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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)

Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd (FCAFC) - s114 of the *Fair Work Act 2009* (Cth) states employees do not have to work public holidays, but an employer can request they do, and employees can refuse if the request is unreasonable or the refusal is reasonable - a requirement that gives employees no choice is not a "request" for the purposes of s114 (B C)

Sanofi v Amgen Inc (FCA) - orders for discovery refused in appeal against decision to grant patents, but leave granted to rely on certain experimental proof of facts, subject to conditions (B)

Western Sydney University v Thiab (NSWCA) - disciplinary action against a nursing student who espoused Covid misinformation while on clinical placement was not discrimination because of her political beliefs (I)

National Australia Bank v Redside Pty Ltd (VSC) - orders made confirming the validity of a bank's appointment of receivers to a defaulting restaurant (B)

Kuperman v Permanent Trustee Australia Limited (QCA) - plaintiff who had left personal injury proceedings dormant for nearly 20 years refused leave to take a further step in the proceedings and proceedings dismissed for want of prosecution (I)

Re Nagy (deceased) (QSC) - probate granted to copy of lost Will on evidence of solicitor who drew the Will (B)

Civmec Construction & Engineering Pty Ltd v Mann (No 2) (WASC) - application by self-represented defendant to set aside consent orders for lack of compliance with rules of court and lack of mental capacity dismissed (I C)

HABEAS CANEM

Co-conspirators in the great escape

Summaries With Link (Five Minute Read)

Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd [2023] FCAFC 51
Full Court of the Federal Court of Australia
Collier, Thomas, & Raper JJ
Industrial law - mining company informed employees they had to work standard shifts on Christmas and Boxing Day for no additional remuneration - Union contended this contravened a National Employment Standard (s114 of the Fair Work Act 2009 (Cth)) and therefore contravened s44 of that Act - Union's proceedings in Federal Court dismissed - appeal to Full Court - held: s114(1) provides employees not be required to work on a public holiday - s114(2) permits an employer to request an employee work on a public holiday - s114(3) provides such a request can be refused if it is not reasonable, or the refusal is reasonable - primary judge erred in holding that a communication from an employer stating the employee has no choice but to work on a public holiday is a "request" - the ordinary meanings of "request" and "require" support that a requirement is not a request - the intention of s114 is that the employee has a choice - this includes the intention that there should be room for negotiation and discussion about the matter - the argument accepted by the primary judge that certain critical services (emergency service and hospitals, for example) have to be available at all times and therefore an employer providing these services must be able to require employees to work on public holidays, and that therefore "request" in s114 must include "require" fails, because an employee can be required to work on public holidays under s114, even if the employer's communication is a request, so long as the request is reasonable and there is no reason for refusal that is reasonable - the legislative history supports, rather than undercuts, the construction favoured by the Full Court - an employer never has complete certainty of operation regarding what it would like to demand of its employees in the future, and whether it can do so lawfully - an employer is only ever able to demand of its employees what is lawful and reasonable, regardless of what a roster or contract says - appeal allowed and declaration of breach made.
Construction, Forestry, Maritime, Mining and Energy Union (B C)

Sanofi v Amgen Inc [2023] FCA 264
Federal Court of Australia
Nicholas J
Patents - Amgen made five applications for standard patents - the alleged inventions were monoclonal antibodies - Sanofi opposed the grant of the patents - delegate of the Commissioner of Patents directed the patents be granted - Sanofi appealed to the Federal Court under s60(4) of the *Patents Act 1990* (Cth) - under the relevant transitional provisions, the amendments made by the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* did not apply - test on appeal would therefore be whether Sanofi had established that any grant would be clearly invalid or whether, as it is sometimes expressed, it would be practically certain that any such claim would be invalid - appeal was a hearing *de novo*, with the onus on the applicant to make out a ground of opposition - Sanofi's grounds of opposition were that each

claimed invention was not a manner of manufacture, lacked fair basis, was not fully described (including best method), was not sufficiently defined, lacked clarity, lacked utility, lacked novelty, and did not involve an inventive step - Sanofi contended the claims were of such breadth that they would claim a monopoly over any antibody that happened to interact with a particular enzyme, regardless of the antibody's amino acid sequence or 3D structure, and irrespective of whether the claimed antibody had the desired biological outcome of lowering plasma LDL (bad cholesterol) levels - Sanofi applied for discovery and for leave to rely on experimental proof: held: documents in the first category of discovery sought (statements made by the alleged inventors in other proceedings) would be unlikely to help determine whether the monoclonal antibodies claimed were a manner of manufacture, fairly based or whether they failed to sufficiently define the invention described - documents in the second category (the results of Amgen's testing or analysis of various antibodies) were unlikely to include evidence of embodiments of the invention that did not achieve a promised result - documents in the third and fourth categories (concerning Amgen's catabolic research program) had not been held relevant by the US Court hearing similar proceedings - application for discovery refused - leave is required to rely on experimental proof of a fact pursuant to r34.50 of the *Federal Court Rules* - such evidence can give rise to expensive and time consuming debates between expert witnesses and has the potential to create a "trial within a trial" - leave to rely on some of the nominated experiments granted subject to conditions.
Sanofi (B)

Western Sydney University v Thiab [2023] NSWCA 57
Court of Appeal of New South Wales
Bell CJ, Meagher & Leeming JJA
Discrimination - respondent was a nursing student who had initially refused to be vaccinated against Covid, and then stated she would not comply with Public Health Orders, and espoused misinformation about the Covid vaccines and related matters while on clinical placement - her clinical placement was terminated and she was subjected to disciplinary measures, including the requirement to write 1,500 words about her unprofessional behaviour while on clinical placement and what she would do in future in a similar situation - s35 of the *Western Sydney University Act 1997* (NSW) provides that a person must not be denied progression at, or any benefit, advantage, or privilege of, the University "because of his or her religious or political affiliations, views or beliefs" - respondent applied to Supreme Court - primary judge found respondent had been discriminated against on the basis of her political views or beliefs, contrary to s35 - University appealed to Court of Appeal - held: the respondent's submission that the word "political" in s35 describes views or beliefs connected with public debate about affairs of government, or the conduct of public affairs, was too broad - "political" at least describes an affiliation, view, or belief associated with a political party, organisation, or sufficiently identifiable political movement - s35 is not a guarantee of free speech, and certainly does not protect all expressions of views or beliefs regarding scientific or medical matters - academic or intellectual freedom of thought and expression is a larger question than that presented under s35 - the fact the respondent referred to the Premier and the Chief Medical Officer in her statements did not

mean she was expressing a political view or belief - the respondent's views or beliefs could not be described as political and were not understood by the relevant University decision makers to be so - in any event, even if the respondent's views or beliefs had been political, the actions the University took against her had not been taken because of those views or beliefs - the decision to terminate the respondent's clinical placement was taken because of an apprehension that the respondent would share misinformation with patients - the further disciplinary measures were imposed because of a well-founded concern that the applicant would express her views in a manner that would endanger public health - appeal allowed and the respondent's application to the Supreme Court dismissed.
View Decision (I)

National Australia Bank v Redside Pty Ltd [2023] VSC 145
Supreme Court of Victoria
M Osborne J
Corporations - the defendant operated a restaurant in Port Melbourne on leased Crown land - it borrowed money from the Bank, which was secured by a mortgage over his leasehold interest in its premises, and by a charge over all its property and undertaking - the defendant defaulted - the Bank appointed receivers and managers - the mortgage did not contain an express power to appoint a receiver - s137AD of the *Land Act 1958* (Vic) provides that a lessee may not transfer, assign, or encumber its leasehold interest without the written consent of the Minister - the Minister had consented to the mortgage but not the charge - the Bank obtained confirmation from the Crown lessor that it had no objection to the appointment of receivers - for abundant caution, the Bank applied to the Supreme Court for an order under s418A of the *Corporations Act 2001* (Cth) that its appointment of the receivers was valid, or, alternatively, orders under s37 of the *Supreme Court Act 1986* (Vic) in which the Court appointed those receivers - neither the Crown lessor nor the defendant sought to be heard - held: s418A allows the Court to make an order declaring whether a receiver has been validly appointed where there is doubt on a specific ground concerning the validity of the appointment - s418A does not give the Court a general discretion to declare an appointment valid merely because it is just and convenient - the Court must be satisfied that the doubt on the specific ground alleged should be resolved in favour of validity - in this case, any failure by the defendant to obtain the Minister's consent to the charge as required by s137AD of the *Land Act* did not invalidate the charge or render it unenforceable - charge therefore was valid and gave the Bank authority to appoint the receivers - it was not necessary to consider whether the Court should itself appoint receivers under s37 - s37 empowers the Court to appoint a receiver whenever it appears just and convenient so to do - if it had been necessary, the Court would have appointed the receivers under s37 - orders made confirming the validity of the Bank's appointment of the receivers.
National Australia Bank (B)

Kuperman v Permanent Trustee Australia Limited [2023] QCA 54
Court of Appeal of Queensland
Mullins P, Dalton JA, & Bradley J

Personal injury - in 1998, the appellant commenced proceedings for personal injury in the District Court, arising out of an injury she allegedly suffered when she slipped on wet tiles in a shopping centre carpark - she took her last step in the proceeding in 2002 - in 2022, she applied for leave to take a further step in the proceeding - the respondent applied to have the proceedings dismissed for want of prosecution - the primary judge refused leave to take a further step in the proceedings and dismissed the proceedings for want of prosecution under s22(2) of the *Civil Proceedings Act 2011* (Qld) - appeal to the Court of Appeal - held: the primary judge had not erred in finding the appellant had given no satisfactory explanation for the delay - she had been impecunious, but she had been represented by a number of well-known no-win no-fee personal injury litigation firms who had withdrawn because of difficulty in obtaining instructions from her - the appellant had deliberately chosen to pursue other litigation in preference to these proceedings - she had never sought the Court's assistance to progress the proceeding - the appellant had herself disclosed reports she now asserted were privileged in her statements of loss and damage in 2002 - she made no privilege claim at that time - she had properly been required to give the respondent a copy of any document identified in her statement of loss and damage - no reasonable apprehension of bias on the part of the primary judge - no denial of procedural fairness below - the appellant had had no "basic fundamental right" to reply to arguments that were not made - appeal dismissed.
Kuperman (I)

Re Nagy (deceased) [2023] QSC 63
Supreme Court of Queensland
Davis J
Probate - deceased executed a Will in 2007 which could not be found - executor applied for probate of a copy of the will - held: no provision in the *Succession Act 1981* (Qld) empowers the Court to grant probate to a copy of a Will - there is no doubt the common law grants such power - five matters must be established for probate of a copy Will - (1) there was actually a Will or a document purporting to embody the deceased's testamentary intentions - (2) that Will or document revoked all previous Wills - (3) the applicant overcomes the presumption that, if the Will cannot be produced to the Court, it was destroyed by the testator with the intention of revoking it - (4) there is evidence of the terms of the Will - (5) the Will was duly executed or that the deceased person intended the document to constitute his or her Will - there is no doubt the deceased executed the Will in 2007 - the Will was drawn by an experienced solicitor - the Will on its face purports to be the last will and testament of the deceased that it revokes all former wills and other testamentary dispositions - the WIll appears duly executed, and the solicitor who drew it swore that the deceased signed the Will and that he witnessed it with another witness - the solicitor swore he had retained the original Will until 2017, when he met with the deceased with a view to drawing a new Will - the solicitor formed the view on that occasion that the deceased lacked capacity due to dementia - the solicitor gave the Will on that day to the executor - the Will was subsequently lost - the Court should accept the solicitor's opinion that the deceased had lacked capacity from a time before the Will was lost - deceased would therefore have similarly lacked capacity to revoke her Will, whether by destroying it or otherwise

- presumption the deceased destroyed that Will with the intention of revoking it therefore overcome - probate granted to copy of Will.
Re Nagy (deceased (B)

Civmec Construction & Engineering Pty Ltd v Mann (No 2) [2023] WASC 99
Supreme Court of Western Australia
Tottle J
Injurious falsehood - the plaintiff is a listed construction and engineering company - employed the defendant as an operations manager in the field of health and safety training - after employment ended, defendant sent a draft book she intended to publish to the plaintiff's CEO - the book was highly critical of the plaintiff's management and health and safety record - plaintiff sued, alleging statements in the book constituted injurious falsehoods - defendant acted for herself - plaintiff's solicitors sent consent orders signed by them and by the defendant to the Court, which included orders for permanent injunctions against publishing the book or the allegations therein - O42r8 of the *Rules of the Supreme Court 1971* (WA) requires that a self-represented defendant attend before a judge and give consent in person to consent orders entering final judgment - the defendant appeared by telephone at a hearing held for this purpose, and confirmed to the judge she understood the orders were for permanent and final injunctions restraining her from publishing the allegations she had made in the book - defendant subsequently sought by to have the consent orders set aside, on the grounds that there had been no compliance with O42r8 and that she had lacked capacity to consent to the orders due to mental impairment - held: the purpose of O42r8 is to ensure that the defendant gives informed consent to the consent order - it does not require the Court to assess the merits of any compromise underlying the consent order - a defendant can give consent "in person" by words spoken over an audio or audio-visual link - in any event, the Court had power to make a case management direction waiving the "in person" requirement - the Court had made such a case management direction by its direction permitting the defendant to attend the direction hearing by telephone - no question of non-compliance with O 42 r8 therefore arose - the issue of the defendant's mental capacity could not be resolved on a summary basis by reference to contentious affidavit evidence led in the existing proceeding - the alleged incapacity must be defined by pleadings - the issue of the defendant's capacity can only be determined fairly if both parties have access to all relevant documentary material - the plaintiff may require the defendant to give discovery of her relevant medical records - the plaintiff may want to cross-examine the defendant and her expert witnesses, and to lead evidence from its own lay and expert witnesses - a challenge to the consent orders on the ground of lack of capacity should therefore be made in fresh proceedings commenced for that purpose - the evidence in this case did not establish lack of capacity, or that the plaintiff had knowledge of any lack of capacity - defendant's application dismissed.
Civmec Construction & Engineering Pty Ltd (I C)

Poem for Friday

An Hymn To The Morning

By: Harriet Tubman (1820-1913)

Attend my lays, ye ever honour'd nine,
Assist my labours, and my strains refine;
In smoothest numbers pour the notes along,
For bright Aurora now demands my song.
Aurora hail, and all the thousand dies,
Which deck thy progress through the vaulted skies:
The morn awakes, and wide extends her rays,
On ev'ry leaf the gentle zephyr plays;
Harmonious lays the feather'd race resume,
Dart the bright eye, and shake the painted plume.
Ye shady groves, your verdant gloom display
To shield your poet from the burning day:
Calliope awake the sacred lyre,
While thy fair sisters fan the pleasing fire:
The bow'rs, the gales, the variegated skies
In all their pleasures in my bosom rise.
See in the east th' illustrious king of day!
His rising radiance drives the shades away-
But Oh! I feel his fervid beams too strong,
And scarce begun, concludes th' abortive song.

Harriet Tubman, was born Araminta Ross, in 1820 or 1822, in Maryland and died in 1915. Her grandparents in 1745 had been captured in west Africa and transported to America to work as slaves. She was born a slave, and sent out as a domestic servant at the age of 5. Even as a child she fought back against the abuse she suffered. In protecting another slave from a beating when she was 12 years old, she suffered a significant head injury from a 2 pound metal weight which hit her head, leaving her with severe headaches throughout her life. It also led, she believed, to her seeing visions She married John Tubman, a free black man, in 1844. She became ill in September 1849 and was to be sold by her master. She prayed for weeks to not be sold, but then said "I changed my prayer. First of March I began to Pay "*Oh Lord, if you aint never going to change that man's heart, kill him, Lord, and take him out of the way".* A week later the master died. Harriet Tubman and her two brothers tried to escape north, returning the first time to the South, but with her then travelling alone on a second journey using the Underground Railroad in 1849. Her husband refused to travel north. She said "*I had reasoned out this in my mind; there was one of two things I had a right to, liberty or death; if I could not have one, I*

would have de other". As she was leaving, she sang this song, to say goodbye to the others remaining on the plantation:

When dat ole' chariot comes
I'm gwine to leave you
I'm bound for the Promised Land
Friends, I'm gwine to leave you.

I'm sorry, friends, to leave you,
Farewell! Oh farewell,
But I'll meet you in de morning
Farewell, oh farewell.

Harriet returned several times to the south and it is believed that she helped around 80 slaves travel to freedom. She was called "*the Moses of Her People"* She had a $40,000 reward on her head. She established the Harriet Tubman Home for the Aged. She received from Queen Victoria a Silver Jubilee medal, after Queen Victoria read her biography. Harriet Tubman died in 1913 at the age of 93. She was buried at Fort Hill cemetery in Auburn, New York, with full military honours.
https://en.wikipedia.org/wiki/Harriet_Tubman

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