High Court Judgments

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Administrative law

Migration – detention pending removal – special case – drawing of inferences

Plaintiff M47/2018 v Minister for Home Affairs [2019] HCA 17 (orders 13 February 2019; reasons 12 June 2019) concerned whether ss189 and 196 of the *Migration Act 1958* (Cth) gave authority to the Commonwealth to detain the plaintiff for what he alleged would be an indefinite period. Section 189 of the Act requires an officer who knows or suspects a person to be an unlawful non-citizen to detain that person. Section 196 of the Act requires unlawful non-citizens to be detained under s189 until they are removed or deported from Australia. Section 198 requires that unlawful non-citizens be removed "as soon as reasonably practicable" if the non-citizen is a detainee and an application for a visa has been refused and finally determined. The plaintiff was an unlawful non-citizen who had been in detention since 2010. He had used several names with overseas officials and had also made visa applications in Australia using different names, nationalities and other personal details. His accounts of his background were inconsistent. He admitted that some applications contained false details. He also did not cooperate with Australian officials who were trying to establish his identity and nationality. The plaintiff, who argued that he was stateless, commenced proceedings in the High Court arguing that his detention was unlawful because the mandate to detain in ss189 and 196 is suspended where removal from Australia is not practicable at all or in the foreseeable future. In the alternative, the plaintiff claimed that the provisions exceeded the legislative power of the Commonwealth. The parties did not agree, for the Special Case, that there was no real prospect of deporting the plaintiff from Australia in the foreseeable future. The plaintiff submitted, however, that inferences to that effect could be drawn. The plaintiff agreed that if none of the inferences he argued for could be drawn, the questions in the Special Case did not arise. The Court unanimously held that the necessary inferences could not be drawn, because it could not be assumed that it was beyond the plaintiff's power to provide further information concerning his identity, and that might alter his prospects of removal. It followed that there was no factual basis to question the lawfulness of the plaintiff's detention. Kiefel CJ, Keane, Nettle and Edelman JJ jointly; Bell, Gageler and Gordon JJ jointly concurring. Answers to questions stated in the Special Case given.

Trade practices law

Consumer protection – unconscionable conduct

Australian Securities and Investments Commission v Kobelt [2019] HCA 18 (12 June 2019) concerned the meaning of "unconscionability" in s12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth). That section provides that a person must not, in trade or commerce and in connection with the supply of financial services, engage in unconscionable conduct. The respondent operated a general store in Mintabie, South Australia, selling goods including food, fuel and second-hand cars. Almost all of his customers were resident in two remote Aboriginal communities. The respondent provided credit through a system known as "book-up", where customers provided the respondent with a debit card linked to a bank account into which wages or Centrelink benefits were paid (with their PIN). The respondent provided goods and was authorised to withdraw funds as they arrived from customers' accounts to reduce customers' debt. 50% was applied to debt and 50% was made available for customer use. Customers had little practical opportunity to access the funds themselves. The respondent also exercised a degree of discretion over what was bought from the store, especially when customer funds were low, and enabled purchases through other stores nearby. The only issue was whether the respondents' actions under this system were unconscionable. The primary judge found that they were, because the respondent

"had chosen to maintain a system which, while it provided some benefits to his Anangu customers, took advantage of their poverty and lack of financial literacy to tie them to dependence on his store". The Full Court allowed an appeal. The Full Court held that the customers were vulnerable under the system, but the respondent's actions were not unconscionable given customers' understanding of the system, their voluntary entering into the contracts, actions that customers could take, and that the respondent had not acted dishonestly or had exerted undue influence on his customers. There was also anthropological evidence suggesting some benefits to customers culturally under the book-up system. A majority of the High Court dismissed an appeal. Although customers under the book-up system were more vulnerable, no feature of the respondent's conduct exploited or otherwise took advantage of their vulnerability. The basic elements of the system were understood and accepted. The acceptance of the system reflected cultural matters, not lack of financial literacy. Kiefel CJ, Bell J jointly; Gageler J and Keane J each separately concurring; Nettle and Gordon JJ jointly dissenting; Edelman J separately dissenting. Appeal from the Full Federal Court dismissed.

Trusts and corporate law

External administrators – receivers – trustee company – rights of indemnity – trust assets

In *Carter Holt Harvey Woodproducts Pty Ltd v Commonwealth* [2019] HCA 20 (19 June 2019), the High Court considered whether property held on trust by a corporate trustee operating a trading trust was property of the company when insolvent, and the creditor priorities in respect of that property. Amerind Pty Ltd carried on a business solely in its capacity as trustee of a trust. After being unable to settle demands for payment from a bank, receivers were appointed and the company was wound up. The trust assets were realised and the bank's demands satisfied. At issue in this case were the priorities applicable to realised surplus funds. The respondent claimed it was entitled to payment for benefits of Amerind's employees in priority to other creditors, under ss433, 555 and 556(1)(e) of the *Corporations Act 2001* (Cth). Those provisions allow, amongst other things, for payment of certain employee benefits to be paid in priority out of property of the company coming into the receiver's hands, or property comprised in or subject to a circulating security interest. As a trustee, Amerind did not itself own the assets of the trust, but did have a right to be indemnified out of the trust assets. Questions arose as to whether the right of indemnity could be assets of the trust, and whether the property held on trust by Amerind could itself be property of the company for the purposes of s433(3). The trial judge said that the assets held on trust were not part of the assets of the company, meaning that the employees would not get priority. The Court of Appeal reversed that decision, finding that the right to be indemnified out of the trust assets was property of the company. It also found that the trust assets were themselves assets of the company. The High Court held that, "the 'property of the company' that is available for the payment of creditors includes so much of the trust assets as the company is entitled, in exercise of the company's right of indemnity as trustee, to apply in satisfaction of the claims of trust creditors." But proceeds from an exercise of the right of exoneration may be applied only in satisfaction of trust liabilities to which the right relates. Kiefel CJ, Keane and Edelman JJ jointly; Bell, Gageler and Nettle JJ jointly concurring; Gordon J separately concurring. Appeal from the Court of Appeal (Vic) dismissed.

Constitutional law

Federal jurisdiction – s79 *Judiciary Act* – meaning of parent

In *Masson v Parsons* [2019] HCA 21 (19 June 2019), the High Court considered the operation of s79(1) of the *Judiciary Act 1903* (Cth) and whether it operated to pick up provisions of the Status of *Children Act 1996* (NSW) concerning parentage. The appellant provided semen to the first respondent for the purposes of artificial insemination. The first respondent conceived as a result. The appellant believed himself to be fathering the child and would support and care for the child. His name was entered on the child's birth certificate as the father. The child lived with the first respondent and her partner, but the appellant had a continuing role in the child's financial support, health, education and welfare. The first respondent and her partner decided to move to New Zealand with the child. The appellant instituted proceedings in the Family Court seeking orders, amongst other things, sharing parental responsibility and restraining the relocation of the child. The issue at first instance was whether the appellant was a legal parent of the child. Section 60H of the *Family Law Act 1975* (Cth) deals with children born as the result of artificial conception. The judge at first instance held that the appellant did not come within that section so as to qualify as a legal parent, but s60H was not exhaustive of establishing parentage and he qualified as a parent "within the ordinary meaning of the word". On appeal, the Full Court held that s79 of the Judiciary Act picked up and applied, in federal jurisdiction, s14 of the *Status of Children Act*. That section provides a series of presumptions about legal parentage. The appellant had not rebutted the presumptions and as a result was not a legal parent. The High Court noted that the purposes of s79 of the Judiciary Act is to "fill a gap in the laws which regulate matters coming before courts exercising federal jurisdiction … by picking up the texts of state laws governing the manner of exercise of state jurisdiction and applying them as Commonwealth laws". Section 79 does not pick up and apply state laws determinative of an individual's rights and duties, as opposed to a law directed to the manner of exercise of jurisdiction. In this case, s14 of the *Status of Children Act* operated as an irrebuttable presumption of law. It was determinative of rights. It was not a law relating to evidence or regulating the exercise of jurisdiction. As such, s14 was not a law to →

which s79 of the *Judiciary Act* was capable of applying. The High Court also held that s79 could not apply in this case because the *Family Law Act* had "otherwise provided". Finally, the respondents argued that, if not picked up by s79, s14 of the *Status of Children Act* was a valid law of NSW applying of its own force in federal jurisdiction. The Court accepted that s14 could generally apply of its own force, but held that s14 was inconsistent with the *Family Law Act* pursuant to s109 of the Constitution, meaning that s14 could not apply in this case. Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ jointly; Edelman J separately concurring. Appeal from the Full Family Court allowed.

October

Statutory construction

Mutual recognition principle – exceptions

Victorian Building Authority v Andriotis [2019] HCA 22 (7 August 2019) concerned whether the appellant had a discretion to refuse to register the respondent and whether Victorian character requirements fell within an exception to the mutual recognition principle. The respondent registered as a waterproofer in New South Wales. In his NSW application he falsely stated his work experience. He later sought registration in Victoria under the *Mutual Recognition Act 1992* (Cth) (MRA). That Act allows for a person registered in one state, after notifying a second state registration authority, to be registered in the second state for the equivalent occupation. Section 19 of the MRA allows for a person to lodge a notice seeking registration. Section 20(1) provides that a person who lodges a notice is entitled to be registered as if registration in the first state was a sufficient ground of entitlement to registration. Section 20(2) provides that the local authority "may" grant registration in the second state on that ground. Section 17(2) provides for a limited exception to the mutual recognition principle: a law in the second state will apply if it applies to all persons seeking to carry on the occupation, but only if it is not based "on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation". The respondent in this case was refused registration on the basis that he did not meet a "good character" requirement applicable in Victoria under s170(1)(c) of the *Building Act 1993* (Vic). The Administrative Appeals Tribunal upheld the refusal. On appeal to the Full Federal Court, the appellant argued that s20(3) of the MRA confers a discretion to register; and that the good character requirement came within the exception in s17(2). The Full Federal Court rejected both arguments. The High Court unanimously dismissed the appeal. The Court held that s20(2) of the MRA is empowering and does not admit of a broader discretion. And the limit on the exception s17(2) was to be interpreted broadly, so that not only qualifications of an educational or technical kind were caught. The limit on s17(2) encompassed the subject matter of s170(1)(c) of the Building Act, meaning the exception could not apply. Nettle and Gordon JJ jointly; Kiefel CJ, Bell and Keane JJ jointly concurring; Gageler J and Edelman J each separately concurring. Appeal from Full Federal Court dismissed.

Constitutional law

Implied freedom of political communication – Australian Public Service Code of Conduct

In *Comcare v Banerji* [2019] HCA 23 (7 August 2019) the High Court held that an exception to the provision of compensation based on reasonable administrative action taken in respect of the respondent's employment did not impermissibly burden the implied freedom of political communication. The respondent was employed by the then Department of Immigration and Citizenship (the department). Under a Twitter handle "@LaLegale", the respondent broadcast more than 9000 tweets, many of which were highly critical of the department, other employees, department policies, and government and opposition policies. A complaint was received about the respondent's actions and an investigation was conducted. A delegate of the Secretary of the department proposed to find that the respondent had breached the Australian Public Service (APS) Code of Conduct and also proposed to terminate the respondent's employment. The Code, which is set out in s13 of the *Public Service Act 1999* (Cth), relevantly provides that an APS employee must at all times behave in a way that upholds the APS values, and the integrity and good reputation of the APS. The APS values, which are set out in s10 of the Public Service Act, include that the APS is apolitical and delivers services fairly, efficiently, impartially and courteously to the public. After her termination, the respondent lodged a claim for compensation under s14 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth). That Act provided that no compensation was payable for an "injury" suffered as a result of reasonable administrative action taken in a reasonable manner in respect of an employee's employment. A delegate of the appellant rejected the respondent's claim on the basis that it came within that exception. The Administrative Appeals Tribunal found that the use of the APS Code impermissibly burdened the respondent's freedom of political communication and set the appellant's decision aside. The respondent also argued that her anonymous tweets did not fall within the scope of the *Public Service Act* provisions (the construction argument). On appeal to the Federal Court, the matter was removed into the High Court. The High Court unanimously rejected the respondent's construction argument. The Court further held that ss10(1), 13(11) and 15(1) of the *Public Service Act* had a permissible or legitimate purpose; that is, consistent with the constitutionally prescribed system of representative and responsible government. The purpose was the maintenance of an apolitical public service. The Court also held that the provisions of the *Public Service Act* were reasonably appropriate

and adapted or proportionate to their purpose. Accordingly, they did not impose an unjustified burden on the implied freedom. Kiefel CJ, Bell, Keane and Nettle JJ jointly; Gageler J, Gordon J and Edelman J each separately concurring. Appeal from the Administrative Appeals Tribunal (removed from the Federal Court) upheld.

Electoral law

Counting of votes – power to publish information about indicative counts

Palmer v Australian Electoral Commission [2019] HCA 24 (Orders 7 May 2019, reasons 14 August 2019) concerned the power of the Australian Electoral Commission (AEC) to publish an indicative two-candidate preferred count (Indicative TCP Count) of votes in an election. The *Australian Electoral Act 1918* (Cth) requires the scrutiny of votes in an election for each Division to include an Indicative TCP Count. The Count is a count of preference votes (other than first preferences) "that, in the opinion of the Australian Electoral Officer, will best provide an indication of the candidate most likely to be elected for the Division". The plaintiffs were candidates at the May 2019 election. They challenged the AEC's practice of publishing the identity of candidates selected for the Indicative TCP Count and the progressive results of the Count after polls had closed for the relevant Division, but while polls in other places were still open. The plaintiffs argued that the Electoral Act did not authorise the publication of that information before all polls were closed; and that publishing the information before the close of all polls would distort the voting system in a manner that would compromise the representative nature of a future Parliament, contrary to the Constitution. The High Court rejected the factual basis for the challenge. It was not shown that publication of the information suggested the giving of an imprimatur to any particular candidate or outcome. The selection of candidates was not shown to be inaccurate or misleading. There was no factual foundation for the contention that the publication of the information after the polls had closed in some, but not all, places had any effect on the constitutional requirements for elections. Section 7(3) of the *Electoral Act*, which gives the AEC power to do "all things necessary or convenient to be done for or in connection with the performance of its functions" empowered the AEC to publish the Indicative TCP Count and related information in the way the AEC did. Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ jointly; Gageler J separately concurring. Application for constitutional writ dismissed.

Costs

Judicial discretion to order costs – impecuniosity of unsuccessful party

In *Northern Territory v Sangare* [2019] HCA 25 (14 August 2019) the High Court held that it was erroneous to decline to order costs only because the unsuccessful party to the litigation might not be able to pay the debt. The respondent brought defamation proceedings in the Northern Territory Local Court arising from a briefing note that the appellant prepared for the Northern Territory Minister for Infrastructure. The briefing note was part of a process for seeking a visa to work in Australia. The respondent alleged that the briefing note contained fabricated material. The matter was transferred to the Supreme Court, which dismissed the proceeding. An appeal was also unsuccessful. The appellant sought its costs of the trial and the appeal. The Court of Appeal acknowledged that the appellant, having been successful, would normally have its costs on the basis of the rule that costs normally follow the event. The Court of Appeal declined to make that order, however, because making such an award would be futile because the respondent was impecunious. The High Court unanimously allowed the appeal. The Court noted that the power to award costs is a wide discretion, but must be exercised judicially. The guiding principle is that a successful party is generally entitled to an order for costs by way of indemnity against the expense of litigation that "should not, in justice, have been visited upon that party". In this case, there was no conduct of the appellant that would have disentitled it to costs, or that would have weighed against the usual exercise of the discretion. It was also not relevant that the appellant was a public body. Impecuniosity of a wrongdoing is not a reason for declining to pay damages, and in the same way, impecuniosity of an unsuccessful party is not a reason to decline to order the payment of a successful party's costs. The Courts have consistently rejected futility due to impecuniosity as a reason not to order costs. Kiefel CJ, Bell, Gageler, Keane and Nettle JJ jointly. Appeal from the Supreme Court (NT) allowed.

Legal professional privilege

Advice privilege – whether legal professional privilege only an immunity or also an actionable legal right

Glencore International AG v Commissioner of Taxation [2019] HCA 26 (14 August 2019) concerned whether legal professional privilege (LPP) can be deployed as an actionable legal right, as opposed to an immunity only. The plaintiff pleaded that it had received legal advice from Appleby (Bermuda) Limited (Appleby), a law practice in Bermuda. That advice was part of a cache of documents stolen from Appleby's electronic file management system and provided to the International Consortium of Investigative Journalists. The Court also assumed that the documents had been further disseminated. The advice came into the possession of the defendants. Upon →

learning of that, the plaintiff requested the return of the advice, asserting that the documents were subject to LPP. The defendants refused and the plaintiff brought proceedings in the High Court's original jurisdiction, seeking an injunction to restrain the use of the documents and seeking their return. The only basis on which the proceeding was brought was LPP, the plaintiff arguing that LPP is not limited to operation as an immunity. The plaintiff did not rely on breach of confidence and the Court noted some difficulties that might have been encountered in relying on such a breach given that the documents are in the public domain. The defendants demurred, arguing there was no cause of action disclosed entitling the plaintiff to the relief sought. The High Court unanimously upheld the demurrer and dismissed the proceedings. The Court held that LPP is "only an immunity from the exercise of powers which would otherwise compel the disclosure of confidential communications". It is not a legal right founding a cause of action. There was no justification in policy for the creation of such a right. On the present state of the law, once privileged communications are disclosed, a party must turn to the equitable doctrine of breach of confidence to protect the material. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Proceeding in the original jurisdiction of the Court dismissed. ■

Information

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Federal Court Judgments

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August

Class actions

Dispensation from giving notice to group members of the commencement of the proceedings, of their right to opt out of the proceedings and of the application for approval of the settlement

In *Sister Marie Brigid Arthur (Litigation Representative) v Northern Territory of Australia* [2019] FCA 859 (30 May 2019), the Court made orders:

1. pursuant to s33X(2) of the Federal Court of Australia Act 1976 (Cth) (the FCA Act), for the applicant to be relieved from the requirement to give notice to group members of the commencement of the proceeding and of their right to opt out of the proceeding; and
2. pursuant to s33X(4) of the FCA Act, for the applicant is relieved from the requirement to give notice to group members of the application for approval of the settlement.

The proceeding is a class action under Part IVA of the FCA Act seeking declarations and injunctions for alleged breaches by the Northern Territory and/or those in charge of the certain detention centres of duties owed by them under the *Youth Justice Act 2005* (NT), the *Youth Justice Regulations 2005* (NT), Policy Determinations made under the regulations and, in addition, for alleged breaches of the *Racial Discrimination Act 1975* (Cth). Group members comprise children detained in Alice Springs Youth Detention Centre and the Don Dale Youth Detention Centre. No damages are sought by the proceeding.

The parties negotiated a settlement of the proceeding, approval of which has not yet been heard or determined by the Court. Justice White exercised discretions under s33X(2) and (4) to relieve the applicant from having to give notice to group members of the commencement of the proceedings, of their right to opt out of the proceedings and the application for approval of the settlement.

Contracts

Specific performance – "fourth category" of Masters v Cameron

In *Lucas v Zomay Holdings Pty Ltd* [2019] FCA 830 (4 June 2019), the Court determined a dispute about the sale of a pharmacy business in the Eastlands Shopping Centre at Rosny Park, in Tasmania. The applicant contended that he entered into a legally binding contract for the purchase of the Priceline Pharmacy Eastlands business and he sought specific performance of it. The respondent contended that the offer to purchase was not binding.

The Court considered the category of contract dubbed the "fourth" category of agreements to contract described in *Masters v Cameron* (1954) 91 CLR 353 at 360-361: at [60]-[63]. O'Callaghan J stated at [70]: "In my view, the Offer to Purchase is clearly an