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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)

Rigoli v Commissioner of Taxation (FCAFC) - income tax - failure to discharge onus to prove Commissioner's assessment excessive - appeal and cross-appeal dismissed (B G)

Dillon v Hair (NSWCA) - negligence - slip and fall on mat on polished floor - occupier should have taken precautions against risk of harm - occupier liable (I)

Blue Oil Energy Pty Ltd v Tan (NSWCA) - security for costs - form of security - subordination of debt agreement - leave to appeal from order for security for costs refused (I B C)

Craigcare Group Pty Ltd v Superkite Pty Ltd (NSWSC) - contract - equity - trusts and trustees - breach of agreement for disbursement of money out of trust account (I B)

Cripps v Vakras (VSC) - defamation - pleadings - article and hyperlinked article were not part of single publication - part of defence struck out (I)

Re Bacchus Distillery Pty Ltd (Administrators Appointed) (VSC) - corporations - administrators had power to sell invention with other business assets - declaration made (B)



Swansson v Harrison (VSC) - insurance policy - professional negligence - loss of amount payable under cancelled life insurance policy - insurance adviser liable - contributory negligence (I)

Summaries with links (5 minute read)

Rigoli v Commissioner of Taxation [2014] FCAFC 29

Full Court of the Federal Court of Australia

Edmonds, Jessup & McKerracher JJ

Income tax – burden of proof - appellant sought review of Commissioner's disallowance of his objections to assessments of income tax – taxpayer conceded that amounts identified by Commissioner were assessable income and sought to confine review to deductions - Administrative Appeals Tribunal upheld deductibility of certain depreciation items disallowed by Commissioner - appellant appealed from decision of primary judge that he had not discharged his burden of proving Commissioner's assessments were excessive as required by s14ZZK(b)(i) *Taxation Administration Act 1953* (Cth) - s167 *Income Tax Assessment Act 1936* (Cth) - Commissioner cross-appealed in relation to consequential orders - ss43 & 44 *Administrative Appeals Tribunal Act 1975* (Cth) - held: burden of proof not discharged by adopting concession - reasoning and conclusions of primary judge entirely correct - appeal and cross-appeal dismissed.

[Rigoli](#) (B G)

Dillon v Hair [2014] NSWCA 80

Court of Appeal of New South Wales

Macfarlan & Emmett JJA; Tobias AJA

Negligence - property manager suffered injury when she slipped on a mat at house - property manager sued occupiers and former tenant and obtained verdict against occupiers - Court gave judgment for former tenant - occupiers ordered to indemnify property manager for costs payable to former tenant - occupiers appealed from Court's finding of negligence - appellants contended a reasonable person in occupier's position would not have taken precautions or realised mat had potential to slip when trodden on - whether it was probable that harm would occur if care not taken - likely seriousness of harm - ss5B(2)(a) & 5B(2)(b) *Civil Liability Act 2002* (NSW) - held: open to primary judge to find that a reasonable person in position of occupier would have taken precautions against risk of harm - it was conceded risk of harm would be caused by an inadequately slip-resistant mat slipping on a smooth polished timber floor - finding inevitable on evidence - no error on primary judge's part demonstrated - appeal dismissed.

[Dillon](#) (I)

**Blue Oil Energy Pty Ltd v Tan [2014] NSWCA 81**

Court of Appeal of New South Wales

Beazley P & Tobias AJA

Security for costs - contract - plaintiffs claimed defendants breached directors' duties and contract - plaintiffs sought leave to appeal from decision of primary judge to grant directors' application for security for costs pursuant to r42.21(1)(d) *Uniform Civil Procedure Rules 2005* (UCPR) or s1335 *Corporations Act 2001* (Cth) - subordination agreement - form of security - whether security required to be in least disruptive or disadvantageous form - held: sufficient evidence referred to in primary judge's reasons to justify finding that there was reason to believe company would be unable to meet an order for costs - no error in primary judge's reasons for rejecting offer of subordination of debt by creditor of company as being relevant to form of security or whether it should be provided - no prospects of success on ground of appeal relating to form of security - no prospects of success in challenges to orders - summons dismissed.

[Blue Oil Energy](#) (I B C)**Craigcare Group Pty Ltd v Superkite Pty Ltd [2014] NSWSC 326**

Supreme Court of New South Wales

Hallen J

Contract - equity - costs - plaintiff claimed money it paid to lawyers acting for first defendant) for certain purposes - plaintiff claimed lawyer who was the sole director of defendant disbursed money out of its trust account otherwise than for purposes asserted by Craigcare - terms of agreement reached about money - whether trust constituted and if so whether it was breached - whether defendant aided and abetted alleged breach of trust - accessory liability - held: no dispute there was an agreement reached between parties in relation to use of money - only reasonable way to construe agreement was that firm was not to part with money except for stated purposes - if money was not used for those purposes, it was an identifiable fund capable of being recovered by plaintiff - Court not satisfied agreement required only that money be paid into firm's trust account - Court not satisfied defendant was at liberty to treat money as if it were its own under agreement - plaintiff established money imbued with a trust - balance of money was disbursed for unrelated transactions - breach of trust established - Court not satisfied accessory liability of lawyer was established or that he was jointly and severally liable with defendant to compensate plaintiff

[Craigcare Group](#) (I B)**Cripps v Vakras [2014] VSC 110**

Supreme Court of Victoria

Kyrou J

Defamation - pleadings - plaintiffs sued defendants in respect of three articles published on internet - statement in one article contained hyperlinks to another article - plaintiffs sought order striking out certain words in defence on the basis that hyperlinked article was a separate publication which did not form part of matter complained of in proceeding - whether separate items



published by a defendant about a plaintiff should be regarded as individual or composite - held: article and hyperlinked article could not reasonably be regarded as a single composite publication for purposes of law of defamation - order granted.

[Cripps](#) (I)

Re Bacchus Distillery Pty Ltd (Administrators Appointed) [2014] VSC 111

Supreme Court of Victoria

Judd J

Corporations - administrators' power of sale - patent - Bacchus was sole registered patentee of invention - administrators sought declaration pursuant to s447D(1) *Corporations Act 2001* (Cth) and r54 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) that they were entitled to sell invention as an asset of Bacchus - assignee of patent sought order under s48 *Trustee Act 1958* (Vic) appointing it as trustee of patent in substitution for or addition to Bacchus or order pursuant to ss51, 58 and/or 63 *Trustee Act* that patent be assigned by Bacchus to itself and assignee in equal shares - held: assignee's application dismissed - Bacchus had power to sell patent with other business assets - if Bacchus did not have a power of sale over patent, s437A *Corporations Act* authorised administrators to sell patent - Bacchus had no right of indemnity as trustee to recover costs and expenses incurred by it from proceeds of sale - administrators did not establish an entitlement to a lien over any proceeds from sale of patent having priority over a claim by assignee - declaration - declaration did not amount to authorisation to sell patent - assignee's interest in sale process to be supervised by Court.

[Re Bacchus Distillery](#) (B)

Swansson v Harrison [2014] VSC 118

Supreme Court of Victoria

Macaulay J

Life insurance policy - professional negligence - misleading and deceptive conduct - innocent non-disclosure - contributory negligence - apportionment - plaintiff cancelled life insurance policy and entered new policy with a different insurer - policies designed to respond if insured died or was diagnosed with a terminal illness - after terminal illness diagnosis plaintiff made claim under new policy - claim declined by insurer on basis of non-disclosure of facts material to acceptance of risk - no dispute about insurer's entitlement to avoid policy - plaintiff uninsured - defendant insurance advisers assisted plaintiff in cancelling first policy and entering second - standard of care of reasonable and prudent insurance advisor - s1041H *Corporations Act 2001* (Cth) - s12DA *Australian Securities and Investments Commission Act 2001* (Cth) - ss26, 48, 57 & 62 *Wrongs Act 1958* (Vic) - oral advice - failure to advise - held: plaintiff's loss of amount that he would have received under first policy when terminal illness diagnosed resulted partly from negligence of insurance advisers and partly from plaintiff's own failure to take reasonable care - advisers liable for his loss but that the damages recoverable by plaintiff should be reduced.

[Swansson](#) (I)



On Viewing the Skull and Bones of a Wolf

by Alexander Posey

How savage, fierce and grim!
His bones are bleached and white.
But what is death to him?
He grins as if to bite.
He mocks the fate
That bade, "Begone."
There's fierceness stamped
In ev'ry bone.

Let silence settle from the midnight sky--
Such silence as you've broken with your cry;
The bleak wind howl, unto the ut'most verge
Of this mighty waste, thy fitting dirge.

[Alexander Posey](#)

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