Andrew Yuile's High Court Judgements

MARCH

CONTRACT

Construction of terms – Rectification

In *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47 (7 December 2016) the Corporation required certain undertakings to be provided and Simic, as the Director of a company named Nebax (the third respondent), provided necessary details for the documents to an employee of ANZ (the second respondent). The details given were wrong and referred to a non-existent entity, rather than the Corporation, as was required. The Corporation later sought to enforce the undertakings and ANZ refused on the basis that the Corporation was not named in the documents. The Corporation argued that the documents could be construed as referring to it, or, alternatively, that the documents should be rectified to refer to it. The High Court held that the documents were to be construed objectively by reference to their text, context and purpose in the usual way. On those principles, the undertakings could not be construed as referring to the Corporation. However, it was appropriate to rectify the documents as there was an 'agreement' between the parties in the sense of a 'common intention' (ascertained by reference to the parties' words or actions) that the undertakings should operate by reference to the Corporation. The documents did not reflect that intention because of a common mistake. Gageler, Nettle and Gordon JJ jointly; French CJ and Kiefel J separately concurring. Appeal from the Supreme Court (NSW) allowed in part, cross-appeals allowed.

CRIMINAL LAW

Sentencing – 'Current sentencing practices'

In *The Queen v Kilic* [2016] HCA 48 (7 December 2016) the respondent pleaded guilty to intentionally causing serious injury after pouring petrol on his girlfriend, who was pregnant with his child, and igniting the petrol. The victim survived, but with serious and ongoing injuries. The pregnancy was terminated. The sentencing judge imposed a total effective sentence of fifteen years' imprisonment with a non-parole period of eleven years. The Court of Appeal held that to be manifestly excessive, stating that it was so disparate with current sentencing practices that there had been a breach of the principle of equal justice. The High Court set aside that judgment and reinstated the original sentence. The Court held that the Court of Appeal erred by impermissibly treating the sentences in the few cases available as defining the sentencing range, and finding that the sentence in this case was excessive because it exceeded the sentences in most similar cases.

Having observed correctly that the offence in this case was at the upper end of the range of seriousness, the question for the Court was why a sentence of fourteen years, where the maximum was twenty, for an offence at the upper end of seriousness, was manifestly excessive. The High Court held that, given the circumstances of the case, that sentence was not unreasonable or plainly unjust. Bell, Gageler, Keane Nettle and Gordon JJ jointly. Appeal from the Supreme Court (Vic) allowed.

COMPETITION

Anti-competitive conduct – Markets – 'In competition

In *Australian Competition and Consumer Commission v Flight Centre Travel Group Limited* [2016] HCA 49 (14 December 2016) the High Court held that Flight Centre was in competition with international airlines when selling airline tickets and was in breach of provisions preventing agreements with the effect of substantially lessening competition. Between 2005 and 2009, Flight Centre attempted to agree with Singapore Airlines, Malaysia Airlines and Emirates that they would stop offering international airline tickets directly at prices lower than fares published to travel agents. The *Trade Practices Act 1974* (Cth) prevented such arrangements if the two parties were in competition in a market and the agreement would substantially lessen competition. The real issue in the appeal was whether the parties were in competition. The ACCC's primary case was that the market was for distribution services, or for the supply of booking services; that case was rejected by the Full Federal Court. The ACCC also advanced an alternative argument, which the High Court accepted—the market was for the supply of tickets for international air travel. Flight Centre argued that it could not be in competition in that market because it was an agent for the airlines; only the airlines were in competition. The High Court rejected that argument. Flight Centre had flexibility to determine ticket prices and its agency arrangement did not impede its sales or activity as a competitor. Flight Centre was free to act in its own interests. It followed that Flight Centre had contravened the Act. Kiefel and Gageler JJ jointly; Nettle and Gordon JJ separately concurring; French CJ dissenting. Appeal from the Full Federal Court dismissed.

LAND RIGHTS

Claimable crown lands, 'lawful use or occupation'

In *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50 (14 December 2016) the High Court held that land in Berrima could not be claimed under the *Aboriginal Land Rights Act* 1983 (NSW) because it was in lawful use or occupation. The Act allowed for the Council to claim lands that were 'claimable crown lands'. Excluded from that definition was land 'lawfully used or occupied'. The land in question had in the past been used for jail and correctional facility purposes, but that had ceased and the proclamations for those uses had been revoked. The state of New South Wales remained the registered proprietor of the land. It was held at first instance that the land was in use given that it was guarded buildings were locked, services continued to be supplied, lands and buildings were maintained, and gardens were visited by the public. The Court of Appeal upheld the finding. The High Court affirmed that the question is one of fact. The Court held that the land was occupied because of the activities taking place on it. It did not need to be actively used for its dedicated jail purposes to be 'lawfully occupied' as that would deny 'occupied' a separate sphere of operation from 'used'. The Court also held that no further statutory authorisation was required—s 2 of the NSW Constitution retained the executive's power to appropriate waste lands subject to legislative control or restrictions. Further, as the owner of the land, the state was empowered to occupy the lands through its agents. French CJ, Kiefel, Bell, and Keane JJ jointly; Gageler J concurring separately; Nettle and Gordon JJ jointly dissenting. Appeal from the Supreme Court (NSW) dismissed.

TAX LAW

Unit trusts – Public trading trusts

In *ElecNet (Aust) Pty Ltd v Commissioner of Taxation* [2016] HCA 51 (21 December 2016) the High Court held that a trust known as the Electrical Industry Severance Scheme (Scheme) was not a public trading trust within Division 6C of the *Income Tax Assessment Act 1936* (Cth) because it was not a 'unit trust'. The Scheme allowed for employers in the electrical contracting industry to become members. Members were obliged to make payments to ElecNet as trustee of the Scheme. If an employee of a member was made redundant, ElecNet made a payment to the employee. ElecNet sought a private ruling that it was a public trading trust, which would allow it to pay income tax at a lower rate. An essential criterion of a public trading trust was that it was a unit trust. The High Court applied the ordinary meaning of unit trust, being a trust under which the beneficial interests were divided into units, which when created or issued are held by the persons with interests in the trust, for whom the trustee maintains and administers the trust estate. This would ultimately turn on the construction of the trust deed. In this case, there were no such units. ElecNet simply made payments out of the estate to redundant workers. The worker's entitlement was not 'unitised' and it was not analogous to a share in a company or similar. No 'right' was held by the worker that was cancelled, extinguished or redeemed when the worker was paid. Kiefel, Gageler, Keane and Gordon JJ jointly; Nettle J separately concurring. Appeal from the Full Federal Court dismissed.

BUILDING AND CONSTRUCTION LAW

Security of payment – Statutory construction – Progress payments

In *Southern Han Breakfast Point Pty Ltd* (in liquidation) v Lewence Construction Pty Ltd [2016] HCA 52 (21 December 2016) the High Court held that a 'reference date' under a construction contract is a necessary precondition to the making of a valid payment claim under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) and that there was no such date in the present case. Southern Han and Lewence were parties to a relevant contract. On 27 October 2014 Southern Han gave Lewence a notice purporting to exercise a right under the contract to take remaining work away from Southern Han for breach. Lewence treated the notice as a repudiation of the contract. It purported to accept the repudiation on 28 October 2014 and terminated the contract. Lewence then served on Southern Han a claim for payment. The issue for the High Court was whether it was necessary for a 'reference date' to have arisen under the contract for the payment claim to be valid (and hence for an adjudicator under the Act to have jurisdiction). The High Court held that a claim could only be made by a person entitled to a 'progress payment' as defined by the Act. A person was entitled to such a payment only on and from each reference date under the contract. A reference date was therefore a necessary precondition to a valid claim. In this case, the contract specified dates (the 8th of each month) upon which progress payment claims could be made. The remaining question was whether 8 November 2014 could be a reference date, given the events of 27 and 28 October 2014. The Court held that, however one construed those events, Lewence would have no right to make a claim for payment. Therefore, there was no reference date and the payment claim was not valid. Kiefel, Bell, Gageler, Keane and Gordon JJ jointly. Appeal from the Supreme Court (NSW) allowed.

CRIMINAL LAW

Child offending – Presumption of incapacity between ten and fourteen – Rebuttal of presumption

In *RP v The Queen* [2016] HCA 53 (21 December 2016), the High Court considered the evidence required to rebut a presumption of incapacity for criminal responsibility in a child aged between ten and fourteen. The presumption can be rebutted if it is shown that the child knew the action was morally wrong. RP was relevantly charged with two counts of sexual intercourse with a child under ten, being his half-brother. The appellant was about eleven and the complainant about six at the time of the offending. The trial judge held the presumption to be rebutted from the circumstances of the offending, which included that the intercourse took place while the children's father was out of the house, RP forced the complainant into the act, RP stopped when the father returned home, and RP told the complainant not to say anything. The only other evidence available were two expert reports, which showed (among other things) that RP was borderline intellectually disabled and of very low intelligence. There was some suggestion of sexual abuse in the household. The High Court held that could not be assumed that the circumstances demonstrated understanding of moral wrongdoing. There was no relevant evidence from RP's parents or school, or evidence about the child's environment that shed light on his moral development. In the absence of evidence on these subjects, it was not open to conclude that it had been proved beyond reasonable doubt that the appellant, with his intellectual limitations, knew that his actions were seriously wrong in a moral sense. Kiefel, Bell, Keane and Gordon JJ jointly; Gageler J separately concurring. Appeal from the Supreme Court (NSW) allowed.

APRIL

ELECTORAL LAW

Parliamentary elections – Disqualification under the Constitution

In *Re Culleton [No 2]* [2017] HCA 4 (3 February 2017) the High Court (sitting as the Court of Disputed Returns) held that Senator Rodney Culleton was incapable of being chosen as a senator at the 2016 federal election. Senator Culleton was convicted of larceny by the NSW Local Court, in his absence, prior to the election. However, under the *Crimes (Sentencing Procedure) Act 1999* (NSW), a sentence of imprisonment cannot be imposed on an offender in their absence. The offence for which Senator Culleton was convicted carried a possible jail term of up to two years. A warrant for his arrest was therefore issued. Before the warrant could be executed, Senator Culleton stood for election as a Senator for Western Australia and was elected. After the election, the warrant was executed and Senator Culleton was brought before the local court. The Court annulled the conviction and re-tried the matter. The Court dismissed the charge without conviction, but ordered Senator Culleton to pay compensation. The question was whether, at the time of the election, s 44(ii) of the Constitution applied. That section renders a person incapable of being elected if they have been convicted and are under sentence, or subject to be sentenced, for an offence with a penalty of one year's imprisonment or more. The High Court held that s 44(ii) applied. The annulment operated only prospectively, meaning that at the time of the election, Senator Culleton had been convicted and was subject to sentence. That was so even though the conviction was in his absence. The Senate vacancy thus created was to be filled by a special count of the ballot papers and votes distributed accordingly. Kiefel, Bell, Gageler and Keane JJ jointly; Nettle J separately concurring. Answers given to questions referred.

TAX LAW

Land tax – Amendments and refunds for overpayments

In *Commissioner of State Revenue v ACN 005 057 349 Pty Ltd* [2017] HCA 6 (8 February 2017) the respondent had overpaid land tax between 1990 and 2002 because a property had been assessed twice by an error on the part of the Commissioner. The respondent had paid the tax as assessed. The error was discovered in 2012 and the respondent sought to have the Commissioner amend the tax returns and issue a refund. The Commissioner refused, on the basis that the power to amend was discretionary and there was no utility in the amendments, because the respondent could not get the relief sought, because the *Land Tax Act 1958* (Vic) precluded proceedings for refunds more than three years after the payments. The respondent brought judicial review proceedings (for mandamus) to compel the Commissioner to amend the assessments and provide the refund. That was refused at first instance but granted by the Court of Appeal. The High Court allowed the appeal. It held that the amounts paid were properly 'tax paid': assessments made at the time imposed a legal obligation to pay, which had been fulfilled. The objection and appeal provisions in the Act were a 'code' that did not allow for refunds or recovery of payments outside that regime. The taxpayer here had lodged no objections to the assessments, and was out of time to apply for the refund. There was no other basis for appeal or review. That reading of the refund provision was also supported by extrinsic materials and the purpose of the Act—to provide certainty in revenue for the state. Further, the Commissioner had a discretion, but not a duty, to exercise the power to amend the assessments. Given that the refund could not be granted, there was no utility in the Commissioner granting the amendments. It was within power to refuse to do so. For that reason, there was also no basis for the Court of Appeal to describe the actions of the Commissioner as 'conscious maladministration'. Bell and Gordon JJ jointly; Kiefel and Keane JJ, and Gageler J separately concurring. Appeal from the Supreme Court (Vic) allowed.

CONSTITUTIONAL LAW

Ch III judicial power – 'Matter' under the Constitution – Corporations law

In *Palmer v Ayres; Ferguson v Ayres* [2017] HCA 5 (10 November 2016 (orders) and 8 February 2017 (reasons)) the High Court upheld the constitutional validity of s 596A of the *Corporations Act 2001* (Cth). Section 596A allows a court, on application by an 'eligible applicant' (here a liquidator), to order that an officer or provisional liquidator of a corporation be summonsed for examination about the corporation's examinable affairs. Clive Palmer and Ian Ferguson were summonsed to be examined about the affairs of Queensland Nickel. After the examinations took place, Mr Palmer and Mr Ferguson sought a declaration from the High Court that s 596A was invalid because it conferred non-judicial power on a federal court. It was sufficient for the plurality dealt with two aspects of that argument. First, the plurality held that conferral of jurisdiction under s 596A involved a 'matter' because that term included controversies that might come before the Court in the future. Section 596A gave a right to examine a person, to establish and then enforce potential rights to relief against potential wrongdoers. Further, an order for examination had an immediate effect on the rights and liabilities of the parties to the order. Second, the plurality held that examination was a procedure directed at the future exercise of judicial power, in aid of anticipated adversarial proceeding, analogous to other pre-trial procedures. That was sufficient to bring the section within a conferral of judicial power. Other arguments of the plaintiff did not need to be addressed. Kiefel, Keane, Nettle and Gordon JJ jointly; and Gageler J separately concurring. Answers to questions reserved given.

TOWN PLANNING

Statutory interpretation – Compensation – Land reserve for public purposes

In *Western Australian Planning Commission v Southregal Pty Ltd; Western Australian Planning Commission v Leith* [2017] HCA 7 (8 February 2017) the High Court held that compensation payable under the *Planning and Development Act 2005* (WA) was payable only to the person who owned land affected by a reservation, and not to a subsequent owner. Under a planning scheme made under the Act, land was reserved for public purposes. At the time, people other than the respondents owned parts of the lands reserved. The respondents subsequently bought the land and applied to develop it. The applications were refused, because of the reservation. The respondents sought compensation under s 173 of the Act. However, s 177(1) provided that compensation was not payable until the first sale of the land after the reservation, the refusal of an application for development or the approval of a development on unacceptable conditions. Section 177(2) provided that compensation was payable only once, to the owner of the land at the date of reservation where the claim was on first sale or the owner of the land at the date of the application where the claim concerned a development application. The question was whether compensation could be claimed by a subsequent owner of the land or only the owner at the time of the reservation. A majority of the High Court held that only the original owner was entitled to claim compensation. That followed from the language of the sections and the Part as a whole; analysis of an earlier decision relating to very similar provisions, in *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30; extrinsic materials; and the purpose of the section. Compensation was payable only once, on the trigger set out in s 177(1). Here, because the first sale had taken place, the occurrence of one of the other events in s 177 (1) could not trigger a further compensation claim. Kiefel and Bell JJ jointly; Gageler and Nettle JJ jointly concurring; Keane J dissenting. Appeal from the Court of Appeal (WA) allowed.

MAY

FAMILY LAW

Parenting orders – Best interests of children – Views of the children

In *Bondelmonte v Bondelmonte* [2017] HCA 8 (1 March 2017) the High Court considered the requirements of the Family Law Act 1975 (Cth) with respect to the consideration of the views of children and interim parenting orders. The parties to the appeal were the father and mother of three children. The two eldest (aged almost seventeen and fifteen) had been taken to New York by the father for a holiday. The father decided not to return, keeping the children with him, in breach of parenting orders that provided for equal parental responsibility, required the children to engage in a Child Responsive Program and provided for parental interviews. The mother applied for the children to be returned to Australia. The father did not indicate what he would do if orders were made for the children's return. The children had expressed a desire to remain with the father. In making orders, the Family Court was required to consider, relevantly, the best interests of the children and any views they had expressed. The primary judge made interim orders for the children's return, considering their views but giving them limited weight because of the father's influence over the children. The children were ordered to return to live with the mother or, if the children preferred, identified parents of friends. The father appealed, arguing that the children's views had not been properly considered and that there was no power to order custody in favour of the friends' parents. The High Court held that the primary judge was entitled to take account of the father's influence in giving weight to the children's views. The judge was also not required to ascertain the children's view on the alternative living arrangements—only to consider views that had been expressed. Lastly, the High Court held that there was power to make parenting orders in favour of a parent of a child "or some other person", which included the friends' parents. Kiefel, Bell, Keane, Nettle and Gordon JJ jointly. Appeal from the Family Court dismissed.

MIGRATION LAW

Migration – Statutory Interpretation – Deeming under Acts Interpretation Act

In *Minister for Immigration and Border Protection v Kumar* [2017] HCA 11 (8 March 2017) one of the criteria for a visa applied for by the respondent was that, at the time of application, the visa applicant was the holder of a visa of a specified class. The respondent held a visa that would have satisfied the criterion, which expired on a Sunday. However, the new visa application was made on the Monday after the old visa expired. The new visa was refused because the applicant did not meet the criterion. The respondent argued that s 36(2) of the *Acts Interpretation Act 1901* (Cth) applied. That section provides that if an Act requires or allows a thing to be done, and the last day for doing the thing is a weekend or public holiday, then the thing can be done on the next working day. The respondent argued that s 36(2) operated to allow the new visa to be applied for and for the criterion to be satisfied on the Monday because the existing visa expired on the Sunday. That was rejected by the Federal Circuit Court but upheld by the Federal Court. The High Court held that the *Migration Act 1958* and *Migration Regulations 1994* did not, in this case, impose a time limit or require a thing to be done by a particular date, expressly or impliedly. It was common ground that the visa application was validly made on the Monday. However, the visa applicant did not meet the criterion on that day. Section 36(2) did not apply to alter the rights or obligations in that scenario. Bell, Keane and Gordon JJ jointly; Gageler J separately concurring; Nettle J dissenting. Appeal from the Federal Court allowed.

CRIMINAL LAW

Directions to juries – Application of the 'proviso' – Approach to questions for appellate courts

In *Perara-Cathcart v The Queen* [2017] HCA 9 (1 March 2017) the High Court held that jury directions as to discreditable conduct evidence were sufficient, and also commented on the application of the 'proviso' (which allows for criminal appeals to be dismissed where there has been an error but where there has been no substantial miscarriage of justice) and the questions for an appellate court. The appellant was convicted of rape and threatening to kill. The trial judge admitted evidence that a small amount of cannabis had been found in the appellant's home when it was searched. The trial judge gave directions as to how the evidence could be used. On appeal, the appellant argued that the evidence should not have been admitted and that the directions were insufficient. The Court of Appeal unanimously held the evidence was admissible. Two members of the Court held that the direction was inadequate; of those, one would have allowed the appeal, but the other applied the proviso to dismiss it. Ultimately, the appeal was dismissed. The appellant argued that the Full Court should have allowed the appeal because a majority had not held that the proviso should apply. In the High Court, a majority (Nettle J dissenting) dismissed the appeal on the basis of a notice of contention, finding that the direction to the jury was sufficient. However, the Court divided on other aspects of the case. Kiefel, Bell and Keane JJ, Nettle J concurring on this issue, held that the application of the proviso presented two questions: whether there had been an error; and whether the proviso should apply. The legislation required a majority for both questions. The notice of contention aside, the members of the joint judgment would have upheld the appeal for that reason. Gageler J and Gordon J held that there was but one question, whether the appeal should be allowed or dismissed. Absent the notice of contention, their Honours would have dismissed the appeal, because a majority of the Court below had not decided that the appeal should be allowed. Kiefel, Bell and Keane JJ jointly; Gageler J and Gordon J separately concurring; Nettle J dissenting. Appeal from the Court of Appeal (SA) dismissed.

CRIMINAL LAW

Apprehension and detention – Reasonable grounds for belief

In *Prior v Mole* [2017] HCA 10 (8 March 2017), the High Court held that the respondent, a police officer, had reasonable grounds to believe that the appellant would commit an offence and therefore the officer's apprehension of the appellant was lawful. Mr Prior was seen intoxicated and drinking alcohol in a public place. The police apprehended him under the *Police Administration Act* (NT), which allows police to apprehend a person that the police reasonably believe is intoxicated and, relevantly, might intimidate, alarm or cause substantial annoyance to people and/or would likely commit an offence. Mr Prior was subsequently charged with offences committed while in custody. He argued that the charges could not be maintained because the initial apprehension was unlawful for lack of reasonable grounds for the officer's requisite beliefs. The primary judge and the Court of Appeal rejected that argument. In the High Court, the question was whether the officer was entitled to rely on his general policing experience, without specific knowledge of the appellant, as part of his reasonable grounds for believing that Mr Prior would commit the offence. The High Court held that, despite a lack of particularity about the officer's experience, the Court of Appeal was entitled to assess as reasonable the grounds of the officer's belief. It was fair for the Court to draw inferences from the evidence about his experience. While minds could differ, the Court's finding was open. In addition, the High Court rejected a separate argument that the apprehension of Mr Prior exceeded the limits of the power to apprehend. Kiefel and Bell JJ jointly; Nettle J and Gordon J separately concurring; Gageler J dissenting. Appeal from the Court of Appeal (NT) dismissed.

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