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Daily Composite 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)

Mathews v State of Queensland (FCA) - bias - no bias arising from Court's previous order in separate proceedings that applicant attend Court in person or by telephone - interlocutory application dismissed (I)

Rowe v Official Trustee in Bankruptcy (FCA) - bankruptcy - trustee entitled to discontinue proceedings commenced by bankrupt in Queensland Civil and Administration Tribunal - appeal dismissed (B)

Bull v Australian Quarter Horse Association (NSWCA) - corporations - contract - cloned horse not entitled to registration in Stud Book - appeal dismissed (I B)

The Estate of Kati Tsilfidis; Stavrakakis v Tsilfidis (NSWSC) - Wills and estates - probate - family provision - letters of administration of deceased's 2012 will granted to administrator of estate - family provision order granted (B)

Commonwealth Bank of Australia v Ian Robert Clapham; Byron Bay Holdings Pty Ltd v Commonwealth Bank of Australia (NSWSC) - loans and mortgages - guarantee - no wrongful conduct by bank - cross-claim dismissed (B)

Trkulja v Google Inc (VSC) - defamation - publication of material on internet generated by search engine - prospects of success - application to set aside service of writ and amended

statement of claim dismissed (I)

Lindner v Corporation of the City of Marion (SASCFC) - environment and planning - no error in categorisation of developments as “row-dwellings” - appeal dismissed (B C)

Summaries With Link (Five Minute Read)

Mathews v State of Queensland [2015] FCA 1264

Federal Court of Australia

Collier J

Bias - primary proceedings concerned application under *Australian Human Rights Commission Act 1986* (Cth) arising from alleged refusal by hospital to allow applicant entry into hospital with his assistance dogs - applicant sought that judge disqualify himself for apprehended bias on basis he ordered him previously, in a different matter, to attend Court either in person or by telephone - rr5.22(c) & 30.22 *Federal Court Rules 2011* (Cth) - held: Court satisfied judge ought not be disqualified for apprehended bias - fact that judge directed applicant in separate matter to attend Court would not cause fair-minded lay observer to reasonably apprehend judge might not bring impartial unprejudiced mind to resolution of claims - interlocutory application dismissed.

[Mathews](#) (I)

Rowe v Official Trustee in Bankruptcy [2015] FCA 1261

Federal Court of Australia

Rangiah J

Bankruptcy - appellant was undischarged bankrupt - respondent was trustee of appellant's estate - Federal Circuit Court dismissed appellant's application pursuant to s178(1) *Bankruptcy Act 1966* (Cth) for review of respondent's decision to discontinue proceedings commenced by appellant in Queensland Civil and Administration Tribunal - ss5, 58, 60(2), 60(4), 60(5), 116 & 178(1) *Bankruptcy Act 1966* (Cth) - ss134A, 137 & 137(3) *Property Agents and Motor Dealers Act 2000* (Qld) - Sch3, ss13(2) & 60(1) *Queensland Civil and Administrative Tribunal Act 2009* (Qld) - held: appellant's proceeding before QCAT fell within s 60(2) Bankruptcy Act which allowed trustee to make election whether to prosecute or discontinue proceeding - primary judge's reasons were adequate - appeal dismissed.

[Rowe](#) (B)

Bull v Australian Quarter Horse Association [2015] NSWCA 354

Court of Appeal of New South Wales

Bathurst CJ, Beazley P & Sackville AJA

Corporations - contract - appellant was breeder of quarter horses - first respondent was “breed association” - appellant purchased cloned horse in United States of America and imported horse to Australia - appellant sought to register horse in first respondent's Stud Book -

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application rejected - primary judge declined to grant relief in respect of refusal - appellant appealed - held: horse not entitled to registration pursuant to Regulation 10.5 in unamended form - horse was imported horse under Regulation 10.3 in its unamended form - as horse not registered with international Stud Book recognised by first respondent not entitled to registration - Regulation 22 in unamended form did not provide basis to register cloned horses - contention rejected that primary judge erred in not finding implied term in agreement between first respondent and its members that Regulations would not be binding until notification of amendments - leave to appeal to raise issue of estoppel refused - appeal dismissed
[Bull](#) (I B)

The Estate of Kati Tsilfidis; Stavrakakis v Tsilfidis [2015] NSWSC 1720

Supreme Court of New South Wales

Stevenson J

Wills and estates - two proceedings - in probate proceedings plaintiff son of deceased sought probate of Will deceased made in 2012 in which deceased appointed him executor and left her entire estate to him. - by cross-claim daughter of deceased sought probate of earlier Will - .daughter contended 2012 Will invalid because deceased did not have capacity to make Will, did not know and approve of its contents and made Will a result of son's undue influence - daughter also contended 2012 Will invalid due to "suspicious circumstances" - if 2012 Will was admitted to probate, daughter sought order in family provision proceedings for provision under s 59 *Succession Act 2006* (NSW) - held: deceased had testamentary capacity when she made 2012 Will - deceased knew and approved of contents on 2012 Will - 2012 not procured by son's undue influence - Court satisfied provision should be made for daughter from deceased's estate - orders made.

[Tsilfidis](#) (B)

Commonwealth Bank of Australia v Ian Robert Clapham; Byron Bay Holdings Pty Ltd v Commonwealth Bank of Australia [2015] NSWSC 1714

Supreme Court of New South Wales

Darke J

Loans and mortgages - guarantee - proceedings concerning acquisition by company (Yarraluma) of macadamia farm - bank (CBA) provided finance to Yarraluma for acquisition of farm and earlier acquisition of smaller farm - security included property mortgages over farms and property owned by husband and wife directors of Yarraluma, who also gave personal guarantees - Yarraluma defaulted under terms of finance - bank sought to enforce deed of guarantee - directors alleged bank provided negligent advice and engaged in misleading or deceptive conduct - bank obtained judgment - cross-claim adjourned - amended cross-claim introduced claims of unconscionable conduct and claim under *Contracts Review Act 1980* (NSW) - cross-claim subject of present hearing - bank denied wrongful conduct - assessment of what took place between director and officer of bank during conversations and meetings - held: no claims of wrongful conduct by bank established - cross-claim dismissed.

[Commonwealth Bank of Australia](#) (B)

Trkulja v Google Inc [2015] VSC 635

Supreme Court of Victoria

McDonald J

Defamation - plaintiff alleged defendant defamed him by publishing material on internet generated by its search engine - defendant sought to set aside service of writ and amended statement of claim on basis proceeding had no real prospect of success - ss63(1) & 64 *Civil Procedure Act 2010* (Vic) - held: defendant's primary contention it could not be a publisher not supported by any authority - defendant failed to establish plaintiff had no real prospect of success in establishing search engine results defamatory - defendant's contention it should have benefit of immunity was invitation for court to adopt role of legislature and rejected - application dismissed.

[Trkulja \(I\)](#)

Lindner v Corporation of the City of Marion [2015] SASCFC 184

Full Court of the Supreme Court of South Australia

Kourakis CJ, Blue & Nicholson JJ

Environment and planning - categorisation decisions - applications to construct three townhouses incorporating garage/carport - Council characterised first development as "row dwelling" (Category 1) and second as "row dwelling" with a wall on boundary (Category 2) - appellants contended developments were not row dwellings because they incorporated a garage/carport but were "residential flat dwellings" (Category 3) - Land and Environment Court judge dismissed appeal - judge found that on assumption of jurisdiction to entertain challenge on ground of want of authority if decision maker, Council's decision maker acted outside scope of delegation but that the requirement should be dispensed with under s33 *Environment Resources and Development Act 1993* (SA) - held: developments were row-dwellings - Environment Court did not have jurisdiction to entertain challenge on ground of want of authority of the decision maker - appeal dismissed.

[Lindner \(B C\)](#)

CRIMINAL

Executive Summary

DPP v Walters (a pseudonym) (VSCA) - criminal law - incest - base-line sentencing provisions incurably defective - no error in conclusion of sentencing judge - appeal against sentence dismissed

R v Place (SASCFC) - criminal law - indecent assault - complaint evidence admissible - uncharged acts admissible - verdicts not unreasonable, unsafe or unsatisfactory - appeal dismissed

Summaries With Link

DPP v Walters (a pseudonym) [2015] VSCA 303

Court of Appeal of Victoria

Maxwell P, Redlich, Tate, Whelan & Priest JJA

Criminal law - respondent pleaded guilty to two charges of committing indecent act with child under 16 and four charges of incest - sentencing judge imposed total effective sentence of six years and eight months' imprisonment with non-parole period of four years' imprisonment - DPP appealed against sentence on ground of manifest inadequacy resulting from errors of law in judge's application of baseline provisions - statutory interpretation - s5A *Sentencing Act 1991* (Vic) - held: baseline sentencing provisions incapable of any practical operation - sentencing judge correct to conclude provisions did not require him to impose different sentence from that which he would otherwise have imposed - statutory provisions incapable of implementation - unnecessary to consider DPP's complaints about judge's endeavour to apply provisions - appeal dismissed.

[Walters](#)

R v Place [2015] SASCFC 163

Full Court of the Supreme Court of South Australia

Sulan, Peek & Lovell JJ

Criminal law - indecent assault - admissibility of evidence - appellant convicted of four counts of indecently assaulting EK - EK gave evidence she complained about appellant's conduct to her then boyfriend (Mr Bottomley), who gave greater detail of the conversation in evidence - appellant contended evidence should not have been admitted as it did not sufficiently refer to charges, or should have been excluded in exercise of discretion - appellant also contended evidence of uncharged similar conduct should not have been admitted and that verdicts were unsafe and unsatisfactory - s34M *Evidence Act 1929* (SA) - held: complaint to boyfriend was complaint evidence admissible pursuant to s34M - Court not persuaded probative value of complaint evidence outweighed by its prejudicial effect - evidence should not be excluded - uncharged acts admissible - permissible and impermissible uses sufficiently explained - verdicts not unreasonable, unsafe or unsatisfactory - appeal dismissed.

[Place](#)



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The Enkindled Spring

BY D. H. LAWRENCE

This spring as it comes bursts up in bonfires green,
Wild puffing of emerald trees, and flame-filled bushes,
Thorn-blossom lifting in wreaths of smoke between
Where the wood fumes up and the watery, flickering rushes.

I am amazed at this spring, this conflagration
Of green fires lit on the soil of the earth, this blaze
Of growing, and sparks that puff in wild gyration,
Faces of people streaming across my gaze.

And I, what fountain of fire am I among
This leaping combustion of spring? My spirit is tossed
About like a shadow buffeted in the throng
Of flames, a shadow that's gone astray, and is lost.

[D. H. LAWRENCE](#)

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