High Court
judgments:
September - October 2009

Migration – Jurisdictional error – Failure to notify of hearing in the prescribed manner

In *Minister for Immigration and Citizenship v SZIZO* [2009] HCA 37 (23 September 2009) the High Court in a joint judgment concluded the failure of the RRT to give notice of a hearing in the manner required by s441G of the *Migration Act* 1958 (Cth) by advising the authorised recipient did not constitute jurisdictional error. Decision in *SAAP v MIC* [2005] HCA 24 distinguished. Appeal by minister allowed: French CJ, Gummow, Hayne, Bell JJ jointly.

Migration – Refugees – Evidence – Exclusion of evidence of conduct after arrival in Australia – When conduct in Australia can be relied on to defeat claim of refugee status – Statutory interpretation – Language in statute unclear and contradicts intent

In *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40 (30 September 2009) the High Court concluded it would be irrational and contrary to the legislative purpose to construe the limitation in s91R(3) of the *Migration Act* on evidence of conduct in Australia that can be relied on to support a claim for refugee status as preventing evidence on conduct in Australia that may be relevant to credit. Appeal allowed: French CJ with Bell J; Crennan with Kiefel JJ; contra Hayne J.

Migration – Jurisdictional error – When failure of migration tribunal to inquire constitutes jurisdictional error

In *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39 (23 September 2009) the High Court considered in general terms when the failure of a migration tribunal conducting an "investigative" review will make a jurisdictional error for failing to inquire into the validity of documents said to be forged by telephoning the alleged author whose mobile telephone numbers appeared on the document. The Court concluded that in the circumstances no failure to inquire had affected the result [26]. Appeal by minister allowed: French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ jointly.

Workers' compensation (Cth) – Application of impairment guide – Whether worker entitled to compensation for second injury that does not alter permanent incapacity from first injury

In *Fellowes v Military Rehabilitation and Compensation Commission* [2009] HCA 38 (23 September 2009) F received compensation for permanent injury to her right knee in 1986. She suffered a like injury to the left knee in 1987 that did not alter her incapacity. The High Court concluded that she was entitled to compensation under the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) for both injuries: Hayne, Heydon, Crennan with Bell JJ jointly; contra Kiefel J. The majority rejected the "whole person" approach to the construction of injury in s24(5) [22]. Appeal allowed.

Stamp duty (NT) – "Land" – Leasehold interests – Whether option to renew Crown lease a part of the interest in the land

In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 (30 September 2009) the High Court considered whether the reference to "land" in s55N(2)(b) of the *Taxation Administration Act* (NT) included a reference to an option to renew a Crown lease and concluded it did not. Appeal allowed: French CJ; Hayne, Heydon, Crennan, Kiefel JJ jointly.

Constitutional law – When state Act inconsistent with commonwealth one

In *John Holland Pty Ltd v Victorian WorkCover Authority* [2009] HCA 45 (13 October 2009) and *John Holland Pty Ltd v Inspector Nathan Hamilton* [2009] HCA 46 (13 October 2009) the High Court in a joint judgment considered whether an employer remained liable to prosecution in Victoria and New South Wales under state occupational and industrial safety legislation after it became subject to commonwealth legislation on the subject. The Court concluded the employer remained liable to prosecution under the state legislation where the offence was committed before the employer became licensed under the *Safety, Rehabilitation and Compensation Act* 1998 (Cth) but the charge was laid after that date: French CJ, Gummow, Hayne, Heydon,

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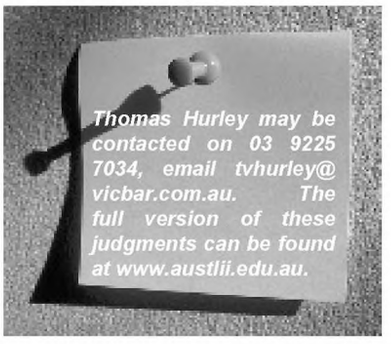

Crennan, Kiefel, Bell JJ. Answers to cases stated accordingly.

Negligence – Reasonable foreseeability – Temporal limits
In *Sydney Water Corporation v Turano* [2009] HCA 42 (13 October 2009) the High Court considered Sydney Water was not liable in negligence for a tree falling on a passing vehicle after its roots were claimed to have been loosened by diversion of natural water flow following installation of a water pipe 30 years earlier. Consideration of foreseeability in the law of negligence. Appeal by Sydney Water allowed: French CJ, Gummow, Hayne, Crennan, Bell JJ.

Guarantee and indemnity – Subrogation – Constructive trust
In *Bofinger v Kingsway Group Ltd* [2009] HCA 44 (13 October 2009) the High Court in a joint judgment considered when a guarantor who had contributed to the reduction of one debt owed by the debtor and secured by a mortgage was entitled to a right of subrogation under the first mortgage in priority to subsequent mortgages. The Court also considered whether the surplus transferred by the first mortgagee to the second mortgagee was subject to a constructive trust in favour of the guarantors. Review of the principles regulating subrogation and guarantees. Appeal allowed.

Federal Court judgments

Federal Court – Practice – Whether orders for summary dismissal of proceeding are interlocutory orders
In *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* [2009] FCAFC 117 (9 September 2009) a Full Court concluded that an order that a proceeding be summarily dismissed was an interlocutory order and that leave to appeal against it was required.

Taxation – Administrative penalty
In *C of T v Star City Pty Ltd (No 2)* [2009] FCAFC 122 (10 September 2009) a Full Court concluded that before an administrative penalty for an erroneous tax return could be imposed under s266L of the *ITAA*, the Commissioner was required to be satisfied as an objective fact that a scheme was carried out for the sole or dominant purpose of enabling a person to avoid tax. The Full Court allowed an appeal where a taxpayer had suffered an administrative penalty for erroneously claimed prepayment of rent as a deduction from income and not as a capital expense.

Industrial law – Penalty – Course of conduct leading to multiple offences
In *Draffin v CFMEU* [2009] FCAFC 120 (10 September 2009) a Full Court considered the primary judge had erred in imposing penalties for one course of conduct that involved multiple breaches of the *Building and Construction Industry Improvement Act* 2005 (Cth).

Migration – Whether tribunal proceeding involved jurisdictional error
In *Aporo v MIC* [2009] FCAFC 123 (11 September 2009) a Full Court concluded the process of the MRT did not involve jurisdictional error arising from a failure to apprehend A was dyslexic and unable to fully complete forms or that the interview was therefore unfair.

Migration – Visas – Cancellation of criminal justice certificate
In *MIC v Zhang* [2009] FCAFC 129 (24 September 2009) a Full Court concluded the power of the Minister for Immigration to cancel a criminal justice certificate under s162(1) of the *Migration Act* 1958 (Cth) was not subject to the rules of natural justice and was a broad power.

Federal Court – Parties – Proceedings under OHS Act – Joinder of parties – Related corporation in occupation of worksite
In *John Holland Pty Ltd v Comcare* [2009] FCAFC 127 (22 September 2009) a Full Court concluded the primary judge did not err in proceedings where Comcare