

## High Court Notes: May 2009

### **Criminal law – Procedure – delay – When proceeding on indictment should be stayed for delay**

*In Q v Edwards [2009] HCA 20 (21 May 2009) the High Court considered when delay in bringing a prosecution could give rise to such unfairness that the proceedings on indictment should be stayed. E was charged in 2004 with operating an aircraft in 2001 so as to endanger the life of a person contrary to the Civil Aviation Act 1988 (Cth). Critical electronic records had been overwritten. Various committal and other court dates were vacated between 2005 and 2007. In 2008 the Supreme Court of Tasmania accepted a defence application to permanently stay the proceedings. The prosecution's appeal to the High Court was allowed in a joint judgment: Hayne, Heydon, Crennan, Kiefel and Bell JJ. The Court concluded that no feature of the delay justified the extreme step of staying the proceedings as no prejudice was shown that could not be cured by a direction. Appeal allowed; order for stay set aside.*

### **Equity – Contribution – coordinate liability – Issue raised without notice by court after hearing**

*In Friend v Brooker [2009] HCA 21 (28 May 2009) the High Court considered aspects of the equitable doctrine of coordinate liability. The Court concluded that notwithstanding that both business partners obtained loans that they each lent to a corporate vehicle, the existence of that vehicle denied the operation of equitable doctrines*

*of contribution in favour of the effects of incorporation: French CJ, Gummow, Hayne, Bell JJ. Heydon J agreed but also allowed the appeal as the contribution point had first arisen in the judgments of the NSW Court of Appeal. Appeal allowed.*

## Federal Court Notes: May and June 2009

### **Admiralty – Vessel illegally fishing in Australian waters – Defence of mistake**

*In Australian Fisheries Management Authority v Su [2009] FCAFC 56 (21 May 2009) a Full Court concluded the trial judge did not err in deciding a navigation by the captain of a fishing vessel was a mistake of fact (so the defence under s92.2 of the Criminal Code (Cth) was made out) and not a mistake of law. Appeal dismissed.*

### **Income tax – Deductions – Payment of interest by bank to raise capital**

*In St George Bank Ltd v C of T [2009] FCAFC 62 (25 May 2009) a Full Court concluded interest payments made by a bank under a debenture to raise capital to improve its capital adequacy ratio were outgoings of a capital nature within s8-1(2) (a) of the ITAA 1987 (Cth).*

### **Income tax – “Share”**

*In Bamford v C of T [2009] FCAFC 66 (3 June 2009) a Full Court considered that the reference to “share” in the*



*phrase “that share of the net income of a trust estate” in s97(1) of the ITAA 1936 (Cth) can refer to an amount rather than a proportion.*

### **Trade practices – Misleading conduct – “Strike through” price for goods that have not previously been sold**

*In Ascot Four Pty Ltd v ACCC [2009] FCAFC 61 (26 May 2009) a Full Court dismissed an appeal against a finding that for a trading corporation to market an item as having a marked down or “strike through” price where there had not in fact been earlier sales so there was no established saving was misleading and deceptive and contrary to the Trade Practices Act.*

### **Federal Court – Powers**

*In Lehman Bros Australia Ltd v Wingecarribee Shire Council [2009] FCAFC 63 (26 May 2009) a Full Court concluded the primary judge had erred in ordering a company that was a respondent to proceedings in the Court under the Trade Practices Act and under administration to produce under s23 of the Federal Court Act copies of insurance contracts. The Full Court concluded the primary judge had erred in deciding proposed releases of directors of the company in a proposed deed of company arrangement constituted an abuse of the*

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process of the Federal Court. Appeal allowed.

### **Bankruptcy – Estoppel**

*In O'Farrell v Palicave Pty Ltd [2009] FCAFC 64 (28 May 2009) a Full Court concluded a party was not estopped, having sued for instalments of a principal debt, from suing for the balance due under the same agreement.*

### **Migration – Whether tribunal obtained information**

*In SZMBS v Minister for Immigration and Citizenship [2009] FCAFC 65 (3 June 2009) a Full Court concluded the Refugee Review Tribunal had, in telephoning a person, done no more than respond to an invitation to do so and had not invited the person to give information within s424(3) of the Migration Act 1958 (Cth) in a way other than provided for in s441A.*

### **Migration – Findings of federal magistrate not supported by evidence**

*In SZMGX v Minister for Immigration and Citizenship [2009] FCAFC 67 (5 June 2009) a Full Court allowed an appeal from a decision of the federal magistrate who dismissed an application for constitutional writs on the ground the decision of the Refugee Review Tribunal was affected by the fraud of a migration agent. The Full Court accepted the decision was*

*based on findings that were not supported by the evidence.*

### **Trade practice – Access to core telecommunications services**

*In ACCC v Telstra Corporation [2009] FCAFC 68 (5 June 2009) a Full Court concluded the primary judge erred in construing the model terms and conditions under s152AQB(2) of the Trade Practices Act for a determination for access to defined core telecommunications services as being an exhaustive statement. Consideration of how the effect of the decision of the Court was to be expressed in the order remitting the matter to the ACCC to remake its determination under s152CP.*

### **Patents**

*In H Lundbeck A/S v Alphapharm Pty Ltd [2009] FCAFC 70 (11 June 2009) a Full Court reviewed authority as to how the claims made in a patent application were to be construed, when claims were “novel”, when a patent is infringed and when one is extended.*

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## CONFERENCES

### 23 - 26 August 2009 **5th World Congress on Family Law & Children's Rights**

World Trade & Convention Centre, Halifax, Nova Scotia, Canada

Phone: +61 2 9999 6577  
[www.lawrights.asn.au](http://www.lawrights.asn.au)

### 1st – 4th September 2009 **International Society for Labour and Social Security Law XIX World Congress**

Sydney  
<http://www.labourlawssydney.com/>

### 4th – 5th September 2009 **QLS and FLPA (QLD) present the 24th Calabro Consulting Family Law Residential**

Gold Coast  
[www.qls.com.au](http://www.qls.com.au)

### 7th – 10th September 2009 **Children and the Law: International Approaches to Children and their Vulnerabilities**

Prato, Italy  
<http://www.med.monash.edu.au/socialwork/conference09/>

### 17 - 19 September 2009 **36th Australian Legal Convention**

Perth  
<http://law09.com.au>

### 24 - 25 September 2009 **2009 National Indigenous Legal Conference**

Adelaide  
<http://nilcsa2009.com>

### 17th – 21st October 2010 **14th Biennial National Family Law Conference**

Canberra  
Law Council of Australia  
Email: [del.dacosta@lawcouncil.asn.au](mailto:del.dacosta@lawcouncil.asn.au)

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