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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)

Ganghui Pty Ltd v YTO Construction Pty Ltd (NSWSC) - developer succeeded in action to recover amounts owed by a builder (I B C)

AAN MP Pty Ltd as trustee for the AAN MP Unit Trust v Camilleri (NSWSC) - Court refused to grant summary judgment to a purchaser who had purported to rescind a contract for the sale of land due to failure to annex a swimming pool certificate (I B C)

VicForests v Environment East Gippsland Inc (VSCA) - injunctions restraining VicForests from logging in State forests without taking certain actions to protect the southern greater glider and the yellow-bellied glider upheld (B C I)

Barjeba Pty Ltd v Bogg (WASC) - company and its directors had not engaged in oppressive conduct by incorrectly registering a natural person, rather than the company he controlled, as shareholder with ASIC, and paying dividends to the natural person rather than the company (I B)

Rolfe v The Territory Coroner & Ors (NTCA) - the privilege against self-exposure to a penalty does not apply to non-curial proceedings without a basis in the statute which governs the proceedings, and in particular does not apply in Northern Territory coronial inquests (I)

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Summaries With Link (Five Minute Read)

Ganghui Pty Ltd v YTO Construction Pty Ltd [2023] NSWSC 729
Supreme Court of New South Wales
Stevenson J
Building and construction - Ganghui entered a contract with a builder to construct an apartment complex in Ashfield comprising 91 residential units and seven retail lots - Ganghui and the builder later entered into a further handwritten agreement - the contract allowed the builder to give to Ganghui a Final Payment Claim and for Ganghui to respond with a Final Payment Certificate - the builder served a Final Payment Claim for $6.256 million and Ganghui served a Final Payment Certificate contending that it owed the builder "$Nil" and that the builder owed it $1.89 million - Ganghui sued the builder for a debt said to arise under the handwritten agreement and for the amounts that it contended were due to it under the Final Payment Certificate - the builder contended there was a further arrangement from which Ganghui was estopped from resiling, and that Ganghui had made five representations, one of which involved the existence of the further arrangement, which were all misleading or deceptive contrary to s18 of the *Australian Consumer Law* - the builder also claimed a quantum meruit, and to recover what it said were loans it had made to Ganghui - held: Ganghui's claim under the handwritten agreement succeeded - the Final Payment Certificate was not effective - the builder had not established that the alleged further arrangement provided any basis upon which it would be entitled to maintain a claim beyond that to which it is already entitled under the contract or the handwritten agreement - the builder's claims under the *Australian Consumer Law* failed, as the Court was not satisfied that each representation was either made or was misleading or deceptive - the builder's claim for a quantum meruit failed - the builder's claim for repayment of the purported loans failed, as one of the purported loans was a payment under the contractual arrangements, and the builder had already been credited as repayment of the other loan - the parties to make submissions on the proper orders to give effect to the Court's reasons for judgment.
View Decision (I B C)

AAN MP Pty Ltd as trustee for the AAN MP Unit Trust v Camilleri [2023] NSWSC 737
Supreme Court of New South Wales
Pedem J
Land law - the plaintiffs were purchasers under a contract for the sale of land in Marsden Park - the contract had been entered into when the plaintiffs exercised a call option granted by a call option deed - they commenced proceedings seeking an order that they had validly rescinded the contract pursuant to s66ZI of the *Conveyancing Act 1919* (NSW), on the ground that the vendors had failed to annex to the contract a valid certificate issued under the *Swimming Pools Act 1992* (NSW) - they sought an order for summary judgment, or alternatively the determination of a separate question whether, at the date of the call option deed, there had been on the land a swimming pool to which the *Swimming Pools Act* applied“ held: r13.1 of the *Unform Civil Procedure Rules 2005* (NSW) empowers the Court to give summary

judgement - on a summary judgment application, the real issue is whether there is an underlying cause of action or defence, not simply whether one is pleaded - the critical question is whether there is more than a "fanciful" prospect of success, or whether the outcome is so certain that it would be an abuse of process to allow the action to go forward - summary disposal is inappropriate where there is any serious conflict as to any matter of fact - there were two issues that would need to be determined on the evidence in favour of the applicant in order to grant summary judgment: (1) on the date of the call option deed, the old pool on the defendants' property was a "swimming pool" within the meaning of the *Swimming Pools Act*; and (2) a defence based on an alleged waiver of the right of rescission (or affirmation) had only "fanciful" prospects of success - there was a triable issue as to both these questions, and so summary judgment would be refused - r28.2 of the *Unform Civil Procedure Rules 2005* (NSW) empowers the Court to order the determination of separate questions - the defendants had served a proposed amended defence and, generally, a separate question ought not be heard before the close of pleadings - the Court did not accept that a determination of the proposed separate question would save time and cost by substantially narrowing the issues for trial, or even by disposing of the proceedings - the fact that the defendants and cross-defendants did not oppose a separate hearing was a relevant consideration, but was not conclusive, and the Court had to make a determination whether ordering a separate question was appropriate in the circumstances - the experience of the Equity Division is that separation of parts of proceedings often does not result in the quicker or cheaper resolution of proceedings, but in fact can have the opposite effect and lead to delay, extra expense, appeals, and uncertainty of outcome, all of which it is intended to avoid - application for summary judgment or determination of separate question dismissed.
View Decision (I B C)

VicForests v Environment East Gippsland Inc [2023] VSCA 159
Court of Appeal of Victoria
Emerton P, Macaulay, & Kaye JJA
Environmental law - Victoria's forest estate comprises large tracts of public land reserved as State forest under the *Forests Act 1958* (Vic) - two species of gliding mammals, the southern greater glider and the yellow-bellied glider, inhabit State forests in eastern and north-eastern Victoria, in East Gippsland, and in the Central Highlands region - the southern greater glider is one of three species of greater glider and the only one found in Victoria, and is s thought to be the most threatened species of greater glider and to have suffered the sharpest population declines - the yellow-bellied glider is found in native eucalypt forests in eastern Australia - VicForests is a business owned by the Victorian Government whose function is the management and sale of timber resources from Victorian State forests on a commercial basis, and which conducts timber harvesting operations in State forests in East Gippsland and the Central Highlands of Victoria - Environment East Gippsland Inc sued VicForests seeking declarations and injunctions requiring VicForests to identify gliders inhabiting coupes in the East Gippsland Forest Management Area by conducting enhanced pre-harvest surveys, and to address risks to identified gliders by taking certain management actions (such as implementing

exclusion areas and appropriate buffers) - the primary judge made orders mostly as sought but different in some respects - VicForests sought leave to appeal - held: the regulation of timber harvesting in State forests occurs within a national policy framework that includes the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Regional Forest Agreements Act 2002* (Cth) - Victoria and the Commonwealth have entered into five Regional Forest Agreements, including the *East Gippsland Regional Forest Agreement* and the *Central Highlands Regional Forest Agreement* - in conducting timber harvesting operations under these agreements, VicForests must comply with the provisions of the *Sustainable Forests (Timber) Act 2004* (Vic) and any relevant Code of Practice made under Pt 5 of the *Conservation, Forests and Lands Act 1987* (Vic) (relevantly the *Code of Practice for Timber Production 2014*) - where a plaintiff has established an appropriate basis for the grant of equitable relief, a court exercising that jurisdiction should fashion the relief granted by it in a manner which is just, practical and appropriate, balancing the competing interests of the parties in question, and that relief may be different than the relief contended for - the primary judge had not denied VicForests procedural fairness by granting different relief than had been sought and argued about at trial - the respondents had established the necessary equity to attract the injunctive relief granted - the primary judge had not failed to properly construe the relevant provisions of the Code so as to fail to limit the injunctions to what was necessary to secure compliance with the law - the declarations made and injunctions granted were not imprecise, uncertain, vague, and evaluative - the primary judge had not failed to give adequate reasons - leave to appeal granted but appeal dismissed.
VicForests (B C I)

Barjeba Pty Ltd v Bogg [2023] WASC 232
Supreme Court of Western Australia
Hill J
Oppression - John McMahon and Bogg had worked together at a supplier of air conditioning products, and, when their employer had decided to no longer have a retail presence in Western Australia, they had agreed to go into business together - in 2001, as reflected in the registers maintained by the company, Bogg and McMahon became directors of Timefocus Pty Ltd, and Bogg and Barjeba Pty Ltd (a company owned and controlled by McMahon) became equal shareholders in Timefocus (owning one share each and a third share jointly) - however, McMahon, rather than Barjeba, was recorded as the owner of the shares in ASIC records - further, between 2009 and 2015, Timefocus paid over $1.4million in dividends to McMahan as shareholder, rather than to Barjeba - in about 2015, McMahon and his wife divorced, and a number of assets of Timefocus were sold as part of the property proceedings that accompanied the divorce - Paul McMahon, John's son, replaced John as director and shareholder of Barjeba - Paul made enquiries about Barjeba's assets, and formed the view that Barjeba was the shareholder of Timefocus, rather than John, and he investigated the reason Barjeba was not shown as a shareholder on ASIC records - Barjeba commenced proceedings, contending that it, and not John McMahon, was the 50% shareholder in Timefocus, and the actions of Timefocus and its directors, John McMahon and Bogg, in denying that Barjeba was a shareholder and in

paying dividends to John McMahon rather than to Barjeba, were oppressive - Barjeba sought an order that Bogg and John McMahon purchase its shares in Timefocus at a price to be determined taking account of such acts of oppression as found by the court to have occurred - held: under s231(b) of the *Corporations Act 2001* (Cth), a person is a member of a company if they agree to become a member of the company after its registration and their name is entered on the register of members - the constitution of Timefocus provided that Timefocus had the power to issue shares - there were three issued share in Timefocus and the shareholders were Barjeba and Hogg - conduct that is a breach of directors' duties may amount to oppression under s232(d) or s232(e) of the *Corporations Act*, although this will not necessarily be the case - in respect of s232(e), the weight of authority is that the phrase "oppressive to, unfairly prejudicial to, or unfairly discriminatory against" is a composite phrase and that these individual elements are simply different aspects of what is the essential criterion of s232(e), namely commercial unfairness - the conduct of Timefocus and its directors in failing to recognise Barjeba as shareholder and paying dividends to John McMahon and not to Barjeba was not oppressive within the meaning of s232 - Barjeba was estopped from denying it had acquiesced to John McMahon receiving dividends paid by Timefocus between 2009 and 2015 - parties to be heard on the appropriate orders to be made.
Barjeba Pty Ltd (I B)

Rolfe v The Territory Coroner & Ors [2023] NTCA 8
Court of Appeal of the Northern Territory
Grant CJ, Barr, & Brownhill JJ
Self-incrimination privilege - the appellant police officer shot an aboriginal man during the course of an arrest, and was subsequently acquitted of murder, manslaughter, and engaging in a violent act causing death - the Coroner then commenced an inquest into the death - the coroner overruled an objection from a police officer to giving evidence on the basis of the privilege against self-exposure to a penalty that may imposed under the *Police Administration Act 1978* (NT) - the Coroner held that the penalty privilege had been modified by s38 of the *Coroners Act 1993* (NT) - another police officer, who had also been served with a summons to appear as a witness, sought an injunction restraining the Coroner from requiring him to give evidence - the appellant was joined as a plaintiff in those proceedings - the primary judge dismissed the proceedings - the appellant appealed - held: the privilege against self-exposure to a penalty is a rule of the common law under which a person cannot be compelled to answer a question if the answer would tend to expose him or her to any kind of punishment or anything in the nature of a penalty - the penalty privilege will not apply to non-curial proceedings unless there is a foundation for applying it on proper construction of the statute which governs the conduct of the proceedings - the original role of the Coroner was administrative in nature and involved an investigation and finding of the cause of death on the verdict of a jury under the direction of the Coroner - the Coroner's function has now evolved to include the conduct of quasi-judicial inquiries into the circumstances of deaths and disasters with an emphasis on making recommendations directed to avoiding like occurrences in the future - an inquest is an inquisitorial fact-finding exercise and not a method of apportioning guilt - the procedure and

rules of evidence which are suitable for one are not suitable for the other - in an inquest, there are no parties, no indictment, no prosecution, no defence, no trial, but simply an attempt to establish the facts - on the enactment of the *Coroners Act*, the penalty privilege was not imported into the conduct of coronial proceedings under that Act - the amendments that put s38 of the Act into its current form were concerned only with the qualification and partial abrogation of the privilege against self-incrimination, and did not import a modified form of penalty privilege into coronial proceedings - even were this not the case, the abrogation of the privilege against self-incrimination by s38 would impliedly exclude the operation of the penalty privilege in any event - appeal dismissed.
Rolfe (I)

Poem for Friday

A Maori Love Song

By: Rakapa of Otaki, Rotorua (Mid-19th century)

See yonder curling clouds ascend
From Hinemutu's springs—
Like those soft mists
Arise my loving sighs for thee!
My soul springs forth in tears
That dim my eyes
And rolling flood my cheeks;
Like gushing water-founts they come,
And in my lonely sleep
The choking sobs are loosed
And all my heart goes forth to thee.

What parts us twain?
Is it the *tapu's* spell?
'Tis but an empty name,
Light as the western breeze.
My love will pass all bounds,
Time, space and thought;
My heart flies forth to thee—
And yet 'tis all in vain!
We dwell apart!

Written from the oral tradition of the original Maori and English translation.

Rakapa composed poetry and song in the mid-19th century. Two famous pieces are waiata-aroha composed for her distant lover Petera whom she later married. Maori culture developed a wealth and depth of poetry, recited and sung, including scared charms, canoe- chants, ritual chants and poems with themes of love, tradition, folk-lore, war, death, history, including recitation of genealogical links, and nature.
Maori poetry - Wikipedia.

An Encyclopaedia of New Zealand 1966 has further information:
Literary Forms – 1966 Encyclopaedia of New Zealand – Te Ara

An example of Maori poetry in song and chant, see Te Rangiura o Wairarapa, Te Matatini, 2023, Whakaeke,

Te Rangiura o Wairarapa | Te Matatini 2023 | Whakaeke - YouTube

For an example of modern Maori poetry and song watch **"Mareikura**" a modern Maori Quartet perform their own composition in 2017:
Modern Maori Quartet - 'Mareikura' live at RNZ - YouTube

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