High Court judgments:

November - December 2010

CONSTITUTIONAL LAW

- ***Judicial power***
- ***Validity of state Act requiring state court to make "control orders" prohibiting persons from associating***

In *South Australia v Totani* [2010] HCA 39 (11 November 2010) s10 of the *Serious and Organised Crime (Control) Act* 2008 (SA) (the Act) authorised the SA Attorney-General to declare that an organisation was involved in serious criminal activity. By s14 the Act required the Magistrates Court of SA, on the application of the Commissioner of Police, to make a "control order" in respect of members of such a declared organisation. A control order prohibited the persons from associating. In May 2009 the Attorney-General declared the Finks Motorcycle Club to be a declared organisation. In May 2009 the Magistrates Court of SA made a control order against H who was a member of the club. H and another member T commenced proceedings challenging the Act and the order. In September 2009 the Full Court of the SA Supreme Court answered questions referred to it by finding s14 of the Act invalid and declaring the control order void. The High Court dismissed the appeal by SA by majority: French CJ, Hayne, Gummow, Crennan with Bell, Kiefel JJ; contra Heydon J. The majority concluded the element of direction given to the Court that required it to make an order meant the legislation exceeded the legislative power of the state by reference to the principles identified in *Kable v DPP (NSW)* [1996] HCA 24. Appeal dismissed.

INCOME TAX

- ***Deductions***
- ***Income from youth allowance***
- ***Requirement of allowance that person study***
- ***Whether cost of educational necessities a deduction***

In *Commissioner of Taxation v Anstis* [2010] HCA 40 (11 November 2010) Ms A received a youth allowance under Part 2.11 of the *Social Security Act* 1991 (Cth). The High Court concluded that it was assessable income for the *Income Tax Assessment Act* 1997 (Cth) and that the educational expenses she incurred to retain the benefit were deductible: French CJ, Gummow, Kiefel, Bell JJ; sim Heydon. Appeal by the Commissioner dismissed.

MIGRATION

- ***Natural justice to persons detained in excised place***

In *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41 (11 November 2010) the two plaintiffs were non-citizens who arrived in Australian waters by boat and without a visa and were detained under s189 of the *Migration Act* 1958 (Cth) (the Act) on the territory of Christmas Island. This was an "excised offshore place" for that Act. By s46A the Act provided the plaintiffs were not able to make a claim for protection visas as refugees from such a place unless the Minister for Immigration personally decided under s46A(2) to allow an application in the public interest or personally decided under s195A to grant a visa without an application. The request by each plaintiff for a refugee visa under these provisions was considered and rejected by officers of the Department of Immigration and these decisions were affirmed by contractors engaged by the department.

The plaintiffs commenced proceedings in the original jurisdiction of the High Court, asserting s46A was invalid and that they had been denied procedural fairness in the making of the decisions because, inter alia, the decision makers accepted that they were not bound to apply the Act nor were they subject to decisions of Australian courts on the Refugees Convention. The plaintiffs asserted they were detained while inquiries were made under the Act as to their status. The Minister asserted they were detained while inquiries without a statutory basis were made that may, or may not, lead to decisions under the Act.

In a joint judgment the High Court concluded that because the decision process was engaged in to determine if the Minister would exercise the powers under ss46A or 195A, the steps were taken under and for the Act. Because the inquiries prolonged the detention of the plaintiffs at the behest of the Australian executive, those who made the inquiries were bound to act fairly and according to law. The inquiries were not made fairly and according to law and declarations to this effect would be made: French CJ, Gummow, Hayne,

Heydon, Crennan, Kiefel and Bell JJ. The Court concluded s46A was valid. It considered that the "Carltona principle" and the question of whether the contractors were "officers of the Commonwealth" for s75(v) of the Constitution did not arise as a declaration would be sufficient remedy. The Court also concluded that while the Minister was not required to consider the exercise of any power and therefore mandamus would not issue, and certiorari had no practical utility, a declaration would suffice. The HighCourt made a declaration that in recommending to the Minister that the plaintiffs were not persons to whom Australia owed obligations as refugees the reviewing persons erred in law by not accepting the provisions of the Act and decisions of the Australian courts as binding and failed to observe the requirements of procedural fairness.

TAXATION

- ***Charities***
- ***Whether body trying to influence government policy a charity***

In *Aid/Watch Inc v C of T* [2010] HCA 42 (1 December 2010) the High Court concluded that an entity can have tax exempt status as a "charity" notwithstanding that one of its objectives is to influence government policy. Appeal by appellant (which inter alia campaigned for effective Australian foreign aid to relieve poverty) allowed: French CJ with Gummow, Hayne, Crennan, Kiefel, Bell JJ jointly; Heydon J.

CRIMINAL LAW

- ***Sentencing***
- ***Consistency in sentencing for federal offences***

In *Hili v Q; Jones v Q* [2010] HCA 45 (8 December 2010) the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ) sentences of imprisonment on the appellants in the NSW District Court for offences concerning income tax evasion were increased on a prosecution appeal by the NSW Court of Criminal Appeal. The High Court in a joint judgment concluded there was no "norm" or starting point expressed as a percentage for the period of imprisonment a federal offender should serve before release on a recognisance order. It also concluded the reasons of the Court of Criminal Appeal were sufficient. Appeals dismissed.

CONSTITUTIONAL LAW

- ***Bill of Rights***
- ***Power of executive to bind Parliament***

In *Port of Portland Pty Ltd v Victoria* [2010] HCA 44 (8 December 2010) a term in the contract for the sale of a port in Victoria to private interests obliged the state to effect specific amendments to Acts imposing land tax so that land tax was assessed on the assets on a certain basis. The High Court concluded the term was not void and contrary to the Bill of Rights as purporting to be an executive act purporting to bind the Parliament: French CJ, Hayne, Heydon, Crennan, Kiefel, Bell JJ. Appeal allowed.

PARTNERSHIP

- ***Interest of partners in partnership property***

In *Commissioner of State Taxation (SA) v Cyril Henschke Pty Ltd* [2010] HCA 43 (1 December 2010) the High Court considered the nature of the interest each partner has in partnership property. The Court concluded that a deed whereby a partner retired for consideration was a "conveyance on sale" of an interest in the partnership property for the purposes of the *Stamp Duties Act* 1923 (SA). Conclusion of SA Court of Appeal reversed: French CJ, Hayne, Heydon, Kiefel JJ. Appeal allowed.

INSURANCE

- **Public liability**
- **Product liability**
- **Failure of product to correctly fulfil its intended uses or function**
- **Grass seed contaminated with weed**
- **Whether damage to farm caused by failure of product to fulfil its function**

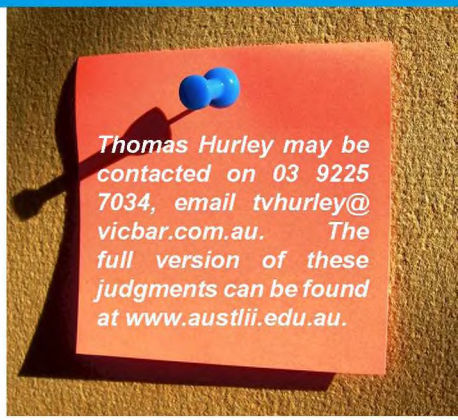
In *Selected Seeds Pty v QBEMM Pty Ltd [2010] HCA 37; 3 Nov 2010* the appellant seed and grain merchant sold as "Summer" grass some grass seed that was contaminated with the weed "Jarra" to one party who was on-sold to others before a farmer purchased it and suffered the cost of eradicating it. The respondent insurer refused to indemnify the appellant insured for the sum the insured had contributed in settlement of the claim brought by the farmer. The insurer contended the policy only required indemnity where the product in question had failed to correctly fulfil its intended uses or function. The insurer prevailed in the Court of Appeal(Q) which concluded the grass had not failed in its use as grass but the damage to the farmer's property was a form of positive harm beyond the scope of the insurance. The appeal by the appellant seed merchant was allowed by the High Court in a joint judgment: French CJ, Hayne, Crennan, Kiefel and Bell JJ. The High Court concluded that the terms of the policy on their proper construction required the insurer to indemnify for damage to property caused by what the seed did and not by what it failed to do. Appeal allowed. Decision at first instance restored.

CRIMINAL LAW

- ***Unreasonable verdict***

In *Q v Nguyen [2010] HCA 38; 3 Nov 2010* N was convicted on his fourth trial in October 2007 of having murdered the occupant of a flat with a sword he was waving during an incursion into the flat in 2004. He appealed to the Court of Appeal (Vic). After hearing argument in July 2009 this Court concluded the verdict was unsafe in orders made allowing the appeal and ordering an acquittal in December 2009. It published its reasons in February 2010. The crown appealed to the High Court. In a joint judgment the High Court allowed the appeal: Hayne, Heydon, Crennan, Kiefel, Bell JJ. The court considered the role of appellate courts reviewing jury

Federal Court judgments:
November - December 2010



verdicts and concluded the Court of Appeal had erred in deciding the verdict was unsafe. The appeal by the crown was allowed and the question of any retrial left for the decision of the DPP (Vic) in light of the history of the matter. Appeal allowed.

Federal Court judgments

INCOME TAX
- ***Capital gains tax***
- ***Scrip-for-scrip roll-over relief***
- ***"Deal with each other at arm's length"***

In *C of T v AXA Asia Pacific Holdings Pty Ltd* [2010] FCAFC 134 (18 November 2010) a Full Court considered the operation of the phrase "did not deal with each other at arm's length" as it appears in s124-780(4) of the *Income Tax Assessment Act* 1997 (Cth). The Full Court concluded, by majority, that the findings of the primary judge that a taxpayer company dealt at arm's length with its financier in disposing of an interest in a subsidiary were correct. Appeal by Commissioner dismissed.

INCOME TAX
- ***Scheme for Part IVA ITAA***
- ***Capital gains tax***

In *British American Tobacco Australia Services Ltd v C of T* [2010] FCAFC 130 (10 November 2010) a Full Court in a joint judgment concluded the trial judge did not err in concluding that in structuring the Australian transactions in an international restructure of a tobacco business so as to exclude capital gains tax from the sale of certain brands the taxpayer had obtained a tax benefit under a scheme within Part IVA of the *ITAA* 1936 (Cth).

CONSTITUTIONAL LAW
- ***Interstate trade***
- ***Racetrack betting***
- ***Requirement in NSW Act that all wagering enterprises pay a fee for race track information***
- ***NSW operators compensated***
- ***Whether trade of NT operator affected***

In *Racing NSW v Sportsbet Pty Ltd* [2010] FCAFC 132 (17 November 2010) s49 of the *Northern Territory (Self-Government) Act* 1978 (Cth) provided that all trade between the Northern Territory and the states "shall be absolutely free". From 2006 legislation in NSW permitted racing authorities in that state to grant approval for the use of race field information to wagering operators for a fee. The respondent (Sportsbet) was a NT wagering operator. It applied under protest for approval between 2008 and 2010 and this was granted. It brought proceedings in the Federal Court contending that other arrangements between the NSW racing authorities and wagering operators in that State effectively insulated NSW wagerers from the fee contrary to s49 of the *NT(SG) Act* within s109 of the Constitution. The primary judge accepted this and ordered the fee for the first approval be repaid. The appeal by the NSW authorities was allowed in a joint judgment. The Court concluded the challenged fee was payable by all operators and the operation of the compensation schemes did not affect this. A cross-appeal by Sportsbet as to the failure to declare the legislation invalid and failing to address other payments was dismissed. Appeal by Racing NSW allowed.

CONSTITUTIONAL LAW
- ***Interstate trade***
- ***Racetrack betting***
- ***Requirement in NSW Act that all wagering enterprises pay a fee for race track information***
- ***Scheme to compensate NSW operators***
- ***Whether trade of Tasmanian operator affected***

In *Betfair Pty Ltd v Racing NSW* [2010] FCAFC 133 (17 November 2010) the same Full Court reached a like result under the Constitution s92 in relation to a challenge to the NSW legislation made by a wagering enterprise from Tasmania. Appeal against decision of primary judge that the NSW legislation was invalid dismissed.

TRADE PRACTICES
- ***Misleading conduct***
- ***"Scientific" tests***

In *Dynamic Hearing Pty Ltd v Polaris Communications Pty Ltd* [2010] FCAFC 135 (19 November 2010) a Full Court concluded the primary judge was not wrong in concluding claims that a test as to the effectiveness of hearing devices was the product of objective science were contrary to the *Trade Practices Act*..