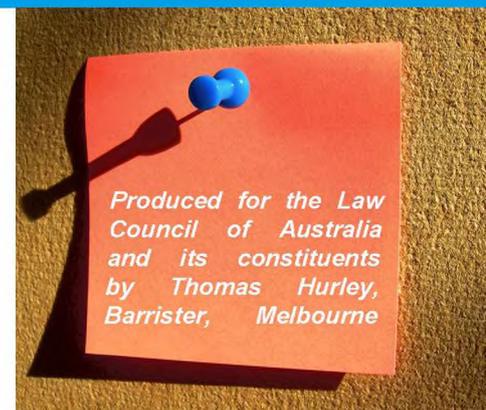


High Court judgments:

November - December 2012



FAMILY LAW

- **Child abduction**
- **Procedural fairness for children**

In *RCB as litigation guardian of EKV, CEV, CIV v Forrest J* [2012] HCA 47 (7 November 2012) the High Court considered the operation of the mechanisms for ascertaining the wishes of children the subject of proceedings under the *Family Law (Child Abduction Convention) Regulations* (Cth) seeking orders to return them to the country they had been removed from. The Court concluded the children had been afforded natural justice notwithstanding that their views had not prevailed. The Court dismissed proceedings in the original jurisdiction of the High Court seeking orders under the Constitution s75(v) to quash the order of the Family Court that the children be returned: French CJ, Hayne, Crennan, Bell JJ jointly; *sim* Heydon J. Proceedings dismissed.

CRIMINAL LAW

- **Miscarriage**

In *Cooper v Q* [2012] HCA 50 (14 November 2012) C was convicted of murder. The prosecution case at trial was that either C hit the deceased or someone else did as part of a joint criminal enterprise. The Court of Criminal Appeal (NSW) found there was no evidence of a joint criminal enterprise but dismissed the appeal against conviction. C's appeal to the High Court was allowed: French CJ, Hayne, Crennan, Kiefel JJ jointly; *contra* Heydon J. The majority found that in the circumstances there had been a miscarriage of

justice within s6(1) of the *Criminal Appeal Act* 1912 (Cth).

INCOME TAX

- **Imputation system**
- **Power of Commissioner to determine "having regard to relevant circumstances" that no imputation credit arose**

In *Mills v C of T* [2012] HCA 51 (14 November 2012) by s177EA of the *ITAA* 1936 the Commissioner is given the power to determine that imputation benefits do not arise having regard to specified circumstances. The Federal Court concluded that a reasonable person would conclude the Commonwealth Bank had entered into the arrangements in question to enable the holders of the securities to obtain a franking credit. The High Court (in a judgment prepared by Gageler J) disagreed and allowed the taxpayer's appeal: French CJ, Hayne, Kiefel, Bell JJ agreeing with Gageler J. Appeal allowed.

EQUITY

- **Trust deed**
- **Interpretation**

In *Montevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48 (7 November 2012) the High Court concluded that as the terms of the relevant trust deed distinguished between natural persons and corporations the Court of Appeal (WA) had erred in construing it as preventing the appointment of a trustee company (whose director was a beneficiary) as trustee: French CJ, Hayne, Crennan, Bell, Gageler JJ jointly. Appeal allowed.

FAMILY COURT

- **Property**
- **Jurisdiction to make property order after parties to marriage deceased**

In *Stanford v Stanford* [2012] HCA 52 (15 November 2012) the High Court concluded the Family Court did have power to make property orders as to matrimonial property under s79(2) of the *Family Law Act* 1975 (Cth) after a party to the marriage died. The Court allowed the appeal from the Full Court of the Family Court on the ground that as it had not been established that before the wife died it would have been just and equitable to have made a property settlement order it was not possible to make one afterwards: French CJ, Hayne, Kiefel and Bell JJ jointly; Heydon J *sim*. Appeal allowed. Matter remitted.

CORPORATIONS

- **Insider trading**
- **False information**

In *Mansfield v Q* [2012] HCA 49 (14 November 2012) the High Court concluded that it is not a defence to a charge of insider trading (contrary to s1002G of the *Corporations Act* 2001 (Cth)) that the information "traded" was false: Hayne, Crennan, Kiefel, Bell JJ jointly; *sim* Heydon J. Appeals dismissed.

TORT

- **Negligence**
- **Multiple tortfeasors**
- **Statutory limit on recovery limited to the amount of the first judgement**
- **Whether applicable if first judgement is a consent judgement**

In *Newcrest Mining Ltd v Thornton* [2012] 60; (13 December 2012) sec 7(1)(b) of the *Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947 (WA)* provided that a person who suffered damage as a result of a tort involving multiple tortfeasors was not entitled to recover in separate actions more than the damages awarded in the first action. The High Court concluded that the term 'judgment first given' referred to judgements given after contested hearing and not consent judgements: French CJ; Heydon J; Bell J; contra Crennan with Kiefel JJ. Appeal dismissed.

TORTS

- **Personal injuries- cost caps (NSW)**
- **Whether claims for damages for assault are claims for 'personal injuries'**
- **Whether legislation should be construed to exclude claims for intentional torts such as false imprisonment**

In *Certain Lloyd's Underwriters Subscribing to Contract No IHOOAAQS v Cross* [2012] HCA 56; (12 December 2012) the High Court concluded that claims by hotel patrons for damages on being assaulted by hotel security staff were claims for 'personal injury damages' for the purposes of the costs cap on such proceedings imposed by ss 198C and 198D of the *Legal Profession Act 1987 (NSW)* French CJ with Hayne J; sim Kiefel; contra Crennan and Bell JJ. Appeal allowed

In *NSW v Williamson* [2012] HCA57; 12 December 2012 the High Court concluded the claims for damages for intentional torts, such as false imprisonment, could be a claim for 'personal injury damages' for the purposed of the costs cap imposed by sec 338 of the *Legal Profession Act 2004 (NSW)*: French CJ with Hayne J; Kiefel J; contra Crennan with Bell JJ. Appeal dismissed.

CRIMINAL LAW

- **Substantial miscarriage of justice**

In *Baini v Q* [2012] HCA 59; (12 December 2012) B was tried with another for blackmailing R. He was also separately charged with blackmailing S. All charges were heard together. It was accepted that there was an irregularity and the single charge of blackmailing S should have been tried separately. By sec 276(1)(a) the *Criminal Procedure Act 2009 (Vic)* obliged the Court of Appeal to allow an appeal where the appellant established that 'as the result of error or an irregularity in, or in relation to, the trial there was a substantial miscarriage of justice'. The Court of Appeal concluded there was no miscarriage of justice as the fact that the jury returned separate verdicts on the counts involving R showed it had considered each properly and the evidence on these counts was clear. The High Court considered when a substantial miscarriage of justice was to be discerned. B's appeal was allowed by the High Court by majority: French CJ, Hayne, Crennan, Kiefel, Bell JJ jointly; contra Gageler J. Appeal allowed; orders of Court of Appeal set aside; matter remitted.

DEFAMATION

- **Defences**
- **Qualified privilege**

In *Papaconstuntinos v Holmes a Court* [2012] HCA 53; (5 December 2012) the majority rejected the submission that the defence of qualified privilege at common law required the author and the recipient of the publication have an interest in the matters in it and also that the author justify the publication by reference to some pressing need to protect his interests: French CJ, Crennan, Kiefel, Bell JJ jointly; Contra Heydon J. Appeal dismissed.

CORPORATIONS

- **Managed investment scheme**
- **Whether unit holder's statutory right to vote under s 601NB can be fettered by contract**

In *Westfield Management Ltd*

v AMP Property Nominees Ltd [2012] HCA 54; (5 December 2012) the High Court considered when members of a managed investment scheme could by contract interfere with the right of members to vote on the question of whether the scheme be wound up recognised by s 601NB of Corporations Act.

TAXATION

- **Income**
- **Share buy-back**
- **Whether proceeds income or capital**

In *C of T v Consolidated Media Holdings Ltd* [2012] HCA 55; (5 December 2012) the High Court in a joint judgement concluded a sum a shareholder was to receive in a 2002 share buy-back scheme was received in the nature of a dividend for the purposes of s 159GZZZP(1) of the ITAA: French CJ, Hayne, Crennan, Bell, Gageler JJ jointly. Appeal allowed.

MIGRATION

- **Children**
- **Refugee and humanitarian visa**
- **'Home country'**

In *Tahiri v Minister for Immigration* [2012] HCA 61; (13 December 2012) the High Court in a joint judgment (French CJ, Bell and Gageler JJ) in the original jurisdiction of the court concluded the delegate had not erred in the way the delegate considering the status and 'home country' of children whose parents were either resident in Pakistan or missing in Afghanistan. Questions in case stated answered accordingly.

CONSTITUTIONAL LAW

- **Judicial power**
- **Integrity of State Courts government policy**
- **Provision requiring industrial tribunals and court apply government policy**

Public Service Association and Professional Officers Association Amalgamated of NSW v Director of Public Employment [2012] HCA 58; (12 December 2012) the High Court concluded sec 146C of the *Industrial Relations*