

Friday, 28 February 2020

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

Von Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber (No 2) (FCAFC) - human rights - sexual harassment - appeal from dismissal of vicarious liability claim against employer - appeal allowed

Garbett v Liu (No 2) (FCAFC) - costs - Court of Disputed Returns - dismissal of petitions - determination concerning costs and operation of s363 *Commonwealth Electoral Act 1918* (Cth) - orders made

PIA Mortgage Services Pty Ltd v King (FCAFC) - industrial law - employment contract - pecuniary penalties - *Fair Work Act 2009* (Cth) - respondent dismissed from employment - appeal allowed in part - cross-appeal allowed in part

PC Case Gear Pty Ltd v Instrat Insurance Brokers Pty Ltd (in liq) (FCA) - contract - negligence - insurance - copyright - plaintiff paid settlement sum to Microsoft in respect of copyright infringement claim concerning licences - defendant failed to properly advise plaintiff concerning copyright infringement exposure - defendant liable to pay damages to plaintiff in amount of settlement sum

Eiser Infrastructure Ltd v Kingdom of Spain (FCA) - arbitration - private international law - foreign state immunity - applicants granted leave to enforce awards against respondent

Charter Hall Real Estate Management Services (NSW) Pty Limited v State of New South Wales (NSWCA) - workers compensation - worker injured in course of employment - worker was respondent's employee - respondent entitled to be indemnified by appellant for payments it

made to worker - appeal dismissed

Wesco Ventures Pty Ltd v Cecil Developments Pty Limited (NSWSC) - contract - specific performance - order for specific performance of Deed of Release granted to plaintiffs - orders made

United Pacific Finance Pty Ltd (Receivers and Managers Appointed) v Govindasamy (NSWSC) - contract - deeds - loan - assignment - limitations - plaintiff sought to recover amounts from defendant allegedly 'payable under two loans' from company to defendant - proceedings dismissed

Kilpatrick v Head, Transport for Victoria (VSC) - land acquisition and compensation - planning and environment - 'disputed claim' under s37(8) *Land Acquisition and Compensation Act 1986* (Vic) - 'before' value of land - compensation amount determined

GG & PM Burrell Pty Ltd v Butler Market Gardens Pty Ltd (VSCA) - damages - negligence - damage to 'spring onion crop' by 'spray drift' - application for leave to appeal against award of damages - appeal dismissed

Chan & Anor v Liu & Anor (VSCA) - real property - caveat - applicants sought to appeal against dismissal of application for removal of caveat - appeal allowed

Hoch v Hoch (QSC) - contract - equity - respondent made offer to applicant - applicant accepted offer - offer contained error - compromise set aside

Carvalho v Town (ACTSC) - negligence - contributory negligence - collision between appellant's vehicle and fire engine - appeal and cross-appeal dismissed

Summaries With Link (Five Minute Read)

Von Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber (No 2) [2020] FCAFC 13

Full Court of the Federal Court of Australia

Flick, Robertson & Rangiah JJ

Human rights - sexual harassment - appellant employed by first respondent - second respondent and third respondent were employees of first respondent - appellant contended she was sexually harassed by second respondent, then 'victimised and discriminated against' by second respondent, third respondent and other employees of first respondent - appellant contended first respondent vicariously liable for sexual harassment by the employees - Federal Court dismissed proceeding against first and third respondents - judgment not delivered until

'more than six years after' trial and final submissions' delivery - appellant appealed - appellant contended judgment was unsafe due to delay in its delivery - appellant also contended reasons inadequate and that primary judge erred in finding first respondent not vicariously liable - held: appeal allowed.

[Von Schoeler](#)

[From Benchmark Monday, 24 February 2020]

Garbett v Liu (No 2) [2020] FCAFC 14

Full Court of the Federal Court of Australia

Allsop CJ; Greenwood & Besanko JJ

Costs - Court dismissed petitions brought by two petitioners - determination of costs - operation of s363 *Commonwealth Electoral Act 1918* (Cth) (Commonwealth Electoral Act) in light of findings of Court concerning s329(1) Commonwealth Electoral Act - whether petitioners should pay own costs 'as well as' first respondents' costs - whether 'some or all of the costs' of petitioners and first respondents should be paid by Commonwealth - Court of Disputed Returns - whether to direct Chief Executive and Principal Registrar 'to act as contemplated by' s363 Commonwealth Electoral Act - held: orders made.

[Garbett](#)

[From Benchmark Monday, 24 February 2020]

PIA Mortgage Services Pty Ltd v King [2020] FCAFC 15

Full Court of the Federal Court of Australia

Rangiah, Charlesworth & Snaden JJ

Industrial law - contract - respondent was first appellant's former chief executive officer - second appellant was first appellant's 'sole director and shareholder' - respondent's employment terminated - respondent contended first appellant's termination of his employment contravened s340(1) *Fair Work Act 2009* (Cth), that second appellant was accessory to contravention and that first appellant contravened s90(2) Fair Work Act by failure to pay respondent amount of accrued 'untaken annual leave entitlements' - primary judge found for respondent and awarded respondent statutory compensation of \$100,000.00 (liability judgment) - pecuniary penalty imposed on appellants for contravention of s90(2) Fair Work Act (penalty judgment) - first appellant and respondent appealed from liability judgment and penalty judgment - whether respondent dismissed in contravention of s340(1) Fair Work Act - whether, if there was contravention, respondent suffered loss due to contravention - whether penalty manifestly excessive - whether compensation insufficient - whether damages for breach of contract should have been awarded to respondent - whether Court should have imposed penalty on appellants for contraventions of s340(1) Fair Work Act - held: penalty for breach of s90(2) was manifestly excessive - Court should have imposed penalty for contraventions of s340(1) Fair Work Act - first appellant entitled to terminate contract of employment - compensation amount of \$100,000 not disturbed - appeal allowed in part - cross-appeal allowed in part.

[PIA](#)

[From Benchmark Thursday, 27 February 2020]

PC Case Gear Pty Ltd v Instrat Insurance Brokers Pty Ltd (in liq) [2020] FCA 137

Federal Court of Australia

Anderson J

Contract - negligence - insurance - copyright - plaintiff sold computers with pre-installed 'Microsoft Corporation's Windows operating system' ('Windows') - plaintiff purchased Windows licences from third party - Microsoft issued letter of demand alleging plaintiff breached copyright in respect of licences - appellant settled claim - plaintiff paid Microsoft \$250,000 ('settlement sum') - defendant provided insurance plans to plaintiff - plans had 'expressly excluded cover for copyright infringement' - plaintiff not covered for settlement's sum's payment to Microsoft - plaintiff sued defendant in negligence and breach of contract - held: defendant breached its 'duties in contract and tort to exercise reasonable skill and care' - defendant negligently failed to advise plaintiff properly of plaintiff's 'exposure to copyright infringement' - if defendant had raised risk in respect of copyright infringement, plaintiff would have taken out 'relevant insurance cover' - defendant's breach had caused payment of settlement sum to Microsoft - settlement sum reasonable - no contributory negligence - negligent use of licences by plaintiff not established - defendant liable to pay damages to plaintiff in amount of settlement sum.

[PC Case Gear](#)

[From Benchmark Thursday, 27 February 2020]

Eiser Infrastructure Ltd v Kingdom of Spain [2020] FCA 157

Federal Court of Australia

Stewart J

Arbitration - private international law - two cases - applicants sought to enforce 'substantial arbitral awards' against respondent - respondent resisted enforcement of awards in reliance on 'foreign state immunity' - awards were made by 'tribunals appointed under the auspices of International Centre for the Settlement of Investment Disputes (ICSID) - ICSID established under Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('Investment Convention) - whether 'apparent inconsistency' between s9 *Foreign States Immunities Act 1985* (Cth) and Art 54 Investment Convention could be resolved - s32 *International Arbitration Act 1974* (Cth) (International Arbitration Act) - held: respondent's foreign state immunity claim failed - applicants granted leave under s35(4) International Arbitration Act to enforce awards.

[Eiser](#)

[From Benchmark Thursday, 27 February 2020]

Charter Hall Real Estate Management Services (NSW) Pty Limited v State of New South Wales [2020] NSWCA 26

Court of Appeal of New South Wales

Macfarlan & White JJA; Simpson AJA

Workers compensation - worker injured in course of employment - worker was respondent's employee - primary judge found respondent entitled to be indemnified by appellant for payments

it made to worker - appellant appealed - no dispute appellant assumed occupier's obligation in respect of worker's safety - whether appellant had 'actual knowledge' of risk of harm - whether risk of harm 'not insignificant' - whether appellant breached duty of care to worker - whether respondent breached duty of care to worker - s151Z(1)(d) *Workers Compensation Act 1987* (NSW) - *Civil Liability Act 2002* (NSW) - held: appeal dismissed.

[View Decision](#)

[From Benchmark Thursday, 27 February 2020]

Wesco Ventures Pty Ltd v Cecil Developments Pty Limited [2020] NSWSC 98

Supreme Court of New South Wales

Ball J

Contract - specific performance - defendants and plaintiffs entered agreement by which defendants obtained interest in 'proposed development' from plaintiffs - under agreement third defendant agreed to pay third plaintiff sum on gazettal of amendment to environmental plan - plaintiffs contended defendants should take 'certain steps' to achieve gazettal and trigger obligation to pay sum - two agreements sued on by plaintiffs: Deed of Release and Voluntary Planning Agreement (VPA) - defendants contended plaintiffs had not established breach of contract, link between VPA's registration and gazettal, or any loss - defendants also contended 'not all parties' to VPA had been joined - defendants also objected to form of order - held: plaintiffs granted order for specific performance of clause of Deed of Release in terms sought with exception that defendants given '28 days to comply' - orders made.

[View Decision](#)

[From Benchmark Monday, 24 February 2020]

United Pacific Finance Pty Ltd (Receivers and Managers Appointed) v Govindasamy [2020] NSWSC 128

Supreme Court of New South Wales

Henry J

Contract - deeds - loan - assignment - limitations - plaintiff sought to recover amounts from defendant allegedly 'payable under two loans' from company (FEA) to defendant to enable defendant to invest in 'Plantations Projects' - plaintiff claimed it was assignee of FEA's rights concerning loans - whether FEA and defendant entered loan agreements - if FEA and defendant entered loan agreements, whether the agreements were 'binding deeds of loan or loan contracts' - whether plaintiff established loan funds were advanced to defendant or on behalf of defendant - whether plaintiff was 'time-barred' from recovering amounts from defendant - whether 'valid and binding deeds of loan' created by defendant's execution of 'finance application forms' - whether defendant entered loan contracts in relation to finance for 'Plantation Projects' and, if so, whether funds advanced under contracts - held: proceedings dismissed.

[View Decision](#)

[From Benchmark Friday, 28 February 2020]

Kilpatrick v Head, Transport for Victoria [2020] VSC 53

Supreme Court of Victoria

Garde J

Land acquisition and compensation - planning and environment - part of plaintiff's land was reserved for 'public purpose' under 'Public Acquisition Overlay 5' to planning scheme - plaintiff, under s98(1)(a) *Planning and Environment Act 1987* (Vic) (PE Act), claimed compensation for financial loss, expenses under s101PE Act and interest under s60(1) *Supreme Court Act 1986* (Vic) - claim became 'disputed claim' under s37(8) *Land Acquisition and Compensation Act 1986* (Vic) - determination of claim - parties had agreed on land's 'after' value and 'all other matters' with exception of land's 'before' value of land - determination of 'before' value of land - held: compensation amount determined.

[Kilpatrick](#)

[From Benchmark Tuesday, 25 February 2020]

GG & PM Burrell Pty Ltd v Butler Market Gardens Pty Ltd [2020] VSCA 31

Court of Appeal of Victoria

Beach, Kyrou & Kaye JJA

Damages - negligence - respondent claimed damages from applicant for loss of 'spring onion crop' due to 'spray drift' and for additional losses and costs - trial judge found in respondent's favour - damages assessed at \$1,346,570 - damages 'in nature of interest' assessed at \$374,588.63 - applicant sought to appeal against award of damages - 'yield issue' - 'market issues' - whether erroneous finding respondent 'bought and transported spring onions from Queensland at a loss' - held: leave to appeal granted only in respect of yield issue - appeal dismissed.

[GG & PM](#)

[From Benchmark Wednesday, 26 February 2020]

Chan & Anor v Liu & Anor [2020] VSCA 28

Court of Appeal of Victoria

Beach, Kyrou & Kaye JJA

Real property - caveat - first respondent 'agreed to purchase' applicants' property - parties in dispute concerning whether they agreed to extend settlement date - applicants sought to rescind contract - first respondent lodged caveat - first respondent contended rescission invalid because settlement date had been extended - applicants sought to remove caveat - primary judge dismissed application, finding first respondent established 'serious issue to be tried' as to whether first respondent had 'caveatable interest', and that balance of convenience favoured caveat's maintenance - applicants sought to appeal - applicants contended primary judge erred in finding first respondent had 'prima facie case of an interest' in property which was 'sufficient to justify the caveat' - whether, as result of respondent's conduct, first respondent was 'precluded from seeking' contract's specific performance - doctrine of election - estoppel - balance of convenience - whether first respondent's conduct 'nullified' arrangement to extend settlement date - held: appeal allowed.

[Chan](#)

[From Benchmark Thursday, 27 February 2020]

Hoch v Hoch [2020] QSC 9

Supreme Court of Queensland

Brown J

Contract - equity - parties owned property ('Kerand') as tenants in common in equal shares - applicant sought order for Kerand's 'partition or sale' - Court ordered vesting of property in trustees 'statutory trust for partition' - trustees proposed Scheme of Partition - respondent sought variation of Scheme of Partition - applicant offered to resolve matter - respondent rejected and made counter offer - applicant accepted counter offer - respondent's solicitors notified applicant's solicitors that offer 'contained an error' - applicant accepted that offer contained 'serious and fundamental mistake' but sought to enforce settlement - respondent contended offer unenforceable - alternatively respondent sought that offer be set aside - held: Court satisfied to set compromise aside - respondent or respondent's solicitor to pay applicant's costs thrown away.

[Hoch](#)

[From Benchmark Monday, 24 February 2020]

Carvalho v Town [2020] ACTSC 1

Supreme Court the Australian Capital Territory

Mossop J

Negligence - appellant's vehicle collided with fire engine - appellant sued first respondent driver and second respondent insurer - second respondent counterclaimed against appellant for recovery of costs of repairs to fire engine - Magistrate found first respondent negligent - Magistrate found contributory negligence by appellant assessed at 60%. - second respondent entitled to recover repair costs with reduction of 40% for first respondent's contributory negligence - appellant granted judgment in sum of \$12,429.93 - appellant appealed and respondents cross-appealed - appellant also sought to amend Statement of Claim and Statement of Particulars and to adduce further evidence - held: permission to amend refused - documents not admitted as further evidence - appeal and cross-appeal dismissed.

[Carvalho](#)

[From Benchmark Monday, 24 February 2020]



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On an Hour-Glass

By: John Hall (1627–1656)

MY life is measur'd by this glass, this glass
By all those little sands that thorough pass.
See how they press, see how they strive, which shall
With greatest speed and greatest quickness fall.
See how they raise a little mount, and then
With their own weight do level it again.
But when th' have all got thorough, they give o'er
Their nimble sliding down, and move no more.
Just such is man, whose hours still forward run,
Being almost finish'd ere they are begun;
So perfect nothings, such light blasts are we,
That ere we're aught at all, we cease to be.
Do what we will, our hasty minutes fly,
And while we sleep, what do we else but die?
How transient are our joys, how short their day!
They creep on towards us, but fly away.
How stinging are our sorrows! where they gain
But the least footing, there they will remain.
How groundless are our hopes, how they deceive
Our childish thoughts, and only sorrow leave!
How real are our fears! they blast us still,
Still rend us, still with gnawing passions fill;
How senseless are our wishes, yet how great!
With what toil we pursue them, with what sweat!
Yet most times for our hurts, so small we see,
Like children crying for some Mercury.
This gapes for marriage, yet his fickle head
Knows not what cares wait on a marriage bed:
This vows virginity, yet knows not what
Loneness, grief, discontent, attends that state.
Desires of wealth another's wishes hold,
And yet how many have been chok'd with gold?
This only hunts for honour, yet who shall
Ascend the higher, shall more wretched fall.
This thirsts for knowledge, yet how is it bought?
With many a sleepless night, and racking thought.
This needs will travel, yet how dangers lay
Most secret ambuscados in the way?
These triumph in their beauty, though it shall



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Like a pluck'd rose or fading lily fall.
Another boasts strong arms: 'las! giants have
By silly dwarfs been dragg'd unto their grave.
These ruffle in rich silk: though ne'er so gay,
A well-plum'd peacock is more gay than they.
Poor man! what art? A tennis-ball of error,
A ship of glass toss'd in a sea of terror;
Issuing in blood and sorrow from the womb,
Crawling in tears and mourning to the tomb:
How slippery are thy paths! How sure thy fall!
How art thou nothing, when th' art most all!

[https://en.wikipedia.org/wiki/John_Hall_\(poet\)](https://en.wikipedia.org/wiki/John_Hall_(poet))

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