

# High Court judgments: March 2012



## CONSTITUTIONAL LAW

- *Freedom of interstate trade*
- *Fees imposed under State legislation for use of racing information*
- *Whether burden on interstate trade*

In *Betfair Pty Ltd v Racing NSW* [2012] HCA 12 (30 March 2012) concluded that the question of whether the law of a state burdened interstate trade contrary to the Constitution s92 was to be determined looking at the entirety of the trade involved and not the idiosyncratic characteristics of the particular trader or class of traders. The Court concluded the appellant had not established that the fees imposed by NSW racing authorities for use of race track information showed an objective intention to treat interstate and intrastate trade on wagering transactions alike notwithstanding a relevant difference between them. The Court observed the legislation was “facially neutral and that the appellant was a low cost operator that operated a ‘betting exchange’”. The Court found it had only established that because of its low margins the state fees absorbed a greater portion of its turnover on interstate transactions than that of others with different margins. Appeal against decisions to like effect in the Federal Court dismissed: French CJ with Gummow, Hayne, Crennan, Bell JJ jointly; sim Heydon J; Kiefel J.

In *Sportsbet Pty Ltd v NSW* [2012] HCA 13 (30 March 2012) the High Court concluded that the practical operation of the legislation was not to alter, impair or detract from the provision in s49 of the *NT (Self*

*Government) Act 1978* (Cth) that trade and commerce between it and the states be “free”. Appeal dismissed.

## CRIMINAL LAW

- *Appeal*
- *Proviso*

In *Baida Poultry Pty Ltd v Q* [2012] HCA 14 (30 March 2012) a worker was killed at work. The appellant was convicted of failing as an employer to provide a safe working environment. In its appeal to the Court of Appeal (Vic) it was accepted that the trial judge should have directed the jury that engaging apparently competent sub-contractors did not discharge the obligation. The Court of Appeal nevertheless declined to set aside the verdict as it concluded no miscarriage of justice had occurred. The High Court allowed its appeal: French CJ, Gummow, Hayne Crennan JJ; sim Heydon J. The High Court concluded that the error identified went to what was reasonably practical for the employer to do.

## COPYRIGHT

- *Constitutional law*
- *Acquisition of property- validity of “cap” on royalty payments*

In *Phonographic Performance Company of Australia Ltd v C of A* [2012] HCA 8 (28 March 2012) by s109 the *Copyright Act 1968* (Cth) provides copyright in sound recordings is not infringed by a broadcaster where there is an order of the Copyright Tribunal allowing the broadcast and an undertaking to pay the owner an amount. The amounts are determined under

s152 and “capped”. The plaintiff brought a case contending that the “cap” was an unconstitutional acquisition of property contrary to Constitution s51(xxxi). The High Court concluded that the question did not arise as the assumption on which it was based (that pre-1968 copyright was preserved after that date) was incorrect: French CJ, Gummow, Hayne, Bell JJ; Heydon J; Crennan with Kiefel JJ.

## CRIMINAL LAW

- *Evidence*
- *Propensity evidence*

In *BBH v Q* [2012] HCA 9 (28 March 2012) the High Court reviewed authority as to when propensity evidence was admissible.

## CRIMINAL LAW (VIC)

- *Rape*
- *Directions as to consent*

In *Q v Getachew* [2012] HCA 10 (28 March 2012) the High Court reviewed amendments to the *Crimes Act 1958* (Vic) concerning rape and the directions to be given on the question of consent required by ss37, 37AA and 37AAA. The Court observed that after the codification of the offence by the *Crimes (Rape) Act 1991* (Vic) decisions under the common law were of only indirect relevance. Appeal by prosecution allowed: French CJ, Hayne, Crennan, Kiefel JJ.

## INCOME TAX

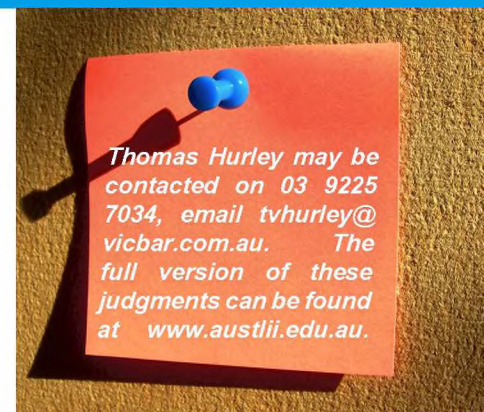
- *Income-exempt income*
- *Income from charitable trust*

In *C of T v Bargwanna* [2012] HCA 11 (29 March 2012) the High Court considered the consequences on the

# Federal Court

## judgments:

March - April 2012



tax exempt status of charitable trusts when they are maladministered and charitable and private expenditure intermingled. Appeal from Full Court Federal Court allowed: French CJ, Gummow, Hayne, Crennan JJ jointly; sim Heydon J. ●

## Federal Court judgments:

### MIGRATION

- **Power of Federal Court to remit decision to primary decision maker**

In *MIC v Maman (No 2)* [2012] FCAFC 35 (20 March 2012) a Full Court concluded by reason of the jurisdiction given by s476 of the *Migration Act* it lacked power to remit the decision to the primary decision maker.

### INCOME TAX

In *Consolidated Media Holdings Ltd v C of T* [2012] FCAFC 36 (20 March 2012) a Full Court considered whether the proceeds of an off-market buy back of company shares constituted a dividend for s159GZZPP of the *ITAA 1936*.

### INCOME TAX

- **Assessment**
- **Onus of proving assessment excessive**

In *C of T v Futuris Corporation* [2012] FCAFC 32 (19 March 2012) a Full Court concluded the

primary judge had not erred in finding that expert evidence led by the taxpayer discharged the onus of establishing an assessment was excessive and there was no tax benefit in connection with a scheme for ss177C or 177D of the *ITAA*.

### INCOME TAX

- **Deductions**
- **Dividend payments**

In *C of T v Noza Holdings Pty Ltd* [2012] FCAFC 4 (28 March 2012) a Full Court considered when a sum payable as a dividend was claimable as a deduction where the company was unable to fund and pay the dividend when it was declared.

### TRADE PRACTICES

- **Loss**
- **Valuation**
- **Liability of employees**

In *Propell National Valuers (WA) Pty Ltd v Australian Executor Trustee Ltd* [2012] FCAFC 31 (20 March 2012) a Full Court considered when subsequent sales can be considered in estimating a value of real estate at a point in time. It also considered when employees could be accessories to contraventions of the *Trade Practices Act* established by misleading valuations.

### FEDERAL COURT APPEAL

- **Overtaking findings of fact**

In *Frost v Sheahan* [2012] FCAFC 46 (28 March 2012) a Full Court reviewed authority as to when factual findings by the primary judge can be overturned on appeal and when fresh evidence can be

called on appeal.

### INDUSTRIAL LAW

- **Civil penalty orders**
- **Calculation of "loss"**

In *CFMEU v ABCC* [2012] FCAFC 44 (27 March 2012) a Full Court considered how compensation was to be calculated for s49(1)(b) of the *Building and Construction Industry Improvement Act 2005* (Cth) for a contravention of that Act.

### INDUSTRIAL LAW

- **Interpretation of union rules**

In *CFMEU v CSBP* [2012] FCAFC 48 (2 April 2012) a Full Court considered how eligibility rules in unions registered under the *Fair Work (Registered Organisations) Act 2006* (Cth) were to be interpreted.

### TRADE PRACTICES

- **Internet advertising**

In *ACCC v Google* [2012] FCAFC 49 (3 April 2012) a Full Court considered whether the practice of third party names appearing in the results of "keyword searches" contravened the *Trade Practices Act* by implying an association between the two.

### TRADE MARK

- **Infringement in third countries**

In *Paul's Retail Pty Ltd v Sporte Leisure Pty Ltd* [2012] FCAFC 51 (11 April 2012) a Full Court considered whether copyright in Greg Norman paraphernalia was infringed by distributing in Australia goods with the relevant mark for which permission was given for use in India. ●