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A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (One Minute Read)

QXNS v Minister for Immigration, Citizenship and Multicultural Affairs (FCA) - AAT's finding that a visa applicant's risk of reoffending was "not negligible", based on his state of mind when he committed the second of two sexual assaults more than 10 years earlier, was legally unreasonable and was not based on probative material or logical grounds

Yes Insurance Group Pty Ltd v Fair Work Ombudsman (FCA) - primary judge had correctly found a modern award had applied to an employer in respect of its employment of a particular employee, but had imposed penalties that were manifestly excessive

Commonwealth of Australia v Winston (NSWCA) - negligence claim arising out of collision between the USS Frank E Evans and the HMAS Melbourne in 1969 - primary judge had erred by granting leave to file an amended statement of claim, as the amendments sought to plead a new cause of action not arising out of substantially the same facts as the current causes of action

Owners Corporation SP6534 v Elkhouri (NSWCA) - Supreme Court had power to declare that a precondition to the exercise of a power given only to NCAT was met, although it erred in finding that the precondition was met

Makki v Makki (NSWSC) - Court declined to transfer NSW District Court proceedings in which a wife sued her former husband for assault and battery to the Federal Circuit and Family Court, where the wife was seeking adjustment of property interests, including a claim that the Court should take the alleged assaults and batteries into account in assessing the contributions of the parties

Bullen and Wyatt as administrators of the estate of Bullen v Bullen (WASC) - Court ordered that two beneficiaries of an intestate estate who could not be found should be treated as having died, and administrators could use the share of another beneficiary who refused further communications because she was convinced she was being scammed to fund further efforts to engage with her

Summaries With Link (Five Minute Read)

QXNS v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCA 1369
Federal Court of Australia
Horan J
Administrative law - a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs refused grant the applicant's husband a partner visa on character grounds under s501(1) of the *Migration Act 1958* (Cth), based on two sexual offences he committed while working as a taxi driver in 2011 - the Administrative Appeals Tribunal affirmed this decision - the applicant sought judicial review - held: the exercise of the AAT's discretion involved the application *of Direction no. 90 - Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*, with which s499 of the *Migration Act* required the AAT to comply - the central issue under Direction 90 involved two primary considerations under Direction 90, being the husband's risk of reoffending in the context of the protection of the Australian community and the expectations of the Australian community - the AAT's finding that the husband's risk of reoffending was "not negligible", based on his state of mind when he committed the second sexual assault more than 10 years earlier, was legally unreasonable and was not based on probative material or logical grounds - this error was material, in the sense that, had the AAT not made the erroneous finding , there was at least a realistic possibility it would not have found that the protection of the Australian community weighed "very heavily" against granting the partner visa - the AAT had not failed to have regard to the applicant's representations in relation to her husband's risk of reoffending, nor failed to consider critical evidence of an expert psychologist regarding the assessment of that risk - the AAT had not failed to afford procedural fairness by not putting the applicant on notice that it had consistently taken a bleak view of sexual assault offences committed by taxi drivers against their passengers - three previous decisions the AAT cited in this regard did not raise any issue that was not already obvious to the applicant - the AAT did not misconstrue the paragraph of Direction 90 that required it to consider the any impact on Australian business interests if the husband were not permitted to remain in Australia - judicial review application upheld, AAT decision set aside, and matter remitted to AAT to be redetermined according to law.
QXNS

Yes Insurance Group Pty Ltd v Fair Work Ombudsman [2024] FCA 1366
Federal Court of Australia

Snaden J
Employment law - Yes Insurance operates an insurance broking business aimed primarily at commercial road transport operators - Yes Insurance decided to create Yes Assist, to market a roadside assistance service, also aimed primarily at commercial road transport operators - it employed Hazari as a Yes Assist Sales Consultant, and provided him with a laptop and mobile phone - after about three months, Hazari ceased working for Yes Insurance - he claimed he had not been paid for his first month's work - after Hazari suggested he might sell the laptop and mobile phone, Yes Insurance told him he would not receive his money until he returned them - Hazari complained to the Fair Work Ombudsman, which served Yes Insurance with a compliance notice under s716(2) of the *Fair Work Act 2009* (Cth), alleging Yes Insurance had contravened a term of the *Banking, Finance and Insurance Award 2020*, and requiring Yes Insurance to remediate this contravention by paying Hazari what he was owed - Yes Insurance did not pay until after the FWO had commenced proceedings in the Federal Circuit and Family Court of Australia (Division 2), alleging Yes Insurance had contravened of s716(2) by failing to comply with the notice and that its director was an accessory - the Federal Circuit and Family Court found the Award applied, Yes Insurance had contravened s716(5), and its director was an accessory, and imposed penalties of $23,310 and $4,662 - Yes Insurance and its director appealed to the Federal Court - held: under s48 of the *Fair Work Act*, A modern award covers an employee or employer if the award is expressed to cover the employee or employer in relation to the particular employment in issue - cl4.1 of the Award provided that the Award covers employers throughout Australia who are engaged in the banking, finance and insurance industry in respect of work by their employees in a classification in the Award and those employees to the exclusion of any other modern award - Hazari's employer was Yes Insurance, which was engaged in the insurance industry - the Yes Assist division was not Hazari's employer, and did not even have legal personhood - the application of the Award turned on: (1) whether Hazari's employer was "engaged in the banking, finance and insurance industry"; and (2) whether the work Hazari did was of a kind described in one of the Award's various work classifications - the answer to both questions was yes, and so the Award applied to Yes Insurance in respect of its employment of Hazari - as to penalty, the appellants had had proper occasion to be concerned about the return of their equipment, and did not ever suggest they were entitled not to pay Hazari the amount that was finally paid - the appellants were first-time contraveners of the *Fair Work Act* - the appellants' submission about the application of the Award was not inherently untenable or ambitious beyond reason - the penalties for which the FWO agitated were extreme - the size of the penalties showed the primary judge's discretion had miscarried in a way that bespoke error - penalties set aside, and penalties of $8,325 and $1,665 imposed.
Yes Insurance Group Pty Ltd

Commonwealth of Australia v Winston [2024] NSWCA 277
Court of Appeal of New South Wales
Gleeson, Leeming, & Adamson JJA
Limitation periods - in 1969, the USS Frank E Evans collided with the HMAS Melbourne during

a joint training exercise in the South China Sea - the Evans was cut in half and 74 of its crew died - Winston was a sailor on the Melbourne, and, in 2019, sued the Commonwealth in negligence, alleging personal injuries including Post-Traumatic Stress Disorder and Major Depressive Disorder as a consequence of the collision - a judge granted an extension of time under s60G of the *Limitation Act 1969* (NSW) - in 2023, Wilson sought leave to amend his statement claim to, *inter alia*, introduce a new cause of action based on the Commonwealth being vicariously liable for the actions and inaction of the task force commander during its transit phase and who was not a crew member of the Melbourne - the proposed amendments also alleged further facts about the collision, and an alleged near miss between another US naval ship and the Melbourne - the primary judge granted leave - the Commonwealth sought leave to appeal - held: s65(2)(c) of the *Civil Procedure Act 2005* (NSW) provides that, after the expiration of any limitation period, a plaintiff may amend the originating process with leave of the Court to add or substitute a new cause of action that arises from the same (or substantially the same) facts as those giving rise to an existing cause of action - whether there is the same "cause of action" and whether the new cause of action arises on "the same (or substantially the same) facts", there is a question of qualitative evaluation, which will involve questions of degree - it is better to apply statutory words in terms, without resorting to particular categories of case, or a potentially distracting metaphor - the reasoning of the primary judge elided the distinction between whether the rule against amending to introduce a statute-barred cause of action is engaged, and whether the limited power to do so should be exercised - the new issues raised in the amendments did not arise out of substantially the same facts as the existing causes of action - the new issues were qualitatively different from the navigational issues to which the original statement of claim was confined - the proposed amended statement of claim did not plead the same cause of action as the original statement of claim, and nor did it plead a cause of action which arose out of the same or substantially the same facts - a further extension of the limitation period should not be granted, as the prejudice to the Commonwealth was significant, and Winston made no submission to the contrary beyond bare assertion - leave to appeal granted, appeal allowed, leave refused to file the proposed amended statement of claim, and Winston granted a final opportunity plead his case by filing any other amended statement of claim within three months.
View Decision

Owners Corporation SP6534 v Elkhouri [2024] NSWCA 279
Court of Appeal of New South Wales
Ward P, McHugh JA, & Griffiths AJA
Powers of courts - Elkhouri and an owners corporation settled a dispute on terms requiring the owners corporation to pass a new by-law - the owners corporation passed a by-law granting the owner of Elkhouri's lot rights of exclusive use of certain parts of common property, to cease on a certain date unless Elkhouri's did certain repairs - Supreme Court proceedings were commenced between Elkhouri's executors and the owners corporation regarding whether the required repairs had been completed in time, and for certain costs and liabilities the owners corporations said were owing under the by-law - the mortgagee in possession of Elkhouri's

apartment then sued the owners corporation in the NSW Civil and Administrative Tribunal, contending the paragraph of the by-law making the exclusive use rights conditional on the repairs was unjust and should be amended under s149(1)(c) of the *Strata Schemes Management Act 2015* (NSW) - the Tribunal transferred its proceedings to the Supreme Court - the primary judge found Elkhouri had not completed the repairs in time, upheld the owners corporation's costs and liabilities claim, declared the relevant by-law paragraph was unjust within the meaning of s149(1)(c), and remitted the matter to NCAT to make orders arising from this declaration - the owners corporation appealed, including on the ground that the Supreme Court had no power to make the declaration - the mortgagee and executors cross-appealed - held: NCAT's transfer order did not enlarge the Supreme Court's jurisdiction, and did not give the Supreme Court the power that s149(1)(c) gave NCAT - the owners corporation's basic proposition (where a statute confers power on a tribunal to apply a statutory test, the Supreme Court has no power to hear or decide questions which involve applying that statutory test unless the statute specifically authorises the Court to do so) stood the proper approach to Supreme Court jurisdiction on its head - the Supreme Court's power where a declaration is sought is very wide - provided a matter is not hypothetical or otherwise lacking in utility, the Court can declare whether a certain set of rights and obligations, or a certain state of affairs, or some combination of the two, meets a statutory description - the correct approach is not to ask whether a given statute confers power to apply a statutory test on some other tribunal, but to ask whether the statute clearly withdraws the determination of that question from the Supreme Court - the Supreme Court's power is not to be read down by implications or limitations not found in the express words of a statute - the primary judge had power to make the declaration - however, he had erred in deciding the paragraph was unjust - there is nothing intrinsically unjust about granting a rights only upon satisfaction of reasonable conditions - neither did extrinsic circumstances make the paragraph unjust - primary judge's declaration set aside - primary judge had also erred in upholding the owners corporation's costs and liabilities claim without making the necessary findings, including identifying defects and then connecting them with particular costs or liabilities - these claims should be referred to a referee.
View Decision

Makki v Makki [2024] NSWSC 1481
Supreme Court of New South Wales
Garling J
Transfer of proceedings - the parties were married in 2005 and separated in 2022 - in February 2024, the plaintiff wife commenced proceedings in the District Court seeking damages from the defendant husband for assault and battery - in May 2024, the wife commenced proceedings in the Federal Circuit and Family Court of Australia (Division 2) seeking alteration of property interests under s79 of the *Family Law Act 1975* (Cth), which were later transferred to Division 1 - the plaintiff sought transfer of the District Court proceedings to the Supreme Court and then to the Federal Circuit and Family Court of Australia (Division 1) under s5(2) of the *Jurisdiction of Courts (Cross Vesting) Act 1987* (NSW) - held: all of the allegations in the District Court proceedings amounted to family violence as defined in s4AB of the *Family Law Act* - the plaintiff

claimed a *Kennon* adjustment in the family law property proceedings (an adjustment made due to the Court considering domestic violence or similar behaviour when assessing each party's contribution to the marriage under s79) - in her affidavit in the family law property proceedings, the wife said that her contributions were 'made significantly more arduous by the pattern of abusive (including physical abuse), coercive and controlling behaviour engaged in by [husband]' - the wife said the allegations of violence in the District Court proceedings were part of the facts she would rely on to substantiate the *Kennon* adjustment in the family law property proceedings - although the husband asserted that no tort claim for damages for assault has been determined in the Family Court or Federal Circuit and Family Court, the Court identified three cases where the Family Court had done this - although all three cases preceded the decision of the High Court of Australia in *Re Wakim*, that would not be a point of substantive difference if the Court were satisfied that the Federal Circuit and Family Court would have jurisdiction to determine the tort claims - the Court was satisfied there was such a sufficient common substratum of facts that the District Court proceedings would fall within the accrued jurisdiction of the Federal Circuit and Family Court with respect to the family law property proceedings - ultimately, it would be for the Federal Circuit and Family Court to satisfy itself of its jurisdiction - it is generally undesirable for two courts to be asked to make findings of contested fact which arise between the same parties and out of the same or similar factual circumstances - s5(b)(ii) required the Court be persuaded that, having regard to the interests of justice, it was 'more appropriate' that the Federal Circuit and Family Court hear and determine the personal injury proceedings than the District Court - the plaintiff had not satisfied the Court of this - the risk of inconsistent findings was reduced by the reality that the findings of fact made in whichever proceedings were determined first may be able to be used by way of estoppel in the later proceeding - there would be a significant delay in the hearing of the personal injury proceedings if they were transferred - the Court declined to order transfer.
View Decision

Bullen and Wyatt as administrators of the estate of Bullen v Bullen [2024] WASC 445
Supreme Court of Western Australia
Master Russell
Succession - a deceased died intestate leaving no surviving parents, wife, de facto partner or children - the value of the estate was modest, at about $113,000 the administrators of a deceased estate applied for orders pursuant to s66 of the *Trustees Act 1962* (WA) and directions pursuant to s45 of the *Administration Act 1908* (WA) in relation to the administration of the estate - there were five beneficiaries of the estate, who were the five defendants - two of the beneficiaries filed notices of intention to abide the decision of the Court, another beneficiary resided in England and was on notice of the proceedings, but had not entered an appearance and the administrators" solicitor had been unable to contact her, and two beneficiaries could not be found - the administrators sought directions or orders that they be permitted to use the share of the estate that would go to the beneficiary in England with whom they could not communicate to fund further efforts to engage with her and to take other steps so that she could receive her entitlement, if she wished to - they also sought orders that they could distribute the estate as if

the two unlocatable beneficiaries had died - held: a beneficiary is not obliged to accept a gift made to them by a will or their entitlement that arises on the intestacy of a deceased, and may disclaim the gift or entitlement - the Court was satisfied on the evidence that the administrators had conducted extensive enquiries to locate the two missing beneficiaries, and there were no further reasonable steps that would improve the position or the state of the evidence - it was appropriate to make the orders sought in respect of these two beneficiaries - the beneficiary who was refusing communication had said she suffered from mental health issues, and had cut off all contact after expressing the opinion that the administrators' solicitors were engaged in a scam - it was within the court's power and an appropriate exercise of the court's jurisdiction to make orders to the effect sought - the Court hoped that when that beneficiary was provided with a copy and read the decision of the Court, any concerns she had about the genuineness of the communications about her interest in the estate would be alleviated - orders made as sought.
Bullen and Wyatt as administrators of the estate of Bullen

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