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

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Executive Summary (One Minute Read)

Keleray Pty Ltd v Dare & Ors (SASCA) - decision of primary judge to set aside an authorisation under s23 of the *Aboriginal Heritage Act 1988* (SA) to conduct a mineral exploration program overturned (C I)

The Agency Group Australia Limited v H.A.S. Real Estate Pty Ltd (FCA) - a real estate agent had not infringed the trade marks THE AGENCY and a stylised A logo by using THE NORTHERN AGENCY and a stylised N logo (I B)

Stellar Vision Operations Pty Ltd v Hills Health Solutions Pty Ltd (NSWCA) - an undertaking between two joint venturers had constituted a binding contract, and one party had owed fiduciary duties to the other (I B)

DXC Eclipse Pty Ltd v Wildsmith (NSWCA) - primary judge had been correct to dismiss proceedings for breach of non-competition and non-solicitation covenants in a business sale agreement (I B)

AML v Longden Super Custodian Pty Ltd (VSCA) - leave refused to appeal in respect of the primary judge and an Associate judge upholding the Civil and Administrative Tribunal's decision to order vacation of residential property (I B)

Willmot v State of Queensland (QCA) - primary judge had not erred in ordering proceedings for historical sexual and physical abuse permanently stayed (I)

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Summaries With Link (Five Minute Read)

Keleray Pty Ltd v Dare & Ors [2023] SASCA 46
Court of Appeal of South Australia
Livesey P, Doyle, & Bleby JJ
Aboriginal heritage - Keleray applied for an authorisation under s23 of the *Aboriginal Heritage Act 1988* (SA) for a mineral exploration program on Lake Torrens - the Department of the Premier and Cabinet embarked upon a consultation program, under s13 of the *Aboriginal Heritage Act*, and provided a consultation package to consultees including the first respondent, an elder of the Barngarla people, and the second respondent, who was a member of the third respondent, the Barngarla Determination Aboriginal Corporation - this corporation provided a submission on behalf of the Barngarla people opposing the grant of an authorisation - the Premier granted the authorisation to conduct the exploration program, and the authorisation expressly permitted Keleray to do things that would otherwise contravene s23; that is, to damage, disturb or interfere with any aboriginal site, object, or remains - the respondents applied for judicial review of the decision to grant the authorisation - the primary judge set aside the decision on the ground that the Premier had misdirected himself or acted *ultra vires* by relying on Keleray' Chance Find Procedures, which were part of its cultural heritage management plan to protect aboriginal sites objects and remains - Keleray appealed - held: s23 provides that a person must not, without the authority of the relevant Minister (that is, the Premier), damage, disturb or interfere with any aboriginal site, damage any aboriginal object, or disturb, interfere with, or remove any aboriginal object or remains - s20 provides that an owner or occupier of private land who discovers an aboriginal site, or an aboriginal object or remains, on the land must notify the Minister - s24 provides that the Minister may give directions prohibiting access to or activities on an aboriginal site or an area containing aboriginal objects of remains - the primary judge had erred in law in holding that an authorisation under s23 must by necessary implication be conditioned by express conditions securing compliance with ss20 and 24 - the trial judge had also erred in law and in law and fact in finding that the Premier had misdirected himself or otherwise acted *ultra vires* in granting the authorisation under s23 - the primary judge had also erred in concluding that the authorisation under s23 substantially detracted from the legal and practical operation of ss20 and 24 - appeal allowed and primary judge's decision set aside.
Keleray Pty Ltd (C I)

The Agency Group Australia Limited v H.A.S. Real Estate Pty Ltd [2023] FCA 482
Federal Court of Australia
Jackman J
Trade marks - The Agency Group operates a real estate business providing services in residential sales, project marketing, property management and finance across Australia, using the brand "The Agency" - it has a wholly owned subsidiary that owns the trade marks THE AGENCY (in a stylised form) and a stylised logo of the letter A - H.A.S. Real Estate has operated a real estate business in the Northern Beaches region of Sydney since March 2023 - it

uses the mark THE NORTH AGENCY and a stylised logo of the letter N - The Agency Group and its subsidiary sued H.A.S. Real Estate and its principals for infringement of the trade marks, misleading or deceptive conduct and making false representations contrary to the *Australian Consumer Law*, and passing off - held: under s120(1) of the *Trade Marks Act 1995* (Cth) a person infringes a registered trade mark if the person uses as a trade mark a sign that is substantially identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered - there was no doubt H.A.S. Real Estate had used THE NORTH AGENCY and the N logo as trade marks - it had also used "thenorthagency" in its domain name and email addresses as a trade mark - when assessing deceptive similarity, in the case of composite marks, the whole of the marks and devices, which may consist of a number of elements, must be considered in their context, including the size, prominence and stylisation of words and device elements used in the mark, and their relationship to each other, and any essential feature - it is relevant to take into account the fact that some element that is common to both marks has been used by a number of traders and therefore must to some extent be discounted - the marks used by H.A.S. Real Estate were not deceptively similar to The Agency Group's trade marks - similarly, H.A.S. Real Estate's conduct had not contravened the *Australian Consumer Law* or constituted passing off - originating application dismissed.
The Agency Group Australia Limited (I B)

Stellar Vision Operations Pty Ltd v Hills Health Solutions Pty Ltd [2023] NSWCA 102
Court of Appeal of New South Wales
Bell CJ, Hammerschlag CJ in Eq, &Adamson JA
Contract and fiduciary duty - Stellar and Questek started working together with a view to supplying patient entertainment systems to hospitals - Questek successfully tendered to supply such systems to the Western Sydney Local Health District (WSLHD) - Hills acquired Questek's business - Stellar and Hills negotiated an undertaking that included an acknowledgment and agreement that provided that the WSLHD tender had been a joint tender between Questek and Stella, and that Hills would negotiate in good faith with Stellar to draft an agreement for a long term relationship - Stellar worked to develop hardware and software for the WSLHD contract - Hills subsequently excluded Stellar from participation in that contract - Stellar sued, alleging breach of contract and breach of fiduciary duties - the primary judge dismissed the claim, and made certain findings regarding the damages that would be recoverable were she wrong on liability - Stellar appealed - held: regarding the existence of a contract, the primary judge's reasoning was at odds with the objective features of the acknowledgement and agreement viewed in the context of the undertaking as a whole, the commercial circumstances in which it was entered into, and the parties' evident aims and expectations as revealed by the undertaking and the commercial circumstances - the acknowledgement and agreement used the language of contract - Hills required Stellar to formally sign and accept the undertaking as a whole, which Stellar did, and this was an indication that the undertaking was intended to be binding - the primary judge had erred in characterising the acknowledgement and agreement as an agreement to agree - as to fiduciary duty, as the party dealing directly with WSLHD and

ultimately the only contracting party, Hills was manifestly in a position where it could affect the interests of Stellar, both in a legal and practical sense - Stellar was in a position of vulnerability to Hills' breach - even if, contrary to the Court's findings on the existence of a binding contract, the parties' dealings had not proceeded beyond mere negotiation, the nature of those dealings was such that the mutual confidence and trust which would underlie a consensual fiduciary relationship was readily apparent - as to damages, the primary judge had erred in allowing a deduction from the net profits expected to be generated from the contract, possibly by relying on a paragraph in a forensic accountant's report that had not been admitted as evidence, but in any event by making findings for which there was no satisfactory basis in the evidence - evidence is to be weighed according to the power of a party to produce it, and Hills, as the party who had entered into and administered the contract, was in a better position than Stellar to lead evidence on this subject - appeal allowed, with Stellar to bring in short minutes reflecting a calculation of damages in accordance with the Court's judgment.
View Decision (I B)

DXC Eclipse Pty Ltd v Wildsmith [2023] NSWCA 98
Court of Appeal of New South Wales
Bell CJ, Brereton JA, & Simpson AJA
Restraint of trade - DXC was a Microsoft business software solutions company - it acquired a software solutions business called Sable37 from a number of sellers, including Wildsmith and On-Key Consulting Pty Ltd, for $9.5 million pursuant to a Securities Purchase Agreement - at the time the agreement was signed, Wildsmith was Global Managing Director of Sable37 and the owner and controller of On-Key Consulting - the Agreement contained non-competition and non-solicitation covenants - Wildsmith later incorporated a new software solutions business called Will Thirty Three Pty Ltd, in which most shares were held by On-Key Consulting - DXC commenced proceedings for interlocutory injunctive relief against Wildsmith and On-Key Consulting, contending that Will Thirty Three violated the non-competition and non-solicitation covenants - a judge initially granted interlocutory relief, but the primary judge later discharged the orders and awarded costs to Wildsmith and On-Key Consulting - SXC was granted leave to appeal and appealed - held: the appeal should be determined on the basis on which it had been fought at first instance, namely that DXC bore the onus of establishing the reasonableness of the restraints - albeit for slightly different reasons, the Court agreed with the primary judge's conclusion that "Microsoft Dynamics 365 Business Central" was not a "future, successor or derivative" of the products used in the business of Sable37 within the meaning of "Business" in the Securities Purchase Agreement, and that it did not form part of "the business of the Sable37 Group as a whole as at the Completion Date" - the primary judge had been correct not to find that Will Thirty Three "might pose a real commercial threat" to, or would compete with, DXC "seriously" - the fact that the trial judge inadvertently expressed this as "will" rather than "might" did not detract from this - if the level of competition in question between a vendor and a purchaser of a business is slight, the greater the nature or extent of the restraint, the less likely it is to be reasonable - although the reasonableness of a restraint is to be assessed as at the time it was entered into, the discretion whether to enforce a restraint may be informed by

considerations at the time enforcement is sought - the primary judge ought to have found that the non-competition restraint was unreasonable in that the restraint period was longer than was reasonably necessary to protect any legitimate interest SXC had in the goodwill it acquired in Sable37 - the restraint in excess of four years in respect of the non-solicitation covenant was also not shown to be reasonable - appeal dismissed.
View Decision (I B)

AML v Longden Super Custodian Pty Ltd [2023] VSCA 118
Court of Appeal of Victoria
Niall & Kaye JJA
Administrative law - AML as lessee and Longden as lessor entered into a fixed twelve month residential tenancy agreement for premises at Glen Iris - on expiration, the rental agreement was not renewed, and continued as a periodic monthly tenancy - Longden served a notice to vacate, as it intended to sell the premises - AML did not vacate - Longden commenced proceedings in the Victorian Civil and Administrative Tribunal - the Tribunal granted possession to Longden and ordered AML to vacate - AML appealed to the Supreme Court under s148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) - an Associate Judge granted summary judgment on the basis the appeal had no real prospects of success - the primary judge dismissed a summons seeking to appeal from the decision of the Associate Judge and for interlocutory relief - AML sought leave to appeal - held: in order to be granted leave to appeal, AML must demonstrate that there was, at the least, an arguable error of law in the decision by the primary to refuse his application for an interlocutory injunction permitting him to continue to reside in the property, and for a stay of execution of the warrant of possession - determining whether there was a serious issue to be tried would involve a consideration whether it was reasonably arguable that, assuming there was a breach of procedural fairness by the Tribunal, AML could show that he had been deprived of an opportunity to put a sustainable proposition to the Tribunal that might have affected the outcome - it was by no means apparent that there was a serious issue to be tried as to whether there even had been any denial of procedural fairness by the Tribunal - however, the hearings before the Associate Judge and the primary judge had proceeded on the assumption that the applicant could demonstrate that it was arguable there was a serious issue to be tried regarding procedural fairness, and it was therefore appropriate that the Court of Appeal proceed on the same assumption - AML had not demonstrated that, had he been afforded procedural fairness, there may have been a different result - further, the balance of convenience clearly weighed strongly against the grant of interlocutory relief - leave to appeal refused.
AML (I B)

Willmot v State of Queensland [2023] QCA 102
Court of Appeal of Queensland
Mullins P, Gotterson, & Boddice AJJA
Negligence - the appellant claimed damages in negligence from the State of Queensland on the basis of psychiatric injury she allegedly suffered from sexual and physical abuse while the State

was responsible for her care under the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) - she alleged the State was liable due to a failure to properly monitor and supervise her, and those into whose care she was placed by the State, including foster parents, her grandmother, and a girls' dormitory - she did not allege vicarious liability - the primary judge ordered that the proceedings be permanently stayed - the appellant appealed - held: the primary judge had not erred by attributing excessive weight to the availability or capacity of the perpetrators to provide instructions to the defendant or give evidence at trial - the primary judge had not erred in concluding that the inability of the State to confront the alleged perpetrators to obtain instructions was sufficient to conclude that any trial would be fundamentally unfair - the primary judge had not erred in concluding that the State had no means for investigating the foundational facts underpinning the alleged wrongful acts which were critical to establishing liability - the primary judge had not erred in finding that it would be insurmountably difficult, for the purposes of causation, to extract one alleged event from the broader allegations of what happened at one particular house and at the girl's dormitory, let alone the other subsequent life events - the primary judge's discretion had not miscarried by failing to take into account relevant material - appeal dismissed.
Willmot (I)

Poem for Friday

A Great Yogi

By: Mirabai (1498-1547)

In my travels I spent time with a great yogi.
Once he said to me
“Become so still you hear the blood flowing
through your veins.”

One night as I sat in quiet,
I seemed on the verge of entering a world inside so vast
I know it is the source of
all of
us.

Mirabai, also known as Meera, and later Sant Meerabai, was a Hindu poet from the 1500s. She was born in 1498 in Kurki, (Rajasthan) India into the Rajput royal family. She was a devoted follower of Sri Krishna and wrote devotional songs, known as bhajans. Her devotion led to friction within her family. It is said that her family attempted to murder her many times to silence her, although biographies during the century after her death make no mention of those attempts, and the reports may be untrue. She became famous across northern India. She was considered a saint. It is said that the Moghul Emperor Akbar, visited her, disguised as a beggar, so as to avoid conflict with Mirabai’s Rajput royal family who were his enemies. Mirabai died in 1547 in Dwarka, India. Her life has been the subject of films and literature.

Mirabai devotional songs, sung by Lata Mangeshkar, “Gadh Se To Meerabai Utri”
https://www.youtube.com/watch?v=KN64AQXupKw

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