

Friday, 8 June 2018

## Weekly Civil Law Review

Selected from our Daily Bulletins covering Insurance, Banking, Construction & Government

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

### Executive Summary (1 minute read)

**Robinson v 470 St Kilda Road Pty Ltd** (FCAFC) - consumer law - causation - damages - apportionment - no error in findings of primary judge - appeal dismissed (I B C G)

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

**Aukuso v Tahan** (NSWCA) - negligence - motor vehicle accident - drivers equally responsible for accident - respondent's damages reduced by 50% - appeal allowed in part (B C I G)

**Winston-Smith v Chief Commissioner of State Revenue** (NSWSC) - taxation - transfer of shares - refusal of exemption under s163H *Duties Act 1997* (NSW) - refusal to remit interest under s25 *Taxation Administration Act 1996* (NSW) - proceedings dismissed (B C I G)

**Broken Hill City Council v Unique Urban Built Pty Ltd** (NSWSC) - commercial arbitration - arbitration agreement effective - application for referral of plaintiff and first defendant to arbitration granted (B C I G)

**Eades v Endeavour Energy** (NSWSC) - security for costs - representative proceedings arising from bushfire - defendants' motions for security for costs dismissed (B C I G)

**H R C Hotel Services Pty Ltd v Chief Commissioner of State Revenue** (NSWSC) - taxation -

employment - liability for payroll tax arising from arrangements for cleaning of hotels - summons dismissed (B C I 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)

**McDonald v Dunscombe** (VSC) - equity - claims in respect of property - no promissory or proprietary estoppel established - no joint endeavour established from which common intention constructive trust arose - claims dismissed (I B C G)

**Uren v Uren** (VSCA) - contract - partnership - limitations - claims for remuneration and interest upheld - leave to appeal granted - appeal dismissed (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)

**Day v Woolworths Group Limited & Ors** (QCA) - judgments and orders - slip and fall - parts of statement of claim struck out - proceeding stayed until appellant submitted to medical examination - appeal dismissed (I B C G)

**Lee v Lee; Hsu v RACQ Insurance Limited; Lee v RACQ Insurance Limited** (QCA) - negligence - motor vehicle accident - no error in finding appellant was driving vehicle at time of accident - appeals dismissed (B C I G)

**Wiesac Pty Ltd & Anor v Insurance Australia Limited** (QSC) - insurance - exclusion clauses - claims arising from flooding of basement - claims defeated by flood exclusion clause - claims dismissed (I B C G)

**Bond v Maughan** (WASC) - judicial review - mining lease - recommendation by Warden to Minister that lease be forfeited - application to amend ground of appeal dismissed - application dismissed (I B C G)

## Summaries With Link (Five Minute Read)

### **Robinson v 470 St Kilda Road Pty Ltd [2018] FCAFC 84**

Full Court of the Federal Court of Australia

McKerracher, Rangiah & Markovic JJ

Consumer law - causation - damages - apportionment - primary judge found respondent made 'misleading or deceptive and negligent' representation - appellant challenged findings on causation - appellant also challenged findings on damages and apportionment - whether

# Benchmark

primary judge erroneously failed to consider appellant's submissions concerning causation and damages - whether erroneous finding respondent's claims should not be apportioned - whether appellant 100% liable - whether appellant's liability for damages should not be 100%, but 50%, shared with company of which he was 'directing mind and will' - 'Tesco liability' - whether there could be apportionment to company for conduct of 'employee or officer' - whether evidence of wrongdoing by company - ss18, 236, 237 & 243 *Competition and Consumer Act 2010* (Cth) - Sch 2 *Australian Consumer Law* - held: no error demonstrated in decision of primary judge - appeal dismissed.

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

[From Benchmark Tuesday, 5 June 2018]

## **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)

[From Benchmark Friday, 8 June 2018]

## **Aukuso v Tahan [2018] NSWCA 117**

Court of Appeal of New South Wales

Macfarlan & Meagher JJA; Simpson AJA

Negligence - motor vehicle accident - respondent injured in motor vehicle collision - respondent was driving one vehicle - appellant was driving other vehicle - respondent claimed damages against appellant in negligence - primary judge found in respondent's favour, finding appellant was sole cause of collision and injuries - appellant sought that judgment be set aside on basis appellant was 'solely responsible' for accident - appellant alternatively contended there was contributory negligence by respondent - whether erroneous factual findings by primary judge - approach to respondent's evidence - approach to witnesses' evidence - 'conduct a real review of the trial' - s75A *Supreme Court Act 1970* (NSW) - held: Court concluded parties were equally responsible for accident - respondent's damages reduced by 50% - appeal allowed in part.

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

[From Benchmark Tuesday, 5 June 2018]

## **Winston-Smith v Chief Commissioner of State Revenue [2018] NSWSC 773**

Supreme Court of New South Wales

Emmett AJA

Taxation - proceedings concerned transfer to plaintiff taxpayer of shares in capital of company (Mac's) from liquidator of company (TCL) - plaintiff sought review of decisions of Chief Commissioner of State Revenue to decline exemption under s163H *Duties Act 1997* (NSW) (Duties Act) and decline to remit interest under s25 *Taxation Administration Act 1996* (NSW) - whether application of Ch 4 Duties Act to acquisition 'would not be just and reasonable' - whether 'premium component' of interest should be remitted - whether 'wilful default' in tax payment - held: no error in decisions of Chief Commissioner - proceedings dismissed.

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

[From Benchmark Tuesday, 5 June 2018]

## **Broken Hill City Council v Unique Urban Built Pty Ltd [2018] NSWSC 825**

Supreme Court of New South Wales

Hammerschlag J

Commercial arbitration - plaintiff, pursuant to s8(1) *Commercial Arbitration Act 2010* (NSW), sought referral of first defendant and plaintiff to arbitration - no issue there was dispute between parties under dispute resolution clause of contract between them - no issue parties were parties to arbitration agreement or that action brought in matter subject of arbitration agreement - issue was whether arbitration agreement was inoperative - meaning of 'inoperative' - whether 'defect' in arbitration clause of agreement - whether arbitration agreement inoperative due to a 'defect' in arbitration clause - whether arbitration agreement inoperative because 'named appointor' did not exist - held: Court satisfied arbitration agreement effective even if clause did not operate - plaintiff and first defendant referred to arbitration.

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

[From Benchmark Wednesday, 6 June 2018]

## **Eades v Endeavour Energy [2018] NSWSC 801**

Supreme Court of New South Wales

Garling J

Security for costs - representative action - plaintiff brought action under Pt 10 *Civil Procedure Act 2005* (NSW) in negligence against company ('Endeavour Energy') in relation to bushfire - plaintiff joined two more companies as defendants ('Asplundh Tree Expert' and 'Pinnacle') - defendants denied negligence - defendants sought security for costs - r42.21 *Uniform Civil Procedure Rules 2005* (NSW) - identification of group members - estimation of defendants' legal costs - stultification - prospects of success - onus - 'genuineness of the proceedings' - whether plaintiff impecunious - cause of impecuniosity - whether capacity to meet adverse costs order - held: Court not satisfied to grant security for costs - motions dismissed.

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

[From Benchmark Wednesday, 6 June 2018]

## **H R C Hotel Services Pty Ltd v Chief Commissioner of State Revenue [2018] NSWSC 820**

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Supreme Court of New South Wales

Ward CJ in Eq

Taxation - employment - payroll tax - proceedings concerned liability for payroll tax arising from arrangements for cleaning hotels, which hotels entered with first plaintiff (HRC), or, in respect of one hotel, with other entity (Housekeeping Solutions) - dispute concerned arrangements' characterisation - defendant Chief Commissioner characterised arrangements as arrangements under which HRC/Housekeeping Solutions supplied/provided staff to hotel clients for provision of services - plaintiffs characterised arrangements as arrangements for 'production of a result' as distinguished for arrangements for provision of staff - whether arrangements were "employment agency contracts" for purposes of s37(1) *Payroll Tax Act 2007* (NSW) - whether deemed wages included payments from HRC/Housekeeping Solutions to sub-contractors or only wages paid by sub-contractors to workers - whether to confirm 25% penalty Chief Commissioner imposed in respect of certain financial years - held: Court found in favour of Chief Commissioner on all issues - plaintiffs' summons dismissed.

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

[From Benchmark Thursday, 7 June 2018]

## **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)

[From Benchmark Friday, 8 June 2018]

## **McDonald v Dunscombe [2018] VSC 283**

Supreme Court of Victoria

McMillan J

Equity - promissory estoppel - common intention constructive trust - defendant was sibling of plaintiff - plaintiff contended that defendant, and parents of plaintiff and defendant, had made representations to plaintiff that when the parents died, plaintiff and another sibling would be joint owners of a property, and defendant would be sole owner of another property - alternatively plaintiff contended defendant and parents encouraged plaintiff to work in business at property,

or that defendant and parents had mutual assumption plaintiff and other sibling would be joint owners of the property - plaintiff claimed one half share proprietary interest in property, or equitable compensation, or that defendant held plaintiff's interest in property as constructive trustee - held: no promissory or proprietary estoppel established - no joint endeavour in business established from which common intention constructive trust arose - claims dismissed.

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

[From Benchmark Monday, 4 June 2018]

## **Uren v Uren [2018] VSCA 141**

Court of Appeal of Victoria

Santamaria, Kyrou & Ashley JJA

Contract - partnership - limitations - parties established partnership to conduct cattle farm - partnership broke down - applicant sought declaration concerning partnership's dissolution, orders concerning partnership assets' sale, application of sale proceeds, and entitlements' adjustment - proceedings settled - two outstanding issues concerned whether respondent entitled to certain adjustments in his favour - applicant contended respondent's claim barred by s5(1) *Limitation of Actions Act 1958* (Vic) (Limitation of Actions Act) in respect of 'wages for work performed' before certain date - trial judge upheld respondent's remuneration and interest claims - applicant sought to appeal - whether respondent entitled to remuneration for labour - calculation of remuneration - whether respondent entitled to interest on 'capital contributions' - calculation of interest - whether waiver of defence under Limitation of Actions Act - ss28 & 48 *Partnership Act 1958* (NSW) - held: certain grounds of appeal arguable - leave to appeal granted - grounds of appeal not upheld - appeal dismissed.

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

[From Benchmark Wednesday, 6 June 2018]

## **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 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)

[From Benchmark Friday, 8 June 2018]

## **Day v Woolworths Group Limited & Ors [2018] QCA 105**

Court of Appeal of Queensland

Sofronoff P, Morrison JA & Atkinson J

Judgments and orders - slip and fall - appellant brought separate proceedings arising from injuries suffered in slip and fall in supermarket - respondents sought appellant's submission to medical examinations and to strike out parts of statement of claim - appellant sought consolidation of proceedings, that proceedings be set down for trial and declaration that certificates of readiness were "false and misleading" - appellant also contended judge should have disqualified himself for apprehended bias - primary judge dismissed appellant's applications, granted order striking out parts of statement of claim, and ordered that proceeding be stayed until appellant submitted to medical examination - appellant appealed - held: no error in primary judge's orders established - appeal dismissed.

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

[From Benchmark Monday, 4 June 2018]

## **Lee v Lee; Hsu v RACQ Insurance Limited; Lee v RACQ Insurance Limited [2018] QCA 104**

Court of Appeal of Queensland

Fraser & Philippides; McMurdo JJA

Negligence - motor vehicle accident - appellant injured in car accident - appellant contended injuries caused by negligence of father as car's driver - compulsory third party insurer (respondent) defended proceedings - sole issue was whether appellant's father, or appellant was driving the car - trial judge found appellant was driving the car and dismissed appellant's claim - trial judge upheld respondent's counter-claim against appellant and parents for money paid in response to notices of claim, contending it was induced to pay money by 'deceitful representations' of appellant and parents - held: Court not persuaded trial judge erred in finding appellant was driving the vehicle - appeals dismissed.

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

[From Benchmark Wednesday, 6 June 2018]

## **Wiesac Pty Ltd & Anor v Insurance Australia Limited [2018] QSC 123**

Supreme Court of Queensland

Davies J

Insurance - exclusion clauses - plaintiffs held "Industrial Special Risks Insurance Policy" (policy) with defendant - claims arose from flooding of basement - first plaintiff claimed against policy for lost rental - second plaintiff claimed against policy for clean-up costs, fitout's replacement, loss due to business interruption and financial expenses - defendant refused claims - proper construction of policy - operation of flood exclusion clause - ss7 & 57 *Insurance*

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*Contracts Act 1984 (Cth)* - held: plaintiffs' claims were defeated by flood exclusion clause - claims dismissed.

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

[From Benchmark Tuesday, 5 June 2018]

## **Bond v Maughan [2018] WASC 162**

Supreme Court of Western Australia

Archer J

Judicial review - mining lease - second respondent sought forfeiture of mining lease which applicants held, contending applicants failed to comply with lease's expenditure conditions - applicants conceded expenditure conditions not met - Warden recommended forfeiture of lease to Minister - applicants sought judicial review - whether Warden identified wrong section of *Mining Act 1978 (WA)* as source of power - whether Warden applied wrong test - whether Warden failed to assess 'totality of the evidence' - whether Warden found applicants had burden to prove 'scientific basis for dowsing as a form of exploration' before dowsing expenditure could be accounted for - whether Warden incorrectly excluded rent from expenditure calculation and/or misunderstand when rent incurred - whether to grant leave to amend ground of appeal - whether error established on amended ground - held: application to amend refused - application dismissed.

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

[From Benchmark Thursday, 7 June 2018]

## 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



# Benchmark

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.

[View Decision](#)

## **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.

[View Decision](#)



# Benchmark

## 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.

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