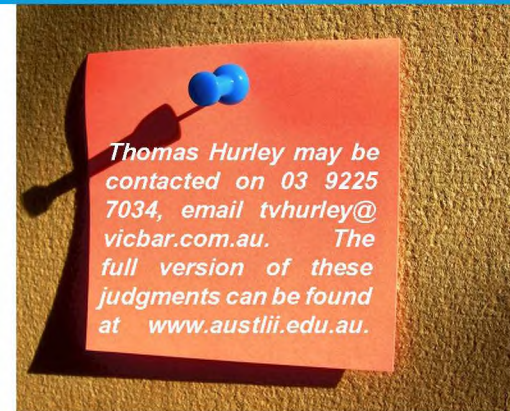


Federal Court

judgments:

April - June 2012



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

elements of the cause of action.

ADMINISTRATIVE LAW

- **Relevant matters**

In *MIC v Buadromo* [2012] FCAFC 101 (13 July 2012) a Full Court concluded that, contrary to the Minister's appeal, the AAT in considering a criminal deportation had taken into account as relevant matters the age at which the respondent started offending and the entire policy direction. Appeal by Minister dismissed.

CONTRACT

- **Employment law**
- **Repudiation of employment contract**

In *Keays v JP Morgan Administrative Services Australia Pty Ltd* [2012] FCAFC 100 (12 July 2012) the Full Court, in a judgement written by Besanko J, reviewed authority as to when evidence as to the extrinsic dealings between the parties to a contract can be considered to interpret its written terms. The court also reviewed authority as to when changes in an employee's duties constitute repudiation of the contract of employment that the employee can accept.

PATENT

In *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd (No 2)* [2012] FCAFC102 (18 July 2012) a Full Court considered when methods of treating human ailments are patentable and whether an expired patent had anticipated the "novelty" in the subject one. The court also considered whether publication to the Therapeutic Goods Administration of a product information document concerning one patent infringed copyright arising from an earlier patent or was authorised under a licence implied as a matter of fact by trade custom.

INCOME TAX

- **Employee share schemes**

In *C of T v McWilliam* [2012] FCAFC 105; 8 Aug 12 a Full Court considered when an employee acquired options in an employee share scheme for Div 13A of the *ITAA 1936 (Cth)*.

MIGRATION

- **Removal of convicted non-citizen**
- **Relevant considerations**

Shi v Min for Immigration and

Citizenship [2012] FCAFC 116; 23 Aug 12 a Full Court concluded the AAT had not erred in concluding courses S had undertaken while in custody were not relevant to assessing his likelihood of reoffending.

INDUSTRIAL LAW

- **Objectionable terms in enterprise bargaining agreement**

In *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108; 14 Aug 2012 a Full Court concluded that a decision of Fair Work Australia to approve an enterprise bargaining agreement did not involve jurisdictional error. The court rejected assertions the terms of the agreement would involve the union being liable for contravention of constructions legislation, entitle union representatives access to work sites otherwise than as provided in the Act and some terms would require employers to give prohibited inducements to employees to take membership action.

INDUSTRIAL LAW

- **Proceedings in Federal Court remitted from High Court**
- **Costs**

In *AMIEU v Fair Work Australia (No 2)* [2012] FCAFC 103; 26 July 2012 a Full Court concluded a proceeding to seek judicial review of a decision of Fair Work Australia that was commenced in the High Court and remitted to the Federal Court fell within s 570(1) of the *Fair Work Act (Cth)* and no order for costs would be made.

INDUSTRIAL LAW

- **Transitional provisions**

In *Yum! Restaurants Australia Pty Ltd v Full Bench Fair Work Australia* [2012] FCAFC 114; 21 Aug 2012 a Full Court considered how the transitional provisions in the Fair Work legislation operated in making a modern enterprise award.

VETERAN'S AFFAIRS

- **Special rate pension**

In *Summers v Repatriation Commission* [2012] FCAFC 104; 31 Jul 2012 a Full Court concluded the AAT had erred by concluding that S did not suffer from post traumatic stress disorder and also that he was precluded from working because he did but it was not war

caused. The Full Court found the AAT had also erred in not finding on the material that evidence of S's alcohol dependence raised a hypothesis that connected this condition to war service for the *Veteran's Entitlements Act (Cth)*.

INCOME TAX

- **Deductions for depreciating assets**
- **Mining leases**

In *Mitsui & Co (Australia) Ltd v C of T* [2012] FCAFC 109; 14 Aug 2012 a Full Court concluded the Commissioner had not erred in the way it assessed a claim to deduct part of the consideration paid for the acquisition of a production licence granted under the *Petroleum (Submerged Land)s Act 1967 (Cth)*.

INCOME TAX

- **GST**
- **Margin scheme**

In *Unit Trend Services Pty Ltd v C of T* [2012] FCAFC 112; 17 Aug 2012 a Full Court considered how the margin scheme enacted in Div 165 of *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* operated in calculating GST on the sale of large numbers of houses and other freehold interests.

CONTRACT

- **Employment contract**
- **Restraint of trade**
- **Validity of terms at common law**
- **Restraints of Trade Act 1976 (NSW)**

In *Pearson v HRX Holdings Pty Ltd* [2012] FCAFC 111; 17 August 2012 a full court reviewed authority as to whether a restraint of trade clause in an employment contract was valid and could restrain a human resources consultant from working in that industry.

HUMAN RIGHTS

- **Discrimination**
- **Wheelchair passengers on aircraft**

In *Kelley v Jetstar Airways Pty Ltd* [2012] FCAFC 115; 23 Aug 2012 a Full Court concluded the primary judge did not err in finding the airline did not discriminate against K unlawfully and contrary to the *Disability Discrimination Act 1992 (Cth)* by limiting the number of wheel chair passengers it allowed on its flights. ●