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Daily Civil Law A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (One Minute Read)

GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore (HCA) - High Court overturned a decision permanently staying a trial for damages arising from alleged sexual abuse by a priest in 1968 (I B)

Corbisieri v NM Superannuation Proprietary Limited (FCA) - the Australian Financial Complaints Authority had erred in law in finding that a pre-suicide text had not terminated the deceased's de facto relationship and revoked a life insurance Non-Lapsing Binding Nomination (I B)

Hinkler Ave 1 Pty Limited v Sutherland Shire Council (NSWCA) - a development application had not been made until all required documents had been lodged and the application fee had been paid (I B C)

Demex Pty Ltd v McNab Building Services Pty Ltd (NSWCA) - an adjudicator under the *Building and Construction Industry Security of Payment Act 1999* (NSW) had not denied procedural fairness by converting weight to volume in a way he was satisfied was reasonable (I B C)

Vision Australia Ltd v Elisha (VSCA) - primary judge had correctly found that employer had breached employment contract in terminating employee's employment, but the damages awarded (for psychiatric injury) had been too remote, and were not available in any event (B I)

Cousins v Construction Occupations Registrar (ACTSC) - judicial review proceedings by owner-builder against rectification order dismissed, as the owner-builder had commenced parallel merits review proceedings in the ACT Civil and Administrative Tribunal (I B C)

HABEAS CANEM

Sunset



Benchmark

Summaries With Link (Five Minute Read)

GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2023] HCA 32

High Court of Australia

Kiefel CJ, Gageler, Steward, Gleeson, & Jagot JJ

Stay of proceedings for historical sexual abuse - the appellant claimed she had been sexually abused by a Catholic priest in 1968 when she was 14 years old, when the priest visited her family home to provide pastoral and spiritual support and guidance after her father had been seriously injured in a motorcycle accident - she alleged that she suffered from complex post-traumatic stress disorder, chronic and recurrent depressive disorders, generalised anxiety disorder, panic disorder, sexual disorder, enduring post-traumatic personality change, and harmful alcohol use - she sued the Diocese of Lismore, alleging both negligence and vicarious liability for the actions of the priest - the Diocese applied to have the proceedings permanently stayed - a single judge dismissed this application - the Court of Appeal allowed the Diocese's appeal, and ordered that the proceedings be permanently stayed - the High Court granted the appellant special leave to appeal on the ground that the Court of Appeal erred in permanently staying the proceedings on the basis that a fair trial could no longer be had such that the proceedings were an abuse of process - held (by majority, Steward and Gleeson JJ dissenting): an exercise of power under s67 of the *Civil Procedure Act 2005* (NSW) to permanently stay proceedings on the ground that they are an abuse of process as any trial will be necessarily unfair or unfairly and unjustifiably oppressive as to constitute an abuse of process is an evaluative but not a discretionary decision - proceedings either are or are not capable of being the subject of a fair trial or are or are not so unfairly and unjustifiably oppressive as to constitute an abuse of process - therefore, the applicable standard of appellate review is not that specified in *House v The King*, but the "correctness standard" as explained in *Warren v Coombes* - in this appeal, the duty of the High Court was to decide the case, as to both the facts and the law, for itself - in passing s6A of the *Limitation Act 1969* (NSW), which completely removed limitation periods for child abuse, Parliament had explicitly provided that that the powers of a court to safeguard the right to a fair trial, and without such unfairness or oppression as to constitute an abuse of process, be preserved - however, the enactment of s6A had involved a fundamental change to the legal context in which the such powers were to be exercised - it could no longer be maintained that the passing of time alone enlivened the power of a court to prevent an abuse of its process - courts must focus on the effect of delay on the trial process, and not on the mere fact of the effluxion of time, and this effect must be evaluated in the radically new context that Parliament had chosen to enact - it will be neither uncommon nor unexpected for the circumstances that the limitation period sought to avoid to be encountered - the Diocese accepted that the only forensic disadvantage upon which it could rely to justify its contention that no fair trial could be held was the death of the priest - on the undisputed facts in the present case, the Diocese did not prove that there could be no fair trial (and did not contend otherwise that a trial would be so unfairly and unjustifiably oppressive as to constitute an abuse of process) - therefore, the Diocese did not prove that the proceedings involved an abuse of

process - appeal allowed.

[GLJ](#) (I B)

Corbisieri v NM Superannuation Proprietary Limited [2023] FCA 1319

Federal Court of Australia

O'Callaghan J

Insurance - a deceased had had made a Non-Lapsing Binding Nomination to pay a death benefit under a policy of insurance to his de facto partner - the deceased's mother, as executrix of his estate, contended that, immediately before his death by suicide, her son had expressed his intention to terminate the de facto relationship in a message he sent to his sister via WhatsApp; and that the Non-Lapsing Binding Nomination was therefore invalid under the relevant Fund rules - the Australian Financial Complaints Authority (ACFA) determined that the entire death benefit of \$1.122million be paid to the de facto partner - the executrix appealed to the Federal Court on a question of law pursuant to s1057 of the *Corporations Act 2001* (Cth) - held: rule 7.10C of the relevant instrument, the AMP Superannuation Savings Trust Consolidated Trust Deed, provides that, subject to rule 7.10D, if all the requirements of the Superannuation Law have been met, where the Trustee is in receipt of a current, valid Non-Lapsing Nomination; and has consented to the Non-Lapsing Nomination in accordance with rule 7.10B; and the Non-Lapsing Nomination complies with any terms and conditions determined by the Trustee pursuant to rule 7.10B, the Trustee must pay the deceased Member's Death Benefit to the person or persons listed in the Non-Lapsing Nomination - rule 7.10D(d) provides that a Non-Lapsing Nomination ceases to be valid and effective upon the date the Member's de-facto relationship (including with a person of the same sex) terminates - the sole question was whether the deceased's WhatsApp message to his sister, on its proper construction, was effective to terminate the de fact relationship within the meaning of rule 7.10D(d) - the message had said it was the deceased's "will and testament" from the date it was sent, had stated that the deceased wanted to leave all his property and assets to his family, and that the de facto partner was to receive "nothing of my assets all for he has put me in the position or stage of my life where I had enough", and that no friends of the de facto should attend his funeral - the only construction of the message that was reasonably open was that the deceased intended by the writing and sending of it to terminate the de facto relationship - AFCA had erred as a matter of law in finding that the message was not effective to terminate the de facto relationship - by reasoning analogous to that in family law cases, it was not necessary for a party to a de facto relationship to communicate his intention to the other party in order to "terminate" the relationship within the meaning of rule 7.10D(d) - it sufficed that the deceased had communicated his intention only to his sister - appeal allowed, determination of AFCA set aside, and matter remitted to AFCA to be redetermined in accordance with the Court's reasons.

[Corbisieri](#) (I B)

Hinkler Ave 1 Pty Limited v Sutherland Shire Council [2023] NSWCA 26

Court of Appeal of New South Wales

Gleeson JA , Basten AJA, & Preston CJ of LEC

Benchmark

Planning law - the applicant appealed to the Land and Environment Court against a deemed refusal by Council of a development - the *State Environmental Planning Policy (Housing) 2021* (NSW) had replaced two earlier State Environmental Planning Policies, one of which dealt with affordable rental housing - the issue was whether the development application was subject to the new or the old Planning Policy - the new Planning Policy had a transitional provision that stated that it did not apply to a development application made, but not yet determined, on or before its commencement date - the applicant uploaded the development application and certain accompanying documents and information to the NSW planning portal before the commencement date, but these did not include an A4 plan of the building showing its height and external configuration, as erected, as required by the *Environmental Planning and Assessment Regulation 2000* (NSW) - council notified the applicant of the fee after the commencement date, and the applicant then paid the fee, as required by the *Environmental Planning and Assessment Act 1979* (NSW) and the *Environmental Planning and Assessment Regulation* - the primary judge held that that the development application had not been made on or before the commencement date for the purpose of the savings provision, as so the new Planning Policy applied - the applicant sought leave to appeal on questions of law - held: he transitional provision requires a precise date or time at which a development application is made, which militates in favour of a construction which permits a ready finding as to that event - an application is lodged when the consent authority provides a notification to that effect on the planning portal, which occurred in this case after the commencement date - the primary judge had been correct to find the application had not been made on or before the commencement date - further, a development application that is not accompanied by the information and documents required by the *Environmental Planning and Assessment Act* and the *Environmental Planning and Assessment Regulation*, and the payment of the fee required by that Act and Regulation is incomplete and ineffective to engage the power of the consent authority to grant consent to the development application - on its proper interpretation, cl50(9) of the Regulation operates to deem a development application not to have been lodged until the fees notified to the applicant by means of the NSW planning portal have been paid - the consent authority is then obliged, under cl50(8), to notify the applicant by means of the NSW planning portal that the development application has been lodged - leave to appeal granted but appeal dismissed.

[View Decision](#) (I B C)

Demex Pty Ltd v McNab Building Services Pty Ltd [2023] NSWCA 261

Court of Appeal of New South Wales

Mitchelmore, Kirk, & Adamson JA

Security of payments - McNab Building Services Pty Ltd subcontracted Demex Pty Ltd to undertake remediation earthworks at a site in Tweed Heads - as part of the works, large quantities of asbestos contaminated materials were exported offsite and clean fill was imported - Demex issued a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) for about \$2.8million - most of the evidence in support of the claim was expressed in terms of the weight of material moved, but the payment claim, as required by the contract, was expressed in terms of the volume of material moved, without supporting

Benchmark

calculations - an adjudicator determined that Demex was entitled to about \$1.4million, and calculated for himself the conversion from weight to volume, using a rate that he said was reasonable by industry standards - McNab commenced proceedings for judicial review, contending that it had been denied procedural fairness - the primary judge held the adjudication determination void - Demex appealed - held: there was no dispute that the adjudicator was obliged to accord the parties procedural fairness in exercising his powers of adjudication under the Act, and the issue was the scope of that obligation - the principle of statutory construction that a statute conferring a power the exercise of which is apt to affect an interest of an individual is presumed to confer that power on condition that the power is exercised in a manner that affords procedural fairness to that individual, where that presumption operates unless clearly displaced by the particular statutory scheme, has been upheld many times regarding the Act - speaking generally, procedural fairness requires that those liable to be affected by a decision be given the opportunity of first being heard - the decision of the adjudicator is only an interim one; it does not affect any right that the parties may have under the construction contract - the nature of the decision-maker is relevant, and s18 of the Act requires adjudicators to have such qualifications, expertise, and experience as may be prescribed by the regulations, but does not require that they be lawyers - the Regulations require that adjudicators have practical industry experience or qualifications in disciplines relevant to building disputes - adjudicators may therefore be expected to bring their experience and expertise to bear in making their determinations - the summary "pay now, litigate later" scheme envisaged by the Act is best served by restricting the scope of intervention by the courts - the adjudicator had gone no further than necessary in himself calculating the conversion rate applied by Demex and satisfying himself that that rate was reasonable - this caused McNab no prejudice, as McNab was no worse off than it would have been if the adjudicator had not addressed the issue, let alone in circumstances where it had had reasonable notice of the issue and had chosen to make no submissions on the point - there had been no substantial practical injustice in all the circumstances - this conclusion could also be expressed in terms of materiality - appeal allowed.

[View Decision](#) (I B C)

Vision Australia Ltd v Elisha [2023] VSCA 265

Court of Appeal of Victoria

McLeish, Kennedy, & Macaulay JJA

Contract - Elisha was employed as an Adaptive Technology Consultant by Vision Australia, a not-for-profit organisation in the business of providing services to vision-impaired persons - Vision Australia terminated Elisha's employment for serious misconduct, namely aggressive and intimidating behaviour towards a member of hotel staff during an overnight stay - Elisha commenced proceedings claiming that that Vision Australia had breached his contract of employment, or alternatively, had been negligent - he alleged he had suffered psychiatric injury as a result of Vision's implementation of processes leading to, and resulting in, the termination of his employment - the primary judge found Vision Australia liable for breach of contract, but rejected the claim in negligence on the basis that Vision Australia did not owe the duty of care alleged - the primary judge gave judgment for Elisha in an amount of about \$1.4million - Vision

Benchmark

Australia sought leave to appeal, and Elisha filed a notice of contention challenging the negligence finding - held: the task of the court was to objectively determine the meaning of the employment contract, having regard to its text, context, and purpose, taking into account what reasonable persons would have intended to convey by the words chosen - the Court did not consider that the statement that the engagement will be "governed by" the *Community Employment, Training and Support Services Award 1999* was intended to incorporate that Award, or the *Vision Australia Unified Enterprise Agreement 2013* - however, the primary judge had been correct to find that Vision Australia's "disciplinary procedure" dated April 2015 had been incorporated into the contract - the key finding of breach distilled down to a failure to put Elisha on notice of, and give him an opportunity in the relevant meeting to respond to, a "secret" or "hidden" allegation that Elisha had a history of aggression and excuse making - the primary judge had determined this issue based on the evidence given by witnesses, having regard to both credit and a careful examination of the evidence regarding the decision making process - Vision Australia had not demonstrated that the primary judge's findings based on seeing and hearing the witnesses give evidence were "glaringly improbable" or "contrary to compelling inferences" - the primary judge had not erred in finding Vision Australia had breached the contract - regarding whether the damages allowed by the primary judge were too remote, the Court was in as good a position as the primary judge to consider the evidence - it could not reasonably be supposed to have been in the parties' contemplation, at the time of the making of the employment contract, that psychological or psychiatric injury to Elisha would be "on the cards" if Vision Australia failed to put the relevant allegations to him - the Court was fortified in its views by expert medical evidence that Elisha's reaction was inconsistent with what could be considered to be the reasonable effect of a wrongful termination - the Court was also of the view that damages for psychiatric injury would not have been available in any event in respect of a breach of contract claim such as this one - the primary judge had not erred in finding that Vision Australia had not owed Elisha a duty to take reasonable care to avoid injury to Elisha in its implementation of the processes leading to and resulting in the termination of his employment - leave to appeal granted, appeal allowed, and damages set aside.

[Vision Australia Ltd \(B I\)](#)

Cousins v Construction Occupations Registrar [2023] ACTSC 305

Supreme Court of the Australian Capital Territory

McWilliam J

Administrative law - the plaintiff was a builder who received an order for rectification under s38 of the *Construction Occupations (Licensing) Act 2004* (ACT), relating to building work carried out by him as an owner-builder on a residential home - he commenced judicial review proceedings in the Supreme Court, seeking to set aside the order, and the decision to issue the order, under s5 of the *Administrative Decisions (Judicial Review) Act 1989* (ACT) - the Construction Occupations Registrar applied to dismiss or stay the proceedings on the basis that the plaintiff had also instituted merits review proceedings in the ACT Civil and Administrative Tribunal - held: the starting point was that the Court was properly seized of the jurisdiction to hear and determine the proceeding - the focus of r3566 of the *Court Procedures Rules*

Benchmark

(2006) (ACT) is on whether the proceeding is "inappropriate" to continue in the Court or to grant the application for relief - that involves the exercise of discretion, with the onus lying on the Registrar to persuade the Court to refrain from exercising its jurisdiction - the judicial discretion is to be exercised, not capriciously, but in a reasonable manner according to the circumstances - there was established authority guiding the principled exercise of the discretion - the refusal of relief to an applicant for judicial review because other and more appropriate remedies are available by law is not a new concept, and the availability of such an alternative remedy has always been a relevant consideration to the grant, or refusal, of such relief - the availability of full merits review of the decision in the Tribunal together with a statutory means for referral of legal questions meant that there was adequate provision for review available under the *Construction Occupations (Licensing) Act* - the Court was not satisfied that the question of law could be determined without determination of contested questions of fact - the question of law giving rise to the judicial review proceedings was not certain to resolve the proceedings, and was not as straightforward as the plaintiff had submitted - s84 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) was available to achieve a binding determination on a question of law - although the question of law sought to be agitated was one of statutory construction, it was not an issue of "broader significance" of the kind referred to in the relevant authorities - in the absence of any agreement on the facts, bypassing the ordinary statutory procedure for review would create more problems than it solved in this case, and the Court would be proceeding on an incomplete factual substratum with no certainty that the determination of the legal questions would finally resolve the dispute between the parties, exposing the parties to costs consequences in the process that do not exist in the Tribunal - it was inappropriate for the judicial review proceedings to continue in the Supreme Court - proceeding dismissed.

[Cousins](#) (I B C)



Poem for Friday

My Childhood Home I See Again

By: Abraham Lincoln (1809-1865)

My childhood home I see again,
And sadden with the view;
And still, as memory crowds my brain,
There's pleasure in it too.

O Memory! thou midway world
'Twixt earth and paradise,
Where things decayed and loved ones lost
In dreamy shadows rise,

And, freed from all that's earthly vile,
Seem hallowed, pure, and bright,
Like scenes in some enchanted isle
All bathed in liquid light.

As dusky mountains please the eye
When twilight chases day;
As bugle-notes that, passing by,
In distance die away;

As leaving some grand waterfall,
We, lingering, list its roar—
So memory will hallow all
We've known, but know no more.

Near twenty years have passed away
Since here I bid farewell
To woods and fields, and scenes of play,
And playmates loved so well.

Where many were, but few remain
Of old familiar things;
But seeing them, to mind again
The lost and absent brings.

The friends I left that parting day,

How changed, as time has sped!
Young childhood grown, strong manhood gray,
And half of all are dead.

I hear the loved survivors tell
How nought from death could save,
Till every sound appears a knell,
And every spot a grave.

I range the fields with pensive tread,
And pace the hollow rooms,
And feel (companion of the dead)
I'm living in the tombs.

Abraham Lincoln was born on 12 February 1809, in Kentucky, in poverty, and raised on the frontier. His brother died at birth. His mother died of milk sickness, in 1818, when Abraham was 9 years old. His sister Sarah died 10 years later leaving Lincoln devastated, and an only child. He was self-educated and is believed to have had formal lessons for less than a year of his life until the age of 15. Until he was 21, he worked as a farm labourer, giving all his earnings to his father. He became a lawyer, in Springfield, handling "*every kind of business that could come from a prairie lawyer*". Much of his work involved transportation, river barge and railroad conflicts. He appeared before the Illinois Supreme Court in 175 cases and appeared alone in 51 of those cases. His legal reputation was the origin of his nickname "Honest Abe". He was a member of the legislature and was a congressman for Illinois. He wrote *My Childhood Home I See Again* in 1847. He was the 16th president of the United States from 1861 to 1865. He led the Union during the American Civil War. He spoke at the dedication of the Gettysburg Battlefield cemetery in 1863, giving the "Gettysburg Address", beginning with the words "*Four score and seven years ago our fathers brought forth, upon this continent, a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal*". On 14 April 1865, the day he had signed legislation to establish the US Secret Service, Lincoln was shot by John Wilkes Booth, at Ford's Theatre. Lincoln died in Washington, D.C. on 15 April 1865.

My Childhood Home I see Again, music composed and sung by Julia Bloom, with photographs and paintings from the Civil War era.

<https://www.youtube.com/watch?v=2saL3seldPg>

Lincoln's **Gettysburg Address**, read by President Obama, in 2013

<https://www.youtube.com/watch?v=CHAyep7ypY>

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