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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)

Australian Securities and Investments Commission v PayPal Australia Pty Limited (FCA) - term in PayPal's contract with small businesses that allowed PayPal to retain any overcharged fees if not notified within 60 days was void under the unfair contract provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (I B)

Cirrus Real Time Processing Systems Pty Limited v Hawker Pacific Pty Ltd (FCA) - applicant failed to establish that a contract had come into existence by an exchange of correspondence, and also failed in an estoppel claim (I B)

Edwards v Nine Network Australia Pty Limited (No 6) (FCA) - unsuccessful respondents in defamation action ordered to pay indemnity costs for part of the proceeding (I B)

Novelly v Tamqia Pty Ltd (NSWCA) - primary judge had erred in dismissing contempt motion on the basis that it alleged criminal contempt only and that the contempt was not contumacious (I B C)

Moran v State of New South Wales (NSWSC) - interrogatories directed to a police officer ordered in malicious prosecution and misfeasance in public office case (I B)

State of Tasmania v Munting (TASSC) - the onus of establishing that s25(1A) of the *Workers Rehabilitation and Compensation Act 1988* (Tas) applies to a claim for compensation rests on the employer (I B)

Summaries With Link (Five Minute Read)

Australian Securities and Investments Commission v PayPal Australia Pty Limited [2024] FCA 762
Federal Court of Australia
Moshinsky J
Unfair contracts - ASIC sued PayPal under the unfair terms provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) in respect of a term in PayPal's contract with small businesses that provided that the business had 60 days to notify PayPal of any fee error, and would not be entitled to correction of the error if it did not notify PayPal of the error within that time - PayPal admitted that the term was an unfair term and void (in standard form contracts with small businesses) under the relevant provisions of the Act - the parties jointly proposed that the Court make declarations that the term was an "unfair term" within the meaning of s12BG(1) and consequently void ab initio (in standard form contracts with small businesses) by operation of s12BF(1), and that the Court restrain PayPal l from applying or relying upon or enforcing the term in each of the relevant contracts, and that PayPal pay ASIC's costs - held: the purpose of the unfair contract terms provisions of the Act is to protect consumers and small businesses from the misuse of standard form contracts in the supply of financial products and services - the assessment of "unfairness" is to be carried out with a close attendance to the statutory provisions and is of a lower moral and ethical standard than unconscionability - the term caused a significant imbalance in the parties' rights and obligations arising under each contract - the term imposed a de facto obligation on the small business to examine account statements and other account activity information to identify whether PayPal had overcharged or wrongly charged fees, in circumstances where the account holder otherwise owed no such obligation to PayPal, and where PayPal possessed the requisite information to confirm whether the fee or charge was correctly charged and calculated - the term was not reasonably necessary to protect the legitimate interests of PayPal - the term would have caused detriment to small businesses if PayPal had relied on it, because, if the small business failed to notify PayPal in writing of any wrongly charged or overcharged fees within 60 days, the term permitted PayPal to retain any such fees - the term was legible, was in the same font size as the rest of the document, and had a heading in bold, but was not otherwise drawn to the attention of the small business upon entering into the contract - orders made as proposed.
Australian Securities and Investments Commission (I B)

Cirrus Real Time Processing Systems Pty Limited v Hawker Pacific Pty Ltd [2024] FCA 763
Federal Court of Australia
Kennett J
Contracts - Cirrus and the respondents planned to bid together for work offered by the New Zealand Defence Force to private contractors - Cirrus provided the fourth version of its quote to

the respondents - Cirrus later commenced proceedings, claiming that an exchange of correspondence created a contract by which it exchanged its authorisation to disclose the Version 4 Quotation for a promise by the respondents that it would be contracted on the terms in the Version 4 Quotation if the respondents ever entered into a contract with the NZ Defence Force that included an Air Warfare Officer training component - Cirrus also claimed the benefit of an estoppel by convention - held: this proceeding involves a matter falling within federal jurisdiction because, when commenced, it included a claim under s18 of the *Australian Consumer Law*, which arose from the same factual substratum as the contract claim, even though the *Australian Consumer Law* claim was later abandoned - the Federal Court therefore had jurisdiction - the Court had to assess whether the parties intended to be legally bound by reference to their conduct and in the light of the commercial circumstances that existed at the time and were known to both Cirrus and the respondents - the parties had not intended to be legally bound - while identification of a distinct "offer" and an inquiry as to whether there was an "acceptance" of that offer is often useful as a way of testing whether the necessary meeting of minds occurred, contracts may be formed even when the facts do not lend themselves to analysis through that rubric - the Version 4 Quotation indicated a contract was yet to come, and omitted a number of matters - the post-contractual conduct did not indicate there was a binding contract - a contract had not come into existence - the estoppel claim also failed - the alleged representations were not representations as to a state of affairs, but were representations about future conduct, which closely matched what Cirrus sought to establish as an express term of a contract - further, the respondents could not be estopped from denying the existence of an agreement with unidentified terms - claim dismissed.
Cirrus Real Time Processing Systems Pty Limited (I B)

Edwards v Nine Network Australia Pty Limited (No 6) [2024] FCA 758
Federal Court of Australia
Wigney J
Costs in defamation cases - the A Current Affair program broadcast a story concerning a dispute about the ownership and custody of a supposedly famous cavoodle dog named Oscar - a website and various social media platforms associated with Nine Network published a similar story - Edwards, a barrister, sued, alleging imputations that she was a thief who stole Oscar; had stolen Oscar for her own financial benefit; had deliberately delayed a court case about Oscar; had exploited Oscar for her own financial benefit; had adopted delay tactics so as to prolong her unlawful possession of Oscar; and had failed to fulfil her obligation to appear in court in relation to her AVO application - the Court had found the publishers liable to Edwards in defamation and awarded damages of $150,000 (see Benchmark 30 April 2024) - the Court now determined costs - held: the usual rule is that an order for costs means costs "as between party and party", under r40.01 of the *Federal Court Rules 2011* (Cth) - the discretion to award costs on a basis other than as between party and party, including on an indemnity basis, is unfettered, save that it must be exercised judicially and not arbitrarily or capriciously - the purpose of a costs order is to compensate the successful party, not to punish the unsuccessful one - s40(2)(a) of the *Defamation Act 2005* (NSW) provides that, if defamation proceedings are

successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff, the Court should order indemnity costs if satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff - there is some doubt whether s40 is "picked up" in federal jurisdiction pursuant to s79 of the *Judiciary Act 1903* (Cth) - Edwards had made an offer in her concerns notice that could fairly be characterised as a demand that the respondents completely capitulate - it had not been unreasonable for the respondents to refuse or fail to accept that offer in all the circumstances - the respondents also had not unreasonably failed to make an offer of compromise - however, Edwards had served a later offer of compromise which met all the requirements of Pt 25 of the *Federal Court Rules* - the respondents to pay Edwards costs, and indemnity costs after the relevant date pursuant to the later offer of compromise.
Edwards (I B)

Novelly v Tamqia Pty Ltd [2024] NSWCA 167
Court of Appeal of New South Wales
Meagher, Gleeson, & Kirk JJA
Contempt of court - Novelly leased a penthouse apartment from Tamqia - Novelly sought specific performance of Tamqia's obligations, including to keep the premises in reasonable repair, and also sought damages and injunctive relief against the sole director of Tamqia - the primary judge dismissed the claim for specific performance, and Tamqia and its director gave undertakings which were accepted by the Court - Novelly filed statements of charge, charging Tamqia and its director with committing breaches of those undertakings, which included the allegations that the alleged breaches of the undertakings were "contumacious" - the primary judge dismissed this motion, finding that, although the respondents' breaches of the undertakings were a civil contempt, Novelly had not proved that the breaches were contumacious - Novelly appealed - held: although the distinction between civil and criminal contempt has been much criticised, the distinction persists for relevant purposes, including appellate rights - s101(6) of the *Supreme Court Act 1970* (NSW) assumes that there is a difference in relation to appellate rights between civil and criminal contempt - an appeal is available in the case of acquittal (or a related order) of civil contempt, but not in the case of acquittal of criminal contempt - the test is whether the proceedings were remedial or coercive in nature, as distinct from being punitive, and this test focuses on the substantial character of the proceedings, not merely formal or incidental features - the time for application of the test is the time of commencement of the proceedings - the proceedings here were remedial or coercive, not punitive, as they concerned a tenant's attempt to satisfy his legitimate interest in securing his rights under the lease - the appeal was competent - the primary judge erred in finding that contumacy was an element of the offence of criminal contempt - the primary judge had not been constrained by the allegations of contumacy from making a finding that the breaches of the undertakings were a civil contempt - the contempt proceedings had had a "double aspect", in that Novelly had sought a finding of "at least" civil contempt, and had also sought a finding that the relevant breaches were contumacious - the respondents' submission that the contempt proceedings were run on the sole basis that the respondents' conduct was contumacious could

not be accepted - appeal allowed.
View Decision (I B C)

Moran v State of New South Wales [2024] NSWSC 856
Supreme Court of New South Wales
Chen J
Malicious prosecution and misfeasance in public office - the plaintiff was a solicitor who had been charged with sexual offending - the Deputy Director of Public Prosecutions determined there should be no further proceedings against the plaintiff, and he was discharged - the plaintiff commenced proceedings against the State, alleging that he was maliciously prosecuted, that the criminal proceedings against him were the product of misfeasance in public office, and that he was falsely imprisoned - the plaintiff sought leave to administer interrogatories directed to a Detective Senior Constable who was alleged to be a prosecutor for the purposes of the tort of malicious prosecution, and a public official for the tort of misfeasance in public office - held: whether leave should be granted to administer the interrogatories turned on whether they were "necessary" within the meaning of r22.1(4) of the *Uniform Civil Procedure Rules 2005* (NSW) - the concept of necessity focusses on the need for disclosure, and the accepted test of necessity is what is reasonably necessary for the disposing fairly of the matter or necessary in the interests of a fair trial - the Court considered each of the proposed interrogatories in the context of the elements of the torts and the issues likely to arise at trial - each of the proposed interrogatories was necessary - interrogatories ordered.
View Decision (I B)

State of Tasmania v Munting [2024] TASSC 36
Supreme Court of Tasmania
Blow CJ
Workers compensation - the respondent was employed within Ambulance Tasmania as a paramedic - he made a claim for workers compensation in respect of a stress disorder - the State disputed his claim - the Workers Rehabilitation and Compensation Tribunal held that a reasonably arguable case existed concerning the State's liability, and made an interim order under s81A(3) of the *Workers Rehabilitation and Compensation Act 1988* (Tas) for compensation not to be payable - the respondent referred his claim for compensation to the Workers Rehabilitation and Compensation Tribunal pursuant to s42 of the Act - that proceeding was currently before the Tasmanian Civil and Administrative Tribunal - the State contended that s25(1A) of the Act applied to the worker's claimed injury, and that the worker is not entitled to compensation - the Civil and Administrative Tribunal determined as a preliminary matter that the onus of establishing that s25(1A) of the Act applies to a claim for compensation rests upon the employer - the State appealed - held: s25(1A) of the Act creates exceptions in relation to an employer's liability to pay compensation - a common law rule places the onus of proof in relation to those exceptions on the employer - s49(2) should not be interpreted as requiring a worker to disprove the applicability of those exceptions - if Parliament had wanted to place the burden of disproof on workers, it could easily have done so using clear language - appeal dismissed.

State of Tasmania (I B)

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