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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)

Environment Council of Central Queensland Inc v Minister for the Environment and Water (No2) (FCA) - Court upheld decisions of Minister regarding extensions of coal mines made on the bases that the extensions would not cause any net increase in greenhouse gas emissions, and that, even if they would, the likely increase in global greenhouse gas emissions would be very small and would not adversely impact world heritage values (B C I)

Burton v Babb (NSWCA) - claim for malicious prosecution failed where applicant had been prosecuted for breach of a court order that the Court of Appeal in due course held to be invalid (I B)

Equity Trustees Wealth Services Limited v Astill (NSWSC) - Court determined the proper construction of a will where there was uncertainty regarding the remainder of a right of residence granted to a person who survived the deceased but then also died (I B)

2nd Chapter Pty Ltd & Ors v Sealey & Ors (VSC) - Court refused to grant interlocutory injunctions enforcing restraint of trade clauses, as the plaintiffs had failed to establish a reasonable case to be tried that the restraints were enforceable (I B)

Santiago-Brown v Australian Wine Research Institute Limited (FedCFamC2G) - Court declined to order general discovery in copyright infringement case, where the applicant alleged that discovery in categories had been insufficient (I B)

HABEAS CANEM

Stealth in camouflage

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Summaries With Link (Five Minute Read)

Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2) [2023] FCA 1208
Federal Court of Australia
McElwaine J
Environmental law - operators of an underground coal mining operation at Narrabri and an open cut coal mine at Mt Pleasant, Begala, referred proposals to extend their operations to the Commonwealth Minister for the Environment and Water pursuant to s68 of *the Environment Protection and Biodiversity Conservation Act 1999* (Cth) - the Minister's delegate determined under s75 that the proposed actions were controlled actions - the proposed actions were assessed pursuant to the Bilateral Agreement provisions in Part 5 of the Act, and were approved at the State level - Environmental Justice Australia on behalf of the Environment Council of Central Queensland requested reconsideration of the controlled action decisions pursuant to s78A - the Minister decided not to revoke the controlled action decisions on the bases that she was not satisfied that the proposed actions would cause any net increase in greenhouse gas emissions, and that, even if they would, the likely increase in global greenhouse gas emissions would be very small with the result that she could not conclude that the proposed actions would be substantial causes of adverse impacts on the world heritage values of declared World Heritage properties - the Environment Council of Central Queensland sought judicial review of the Minister's decisions under s39B of the *Judiciary Act 1903* (Cth) and s5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) - held: the Court rejected the applicant's submission that it was not open to the Minister to engage in counter-factual reasoning by netting off likely emissions from the proposed actions from total global emissions from other sources in a world where the action does not occur - the Court also rejected the submission that the Minister was required to contemplate what were "the really possible events or circumstances in a future with the coal mine" - there is no express requirement in the Act which compels the Minister to reason in any particular way in order to be satisfied that revocation and substitution of a controlled action decision is warranted by the availability of substantial new information - the Act does not expressly require the Minister to take into account prescribed matters, or to proceed in accordance with any particular pathway - the Minister did not dispute that a reasoning pathway was open to her that may have traversed a wider spectrum of scenarios than those she actually considered - however, the Act leaves it to the Minister to assess whether the proposed action is a substantial cause of an event or circumstance of an indirect consequence and whether there is an impact within the meaning of s78(1)(a) - clearly the Minister understood that there were very many variables that impact upon the likely contribution of greenhouse gas emissions from combusted coal sourced from the proponents' mines - the climate scientists in formulating models that are designed to generate a range of feasible future outcomes, and which turn on a very large number of assumptions, do not do so in order to address the statutory tests that the Minister is required to address at s78(1) of likely impact and s527E(1)(b) as to substantial cause - the Minister did take the precautionary principle into account as a decisional rule in her assessment of the scientific material contained

in the request - s391(1) provides that the precautionary principle is to be taken into account to the extent that the Minister "can do so consistently with the other provisions of this Act", which is subordinating and confirms that that principle does not have pre-eminent effect - the Minister had not engaged in unreasonable or irrational reasoning - applications dismissed.
Environment Council of Central Queensland Inc (B C I)

Burton v Babb [2023] NSWCA 242
Court of Appeal of New South Wales
Adamson JA & Simpson AJA
Malicious prosecution - a child suffering from significant health conditions was removed from premises in Newcastle and placed into the care of Family and Community Services at a hospital where the child was examined - care proceedings were brought in respect of the child in the Children's Court - the Children's Court made an order pursuant to the *Court Suppression and Non-publication Orders Act 2010* (NSW) (the Act), expressed to be an interim order, prohibiting the publication of information that would tend to identify individuals connected with proceedings in that Court - the plaintiffs posted material on Facebook which appeared to breach this order, and refused to remove the posts notwithstanding a request by a representative of Family and Community Services - the Secretary of Family and Community Services brought proceedings in the Equity Division of the Supreme Court, seeking orders against the plaintiffs to require them to remove the Facebook posts - the Court made the orders sought - the plaintiffs were charged with breach of the suppression order made by the Children's Court - a magistrate dismissed applications challenging these charges - the plaintiffs commenced proceedings in the Common Law Division of the Supreme Court, seeking judicial review of the magistrate's decision - a single judge dismissed this application - the Court of Appeal upheld the plaintiffs appeal, on the basis that the Children's Court order was not an interim order, and, as it duration was not stipulated, it was unenforceable - the charges were withdrawn - the plaintiffs then commenced proceedings for malicious prosecution against the Director of Public Prosecutions and the Secretary of Family and Community Services - the primary judge gave judgement for the defendants with costs on the basis that the plaintiffs had not established any of the elements of the tort of malicious prosecution apart from the element that the criminal proceedings terminated in their favour - one of the plaintiffs sought leave to appeal - held: there was no suggestion that the malfunction in the recording equipment during trial deprived the primary judge of the opportunity of hearing and having regard to all the oral submissions which were made during the period of the malfunction - the purposes of the judicial obligation to give reasons that explain why a decision has been reached include that the unsuccessful party is entitled to know why he or she has lost and also whether any error might warrant a challenge to the decision by an appeal - in the present case, where the plaintiffs had adduced no evidence to establish a number of the elements of the cause of action which they propounded, the primary judge was not required to do more than identify each element and explain why he considered proof to be deficient - the primary judge addressed the question of malice at length, and there was no evidence that any "malice" could be sheeted home to either of the defendants, even if one or both of them could be shown to be a prosecutor for the purpose of the tort of malicious

prosecution - the positions held by the defendants at the relevant time were insufficient to establish they were prosecutors for that purpose, as the law looks beyond theory and regards the person in fact instrumental in prosecuting the accused as the real prosecutor - it did not follow from the fact that the characterisation of the Children's Court order as an interim order turned out to be incorrect that there was any malice or lack of reasonable or probable cause in the prosecution of the plaintiffs for breach of the order which the prosecutors can be taken to have believed to be lawful at the time - the primary judge had not erred in making the costs order - leave to appal refused with costs.
View Decision (I B)

Equity Trustees Wealth Services Limited v Astill [2023] NSWSC 1209
Supreme Court of New South Wales
Richmond J
Succession - a deceased left a right of residence in a property at Toukley to his friend Margaret - Margaret also later died - the plaintiff was the executor of the deceased's will, and the defendant was the executor of Margaret's will - the administration of the deceased's estate was complete except for the outstanding issue of who was entitled to the remainder of the Toukley property, on the proper construction of the relevant clauses in the will - the executor sought declarations as to the proper construction of those clauses - held: the right of residence conferred on Margaret, if she survived the deceased, had three significant features: (a) it would continue rent free until Margaret's death provided that she paid all rates, taxes (other than capital gains tax) and outgoings on the property, kept the property insured and maintained the property in a good state of repair; (b) Margaret could terminate the right of residence at any time by notice to the Trustee; (c) the Trustee was given the power to sell the Toukley property if Margaret so requested, and to reinvest the proceeds in a new property for Margaret to live in during her life, but on terms that preserved for the deceased's estate an interest in the substitute property, reflecting the proportion of the purchase price contributed from the proceeds of sale of the Toukley property - the date of termination of the right of residence of the Toukley property was the date of Margaret's death, under clause 3 of the will, and the Toukley property then became an accretion to the estate, the distribution of which was governed by clause 4, which provided for the division of the residue of the estate into nine equal shares and for a gift of each such share to nine named persons - each of those gifts was a class gift because the persons who were to take each of the nine parts are united or connected by a common tie so you can say that the testator was looking to the body as a whole rather than to members as individual - there was a clear difficulty in reading clauses 3 and 4 together - clause 3 provided that the Toukley property would form part of the residuary estate after the date of termination and directed that the interest of a beneficiary in the Toukley property as part of the residuary estate is contingent on that beneficiary surviving the date of termination - clause 4, read in isolation, did not contemplate a situation where any interest in residue will arise in favour of any person, other than Margaret, where Margaret survived the deceased - the fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended - the question is not what the testator meant to do

when he made his will, but what the written words he uses mean in the particular case, that is, what are the "expressed intentions" of the testator - the "golden rule of construction" is that the Court should prefer a construction that avoids an intestacy - it is accepted that a Court can, as part of the process of construction, read words into a will where it is clear on the face of the will that words have been omitted from the will and what those omitted words are - the proper construction of the will was that the Toukley property fell into the residuary estate and was to be held for the beneficiaries in each of the nine classes named in clause 4 who survived the date of termination - this construction avoided a partial intestacy, was more consistent with the scheme of the will, and avoided the absurd result put forward by the executor of Margaret's estate.
View Decision (I B)

2nd Chapter Pty Ltd & Ors v Sealey & Ors [2023] VSC 599
Supreme Court of Victoria
Waller J
Restraint of trade - Escala is in the business of providing financial advisory and wealth management services - Sealey and Vickers-Willis were financial advisers with Escala, and, through trusts, also shareholders in Escala - Sealey and Vickers-Willis, together with other shareholders, agreed to sell all their shares to Focus Holdings, and were paid about $4.2million and $25,000 respectively - the Share Purchase Agreement contained covenants in restraint of trade given by Sealey and Vickers-Willis which extends up to the fifth anniversary of the completion date to the Share Purchase Agreement - a Shareholders Agreement, Management Deed, and Employment Agreements contained similar restraints - the plaintiffs, including Focus, contended that Sealey and Vickers-Willis had breached the restraint of trade clauses and intended to continue to breach them - the plaintiffs sought interlocutory relief restraining Sealey and Vickers-Willis from continuing such alleged breaches - held: the Court needed to be satisfied that there was a serious question to be tried and that the balance of convenience favoured the grant of the injunction - where an agreement contains a covenant which restrains one party from freely engaging in trade in respect of its products or services, the party receiving the benefit of the covenant carries an onus to justify the restraint - to do so, the covenantee must demonstrate that the restraint is reasonable in reference to the interests of both parties and the public, in the sense that it affords not more than adequate protection of its legitimate interests - the time of assessing reasonableness is the date of entry into the restraint - the law draws a distinction between employee covenants and goodwill covenants, and is more willing to enforce the latter - the plaintiffs therefore had to establish a serious case to be tried in respect of the enforceability of the restraints contained the agreements - they had failed to do so - the restraints in all four agreements were not reasonable as between the parties, even if the least restrictive geographical area were adopted, and were not reasonable in the public interest as they would have the effect of preventing clients or former clients of Escala from taking their business to the business now associated with Sealey and Vickers-Willis for any reason, including if the client was concerned about the quality of Escala's performance or had lost trust and confidence in Escala - in respect of the Employment Agreements, it was also doubtful whether the restraints survived the termination of those agreements - in any event, the balance

of convenience also weighed against the grant of the injunction, as damages would likely be an adequate remedy for the plaintiffs if the restraints were valid but an injunction were not granted, whereas Sealey and Vickers-Willis would be unable to work in their chosen profession and their families would be without an income if the injunction were made - application for interlocutory injunction dismissed.
2nd Chapter Pty Ltd & Ors (I B)

Santiago-Brown v Australian Wine Research Institute Limited [2023] FedCFamC2G 889
Federal Circuit and Family Court of Australia (Division 2)
Judge Manousaridis
Copyright - the applicant claimed that she had created five original works within the meaning of s10 of the *Copyright Act 1968* (Cth): (1) a PhD thesis titled "Sustainability Assessment in Wine Grape Growing", including chapter 4 of the PhD Thesis, titled "Comparison of Sustainability Assessment Programs for Viticulture and a Case-study on programs' engagement processes"; (2) an electronic document known as the "McLaren Vale Sustainable Winegrowing Australia Program" that included computer programs designed to facilitate the collation and interpretation of research data; (3) a document titled "McLaren Vale Sustainable Winegrowing Australia - Workbook", which was an appendix to the PhD Thesis; chapter 5 of the Workbook titled "Waste Management"; and (5) chapter 6 of the Workbook titled "Social (Work, Community and Wineries relations)" - the PhD Thesis was published by the University of Adelaide in 2014 - she claimed that, in about 2019, the McLaren Vale Grape & Wine Tourist Association provided all content from the McLaren Vale Sustainable Winegrowing Australia Program to Australian Wine Research Institute Limited without her consent - the alleged that company and another company had been infringing her copyright in the works, and had engaged in misleading or deceptive conduct by falsely representing to consumers that they were the authors of, or owned all the rights in, McLaren Vale Sustainable Winegrowing Australia Program - a judge of the Court made orders in chambers that the respondents give discovery in agreed categories - the applicant took issue with the discovery provided, and submitted that an order for general discovery would be the most efficient and cost effective means of further progressing the matter - held: s176(2) of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) provides, in proceedings other than in relation to family law and child support proceedings, that interrogatories and discovery are not allowed unless the Court or a Judge declares that it is appropriate, in the interests of the administration of justice, to allow the interrogatories or discovery - the Court must consider whether allowing the discovery would be likely to contribute to the fair and expeditious conduct of the proceedings; and such other matters (if any) that the Court considers relevant - whether it would be in the interests of the administration of justice to allow discovery largely turns on whether there is a substantial imbalance between the parties of their knowledge, or means of acquiring knowledge, of the existence of documents that are relevant to all or some of the issues in the proceeding - the applicant's asserted purpose of remedying an alleged failure to properly discover documents by category did not justify making an order for general discovery - the remedy for such failure would be to seek orders compelling proper discovery under the categories already ordered - it was not in the interests of the

administration of justice to order general discovery - however, it was in the interests of the administration of justice to order discovery of further categories relating to quantum that had not been previously ordered.
Santiago-Brown (I B)

Poem for Friday

No Coward Soul Is Mine

By: Emily Bronte (1818-1848)

No coward soul is mine
No trembler in the world's storm-troubled sphere
I see Heaven's glories shine
And Faith shines equal arming me from Fear

O God within my breast
Almighty ever-present Deity
Life, that in me hast rest,
As I Undying Life, have power in Thee

Vain are the thousand creeds
That move men's hearts, unutterably vain,
Worthless as withered weeds
Or idlest froth amid the boundless main

To waken doubt in one
Holding so fast by thy infinity,
So surely anchored on
The steadfast rock of Immortality.

With wide-embracing love
Thy spirit animates eternal years
Pervades and broods above,
Changes, sustains, dissolves, creates and rears

Though earth and moon were gone
And suns and universes ceased to be
And Thou wert left alone
Every Existence would exist in thee

There is not room for Death
Nor atom that his might could render void
Since thou art Being and Breath
And what thou art may never be destroyed.

Emily Bronte, an English poet and novelist, was born on 30 July 1818 in Yorkshire, UK.

Her mother died when she was three years old. She and her sisters were educated at the Clergy Daughters' School. She is best known for the novel *Wuthering Heights*. Her siblings included Charlotte Bronte, the author of the novel *Jane Eyre*. Only three Bronte girls survived into adulthood, after Elizabeth and Maria died of typhoid. Emily became a teacher, however she returned home, and thereafter kept house, while working on her literature and poetry, learning German and playing the piano. Emily was reclusive throughout her life. Constantin Heger wrote of her character "*She should have been a man - a great navigator. Her powerful reason would have deduced new spheres of discovery from the knowledge of the old; and her strong imperious will would never have been daunted by opposition or difficulty, never have given way but with life. She had a head for logic, and a capability of argument unusual in a man and rarer indeed in a woman...impairing this gift was her stubborn tenacity of will which rendered her obtuse to all reasoning where her own wishes, or her own sense of right, was concerned".*

Her sister Charlotte Bronte wrote of her: "*My sister's disposition was not naturally gregarious; circumstances favoured and fostered her tendency to seclusion; except to go to church or take a walk on the hills, she rarely crossed the threshold of home. Though her feeling for the people round was benevolent, intercourse with them she never sought; nor, with very few exceptions, ever experienced. And yet she knew them: knew their ways, their language, their family histories; she could hear of them with interest, and talk of them with detail, minute, graphic, and accurate; but WITH them, she rarely exchanged a word"*. Emily Bronte died on 19 December 1848. The current president of the Bronte Society in the UK is Dame Judi Dench.

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