

Friday 20 June 2014

## Insurance, Banking, Construction & Government

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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#### Executive Summary (1 minute read)

**Inghams Enterprises Pty Ltd v Lakovska** (NSWCA) - workers compensation - Medical Appeal Panel - procedural fairness - leave to appeal refused (I G)

**University of New South Wales v AAI Ltd** (NSWCA) - dust diseases - liability of insurers - insolvency refusal to appoint insurer as *designated insurer* - leave to appeal refused (I)

**Walsh v Walgett Shire Council** (NSWSC) - evidence - business record - tender of document made in connection with criminal investigation rejected (I)

**PPK Willoughby v Eighty Eight Construction** (NSWSC) - security of payments - no failure to exercise statutory power - challenge to adjudicator's determination failed (C)

**The Palace Gallery Pty Ltd v WorkCover Premium Review Panel** (SASCFC) - judicial review - *workers* - entertainment venue required to pay WorkCover levy - appeal dismissed (I G)

**Caltex Australia Petroleum Pty Ltd v City of Holdfast Bay** (SASCFC) - proposed development not a non-complying use for purpose of development plan - appeal allowed (C)



**Twining v Curtis (ACTCA)** - injurious falsehood - security for costs of appeal ordered (I)

## Summaries with links (5 minute read)

### **Inghams Enterprises Pty Ltd v Lakovska [2014] NSWCA 194**

Court of Appeal of New South Wales

Basten, Barrett & Gleeson JJA

Administrative law - workers compensation - medical appeal - worker suffered acute back pain in course of employment - employer admitted liability for compensation but there was no agreement about degree of impairment - approved medical specialist (AMS) discounted assessment for pre-existing condition - after challenge by both parties, Workers Compensation Commission referred matter back to AMS under s329 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) who reduced WPI to 8% - Medical Appeal Panel found degenerative condition had not contributed to impairment and assessed whole person impairment WPI at 15% - held: Appeal Panel's review conducted within limits set by s328(2) - Appeal Panel did not err in declining to convene oral hearing - no denial of procedural fairness - summons for leave to appeal dismissed.

[Inghams Enterprises Pty Ltd](#) (I G)

### **University of New South Wales v AAI Ltd [2014] NSWCA 153**

Court of Appeal of New South Wales

Basten & Leeming JJA; Ball J

Dust diseases - insurance - worker diagnosed with mesothelioma after exposure to asbestos in course of employment with university and sued employer in Dust Diseases Tribunal - employer settled and sought order appointing respondent as *designated insurer* under s151AC *Workers Compensation Act 1987* (NSW) - four insurers provided cover to employer during period of exposure- two insurers were insolvent and respondent had assumed obligations of third - DDT found there was no dispute within s151AC about which insurer was liable because only one insurer remained and declined to make order - whether s151AC applied where there was only one solvent insurer among a number of insurers - held (by majority): s151AC did not apply unless there was more than one insurer that was party to dispute when dispute arose as to which insurer was liable under s151AB - no prejudice suffered by employer as consequence of refusal to make the order it sought - leave to appeal refused.

[University of New South Wales](#) (I G)

### **Walsh v Walgett Shire Council [2014] NSWSC 812**

Supreme Court of New South Wales

McDougall J

Evidence - plaintiff claimed damages for injuries suffered in empty pool - plaintiff sought to rely on answers to questions posed by WorkCover under s155 *Work Health & Safety Act 2011* (NSW) -



whether document was *business record* under s69 *Evidence Act* 1995 (NSW) - effect of s69(3)(b) which provided exception to hearsay rule did not apply to representations made in connection with criminal proceeding - held: WorkCover's investigation related to a criminal proceeding - document should not be admitted by reason of s69(3)(b) - strong discretionary reasons for refusing to admit evidence - Court would also reject tender of document under s135 - tender rejected.

[Walsh](#) (I)

## **PPK Willoughby Pty Limited v Eighty Eight Construction Pty Limited [2014] NSWSC 760**

Supreme Court of New South Wales

McDougall J

Security of payments - payment dispute under *Building and Construction Industry Security of Payment Act* 1999 (NSW) - principal challenged adjudicator's determination on basis that adjudicator did no more than adopt Superintendent's valuation of work - contractor contended Superintendent had no power to issue another payment certificate in absence of progress claim - *business day* - *working day* - held: adjudicator considered relevant statutory and contractual provisions, relevant reason for non-payment and submissions and material in support of that reason - challenge to adjudicator's determination failed - last day for contractor to submit progress claim had not passed when Superintendent purported to issue payment certificate - certificate had no legal force as between parties - principal's claims failed.

[PPK Willoughby Pty Limited](#)(C)

## **The Palace Gallery Pty Ltd v WorkCover Premium Review Panel [2014] SASCFC 60**

Full Court of the Supreme Court of South Australia

Kourakis, Gray & Bampton JJ

Judicial review - operator of strip-tease venue sought judicial review of decision of WorkCover Premium Review Panel that it was liable to pay WorkCover levy on remuneration it paid DJs and showgirls - whether DJs and showgirls fell within extended definition of *worker* under *Workers Rehabilitation and Compensation Act* 1986 (SA) as they met criteria set out in reg 5(1)(f) *Workers Rehabilitation and Compensation (Claims and Registration) Regulations* 1999 (SA) - whether Panel erred in finding items used by showgirls and DJs were not materials - *value of any materials supplied* - held: purpose of reg 5 was to extend persons to whom Act applied beyond common law employees - disputed items were not *materials* within meaning of reg 5(1)(f) - appeal dismissed.

[The Palace Gallery Pty Ltd](#) (I G)

## **Caltex Australia Petroleum Pty Ltd v City of Holdfast Bay [2014] SASCFC 59**

Full Court of the Supreme Court of South Australia

Kourakis CJ; Bampton & Parker JJ

Environment and planning - service station owner appealed from decision of Environment Resources and Development Court confirming Council's decision that proposed development on existing site was non-complying use for purposes of development plan - ss33, 34, 35 & 86 *Development Act* 1993 (SA) - held: if proposed development did not effect change in existing use

no cause to ask whether development reasonable - neither building work nor additional shopping and parking spaces changed use of land - planning use of land remained that of petrol filling station and shop - proposed development was a continuation of existing non-complying use of site and not a non-complying use purpose of development plan - appeal allowed.

[Caltex Australia Petroleum Pty Ltd](#) (C)

### **Twining v Curtis [2014] ACTCA 19**

Court of Appeal of Australian Capital Territory

Refshauge J

Security for costs of appeal - appellant's employment terminated and appeals unsuccessful - appellant alleged termination occurred because of respondent's false statement and appealed from dismissal of his claim for damages for injurious falsehood - respondent sought security for costs of appeal - r5302 *Court Procedures Rules 2006* (ACT) - whether statements were false, malicious or caused actual damage - held: appellant was impecunious - no delay in bringing application - respondent did not cause impecuniosity - prospects of success were poor - security for costs ordered.

[Twining](#) (I)

### **Habit**

by Hazel Hall

Last night when my work was done,  
And my estranged hands  
Were becoming mutually interested  
In such forgotten things as pulses,  
I looked out of a window  
Into a glittering night sky.

And instantly  
I began to feather-stitch a ring around the moon.

[Hazel Hall](#)

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