

High Court judgments:

April - May 2011



IMMIGRATION

- **Removal of unlawful non-citizens to country approved by Minister**
- **Approval on Minister being satisfied country had certain characteristics**
- **Whether approval by Minister jurisdictional fact or jurisdictional task**

In *Plaintiff M70/2011 v Minister for Immigration and Citizenship*; *Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32(31 August 2011) the *Migration Act 1958* (Cth) authorised the removal from Australia of unlawful non-citizens who claimed refugee status without determining that status if the persons were removed to a country the Minister had approved under s198A(3) of the Act. That provision authorised the Minister to approve a country where it had certain characteristics. The plaintiffs challenged the approval of Malaysia by the Minister. The High Court held by majority that the approval of Malaysia by the Minister under s198A(3) of the Act was a jurisdictional fact and that the approval was not valid. The Court therefore ordered the removal of the plaintiffs to Malaysia be restrained. The Court also concluded the Minister had obligations to a plaintiff who was an unaccompanied minor by reason of being the guardian of such persons under the *Immigration (Guardianship of Children) Act 1946* (Cth): French CJ; Gummow with Hayne, Crennan and Bell JJ jointly; Kiefel J; contra Heydon J. Orders accordingly.

EQUITY

- **Trusts**

In *Byrnes v Kendle* [2011] HCA 26(3 August 2011) the High Court reviewed authority as to when a trust is created, the duties of trustees to collect trust property and when that duty is qualified by acquiescence of the beneficiaries in breaches of the duty. K was the registered proprietor of land in South Australia. In 1997 he acknowledged he held an undivided half on trust for his former wife (B). In an action in South Australia B claimed that K was in breach of duties as a trustee to preserve trust property by failing to collect rent from his son who tenanted the premises from 2002 to 2007. This claim was rejected at trial where the court found there was no intention to create a trust and in any event relief was not open for acquiescence or consent. The claim by B was also rejected on appeal to the SA Court of Appeal. These decisions were reversed on appeal to the High Court: French CJ; Gummow with Hayne JJ; Heydon with Crennan JJ. The High Court considered what was required to be proved to create a trustee relationship, the duties of trustees to maintain trust property and when beneficiaries lose the right to complain by acquiescence and delay. Appeal by B allowed.

EQUITY

- **Contribution**
- **Coordinate liability**

In *HIH Claims Support Ltd v Insurance Australia Ltd* [2011] HCA 31(22 August 2011) the High Court reviewed the requirement in the equitable doctrine of contribution

that the parties have coordinate liabilities. The Victorian Court of Appeal had concluded that the insurer of a scaffolding sub-contractor who erected a scaffold that collapsed at the Grand Prix had a coordinate liability with the insurer of the event and was obliged to contribute to the loss caused. An appeal against this conclusion was allowed: Gummow ACJ, Hayne, Crennan and Kiefel JJ jointly; Heydon J sim. Appeal allowed.

PLANNING LAW (NSW)

- **Effect of local law that rendered property rights unenforceable**
- **Failure to obtain consent of governor**

In *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* [2011] HCA 27(3 August 2011) the effect of the relevant planning instrument was that local laws that affected restrictive covenants as to the use of land only operated with the consent of the minister and the governor. The High Court concluded that the local law in question did affect the operation of a restrictive covenant and because it had not been approved by the governor it was not effective. Appeal from NSW Court of Appeal allowed: Gummow ACJ with Hayne, Crennan and Bell JJ; sim Heydon J.

DEFAMATION

- **Defences**
- **Qualified privilege**
- **Malice**

In *Cash v Dillon; Boland v Dillon* [2011] HCA 30(10 August 2011) the trial judge ruled that a defence to an action in defamation arising from

the statement between employees that it was rumoured two fellow employees were having an affair was not made on an occasion of qualified privilege. That conclusion was reversed by the NSW Court of Appeal. The High Court allowed an appeal: French CJ with Crennan and Kiefel JJ; Gummow with Hayne and Bell JJ; Heydon J. The Court considered when publication of a rumour attracts the defence of qualified privilege. Appeal allowed.

CONSTITUTIONAL LAW

- *Judicial power*
- *Legislation*
- *Validating decisions of*

UNCONSTITUTIONAL COURT

In *Haskins v Commonwealth* [2011] HCA 28(10 August 2011) the *Military Justice (Interim Measures) Act (No2) 2009* (Cth) purported to validate decisions of the Australian Military Court (that the High Court declared unconstitutional in *Lane v Morrison* [2009] HCA 29) by providing the decisions of the Court were decisions of the courts martial system that had been replaced. The High Court rejected a submission that this was unconstitutional as the exercise of judicial power by the Parliament. The Court also rejected an argument that the legislation was unconstitutional

as representing the acquisition by the Commonwealth without just compensation of the plaintiff's right to sue the Commonwealth for unlawful detention. The Court concluded that in the circumstances of military justice the plaintiff had not had the right to sue for unlawful detention occasioned by implementing apparently proper orders: French CJ with Gummow, Hayne, Crennan, Kiefel and Bell JJ; contra Heydon J on the point concerning judicial power. Orders accordingly. The Court applied this decision in the like matter of *Nicholas v Commonwealth* [2011] HCA 29 (10 August 2011). ●

Federal Court Judgments

ADMINISTRATIVE LAW

- *Preconditions to exercise of statutory power*
- *Appointment of decision maker*
- *Failure of ministers to consult before appointing members to professional review panel*

In *Kutlu v Director Professional Services Review* [2011] FCAFC 94(28 July 2011) a Full Court concluded that failure of ministers to consult with the Australian Medical Association before appointing medical practitioners to a Professional Services Review Panel as required by s84(3) of the *Health Insurance Act 1973* (Cth) rendered invalid the appointments and thus the decision of the panel.

INDUSTRIAL LAW

- *"Part" of a business*

In *CFUME v Pilbara Iron Company (Services) Pty Ltd* [2011] FCAFC 91(25 July 2011) a Full Court considered whether the reference in s327 of the *Workplace Relations Act 1996* (Cth) to an agreement with employees employed in a single business or "part" of a

single business was a reference to something less than the whole or something that was a recognisable part of a business.

ABORIGINAL CORPORATIONS

- *Special administration*

In *Dunghutti Elders Council* (Aboriginal Corporation) RNTBC v Registrar Aboriginal and Torres Strait Islander Corporations [2011] FCAFC 88(21 July 2011) a Full Court considered the procedure by which the registrar was able to issue a show cause notice as to why an Aboriginal corporation should be subject to special administration under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth).

NATIVE TITLE

- *Future acts*

In *Cheedy v Western Australia* [2011] FCAFC 100(12 August 2011) a Full Court considered the operation of the "future acts" provisions of the *Native Title Act 1993* (Cth). It dismissed an appeal that sought to overturn a decision of the National Native Title Tribunal that authorised the grant of mining leases subject to conditions by the State of WA over land for which the appellants were registered native title claimants.

EXTRADITION

- *Operation of scheme*

In *O'Connor v Zentai* [2011] FCAFC 102(16 August 2011) a Full Court reviewed in detail the operation of the *Extradition Act 1988* (Cth) and the operation of the *Extradition (Republic of Hungary) Regulations 1997* (Cth). The Court considered the role of the various functionaries who make decisions in the extradition process, when the minister is required to give reasons and whether English authorities to the effect that extradition treaties should be construed broadly applied in Australia. Appeal allowed in part.

EXTRADITION

- *Deadlines*

In *Michaels v New Zealand* [2011] FCAFC 101(9 August 2011) a Full Court concluded that because the notice of appeal against a decision of the Supreme Court of Queensland was filed outside the 15 days provided in s35(1) of the *Extradition Act*, it was invalid.

EXTRADITION

- *Refusal of petition for clemency*

In *Nudd v Minister for Home Affairs* [2011] FCAFC 105(19 August 2011) a Full Court dismissed an appeal against the refusal of judicial review