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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)

Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs (HCA) - the Minister must exercise power under s351(1) of the *Migration Act* personally - Ministerial Instructions requiring officials not to refer s351(1) requests to the Minister unless the officials considered there were unique or exceptional circumstances were invalid (I B)

Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l. (HCA) - Spain had waived immunity from the jurisdiction of Australian courts regarding recognition and enforcement, but not execution, of an arbitral award under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (I B)

Ceerose Pty Ltd v A-Civil Aust Pty Ltd (No 2) (NSWSC) - adjudication decision under the *Building and Construction Industry Security of Payment Act* partially set aside as the adjudicator had denied procedural fairness by deciding part of the dispute on a different basis that than contended for by the parties (I B C)

Hossain v Ali and Ors (Ruling No 2) (VCC) - plaintiff not permitted to amend pleaded imputations where the proposed new imputations differed in substance from the imputations particularised in the concerns notice (I)

Re Lifestyle Residences Hobsons Bay Pty Ltd (recs & mgrs apptd) (VSC) - director had

validly brought proceedings to set aside a statutory demand in the company's name, but had done so out of time (B)

Bob Brown Foundation Inc v Barnett (No 2) (TASSC) - application for judicial review of the Minister's decision to grant a mining lease over a road allowing the mining company to access a proposed mine dismissed (C)

HABEAS CANEM

Waiting for the passengers

Summaries With Link (Five Minute Read)

Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs [2023] HCA 10

High Court of Australia

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

Administrative law - s351(1) of the *Migration Act 1958* (Cth) empowers the Minister to substitute a decision of a Tribunal with a decision more favourable to the applicant, if the Minister thinks it is in the public interest to do so - s351(3) provides the Minister must exercise this power personally - the two appellants asked the Minister to exercise the power - these requests were rejected by officials in the Department without reference to the Minister, pursuant to 2016 Ministerial Instructions that such requests not be referred to the Minister unless the Department assessed the request has having unique or exceptional circumstances - applications to Federal Court for judicial review rejected by both the primary judges and the Full Court - special leave granted to appeal to the High Court - held, by Kiefel CJ, Gageler, and Gleeson JJ: s351(1) requires the Minister to personally make two decisions, a procedural decision whether to consider to exercise the power, and (if the answer to the procedural decision is positive) a substantive decision how to exercise the power - the procedural decision involves a discretionary value judgment no less than the substantive decision - executive power is always susceptible to control by statute - the Ministerial Instructions were phrased in terms of "unique or exceptional circumstances" - this was an approximation of "the public interest" - the Ministerial Instructions therefore exceeded the statutory limit on executive power imposed by s351(3) - held, by Gordon J: it is always necessary to identify the source of power said to be executive power - merely stating a power is "non-statutory executive power" or "common-law executive power" does not demonstrate the existence of the power - the power to give the Ministerial Instructions was derived from s351, not some non-statutory source - the fact that the Minister was under no obligation to exercise the statutory power to make the procedural decision did not mean the Minister could therefore choose not to make the procedural decision but instead give "non-statutory" instructions to officials - held Edelman J: loose vocabulary concerning "executive power" and "rights" was the source of much confusion - the presently fashionable distinction between common law prerogative powers and common law general administrative powers fails to distinguish between a power and a liberty - the absence of a prohibition on executive power provides no justification for the existence of such power - the official's actions under the Ministerial Instructions did not infringe any rights of the appellants - those actions amounted to the exercise of the Minister's personal liberty to make the procedural decision, and were therefore unlawful - held, by Jagot J: the executive power referred to in s61 of the Constitution did not enable the Minister to purport to require officials to decide matters within the Ministers' exclusive personal decision-making power - held, by Steward J (dissenting): the application of the Ministerial Instructions did not constitute the exercise of power amenable to judicial review - each application was an anterior exercise, designed to facilitate the provision of advice to the Minister or otherwise operate as a screening mechanism for requests the Minister did not generally wish to consider - appeals allowed.

Davis (I B)

Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l. [2023] HCA 11
High Court of Australia
Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson, & Jagot JJ
Foreign state immunity - the respondents commenced arbitration against the Kingdom of Spain under the *Energy Charter Treaty* (1994) and the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965) (ICSID Convention) to which Spain was a party - the ICSID Convention provides for an arbitral tribunal to hear and determine disputes between states and nationals of other states - the respondents obtained an arbitral award of ??101 million - they brought proceedings in the Federal Court of Australia to enforce that award under s354 of the *International Arbitration Act 1974* (Cth) and sought orders that Spain pay them of ??101 million - the *Foreign States Immunities Act 1985* (Cth) provides that a foreign state is immune from the jurisdiction of Australian courts except as provided by that Act - an exception under that Act occurs where the foreign state has submitted to jurisdiction - the judge at first instance held Spain's agreement to the ICSID Convention constituted a waiver of immunity from recognition and enforcement, but not from execution, of the award, and ordered Spain pay the applicants ??101 million - the Full Court of the Federal Court held Spain had waived immunity from recognition, but not from execution, and perhaps also not from enforcement, of the award - the Full Court concluded the orders of the first instance judge went too far by requiring Spain to do something - Full Court made orders recognising the award as binding on Spain, as well as entering judgment against Spain for ??101 million, but the orders provided that they should not be construed as derogating from Spain's immunity from execution - Spain appealed to the High Court - held: section 10(2) of the *Foreign States Immunities Act* provides that the general immunity of a foreign state from jurisdiction does not apply if the foreign state has waived its immunity either explicitly or by implication - words said to evidence waiver by implication must be construed narrowly - waiver is rarely accomplished by implication and only where waiver is unmistakable - the general principles of treaty interpretation are contained in the *Vienna Convention on the Law of Treaties* (1969), rather than domestic rules of statutory interpretation - Spain's agreement to the ICSID Convention amounted to a waiver of foreign state immunity from the jurisdiction of Australian courts to recognise and enforce the arbitral award, but not from the jurisdiction regarding execution of the arbitral award - the orders of both the first instance judge and the Full Court of the Federal Court were properly characterised as orders for recognition and enforcement - the orders of the Full Court of the Federal Court should not be disturbed - appeal dismissed
Kingdom of Spain (I B)

Ceerose Pty Ltd v A-Civil Aust Pty Ltd (No 2) [2023] NSWSC 345
Supreme Court of New South Wales
Richmond J
Security of payments - Ceerose subcontracted A-Civil to do certain excavation works as part of construction work in Alexandria - Ceerose terminated the contract and A-Civil left the site - A-

Civil issued a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) for just under $800,000 - Ceerose responded with a payment schedule claiming the amount owing was nil - the matter went to adjudication - the adjudicator determined that the amount payable was about $168,000, which included an amount of about $116,000 that were "retention monies" - retention monies were amounts payable to A-Civil for construction work but held back by Ceerose as security, with 50% to be returned to A-Civil after the certificate of practical completion under the head contract, and 50% to be returned to A-Civil after the final certificate was issued under the head contract - Ceerose applied to the Supreme Court challenging the validity of the adjudication determination on the basis that the adjudicator had denied procedural fairness in respect of the retention monies amount - held: an adjudication determination is only subject to judicial review if it is affected by jurisdictional error - a denial of procedural fairness which is material will constitute jurisdictional error - there will be a denial of procedural fairness where the adjudicator decides the case on a basis different from that advocated by the parties, without notifying them of an intention to do so and permitting them to be heard - however, there will not be a denial of procedural fairness on this basis where the parties could reasonably have anticipated that the adjudicator would decide the case on the basis on which he did - what procedural fairness requires in any given case is determined in the context of the scheme established by the Act, which establishes a "pay now, argue later" system to allow for the speedy but interim resolution of disputes to preserve cash flow for subcontractors, without prejudice to the common law rights of the parties which can then be determined in the normal manner - the payment claim, payment schedule, adjudication application, and adjudication response are not pleadings, but they do serve to define the scope of the issues in dispute which the adjudicator must determine - the adjudicator determined the claim in respect of retention monies on a basis that Ceerose could not reasonably have anticipated - there was a realistic possibility that the decision may have been different but for this denial of procedural fairness - the determination was affected by jurisdictional error and was set aside to the extent that it ordered the payment of the retention monies.
View Decision (I B C)

Hossain v Ali and Ors (Ruling No 2) [2023] VCC 514
County Court of Victoria
Judge Clayton
Defamation - plaintiff sued the defendant in defamation, regarding an email sent to members of the Victorian Bangladeshi Community Foundation (VBCF) and Western Region Bangla School - plaintiff sought leave to amend statement of claim - this was necessary because the statement of claim repeatedly referred to "my client" instead of "the plaintiff", because the numbering was not consecutive, because the plaintiff had discontinued against some of the defendants, and because the plaintiff sought to plead amended imputations arising out of the email, largely restricting the imputations to when the plaintiff was working on the Committee of the VBCF - held: Part 3 of the *Defamation Act 2005* (Vic) sets out what the plaintiff has to do before issuing proceedings - s12B prevents a plaintiff from commencing defamation proceedings unless the defendant has been provided with a concerns notice, particularising the imputations to be relied

upon, and giving a period for an offer of amends - s12B(2) clarifies that the plaintiff may rely on an imputation that is "substantially the same" as that particularised in the concerns notice - an appropriate question in deciding whether two imputations are substantially the same is whether the same facts could be relied upon to prove those imputations - where different evidence is required to prove different imputations, those imputations differ in substance - if the new imputations sought by the plaintiff were allowed, the evidence the defendant would have to call to establish a defence of truth would change - the defendant would be limited to evidence demonstrating the plaintiff engaged in the alleged conduct while working at the VBCF - it would deprive the defendant of the ability to call evidence that the plaintiff had bullied others - the allegation that the plaintiff broke the law by engaging in workplace bullying is different, and would require different evidence to prove, than an allegation that the plaintiff engaged in bullying while working on the committee of the VBCF - the proposed imputations may be better, but they were not substantially the same as the imputations particularised in the concerns notice - a plaintiff who attempts to bolster his case by exaggerating or inflaming the imputations particularised in the concerns notice may find himself stuck with those imputations in a subsequent pleading - this puts a high burden on plaintiffs to "get it right" in the concerns notice, which, in turn, has the potential to "front load" costs in defamation proceedings - however the recent amendments to the Act make it clear this follows from what the legislature intended - application for leave to amend granted only in part.
Hossain (I)

Re Lifestyle Residences Hobsons Bay Pty Ltd (recs & mgrs apptd) [2023] VSC 179
Supreme Court of Victoria
Hetyey AsJ
Corporations law - a shareholder and sole director of a company sought leave under s236 of the *Corporations Act 2001* (Cth) to bring these proceedings in the name of the company - the proceedings were to set aside a statutory demand served on the company under s459G of the *Corporations Act* - receivers and managers had been appointed to the company - the director did not seek the consent of the receivers and managers before commencing the proceeding - held: as a matter of law, the appointment of receivers does not entirely displace a director's power and authority to commence proceedings - while receivers may effectively control the company's dealings with the outside world, the receivership does not change the company's internal structure - the practical question is whether the exercise by a director of any power in the name of the company would interfere with the legitimate exercise of the receivers' powers - the proceedings had been properly commenced with the authority of the company - the interests of secured creditors was threatened by the continuation of the present proceedings, as there was a risk that the company's assets would be diminished by the legal costs incurred and the company's exposure to an adverse costs order - the director should provide a satisfactory indemnity to the company in respect of those costs, underpinned by appropriate security - however, the proceedings were not commenced within the period required by s459G of the *Corporations Act* - the doctrine of fair notice and s459J(1)(b) did not apply - application dismissed

Re Lifestyle Residences Hobsons Bay Pty Ltd (recs & mgrs apptd) (B)

Bob Brown Foundation Inc v Barnett (No 2) [2023] TASSC 6
Supreme Court of Tasmania
Blow CJ
Administrative law - the second respondent, MMG Australia Ltd, operates a mine near Rosebery - it wanted to build a new tailings dam on the northern side of the Pieman River - MMG already had a mining lease over the site of the proposed dam - MMG applied for a new mining lease over the access road to the dam to enable it to use that road to access the dam - there was to be no mining on the area under the new lease, it was only for access - the first respondent, the Minister for Resources, granted the new lease - Bob Brown Foundation Inc and two of its employees applied to the Supreme Court for review of the Minister's decision under the *Judicial Review Act 2000* (Tas) - held: the fact that compliance with the marking-out requirement in s72(1) of the *Mineral Resources Development Act 1995* (Tas) was effected in the name of an employee of MMG rather than MMG itself could not affect the validity of the mining lease - there was nothing in that Act to suggest that the minister had a nondelegable personal obligation to scrutinise every application - a communication by the Minister at an earlier time that he had not yet granted or refused the application did not constitute the refusal of the application - it was clearly open to the Minister to be satisfied that the granting of the lease would enable the road to be used to access the proposed mine - there was no evidence that the Minister failed to engage in the active intellectual processes required by law in approving the application - the Minister had not had regard to irrelevant considerations when considering security of access and control of the access route - the Minister had not been obliged to prefer the interests of protestors to the interests of MMG - the Minister's decision had not been unreasonable - application dismissed.
Bob Brown Foundation Inc (C)

Poem for Friday

Ode to a Nightingale

By: John Keats (1795-1821)

My heart aches, and a drowsy numbness pains
My sense, as though of hemlock I had drunk,
Or emptied some dull opiate to the drains
One minute past, and Lethe-wards had sunk:
'Tis not through envy of thy happy lot,
But being too happy in thine happiness,—
That thou, light-winged Dryad of the trees
In some melodious plot
Of beechen green, and shadows numberless,
Singest of summer in full-throated ease.

O, for a draught of vintage! that hath been
Cool'd a long age in the deep-delved earth,
Tasting of Flora and the country green,
Dance, and Provençal song, and sunburnt mirth!
O for a beaker full of the warm South,
Full of the true, the blushful Hippocrene,
With beaded bubbles winking at the brim,
And purple-stained mouth;
That I might drink, and leave the world unseen,
And with thee fade away into the forest dim:

Fade far away, dissolve, and quite forget
What thou among the leaves hast never known,
The weariness, the fever, and the fret
Here, where men sit and hear each other groan;
Where palsy shakes a few, sad, last gray hairs,
Where youth grows pale, and spectre-thin, and dies;
Where but to think is to be full of sorrow
And leaden-eyed despairs,
Where Beauty cannot keep her lustrous eyes,
Or new Love pine at them beyond to-morrow.

Away! away! for I will fly to thee,
Not charioted by Bacchus and his pards,

But on the viewless wings of Poesy,
Though the dull brain perplexes and retards:
Already with thee! tender is the night,
And haply the Queen-Moon is on her throne,
Cluster'd around by all her starry Fays;
But here there is no light,
Save what from heaven is with the breezes blown
Through verdurous glooms and winding mossy ways.

I cannot see what flowers are at my feet,
Nor what soft incense hangs upon the boughs,
But, in embalmed darkness, guess each sweet
Wherewith the seasonable month endows
The grass, the thicket, and the fruit-tree wild;
White hawthorn, and the pastoral eglantine;
Fast fading violets cover'd up in leaves;
And mid-May's eldest child,
The coming musk-rose, full of dewy wine,
The murmurous haunt of flies on summer eves.

Darkling I listen; and, for many a time
I have been half in love with easeful Death,
Call'd him soft names in many a mused rhyme,
To take into the air my quiet breath;
Now more than ever seems it rich to die,
To cease upon the midnight with no pain,
While thou art pouring forth thy soul abroad
In such an ecstasy!
Still wouldst thou sing, and I have ears in vain—
To thy high requiem become a sod.

Thou wast not born for death, immortal Bird!
No hungry generations tread thee down;
The voice I hear this passing night was heard
In ancient days by emperor and clown:
Perhaps the self-same song that found a path
Through the sad heart of Ruth, when, sick for home,
She stood in tears amid the alien corn;
The same that oft-times hath
Charm'd magic casements, opening on the foam
Of perilous seas, in faery lands forlorn.

Forlorn! the very word is like a bell
To toll me back from thee to my sole self!
Adieu! the fancy cannot cheat so well
As she is fam'd to do, deceiving elf.
Adieu! adieu! thy plaintive anthem fades
Past the near meadows, over the still stream,
Up the hill-side; and now 'tis buried deep
In the next valley-glades:
Was it a vision, or a waking dream?
Fled is that music:—Do I wake or sleep?

John Keats, an English poet, was born 31 October 1795, in Moorgate, London, and died of tuberculosis, at the age of 25 on 23 February 1821 in Rome, Papal States (Italy). His father died in 1804 after an accident when his horse faltered and he fell suffering a head injury. His mother died of tuberculosis when Keats was only 14. His brother also died of tuberculosis. After his father's death the family lost most of its inheritance to the actions of a trustee, who only after Keats's death, came to a settlement with his sister Fanny. Keats trained to be a surgeon. He was considered later to have been a poet of the later Romantic period. He only published 54 poems. His most famous were the Odes, including *Ode on a Grecian Urn*. *Ode to a Nightingale* represents the cycle of nature and death. The poem was written by Keats in only a couple of hours. He was subject to criticism by some of his contemporaries for his style of writing, and perhaps due to his background. Of his death, his friend Joseph Severn, an English painter, who remained by his side wrote: *"He told me not to tremble for he did not think he would be convulsed – he said. Did you see anyone die ? no ? well then I pity you poor Severn ? what trouble you have got into for me. Now you must be firm for it will not last long ? I shall soon be laid in a quiet grave."*
https://en.wikipedia.org/wiki/John_Keats

Stephen Fry reads *Ode to a Nightingale*
https://www.youtube.com/watch?v=nKVNJH0SbUM

Benedict Cumberbatch recites *Ode to a Nightingale*
https://www.youtube.com/watch?v=_pkQYLVqBms

Mathew Coulton recites *Ode to a Nightingale*
https://www.youtube.com/watch?v=S1KH60CenMM

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