

Friday, 8 June 2018

## Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

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### 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

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

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

**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

**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

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

**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

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

**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

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

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

**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

**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

**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

## 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 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](#)

[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](#)

[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](#)

[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' -

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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](#)

[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](#)

[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.

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[From Benchmark Wednesday, 6 June 2018]

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

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











# 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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