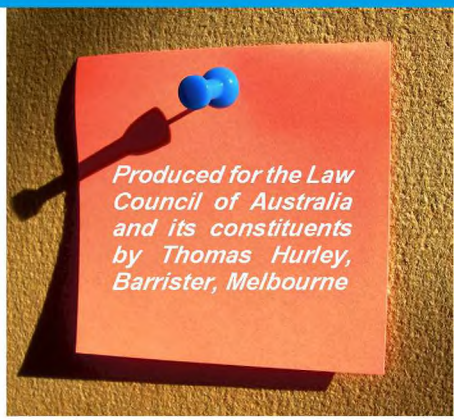
High Court judgments: December 2010 - February 2011



MIGRATION

- ***Tribunals***
- ***Genuine and realistic consideration of material***
- ***When rejection of material exhibits bias***

In *Minister for immigration v SZJSS [2010] HCA 48; 15 Dec 2010* the RRT rejected letters tendered by applicants for protection visas. In doing this it concluded certain evidence and the letters were "a baseless tactic". The applicants sought judicial review contending this showed the RRT had not given their claims "proper genuine and realistic consideration" (see s 425 Migration Act and *NAIS v MIMIA [2005] HCA 77)* and that this was jurisdictional error and the RRT had exhibited bias. The application was rejected by the FMC but accepted by the Federal Court. The High Court in a joint judgement allowed the appeal by the Minister. The High Court reviewed the grounds of review that may constitute jurisdictional error. It concluded the expression used by the RRT was one of emphatic rejection of evidence and was not jurisdictional error, nor a basis for finding bias. The High Court observed the Federal Court had erred by considering the findings the RRT had made and not the process by which they were made: French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ jointly. Appeal allowed.

CONSTITUTIONAL LAW

- ***Parliament***
- ***Elections***
- ***Franchise***
- ***Electoral rolls***
- ***Removal of "period of grace" for enrolment***

STATUES

- ***Interpretation***
- ***Mischief***
- ***Whether statute a disproportionate response***
- ***Electoral fraud***

In *Rowe v Electoral Commissioner [2010] HCA 46; 15 Dec 2010* from the 1930s a "period of grace" existed under the Commonwealth Electoral Act 1918 (Cth) arising for registration on the electoral roll from the practice of announcing elections seven days before the issue of the writs. From 1983 the Act contained a statutory period of "grace" enabling voters to be recorded on the electoral roll. Amendments made in 2006 removed this and required voters be correctly recorded on the roll by 8pm on the day the writs for the election were issued. One plaintiff in the subject High Court proceedings was a person who turned 18 after the writs for the election were issued but before polling day. The other was a person who was unable to submit documents recording a change of address before 8pm on the day the electoral writs were issued. They commenced a proceeding in the original jurisdiction of the High Court seeking declarations that the amendments offended the Constitution. The proceeding was referred to a Full Court and allowed by majority: French CJ; Gummow with Bell JJ; Crennan J; Contra: Hayne J; Heydon J; Kiefel J. The majority generally observed the removal of the "period of grace" was not an appropriate response to prevent a merely theoretical chance of electoral fraud. The Court declared the amendments effected by parts of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth)* invalid.

Stamp Duty

- ***Fixtures***
- ***Items fixed to mining tenements***
- ***High Court***
- ***Appeals***
- ***Litigation below conducted on an incorrect basis***

In *TEC Desert Pty Ltd v Commissioner of State Revenue (WA) [2010] HCA 49; 15 Dec 2010,* the appellant was assessed to stamp duty under the *Stamp Act 1921 (WA)* on the sale of electrical power stations and transmission lines it owned on freehold land it owned and also on mining tenements it held. The sale agreement was structured so that title in land passed at settlement but assets classed as "fixtures" (as defined in the agreement) were subject to a fifteen year licence agreement. The Commissioner assessed the "fixtures" as part of the realty subject to duty. This conclusion was accepted by the Court of Appeal WA. The appeal by the appellant/vendor was allowed by the High Court in a joint judgment. The High Court observed that the fact that litigation had been conducted on an incorrect premise on an important question of law was no barrier to the proceedings in the High Court being conducted on the correct basis. The Court concluded that the characterisation by the Commissioner of all the equipment as "fixtures" in the

technical legal sense arose from an incorrect appreciation of the rights given by mining tenements which lead to those assets being equated with tenant's fixtures. The High Court reviewed the concept of "fixture". It concluded that items affixed to the land do not become, merely because of their affixation, "fixtures" in the technical sense without regard to the basis on which the land was held: French CJ with Gummow, Heydon, Crennan, Kiefel JJ. Appeal against decision of Court of Appeal WA allowed.

MIGRATION

- ***Tribunals***
- ***When tribunal required to consider using investigative powers***

In *Minister for Immigration and Citizenship v SZGUR [2011] HCA 1; 2 Feb 2011* in proceedings before the Refugee Review Tribunal reviewing a decision to refuse S refugee status S claimed that his statements in interview to departmental officers were affected by his mood disorder. He requested the RRT arrange an independent assessment of his condition. The Federal Court found the RRT made a jurisdictional error in failing to consider whether to use the powers given to it by s 427(1)(d) of the *Migration Act 1958(Cth).* The appeal by the Minister was allowed: French CJ with Kiefel J; Gummow J sim: Heydon J and Crennan J separately concurred. The High Court concluded the failure was not a jurisdictional error. Appeal allowed.

COURTS

- ***Judges***
- ***Bias***
- ***Findings on the issue by proposed trial judge in similar proceedings***

In *British American Tobacco Australia Services Ltd v Laurie [2011] HCA 2; 9 Feb 2011* In 2006 Judge C (a member of the Dust Diseases Tribunal of NSW) ordered the appellant BATAS give discovery in proceedings between a Ms M (a widow of an employee of Brambles exposed to asbestosis) and Brambles where brambles sought contribution from BATAS for exposing the deceased to tobacco. In ordering BATAS give discovery to Ms M Judge C concluded the evidence before him established that BATAS had implemented a document retention policy aimed at destroying documents that would prejudice BATAS in future litigation. Judge C found the evidence in the interlocutory application persuaded him that evidence of BATAS legal advisers was not protected by legal privilege as the communications in question were for the furtherance of a fraud within s 125 of the *Evidence Act (NSW)* being the destruction of evidence. In a subsequent proceeding brought by Ms L (the respondent) the existence of the same document retention policy was in issue. Judge C refused an application by BATAS that he disqualify himself from hearing Ms L's matter because of the findings he had made in the proceedings involving Ms M. This conclusion was upheld by the majority of the Court of Appeal (NSW). The High Court set aside the orders by majority: Heydon, Kiefel, Bell JJ; contra: French CJ; Gummow J. The majority concluded that because the issue was the same the circumstance that the issue was decided in an interlocutory hearing was not decisive and a fair minded observer would find bias. Order that Judge C be prohibited from hearing the proceeding brought by Ms L.

Federal Court judgments:

COPYRIGHT

- ***Licence fee***
- ***Procedural fairness***
- ***Reliance on obscure evidence***

In *Fitness Australia Ltd v Copyright Tribunal [2010] FCAFC] 148; 13 Dec 10* a Full Court concluded the appellant had been denied natural justice when the Copyright Tribunal set a licensing fee under the Copyright Act by reference to an earlier study that was overshadowed in the hearing by a larger later study that was successfully criticised. The court concluded the Tribunal should have disclosed its approach to the parties.

EXTRADITION

- ***Nature of appeal from magistrate to Federal Court***

In *New Zealand v Johnston [2011] FCAFC 2; 11 Jan 11* a Full Court restated that an appeal from a decision of a State Magistrate under the *Extradition Act 1988 (Cth)* was an appeal in the strict sense and the decision could only be overturned on finding an error of law. The Full Court concluded the primary Federal Court Judge (who found extradition to New Zealand "unjust" under s 34(2) of the Act where the State Magistrate found the extradition "oppressive") had erred. The Court concluded that while a conclusion that extradition was oppressive etc was a question of mixed fact and law the primary judge had erred. Appeal allowed and extradition ordered.

MIGRATION

- ***When document dispatched***
- ***"If not delivered in 7 days return"***

In *SZOBI v MIC (No 2) [2010] FCAFC 151; 16 Dec 10* a Full Court considered when a document was dispatched within s 494B(4) of the *Migration Act 1958 (Cth).* The Court concluded that a statement on the envelope containing a document that if the envelope was not delivered in seven days it should be returned to the department did not qualify or limit the fact that the document was dispatched when the envelope was posted.

BANKRUPTCY

- ***Costs***

In *Donnelly v Maxwell-Smith [2010] FCAFC 154; 16 Dec 2010* a Full Court considered the effect of an order of the Federal Court that