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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)

HCF v The Queen (HCA) - High Court dismissed an appeal (by majority) where a juror had conducted independent internet research and the jury had discussed that research (I)

McNamara v The King (HCA) - s135 of the *Evidence Act 1995* (NSW) allows the evidence of one co-accused to be excluded on the basis that its probative value is substantially outweighed by the danger that it might be unfairly prejudicial to another co-accused (I)

B&D Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (FCA) - union restrained from organising a “community picket” blocking access to the employer’s premises, and from trespassing on the employer's premises (I B)

Saville v Insurance and Care NSW (NSWSC) - proceedings summarily dismissed as there was no case which supports the proposition that an insurer such as the workers compensation insurer in this case, owes a duty of care or a duty of good faith to a claimant, absent a contractual arrangement (I B)

Re Dask Entertainment Melbourne Pty Ltd (VSC) - application to set aside statutory demand arising from an adjudication under the *Building and Construction Industry Security of Payment Act 2002* (Vic) - applicant could not rely on an offsetting claim that was part of the foundation of the adjudication (I B C)

Flori v Winter & Ors [No 3] (QCA) - former Queensland police officer failed in action for reprisal under the *Public Interest Disclosure Act 2010* (Qld) against officers in the Ethical Standards Command (I)

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Summaries With Link (Five Minute Read)

HCF v The Queen [2023] HCA 35
High Court of Australia
Gageler CJ, Edelman, Steward, Gleeson & Jagot JJ
Juror misconduct - the appellant was tried before a jury with 25 counts of sexual offences between 1989 and 2001 - the jury found the appellant guilty on 6 counts - the day after the verdicts, a juror delivered a note to the Acting Deputy Registrar of the District Court, which caused the trial judge to authorise the Sheriff to conduct an investigation under s70(7) of the *Jury Act 1995* (Qld) - the jury had disobeyed the trial judge's directions in that one juror had conducted internet research regarding the sentences for the offences charged, that juror had shared this research with other jurors, who had then discussed the research with at least some members reaching conclusions on the sentencing practices; and every member of the jury had disobeyed the trial judge's direction to report any internet research in a note to the bailiff - an appeal to the Court of Appeal was unsuccessful - the appellant was granted special leave to appeal to the High Court on the ground the jury misconduct had caused a miscarriage of justice - held (by majority, Edelman & Steward JJ dissenting) - if an error or irregularity is properly characterised as a failure to observe the requirements of the criminal process in a fundamental respect, then a conviction cannot stand regardless of any assessment of its potential effect on the trial, but otherwise there is no miscarriage unless the error or irregularity is prejudicial in the sense that there was a real chance that it affected the jury's verdict, or realistically could have done so, or had the capacity for practical injustice, or was capable of affecting the result of the trial - in all cases of jury misconduct, what is required to establish a miscarriage of justice, and what will also establish a substantial miscarriage of justice, is that a fair-minded and informed member of the public might reasonably apprehend that the jury might not have discharged its function of rendering a verdict according to law, on the evidence, and in accordance with the directions of the judge - the objective nature and extent of the jury misconduct in this case might provide a basis upon which someone might speculate that the jury might not have discharged that function as required, but provided no basis to conclude that a fair-minded and informed member of the public might reasonably apprehend that this jury might not have discharged its function according to law, on the evidence, and in accordance with the directions of the judge - Edelman and Steward JJ would have allowed the appeal, on the basis that a person is entitled to a trial where rules of procedure and evidence are strictly followed, and that justice will miscarry unless the Crown can make it clear that there is no real possibility that justice has miscarried - given the conduct of the jury, the appellant could not be said to have received a trial where rules of procedure and evidence had been strictly followed - the jury's disobedience supported, at the very least, a conclusion that there was a capacity for prejudice to the jury's consideration of the appellant's case - by majority, appeal dismissed.
HCF (I)

McNamara v The King [2023] HCA 36
High Court of Australia

Gageler CJ, Gordon, Steward, Gleeson & Jagot JJ
Evidence - the appellant and his co-accused Roger Rogerson were tried before a jury of one count of murder and one count of supplying a large commercial quantity of methylamphetamine - the Crown case was that they had engaged in a joint criminal enterprise pursuant to which they lured a drug supplier to a storage unit, dispossessed him of methylamphetamine, and killed him - McNamara said he was not party to any joint criminal enterprise, and that Rogerson had shoot the supplier, and that he had assisted in handling the drugs and disposing of the body under duress from Rogerson - McNamara proposed to give evidence that, after the shooting, Rogerson threatened him in terms that included an admission that Rogerson had earlier killed Drury, and that, during earlier conversations, Rogerson had said that he had shot Drury, and had also murdered or been involved in the murder of five other people - Rogerson objected to this evidence - the trial judge upheld the objection and excluded the evidence pursuant to s135 of the *Evidence Act 1995* (NSW) on the basis that its probative value was substantially outweighed by the danger that it might be unfairly prejudicial to Rogerson - both co-accused were convicted of both charges and sentenced to life imprisonment without parole - both unsuccessfully appealed to the Court of Criminal Appeal - McNamara was granted special leave to appeal to the High Court on the ground that the trial judge erred in excluding his testimony - McNamara contended that a joint criminal trial is the concurrent holding of separate trials, and that evidence by one co-accused does not become evidence in the Crown case against another co-accused unless the Crown re-opens its case against that co-accused and adopts the evidence - the risk that the jury will improperly consider the evidence in the case against the other co-accused can be managed by the trial judge using management tools available in that separate trial - however, the trial judge cannot apply s135 in that separate trial, because that separate trial is not "a proceeding" in which the co-accused proposing to give evidence is "a party" - held: the nature of a criminal trial had changed markedly during the period between the end of the seventeenth century and the end of the eighteenth century - an indictment is a feature of criminal procedure for trial by jury at common law that has been constant through the centuries and remains foundational - in a trial upon indictment the jury is, and can only be, impanelled and sworn to try the issues of the particular indictment - where multiple accused have together been charged with one offence on one indictment, it has not been thought inappropriate to refer to them as "co-accused" who are "jointly charged" on a "joint indictment" and to refer to the resultant trial in the event of pleas of not guilty as a "joint trial" - the authorities refuted the contention that evidence of one co-accused was only admissible against another if adopted by the Crown in its case against the other co-accused - the construction of s135(a) turned on the meaning properly to be attributed to the text of that provision purposively construed in the context of the *Evidence Act* - a joint criminal trial is "a proceeding" to which the Crown is "a party" and to which each co-accused is also "a party" - appeal dismissed.
McNamara (I)

B&D Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2023] FCA 1451
Federal Court of Australia

Rofe J
Industrial law - B&D sought an urgent interlocutory injunction restraining the AMWU from organising any "community picket" at, and blocking access to, B&D's premises in Kilsyth, Victoria - held: B&D and AMWU were covered by the *B&D Doors Australia Pty Ltd Kilsyth Workshop Enterprise Agreement 2020-2023* made under the *Fair Work Act 2009* (Cth), which had a nominal expiry date of 30 June 2023 - the parties had been bargaining for a new enterprise agreement since April 2023 - a number of bargaining meetings had occurred - the applicant had made three offers for a proposed enterprise agreement, all of which had been rejected by employees - B&D employees covered by the Agreement and the AMWU had engaged in protected industrial action on a large number of occasions in a variety of forms, including work stoppages - B&D did not seek to restrain its employees or the AMWU from engaging in protected industrial action - B&D alleged that the AMWU had (a) contravened s343 of the *Fair Work Act* by organising or taking action, including organising a "community picket" (that is, encouraging members of the public who are not B&D employees to protest at the Kilsyth site), and by blockading the entrances to the Kilsyth site with intent to coerce B&D not to exercise its workplace right to participate in enterprise bargaining negotiations or, alternatively, to exercise its workplace right to participate in enterprise bargaining negotiations in a particular way; (b) unlawfully trespassed on its property; and (c) committed the tort of interference with economic relations or loss of services by organising unlawful conduct, including the community pickets - held: the Court had power to grant the injunction sought pursuant to both s545 of the *Fair Work Act* and s23 of the *Federal Court of Australia Act 1976* (Cth) - B&D had to show that it had a prima facie case and that the balance of convenience favoured the grant of an injunction - these are related inquiries - the AMWU did not dispute that blocking the entry and exit to B&D's Kilsyth site constituted coercion within the meaning of s343 of the *Fair Work Act* - a reasonable inference could be drawn from the evidence that the AMWU had "organised" persons to attend the B&D Site and blockade access to the site, in order to coerce B&D to offer terms more favourable to its employees and AMWU with respect to a new enterprise agreement - AMWU officials had also, on a number of occasions, trespassed on B&D property, including on the morning of the hearing - regarding the balance of convenience, the unlawful coercion had caused, or was likely to cause, loss and damage to B&D, both in financial terms by virtue of its employees being prevented from attending work, and due to the stress and anxiety experienced by its employees as a result of the unlawful conduct - it may be accepted that the AMWU and its members have a right to organise and take protected industrial action and to engage in peaceful protest and picketing - however, the terms of the proposed injunction were clear, and only restricted the AMWU from trespassing and blockading persons from entering or exiting the Kilsyth site - the AMWU was still entitled to take protected industrial action - a peaceful picket, not on B&D property and that did not have the effect of blocking access to the site, would permissible under the proposed injunction - injunction granted.
B&D Australia Pty Ltd (I B)

Saville v Insurance and Care NSW [2023] NSWSC 1415
Supreme Court of New South Wales

Cavanagh J
Torts - the plaintiff was a nurse who claimed workers compensation for abuse, bullying, and sexual abuse - it took six years for the workers compensation insurer to accept her claim, and she was subject to five independent reviews by medical practitioners - she sued the insurer and two workers compensation regulators, seeking damages for distress and psychological injury caused by the way in which the insurer had dealt with her claim - her initial statement of claim tried to plead a claim in negligence - the Court ordered this statement of claim be struck out with liberty to refile an amended statement of claim, which the plaintiff did not do - the respondents sought that the proceedings be summarily dismissed under r13.4 of the *Uniform Civil Procedure Rules 2005* (NSW), or alternatively dismissed for want of due dispatch - held: before dismissing the proceedings under r13.4, the Court must be satisfied that the plaintiff's claim is so clearly untenable that it cannot possibly succeed - some leeway must be given to unrepresented litigants, as they cannot be expected to be familiar with the pleading rules - however, even such a person must ensure that the statement of claim sets out the material facts and identifies the causes of action so that the defendants can understand the case that has to be met - the plaintiff now sought to rely on an proposed amended statement of claim that was a statement of her complaints and the sort of cause of action that she wished to pursue - the Court preferred to deal with the matter in substance rather than form - if it appeared the document could be reshaped into one on which the parties could go forward, and provide an arguable cause of action, then it would allow the plaintiff further time - it was clear what the plaintiff wished to allege and the basis on which she would allege it - dismissing the proceedings for want of due dispatch would be unfair bearing in mind the plaintiff's difficulties in obtaining legal representation and her psychological distress - the question was whether the causes of action which she wished to pursue (even if properly set out in a better document) were so untenable that the proceedings should be dismissed, even assuming there was some merit in the allegations of fact - the plaintiff was seeking to pursue causes of action which higher courts had said were not available - there was no NSW case which supported the existence of a tortious duty of good faith - the argument the plaintiff sought to run had been rejected in earlier cases - the common law develops in Australia incrementally and the High Court may consider this issue at some stage in the future, but the Court was bound by existing law - there was no case which supports the proposition that an insurer such as the workers compensation insurer in this case owes a duty of care or a duty of good faith to a claimant, absent a contractual arrangement - this was not a case in which the Court should consider whether the development of the law might allow for incremental changes or might allow for the development of a new tort - proceedings dismissed.
View Decision (I B)

Re Dask Entertainment Melbourne Pty Ltd [2023] VSC 660
Supreme Court of Victoria
Efthim AsJ
Security of payments - Aussie Fitouts Pty Ltd entered into a contract with a related entity of Dask Entertainment Melbourne Pty Ltd to do fit-out works in Fortitude Valley - pursuant to the

contract, a related entity of Dask was to pay Aussie Fitouts on a costs-plus 15% margin basis - following the completion of this work, the parties discussed proposed fit-out works in Melbourne - Aussie Fitouts alleged, and Dask denied, that the Melbourne works would proceed on a costs-plus 15% margin basis - Aussie Fitouts started the Melbourne works - Aussie Fitouts made a payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) - Dask did not serve a payment schedule in response - Aussie Fitouts served a notice of suspension of the works under s16 of the Act - Dask purported to terminate the contract - Aussie Fitouts said this was a repudiation of contract, accepted that repudiation, and itself purported to terminated the contract - Dask applied for an adjudication under the Act - the adjudicator found in favour of Aussie Fitouts, and the County Court gave effect to the adjudication certificate by ordering judgment for Aussie Fitouts for about $1.3million - Aussie Fitouts served a statutory demand for the judgment amount on Dask - Dask sought to have that statutory demand set aside, on the basis of an offsetting claim for breach of the contract for the Melbourne works - held: to quantify an offsetting claim in money terms, it is not necessary that the party seeking to have the statutory demand set aside should particularise the amount of the claim to the last dollar and cent - the plaintiff had provided a proper quantification regarding the claim for breach of contract - however, there was no quantification of the costs to remedy the alleged defects - where a statutory demand is based on an adjudicator's determination under the act and a consequent judgment, the plaintiff may be successful in an application to set aside a statutory demand if it has an offsetting claim arising from a separate transaction to that which gave rise to the judgment debt - the Act is intended to create an interim payment scheme - previous cases relied on by Dask to support the proposition that there can be an offsetting claim to an amount owing due to an adjudication under the Act were cases in which the offsetting claim was not part of the basis for the adjudicator's decision - in this case, the offsetting claim arose out of the same transaction which the adjudicator had before him, and found that the parties entered into a costs-plus 15% margin contract - the plaintiff could not rely on such an offsetting claim - application dismissed.
Re Dask Entertainment Melbourne Pty Ltd (I B C)

Flori v Winter & Ors [No 3] [2023] QCA 229
Court of Appeal of Queensland
Morrison, Dalton & Flanagan JJA
Whistleblower protection - in 2012, confidential Queensland Police Service CCTV footage was impermissibly given to the media, showing the arrest of an individual by Gold Coast police officers - Police investigated the disclosure of this material and formed a suspicion that Flori, a police officer, had released it - they executed a search warrant on Flori's home, and found a letter on his computer which had nothing to do with the arrest shown in the leaked footage, but which was a letter to the Queensland Crime and Misconduct Commission purported to be written by another officer, McGrath - Flori later admitted he had written the letter - disciplinary proceedings were instituted against Flori but withdrawn, criminal charges were brought against him but were unsuccessful, and he was transferred to a new station without request - at the end of 2015 he took leave without pay, and then resigned from the Police - he commenced

proceedings, seeking damages for the statutory tort of reprisal against two senior officers in the Ethical Standards Command - the primary judge dismissed this claim - Flori sought to appeal - held: although this appeal was filed as a civil appeal, counsel for Flori accepted that he needed leave to appeal pursuant to s118(3) of the *District Court of Queensland Act 1967* (Qld) - at the relevant time, s40(1)(a) of the *Public Interest Disclosure Act 2010* (Qld) defined the statutory tort of reprisal, and relevantly provided that a person must not cause detriment to another person because, or in the belief that, the other person or someone else has made a public interest disclosure - the primary judge had correctly found that the letter discovered on Flori's computer was not a public interest disclosure as defined in the Act - the conduct set out in the letter would not be demonstrative of official misconduct - the trial judge had also taken a sceptical view of Flori's credit, and noted that Flori did not seek whistleblower protection at the time he wrote the letter, did not put his name to the letter but dishonestly used McGrath's name, did not know of the matters alleged in the letter himself and had produced no witnesses who did know of the conduct and who had told Flori of it, and that McGrath and another officer, whose testimony was to be preferred to Flori's, had contradicted Flori's evidence that they were Flori's sources of information - the primary judge had also correctly found that Flori had failed to prove that the respondents caused him detriment because he had made a public interest disclosure - the word "because" in s40(1) of the *Public Interest Disclosure Act* requires an enquiry into the motive or reasons for the action said to be retaliatory - the now replead but then applicable *Whistleblowers Protection Act 1994* (Qld) would not protect other independent wrongs or wrongdoings simply because they happened to be in the same document as a public interest disclosure - the proposed appeal was unmeritorious - leave to appeal refused.
Flori (I)

Poem for Friday

Discipline

By: George Herbert (1593-1633)

Throw away thy rod,
Throw away thy wrath:
O my God,
Take the gentle path.

For my heart's desire
Unto thine is bent:
I aspire
To a full consent.

Not a word or look
I affect to own,
But by book,
And thy book alone.

Though I fail, I weep:
Though I halt in pace,
Yet I creep
To the throne of grace.

Then let wrath remove;
Love will do the deed:
For with love
Stony hearts will bleed.

Love is swift of foot;
Love's a man of war,
And can shoot,
And can hit from far.

Who can 'scape his bow?
That which wrought on thee,
Brought thee low,
Needs must work on me.

Throw away thy rod;

Though man frailties hath,
Thou art God:
Throw away thy wrath.

George Herbert was born on 3 April 1593 in Wales, into one of the oldest and most important families in Montgomeryshire. His mother was said to have been an extraordinary woman who managed the family's complex finances, the education of their 10 children, and the home, moving to advance the interests and education of the children. She was a friend of the poet John Donne, who stood in as godfather to the children after the death of Herbert's father in 1596. Herbert was said to have been deeply devoted to his mother. He was educated at home, but then attended Westminster School, and then Trinity College, Cambridge. After graduating, he remained as a lecturer and was made university orator at Cambridge. He wrote much of his poetry at this time, in English and Latin. He had a modest income and was concerned throughout his life about his finances, and concerned for his health, writing "I alwaies fear'd sickness more than death because sickness has made me unable to perform those Offices for which I came into the world." By 1624 he was required to take holy orders to remain at Cambridge (usually required within seven years of obtaining a master's degree). However he left Parliamend and Cambridge, and received ordination as a deacon. He became a priest of the small parish at Bemerton, having married in 1629, remaining there for his last three years. He died on 1 March 1633. He is known as one of the most important British devotional poets and lyricists.

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