HighCourt judgments:
May - June 2012

CONSTITUTIONAL LAW
- ***Judicial power***
- ***State courts***
- ***Power of state legislature to curtail judicial review by state Supreme Courts***

ADMINISTRATIVE LAW
- ***Error***
- ***Whether review for excess or want of jurisdiction excludes review for erroneous decision not to exercise jurisdiction***

In *Public Service Association (SA) v Industrial Relations Commission SA* [2012] HCA 25 (11 July 2012) s206 of the *Fair Work Act* 1994 (SA) provided a determination of the Industrial Relations Commission of SA was final and could only be challenged in the Supreme Court on the ground of "excess or want of jurisdiction". The Supreme Court of SA concluded this prevented review of a decision of the Commission that no industrial dispute existed and consequently it would take no action. The Court concluded it had no power to consider a refusal to exercise jurisdiction. The application by the unsuccessful union for special leave was referred to the Full Court of the High Court. All members of the High Court concluded that the provision did give the Supreme Court jurisdiction to decisions of the Commission that involved jurisdictional error: per French CJ that the Supreme Court had jurisdiction to review decisions on jurisdictional facts; per Gummow, Hayne, Crennan, Kiefel and Bell JJ jointly on the ground that the provision gave the Supreme Court jurisdiction over jurisdictional errors but not others; and by Heydon J on the ground s206 was invalid to the extent that it prevented review for jurisdictional error of a failure to exercise jurisdiction. Decision in *Public Service Association v PSA* [1991] HCA 33 not followed. Consideration of the limitation on the jurisdiction of state legislatures to limit the jurisdiction of the state Supreme Courts recognised in *Kirk v Industrial Court (NSW)* [2010] HCA 1. Application for special leave granted; appeal allowed; decision of Supreme Court of South Australia set aside; matter remitted to that court.

CRIMINAL LAW
- ***Evidence***
- ***Evidential burden on accused seeking to rely on defence or exception***

Q v Khazal [2012] HCA 26; 19 Aug 12 K had an interest in the Muslim faith. He had worked as a journalist author and academic. He assembled extracts from the internet concerning 'jihad' that referred to targets for assassination and the like and added some elements that were his own work and made an e-book. In 2008 he was convicted by a jury on a charge of 'making a document connected with the assistance in a terrorist act knowing of that connection' contrary to s 101.5 of the *Criminal Code (Cth).* By s 101.5(5) it was a defence if the work was not intended to facilitate preparation for, engagement of a person in, or assistance in, a terrorist act. By s 13.3(3) the Code imposed an evidential burden on any person seeking to rely on an exception or defence in the Code. K did not give evidence but the jury was told of his interests as a scholar. K's conviction was quashed and a re-trial ordered by the Court of Appeal (NSW). This court concluded the evidence as to K's past interests as an academic etc discharged the evidential burden in s 13.3(3) of the Code and K had established the defence created by s 101.(5)(5). The appeal by the prosecution was allowed by the High Court: French CJ; Gummow, Crennan with Bell JJ; Heydon J. The plurality considered the contents of the work did not permit inferences to be drawn from evidence of K's past lawful work. The Court rejected a contention made by K that there had been a misdirection as to whether the document was 'not connected with' a specific terrorist act. Appeal from Court of Appeal allowed. Appeal to that court dismissed.

CRIMINAL LAW
- ***Procedure- change in prosecution case mid way through trial***
- ***Whether fundamental failure of process***

In *Patel v Q [2012] HCA 29; 24 Aug 12* P was a general surgeon practising in Bundaberg in Queensland. He was convicted of three counts of manslaughter and one of grievous bodily harm arising from unsuccessful surgery. The prosecution opened the trial contending that P was incompetent in recommending surgery, conducting the surgery, and the post-operative treatment that he supervised. The prosecution contended that the standard of care proved by P was so low that it breached s 288 of the *Criminal Code (Q).* On day 43 of the trial the prosecution gave further particulars that focussed solely on whether P had been incompetent in advising whether the surgical treatment should have been undertaken. The trial judge refused an application that the jury be discharged. P's appeal against conviction to the Court of Appeal was dismissed. His appeal to the High Court was allowed (French CJ, Hayne, Kiefel, Bell JJ jointly; Heydon J sim. The

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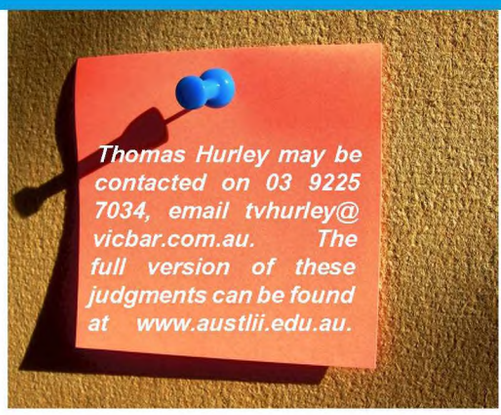

plurality concluded that the change of direction in the prosecution case rendered much of the preceding evidence as to mal-practice in the operating theatre and afterwards irrelevant but highly prejudicial. The Court concluded s 288 of the *Criminal Code* was not limited to the conduct of surgery and applied to the anterior decision to undertake it. The Court concluded the change in prosecution case mean that so much prejudicial evidence was in the minds of the jury that the irregularity went to the root of the proceeding and the proviso in s 688E(1A) of the *Criminal Code* (that protected decisions absent a substantial miscarriage of justice) was not applicable. Appeal allowed. Orders of Court of Appeal set aside and in lieu thereof order that conviction quashed.

EXTRADITION

- ***Offence for which extradition sought not a crime at date of offence***

In *Minister for Home Affairs v Zantai [2012] HCA 28; 15 Aug 12* the High Court concluded the *Extradition Act 1988 (Cth)* and the extradition treaty between Australia and Hungary did not authorise extradition to Hungary where the relevant offence of "war crime" (alleged in relation to World War 2) was not a crime that existed in the requesting country when the alleged events occurred: French CJ; Gummow, Crennan, Kiefel, Bell JJ; Contra Heydon J. Appeal dismissed.

CRIMINAL LAW

- ***Evidence***
- ***Admissions by co-accused that benefit accused***

In *Baker v Q [2012] HCA 27; 15 Aug 12* B and a minor were tried for the murder of S who died as a result of a fall through a window after a fight. The minor made admissions to police and others that could be taken as admissions for causing the fall. Neither B nor the minor gave evidence. The trial judge ruled that under the common law the admissions made by the minor were evidence in his case only and not that of B. (The trial preceded the *Evidence Act 2008(Vic)).* B was convicted. The minor was acquitted. B's appeal to the Court of Appeal (Vic) was dismissed as was his appeal to the High Court: French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ; sim Heydon J. The Court concluded no miscarriage of justice had occurred and there was no occasion to extend the exceptions to the hearsay rule to allow third party confession to be considered. Appeal dismissed.

Federal Court Judgments

ADMINISTRATIVE LAW

- ***Review of decision***
- ***Reasons of tribunal***
- ***Reasons copied from submission of one party***
- ***Whether tribunal applied its own mind***

In *LVR (WA) Pty Ltd v AAT* [2012] FCAFC 90 (22 Jun 2012) a Full Court reviewed authorities as to when a tribunal whose reasons reveal it copied substantial parts of the written submissions of one party fails to discharge its duty to itself determine the matter before it. The Court concluded, contrary to the primary judge, that by adopting the submissions of one party and not referring to an answering affidavit filed by the other, the AAT had failed to take a relevant matter into account.

MIGRATION

- ***Jurisdictional error***
- ***Relevant matters***
- ***Independent reviewer***

In *MZYPW v Minister for Immigration and Citizenship* [2012] FCAFC 99 (11 July 2012) a Full Court concluded the decision of the Independent Merits Reviewer that a person who had a fear of persecution for reason of membership of a social group not be recognised as a refugee because he could re-locate within Afghanistan involved jurisdictional error. The Court concluded that having recognised the issues of lack of family support and the identification of the claimant and his children because of their dialect the reviewer erred in not addressing these issues.

FEDERAL COURT

- ***Jurisdiction***
- ***Defamation in ACT***

In *Crosby v Kelley* [2012] FCAFC 96 (2 Jul 2012) a Full Court concluded that s9(3) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth) validly conferred on the Federal Court jurisdiction to determine an action for defamation brought in the ACT.

FEDERAL COURT

- ***Practice***
- ***Strike out***
- ***Summary dismissal as "no reasonable cause of action"***

In *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* [2012] FCAFC 97 (4 July 2012) a Full Court concluded the primary judge had not erred in concluding a claim for breach of a common law duty to exercise statutory powers with reasonable care had no reasonable prospects of success so the Federal Magistrate was correct in summarily dismissing it. Consideration of the