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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)

May v Military Rehabilitation and Compensation Commission (FCA) - Comcare legislation - *injury* - failure to raise question of law on appeal - appeal dismissed (I G)

In the matter of Glass Recycling Pty Ltd (ACN 001 332 654) (NSWSC) - corporations - company demonstrated it was no longer insolvent - winding up terminated (B C)

Wardy v Salier (NSWSC) - wills - family provision - assets of family trust designated as notional estate - provision order - legacies (B)

In the matter of All Class Insurance Brokers Pty Ltd (in liq); Vardy v Westpac Banking Corporation (NSWSC) - corporations - liquidator's application for judicial advice on dealing with money in trust account - directions and orders (I B)

Bolitho v Banksia Securities Ltd (No 2) (VSC) - pleadings - group proceeding - non-disclosure of material in company prospectuses - amendment of statement of claim allowed in part (I B)

Scald Pty Ltd v Turner Developments Pty Ltd (ACTSC) - contract - multi-party loan agreement - no common intention to execute agreement in terms pleaded in counterclaim - rectification refused (B C)

Zwambila v Wafawarova (ACTSC) - defamation - contravention of orders for answering interrogatories and discovery - defendant prevented from defending proceedings (I)

Summaries with links (5 minute read)

May v Military Rehabilitation and Compensation Commission [2014] FCA 406

Federal Court of Australia

Buchanan J

Administrative law – Comcare legislation - appellant unable to continue in a career in Royal Australian Air Force because he developed disabling symptoms including vertigo which he attributed to vaccinations received during service - made claim for compensation under *Safety, Rehabilitation and Compensation Act 1988* (Cth) - Administrative Appeals Tribunal rejected appellant's claim - whether appellant was disabled due to an *injury* - ss4, 6A & 6A(2)(b) - held: Tribunal did not add an additional test to statutory test for *injury* - Tribunal found as a fact that appellant had not established he suffered an injury - Tribunal's finding it was not satisfied that symptoms corresponded to an injury was finding of fact which involved no error of law - Tribunal took into account argument that inference arose from temporal proximity of symptoms with vaccinations but did not accept that an injury had occurred - no misunderstanding of any relevant legal principle including the appropriate standard of proof - appeal failed to state a relevant question of law - appeal dismissed.

[May](#) (I G)

In the matter of Glass Recycling Pty Ltd (ACN 001 332 654) [2014] NSWSC 439

Supreme Court of New South Wales

Brereton J

Corporations - winding up - plaintiff and wife were directors of company which carried on glass recycling business and property development - property development unsuccessful - liquidators concluded company had failed to maintain adequate financial records but that on balance company did not trade while insolvent - plaintiff sought order terminating winding up pursuant to s482 *Corporations Act 2001* (Cth) in order to resume trading in glass crushing and recycling business - liquidators neither supported nor opposed application - held: director's undertaking to contribute equity to company moved state of affairs from position of *bare solvency* to a demonstration of solvency in substance - it was reasonable having regard to interests of potential future creditors and to public interest that company be returned to the control of its directors - winding up terminated.

[Glass Recycling Pty Ltd](#) (B C)



Wardy v Salier; Wardy v Salier; Wardy v Estate of late Wardy, developer and Ch 3 of the Succession Act 2006 [2014] NSWSC 473

White J

Wills and estates - family provision - widow and two (of six) sons claimed provision out of estate or notional estate - plaintiffs sought order that assets of family trust were liable to be designated as notional estate - deceased was director of trustee and appointer of trust with power to replace trustee - another son of deceased became appointer on father's death - whether will displaced statutory order for payment of debts, funeral and testamentary expenses - determination of value of plaintiffs' entitlements - ss55, 75-77, 80, 83, & 87-89 *Succession Act 2006* (NSW) - ss21-23 *Family Provision Act 1982* (NSW) - held: assets of trust liable to be designated as notional estate and net assets to be taken into account in determining adequate provision for plaintiffs - provision order made for widow - plaintiff sons to receive legacies - burden of orders for provision to be borne out of appointer's entitlements under will so far as it extended and otherwise out of notional estate - appointer's entitlements under will to be augmented by shares plaintiff sons would otherwise have received under will but for orders for but without disturbing interim distributions made.

[Wardy](#) (B)

In the matter of All Class Insurance Brokers Pty Ltd (in liq); Vardy v Westpac Banking Corporation [2014] NSWSC 475

Supreme Court of New South Wales

White J

Corporations - liquidator of broker sought directions and advice as to disposition of money in a trust account under s511 *Corporations Act 2001* (Cth) and s63 *Trustee Act 1925* (NSW) - broker's financial services licence cancelled - broker established trust account into which money paid by or on behalf of or for benefit of clients - trust allowed to go into debit - creditors being insurers and premium funding lenders claimed to be beneficially entitled to share in money - how money in trust should be dealt with - ss479, 511, 764A, 766A, 766C & 981A-981H *Corporations Act 2001* (Cth) - s28 *Insurance (Agents and Brokers) Act 1984* (Cth) - held: trust account was only asset available to liquidator - liquidator justified in dealing with money by retaining sum sufficient to pay his reasonable remuneration and expenses properly incurred in administering trusts - balance of money in account to be distributed between creditors pro rata according to claims as liquidator might properly determine - directions and orders made.

[Class Insurance Brokers Pty Ltd](#) (I B)

Bolitho v Banksia Securities Ltd (No 2) [2014] VSC 184

Supreme Court of Victoria

Ferguson J

Pleadings - group proceedings - trusts and trustees - financial services - plaintiff sued on behalf of persons who held debentures issued by company and who suffered loss and damage as a result of defendants' conduct in relation to non-disclosure of material and adverse matters in three



prospectuses issued by company - plaintiff sought leave to file further amended statement of claim - application opposed by defendant trustee for company debenture holders and defendant auditors of company - held: leave refused to file proposed pleading against trustee concerning mixing of trust assets as trustee not alleged to hold assets on trust - alleged contraventions by trustee of s283DA *Corporations Act 2001* (Cth) concerning reasonable diligence obligations not properly identified - claim against auditors in relation to statement in prospectus under s729(1) was not deficient pleading and should be allowed to proceed - not just to shut out plaintiff at pleading stage where claim could not be said to have no reasonable prospect of success - application allowed in part.

[Bolitho](#) (I B)

Scald Pty Ltd v Turner Developments Pty Ltd [2014] ACTSC 72

Supreme Court of the Australian Capital Territory

Master Harper

Equity - rectification - multi-party loan agreement - joint venture for development of apartment complex - plaintiff was party to and lender to joint venture - first defendant was joint venture vehicle - other defendants were lenders to joint venture - joint venture did not make profit - insufficient funds to repay borrowings in full - common ground that available funds should be used to repay outstanding borrowings to extent possible - dispute about how much plaintiff was entitled to be paid - determination of counterclaim in which defendants particularised what they claimed was *true agreement* to – and asserted repayments had been made under it – defendants asserted they were owed additional amounts - whether agreement should be rectified - held: Court satisfied that mistake was made in preparation of the loan agreement - all parties executed a loan agreement which was unlikely to have been what any of them intended - Court not satisfied that there was an intention which was common to all other parties to the agreement to execute an agreement with terms pleaded in counterclaim – counterclaim for rectification dismissed.

[Scald Pty Ltd](#) (B C)

Zwambila v Wafawarova [2014] ACTSC 73

Supreme Court of the Australian Capital Territory

Penfold J

Defamation - pleadings - discovery - plaintiff was Zimbabwean Ambassador to Australia - action in defamation arising from publication by defendant of article in Zimbabwean newspapers and republication on defendant's website - plaintiff sought to strike out defence to amended statement of claim for defendant's failure to comply with orders in relation to discovery and interrogatories - held: Court satisfied defendant contravened orders - defendant had no excuse for contraventions - no basis for exercise of discretion to give defendant further chance to comply - appropriate to make order under r671 *Court Procedures Rules 2006* (ACT) preventing defendant from defending proceeding - order made.

[Zwambila](#) (I)

**To the Cuckoo**

By William Wordsworth

O blithe New-comer! I have heard,
I hear thee and rejoice.
O Cuckoo! shall I call thee Bird,
Or but a wandering Voice?

While I am lying on the grass
Thy twofold shout I hear;
From hill to hill it seems to pass,
At once far off, and near.

Though babbling only to the Vale
Of sunshine and of flowers,
Thou bringest unto me a tale
Of visionary hours.

Thrice welcome, darling of the Spring!
Even yet thou art to me
No bird, but an invisible thing,
A voice, a mystery;

The same whom in my school-boy days
I listened to; that Cry
Which made me look a thousand ways
In bush, and tree, and sky.

To seek thee did I often rove
Through woods and on the green;
And thou wert still a hope, a love;
Still longed for, never seen.

And I can listen to thee yet;
Can lie upon the plain
And listen, till I do beget
That golden time again.

O blessèd Bird! the earth we pace
Again appears to be



An unsubstantial, faery place;
That is fit home for Thee!

[William Wordsworth](#)

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