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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)

Smith v Bunnings Group Limited (FCA) - leave to bring a discrimination claim against Bunnings refused to a customer who had claimed a medical exemption from wearing a mask in 2021 (B I)

BCEG International (Australia) Pty Ltd v Xiao (No 3) (NSWSC) - punishments for serious contempts of court imposed, including imprisonment of an individual and sequestration of a company (I B)

Ellis v Commonwealth of Australia (NSWSC) - settlement of stolen generation class action approved by the Court (B I)

Fire Rescue Victoria v Wheatley (VSC) - Victorian Civil and Administrative Tribunal did not err in refusing to summarily dismiss discrimination proceedings on the basis they had been brought more than 12 months after the relevant events (I)

Greenwells Wollert Pty Ltd v Head, Transport For Victoria (VSC) - claim for compensation for loss allegedly suffered by reservation of land being for a public purpose rejected, as the loss was neither a direct nor reasonable consequence of the reservation of the land (I B C)

Stevenson v Hall and anor (TASSC) - solicitors restrained from continuing to act, as one of them may be a witness, and would be seen to be compromised by conflicts between his obligation of loyalty to his client, his role and knowledge as a witness of material facts, and his

potential personal interest (I B)

HABEAS CANEM

Catching a cloud

Summaries With Link (Five Minute Read)

Smith v Bunnings Group Limited [2023] FCA 516
Federal Court of Australia
S Derrington J
Discrimination - in 2021, the NSW Government promulgated the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 3) 2021* (NSW) pursuant to s7 of the *Public Health Act 2010* (NSW) - cl5(1)(d)(i) of the Order directed that a person must wear a fitted face covering at all times when in an indoor area in retail premises - cl5(6)(b) provided that this requirement did not apply to a person with a physical or mental health condition or disability that made wearing a fitted face covering unsuitable - it was an offence under s10 of the *Public Health Act* not to comply with the Order without reasonable excuse - in response to the Order, Bunnings imposed a policy which required all customers to wear a face mask when entering its stores, unless a medical exemption applied, and required any customer who refused to wear a mask to provide evidence of a medical exemption - the applicant attempted to enter a Bunnings store in Nowra, and told the staff member at the entrance that she was medically exempt - she refused to show a medical exemption, and was asked to leave the store - she nevertheless obtained items and went to the checkout point, where she again refused to show medical exemption - she paid for the items and left the store - she complained to the Australian Human Rights Commission, stating that the incident caused her significant stress and she sought to hold Bunnings and the staff members accountable for their coercion, harassment and discrimination - the AHRC found there was insufficient information to support a claim of unlawful discrimination and terminated the complaint - the applicant then sought leave to commence an unlawful discrimination claim under the *Disability Discrimination Act 1992* (Cth) - held: leave was required pursuant to s46PO(3A) of the *Australian Human Rights Commission Act 1986* (Cth), which operates to filter out meritless cases, but which was not intended to create a high bar - the Court should be satisfied merely that the claims made by an applicant are reasonably arguable and not fanciful - it is not for the Court at that stage to undertake a close examination of the evidence - however, the applicant had adduced no evidence as to existence of her alleged disability (severe anxiety) - she also had adduced no evidence as to the alleged inutility of Bunning's mask policy - as it was for her to persuade the Court to exercise its discretion to grant leave, and as she had to demonstrate a prima facie case on the evidence, her failure to provide even the slimmest evidential base for her proposed claim was fatal - there was no arguable case of direct discrimination within the meaning of s5(1) of the *Disability Discrimination Act*, or indirect discrimination within the meaning of s6(1) - leave refused with costs.
Smith (B I)

BCEG International (Australia) Pty Ltd v Xiao (No 3) [2023] NSWSC 554
Supreme Court of New South Wales
Darke J
Contempt - the Court had previously found that the first, second, fourth, and fifth defendants were guilty of various contempts of court - the contempts had involved breaches of freezing

orders and undertakings to the Court, primarily by engaging in a "security swap transaction" involving the mortgaging of a previously unencumbered property, and then failing to reverse the transaction, disbursing monies from a bank account, and failing to provide certain information concerning their financial positions - the Court then conducted a further hearing on penalty - held: the Court had power to punish the contempts under Part 55 Rule 13 of the *Supreme Court Rules 1970* (NSW) - where the contemnor is not a corporation, the Court may punish contempt by committal to a correctional centre or fine or both - where the contemnor is a corporation, the Court may punish contempt by sequestration or fine or both - the Court may also order punishment on terms, including suspension of the punishment - imprisonment is to be regarded as a punishment of last resort - the appropriate penalty to impose the first defendant was committal to a correctional centre, and a fine of $125,000 - further, an indefinite term of imprisonment, terminable upon the purging of the contempts committed by Mr Xiao, was appropriate in the circumstances - the commencement of the imprisonment should be suspended for 21 days to allow the contempts to be purged within that period and imprisonment thereby avoided - the appropriate punishment for the second defendant was a fine of $75,000 - the appropriate punishment for the fourth defendant (a corporation) was an order for indemnity costs, as that contempt was only for failure to provide financial information, and that contempt had now been purged - the appropriate punishment for the fifth defendant (a corporation) was an order for sequestration until the contempt is purged - sequestration was also suspended for 21 days to allow the contempt to be purged within that period and sequestration avoided.
View Decision (I B)

Ellis v Commonwealth of Australia [2023] NSWSC 550
Supreme Court of New South Wales
Beech-Jones CJ at CL
Class actions - the original lead plaintiff filed a statement of claim commencing representative proceedings against the Commonwealth, alleging false imprisonment and negligence - the group members were all First Nations children located in the Northern Territory who were removed by the relevant authorities from their families in the period 1931ˆ’1973, as well as close family members of those children, ostensibly, their parents and siblings - the Commonwealth later announced the Territories Stolen Generations Redress Scheme - the parties then reached an in-principle settlement of these proceedings, which was recorded in a deed - the deed provided that that those removed children who could participate in the Redress Scheme would be taken out of the proceedings with a view to participating in that Scheme, and that those who remained would receive a payment of $50.45 million, which, after deductions for the litigation funder’s commission and the plaintiff’s legal costs and disbursements, would be made available to the "estates" of removed children who had died and who could therefore not participate in the Redress Scheme, as well as the close family members and their estates - the Court had to approve the settlement - held: the central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the group members as a whole - the Court’s role in relation to group members is supervisory and protective, and is analogous to that which the Court assumes when approving settlements on behalf of persons with a disability

- the Court must consider whether the settlement is fair and reasonable in comparison to the alternative, including the risks and costs of further litigation - the question whether the settlement is fair and reasonable cannot be separated from issues of approval of funding and legal costs - a detailed joint opinion from Senior and Junior Counsel for the plaintiff was tendered and remained confidential - the Court was satisfied the settlement was fair and reasonable *inter partes* - the Court was also satisfied the settlement was fair and reasonable as between group members - the Court was satisfied that the total of the amounts deducted represented a reasonable cost for the group in bringing the proceedings - settlement approved.
View Decision (B I)

Fire Rescue Victoria v Wheatley [2023] VSC 269
Supreme Court of Victoria
Gorton J
Discrimination - the respondent worked for Fire Rescue Victoria, or its predecessor, on short term contracts in 1998 and 1999 and then full time from 2003 until she ceased work in 2021 - she alleged she was sexually harassed and subjected to other forms of discrimination on numerous occasions over effectively that entire period of employment - she commenced proceedings in the Victorian Civil and Administrative Tribunal under the *Equal Opportunity Act 2010* (Vic) - Fire Rescue Victoria's applied to have the proceedings summarily dismissed, on the basis that they were an abuse of process because of delay - the Tribunal rejected that application - Fire Rescue Victoria sought leave to appeal from that rejection - held: in light of its legislative history, the purpose of cl18 of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) was to give to the Tribunal the power to summarily dismiss a proceeding in circumstances where the Commissioner previously had the power to decline to entertain it - it was intended to give to the Tribunal a broad power to summarily dismiss an application if the proceeding were unfair to the respondents, or perhaps contrary to the public interest, if, but only if, the proceeding had been commenced more than 12 months after the relevant events - where it applies, cl18 has the effect of expanding the operation of s76 of the Act (which deals with want of prosecution) to enable the Tribunal to consider not just delays after the commencement of proceedings but also delays before commencement - therefore, the reference to the 12 month period in cl18 did not create a statutory presumption, that a delay of more than 12 months will be unfair to a respondent and that Tribunal must have regard to that statutory presumption as a significant factor in the exercise of its discretion - the Tribunal did not err in the exercise of its discretion - leave to appeal granted but appeal dismissed.
Fire Rescue Victoria (I)

Greenwells Wollert Pty Ltd v Head, Transport For Victoria [2023] VSC 271
Supreme Court of Victoria
McDonald J
Reservation of land - Greenwells is the registered proprietor of land at Wollert - the *Whittlesea Planning Scheme* reserved 0.85ha of the land for the future widening of Craigieburn Road - Greenwells sought to subdivide the land, including the reserved 0.85ha - Council rejected the

application on the basis of the reservation - Greenwells made a claim for compensation under s98(1)(a) of *the Planning and Environment Act 1987* (Vic), contending that it suffered financial loss of $1.83 million as a consequence of the land being reserved for a public purpose - the Court ordered under r47.04 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) that the question of liability be determined separately from the question of quantum - held: s108(1) of the Act did not render a person ineligible to claim compensation if the person was not the owner or occupier of the land when a right to claim compensation *first arose* - Greenwells therefore had standing to apply for compensation - for liability to be established, the claimed loss had to be the natural, direct and reasonable consequence of the land being reserved for a public purpose - all three criteria must be satisfied, that is, natural, direct, and reasonable - "natural" means arising according to the usual course of things - "direct" connotes an immediate and substantial causal connection - "reasonable" connotes a reasonable response to the event triggering the right to compensation - the claimed loss was a natural consequence of the land being reserved for a public purpose - however, the claimed loss was neither a direct consequence nor a reasonable consequence land being reserved for a public purpose - the direct cause of any loss was Greenwells' decision to purchase the land while on notice that the alignment of Craigieburn Road would affect its capacity to undertake residential development - any loss flowing from the rejection of the subdivision application was not a reasonable response to the rejection of that application - claim for compensation rejected.
Greenwells Wollert Pty Ltd (I B C)

Stevenson v Hall and anor [2023] TASSC 11
Supreme Court of Tasmania
Holt AsJ
Solicitors' duties - the applicant in proceedings for the dissolution of a partnership and the taking of the partnership accounts applied for an order restraining the respondents' solicitors from continuing to act for the respondents in the proceedings - the applicant contended that at a reasonable observer, aware of the relevant facts, would perceive a real possibility that the solicitors might use confidential information imparted by the applicant, a former client, to advance the interests of the respondents to the detriment of the applicant - further, the applicant asserted that one of the solicitors might be a material witness in the case which it was said to be likely to involve an evaluation of his conduct - held: the Court has inherent jurisdiction to restrain solicitors from acting in a particular case as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice - the Court was not persuaded that there was any relevant confidential information imparted by the applicant to the solicitors - however, a fair-minded, reasonably informed, member of the public would conclude that the independent objectivity of the solicitor as witness would be compromised by conflict between his obligation of loyalty to his client, his role and knowledge as a witness of material facts, and his potential personal interest - the respondents had not suggested that, if a restraint order were imposed, they would have difficulty in obtaining alternative appropriate legal representation - there was a public interest that litigants not be deprived of their choice of legal representation without good cause - however, fair minded and reasonably informed members of the public

would expect that lawyers would conduct litigation free of and unaffected by the impact of personal interest - engagement of counsel by the respondents would not remedy the situation - solicitors restrained from continuing to act.
Stevenson (I B)

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Poem for Friday

Jabberwocky

By: Lewis Carroll (1832-1898)

'Twas brillig, and the slithy toves
Did gyre and gimble in the wabe:
All mimsy were the borogoves,
And the mome raths outgrabe.

"Beware the Jabberwock, my son!
The jaws that bite, the claws that catch!
Beware the Jubjub bird, and shun
The frumious Bandersnatch!"

He took his vorpal sword in hand;
Long time the manxome foe he sought—
So rested he by the Tumtum tree
And stood awhile in thought.

And, as in uffish thought he stood,
The Jabberwock, with eyes of flame,
Came whiffling through the tulgey wood,
And burbled as it came!

One, two! One, two! And through and through
The vorpal blade went snicker-snack!
He left it dead, and with its head
He went galumphing back.

"And hast thou slain the Jabberwock?
Come to my arms, my beamish boy!
O frabjous day! Callooh! Callay!"
He chortled in his joy.

'Twas brillig, and the slithy toves
Did gyre and gimble in the wabe:
All mimsy were the borogoves,
And the mome raths outgrabe.

Jabberwocky, a nonsense poem, was included in Lewis Carroll's 1871 novel *Through the Looking- Glass*, the story of Alice's adventures in Looking-glass World. Nonsense verse, usually included words that are made up, and verse which is light-hearted and amusing, with fantasy characters, and not restrained by common views of what is rational expression. GK Chesterton described nonsense verse as "lawless and innocent". Jabberwocky included the made-up word "chortle", since then absorbed into daily speech.
Jabberwocky

Lewis Carroll is the pen name of Charles Lutwidge Dodgson, an English poet, author, academic and mathematician born on 27 January 1832. His education was at home until being enrolled at Rugby School. He with other young boys was bullied at Rugby, a school which he found to be a torture. Charles' nephew later wrote about his protection of other young boys at Rugby that "*even though it is hard for those who have only known him as the gentle and retiring don to believe it, it is nevertheless true that long after he left school, his name was remembered as that of a boy who knew well how to use his fists in defence of a righteous cause"*. He spent most of his life at Christ Church College, Oxford. He excelled at mathematics and wrote 11 books on mathematics during his life. Throughout his life he had health problems, including epilepsy, deafness and migraines. His most famous work is **Alice in Wonderland**. His published work included 12 books of fiction. He died on 14 January 1898.
https://en.wikipedia.org/wiki/Lewis_Carroll

Benedict Cumberbatch reads **Jabberwock**y by Lewis Carroll
https://www.youtube.com/watch?v=Q_Um3787fSY

Sir John Gielgud reads **Jabberwocky** by Lewis Carroll
https://www.youtube.com/watch?v=KjOj970ZJC8

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