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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)

Dixon v United Workers Union (FCA) - Court refused to make interlocutory injunction restraining termination of employment as proscribed adverse action, as the applicants had not established a primary facie case that the employer had the required intention (I B)

Commissioner of the Australian Federal Police v Duggan (NSWSC) - Court refused to vacate *ex parte* orders registering a US restraining order over NSW property where the evidence on which the Court had made the *ex parte* orders had contained two inaccuracies (I B)

Giurina v Greater Geelong City Council & Anor (VSCA) - Court refused to grant leave to appeal and to amend application for leave to appeal where a caveator sought to resist execution against property to satisfy costs orders arising from litigation regarding an emergency order under the *Building Act 1993* (Vic) (I B C)

Callinan v Power Equipment Pty Ltd (QCA) - boat engines manufactured in breach of the *Australian Consumer Law* consumer guarantee of acceptable quality - consumer entitled to damages calculated as a percentage of the purchase price, based on the Court's assessment of the reduction of the utility of the engines (B I)

Marble Group Services Pty Ltd v Blenkinsop (WASC) - interlocutory injunctions granted where employee had moved to a competing business and seemed to be violating the confidentiality, non-solicitation, and non-compete clauses of his original contract (B C I)

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Summaries With Link (Five Minute Read)

Dixon v United Workers Union [2023] FCA 1526
Federal Court of Australia
Snaden J
Industrial law - the applicants were employed by the United Workers Union as a coordinator and as a lead organiser - they were at what the Court described as "the pointy end" of disciplinary proceedings - they had been dissatisfied with the wage increases granted by the Union and had made efforts to secure a "majority support determination" under the *Fair Work Act 2009* (Cth), involving the circulation of a petition amongst the union's staff, in order to indicate a desire to bargain with the Union in relation to a proposed enterprise agreement under Part 2-4 of the Act - they contended that misconduct allegations had been made against them in retaliation for this activity - they applied to the Court for injunctions restraining the Union from terminating their employment, from continuing to subject them to a "show cause" process related to the disciplinary proceedings, and from continuing to suspend them from the performance of their duties - held: the applicants had to demonstrate that they had a prima facie case and that the balance of convenience favours the grant of an injunction - a prima facie case in this context is one with a sufficient likelihood of success to justify the preservation of the status quo pending trial - the degree of likelihood required depends upon the nature of the rights asserted and the practical consequences likely to flow from the order sought, and so the question of a prima facie case should not be considered in isolation from the balance of convenience - as to prima facie case, the applicants' claim for final relief was on the basis that the Union had engaged in adverse action in response to the exercise of a workplace right, contrary to s340 of the *Fair Work Act* - adverse action taken for multiple reasons will be actionable if one of those reasons is a proscribed reason - it was arguable that the applicants possessed a workplace right to obtain (or to seek to obtain) a majority support determination; and that, by circulating the petition that was created for that purpose, they should be understood to have proposed the exercise of that right - their case would turn on the subjective reasons that have animated the union's conduct - there was no evidence that directly substantiated that the Union had a proscribed purpose - however, the evidence prima facie sufficed to establish six factual circumstances that might allow the Court to infer that the Union's asserted reasons for the disciplinary action were not the actual reasons - however, the applicants had to show a prima facie case that the true reasons included proscribed reasons - at the interlocutory stage, the presumption in s361 that effectively switches the burden of proof regarding whether the Union had a proscribed intention does not apply - the Court could not properly infer from the current evidence that the Union had a proscribed intention - had a prima facie case been established, the Court would have found that the balance of convenience favoured granting the injunction - application dismissed.
Dixon (I B)

Commissioner of the Australian Federal Police v Duggan [2023] NSWSC 1511
Supreme Court of New South Wales
Chen J

Private international law - Duggan was indicted in the United States for conspiracy to violate the *Arms Export Control Act* and conspiracy to defraud the United States, violation of the *Arms Export Control Act*, and conspiracy to launder money - a judge of the US District Court for the District of Columbia made a restraining order in relation to a property in Saddleback Mountain, NSW, on the basis that it was a property derived from proceeds traceable to violations of the *Arms Export Control Act*, the *International Traffic in Arms Regulations* and a conspiracy to commit such violations, and was property involved in a money laundering conspiracy - the US Department of Justice requested the Australian Attorney-General's Department register the restraining order pursuant to s34A of the *Mutual Assistance in Criminal Matters Act 1987* (Cth) - the Commissioner of the Australian Federal Police sought and obtained a registration order *ex parte* - Duggan sought that the order be vacated pursuant to r36.16(2)(b) of the *Uniform Civil Procedure Rules 2005* (NSW), which provides that the Court may set aside or vary a judgment or order after it has been entered if it has been made in the absence of a party, whether or not the absent party had notice of the relevant hearing or application - held: the evidence on which the Commissioner had obtained the *ex parte* orders had two factual inaccuracies - first, the name of the company through which Duggan owned the property was slightly wrong, which the Court said was no more than an insignificant misdescription - second, Duggan had been described as a director of that company, when he was not and had never been, and Duggan's domestic partner was the sole director - once these inaccuracies were drawn to the attention of the Commissioner, they were very promptly and properly drawn to the attention of the Court - the obligation to make proper disclosure when seeking relief from a court without notice to the opposite party applies not merely to applications for equitable relief, but to a wide range of circumstances - where an application is made *ex parte*, the applicant has an obligation to disclose all material facts, that is, facts material to the decision - what is material will depend upon the nature of the proceeding and the nature of the right affected - even if a court finds that there has been a material non-disclosure, a discretion is retained as to whether the orders should be set aside - Duggan did not argue that the evidence demonstrated he was neither an owner of the property nor had an interest in it - it was not difficult to envisage a situation where the evidence may be such that, given the interest of another, it would be contrary to the "interests of justice" to register the foreign order, but that was not the case here - if there had been deliberate and intentional non-disclosure, or deliberate and intentional disclosure of misleading information, then generally that would be a proper basis for discharging the orders made, but that also was not the case here - the directorship misstatement was the product of innocent inadvertence and inattention to detail - it was also not legally material to a consideration of whether or not to register the foreign order in the circumstances of this case - application dismissed.
View Decision (I B)

Giurina v Greater Geelong City Council & Anor [2023] VSCA 299
Court of Appeal of Victoria
Beach & McLeish JJA
Caveats - Giurina was the executor of his mother's deceased estate, who was in that capacity

the registered proprietor of a property in Geelong West - Greater Geelong City Council made an emergency order under s102 of the *Building Act 1993* (Vic) concerning the house on the property - Giurina engaged in unsuccessful judicial review litigation against Council concerning the order, resulting in two orders for costs being made against him in his capacity as executor - each of those orders was the subject of a warrant of seizure and sale against the property issued at the request of Council, warranting authorised execution to be levied by the Sheriff for the purpose of satisfying the costs orders - Giurina the lodged two caveats over the property - Council applied for removal of the caveats under s90(3) of the *Transfer of Land Act 1958* (Vic) - the primary judge ordered removal of the caveats - Giurina sought leave to appeal on the sole ground that Council] did not have standing to bring the caveat removal application - the Court of Appeal had previously rejected this proposition, but Giurina now sought to advance additional authorities and arguments, and sought leave to amend his application - held: the Court agreed with the reasons of the Court of Appeal on the previous occasion (which are summarised in Benchmark 23 June 2023) - the Court also rejected Giurina's new submission that, even if his previous submissions had been wrong, it was only the Sheriff who had standing to apply to remove the caveats by virtue of the warrants - the Court rejected the submission that in order to make an application under s90(3) of for removal of caveats, a person must have power to deal directly with the land, if that results in a judgment creditor in the position of the Council being unable to make such an application - there was no basis for such a limited construction of the section - the Court made no comment about the standing of the Sheriff to make an application to remove a caveat from the title of a property that is the subject of a warrant of seizure and sale - Giurina's claim that he was the freehold owner of the property by virtue of a proprietary estoppel is totally devoid of merit - even if it could be sensibly suggested that a proprietary estoppel can be founded on a representation made by a person to himself, there was no reason to suggest that equity would require the freehold interest in the property to pass, rather than providing a remedy of the type equity customarily provides in cases of proprietary estoppel - there was no prima facie case that the property was no longer an asset of the estate - leave to amend the application refused - leave to appeal refused.
Giurina (I B C)

Callinan v Power Equipment Pty Ltd [2023] QCA 246
Court of Appeal of Queensland
Bond JA, Henry, & Cooper JJ
Consumer law - the applicant owns a recreational speedboat named Quick Fix - when he bought Quick Fix in 2006, it was fitted with two Volvo engines and accompanying Volvo sterndrives - in 2021, he replaced the Volvo engines and sterndrives with two Yanmar engines and two accompanying Yanmar sterndrives - Power Equipment Pty Ltd had imported the Yanmar equipment into Australia, and so was came within the definition of manufacturer under s7(1)(e) of the *Australian Consumer Law* - the Yanmar equipment suffered from numerous performance issues including the complete failure of one of the engines and both sterndrives - the applicant claimed about $150,000 in damages from Power Equipment, for breach of contract, and for breach of a consumer guarantees by a supplier under s259 of the *Australian*

Consumer Law and by a manufacturer under s271 of the *Australian Consumer Law* - the primary judge dismissed the breach of contract claim and the claim under s259, but upheld the claim under s271 and awarded damages of about $8,000 for the reasonably foreseeable loss suffered by the applicant because of the failure to comply with the consumer guarantee of acceptable quality in s54 of the *Australian Consumer Law* - the applicant sought leave to appeal the assessment of damages - held: s272(1)(a) provides for compensation for a particular kind of loss and damage, namely a reduction in the value of the goods - at least generally, the time for assessing damages for reduction in the value of goods is the time of supply - as the overarching consideration is that the amount of compensation for any reduction in value be appropriate, assessment of reduction in value damages may be undertaken by reference to the price paid at the time of supply, but taking into accounts subsequent events if appropriate - in most cases, the intrinsic value of consumer goods to a retail buyer will lie in the utility of those goods rather than the price at which they may be on-sold - therefore, the value of consumer goods at the time of purchase is indicated by the price that a consumer would pay to acquire those goods and not by the price that may be paid by a buyer to the consumer if those goods were immediately on-sold - the applicant's use of Quick Fix after the installation of the Yanmar equipment, albeit interrupted by the occurrence of the various failures, meant that the Yanmar equipment could not be characterised as completely useless - applying the recent case of *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 (see Benchmark 19 March 2023), understanding the extent to which the utility of the Yanmar equipment was diminished requires a comparison between the lifetime use of that equipment with and without the failures - a reasonable consumer with knowledge of the failures would regard those failures as having a significant impact on the utility of the Yanmar equipment, as: (1) they impacted the reliable operation of the equipment, and reliability is a critical factor in the safe operation of a vessel such as Quick Fix in open waters; (2) the failures significantly reduced the equipment's useful life; and (3) the failures would likely increase the cost of service and repair, and the time the vessel could not be used - the Court assessed the reduction in the value of the Yanmar equipment at the time of supply as 50% of the price the applicant paid, which amounted to about $62,000 - this approach did not require the residual value of equipment which remains installed to be brought to account - the applicant was not entitled to recover the replacement cost of the Yanmar equipment - leave to appeal granted, appeal allowed, and damages of about $62,000 ordered.
Callinan (B I)

Marble Group Services Pty Ltd v Blenkinsop [2023] WASC 464
Supreme Court of Western Australia
Lundberg J
Restraint of trade - Marble Recruitment was founded in Perth and operates a national recruitment business, providing candidates to the construction, engineering, manufacturing and mining sectors - Fetch Recruitment also operates a recruitment business, primarily based in Victoria, but has made a foray into the Western Australian market - Fetch opened an office in Perth, just a few steps away from Marble's offices - Blenkinsop was employed by Marble as a

Business Development Manager and then a Senior Recruitment Consultant - his contract of employment had a confidentiality cause; a non-solicitation clause, and a non-compete clause - the non-solicitation and non-compete clauses had cascading temporal limitations ranging from nine months, six months, and three months - the non-solicitation clause extended to a 100km radius from the Perth metropolitan area - the non-compete clause had a cascading operation, going from the State of Western Australia to the Perth metropolitan area - Blenkinsop resigned from Marble and started working with Fetch in the same month - Marble considered Blenkinsop was contacting its clients, was using its confidential information, and was providing recruitment services in the commercial construction or building sector - Marble commenced proceedings, and sought interlocutory injunctions imposing urgent restraints on Blenkinsop and Fetch - held: Marble had to demonstrate there was a serious question to be tried and to further demonstrate that the balance of convenience favoured the grant of the restraints which were sought - there was a serious question to be tried whether Marble's candidate and client databases, and the associated information regarding those candidates and clients, fell within the confidentiality clause - this was not mere know-how picked up by an employee in the course of their employment, but had a more direct connection with the employer's business model and its operations - there was a serious question to be tried that this information had the necessary quality of confidence that it would be protected in equity, quite apart from the contract - there was a serious question to be tried as to whether Blenkinsop took with him Marble's the candidate database (and the client database), in order to use that information to assist Fetch's entry into the Western Australian market - there was a serious question to be tried as to whether Blenkinsop had facilitated or permitted this information being used by Fetch, evidenced by emails sent by Blenkinsop to Marble's clients and candidates which were branded as part of Fetch's business - there was a serious question to be tried as to whether Blenkinsop had sought to solicit Marble's clients and candidates through those emails - regarding restraint of trade, there was a serious question to be tried that the plaintiff had a legitimate interest in protecting its confidential information as to its clients and candidates, given the competitive nature of the industry within which it operates - the balance of convenience favoured the imposition of restraints on both the defendants - if Marble's claims failed but restraints were imposed, Blenkinsop and Fetch would have the undertaking as to damages to call upon, and Marble as a business of substance - if Marble's claims succeeded but restraints were not imposed, Marble's claim for damages would be a hollow victory, as Fetch would have been able to position itself in the local market by using Marble's information in defiance of the contractual and other obligations owed by Blenkinsop to Marble - restraints imposed reflecting the requirements in the contact.
Marble Group Services Pty Ltd (B C I)

Poem for Friday

Claribel

By: Alfred, Lord Tennyson (1809-1892)

Where Claribel low-lieth
The breezes pause and die,
Letting the rose-leaves fall:
But the solemn oak-tree sigheth,
Thick-leaved, ambrosial,
With an ancient melody
Of an inward agony,
Where Claribel low-lieth.

At eve the beetle boometh
Athwart the thicket lone:
At noon the wild bee hummeth
About the moss'd headstone:
At midnight the moon cometh,
And looketh down alone.
Her song the lintwhite swelleth,
The clear-voiced mavis dwelleth,
The callow throstle lispeth,
The slumbrous wave outwelleth,
The babbling runnel crispeth,
The hollow grot replieth
Where Claribel low-lieth.

Alfred, Lord Tennyson was born on 6 August 1809, in Somersby, Lincolnshire, England. His father, an Anglican priest, and the son of an MP, married Mary Turner an heiress, and was described as being a man of "*superior abilities and varied attainments, who tried his hand with fair success in architecture, painting, music, and poetry*". Alfred, Lord Tennyson was educated at King Edward VI Grammar School and then Trinity College, Cambridge. He was Poet Laureate from 1850 to 1892, and was greatly admired by Queen Victoria and Albert, Prince Consort. He married Emily Sellwood in 1850 and they had two sons. *Claribel* was one of Tennyson's well-known poems, and included in his first collection *Poems, Chiefly Lyrical* published in 1830. His best-known poems include *Ulysses* and *The Charge of the Light Brigade*. One of his famous lines is "*Tis better to have loved and lost than never to have loved at all*", from *In Memoriam.* Alfred, Lord Tennyson died on 6 October 1892.

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