HighCourt judgments:

September - October 2012

MIGRATION

- VISAS-CRITERION
  - ***Provision in regulations for visa to be refused on adverse security assessments by ASIO***
  - ***Whether provision conflicted with provision in Act for review of such assessments on like decision by Minister***
- ***STATUTES***
  - ***Whether scheme in Migration Regulations for ASIO security assessments inconsistent with the Migration Act***

In *Plaintiff M47-2012 v Director-General of Security* [2012] HCA 46 (5 October 2012) by s504 the *Migration Act* 1958 (Cth) provided for regulations to be made "not inconsistent with the Act" prescribing required matters and by s32 the Act provided for the regulations to create classes of visas. The Act contained in s501 a procedure for review by the AAT of adverse security assessments on visa applicants. The regulations that specified protection visas imported a public interest criterion in Schedule 4 cl 4002. This required a visa be refused where a person was assessed by ASIO as a risk to national security. There was no provision for this to be reviewed. The plaintiff was refused a protection visa because an adverse ASIO report meant he failed public interest criterion in clause 4002. He brought a proceeding in the original jurisdiction of the High Court contending the clause was invalid and that he had been denied natural justice. The High Court by majority concluded public interest criterion cl 4002 was invalid for being inconsistent with the Act: French CJ, Hayne J, Crennan J, Kiefel J; contra Gummow J, Heydon J, Bell J. The majority concluded that if the criterion in cl 4002 operated as the Minister contended it rendered the specific provisions in s501 for reviewing such assessments otiose. The Court found there was no denial of natural justice and no need to consider whether the open-ended detention of the plaintiff in circumstances where he could not be removed as no other country would accept him was lawful. Questions in case stated answered accordingly.

CORPORATIONS

- ***Financial services***
- ***Financial services business***
- ***Litigation funding***

In *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2012] HCA 45 (5 October 2012) by Chp 7 the *Corporations Act* 2001 (Cth) regulates "financial services and markets". ILP was a litigation funder and advanced funds to Chameleon so it could fund Federal Court litigation. A dispute arose at the conclusion of the litigation and Chameleon obtained alternative finance in circumstances that triggered liability to pay an early termination fee to ILP. Chameleon resisted contending the ILP had provided "financial services" without a licence and recovery was prevented by s925A of the Act. ILP responded contending it had provided "credit" and this was excluded by s765A and the definition of "credit" in reg 7.1.06(3). This was accepted by the primary judge but not by the Court of Appeal (NSW). The High Court considered the nature of "credit". It concluded the funding agreement was a "credit facility" within s765A(1)(h)(i) of the Act and thus excluded from the Act and ILP was not disbarred from the fee: French CJ, Gummow, Crennan, Bell JJ; Heydon J. Appeal allowed.

DEFAMATION

- ***Defences***
- ***Qualified privilege***
- ***Defamatory comments in response to defamatory comments***

In *Harbour Radio Pty Ltd v Trad* [2012] HCA 44 (5 October 2012) the High Court considered, in proceedings under the *Defamation Act* 1974 (NSW), when the defence of qualified privilege extended to comments made by one party in response (or by way of "counter-attack") to earlier defamatory comments made by another.

CONSTITUTIONAL LAW

- ***Acquisition of property***
- ***Cigarette packaging***
- ***What is "property"***

In *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012) various cigarette traders commenced proceedings in the original jurisdiction seeking declarations that the *Tobacco Plain Packaging Act* 2011 (Cth) was invalid as a law for the compulsory acquisition of property other than for just compensation contrary to

Constitution s51(xxxi). The High Court rejected a contention that legislation banning cigarettes from having other than anonymised packaging constituted acquisition of the property represented by the value of the business. The Court also rejected the contention that the grant of trade marks under trade mark legislation implied a right to use the marks above other regulatory legislation. The Court found the legislation valid: French CJ; Gummow J; Hayne with Bell JJ; contra Heydon J.

HIGH COURT PROCEDURE

- ***Costs***

In *Board of Bendigo Regional Institute of Technical and Further Education v Barclay (No 2)* [2012] HCA 42 (3 October 2012) the High Court ordered that costs follow the event notwithstanding the apparent abandonment of a claim for costs in the application for special leave.

INCOME TAX

- ***GST***
- ***Unused airline tickets***

In *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCA 41 (2 October 2012) the High Court found that the terms on which QANTAS and Jetstar provided air travel was at least a promise to use best endeavours to carry passengers having regard to the business operations of the airline and that this was a "taxable supply" for *A New Tax System (Goods and Services Tax) Act* 1999 (Cth). The Court concluded that the airlines were required to pay the GST on fares received where the passengers did not in fact travel. Appeal against decision of the Full Federal Court allowed: Gummow, Hayne, Kiefel, Bell JJ; contra Heydon J.

TORT

- ***Rule in Baker v Bolton***
- ***Claim by employer for economic loss caused by death and injury to staff***

In *Barclay v Penberthy* [2012] HCA 40 (2 October 2012) employees of a company were killed and injured in an aeroplane crash. The employer sued the pilot and the designer of a faulty part of the aircraft for its economic loss measured as the loss of services of its employees. The High Court concluded that the rule in *Baker v Bolton* [1808] EWHC J92; 170 ER 1033 remained part of the common law of Australia and had not been discarded and its future was a matter for the legislature. The court also concluded the action of *per quod servitium amisit* remained as part of the common law and further that the pilot owed a duty at common law to avoid economic loss to the employer caused by the loss of services of the employees: French CJ, Hayne, Crennan, Bell JJ; sim Heydon J; Kiefel J.

CORPORATIONS

- ***Misleading statements***
- ***Statement that "binding agreement" made***

In *Forrest v ASIC* [2012] HCA 39 (2 October 2012) F was a director of a mining company. By s1041H the *Corporations Act* 2001 (Cth) made it an offence for an officer of a corporation to make misleading or deceptive statements. ASIC alleged in proceedings in the Federal Court that F had contravened this provision by making statements on behalf of the mining company that it had entered into a binding contract with a Chinese purchaser. The proceeding was dismissed by the primary judge but ASIC's appeal allowed by the Full Federal Court. F's appeal to the High Court was allowed: French CJ, Gummow, Hayne, Kiefel JJ; Heydon J sim. The High Court concluded that once it was accepted the statements correctly stated the parties intended to enter an agreement the statements were not misleading even though the agreement did not eventuate. Appeal allowed.

CONSTITUTIONAL LAW

- ***Judicial power***
- ***Liquidator's examination***

In *Saraceni v Jones* [2012] HCA 38 (7 September 2012) Gummow, Hayne and Bell JJ, in dismissing an application for special leave, noted that the power of courts to examine, on the application of a liquidator, persons as to the affairs of a company was of such long standing that it was accepted as an exercise of judicial and not executive power.

CRIMINAL LAW

- ***Accessories***
- ***Whether abuse to charge one person with murder after accepting pleas on lesser charges from the accessories***

In *Likiardopoulos v The Queen* [2012] HCA 37 (14 September 2012) the High Court rejected a submission that the decision of the prosecution to prosecute L for murder after accepting pleas to lesser offences from the others involved in the beating of the deceased was an abuse of process. Consideration of the liability of accessories: French CJ; Gummow, Hayne, Crennan, Kiefel, Bell JJ jointly; Heydon J. Appeal dismissed.

TRADE PRACTICES

- ***Access to infrastructure***
- ***Decision by Minister***
- ***"Reconsideration" by Competition Tribunal***
- ***Error in Tribunal reviewing the entire matter***

In *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 (14 September 2012) by Part IIIA the *Competition and Consumer Act* 2010 (Cth) authorised a minister to accept a recommendation by the National Competition Council (NCC) and declare third parties entitled to use infrastructure owned by another. It provides for actual decisions or deemed refusals to be "reconsidered" by the Australian Competition Tribunal (ACT). From 2004 the appellant (connected to the Fortescue mining group operating in the Pilbara) sought access under this to rail lines owned by BHP and Rio Tinto. The NCC

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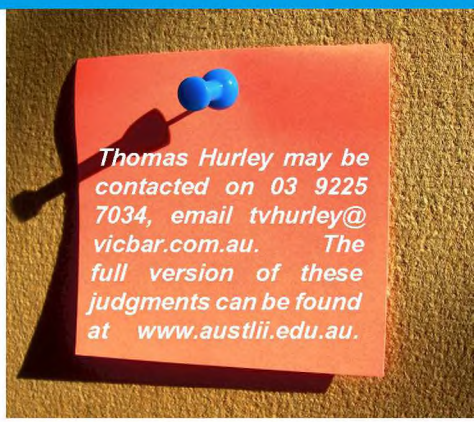

recommended certain rail lines be declared and in 2008 the Minister made one declaration and was deemed to have refused another. These decisions were varied after an extensive hearing by the ACT and various parties sought judicial review of these decisions that concluded with a decision of a Full Court of the Federal Court. Before the High Court the issue arose as to whether the ACT had erred by conducting a full review of the matter on extensive fresh evidence. The High Court concluded the ACT had erred and its role under s44K of the *Competition and Consumer Act* was simply to "reconsider" the decision of the Minister and not review the entire matter. The Court noted that a decision of the Minister as to what was in the "national interest" was not to be set aside lightly: French CJ, Gummow, Hayne, Crennan, Kiefel, Bell JJ jointly; Heydon J sim. The Court reviewed the criterion the Minister was to apply set out in ss44G and 44H. Appeal allowed; decision of the ACT set aside; no order as to costs.

CRIMINAL LAW

- ***Manslaughter***
- ***Supply of drugs to deceased***
- ***Whether supplier under any duty to assist deceased on adverse reaction to the drugs***

In *Burns v The Queen* [2012] HCA 35 (14 September 2012) Mrs B and her husband supplied methadone to H who died from the combined effect of this and a prescription drug. Mrs B was convicted of manslaughter contrary to s24 of *Crimes Act* 1900 (NSW). At trial the prosecution contended that supply of methadone was a dangerous act and also that Mrs B was under a duty to assist H once the effects became apparent but did not do so. Her appeal to the Court of Criminal Appeal (NSW) failed. Her appeal to the High Court was allowed: French CJ; Gummow, Hayne, Crennan, Kiefel, Bell JJ jointly; sim Heydon J. Before the High Court the prosecution accepted that mere supply of the methadone was not an inherently dangerous act and that the conviction could not stand on that ground. The High Court concluded the evidence did not support manslaughter for failure to offer or obtain medical assistance and so a retrial would not be ordered. The joint judgment reiterated that criminal liability fastened on acts and not omissions and outside limited exceptions a person remains at liberty in law to refuse to hold out her hand to the person drowning in a shallow pool. Appeal allowed; verdict of acquittal entered.

Federal Court Judgments

INCOME TAX

- ***Notice to bank under s264 of ITAA***

In ANZ *Banking Group Ltd v Konza* [2012] FCAFC 127 (12 September 2012) a Full Court concluded an Australian bank was obliged by a notice under s264 of *ITAA* to disclose from its world-wide electronic database information about customers in Vanuatu. The Full Court generally concluded the customer had not established that disclosure would cause breach of the bank's non-statutory obligation of confidentiality to customers nor that the notice was in any way not for a proper purpose. The Court accepted that one notice was too vague. Appeals generally dismissed.

ADMINISTRATIVE LAW

- ***When tribunal functus officio***
- ***Migration***
- ***When tribunals may receive further documents***

In *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131 (12 September 2012) a Full Court concluded that the RRT was not *functus officio* until its decision was communicated to the parties. The Full Court concluded the RRT member had erred in not considering further submissions from the review applicant where the member had prepared his decision and sent it to the registry of the RRT before seeing the submissions. Appeal by Minister dismissed.

WORKERS COMPENSATION

- ***Injury resulted from reasonable administrative action***

In *Dunkerley v COMCARE* [2012] FCAFC 132 (13 September 2012) a Full Court found the aggravation of the appellant's adjustment disorder caused by communication of the results of a Selection Advisory Committee was not a