contracted with Kenik for Kenik, as contractor, to design and construct for TPG, as principal, a retail complex including a Coles supermarket and a Liquorland - construction took significantly longer than anticipated under the contract and the cost of construction Kenik claimed was significantly greater than the contract price for the original scope of works - an adjudicator under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) ruled TPG pay Kenik about \$4.2 million - TPG sought judicial review - the Court had rejected TPG's contention that the decision was void for jurisdictional error (see Benchmark 13 December 2024) - the Court now considered TPG's application for a stay preventing enforcement of the judgment debt created by the adjudication on the basis of Kenik's precarious financial position - held: there was no issue about the Court's power to order a stay, either pursuant to r800 of the *Uniform Civil Procedure Rules 1999* (Qld) or its inherent jurisdiction - the Court should exercise considerable caution as a stay would detract from the primary purpose of

the *Building Industry Fairness (Security of Payment) Act* - that Act is designed to improve cashflow for contractors, and generally the principal must bear any risk of non-recovery of payments under the Act as a consequence of the financial failure of the contractor - on the evidence here, there was a very high risk Kenik would not be able to pay the adjudicated amount if it were later found not to be entitled to it - a stay should be granted on conditions of the TPG making further payments into court and providing the usual undertaking as to damages, and that the adjudication costs be released to Kenik from the amount already paid into court.

[Taringa Property Group Pty Ltd \(I B C\)](#)

### **Doble v Chaffey Services Pty Ltd [2025] WASCA 3**

Court of Appeal of Western Australia

Buss P, Mitchell, & Vaughan JJA

Equitable duty of confidence - Doble was a former employee of Chaffey who used Kirahnley Pty Ltd to establish a competing business - Chaffey sued, contending Doble breached his fiduciary duty, duty of confidence, and s181 to s183 of the *Corporations Act 2001 (Cth)*, and that Kirahnley was party to those contraventions - Chaffey sought equitable compensation, an account of profits, and compensation under s1317H of the Act - the primary judge found: (1) Doble dishonestly breached his equitable duty of confidence and duties he owed as an employee under s182 and s183 by using information relating to Chaffey's turnover to obtaining finance to establish the new business; and (2) Doble dishonestly breached his fiduciary duty and duties he owed as an employee under s182 and s183 by sending quotes to Chaffey's major client while still Chaffey's employee; and (3) Kirahnley was involved in Doble's contraventions of s182 and s183 - the primary judge ordered compensation under s1317H of about \$100,000 - Doble and Kirahnley appealed - held: the evidence did not support an inference that Chaffey's major client requested Kirahnley, rather than Chaffey, to provide the relevant quotes - primary judge did not err in failing to draw an inference he was not asked to draw at trial - even if the Court were to infer Chaffey's major client requested Kirahnley, rather than Chaffey, provide the quotes, this would not lead to a conclusion there was no breach of duty - it would be a contravention of s182 for Doble to improperly use his position to gain an advantage for himself no matter who initiated Kirahnley providing quotes - primary judge did not err in finding the turnover information was subject to a duty of confidence Doble owed to Chaffey - appeal dismissed.

[Doble \(I B\)](#)

## Poem for Friday

### Song of the Open Road (Parts 1, 11 and 15)

By Walt Whitman (1819-1892)

1.

Afoot and light-hearted I take to the open road,  
Healthy, free, the world before me,  
The long brown path before me leading wherever I choose.

Henceforth I ask not good-fortune, I myself am good-fortune,  
Henceforth I whimper no more, postpone no more, need nothing,  
Done with indoor complaints, libraries, querulous criticisms,  
Strong and content I travel the open road.

The earth, that is sufficient,  
I do not want the constellations any nearer,  
I know they are very well where they are,  
I know they suffice for those who belong to them.

(Still here I carry my old delicious burdens,  
I carry them, men and women, I carry them with me wherever I go,  
I swear it is impossible for me to get rid of them,  
I am fill'd with them, and I will fill them in return.)

11.

Listen! I will be honest with you,  
I do not offer the old smooth prizes, but offer rough new prizes,  
These are the days that must happen to you:  
You shall not heap up what is call'd riches,  
You shall scatter with lavish hand all that you earn or achieve,  
You but arrive at the city to which you were destin'd, you hardly settle yourself to  
satisfaction before you are call'd by an irresistible call to depart,  
You shall be treated to the ironical smiles and mockings of those who remain behind you,  
What beckonings of love you receive you shall only answer with passionate kisses of  
parting,  
You shall not allow the hold of those who spread their reach'd hands toward you.

15.

Allons! the road is before us!  
It is safe—I have tried it—my own feet have tried it well—be not detain'd!

Let the paper remain on the desk unwritten, and the book on the shelf unopen'd!  
Let the tools remain in the workshop! let the money remain unearn'd!  
Let the school stand! mind not the cry of the teacher!  
Let the preacher preach in his pulpit! let the lawyer plead in the court, and the judge  
expound the law.

Camerado, I give you my hand!  
I give you my love more precious than money,  
I give you myself before preaching or law;  
Will you give me yourself? will you come travel with me?  
Shall we stick by each other as long as we live?

The complete poem *Song of the Open Road* may be read at this link  
<https://www.poetryfoundation.org/poems/48859/song-of-the-open-road>

**Walt Whitman** (31 May 1819 - 26 March 1892) is regarded as one of the most significant American poets of the 19th century. Whitman grew up in Brooklyn, New York, in a family that struggled financially. He had little formal education, working from the age of 11, first as an office boy, and later as a clerk, teacher, librarian and journalist. He published "Leaves of Grass", (the publication of which he financed himself), which included in the second edition, *Song of the Open Road*. Ralph Waldo Emerson described Leaves of Grass as "the most extraordinary piece of wit and wisdom that America has yet contributed." During the Civil War, while working as a clerk in Washington, he assisted and cared for injured soldiers. He has been described as the father of free verse. Whitman died in 1892, living on his brother's property after a stroke 10 years earlier. He received little positive acclaim for his poetry in America during his lifetime, although he had a collection of those who admired his work, including in the UK. The Walt Whitman Archive is at this link <https://whitmanarchive.org/>.

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