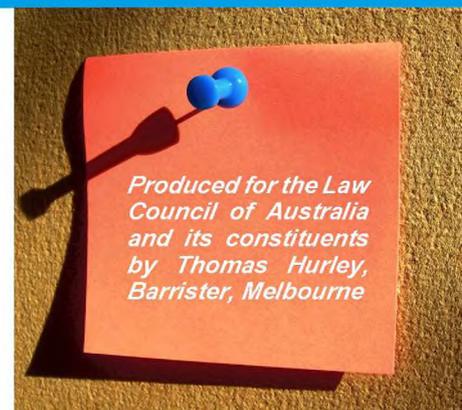


High Court judgments: September - October 2010



CORPORATIONS

• Charges

In *Public Trustee of Queensland v Fortress Credit Corporations (Aus) 11 Pty Ltd* [2010] HCA 29 (1 September 2010) the High Court in a joint judgment considered whether a deed purporting to vary a charge under Ch 2K of the Corporations Act 2001 (Cth) to include liability under a guarantee was void by reason of s266 or required notice under s268. Appeal against decision of Court of Appeal (Q) that charge remained valid dismissed.

CONSTITUTIONAL LAW

• Inconsistency • Application of state criminal law to commonwealth property

In *Dickson v Q* [2010] HCA 30 (22 September 2010) D was charged under s321 of the Crimes Act 1958 (Vic) with conspiracy to steal from a corporation some imported cigarettes that by operation of the Customs Act 1901 (Cth) had been forfeited, and were possessed by, the Commonwealth. Before the High Court D contended that this attracted the operation of s131.1 of the Criminal Code (Cth) and the conspiracy provisions in s11. The High Court in a joint judgment concluded that these provisions creating the offence of conspiracy were directly inconsistent within s109 Constitution with the state provisions relied on because the state provisions rendered conduct criminal that was deliberately excluded from conduct rendered criminal by the Criminal Code (Cth). Appeal allowed. Conviction and sentences quashed.

TRADE PRACTICES

• Evidence

In *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31 (29 September 2010) the High Court concluded the terms of a certificate of insurance provided by an insurance broker to an experienced premium lender were not misleading and deceptive and did not misdescribe the insurance. The Court considered when an appellate court can disturb findings of fact. Appeal against decision of Victorian Court of Appeal allowed: French CJ with Kiefel J; sim Heydon, Crennan, Bell JJ jointly.

COURTS

• Appeals • Appeal from tribunal • What is a question of law • When “no evidence” a question of law

In *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32 (29 September 2010) s67(1) of the Consumer Trader and Tenancy Tribunal Act 2001 (NSW) as in force allowed appeals from that tribunal to the Supreme Court of NSW where the Tribunal “decides a question with respect to a matter of law”. Home owners applied to the Tribunal for relief against a builder’s statutory insurer on the builder failing to complete a domestic building contract. The owners sought to appeal against a decision of the Tribunal in answering a preliminary question that the contract had been repudiated after the time for performance had been extended. The owners asserted there was no evidence for this

conclusion. The Tribunal’s finding was set aside by the Supreme Court of NSW. An appeal by the insurer to the NSW Court of Appeal was allowed. The High Court concluded that the question of whether there was no evidence for a finding was a question of law, as was the question of whether there was sufficient evidence: Hayne, Heydon, Crennan, Kiefel JJ jointly at [91]; French CJ sim. Appeal allowed. Decision of primary judge setting aside decision of Tribunal restored.

INCOME TAX

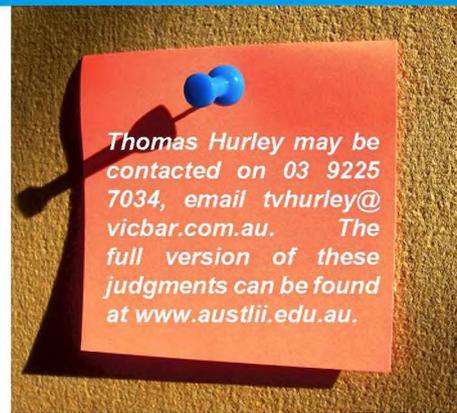
• GST • Whether supply of foreign currencies on departure side of customs barrier “GST-free” • Whether supply was supply of rights for use outside of Australia

In *Travelex v C of T* [2010] HCA 33 (29 September 2010) the High Court by majority decided that the supply of foreign currency on the departure side of the customs barrier was not subject to GST by reason of item 4(a) in the table to s38-190(1) of A New Tax System (Goods and Services Tax) Act 1999 (Cth). The majority concluded the supply constituted by the sale of a foreign currency is a supply of the rights that attend on ownership of that currency: French CJ with Hayne J; Heydon J; contra Crennan J with Bell J. Appeal from Full Court of the Federal Court allowed.

Federal Court

judgments:

September - October 2010



WORKERS' COMPENSATION (QUEENSLAND)

- **Entitlement of workers' compensation insurer to seek indemnity against person liable for death of worker**
- **Whether right of indemnity limited to rights of estate of deceased worker to damages**

In *WorkCover Queensland v Amaca Pty Ltd* [2010] HCA 34 (20 October 2010) the High Court in a joint judgment (French CJ, Gummow, Crennan, Kiefel, Bell JJ) considered the operation of the provisions of s207B of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) that granted WorkCover Queensland a right of indemnity against a person who would have been liable if sued for the deceased worker's injury where no proceedings had been brought by the deceased worker at the time of death. The Court concluded this right of indemnity was not limited by s66(2) of the *Succession Act 1981* (Cth) or limited by reference to the amount the deceased or his estate would have recovered in an action but only by what the party would have been liable to pay. Appeal allowed.

SUPERANNUATION

- **Trust deeds**
- **Benefits**
- **Incapacity for "all active work"**

In *Finch v Telstra Super Pty Ltd* [2010] HCA 36 (20 October 2010) the Victorian Court of Appeal concluded a superannuation trustee had correctly concluded that the appellant (F), who had

undergone gender reassignment procedures, was not entitled to a total and permanent invalidity (TPI) benefit under an employment superannuation fund. The High Court allowed F's appeal in a joint judgment (French CJ, Gummow, Heydon, Crennan, Bell JJ). The court considered the principles by which the trustees of an industry superannuation fund were to decide whether a beneficiary had been absent from "all active work" and was unlikely to ever engage in "gainful work" so as to be entitled to the TPI benefit. The Court observed that the recognition by trustees of the entitlement of members to benefits was not a "discretionary" judgment as choosing between beneficiaries under a testamentary trust as considered in *Karger v Paul* [1984] VR 161. Special leave granted; appeal allowed; decision of the trial judge in favour of the appellant/beneficiary restored.

CRIMINAL LAW (QUEENSLAND)

- **Defences**
- **Provocation**
- **Degree to which accused's loss of self control must immediately follow provocative act**

In *Pollock v The Queen* [2010] HCA 35 (20 October 2010) the High Court in a joint judgment (French CJ, Hayne, Crennan, Kiefel, Bell JJ) considered the elements required to establish provocation as a partial defence to murder under s304 of the *Criminal Code* (Qld). Appeal allowed. Retrial ordered. ●

Federal Court Judgments

CITIZENSHIP

- **Parent**

In *Hudson v MIC* [2010] FCAFC 119 (15 September 2010) a Full Court considered whether the term "parent" as used in s16(2) of the *Citizenship Act 1948* (Cth) required a genetic link. The Court concluded the Administrative Appeals Tribunal did not err in finding that a person who was accepted as the child of parents was their child for the purposes of the Act, even though there was doubt about paternity. Appeal allowed.

INCOME TAX

- **GST**
- **Input tax credits**
- **Credit cards**

In *C of T v American Express Wholesale Currency Services Pty Ltd* [2010] FCAFC 122 (17 September 2010) a Full Court considered the operation of the GST legislation in respect of transactions effected by credit cards.

MIGRATION

- **Jurisdictional error**
- **Persecution for religious belief**

In *MIC v SZLSP* [2010] FCAFC 108 (3 September 2010) the Federal Magistrates Court found the Refugee Review Tribunal (RRT) had committed jurisdictional error by requiring a couple who feared persecution as followers in China of Falun Gong to establish a standard of knowledge of that faith and to do so by reference to an undisclosed