High Court Judgments

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May

Native Title

Compensation for impairment of native title rights and interests

In *Northern Territory v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 (13 March 2019) the High Court considered the proper amount payable in compensation for the extinguishment of certain native title rights. The Ngaliwurru and Nungali People (the "Claim Group") held non-exclusive native title rights over land in the Northern Territory that had been extinguished by acts done by the Northern Territory. That gave rise to an entitlement to compensation under s51 of the *Native Title Act 1993* (Cth). The question in this case was the proper method of determining the compensation payable. At trial, the Claim Group was awarded compensation assessed at 80% of the unencumbered freehold value of the land, plus simple interest, plus compensation for non-economic (cultural) loss of $1.3m. On appeal, the Full Court varied the trial judge's assessment to award the Claim Group 65% of the unencumbered freehold value of the land but otherwise affirmed the trial judge's decision. The High Court held that the first step is to determine the value of the particular native title rights held and to deduct from the full exclusive native title rights a percentage that represented the comparative limitations of the Claim Group's interests, then to apply that reduction in percentage value to the full freehold value of the land as a proxy for full exclusive native title. In this case, that percentage equated to no more than 50% of the freehold value. The Court also upheld the award of simple as opposed to compound interest, and upheld the award for cultural loss, also commenting on the factors to be considered in determining that award. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly; Gageler J separately concurring except as to the method for determining the economic value of the Claim Group's interests; Edelman J separately concurring except as to the method of valuation of cultural loss. Appeals from the Full Federal Court allowed in part.

Criminal law

Statutory interpretation – meaning of "destroys or damages"

In G*rajewski v Director of Public Prosecutions* (NSW) [2019] HCA 8 (13 March 2019) the High Court held that alteration to the physical integrity of a thing is required to show that the thing was damaged. The appellant was a protestor who climbed into a ship loader at a coal terminal and locked himself in. The appellant put the ship loader in a position where he was at risk of harm. The ship loader was shut down because of safety concerns and remained inoperable until he was removed. The appellant was convicted of intentionally or recklessly destroying or damaging property belonging to another, contrary to s195(1)(a) of the *Crimes Act 1900* (NSW). The offence was particularised as doing damage to property causing the temporary impairment of the working machinery of the ship loader. The appellant appealed his conviction to the District Court of New South Wales, which stated a case to the Court of Criminal Appeal asking whether the facts could support a finding of guilt under s195(1)(a). The Court said that they could. In the High Court, a majority held that "damage to property within the meaning of s195(1) of the *Crimes Act* requires proof that the defendant's act or omission has occasioned some alteration to the physical integrity of the property, even if only temporarily". The question stated in this case had to be answered no and the appellant's conviction quashed. Kiefel CJ, Bell, Keane and Gordon JJ jointly. Nettle J dissenting. Appeal from the Court of Criminal Appeal (NSW) allowed.

Jury directions – Prasad directions

In *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9 (20 March 2019) the High Court held that jury directions commonly known as Prasad directions are contrary to law and should not be administered. The case concerned an accused who was arraigned on an indictment of murder. A plea of not guilty was entered and a jury empanelled. At the end of the Crown case, the defence sought a Prasad direction, which allows for the jury to be informed that they are allowed at any time after the close of the prosecution case to return a verdict of not guilty without hearing more. Over the

Crown's objection, a lengthy Prasad direction was given. The jury considered the direction but asked to hear more. After the close of the defence case, but before final addresses, the jury was reminded of the direction. After considering again, the jury returned a verdict of not guilty without hearing more. The Director of Public Prosecutions referred a point of law to the Court of Appeal, asking whether Prasad directions are contrary to law and should not be administered. A majority of the Court of Appeal held that there was no reason in principle to hold that such directions should not be given. The High Court unanimously upheld the appeal. The Court held that a jury does not have a common law right to return a verdict of not guilty any time after the close of the Crown case. To give a Prasad direction was inconsistent with the division of functions between the judge and the jury (for example, because it might suggest to the jury that the judge considers acquittal to be appropriate, or because it leaves the jury without the benefit of the prosecution's final address and the judge's summing up). It is a matter for the jury to decide if guilt beyond reasonable doubt has been established, assuming that the evidence at its highest is capable of sustaining a conviction. A jury cannot make that decision until the end of the case. The Court therefore held that Prasad directions are contrary to law and should not be administered. Appeal from the Court of Appeal (Vic) allowed.

Jury directions – lies in complainant's evidence – application of the proviso

In *OKS v Western Australia* [2019] HCA 10 (20 March 2019) the appellant had been charged with four counts of indecently dealing with a child under 13. The trial took place nearly 20 years after the alleged offending. The central issue at trial was the credibility and reliability of the complainant's evidence. The complainant admitted to telling lies to police in her earlier accounts of events, and further lies were asserted by the defence. In the course of summing up, the trial judge directed the jury that they should not reason that just because the complainant had been shown to have lied, all of her evidence was dishonest and could not be relied on. The jury returned verdicts of guilty on one count and not guilty on the other (two counts were withdrawn). On appeal the Court of Appeal held that the direction given was a wrong decision on a question of law but held that the conviction should stand because there had not been a substantial miscarriage of justice (the proviso). The High Court unanimously upheld the appeal. The Court held that it was open to the jury, if it accepted that the complainant had lied, not to accept the balance of her evidence as making out the offences. The direction effectively prevented the jury from reasoning in that way or was apt to lessen the weight that the jury might properly give to a finding about the complainant's lies. The jury's assessment of her credibility was wrongly circumscribed. On the proviso, the High Court said that the only gauge of sufficiency of the evidence for the Court of Appeal was the verdict. But it could not be assumed that the misdirection had no effect on that verdict, in circumstances where the misdirection precluded the jury from adopting a process of reasoning, favourable to the appellant, that was open to it. The conviction had to be quashed and a new trial ordered. Bell, Keane, Nettle and Gordon JJ jointly; Edelman J separately concurring. Appeal from the Supreme Court (WA) allowed.

June

Constitutional law

Implied freedom of political communication

Kathleen Clubb v Alyce Edwards; John Graham Preston v Elizabeth Avery [2019] HCA 11 (10 April 2019) concerned the validity of Victorian and Tasmanian laws prohibiting communications and protests near abortion clinics. Kathleen Clubb was convicted of an offence under s185D of the *Public Health and Wellbeing Act 2008* (Vic), which prohibits a person from communicating in relation to abortions to persons accessing or attempting to access premises where abortions are provided, if the communication is reasonably likely to cause distress or anxiety. John Preston was convicted of an offence under s9 of the *Reproductive Health (Access to Terminations) Act 2013* (Tas), which prohibits protests in relation to terminations that are able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided. Both appellants argued that the relevant sections impermissibly burdened the freedom of political communication about governmental matters implied into the Commonwealth Constitution. In relation to the Victorian Act, Gageler J, Gordon J and Edelman J held that the validity of the section should not be decided. Ms Clubb had not contended that her communication was political. Gageler J held that in the absence of appropriate facts, the validity of the section should not be decided. Gordon J held to the same effect and also held that s185D would be severable from a case with facts involving political communication. Edelman J also held that s185D was severable. Their Honours dismissed the Clubb appeal for those reasons. The rest of the Court held that s185D of the Victorian Act burdened the implied freedom but was justified by the legitimate purposes of the provisions, being the protection of the safety, wellbeing, privacy and dignity of persons accessing the relevant premises. The whole Court held that s9 of the *Tasmanian Act* burdened the implied freedom but was justified by the same legitimate purposes as the *Victorian Act*. Kiefel CJ, Bell and Keane JJ jointly; Gageler J separately dismissing the Clubb appeal because the appellant had not engaged in political communication, and concurring on the Preston appeal; Nettle J separately concurring with the plurality in both appeals; Gordon J separately dismissing the Clubb appeal because the appellant had not engaged in political communication and because s185D was severable, and concurring on the Preston appeal; Edelman J separately dismissing the Clubb appeal because s185D was severable, and →

concurring on the Preston appeal. Appeals removed from the Magistrates Court (Vic) and the Magistrates Court (Tas) dismissed.

Native title

Extinguishment of rights – definition of "leases"

In *Tjungarrayi v Western Australia; KN (deceased) and Others (Tjiwarl and Tjiwarl #2) v Western Australia* [2019] HCA 12 (17 April 2019) the High Court considered whether petroleum exploration permits and mineral exploration licences came within the definition of "leases" within s47B(1)(b)(i) of the *Native Title Act 1993* (Cth). In each appeal, the appellants made a native title claim, including over areas of vacant Crown land. In each claim, the traditional laws and customs acknowledged and observed by the claim group in relation to the claim area conferred rights of exclusive possession. However, those rights were extinguished by acts of partial extinguishment prior to the enactment of the *Native Title Act*. Generally, extinguishment of rights is permanent. However, s47B(1)(b)(i) relevantly provides that historical acts of extinguishment are to be disregarded for the purposes of a claim over vacant Crown land, unless the area is covered by a "lease". The issue for the High Court was whether a petroleum exploration permit granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) and a mineral exploration licence granted under the *Mining Act 1978* (WA) were "leases" within s47B. The trial judge held they were not. The Full Federal Court disagreed, relying on s242(2) of the *Native Title Act*. That section extends the meaning of "lease" in certain circumstances, and relevantly provides that "[i]n the case only of references to a mining lease, the expression lease also includes a licence . . . or an authority". A majority of the High Court held that s242(2) was engaged only where the operative provision of the *Native Title Act* contains an express textual reference to a "mining lease". Section 47B(1)(b)(i) did not contain such a reference and so s242(2) could not apply. It followed that the petroleum exploration permit and mining exploration licence could not be "leases". Kiefel CJ, Bell, Keane, and Edelman JJ jointly; Gageler J, Nettle J and Gordon J separately concurring. Appeal from the Full Federal Court allowed.

July

Contract law

Arbitration clause – construction of contract

Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart [2019] HCA 13 (8 May 2019) concerned the scope of arbitration clauses in certain deeds and whether the validity of the deeds could also be subject to arbitration under the deed. The appellants (Bianca Rinehart and John Hancock, children of Gina Rinehart) brought proceedings in the Federal Court concerning the conduct of Gina Rinehart, Hancock Prospecting Pty Ltd and others. It was alleged that Ms Rinehart dealt with companies in the Hancock Group to her benefit and to the detriment of assets (shares in Hancock Group companies) of trusts of which Ms Rinehart is the trustee and of which the appellants are beneficiaries. Prior to lodging a defence, the respondents sought an order pursuant to s8(1) of the *Commercial Arbitration Act 2010* (NSW). That section requires a court to refer parties to a proceeding before the court to arbitration in certain circumstances. The respondents' applications relied on several deeds. Three of those deeds, the subject of this litigation, were said by the appellants to be void because of misconduct on the part of one or more of the respondents. Each of those deeds contained a clause providing that in the event of a dispute "under this deed" there was to be a confidential arbitration. The question was whether a dispute about the validity of the deeds could be referred to arbitration under the clause in the deed. The trial judge held that it could not. The Full Court disagreed, holding that the clauses should be given a liberal interpretation by which the arbitrator could deal with all issues including in respect of validity. The High Court unanimously dismissed the appeal, holding that, understood in context, the arbitration clauses extended to claims about validity. This was not a case that had to be decided on the language alone – the background and purpose of the deeds pointed to wide coverage of the confidential arbitration processes. The High Court also considered a cross-appeal from an aspect of the Full Court's decision which held that three companies not parties to the deeds could not be referred to the arbitration because they were not persons claiming "through or under" the deed. By majority, the High Court held that, having regard to the subject matter in controversy, the third party companies were claiming through or under the deed and therefore were "parties" that could be referred to arbitration under s8 of the Act. Kiefel CJ, Gageler, Nettle and Gordon JJ jointly; Edelman J separately concurring on the appeal and dissenting on the cross-appeal. Appeal from the Full Federal Court dismissed; cross-appeal allowed.

Aviation law

Tort – carriage of passengers by air – carrier's liability – statutory construction

In *Parkes Shire Council v South West Helicopters Pty Limited* [2019] HCA 14 (8 May 2019) the High Court considered whether claims in tort were precluded by the terms of the C*ivil Aviation (Carriers' Liability) Act 1959* (Cth). The appellant hired the respondent to provide assistance with a low level noxious weed survey to be conducted by helicopter. In carrying out that activity, the helicopter crashed and two officers of the appellant were killed. The widow and children of one of the officers brought a claim in tort for damages from negligently inflicted psychiatric harm resulting from the death of the officers. Part IV of the Act applies to create liability in the carrier for damages sustained by death of a passenger resulting from an accident that took place on board (s28). That liability is "in substitution for any civil liability of the carrier under any other law" in respect of death or injury of

a passenger (s35(2)). Section 34 imposes a time limit on rights of action under Pt IV. In this case, the claims brought were outside the time allowed by s34. The question was whether the claim came within Pt IV of the Act, thus precluding the claim. The judge at first instance held the claim did not come within s35(2). The Court of Appeal by majority allowed an appeal. The High Court dismissed the appeal. The High Court held that the family was entitled to bring an action under s28 of the Act. This was an action in respect of the death of a passenger. Section 35(2) then substituted that s28 entitlement for any claim that could be brought at common law. In his case, that meant that s34 extinguished the entitlement to claim, and the claim should have been dismissed. Kiefel CJ, Bell, Keane and Edelman JJ jointly; Gordon J separately concurring. Appeal from the Court of Appeal (NSW) dismissed.

Constitutional law

Implied freedom of political communication – laws restricting gifts and donations

In *Spence v State of Queensland* [2019] HCA 15 (15 May 2019) the High Court considered the validity of Queensland and Commonwealth laws purporting to regulate the making of gifts to political parties. The relevant Queensland laws purported to prohibit property developers from making gifts to political parties endorsing and promoting candidates for the Queensland Legislative Assembly and local government councils. The relevant Commonwealth law permits a person to make a gift to a political party registered under the *Commonwealth Electoral Act 1918* (Cth) and permits the party to receive and retain the gift, despite any state or territory electoral law, if the gift or part of the gift is required to be used or might be used to incur expenditure for the dominant purpose of influencing voting in the House of Representatives or the Senate. The plaintiff commenced proceedings in the High Court's original jurisdiction arguing that the Queensland laws were invalid because they infringed the implied freedom of political communication. The plaintiff also argued that the Queensland laws were exercises of legislative power vested exclusively in the Commonwealth parliament, and that the Queensland laws were invalid by operations of s109 of the Constitution as they were inconsistent with the Commonwealth law. The defendant, in turn, challenged the validity of the Commonwealth law. A majority of the High Court held that the Commonwealth law was invalid because it went beyond the reach of Commonwealth legislative power to the extent that it purported to immunise from state law the making of a gift that merely might be used to incur expenditure for the dominant purpose of influencing voters in a federal election. That holding meant that there could be no s109 inconsistency between the Commonwealth and Queensland laws. A minority of the Court would have held the Commonwealth law valid and that the Queensland laws were to some extent invalid for inconsistency with the Commonwealth laws. The Court unanimously held that the Queensland laws were not invalid on any of the other grounds raised by the plaintiff. Kiefel CJ, Bell, Gageler and Keane JJ jointly; Nettle J, Gordon J and Edelman J each separately dissenting in respect of the validity of the Commonwealth law, holding that the Queensland laws would in that case have been invalid in part under s109, and concurring that the Queensland laws were not otherwise invalid. Answers to Special Case given.

Administrative law

Administrative Appeals Tribunal review – spent convictions – scope of review

In *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16 (15 May 2019) the High Court considered whether the Administrative Appeals Tribunal (AAT) was prohibited from taking into account spent convictions in conducting merits review of a banning order imposed by Australian Securities and Investments Commission (ASIC), where ASIC was prohibited from taking those spent convictions into account. The appellant was convicted of offences in 1978 and 1997. At all relevant times in this litigation, those convictions were "spent" within the meaning of Pt VIIC of the *Crimes Act 1914* (Cth). In 2014, a delegate of ASIC made a banning order in respect of the appellant because he was not a fit and proper person to engage in credit activities. On review, the AAT took into account the spent convictions. Division 3 of Pt VIIC had the effect, relevantly, that a "Commonwealth authority" is prohibited from taking into account a spent conviction (including findings of guilt without conviction). "Commonwealth authority" includes ASIC and the AAT. That plainly precluded the delegate from taking the spent convictions into account. However, s85ZZH(c) of the Act provides that Div 3 of Pt VIIC does not apply in relation to the disclosure of information to, or the taking into account of information of, a tribunal established under Commonwealth law. Both the judge at first instance and the Full Court held that s85ZZH(c) allowed the AAT to take the spent convictions into account on review. The High Court held unanimously that the jurisdiction of the AAT on review of the ASIC decision under the *National Consumer Credit Protection Act 2009* (Cth) is not affected by s85ZZH(c). The jurisdiction of the AAT is to stand in the shoes of the decision maker, subject to the same constraints, except where altered by clearly expressed statutory indication. In this case, s85ZZH(c) did not alter the statutory jurisdiction of the AAT to allow it to take account of a spent conviction. The statutory language was held ultimately to be insufficient to have that effect. Bell, Gageler, Gordon and Edelman JJ jointly; Kiefel CJ, Keane and Nettle JJ jointly concurring. Appeal from the Full Federal Court allowed.

Information

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