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A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (One Minute Read)

Farrell v Super Retail Group Limited (Cross-claim) (FCA) - cross-claim seeking to have solicitors restrained from acting for the applicants dismissed (I B)

Gaynor v Minister for Communications (FCA) - Classification Review Board erred in giving an "Unrestricted" classification to the publication *Gender Queer* (I)

Commissioner of Police v Attorney General for New South Wales (NSWCA) - the *Law Enforcement Conduct Commission Act 2016* (NSW) abrogates public interest immunity in relation to the production under notices issued under s114(3)(d) for the purpose of oversight and monitoring of a critical incident investigation (I)

Cui v Salas-Photiadis (NSWSC) - order withdrawing caveat refused after parties let settlement go through in PEXA while the caveat was in place (I B C)

Hoe v Kode (TASSC) - responses by a medical practitioner to the Australian Health Practitioner Regulation Agency were not protected by client legal privilege in a medical negligence action arising out of the same incident (I)

Summaries With Link (Five Minute Read)

Farrell v Super Retail Group Limited (Cross-claim) [2024] FCA 1189

Federal Court of Australia
Lee J
Solicitors' duties - a dispute arose between two senior employees of SRG and that company - the employees commenced separate proceedings, claiming that a binding settlement of the dispute had been reached - SRG and others cross-claimed, seeking to enjoin the applicants' solicitors from acting for them - SRG contended that there was the possibility of defamation actions by third parties against the applicants and their solicitors arising out of a purported "emergency disclosure" under s1317AAD of the *Corporations Act 2001* (Cth) and a related media statement made by the solicitors, and that the solicitors therefore had an interest in avoiding such liability - SRG also contended that the authorisation of the emergency disclosure may be found to have been repudiatory conduct that entitled SRG to terminate the applicant's employment, and the solicitors may therefore be liable in negligence for failure to advise - held: the Court has an implied jurisdiction to restrain legal representatives from acting in a particular case, as an aspect of its supervisory jurisdiction - the test is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a representative be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice - the applicants had rationally formed the view that persons acting or purporting to act to promote the interests of SRG had suggested to at least one journalist that SRG believed they were engaged in some form of "shakedown" of a public company - it was against the background of such public suggestions that the solicitors for the employees had made the purported "emergency disclosure" and media statement - the approach to any conflict must be applied realistically to a state of affairs in assessing whether it discloses a real conflict of duty and interest and not to something theoretical or a rhetorical conflict - the possibility of defamation proceedings was no higher than a non-fanciful possibility - a more obvious conflict arose due to the fact that, despite advice given by the solicitors to the contrary, the media statement was expressly not a protected disclosure, meaning that SRG was not prevented, under Pt 9.4AAA of the *Corporations Act*, from enforcing contractual rights against the applicants in connexion with the media statement - however, although the solicitors had a reputational interest in having their advice no scrutinised, the Court was not convinced that this will cause any practical difficulty in the conduct of the case - cross-claim dismissed.
Farrell (I B)

Gaynor v Minister for Communications [2024] FCA 1186
Federal Court of Australia
Jackman J
Administrative law - a majority of the Classification Review Board upheld a decision of the Classification Board which classified a publication titled *Gender Queer* as "Unrestricted" and gave consumer advice of "M-Not recommended for readers under 15 years" under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) - the Review Board described *Gender Queer* as "an autobiographical non-fiction graphic memoir, written by Maia Kobabe, that explores the author's path to identifying as nonbinary and asexual" - an applicant sought judicial review of the Review Board's decision - the applicant contended that the Review

Board ignored, overlooked, or misunderstood relevant facts or materials, namely (1) the written submissions from interested members of the public, and (2) a letter from a lecturer in Educational Psychology and Child Protection at the University of South Australia - if a decision-maker ignored, overlooked, or misunderstood relevant facts or materials, that may give rise to jurisdictional error - in applying that principle, the Court must bear in mind its limited role in reviewing the exercise of an administrative discretion and not substitute its decision for that of an administrative decision-maker - the "overwhelming" or dominant theme of the submissions were that the book tolerates or promotes paedophilia, and that such a stance is against the criminal law in Australia and is morally repugnant - few of the submissions opposing an unrestricted classification could rationally be described as "broadly anti-LGBTQIA+", as characterised by the Review Board, although some clearly did - no rational person who had actually read the submissions could arrive at the conclusion that they were broadly anti-LGBTQIA+ - the Review Board had also ignored, overlooked, or misunderstood an argument made by the lecturer in her letter that an ancient Greek image depicting a sexual encounter between a teacher and his student may be problematic in the light of standards of morality, decency and propriety generally accepted by reasonable adults whether or not the student were a child - decision quashed and an order in the nature of mandamus be made to compel the Review Board to determine the matter according to law.
Gaynor (I)

Commissioner of Police v Attorney General for New South Wales [2024] NSWCA 150
Court of Appeal of New South Wales
Ward P, Gleeson, & Adamson JJA
Public interest immunity - the Law Enforcement Conduct Commission, a corporation constituted by s17 of the *Law Enforcement Conduct Commission Act 2016* (NSW), was monitoring two critical incident investigations pursuant to Pt 8 of that Act, which each involved the death of a person during a police operation - it issued a notice under s114(3)(d) of the Act in respect of each incident to the relevant police officers - the Commissioner of Police took the view that, on its proper construction, s114(3)(d) did not abrogate public interest immunity, with the result that the notices did not compel the production of the documents sought - the Chief Commissioner of the LECC decided that s114 did abrogate public interest immunity - the Commissioner of Police and the relevant officers sought declaratory relief in the summary jurisdiction of the Court of Appeal - held: on the proper construction of s114(3)(d), read in the context of the legislation as a whole and having regard to the objects and purpose of the legislation, public interest immunity had been abrogated by necessary intendment in relation to the production of material to LECC under notices issued under that section for the purpose of oversight and monitoring of a critical incident investigation - the stated legislative objective was that there be "independent oversight and real time monitoring" by LECC of critical incident investigations by the Police - the legislature contemplated that LECC would be overseeing and monitoring the critical incident investigation as it was occurring and would be provided with all relevant materials to enable it to form the necessary view as to the conduct of the investigation so as to give the advice contemplated by s117 whether it considered the investigation was fully and properly conducted

- the obligation of co-operation in relation to the investigation (by the Police) and monitoring (by LECC) of critical incident investigations was a strong indication that Parliament intended that LECC and the Police effectively work together in the exercise of their respective functions - proceedings dismissed.
View Decision (I)

Cui v Salas-Photiadis [2024] NSWSC 1280
Supreme Court of New South Wales
Hmelnitsky J
Caveats - the plaintiff entered into a contract to purchase a home from the second defendant, borrowing funds from a bank who was to be the incoming mortgagee - the first defendant lodged a caveat over the property, relying on an interest under a "charge" granted under a loan agreement relating to building work done by the first defendant - no participant in the PEXA workspace noticed that the first defendant's caveat had been lodged - on settlement in PEXA, documents were lodged with Land Registry Services, and the funds were disbursed in accordance with the financial settlement schedule - the following day, the bank received a requisition from Land Registry Services informing it that the transfer and mortgage could not be registered because of the first defendant's caveat - the plaintiff sought an order that the caveat be withdrawn under s74MA of the *Real Property Act 1900* (NSW) - held: an equitable charge may or may not take the form of an equitable mortgage - the caveator's reference to a "charge" in the caveat did not necessarily invoke the definition of "Charge" in the *Real Property Act* - the caveat therefore did not fail sufficiently to specify the first defendant's claimed interest merely because it described a claimed equitable mortgage as a charge - under s7D of the *Home Building Act 1989* (NSW), an agreement which purports to grant security for the payment of the consideration payable under a contract to do residential building work is an "other agreement" within the meaning of that provision - the loan agreement here was therefore within the scope of s7D to the extent it purported to secure payment for residential building work - however, s7D left the balance of the loan agreement intact - the mere failure of the caveat to specify the amount secured is not a sufficient reason to set the caveat aside - the first defendant had demonstrated that it had a good arguable case that the caveat had substance - the balance of convenience favoured the continuation of the caveat until such time as the rights of the parties can be dealt with on a final basis, which would inevitably include a contest as to the parties' competing priorities - order under s74MA refused and matter listed for directions on the Real Property List.
View Decision (I B C)

Hoe v Kode [2024] TASSC 51
Supreme Court of Tasmania
Daly AsJ
Client legal privilege - the plaintiff claimed damages for personal injuries suffered as a result of the defendant's negligent medical treatment during and around surgery undertaken in 2019 - the plaintiff also submitted a complaint to the Australian Health Practitioner Regulation Agency about "a concern" relating to her treatment, seeking "an apology, a refund, action to keep the

public safe, disciplinary action, and to suspend the practitioner" - the defendant provided a response to AHPRA - the response was disclosed during discovery in the medical negligence action - a second response to AHPRA in a letter from the defendant's lawyers came to the plaintiff's attention during communications with AHPRA - plaintiff sought disclosure of the second response, and the defendant sought orders that its first response was protected by client legal privilege - held: the defendant had the onus of showing that the communications were privileged - verbal formulae and bare conclusory assertions of purpose are not sufficient to make out a claim for privilege - while the first response was prepared by the defendant for AHPRA, it was not made by or to any person who was under an express or implied obligation not to disclose its contents - AHPRA was not under any obligation not to disclose the contents of the first response - the second response was prepared by the defendant's solicitors on instructions from the defendant - the second response was prepared for AHPRA - the second response is a communication or a document recording what the defendant instructed his lawyers to communicate to AHPRA - when the second response was made or prepared, AHPRA was under an obligation not to disclose its contents, which obligation arose from the face of the document itself - the facts and circumstances strongly suggested that the purpose for which each response was brought into existence was to communicate to AHPRA, with the intention of persuading it that the defendant treated the plaintiff with all due care, and that it should not uphold the plaintiff's notification of a complaint - the evidence failed to establish that either of the responses were brought into existence for dominant purpose of a lawyer providing legal advice to the defendant - even if the first response was privileged, that privilege was lost when it was communicated to the plaintiff - defendant ordered to make discovery of the second response.
Hoe (I)