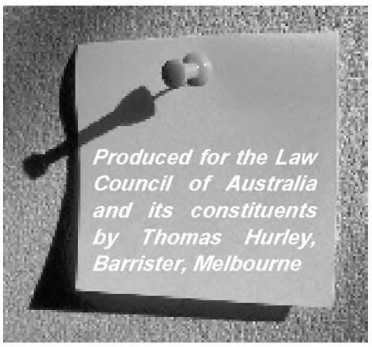
High Court

judgments:

January - March 2010



CONSTITUTIONAL LAW

- ***Judicial power***
- ***Effect of privative provision purporting to oust the jurisdiction of the Supreme Court (NSW) to grant certiorari against Industrial Court (NSW)***
- ***Nature of jurisdictional error***
- ***Whether accused a competent witness for prosecution***
- ***Defences to prosecution under OHS legislation***

In *Kirk v Industrial Relations Commission (NSW) [2010] HCA 1; 3 Feb 2010* K and a company he controlled were prosecuted in the Industrial Court (NSW) for breaches of the *Occupational Health and Safety Act (NSW)* relating to the death of a farm worker. The High Court concluded the proceedings before the Industrial Court were flawed for two reasons: First that Court misunderstood the guarantee against harm provided by s 15 of the OH&S Act in light of the defence in s 53(a) that it was not reasonably practicable to comply with a provision of the Act. It also found error for allowing K to be called in the prosecution case as s 17(2) of the *Evidence Act 1995 (NSW)* provided K was not a competent witness for the prosecution and this provision could not be waived. K and the company were convicted and appealed to a Full bench of the Industrial Court which dismissed the appeals. They applied to the Court of Appeal (NSW) for certiorari to quash the proceedings in the Industrial Court. The *Industrial Relations Act 1996 (NSW)* provided that decisions of the Industrial Court were final and it was superior court of record. The Act contained a privative clause that purported to oust the jurisdiction of the Supreme Court. The Court of Appeal found any errors were findings of fact and not jurisdictional error and refused to grant certiorari. K sought special leave from this. The High Court granted special leave, set aside the decision of the Court of Appeal and in lieu ordered that the orders of the Industrial Court be quashed. In doing this the court reviewed the nature of jurisdictional error [55] and observed that *Craig v SA [1995] HCA 58* does not provide a "rigid taxonomy of jurisdictional error" [73]. The High Court found the errors of the Industrial Court were jurisdictional errors. The High Court also observed that it was impermissible to remove from the Supreme Court of a State the power to confine inferior courts to their jurisdiction as this was a defining characteristic of the State Supreme Courts protected by the Constitution. It observed the description of the Industrial Court as a superior court of record was irrelevant. (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ jointly; sim Haydon J who observed the costs results made K's victory Pyrrhic). Appeals allowed. Orders of Industrial Court quashed.

COMPULSORY ACQUISITION (WA)

- ***When land reserved for one purpose can be acquired for another purpose***
- ***Severance***

In *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission [2010] HCA 3; 3 Feb 2010* the High Court generally concluded that a power under West Australian legislation to compulsorily acquire land reserved for one purpose (a road) could not be used to acquire the land for another (a railway). The Court also concluded that acquisition of land to avoid making level crossings for a train line was not acquisition for the purpose of building the railway line or incidental. It considered whether the common law doctrine of severance permitted adjustment where part of the land was acquired for permissible reasons but not all. Appeal from Court of Appeal of Supreme Court WA allowed. (French CJ, Gummow, Crennan, Bell JJ jointly; Hayne J sim). Appeal allowed.

CONSTITUTIONAL LAW

- ***Criminal law***
- ***Extra-territorial offences***
- ***Fishing***
- ***Offence of being in the Australian Fishing Zone with boat equipped to fish***
- ***Whether Act extends offence to continental shelf beyond Fishing Zone***

In *Muslimin v Q [2010] HCA 7; 10 Mar 10* the High Court in a joint judgment concluded s 12(2) of the *Fisheries Management Act 1991 (Cth)* did not extend the Act to parts of the Australian Continental Shelf beyond the Australian Fishing Zone. The Court in a joint judgment allowed the appeal by an Indonesian

national against a conviction under s 101(2) of the Act for being equipped to fish in such waters: French CJ, Gummow, Hayne, Heydon, Keifel JJ jointly. Appeal allowed.

DAMAGES

- ***ASSESSMENT***
- ***Remoteness***
- ***Undertaking to compensate loss caused by granting injunction***
- ***Undertaking to pay money into court in US dollars and not Euros***
- ***Claim for loss of use of money***
- ***Whether loss due to exchange fluctuations a compensable loss under undertaking as to damages***

INJUNCTIONS

- ***Undertaking as to damages***
- ***Assessment of damages***
- ***Whether loss foreseeable***

In *European Bank Ltd v Robb Evans of Robb Evans & Associates [2010] HCA 6; 10 Mar 2010* R was the receiver of American businesses said to have engaged in credit card fraud. He brought proceedings in Australia in 1999 seeking declarations that funds held by the appellant bank were held on trust for him. He failed in the NSW Supreme Court and in 2004 sought special leave to appeal. On R giving the usual undertaking as to damages the Court of Appeal ordered the bank pay $US 8.7m into court. The application for special leave failed and this sum (increased to $US 8.9m with interest) was paid to the bank in March 2005. The bank moved for assessment of its loss and was awarded $US 800,000 calculated by reference to movements in the Euro (where the funds would otherwise have been held) and different applicable interest rates. This was set aside by the NSW Court of Appeal which concluded that movement in exchange rates was too remote from the reason the bank was kept out of its money and thus not a foreseeable loss. The appeal by the bank was allowed and the decision of the primary judge restored by the High Court in a joint judgment: French CJ, Gummow, Hayne, Heydon, Kiefel JJ. The court reviewed authority as to the assessment of damages for loss caused by an injunction. Appeal allowed.

FAMILY LAW

- ***Parenting orders***
- ***Best interests of the child***
- ***What is reasonably practicable***
- ***Order made that contradicted situation of one parent***

In *MRR v GR [2010] HCA 4; 3 Mar 2010* the FMC ordered in 2008 that the child of a marriage spend equal time between her parents on the basis that both parents would live in Mt Isa which was against the mother's express wish to leave that town. The mother's appeal was dismissed by the Family Court. In a joint judgment the High Court allowed the mother's appeal. It observed the FMC could not have concluded the orders were based on what was "reasonably practicable" within s 65DAA(1)(b) and (c) of the *Family Law Act 1975 (Cth)* where they were made in the face of what one party required: French CJ, Gummow, Hayne, Kiefel, Bell. Appeal allowed.

NEGLIGENCE

- ***Causation***
- ***Proof***
- ***Whether death from lung cancer caused by tobacco, asbestos, both or neither***

In *Amaca Pty ltd v Ellis [201] HCA 5; 3 Mar 2010* E (as C's executor) sued C's former employers (in WA and SA) in the Supreme Court of WA for breach of duties in the contracts of employment and negligence contending that C's death from lung cancer arose from exposure to asbestos in his employment with them. C was a smoker. C's executor succeeded at trial and in the Court of Appeal (W A). The appeal by the employers was allowed by the High Court in a joint judgment: French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ. The High Court concluded there was no evidence that established facts which positively suggested that it was more probable than not that the negligence of an employer was the cause of C's cancer [13]. The court explained the paradox that the result entailed (if the result of population studies did not permit the inference that lung cancer was contributed to by asbestos how can it be correct that all individual cases must fail?) with the observation that there was no specific evidence and establishing exposure may have been a cause was insufficient as proof. Appeals allowed.