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

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

### Executive Summary (1 minute read)

**Chua v Commissioner of Taxation (FCAFC)** - taxation - preliminary question - Commissioner's demurrer was complete answer to applicant's claims - appeal dismissed (I B G)

**Grace v Bennie (No 2) (NSWSC)** - security for costs - no due despatch in compliance with orders for payment of amount into Court - stay dissolved - proceedings dismissed (I B C G)

**Campbell v Hamilton & OR's (NSWSC)** - real property - easements - parties had agreed plaintiff would grant easement over plaintiff's land in defendants' favour - declaration (B C I G)

**The Real Thing Food Supplements CC v Media Tag Pty Ltd (No 2) (NSWSC)** - costs - indemnity costs - 'walk away' offer - invitation to surrender - rejection of Calderbank offer not unreasonable - indemnity costs refused (B C I G)

**Taylor v McLachlan (VSC)** - trade and commerce - misleading and deceptive conduct - separate determination of questions refused (I B C G)

**Molonglo Group (Australia) Pty Ltd v Cahill (VSCA)** - contract - sale of land - specific performance - caveat - non-party refused leave to appeal in proceedings (I B C G)

**In the matter of Bernsteen Pty Ltd (in liq) (SASC)** - corporations - judgments and orders -

plaintiff former liquidator sought declarations concerning committee meetings - plaintiff was not an 'interested person' - application dismissed (I B C G)

## Summaries With Link (Five Minute Read)

### **Chua v Commissioner of Taxation [2018] FCAFC 86**

Full Court of the Federal Court of Australia

Logan, Moshinsky & Steward JJ

Taxation - preliminary question - applicant sought to quash Commissioner's opinion that there was 'fraud or evasion' pursuant to item 5 s170(1) *Income Tax Assessment Act 1936* (Cth) and to quash amended assessments - applicant also challenged assessments' 'excessiveness' in Administrative Appeals Tribunal - Commissioner demurred to applicant's statement of claim on basis alleged facts provided no basis for relief - primary judge determined preliminary question whether Commissioner's demurrer provided 'complete answer' to claims for relief - primary judge found in Commissioner's favour - applicant sought extension of time to appeal - s37M *Federal Court of Australia Act 1976* (Cth) - held: no error in decision of primary judge - appeal dismissed.

[Chua](#) (I B G)

### **Grace v Bennie (No 2) [2018] NSWSC 831**

Supreme Court of New South Wales

Harrison AsJ

Security for costs - due despatch - Court ordered stay of proceedings pursuant to s67 *Civil Procedure Act 2005* (NSW) until plaintiff paid sum into Court - sum had not been paid into Court - whether to dissolve stay and dismiss proceedings - held: there had not been due despatch in compliance with security for costs orders - there had been 12 month delay - a party would normally be given 28 days to pay amount - Court concluded it should dissolve stay and dismiss proceedings.

[View Decision](#) (I B C G)

### **Campbell v Hamilton & OR's [2018] NSWSC 806**

Supreme Court of New South Wales

Slattery J

Real property - easements - first and second defendants signed heads of agreement (2015 Heads) following mediation in relation to claims first and second defendants made for grant of easement over plaintiff's land under s88K *Conveyancing Act 1919* (NSW) - 2015 Heads perfected in deed - parties disputed 'meaning and effect' of 2015 Heads and deed - dispute was as to whether 2015 Heads and deed granted defendants easement over plaintiff's land for their adjacent land's benefit, or only rights of personal access over plaintiff's land to defendants - third defendant Registrar General registered easement over plaintiff's land for benefit of the defendants' land - plaintiff sought removal of notation of easement - defendants

sought to maintain easement, contended that deed had been performed through easement's registration - held: Court found in defendants' favour that parties had agreed that plaintiff would grant easement over his land in defendants' favour - declaration made.

[View Decision](#) (B C I G)

## **The Real Thing Food Supplements CC v Media Tag Pty Ltd (No 2) [2018] NSWSC 850**

Supreme Court of New South Wales

Stevenson J

Costs - Court dismissed proceedings - first defendant sought costs on indemnity basis in reliance Calderbank offer - whether offer was genuine - whether rejection of offer was unreasonable - held: offer was a 'walk away' offer which 'really amounted' to invitation to surrender - not unreasonable for plaintiff to reject offer - indemnity costs refused - proceedings dismissed.

[View Decision](#) (B C I G)

## **Taylor v McLachlan [2018] VSC 298**

Supreme Court of Victoria

John Dixon J

Trade and commerce - separate questions - plaintiff contended defendants, in contravention of s18 Australian Consumer Law, engaged in misleading and deceptive conduct - plaintiff's contentions concerned Australian Football League's conduct during investigation into supplements program of club - plaintiff sought 'corrective advertising' pursuant to s232(2) Australian Consumer Law - defendants sought preliminary determination of two questions: whether defendants' conduct in making statements was conduct 'in trade or commerce' under s18 Australian Consumer Law and, if so, whether the statements 'not actionable' because they were opinions 'or would not have induced error' - held: Court not satisfied to determine either question separately - Court not satisfied it could fairly determine whether conduct was in trade or commerce separately from whether conduct was misleading - evaluating statements required characterisation of defendants' conduct 'in all of the circumstances' - separate determination of questions refused.

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

## **Molonglo Group (Australia) Pty Ltd v Cahill [2018] VSCA 147**

Court of Appeal of Victoria

Maxwell ACJ; Whelan & Kyrou JJA

Contract - sale of land - company (Kiversun) owned commercial property - Kiversun and first respondent executed 'Agreement to Purchase' concerning property - Kiversun and applicant executed contract of sale concerning property - first respondent and applicant lodged caveats - Kiversun withdrew from sale to first respondent - first respondent claimed against Kiversun for specific performance of agreement (Cahill proceeding) - applicant claimed against first respondent and Registrar of Titles, seeking removal of first respondent's caveat (Molonglo proceeding) - first respondent counterclaimed in Molonglo proceeding for removal of applicant's

# Benchmark

caveat - Court found Cahill agreement 'binding and specifically enforceable' - Court granted specific performance order in Cahill proceeding and removal of applicant's caveat in Molonglo proceeding - applicant, though not a party to Cahill proceeding, sought to appeal against specific performance order - applicant also sought to appeal against order in Molonglo proceeding - s14C *Supreme Court Act 1986* (Vic) - held: Court concluded that applicant, as non-party, should not have leave to appeal concerning order in Cahill proceeding - refusal of leave in respect of Cahill proceeding entailed refusal of leave in respect of Molonglo proceeding.

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

## **In the matter of Bernsteen Pty Ltd (in liq) [2018] SASC 76**

Supreme Court of South Australia

Doyle J

Corporations - judgments and orders - plaintiff former liquidator of company (Bernsteen) sought, pursuant to s1322(4) *Corporations Act 2001* (Cth) declarations concerning committee of inspection meetings which occurred while plaintiff was liquidator - threshold issue was whether plaintiff was an "interested person" under s1322(4) - plaintiff contended he was an interested person in reliance on status as former liquidator, and that he had brought application at request of Australian Securities and Investments Commission - held: Court not satisfied plaintiff was interested person - application dismissed.

[In the matter of Bernsteen](#) (I B C G)

## CRIMINAL

### Executive Summary

**Chen v R** (NSWCCA) - criminal law - drug offences - knowingly taking part in supply of more than commercial quantity of prohibited drug - admissibility of interpreter's evidence - jury directions - appeal against conviction dismissed

**Flood-Smith v R** (NSWCCA) - criminal law - recklessly causing grievous bodily harm - admissibility of admissions - jury directions - verdict not unreasonable appeal dismissed

### Summaries With Link

#### **Chen v R [2018] NSWCCA 106**

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL; Schmidt & Campbell JJ

Criminal law - drug offences - evidence - appellant convicted of knowingly taking part in supply of more than commercial quantity of prohibited drug - on voir dire appellant challenged



admissibility of interpreter's evidence of intercepted phone calls, contending lack of expertise, lack of impartiality, and bias - appellant also challenged translations' accuracy - appellant was unsuccessful in challenges to admissibility - appellant appealed - appellant contended trial judge erred in ruling interpreter's evidence admissible, in failing to exclude interpreter's evidence, in failing to withdraw interpreter's evidence, and in failing to 'issue appropriate warnings or directions' - whether non-compliance with 'expert witness code of conduct' rendered evidence inadmissible - ss79, 135 & 137 *Evidence Act 1995* (NSW) - Pt 75 r 3J *Supreme Court Rules 1970* (NSW) - held: grounds of appeal failed - appeal against conviction dismissed.

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### **Flood-Smith v R [2018] NSWCCA 103**

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL; Walton & Button JJ

Criminal law - applicant found guilty of recklessly causing grievous bodily harm - applicant sentenced to non-parole period of three years in prison - applicant sought to appeal - applicant contended there had been a miscarriage of justice arising from trial judge's failure to exclude 'ambiguous or equivocal' admissions - alternatively applicant contended there had been miscarriage of justice arising from trial judge's failure to direct jury in relation to when they could act on an admission, and arising from trial advocate's invitation to jury to act on ambiguous or equivocal admissions - applicant also contended verdict was unreasonable or could not be supported with regard to evidence - s35(2) *Crimes Act 1900* (NSW) - s5(1)(b) *Criminal Appeal Act 1912* (NSW) - ss90 & 137 *Evidence Act 1995* (NSW) - r4 *Criminal Appeal Rules* - held: leave to appeal granted in respect of ground of appeal contending verdict was unreasonable or could not be supported with regard to evidence - appeal dismissed.

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## The Word

**By:** Ella Wheeler Wilcox

Oh, a word is a gem, or a stone, or a song,  
Or a flame, or a two-edged sword;  
Or a rose in bloom, or a sweet perfume,  
Or a drop of gall is a word.

You may choose your word like a connoisseur,  
And polish it up with art,  
But the word that sways, and stirs, and stays,  
Is the word that comes from the heart.

You may work on your word a thousand weeks,  
But it will not glow like one  
That all unsought, leaps forth white hot,  
When the fountains of feeling run.

[https://en.wikipedia.org/wiki/Ella\\_Wheeler\\_Wilcox](https://en.wikipedia.org/wiki/Ella_Wheeler_Wilcox)

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