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

Andrew Yuile is a Victorian barrister, telephone (03) 9225 7222, email ayuile@vicbar.com.au. The full version of these judgments can be found at www.austlii.edu.au.

Federal Court Judgments

DAN STAR QC Senior Counsel, Victorian Bar

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

agreement that falls within the so-called fourth category of *Masters v Cameron*. That is to say, the parties intended to be bound immediately, notwithstanding that they contemplated the need for further documentation."

The Court would have granted declaratory relief and made an order for specific performance: at [89]. However after the hearing, but before judgment, an administrator was appointed to the respondent so the Court did not do so yet having regard to the operation of s440D of the *Corporations Act 2001* (Cth).

Practice and procedure

Application for extension of time – apprehended bias

In *Gambaro v Mobycom Mobile Pty Ltd* [2019] FCA 910 (14 June 2019), the Court granted an application for an extension of time for leave to appeal from interlocutory orders of Federal Circuit Court of Australia. Rangiah J held that the applicant's proposed appeal had sufficient prospects of success for apprehended bias and unfair conduct by the primary judge: at [23]-[24] and [29]. The appeal is to be heard by a Full Court.

Industrial law

Breach of right of entry laws by union and union officials – personal payment orders

In *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Laverton North and Cheltenham Premises case) (No 2)* [2019] FCA 973 (21 June 2019), the Court imposed pecuniary penalties in total of $100 000 on the union, $7,800 on one union official and $11 500 on another union official. The penalties were for a number of contraventions of s500 of the F*air Work Act 2009* (Cth) (FW Act) and also for a contravention of s340(1) of the FW Act: at [108].

Bromberg J made personal payment orders against the union officials so as to require the individuals to pay the penalty imposed and not to seek or encourage the union to pay to him any money or provide any financial benefit referable to the payment of the penalty, and additionally, not accept or receive from the union any money or financial benefit referable to that payment: at [86]-[94].

Bromberg J explained at [93]: "The systemic willingness of the CFMMEU, through the Divisional Branch, to support the unlawful conduct of the officials of the Divisional Branch by paying the pecuniary penalties imposed upon them demonstrates that it is likely that officials of the Divisional Branch will not personally pay for penalties imposed for their contraventions. But that is not all. It also demonstrates that there will be no condemnation or other detrimental consequence inflicted upon those officials by the Divisional Branch."

Furthermore, at [94]: "The unique circumstances demonstrate that it is likely that, in the absence of a personal payment order, MacDonald and Long will not feel the sting or experience the burden of any pecuniary penalty imposed upon them."

Insurance

Interpretation of professional indemnity insurance policy – insolvency exclusion

In *AIG Australia Limited v Kaboko Mining Limited* [2019] FCAFC 96 (14 June 2019) the Full Court considered the meaning of an insolvency exclusion endorses on an insurance policy covering directors and officers liability. The primary judge found that the insolvency exclusion did not preclude cover under the insurance policy for the claims made by the respondent (Kaboko). The applicant's appeal was dismissed.

The insolvency exclusion endorsed on the policy was expressed as follows:

The Insurer shall not be liable under any Cover or Extension for any Loss in connection with any Claim arising out of, based upon or attributable to the actual or alleged insolvency of the Company or any actual or alleged liability of the Company to pay any or all of its debts as and when they fall due.

The key question was whether it is the subject matter of the Claim that must have the specified insolvency link or whether the link is also established where, by reason of the circumstances that have led to the bringing of the claim, it can be said that the Claim arises out of, is based upon or is attributable to the actual or alleged insolvency of Kaboko or its inability to pay its debts when due.

Allsop CJ, Derrington and Colvin JJ held at [50]: ". . . for the purposes of the insolvency exclusion, a Claim does not arise out of, is not based upon and is not attributable to the insolvency of Kaboko or its inability to pay its debts unless the subject matter of the Claim has that character (being a character derived in the case of civil proceedings from the acts, errors or omissions that are the subject of the proceedings and the associated loss that may become the Loss if the proceedings are successful). The exclusion is not to be read as applying where the insolvency of Kaboko or its inability to pay its debts might be said to have motivated or led to the Claim being brought (for reasons other than providing a material part of the basis of the Claim)."

→

September

Administrative law and contempt of court

Findings of contempt set aside – primary judge denied procedural fairness to convicted

Jorgensen v Fair Work Ombudsman [2019] FCAFC 113 (8 July 2019) was an appeal from orders made in the Federal Circuit Court of Australia (FCCA) which had the effect of convicting the appellant (Mr Jorgensen) of contempt of court and sentencing him to a period of imprisonment. In late 2014, the Fair Work Ombudsman (Ombudsman) commenced proceedings against Jorgensen and one of his companies alleging that the company had contravened s716(5) of the *Fair Work Act 2009* (Cth) because it had failed to comply with compliance notices which required the company to pay $29 956.75 for outstanding wages and entitlements of three of its employees. The company was ordered to pay a pecuniary penalty of $55 000 and to comply with the compliance notices and Mr Jorgensen was ordered to pay a pecuniary penalty of $12 000. In 2015, the Ombudsman obtained freezing orders which had the effect of restraining the company from disposing of or dealing with any of its assets other than in certain specified circumstances. In 2017, the Ombudsman commenced proceedings against Mr Jorgensen in the FCCA alleging that he was in contempt of court by causing the company to breach the freezing orders. In 2018, the primary judge convicted Mr Jorgensen of nine counts of contempt of court. On 10 May 2018, the primary judge sentenced Mr Jorgensen to imprisonment for 12 months, but ordered that he be released on 20 May 2018 if he paid a sum of money to the Ombudsman which represented the amount that the company had initially been ordered to pay the Ombudsman in the underlying proceeding. Mr Jorgensen appealed both his conviction and the sentence imposed on him by the primary judge. The orders made by the primary judge were stayed pending the hearing and determination of the appeal and Mr Jorgensen was released on conditional bail.

The conviction appeal raised three issues (at [8] and [88]-[92]):

a. whether Mr Jorgensen was denied procedural fairness during his trial in the FCCA by reason of the primary judge's excessive and inappropriate interventions during the course of his evidence

b. whether the primary judge misdirected himself in relation to the proper interpretation of the "ordinary and proper course of business" exception in the freezing orders and the relevant mental element of the contempt charges which had been brought against Mr Jorgensen

c. the primary judge's use of a particular documentary exhibit in making what, at least on his Honour's view of the contempt charges, was an important finding against Mr Jorgensen.

The Court first considered the ground of a denial of procedural fairness by reason of the primary judge's excessive interventions. Greenwood, Reeves and Wigney JJ explained at [93]: "Where, as here, an appeal involves grounds involving allegations of apprehended bias or denial of procedural fairness along with other substantive or discrete grounds, the appeal court should first deal with the issues of bias or procedural fairness. That is because those grounds, if made out, would strike at the validity of the trial and require the matter to be remitted for retrial: . . . [citations omitted]. If the bias or procedural fairness ground is made out, it may then be inappropriate to determine the remaining grounds of appeal". However, the Full Court held that this was a case where it should consider and determine the remaining grounds of appeal even though Mr Jorgensen succeeded on the procedural fairness ground of appeal (at [161]-[165]).

Mr Jorgensen succeeded on all issues (at [235]-[240]). The proviso that an appeal may be dismissed where there is no substantial miscarriage of justice (s28(1)(f) of the *Federal Court of Australia Act 1976* (Cth)) did not apply to any of the errors made by the primary judge. The Full Court made orders setting aside the declarations and order that had the effect of convicting Mr Jorgensen of contempt and remitting the matter to the FCCA for retrial by a different judge.

On the main ground of procedural fairness, the Full Court held that a detailed review and analysis of the trial transcript clearly supported a finding that the trial judge's interventions were such that both the "disruption ground" and the "dust of conflict" ground were made out (at [105]). The "disruption ground" is made out where the interventions unfairly undermine the proper presentation of a party's case (at [99]). The "dust of conflict" ground is made out where the questioning or intervention is "such an egregious departure from the role of a judge presiding over an adversarial trial that it unduly compromises the judge's advantage in objectively evaluating the evidence from a detached distance" (at [99]): *R v T* at [38]. There were 12 features of the primary judge's interventions that concerned the Full Court (at [109]-[141]). In summary, Greenwood, Reeves and Wigney JJ said at [148]: "The primary judge significantly interrupted and disrupted the orderly flow of Mr Jorgensen's evidence concerning what turned out to be the determinative issues. His Honour was also sarcastic, disparaging and dismissive of significant parts of Mr Jorgensen's evidence. His Honour's aggressive and, at times, unfair questioning appeared on occasion to confuse Mr Jorgensen and cause him to make concessions he may not otherwise have made. His Honour also frequently cut Mr Jorgensen off while he was endeavouring to explain critical aspects of his case, in particular his belief that the impugned transfers fell within the 'ordinary and proper course of business' exception. The extent and nature of the primary judge's interventions were such that it is impossible to avoid the conclusion that Mr Jorgensen was relevantly impeded from 'giving his account in such a way as to do himself justice': cf. *Lockwood v Police* (2010) 107 SASR 237 at [16]".

Administrative law and migration law

Ground of proper, genuine and realistic consideration – whether the primary judge should have drawn a Jones v Dunkel inference from the failure of the Minister or a member of his staff to give evidence

In *Chetcuti v Minister for Immigration and Border Protection* [2019] FCAFC 112 (2 July 2019) the appellant appealed from the dismissal of his judicial review application by a single judge of the Federal Court. The underlying decision was a decision by the respondent (the Minister) personally under s501(3) of the *Migration Act 1958* (Cth) to cancel the appellant's visa on character grounds.

The first ground of appeal, which succeeded, was that the Minister committed jurisdictional error by failing to give proper, genuine and realistic consideration to the merits of his decision to cancel the appellant's visa. Central to this ground was whether the Minister considered the material before him for a time too short to allow an active intellectual process to be applied to the merits of the decision. The appellant's primary contention was that the Minister spent no more than 11 minutes considering the material before making his decision. The Minister contended that the evidence demonstrated that he could have taken up to 1 hour, 9 minutes. The majority (Murphy and Rangiah JJ) accepted the appellant's case that the Minister spent only up to 11 minutes considering the materials, while O'Callaghan J dissented on this point. The Minister accepted that if the Court were to find that his consideration was for the time period contended by the appellant, the Minister could not have engaged in the active intellectual process in respect of the material that was necessary to discharge his statutory function.

In determining this first appeal ground, the majority considered the application of the rule in *Jones v Dunkel* (1959) 101 CLR 298, as neither the Minister nor any member of his staff gave evidence as to when he began his consideration of the decision (at [82]-[91]).

The Full Court rejected the second ground of appeal that the primary judge failed to accord procedural fairness to the appellant as a self-represented litigant by not informing him that he could seek further discovery from the Minister concerning how or when the decision was made; ask the Court to draw inferences from the Minister's failure to put on evidence about what the Minister did to consider the decision; and ask the Court to issue subpoenas to the Minister and/or others to give evidence (at [102]-[111]).

Evidence

Appeal of ruling excluding line of questioning in cross-examination – importance of "explicit clarity" in pleadings

In *Oztech Pty Ltd v Public Trustee of Queensland* [2019] FCAFC 102 (21 June 2019) the Full Court dismissed an appeal from a ruling excluding a line of questioning in cross-examination for lack of relevance. Central to the Full Court's judgment was the manner in which the case was conducted prior to and at trial. Middleton, Perram and Anastassiou JJ considered the parties' obligation to plead all causes of action and defences explicitly (at [28]-[35]).

October

Administrative Law

Procedural fairness - McKenzie friend

For a third time, the Federal Court has made orders setting aside orders of the Federal Circuit Court in litigation in bankruptcy proceedings involving Brett John Hayes. In *Hayes v Pioneer Credit Acquisition Services Pty Ltd* [2019] FCA 1260 (13 August 2019) Rangiah J set aside a sequestration order against the estate of Mr Hayes on the ground of a denial of procedural fairness.

At the commencement of the hearing in the Federal Circuit Court, the primary judge refused to allow Mr Hayes to be represented by Mr Welch, who was not a lawyer. His Honour also directed Mr Welch to leave the area where he was sitting behind the bar table near Mr Hayes and move to the public gallery. The primary judge subsequently called security staff into the courtroom and threatened to remove Mr Hayes. However the hearing continued, with Mr Hayes making submissions on his own behalf.

In the appeal, the Federal Court considered the concept of a McKenzie friend from *McKenzie v McKenzie* [1971] P 33: at [25]-[30]. Rangiah J stated at [30]: "In Australia, the prevailing view is that in criminal cases, the court has a discretion as to whether to allow a litigant a McKenzie friend: for example, *Smith v R* (1985) 159 CLR 532 at 534; *R v EJ Smith* [1982] 2 NSWLR 608; *R v Dodd (No 2)* [1985] 2 Qd R 282 at 283–284; *Crown v Burke* [1993] 1 Qd R 166 at 167, 173, 178–179. The position is different in civil cases. I understand the Queensland Court of Appeal to have held in *Coffey v State of Queensland* [2010] QCA 29 at [37]-[38] that in a civil case, an unrepresented litigant may have a person attend as a McKenzie friend, subject to the power of the court to disallow such assistance where that becomes necessary".

The Court held at [31] and [40] that Mr Hayes was denied procedural fairness by being denied that assistance of Mr Hayes as a McKenzie friend. However, it was not shown that it was unreasonable for the primary judge to call in security staff, or that it was otherwise an error in doing so (at [39]). The matter was remitted again to the Federal Circuit Court for a new trial. →

Consumer and credit law

ASIC case – alleged contraventions of s128 of *National Consumer Credit Protection Act 2009* (Cth)

In *Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial)* [2019] FCA 1244 (13 August 2019) Perram J dismissed ASIC's case that Westpac breached the *National Consumer Credit Protection Act 2009* (Cth) (the Act) in the manner in which it extended hundreds of thousands of Westpac-branded home loans across the period 12 December 2011 to March 2015. The Court considered the provisions in Division 3 of Part 3-2 of Chapter 3 of the Act.

Relevantly, the Act requires a credit provider to ask itself only whether "the consumer will be unable to comply with the consumer's financial obligations under the contract" or, alternatively, whether the consumer "could only comply with substantial hardship": s131(2)(a) (the s131(2)(a) Questions) (at [3]).

The alleged breaches fell into two categories. The first was an allegation that in approving its home loans Westpac failed to have regard to any of the living expenses declared by consumers on their loan application forms. The Court rejected this case on the facts (at [2], [21]-[35] and [86]). In any event, the Court held that the Act does not operate as ASIC alleged (at [56]-[85] and [87]-[92]). Perram J summarised his conclusion at [3]: "Whilst I accept that the Act requires a credit provider to ask the consumer about their financial situation (s130(1)(b)) and, in turn, to ask itse – —and to answer – the s131(2)(a) Questions, I do not accept that this has the further consequence that the credit provider must use the consumer's declared living expenses in doing so".

The second category of alleged contraventions of the Act were where Westpac calculated proposed repayments with principal amortised over the life of loans in the case of loans having an initial interest only period before payment of principal was required (at [7]-[8]). ASIC's case on these allegations were also rejected (at [93]-[103]).

There is a section in the Court's judgment about the Household Expenditure Measure (HEM) benchmark, which measures household expenditure across the Australian community (at [26]-[47]). ASIC did not allege that Westpac was entirely prohibited by the Act from using the HEM benchmark, rather its case was that Westpac had not used the consumer's declared living expenses and had, rather, relied solely on the HEM benchmark (at [10]). While following the judgment there was media comment about this aspect of the case, Perram J stated that the HEM benchmark was of "marginal relevance" to the case (at [36]). Further, "the capacity of the HEM benchmark to serve as a proxy for substantial hardship is not an issue which is actually live in the litigation" (at [38]).

Consumer law and damages

Damages assessment under s236 of the *Australian Consumer Law*

In *Flogineering Pty Ltd v Blu Logistics SA Pty Ltd (No 3)* [2019] FCA 1258 (9 August 2019) Greenwood J determined an interlocutory dispute concerning the production of documents and particulars following the Court's judgment on the separate question in which it was held that the respondents had engaged in conduct in contravention of ss18 and 29 of the Australian Consumer Law (ACL). The interlocutory dispute related to the applicant's claim for damages pursuant to s236 of the ACL. The Court considered the formulation of the text on causation in s236 of the ACL of "a person suffers loss because of [contravening] conduct" as compared with the earlier test of s82(1) of the *Competition and Consumer Act 2010* (Cth) of "a person who suffers loss or damage by conduct of another . . ." (at [23]-[28]). Greenwood J held that, notwithstanding the difference in text, the principles in the cases on s82 "properly characterise the approach to s236, having regard to the text, context and purpose of the *Competition and Consumer Act 2010* (Cth) and Schedule 2 to that Act" (at [27]).

Native title and administrative law

Tension between gender restriction orders and the natural justice hearing rule

In *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding)* [2019] FCA 1282 (15 August 2019) the Court heard an application for orders to take account of cultural and customary concerns of claimant groups regarding the evidence in proceedings for the determination of two overlapping claims of native title. One of the claimant groups (the Walka Wani People) sought a range of orders the effect of which would preclude any Aboriginal man who has not been initiated into the relevant Men's Law which is to be the subject of evidence from hearing that evidence or being informed of it. The other claimant group (the Arabana People) and the State objected to aspects of the orders, namely the limitation with respect to the Aboriginal men who may hear or be informed of the evidence. In the case of the Arabana People, that was because the restriction would preclude any member of the Arabana People from hearing, or being informed of, the male gender restricted evidence and such a restriction would thereby inhibit their ability to give instructions concerning that evidence, to contest that evidence to the extent thought appropriate, and to give evidence themselves concerning those matters (at [17]).

The Court considered its powers authorising the exclusion of persons from a hearing (s17 of the *Federal Court of Australia Act 1976* (Cth)) and in native title matters to take account of the cultural and customary concerns of Aboriginal peoples and Torres Straight Islanders (s82 of the *Native Title Act 1993* (Cth)) (at [25]-[39]). The Court also considered the entitlement of a party to litigation to hear, or at least be informed

about, the evidence presented for the purpose of defeating the party's claim as an incident of the natural justice hearing rule (at [45]-[48]).

Justice White held at [66]: "In summary, I am satisfied that orders in the form proposed by the Walka Wani Applicants would prejudice unduly the Arabana People in the proceedings as they would involve an abrogation of the natural justice hearing rule with respect to matters which appear to be at the heart of the contest between the two claimant groups. As already indicated, that rule is fundamental to the provision of procedural fairness. Taking account of the cultural and customary concerns of the Walka Wani by precluding any member of the Arabana People from hearing, or being informed about, the restricted gender evidence would, in my judgment, prejudice the Arabana People unduly".

Practice and Procedure

Application by litigation representative for approval of settlement

In *James v WorkPower Inc* [2019] FCA 1239 (8 August 2019) the Court made an order approving the settlement by a litigation representative of the applicant's claims of discrimination contrary to the *Disability Discrimination Act 1992* (Cth) and a contravention under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

After referring to rules 9.70 and 9.71 of the Federal Court Rules which deal with settlement of a proceeding involving a litigation representative and approval by the Court, Mortimer J said at [11]: ". . . in determining whether or not to approve a settlement, for the purpose of rendering it binding on an applicant under a legal incapacity, the Court must be satisfied the settlement is in the applicant's best interests, or beneficial to the applicant's interests. That is not a requirement of the Rules themselves but stems from the nature of the jurisdiction exercised by the Court where a party is under a disability and unable to conduct or conclude a proceeding himself or herself".

The Court also noted that a relevant factor in considering the risks attending the full litigation of a proceeding include the emotional and psychological strain of litigation on the person under a disability (at [14]). ■

Information

Dan Star QC is a Senior Counsel at the Victorian Bar, telephone (03) 9225 8757 or email danstar@vicbar.com.au. **The full version of these judgments can be found at www.austlii.edu.au. Numbers in square brackets refer to a paragraph number in the judgment.**

Catching some ZZZs – are you catching enough?

Having a regular sleeping pattern and getting the right amount of quality sleep is important for our health and wellbeing. It improves our mood, helps us manage stress better and maintain our weight + more. So how much sleep do we actually need? According to the National Sleep Foundation:

Newborns 0-3 months	Infants 4-11 months	Toddlers 1-2 yrs	Preschoolers 3-5 yrs	School aged children 6-13 yrs	Teenagers 14-17 yrs	Younger adults 18-25 yrs	Adults 26-64 yrs	Older adults 65+
14-17 hrs	12-15 hrs	11-14 hrs	10-13 hrs	9-11 hrs	8-10 hrs	7-9 hrs	7-9 hrs	7-8 hrs

Source https://www.sleepfoundation.org/articles/how-much-sleep-do-we-really-need

Visit sleepfoundation.org for information on sleep, sleep disorders and sleep solutions.