HighCourt judgments:
February - May 2013

CONSTITUTIONAL LAW
- ***Judicial power***
- ***Whether Act requires court to ignore error on face of arbitration award***

In *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5 (13 March 2013), s16(1) of the *International Arbitration Act* 1947 (Cth) provided that the UNCITRAL Model Law on International Commercial Arbitration has the force of law in Australia. Article 35 of the Model Law provided that an award shall be enforced on application made to a competent court. The plaintiff sought constitutional writs to restrain the Federal Court enforcing an award. It contended that the provisions gave the Court a jurisdiction that was incompatible with judicial power under Chapter II of the Constitution because they required a court to enforce an award that contained an error of law on its face or denied the exercise of judicial power to determine this. All members of the High Court rejected this contention: French CJ with Gageler J; sim Hayne, Crennan, Kiefel, Bell JJ. Application for constitutional writs refused.

CONSTITUTIONAL LAW
- ***Judicial power***
- ***Integrity of State Courts***

In *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7 (14 March 2013) provisions of the *Criminal Organisation Act* 2009 (Qld) authorised the Supreme Court of Queensland to receive evidence in a closed hearing and make an order banning organisations involved in serious criminal activity. In June 2012 the applicant police officer applied for such an order against the Finks Motor Cycle Club and the respondent company alleging it was part of a motor cycle "chapter" and thus part of the "organisation". The officer was granted interlocutory orders that declared certain information was "criminal intelligence" and required a special closed hearing. The effect of s76 of the Act was that an informant who provided "criminal intelligence" could not be cross-examined. Section 78 of the Act required the court considering "criminal intelligence" to do so in a hearing closed to those affected. The respondents contended that these provisions operated to contravene the Judicial Power in Chapter II of the Constitution by undermining the integrity of state courts. In October 2012 this question was removed to the High Court and questions concerning the constitutional validity of these provisions were stated. All members of the High Court answered the questions to the effect that the provisions were valid: French CJ; Hayne, Crennan, Kiefel and Bell JJ jointly; sim Gageler J. Questions stated answered.

CRIMINAL LAW
- ***Preventative detention at conclusion of sentence***
- ***Whether evidence person was a danger to the community***

In Yates v Q [2013] HCA 8 (14 March 2013), s662 of the Criminal Code (WA) authorises a sentencing court to order that sentenced persons be detained in prison at the Governor's pleasure after the conclusion of their sentence if the circumstances of the case require this. Y was intellectually disabled. In March 1987 he was sentenced to imprisonment and an order was made under s662. In October 1987 his appeal against sentence was allowed by the Court of Criminal Appeal (WA) but Y's appeal against the s662 order was dismissed by majority. Y's term of imprisonment ended in June 1993 but he remained in prison under the s662 order. In June 2011 Y sought to have the Attorney-General refer his case to the Court of Criminal Appeal (WA) but this was refused. In June 2012 Y applied for an order dispensing with the time to file an application for special leave to appeal against the decision of the Court of Criminal Appeal in relation to the s662 order and for special leave to appeal. These applications were referred to an enlarged Full Court of the High Court and granted: French CJ, Hayne, Crennan, Bell JJ; sim Gageler J. The High Court concluded the evidence did not enable the trial judge to have imposed the order and the majority of the Court of Appeal had erred in not accepting this. Order dispensing with time limits for application for special leave; special leave granted; appeal allowed; order of Court of Criminal Appeal of October 1987 set aside and remitted.

CRIMINAL LAW
- ***Joint enterprise liability***
- ***Directions to jury***

In *Huyuh v Q* [2013] HCA 6 (13 March 2013) the High Court concluded the direction of the trial judge on "joint enterprise liability"

did not contain an error of law: French CJ, Crennan, Kiefel, Bell and Gageler JJ jointly. Application for leave to appeal granted; appeal heard instanter and dismissed.

MIGRATION

- ***Role of s91U of the Migration Act***

In *SZOQQ v Minister for Immigration and Citizenship* [2013] GFCAFC 12 (10 April 2013) the High Court (in a judgment given by Keane J) held that s91U of the *Migration Act* 1958 (Cth) did not confine the scope of persons to whom Australia owes protection obligations under the Refugees Convention identified in s32.

PROPORTIONATE LIABILITY

- ***Apportionable claim***

In Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 (3 April 2013) V and a fraudster C were in business. C used the services of his cousin F and a solicitor to satisfy a lender MMN to advance money to V and C's business secured by a mortgage over V's properties. The mortgage documents, prepared by the appellant solicitors H&H who were MMN's solicitors, were defective. In proceedings where V sued MMN, the primary judge found MMN's claim in negligence against H&H was an apportionable claim under the Civil Liability Act 2002 (NSW). He found H&H liable for 12.5 per cent of MMN's loss, F liable for 72.5 per cent and C for 15 per cent. The Court of Appeal (NSW) allowed MMN's appeal and concluded H&H was not a concurrent wrongdoer. This decision was reversed by the High Court by majority: French CJ with Hayne and Kiefel JJ; contra Bell and Gageler JJ jointly. The majority concluded the claim by MMN against H&H was an apportionable claim as the loss MMN suffered was the inability to recover its money and its claim against H&H was different from the ones it had against F and C. Appeal allowed. Decision of NSW Court of Appeal set aside.

REAL PROPERTY

- ***Torrens title***
- ***Easements***

In *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* [2013] HCA 11 (10 April 2013) s42(1)(a) of the *Real Property Act* 1900 (NSW) provides that a person holds title to land subject to registered interests and "*in the case of the omission*" of an easement validly created under the Act. In 2001 the Registrar-General removed an easement over the title to land under the Act at the request of the servient tenement and with notice to, but no objection from, the then owners of the dominant tenement. In 2008 a subsequent purchaser of the dominant tenement (the respondent) requested the Registrar-General restore the easement. The Registrar-General refused. In proceedings brought to compel this, the trial judge concluded the respondent was not entitled to orders to compel the restoration of the easement. This was reversed by the Court of Appeal (NSW). The appeal by the owners of the servient tenement was allowed by the High Court by majority: Hayne, Crennan, Kiefel, Bell JJ jointly; contra Gageler J. Appeal allowed.

CORPORATIONS

- ***Appointment of officers***

In Weinstock v Beck [2013] HCA 14 (1 May 2013) s1322(4)(a) of the Corporations Act 2001(Cth) enabled a court to, by order, excuse irregularities arising from the failure to conduct companies as required by the Act. A company was incorporated in 1971 with a husband and wife as directors. In 1973 their children ADW and Mrs B were appointed additional directors. Their re-appointment thereafter was not as required by the company's articles. By 2003 the parents had died and ADW became the sole director where two were required. He relied on the articles and appointed his wife HD as the other director. His sister (Mrs B) sought to have the company wound up. The primary judge declared under s1322 of the Act that the appointment of HD was not invalid. This order was set aside by the NSW Court of Appeal but restored by the High Court: French CJ; Hayne J, Crennan, Kiefel JJ jointly; sim Gageler J. Consideration of the power given by s1322 Corporations Act. Appeal allowed.

CORPORATIONS

- ***Shares***
- ***Preference shares***
- ***Whether there must be ordinary shares before preference shares can be issued***

In Beck v Wienstock [2013] HCA 15 (1 May 2013) a company run by a family issued preference shares to the founder's wife in 1971. On her death the company purported to redeem them at their nominal value. Her executor brought proceedings contending the shares could not be redeemed as they could not be preference shares in the absence of other shares over which they had preference and there were none. This was accepted by the primary judge but rejected by the NSW Court of Appeal and by the High Court: French CJ; Hayne with Crennan, Kiefel JJ jointly; Gageler J. The High Court considered the shares had been validly issued as preference shares under the Companies Act 1961 (NSW). Consideration in detail of the nature of shares and preference shares. Appeal dismissed.

CRIMINAL LAW

- ***When omission to act creates criminal liability***
- ***Retrospective creation of duty to act***

In DPP (Cth) v Keating [2013] HCA 20 (8 May 2013) s66A(2) of the Social Security (Administration) Act 1999 (Cth) was inserted in the Act in August 2011 (while the decision in Poniatowska v DPP (Cth) [2011] HCA 43 was pending) and was taken to have commenced in March 2000. It provided that a person in receipt of a social security payment must inform the department of an event or change in circumstances that might affect payment of the benefit. P was charged with engaging in conduct and thereby obtaining a financial advantage by failing to advise matters in 2007, 2008 and 2009. The prosecution was removed into the High Court.

The High Court concluded s66A did not create a duty for s4.3(b) of the Commonwealth Criminal Code such that failure to inform in response to notices sent prior to the enactment of s66A amounted to "engaging in conduct" for the purposes of s135.2(1)(a) of the Criminal Code. The Court observed that the offence in s4.3 was created where a person "is" under a duty and that was not achieved by retrospective legislation: French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ jointly. Questions in case stated answered accordingly.

EVIDENCE

- ***Tendency rule***

In Aristocrat Technologies Australia Pty Ltd v Global Gaming Supplies Pty Ltd [2013] HCA 21 (10 May 2013) s97 of the Evidence Act 1995 (Cth) provides that absent conditions including reasonable notice evidence of a tendency that a person has or had is not admissible to prove that a person has or had a tendency to act in a particular way. In a claim for breach of copyright the primary Federal Court judge found email exchanges of the respondent showed it knew of the infringing conduct. On appeal a Full Court found the primary judge used this evidence to find a tendency to infringe. The applicant for special leave contended this was not open to the Full Court. The application for special leave was removed to a Full Court of the High Court and dismissed. The High Court in a joint judgement found the conclusion was open to the Full Court: French CJ, Crennan, Kiefel, Gageler, Keane JJ jointly. Application for special leave refused.

MIGRATION

- ***Personal power of Minister to grant visa to person not entitled to it in the public interest***
- ***Whether visa granted for improper purpose***

In Plaintiff M79-2012 v Minister for Immigration [2013] HCA 24 (29 May 2013) s195A of the Migration Act 1958 (Cth) authorised the Minister to grant to a person in detention a visa even though the person may not be entitled to it if the Minister thought this was in the public interest. The plaintiff was in detention while his claim for a protection visa was being processed. The Minister granted him a Safe Haven visa which had the effect of allowing his release but engaged a statutory bar to making a further application for a visa while in Australia (a bar the Minister could lift). The plaintiff commenced proceedings in the Federal Circuit Court for a constitutional writ. While this was pending the plaintiff applied for a protection visa and then sought mandamus from the High Court requiring this be processed contending the granting of a Safe Haven visa was improper. The High Court concluded by majority that the decision to grant the Safe Haven visa was lawful and refused mandamus: French CJ, Crennan, Bell JJ jointly; sim Gageler J. In dissent Hayne J concluded the Minister had not taken into account a matter required by the Act. Hayne J referred to the oddities in a statutory scheme which entitled the Minster to grant visas to which persons were not entitled. Application for mandamus refused.

MIGRATION

- ***Procedure***
- ***Adjournment***
- ***Decision refusing visa on skill grounds***
- ***Refusal of adjournment to obtain updated assessment***
- ***Reasonableness as a statutory implication***

In Minister for Immigration v Li [2013] HCA 18 (8 May 2013) s352 the Migration Act 1958 (Cth) provided the Migration Review Tribunal (MRT) in conducting a review was not bound by legal forms and was required to act according to the substantial justice of the case. L was refused a visa based on a skills assessment and sought review by the MRT. The MRT refused to adjourn the hearing to enable L to receive an up-to-date assessment. The MRT affirmed the decision to refuse the visa. This decision was quashed by the Federal Magistrates Court as unreasonable. The Minister's appeal to a Full Court of the Federal Court was dismissed. The Minister's further appeal to the High Court was also dismissed by all members: French CJ; Hayne, Kiefel, Bell JJ jointly; Gageler J. All members considered when an exercise of discretion will be unreasonable. Appeal dismissed.

NEGLIGENCE

- ***Causation***

In Wallace v Kam [2013] HCA 19 (8 May 2013) a patient W was advised by a doctor K that a procedure had inherent risks, one of which was neurapraxia. It also had a one-in-twenty chance of catastrophic paralysis. W underwent the procedure and suffered neurapraxia. W sued claiming that had he been advised of both risks he would not have agreed to the procedure. His claim failed at trial as did his appeal to the Court of Appeal (NSW). His appeal to the High Court also failed in a joint judgement. All members concluded W could not be compensated for the realisation of a risk he was prepared to accept and there was no requirement for compensation for a risk that had not materialised. (French CJ, Crennan, Kiefel, Gageler, Keane JJ jointly). Appeal dismissed.

TAXATION

- ***GST***
- ***Anti-avoidance***

In C of T v Unit Trust Services Pty Ltd [2013] HCA 16 (1 May 2013) the High Court considered the anti-avoidance provisions in the A New Tax System (Goods and Services) Tax 1999 (Cth). The Commissioner contended the GST benefit claimed by developers of Gold Coast real estate was not attributable to the making of a choice open to taxpayers under the legislation. In a joint judgement the High Court allowed an appeal by the Commissioner and restored the decision of the AAT: French CJ, Crennan, Kiefel, Gageler, Keane JJ. The High Court observed that tension between general anti-avoidance provisions and specific provisions allowing a taxpayer a choice that will confer a benefit

Federal Court judgments:

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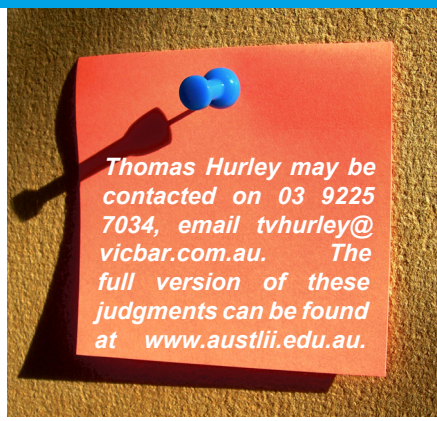

are to be resolved in favour of the specific provision [52]. Appeal by Commissioner allowed.

TORT

- ***Malicious prosecution***
- ***Whether innocence of plaintiff an issue***
- ***Davis exception overruled***

In Beckett v NSW [2013] HCA 17 (8 May 2013) B was prosecuted for offences against her husband and convicted at trial in 1991. Her appeal failed. In 2001 her petition to the governor for review of her convictions was referred to the NSW Court of Criminal Appeal. In August 2005 that Court set aside most of the convictions. In September 2005 the DPP (NSW) directed there be no further proceedings on the other counts. In 2008 B sued NSW for malicious prosecution. In Davis v Gell (1924) 35 CLR 275 the High Court had recognised an exception to the general rule that a plaintiff claiming malicious prosecution need not prove innocence in the case where the prosecution was terminated by the entry of a nolle prosequi ("the Davis exception"). The primary judge applied the Davis exception and answered separate questions to the effect B needed to prove that she was innocent of the charges. The Court of Appeal (NSW) did likewise and dismissed B's appeal. The High Court considered when its previous decisions should be overruled and decided to overrule the Davis exception and allow the appeal: French CJ, Hayne J, Crennan J, Kiefel, Bell JJ jointly; Sim Gageler J. Appeal allowed.

Federal Court Judgments

CONSTITUTIONAL LAW

- ***Acquisition of property***
- ***Amendment of abalone licences***

In *Alcock v Commonwealth of Australia* [2013] FCAFC 36 (8 Apr 2013) a Full Court concluded that the limitations on the rights of Victorian abalone divers imposed by decisions under the *Fisheries Management Act* 1991 (Cth) and the *National Parks (Marine National Parks and Marine Sanctuaries) Act* 2002 (Vic) did not involve the acquisition of rights and the overall legislative scheme was not unconstitutional.

FEDERAL COURT PRACTICE

- ***Dispensation from complying with notice to produce as this would contravene laws of Samoa***

In *Hua Wang Bank Berhad v Commissioner of Taxation* [2013] FCAFC 28 (13 March 2013) a Full Court considered when rules of court can be dispensed with under FCR O.1.34 and when a party can be excused from complying with a notice to produce served under FCR O.30.28(3). The Full Court concluded the primary judge had not erred in rejecting an application that compliance be dispensed with as it would involve breaches of the law of Samoa.

INCOME TAX

- ***Assessment by asset betterment***

In *Gashi v Commissioner of Taxation* [2013] FCAFC 30 (14 March 2013) a Full Court reviewed the onus on a taxpayer who had intermittently filed tax returns and who was assessed to tax by asset betterment to satisfy the onus established by s14ZZO and Part IVC of the *Taxation Administration Act* 1953 (Cth) and establish actual income.

MIGRATION

- ***Exercise of personal non-compellable powers***

In *Minster for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 (20 March 2013) a Full Court of five justices decided an International Treaties Obligations assessment that concluded that returning the appellant would not breach the Conventions Against Torture etc. and the International Covenant on Civil and Political Rights, was not made in accordance with law as the assessor failed to apply the correct standard of proof to the question of whether there was a real risk of harm and for want of procedural fairness. The court was convened to consider the correctness of the decision in *SZQDZ v Minister for Immigration and Citizenship* [2012] FCAFC 26 but either found the question did not arise (Lander and Gordon JJ [180] with whom Flick J agreed) or the decision was correct (Besanko and Jagot JJ [330]). The Court considered the exercise of the Minister of various personal non-compellable powers including ss91K and 91L of the *Migration Act* 1958 (Cth) to allow repeat visa applications. The majority observed that detention of a non-citizen while an application for a visa was processed according to law may not be lawful where the Minister indicated the