

# Federal Court

## judgments:

September - October 2009



Crennan, Kiefel, Bell JJ. Answers to cases stated accordingly.

### **Negligence – Reasonable foreseeability – Temporal limits**

In *Sydney Water Corporation v Turano* [2009] HCA 42 (13 October 2009) the High Court considered Sydney Water was not liable in negligence for a tree falling on a passing vehicle after its roots were claimed to have been loosened by diversion of natural water flow following installation of a water pipe 30 years earlier. Consideration of foreseeability in the law of negligence. Appeal by Sydney Water allowed: French CJ, Gummow, Hayne, Crennan, Bell JJ.

### **Guarantee and indemnity – Subrogation – Constructive trust**

In *Bofinger v Kingsway Group Ltd* [2009] HCA 44 (13 October 2009) the High Court in a joint judgment considered when a guarantor who had contributed to the reduction of one debt owed by the debtor and secured by a mortgage was entitled to a right of subrogation under the first mortgage in priority to subsequent mortgages. The Court also considered whether the surplus transferred by the first mortgagee to the second mortgagee was subject to a constructive trust in favour of the guarantors. Review of the principles regulating subrogation and guarantees. Appeal allowed.

## Federal Court judgments

### **Federal Court – Practice – Whether orders for summary dismissal of proceeding are interlocutory orders**

In *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* [2009] FCAFC 117 (9 September 2009) a Full Court concluded that an order that a proceeding be summarily dismissed was an interlocutory order and that leave to appeal against it was required.

### **Taxation – Administrative penalty**

In *C of T v Star City Pty Ltd (No 2)* [2009] FCAFC 122 (10 September 2009) a Full Court concluded that before an administrative penalty for an erroneous tax return could be imposed under s266L of the *ITAA*, the Commissioner was required to be satisfied as an objective fact that a scheme was carried out for the sole or dominant purpose of enabling a person to avoid tax. The Full Court allowed an appeal where a taxpayer had suffered an administrative penalty for erroneously claimed prepayment of rent as a deduction from income and not as a capital expense.

### **Industrial law – Penalty – Course of conduct leading to multiple offences**

In *Draffin v CFMEU* [2009] FCAFC 120 (10 September 2009) a Full

Court considered the primary judge had erred in imposing penalties for one course of conduct that involved multiple breaches of the *Building and Construction Industry Improvement Act 2005* (Cth).

### **Migration – Whether tribunal proceeding involved jurisdictional error**

In *Aporo v MIC* [2009] FCAFC 123 (11 September 2009) a Full Court concluded the process of the MRT did not involve jurisdictional error arising from a failure to apprehend A was dyslexic and unable to fully complete forms or that the interview was therefore unfair.

### **Migration – Visas – Cancellation of criminal justice certificate**

In *MIC v Zhang* [2009] FCAFC 129 (24 September 2009) a Full Court concluded the power of the Minister for Immigration to cancel a criminal justice certificate under s162(1) of the *Migration Act 1958* (Cth) was not subject to the rules of natural justice and was a broad power.

### **Federal Court – Parties – Proceedings under OHS Act – Joinder of parties – Related corporation in occupation of worksite**

In *John Holland Pty Ltd v Comcare* [2009] FCAFC 127 (22 September 2009) a Full Court concluded the primary judge did not err in proceedings where Comcare

sought a declaration that premises were unsafe within the *Occupational Health and Safety Act 1991* (Cth) in ordering another member of a corporate group that was a co-occupier of the premises be joined as a respondent under *FCR O.6 r8* to ensure that all matters in dispute were decided in the proceeding.

**Tax – Charities – Body reviewing relief of poverty**

In *C of T v Aid/Watch Incorporated* [2009] FCAFC 128 (23 September 2009) a Full Court considered how entities were to be identified as “charities” for taxation legislation. The Court concluded the AAT had erred in finding a body that monitored and lobbied the provision of foreign aid to ensure that the local population was involved was involved in the relief of poverty and thus a “charity” for tax purposes.

**Tax – GST – Acquisition of foreign currency for use outside Australia**

In *Travelex Ltd v C of T* [2009] FCAFC 133 (29 September 2009) a Full Court concluded that the conversion of Australian dollars into foreign currency for use outside Australia did not attract liability to pay GST.

**Statutory construction – Notice under s155 Trade Practices Act**

In *Singapore Airlines Pty Ltd v ACCC* [2009] FCAFC 136 (2 October 2009) a Full Court concluded a notice issued under s155 of the *TP Act* requiring information on freight rates for transport “including on routes to and from Australia” was not to be construed in a precious or over-technical manner. Review of authorities as to the operation of s155 of the *TP Act*.

**Administrative law – Inadequate reasons of tribunal**

In *Civil Aviation Safety Authority v Central Aviation Pty Ltd* [2009] FCAFC 137 (2 October 2009) a Full Court concluded the AAT had not given adequate reasons for its decision to set aside a decision to cancel the registration of an aircraft maintenance engineer and to issue a conditional certificate under the *Civil Aviation Regulations 1988* (Cth). The Full Court considered whether the decision or the reasons should be quashed. It concluded the power to alter the reasons of the AAT under s43AA(1) of the *AAT Act* for “obvious error” did not empower the AAT to re-write its reasons. It also considered the consequences on remitter of the AAT member ceasing to be a member of the AAT. Matter remitted to the AAT. ↓

## A Cautionary Christmas Riddle

Santa Claus, a high fee charging lawyer, and a low fee charging lawyer were sitting together at table in an otherwise empty Top End hotel bar on Christmas Eve.

There was a Christmas stocking on the table containing \$250,000 in usgd notes.

A howling wet season storm was blowing outside and the lights went out for 10 minutes due to a power cut.

When the lights came back on, the money was gone.

The brief for counsel’s opinion as to who took the money was:

Santa Claus, the high fee charging lawyer, or the low fee charging lawyer?

**The answer is on page 52**