



Tuesday, 17 February 2015

## Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Lavin v Toppi** (HCA) - guarantee - sureties entitled to recover contribution from co-sureties despite creditor's covenant not to sue co-sureties - appeal dismissed (I B)

**Sydney Night Patrol & Inc Co v Absolom** (NSWSC) - worker's compensation - jurisdictional error by Medical Appeal Panel - decision quashed (I G)

**Falkingham v Peninsula Kingswood Country Golf Club** (VSCA) - corporations - oppressive conduct - laches - acquiescence - delay - appeal dismissed (I B)

**Di Paolo v Salta Constructions Pty Ltd** (VSC) - choice of law - workplace injury - limitations - uniform cross-border compensation legislation (I C)

**James as Administrator of ZYL LTD** (WASC) - corporations - resolution appointing administrator without statutory minimum number of directors - appointment confirmed (I B)

**Docking v Schwarzkopf** (SASC) - Wills - deceased lacked testamentary capacity to make 2007 Will - orders pronouncing force and validity of 1989 Will (B)

**Stewart v Ackland** (ACTCA) - negligence - student injured performing backward somersault on jumping pillow on farm – occupiers of farm who conducted amusement park business liable - appeal dismissed (I)

## Summaries with links (5 Minute Read)

### **Lavin v Toppi [2015] HCA 4**

High Court of Australia

French CJ; Kiefel, Bell, Gageler & Keane JJ

Guarantee - contribution in equity - bank consolidated loans into loan to company - parties were guarantors of loan - bank made demands on guarantors - demand not met - bank sued guarantors - appellants and bank entered deed of release and settlement - bank covenanted not to sue appellants if first appellant paid minor portion of debt - first appellant paid portion - respondents paid remaining debt - respondents claimed contribution from appellants in respect of payment in excess of their proportionate share of debt - coordinate liabilities - held: Court of Appeal of New South Wales correct to hold bank's covenant not to sue did not extinguish appellants' liability under guarantee - respondents' entitlement in equity to contribution from time parties were called upon to satisfy guarantee could not be defeated by bank giving appellants covenant - appeal dismissed.

[Lavin \(I B\)](#)

### **Sydney Night Patrol & Inc Co v Absolom [2015] NSWSC 60**

Supreme Court of New South Wales

Harrison AsJ

Workers compensation - plaintiff sought judicial review of decision of Medical Appeal Panel due to its failure to convene open oral assessment hearing - plaintiff sought to quash decision on basis Appeal Panel failed to take into account a matter it was required to take into account when determining not to hold hearing on erroneous understanding that parties consented to matter being determined on the papers - held: Appeal Panel failed to take into account mandatory consideration whether or not to conduct hearing where party could make oral submissions - jurisdictional error established - decision quashed.

[Sydney Night Patrol & Inc Co \(I G\)](#)

### **Falkingham v Peninsula Kingswood Country Golf Club [2015] VSCA 16**

Court of Appeal of Victoria

Warren CJ; Whelan & Beach JJA

Corporations - oppression - members of golf club passed ordinary resolution directing and empowering board of directors to give effect to merger of their club with another club - appellant member of golf club sought relief and declarations under oppression provisions of *Corporations Act 2001* (Cth) - trial judge found board exercised its power to admit new members for purpose other than that for which power had been conferred and that the conduct was oppressive - Court however refused relief and dismissed proceeding because of laches, acquiescence and delay - ss232 & 233 - held: parties accepted that decision on laches, acquiescence and delay was a discretionary judgment - appellant failed to establish error to overturn judgment - trial judge correct in finding board exercised its power for purpose other than that for which it was conferred by the Constitution - appeal dismissed.

[Falkingham](#) (I B)

## **Di Paolo v Salta Constructions Pty Ltd [2015] VSC 31**

Supreme Court of Victoria

Ginnane J

Choice of law - limitations - plaintiff sued defendants for workplace injuries sustained in Perth - plaintiff was resident of the State of Victoria and working in Perth at time of accident - plaintiff contended law of Victoria governed proceeding - effect of national uniform legislation for coverage of workers operating temporarily in another jurisdiction - limitation period governing claims - ss80, 129MA & 129MB *Accident Compensation Act 1985* (Vic) – ss20, 93AA, 93AB *Workers' Compensation and Injury Management Act 1981* (WA) (WCIMA) - held: plaintiff's claims governed by substantive law, including applicable limitation periods, of common law of Western Australia, unmodified by Div 1a Pt IV *Workers' Compensation and Injury Management Act 1981* (WA).

[Di Paolo](#) (I C)

## **James as Administrator of ZYL LTD [2015] WASC 57**

Supreme Court of Western Australia

Master Sanderson

Corporations - plaintiff appointed administrator of company by resolution of company pursuant to s436A *Corporations Act 2001* (Cth) - plaintiff sought orders addressing uncertainty he considered existed in relation to validity of resolution and appointment - ss201A, 447A, 447C, 1311 & 1312 - requisite number of directors under s201A(2) - held: Court satisfied there was breach of s201A(2) - it was arguable resolution passed was invalid - pt 5.3A of the Act operated to effect that notwithstanding non-compliance with s201A(2) plaintiff was validly appointed as administrator of company pursuant to s436A - directors had acted bona fide - no-one was prejudiced by decision - appointment of administrator confirmed.

[James](#) (I B)

## **Docking v Schwarzkopf [2015] SASC 18**

Supreme Court of South Australia

Stanley J

Wills - deceased died in 2009 - in 1989 deceased made Will appointing plaintiff as the sole executor of estate - in 2007 deceased made document purporting to be Will revoking all former Wills and testamentary dispositions - document appointed defendant sole executor - plaintiff sought to have 1989 will admitted to probate - testamentary capacity - held: 2007 executed in accordance with *Wills Act 1936* (SA) - there was evidence establishing deceased lacked testamentary capacity at time of making 2007 Will - there was presumption arising from proper execution of 1989 will that the deceased had testamentary capacity at that time - orders pronouncing force and validity of 1989 Will.

[Docking](#) (B)



**Stewart v Ackland [2015] ACTCA 1**

Court of Appeal of New South Wales

Penfold J; Walmsley & Robinson AJJ

Negligence - appellants were owner/occupiers of farm on which they conducted business involving amusement park - respondent university student injured when performing aerial backward somersault on jumping pillow owned by owner/occupiers - trial judge found owner/occupiers liable for respondent's injuries - held: trial judge correctly decided activity in which respondent was engaged when injured was a *dangerous recreational activity* - no error in finding that risk was not *obvious* - open to trial judge to find breach of duty by appellants and that causation established - appeal dismissed.

[Stewart](#) (I)

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