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## Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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

### Executive Summary (1 minute read)

**Australian Competition and Consumer Commission v Clinica Internationale Pty Ltd (No 2)** (FCA) - consumer law - breaches of ss18, 21, 29 & 31 *Australian Consumer Law* in relation to recruitment consulting service - ACCC entitled to relief sought (I B)

**Brewer v AAL Aviation Ltd** (FCA) - superannuation - negligence - claim that Qantas was liable for TAA's conduct in blocking entry to superannuation schemes - applications dismissed (I B)

**Elachi v Council of the City of Shoalhaven** (NSWCA) - environment and planning - appellant's vegetation clearing work breached *Environmental Planning and Assessment Act 1979* (NSW) - appeal dismissed (I B C G)

**Hoff v City of Mitcham** (SASCFC) - environment and planning - limitations - application for review of categorisation decision was out of time - appeal dismissed (I B C)

**Christie v Christie** (WASC) - succession - family provision - disentitling conduct - violence by claimant son against deceased mother - claim for provision refused (B)

**Chu v Russell** (TASFC) - negligence - motor vehicle collision - cyclist injured in collision with motor vehicle - motor vehicle driver liable - reduction for contributory negligence increased from 30% to 50% (I)

**Long v Kmart Australia Ltd** (TASSC) - workers compensation - aggravation or exacerbation of underlying disease - error of law by Workers Rehabilitation and Compensation Tribunal - appeal allowed (I G)

## Summaries With Link (Five Minute Read)

### **Australian Competition and Consumer Commission v Clinica Internationale Pty Ltd (No 2) [2016] FCA 62**

Federal Court of Australia

Mortimer J

Consumer law - ACCC sought declarations, injunctions orders, non-party redress orders and pecuniary penalties for contraventions of ss18, 21, 29 & 31 *Australian Consumer Law* by respondents in relation to recruitment consulting service - admissions of contraventions - s1323 *Corporations Act 2001* (Cth) - s191 *Evidence Act 1995* (Cth) - reg 5.19(4)(h)(ii), Sch 1, Item 1114C, Sch 2, Item 187 *Migration Regulations 1994* (Cth) - *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth) - held: ACCC had made out alleged contraventions and was entitled in substance to the relief it sought.

[Clinica Internationale](#) (I B)

### **Brewer v AAL Aviation Ltd [2016] FCA 93**

Federal Court of Australia

Buchanan J

Superannuation - negligence - limitations - applicants employed by TransAustralia Airlines (TAA) and then by Qantas - applicants claimed respondent liable for TAA's conduct in blocking entry to superannuation schemes - negligent misrepresentation - time at which claimed loss arose - ss6, 17, 18, 31A, 42, 43, 63 *Australian National Airlines Act 1945-1973* (Cth) - s18 *Australian Consumer Law* - s4 *Superannuation Act 1922-1973* (Cth) - ss3, 11, 12, 13, 16, 80, 137 *Superannuation Act 1976* (Cth) - s52 *Trade Practices Act 1974* (Cth) - s38 *Limitation Act 2005* (WA) - s55 *Limitation Act 1969* (NSW) - s27 *Limitation of Actions Act 1958* (Vic) - held: no causes of action succeeded - applications dismissed.

[Brewer](#) (I B)

### **Elachi v Council of the City of Shoalhaven [2016] NSWCA 15**

Court of Appeal of New South Wales

Basten & Ward JJA; Sackville AJA

Environment and planning - respondent sought declaration in Land and Environment Court that appellant's vegetation clearing work contravened s76A(1) *Environmental Planning and Assessment Act 1979* (NSW) - respondent also sought to restrain appellant from undertaking clearing and that appellant restore property - primary judge granted declaration and restraining order - rectification order made by consent - appellant appealed - s109 Constitution - Divs 1, 2 & 6, Pt 4 & Pt 5, ss4, 5, 13, 18, 21, 26, 33A, 74, 74C, 76A, 76B *Environmental Planning and*

*Assessment Act 1979* (NSW) - Pt 3, Divs 2, 3 & 4, ss11, 12, 16, 19, 20, 21 & 22 *Native Vegetation Act 2003* (NSW) - relationship between cl 5.2.3 *Shoalhaven Development Control Plan 2014* and cl 5.9(8) & (9A) *Shoalhaven Local Environmental Plan 2014* - held: trial judge correct to determine there was breach of s76A(1) - appeal dismissed.

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

### **Hoff v City of Mitcham [2016] SASCFC 3**

Full Court of the Supreme Court of South Australia

Kourakis CJ, Bampton & Parker JJ

Environment and planning - limitations - appellants' home adjacent to site of proposed development - Council assigned development to Category 2 - appellants sought declaration that development should have been declared a Category 3, not a Category 2 development - ss35, 38, 38(4), 86(1), 86(4) & 88 *Development Act 1993* (SA) - issue concerned when time began to run for application for review of categorisation - held: time began to run at time categorisation decision made - application for review of categorisation was out of time - appeal dismissed.

[Hoff](#) (I B C)

### **Christie v Christie [2016] WASC 45**

Supreme Court of Western Australia

Master Sanderson

Succession - family provision - plaintiff son of deceased sought provision from deceased's estate - 'disentitling conduct' provision in s6(3) *Family Provision Act 1972* (WA) - community's current attitudes and expectations - held: Court satisfied that while plaintiff resided with deceased he was physically violent and abusive towards her - plaintiff did not attempt to reconnect with deceased after moving out of home in 1987 - plaintiff did not contribute to assets - person who was violent towards testator could not expect to receive proportion of estate - claim dismissed.

[Christie](#) (B)

### **Chu v Russell [2016] TASFC 1**

Full Court of the Supreme Court of Tasmania

Blow CJ; Porter & Estcourt JJ

Negligence - motor vehicle collision - collision between motor vehicle and bicycle - respondent was riding bike when appellant driver collided with his bicycle from behind - respondent injured - primary judge held appellant liable in negligence - primary judge also found damages should be reduced by 30% for respondent's contributory negligence - appellant challenged finding of liability - appellant also contended 30% reduction for contributory negligence manifestly inadequate - held (by majority): Court agreed with conclusion by primary judge that collision would not have occurred but for appellant's failure to keep a proper lookout and speed - Court determined respondent's damages be reduced by 50% for contributory negligence - appeal allowed.

[Chu](#) (I)



## **Long v Kmart Australia Ltd [2016] TASSC 6**

Supreme Court of Tasmania

Porter J

Workers compensation - worker alleged he was injured in course of employment - worker appealed from Workers Rehabilitation and Compensation Tribunal's answers to questions - whether aggravation or exacerbation of underlying disease to which employment was major or most significant contributing factor - *Workers Rehabilitation and Compensation Act 1988 (Vic)* - held: Commissioner's approach was wrong in law - Commissioner failed to give adequate reasons and failed to state essential factual findings - appeal allowed.

[Long](#) (I G)

## CRIMINAL

### Executive Summary

**Dib v R (NSWCCA)** - criminal law - murder - reasonable doubt whether applicant shot deceased and Crown witness - applicant acquitted

**R v Van Ryn (NSWCCA)** - criminal law - child sexual assault - sentence manifestly inadequate and plainly unjust - appellant sentenced to 18 years in prison with non-parole period of 13 years 6 months

### Summaries With Link

## **Dib v R [2016] NSWCCA 15**

Court of Criminal Appeal of New South Wales

Hoeben CJ; Adams & McCallum JJ

Criminal law - murder - deceased and husband were in car - deceased and husband shot by occupant of another car while it was driving past them - husband was Crown witness - applicant found guilty of murder - applicant contended verdict of guilty unreasonable - identification of applicant by husband - ss5(1)(a) & (b), s6(1) *Criminal Appeal Act 1912 (NSW)* - ss38 & 128, s195 *Evidence Act 1995 (NSW)* - held: not open to jury to be satisfied beyond reasonable doubt applicant shot husband and deceased - there was reasonable doubt which jury should have had - Court was in position as good as the jury to make assessment - applicant acquitted.

[Dib](#)

## **R v Van Ryn [2016] NSWCCA 1**

Court of Criminal Appeal of New South Wales

Leeming JA; Johnson & R A Hulme JJ

Criminal law - child sexual assault - respondent committed child sexual assault offences against victims from 2003 to 2014 - respondent sentenced to 13 years in prison with 7 year non-parole period - DPP appealed against sentence under s5D(1) *Criminal Appeal Act 1912* (NSW) on grounds it was manifestly inadequate - held: sentence manifestly inadequate - judge made specific errors in approach to sentencing - even if errors did not cause inadequacy sentence unreasonable and plainly unjust amounting to an affront to administration of criminal justice - applicant sentenced to 18 years in prison with non-parole period of 13 years 6 months.

[Van Ryn](#)



# Benchmark

## **Songs for the People**

BY FRANCES ELLEN WATKINS HARPER

Let me make the songs for the people,  
Songs for the old and young;  
Songs to stir like a battle-cry  
Wherever they are sung.

Not for the clashing of sabres,  
For carnage nor for strife;  
But songs to thrill the hearts of men  
With more abundant life.

Let me make the songs for the weary,  
Amid life's fever and fret,  
Till hearts shall relax their tension,  
And careworn brows forget.

Let me sing for little children,  
Before their footsteps stray,  
Sweet anthems of love and duty,  
To float o'er life's highway.

I would sing for the poor and aged,  
When shadows dim their sight;  
Of the bright and restful mansions,  
Where there shall be no night.

Our world, so worn and weary,  
Needs music, pure and strong,  
To hush the jangle and discords  
Of sorrow, pain, and wrong.

Music to soothe all its sorrow,  
Till war and crime shall cease;  
And the hearts of men grown tender  
Girdle the world with peace.

[FRANCES ELLEN WATKINS HARPER](#)

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