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

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Di Cioccio v Official Trustee in Bankruptcy (as Trustee of the Bankrupt Estate of Di Cioccio) (FCAFC) - bankruptcy - shares were *after-acquired property* which vested in Official Trustee (B)

BHP Billiton Ltd v Dunning (NSWCA) - workers compensation - worker contracted mesothelioma during employment - employer liable (I C G)

Rinehart v Rinehart (NSWSC) - preliminary discovery - subpoena issued to third party not set aside - notice of produce set aside (I C)

French v Fraser (NSWSC) - pleadings - defamation - objections to form of pleading in statement of claim (I)

Giedo van der Garde BV v Sauber Motorsport AG (VSC) - arbitration - no grounds for refusal to enforce foreign arbitral award (I B)

Goldus Pty Ltd v Australian Mining Pty Ltd (SASC) - joint venture - joint venturer not required to give notice of proposed sale of shares (I B C)

Avopiling (WA) Pty Ltd v Central Systems Pty Ltd (WASC) - contract - enforceable agreement to settle dispute (B C)

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Summaries with links (5 Minute Read)

Di Cioccio v Official Trustee in Bankruptcy (as Trustee of the Bankrupt Estate of Di Cioccio) [2015] FCAFC 30

Full Court of the Federal Court of Australia

Edmonds, Gordon & Beach JJA

Bankruptcy - appellant during bankruptcy used income below *actual income threshold amount* to acquire shares in company - Official Trustee decided shares were *after-acquired property* which vested in Official Trustee under s58(1) *Bankruptcy Act 1966* (Cth) - appellant contended shares excluded from operation of s58(1) by operation of Div 4B of Pt V - statutory construction - held: shares were *after-acquired property* - vested in Official Trustee under s58(1) - bankrupt entitled to retain income derived *below actual income threshold amount* applicable to bankrupt - Act did not prohibit bankrupt from acquiring specific item of property - Act deemed that after-acquired property vested in bankrupt's trustee unless it was property of a kind specified in s116(2) - shares were not property listed in s116(2) - no inconsistency in construction of Act - appeal dismissed.

[Di Cioccio](#) (B)

BHP Billiton Ltd v Dunning [2015] NSWCA 42

Court of Appeal of New South Wales

Basten, McFarlane & Meagher JJA

Workers compensation - worker suffering from mesothelioma claimed illness caused by inhalation of asbestos dust and fibre in course of employment with BHP - worker claimed BHP was negligent and breached its statutory duties - Tribunal found in worker's favour - s3B(1)(b) *Civil Liability Act 2002* (NSW) - held: primary judge did not err in finding BHP breached duty of care because it did not take available practical alternative measures which would have reduced worker's exposure to asbestos - no error in admission of former employee's evidence, in finding worker exposed to asbestos dust and fibre during course of employment or in findings concerning available practical alternative measures - appeal dismissed.

[BHP Billiton Ltd](#) (I C G)

Rinehart v Rinehart [2015] NSWSC 205

Supreme Court of New South Wales

Darke J

Preliminary discovery - applications to set aside subpoena and notice to produce - plaintiffs had sought orders that defendants provide preliminary discovery pursuant to r5.3 *Uniform Civil Procedure Rules 2005* (NSW) - plaintiffs issued subpoena directed to non-party - second defendant issued notice to produce directed to plaintiffs - overlap between documents sought - abuse of process - held: plaintiffs in this case, in issuing the subpoena, have done so for the legitimate purpose of assisting their case under r5.3(1)(a) - no abuse of process - subpoena not set aside - notice to produce failed to comply with Equity Division Practice Note 11 - there were

defects in form of notice - notice set aside.

[Rinehart](#) (I C)

French v Fraser [2014] NSWSC 1937

Supreme Court of New South Wales

McCallum J

Pleadings - defamation - action arising out of publications on website - defendant objected to form of pleading of plaintiff's statement of claim - whether imputations capable of conveying matter complained of - held: certain imputations struck out - Court not persuaded one imputation was incapable of arising, or that a particular of aggravated damages should be struck out on basis of inconsistency with other particulars - objections determined.

[French](#) (I)

Giedo van der Garde BV v Sauber Motorsport AG [2015] VSC 80

Supreme Court of Victoria

Croft J

Arbitration - applicants sought enforcement of foreign arbitral award - critical dispositive provision granted order requiring respondent to refrain from taking action to deprive first applicant of entitlement to participate in the 2015 Formula One Season as nominated race driver - common ground that threshold requirements of s8 *International Arbitration Act 1974* (Cth) satisfied - whether respondent could prove circumstances in ss8(5) and (7) as grounds for refusal of enforcement - scope of submission to arbitration - non-arbitrability - public policy - held: no grounds to refuse to enforce award - award enforced.

[Giedo van der Garde BV](#) (I B)

Goldus Pty Ltd v Australian Mining Pty Ltd [2015] SASC 32

Supreme Court of South Australia

Parker J

Joint venture agreement - plaintiff and first defendant were joint venturers - second defendant sole shareholder of first defendant contracted to sell shares to third party - plaintiff contended that, under agreement, first defendant required to give notice of proposed sale and that plaintiff had pre-emptive right to purchase first defendant's participating interest in joint venture on the terms of sale - plaintiff also contended implied term of agreement required joint venturer could not sell interest to unrelated party incapable of discharging rights and obligations required of joint venture - evidence of prior negotiations - *it goes without saying* - held: clauses of joint venture uncertain, void and severed from agreement - first defendant not required to give notice of share sale - no term implied in agreement - action dismissed.

[Goldus Pty Ltd](#) (I B C)

Avopiling (WA) Pty Ltd v Central Systems Pty Ltd [2015] WASC 82

Supreme Court of Western Australia

Allanson J

Contract - parties disputed amounts owing under construction contract - plaintiff issued writ - in

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exchange of phone text messages, defendant offered and plaintiff accepted an amount 'in full and final settlement' - whether parties formed enforceable agreement to settle dispute which included settlement foreshadowed counterclaim by defendant - held: parties demonstrated intention to make legally binding agreement - agreement in full and final settlement of dispute - declarations made.

[Avopiling \(WA\) Pty Ltd \(B C\)](#)

CRIMINAL

Executive Summary

Cox v The Queen (VSCA) - evidence - no error in ruling coincidence reasoning open to jury - appeal dismissed

Skinner (a Pseudonym) v The Queen (VSCA) - cross-examination of accused resulting in substantial miscarriage of justice - retrial

Slipper v Turner (ACTSC) - offences against government - failure to exclude rational inferences consistent with innocence - appeals upheld

Summaries with links

Cox v The Queen [2015] VSCA 28

Court of Appeal of Victoria

Weinberg, Priest & Beach JJA

Evidence - coincidence evidence - appellant convicted of five charges of rape and six charges of indecent assault - offences committed against three complainants (GF, WL and SK) - appellant contended trial judge erred in finding there was evidence in relation to GF that was admissible on coincidence basis in relation to WL and SK - appellant also contended trial judge's refusal to sever the charges relating to GF from charges relating to WL and SK resulted in substantial miscarriage of justice - ss 98 and 101 *Evidence Act 2008* (Vic) - held: trial judge did not err in ruling coincidence reasoning was open to jury - notwithstanding some differences in complainants' accounts, there was *sufficient underlying unity* to form basis for availability of coincidence reasoning - no basis for contending trial judge wrong to decline to sever charges relating to GF from indictment - appeal dismissed.

[Cox](#)

Skinner (a Pseudonym) v The Queen [2015] VSCA 26

Court of Appeal of Victoria

Weinberg, Priest & Beach JJA

Cross-examination - appellant sought to appeal against convictions for offences of indecent assault and sexual penetration against four complainants - appellant contended there had been substantial miscarriage of justice as result of his cross-examination, that trial judge erred in failing to direct jury they should not use certain evidence as evidence of consciousness of guilt, and erred in relation to tendency evidence - held: prosecutor put questions to appellant that invited him to agree that complainants' sexual allegations against him were lies - there was repetition in prosecutor's questions of proposition that appellant claimed (or agreed)

complainants were lying in their accounts - accused had given evidence-in-chief without branding complainants liars - proposition that complainants lying was matter first raised by prosecutor in cross-examination - cross-examination of accused to effect that accused could not suggest any reason why complainant might be lying impermissible - cross-examination led to substantial miscarriage of justice - appeal allowed - conviction quashed - retrial.

[Skinner \(a Pseudonym\)](#)

Slipper v Turner [2015] ACTSC 27

Supreme Court of the Australian Capital Territory

Burns J

Offences against government - appellant convicted of dishonestly claiming travel expenses for parliamentary business - prosecution case against appellant was purely circumstantial - whether Magistrate entitled to find beyond reasonable doubt that appellant undertook each of three journeys the subject of the charges for purely personal reasons - *parliamentary business* - absence of direct evidence - held: evidence before Magistrate capable of raising inference appellant undertook journeys for purposes unrelated to parliamentary business – however, Magistrate was obliged to exclude any hypothesis consistent with innocence - *parliamentary business* was to be given broad interpretation - prosecution could not exclude other rational inferences consistent with innocence - guilt of appellant not the only rational inference available on evidence - not open to the Magistrate, viewing evidence as a whole, to convict - appeals upheld - convictions and penalties set aside.

[Slipper](#)



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Passers-by

by Carl Sandburg

Passers-by,
Out of your many faces
Flash memories to me
Now at the day end
Away from the sidewalks
Where your shoe soles traveled
And your voices rose and blent
To form the city's afternoon roar
Hindering an old silence.

Passers-by,
I remember lean ones among you,
Throats in the clutch of a hope,
Lips written over with strivings,
Mouths that kiss only for love,
Records of great wishes slept with,
Held long
And prayed and toiled for:

Yes,
Written on
Your mouths
And your throats
I read them
When you passed by.

[Carl Sandburg](#)

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