

the statement between employees that it was rumoured two fellow employees were having an affair was not made on an occasion of qualified privilege. That conclusion was reversed by the NSW Court of Appeal. The High Court allowed an appeal: French CJ with Crennan and Kiefel JJ; Gummow with Hayne and Bell JJ; Heydon J. The Court considered when publication of a rumour attracts the defence of qualified privilege. Appeal allowed.

### CONSTITUTIONAL LAW

- **Judicial power**
- **Legislation**
- **Validating decisions of**

### unconstitutional court

In *Haskins v Commonwealth* [2011] HCA 28(10 August 2011) the *Military Justice (Interim Measures) Act (No2) 2009* (Cth) purported to validate decisions of the Australian Military Court (that the High Court declared unconstitutional in *Lane v Morrison* [2009] HCA 29) by providing the decisions of the Court were decisions of the courts martial system that had been replaced. The High Court rejected a submission that this was unconstitutional as the exercise of judicial power by the Parliament. The Court also rejected an argument that the legislation was unconstitutional

as representing the acquisition by the Commonwealth without just compensation of the plaintiff's right to sue the Commonwealth for unlawful detention. The Court concluded that in the circumstances of military justice the plaintiff had not had the right to sue for unlawful detention occasioned by implementing apparently proper orders: French CJ with Gummow, Hayne, Crennan, Kiefel and Bell JJ; contra Heydon J on the point concerning judicial power. Orders accordingly. The Court applied this decision in the like matter of *Nicholas v Commonwealth* [2011] HCA 29 (10 August 2011). •

## Federal Court Judgments

### ADMINISTRATIVE LAW

- **Preconditions to exercise of statutory power**
- **Appointment of decision maker**
- **Failure of ministers to consult before appointing members to professional review panel**

In *Kutlu v Director Professional Services Review* [2011] FCAFC 94(28 July 2011) a Full Court concluded that failure of ministers to consult with the Australian Medical Association before appointing medical practitioners to a Professional Services Review Panel as required by s84(3) of the *Health Insurance Act 1973* (Cth) rendered invalid the appointments and thus the decision of the panel.

### INDUSTRIAL LAW

- **"Part" of a business**

In *CFUME v Pilbara Iron Company (Services) Pty Ltd* [2011] FCAFC 91(25 July 2011) a Full Court considered whether the reference in s327 of the *Workplace Relations Act 1996* (Cth) to an agreement with employees employed in a single business or "part" of a

single business was a reference to something less than the whole or something that was a recognisable part of a business.

### ABORIGINAL CORPORATIONS

- **Special administration**

In *Dunghutti Elders Council* (Aboriginal Corporation) RNTBC v Registrar Aboriginal and Torres Strait Islander Corporations [2011] FCAFC 88(21 July 2011) a Full Court considered the procedure by which the registrar was able to issue a show cause notice as to why an Aboriginal corporation should be subject to special administration under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth).

### NATIVE TITLE

- **Future acts**

In *Cheedy v Western Australia* [2011] FCAFC 100(12 August 2011) a Full Court considered the operation of the "future acts" provisions of the *Native Title Act 1993* (Cth). It dismissed an appeal that sought to overturn a decision of the National Native Title Tribunal that authorised the grant of mining leases subject to conditions by the State of WA over land for which the appellants were registered native title claimants.

### EXTRADITION

- **Operation of scheme**

In *O'Connor v Zentai* [2011] FCAFC 102(16 August 2011) a Full Court reviewed in detail the operation of the *Extradition Act 1988* (Cth) and the operation of the *Extradition (Republic of Hungary) Regulations 1997* (Cth). The Court considered the role of the various functionaries who make decisions in the extradition process, when the minister is required to give reasons and whether English authorities to the effect that extradition treaties should be construed broadly applied in Australia. Appeal allowed in part.

### EXTRADITION

- **Deadlines**

In *Michaels v New Zealand* [2011] FCAFC 101(9 August 2011) a Full Court concluded that because the notice of appeal against a decision of the Supreme Court of Queensland was filed outside the 15 days provided in s35(1) of the *Extradition Act*, it was invalid.

### EXTRADITION

- **Refusal of petition for clemency**

In *Nudd v Minister for Home Affairs* [2011] FCAFC 105(19 August 2011) a Full Court dismissed an appeal against the refusal of judicial review



# Federal Court

judgments:  
April - May 2011

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of a decision by the respondent (as Attorney-General (Cth)) to refuse to act on the appellant's petition under s672A of the *Queensland Criminal Code* and refer the petition against his conviction for commonwealth offences to the Queensland Court of Appeal.

## AAT

- **Successful appeal to Federal Court**
- **Scope of matter remitted to AAT**

In *Kaluza v Repatriation Commission* [2011] FCAFC 97(4 August 2011) a Full Court considered what questions were alive and open to be considered or reconsidered by the AAT where the Federal Court allowed an appeal in part and remitted part of a matter to the AAT.

## Income tax

- **Non-residents**
- **Trustee**

In *Leighton v C of T* [2011] FCAFC 96(10 August 2011) a Full Court concluded the appellant should not have been assessed to tax as a trustee. It concluded the appellant held money as realisation of income already derived and taxed and not as a trustee.

## INCOME TAX

- **Whether "tax benefit" from scheme obtained**

In *RCI Pty Ltd v C of T* [2011] FCAFC 104(22 August 2011) a Full Court considered how Part IVA of the *ITAA 1936* (Cth) was to be approached in considering whether a taxpayer had obtained a "tax benefit" from a scheme for s177C.

## TRADE PRACTICES

- **Misleading conduct**
- **Coffee plungers**

In *Bodum v DKSH Australia Pty Ltd* [2011] FCAFC 98(5 August 2011) a Full Court considered when offering a product for sale that embodied features of the product of another trader constituted conduct that contravened ss52 and 53 of the *Trade Practices Act 1974* (Cth).

## CORPORATIONS

- **Winding up**
- **Proposed litigation to be brought by liquidator**

In *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2011] FCAFC 89(25 July 2011) a Full Court reviewed authority as to what was to be considered by a liquidator in deciding for ss477 and 477(2B) of the *Corporations Act 2001* (Cth) to commence proceedings funded by a litigation funder against a potential creditor of the company.

## FREEDOM OF INFORMATION

- **Exemptions**
- **Legal privilege**
- **When privilege lost by waiver**
- **Publication of advice in Parliament**

In *British American Tobacco Australia Ltd v Secretary, Department of Health and Ageing* [2011] FCAFC 107(23 August 2011) a Full Court concluded that reference to legal advice concerning cigarette packaging in a document tabled in Parliament did not constitute waiver of confidentiality in the advice or make it cease to be confidential and exempt from release under the *FOI Act 1982* (Cth).

## TRADE PRACTICES

- **Lotteries**
- **Misleading conduct**

In *NSW Lotteries Corporation Pty Ltd v Kuzmanovski* [2011] FCAFC 106(24 August 2011) a Full Court considered the operation of the statutory scheme under which lotteries are conducted in New South Wales and the construction of the contract between the purchaser of a lottery ticket and the lottery operator. The Court found the trial judge did not err in finding the lottery provider had engaged in misleading and deceptive conduct when the clear instructions on the "scratch it" ticket departed from the contractual rules of the lottery.

## WORKERS' COMPENSATION

- **Depression arising from sexual relationship with co-worker**

In *Dunstan v COMCARE* [2011] FCAFC 108(24 August 2011) a Full Court considered the AAT had erred in finding that depression suffered by an employee consequent on a workplace relationship was not compensable under the *SRC Act* because employment was merely the setting in which the relationship occurred. Matter remitted.

## INDUSTRIAL LAW

- **General protection application**

In *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109(24 August 2011) a Full Court considered the operation of Part 3-1 of the *Fair Work Australia Act 2009* (Cth) and provisions intended to prevent employees being dismissed or penalised for exercising a workplace right. ●