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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)

Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd) (FCA) - consumer law - treatments for premature ejaculation and erectile dysfunction - unconscionable conduct - declarations and orders (I B G)

Commonwealth Bank of Australia v The Right Reverend Ian Palmer, Bishop of the Diocese of Bathurst (NSWSC) - privilege - no waiver of legal professional privilege by bank - Court declined to order production of documents (I B C)

Raskopoulos v Jensen Laundry Systems Australia Pty Ltd (NSWSC) - pleadings - negligence - crush injury in laundromat - leave to file amended statement of claim (I)

Dowker v Paoletti (SASCFC) - residential tenancies - no error in order for vacant possession of property on basis of failure to comply with residential tenancies agreement (B G)

Enviro Systems Renewable Resources Ltd (Receivers & Managers Appointed) v Westpac Banking Corp (SASC) - corporations - winding up - no genuine off-setting claim in respect of statutory demand - appeal dismissed (B C)

KEP Management Services Pty Ltd v Goldwest Enterprises Pty Ltd (WASC) - corporations - statutory demand set aside on basis of genuine off-setting claim (B C)

Electricity Generation and Retail Corporation t/as Synergy v Woodside Energy Ltd (WASC) - costs - special costs orders granted pursuant to s280(2) *Legal Profession Act 2008* (WA) (I B C)

Summaries With Link (Five Minute Read)

Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd) [2015] FCA 368

Federal Court of Australia

North J

Consumer law - unconscionable conduct - contract - AMI offered treatments for premature ejaculation and erectile dysfunction advertised to result in longer lasting sex - ACCC alleged AMI engaged in unconscionable conduct contrary *Trade Practices Act 1974* (TPA) and *Australian Consumer Law* - ACCC also alleged refund term unfair and void under ACL - ss21, 22, 23, 24, 25, 27, 232, 239, 240, 243, 246 & 250 *Competition and Consumer Act 2010* - ss97 & 14 *Evidence Act 1995* - ss51AB & 80 TPA - held: AMI's conduct unconscionable - contract term unfair - CEO made all critical decisions relating to business of AMI - CEO responsible for AMI's unconscionable conduct - orders and injunctions made - CEO excluded for seven years from continuing main role in business of AMI which involved the unconscionable conduct - declarations and orders made.

[AMI](#) (I B G)

Commonwealth Bank of Australia v The Right Reverend Ian Palmer, Bishop of the Diocese of Bathurst [2015] NSWSC 450

Supreme Court of New South Wales

Rein J

Legal professional privilege - bank was seeking to recover amount under asserted letter of guarantee given by Bishop in respect of loans to fund - defendants' solicitors served notice to produce on bank - whether legal professional privilege in respect of two documents had been waived by bank by reason of banks' pleadings and content of affidavit of bank manager - held: bank had not made assertions about content of privileged communications while at the same time seeking to maintain privilege - bank was not making assertions about its state of mind or bank manager's state of mind in circumstances where confidential information likely to have affected that state of mind - bank had not waived privilege - Court declined to order production of documents.

[Commonwealth](#) (I B C)

Raskopoulos v Jensen Laundry Systems Australia Pty Ltd [2015] NSWSC 427

Supreme Court of New South Wales

Bellew J

Pleadings - plaintiff employed in commercial laundry sued defendant for injuries suffered when crushed between two machines - plaintiff sought leave to file amended statement of claim to add particulars of negligence - s64 *Civil Procedure Act 2005* - held: amendments not inconsistent with substance of pleadings originally framed or with matters already raised in expert evidence served by plaintiff - leave granted to file amended statement of claim.

[Raskopoulos](#) (I)

Dowker v Paoletti [2015] SASCFC 43

Full Court of the Supreme Court of South Australia

Kourakis CJ; Stanley & Parker JJ

Landlord and tenant - residential tenancies - Residential Tenancies Tribunal made order for vacant possession of respondent's property - primary judge rescinded Tribunal's decision subject to appellants' complying with tenancy agreement - primary judge subsequently found appellants failed to comply with tenancy agreement - primary judge discharged earlier orders made order for vacant possession - s95 *Residential Tenancies Act 1995* - held: there was proper basis for finding appellants failed to comply with tenancy agreement - primary judge did not err in discharging orders or making order for vacant possession - appeal dismissed.

[Dowker](#) (B G)

Enviro Systems Renewable Resources Ltd (Receivers & Managers Appointed) v Westpac Banking Corp [2015] SASC 59

Supreme Court of South Australia

Master Dart

Corporations - winding up - statutory demand - plaintiff sought to set aside statutory demand served on it by defendant in respect of money owing under banking facilities - plaintiff sought to set aside statutory demand - plaintiff's land sold by receivers allegedly at undervalue - receivers' duties - off-setting claim - ss420A, 423, 459C, 459H, 459J & 459M *Corporations Act 2001* (Cth) - s77(4) *Transfer of Land Act 1958* - held: Court not satisfied plaintiff established genuine off-setting claim - application dismissed.

[Enviro](#) (B C)

KEP Management Services Pty Ltd v Goldwest Enterprises Pty Ltd [2015] WASC 132

Supreme Court of Western Australia

Master Gething

Corporations - statutory demand - applicant sought orders pursuant to s459G *Corporations Act 2001* setting aside statutory demand for amounts owing under agreements for provision of workers by respondent - off-setting claim - sufficiency of evidence - assessment whether or not offsetting claim genuine based on the face value of the claim - ss459H, 459J & 459M - held: statutory demand set aside on basis of off-setting claim - conditions imposed.

[KEP](#) (B C)

Electricity Generation and Retail Corporation t/as Synergy v Woodside Energy Ltd [2014] WASC 469

Supreme Court of Western Australia
Martin CJ

Costs - Court refused leave to appeal from an arbitral award fixing price at which gas would be sold to buyer by sellers - sellers sought orders pursuant to s280(2) *Legal Profession Act 2008* (WA) - general effect of orders sought would be to permit taxing officer to award costs without being limited by applicable costs determinations in respect of general hourly rates for particular classes of practitioner, maximum amounts specified in respect of various items, or maximum hours specified in relation to those items - held: complexity of issues litigated, financial significance of issues, and legal resources applied by each party to litigation leave no room for any doubt whatsoever that order under s280(2) appropriate - special costs orders granted.

[Electricity](#) (I B C)

CRIMINAL

Executive Summary

Gall v R; Gall v R - criminal law - convictions and sentences in relation to murder and attempted shootings of members of motorcycle club - appeals dismissed

R v Wallace (QCA) - criminal law - fraud - leave to adduce evidence - sentence manifestly excessive - appeal allowed

Summaries With Link

Gall v R; Gall v R [2015] NSWCCA 69

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL, R A Hulme J & Davies J

Criminal law - Bruce and Kevin Gall convicted and sentenced in relation to murder and attempted shooting of two members of motorcycle club - Kevin Gall (KG) convicted for murder and sentenced to 33 years imprisonment with non-parole period of 24 years - KG appealed against conviction on basis trial judge failed to properly direct jury, and against sentence on basis it was manifestly excessive, that elements of provocation not sufficiently taken into account, and that there should have been greater concurrency in sentences - Bruce Gall appealed against his conviction as accessory after fact to murder on basis jury not sufficiently directed as to requirements for conviction for accessory to murder as opposed to manslaughter - BG also appealed against sentence of 6 years imprisonment with non-parole period of 4 years and 6 months on grounds relating to trial judge's findings and degree of accumulation of three sentences - held: primary judge gave clear, accurate and comprehensive directions in relation to KG's conviction - despite error in directions to jury in relation to BG's conviction BG had not

lost real chance of being convicted of lesser offence - no substantial miscarriage of justice - findings on sentencing open to primary judge - appeals dismissed.

[Gall](#)

R v Wallace [2015] QCA 62

Court of Appeal of Queensland

McMurdo P, Gotterson JA & Douglas J

Criminal law - applicant pleaded guilty to six counts of fraud over \$30,000 as an employee and one count of fraud over \$30,000 - applicant sentenced to effective term of 12 years imprisonment with parole eligibility after five years - applicant sought leave to appeal contending sentence is manifestly excessive - applicant also sought to adduce evidence not adduced at sentence - held: applicant was exhibiting behavioural disturbances following prolonged and significant physical and emotional abuse, which took offending behaviour out of worst category of fraudulent offending in which sentencing judge placed it - further evidence raised possibility some other sentence may be warranted - if so its exclusion would result in a miscarriage of justice - most compelling mitigating feature was that applicant's offending was committed whilst her thinking was disordered because she was victim of sustained spousal abuse - sentence of 11 years imprisonment should be imposed to reflect objective seriousness of offending but with parole eligibility after three years to reflect various significant mitigating features - appeal allowed.

[Wallace](#)

Benchmark

Swallows

By Leonora Speyer

They dip their wings in the sunset,
They dash against the air
As if to break themselves upon its stillness:
In every movement, too swift to count,
Is a revelry of indecision,
A furtive delight in trees they do not desire And in grasses
that shall not know their weight.

They hover and lean toward the meadow
With little edged cries;
And then,
As if frightened at the earth's nearness, They seek the
high austerity of evening sky And swirl into its depth.

[Leonora Speyer](#)

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