

Federal Court

judgments:

September - December
2012

Act 1996 (NSW) which required the NSW IRC to give effect to declared government policy when making or varying an award did not compromise that part of the IRC that composed the industrial Court: French CJ; Hayne, Crennan, Kiefel and Bell JJ jointly; sim Heydon J. Appeal dismissed. ●

Federal Court judgments:

INDUSTRIAL LAW

- **Tribunals**
- **Failure to provide adequate reasons**

In *Soliman v University of Technology Sydney* [2012] FCAFC 146 (24 October 2012) a Full Court (in a matter remitted from the High Court) set aside the decision of a vice president of the Australian Industrial Relations Commission (made before the *Fair Work Act* (Cth)) that failed in the reasons to address issues as to the “proportionality” of discipline measures visited on an academic. The Court observed the decision was not quashed for failure to give reasons but for failure to take a relevant matter into account.

INDUSTRIAL LAW

- **Occupational health and safety**
- **Penalty**

In *Comcare v Post Logistics Australia* [2012] FCAFC 168 (23 November 2012) a Full Court considered how penalties for

breaches by employers providing a safe system of work imposed by the *Occupational Health and Safety Act 1991* (Cth) were to be assessed.

MIGRATION

- **Refugees**
- **Whether applicant at risk of significant harm**
- **Protection from other country**

In *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147 (24 October 2012) a Full Court concluded the Refugee Review Tribunal had not erred in construing s36(2B)(b) of the *Migration Act 1958* (Cth) as requiring a higher level of state protection for an applicant under s36(2)(aa) than that required by s36(2)(a).

COURT BIAS

- **Unrepresented party**

In *George v Fletcher* [2012] FCAFC 148 (25 October 2012) a Full Court considered the difficulties faced by judicial officers hearing hard fought litigation where one party is not represented. The Court concluded that the federal magistrate’s stinging criticisms of an unrepresented party’s credibility and acerbic comments in running did not establish bias.

INCOME TAX

- **Equitable damages as income**

In *Howard v C of T* [2012] FCAFC 149 (26 October 2012) a Full Court considered whether a taxpayer awarded equitable damages for breach of a joint venture arrangement held the award on

trust for the company that was the joint venture vehicle or as income.

INCOME TAX

- **Unreasonable decision**

In *Queensland Maintenance Services Pty Ltd v C of T* [2012] FCAFC 152 (2 November 2012) a Full Court concluded the decision of the Commissioner to reduce the amount a creditor was required to pay the Commissioner from funds payable to the taxpayer was not unreasonable.

AAT

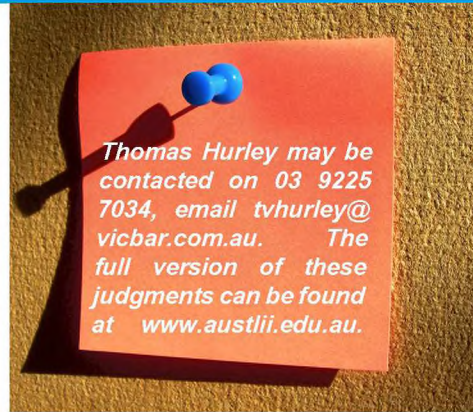
- **Appeals on question of law**
- **Findings as to source of income**

In *C of T v Crown Insurance Services Ltd* [2012] FCAFC 153 (2 November 2012) a Full Court concluded that findings by the Administrative Appeals Tribunal as to whether the respondent received its premium income directly or indirectly from Australia for s6-5 of the *ITAA 1997* (Cth) was a question of fact and that in the absence of a question of law the Federal Court had no jurisdiction to consider the matter.

FEDERAL COURT

- **Practice**
- **Leave to appeal interlocutory orders**
- **Strike out**

In *Fuller v Toms* [2012] FCAFC 155 (5 November 2012) a Full Court considered when orders dismissing a proceeding on striking out the statement of claim were interlocutory so that leave to appeal was required. Leave to appeal refused.



NATIVE TITLE

- **Extinguishment of native title**

In *Brown v WA* [2012] FCAFC 154 (5 November 2012) a Full Court considered whether mining leases granted in 1964 in Mount Goldsworthy in Western Australia had the effect of extinguishing native title.

INDUSTRIAL LAW

- **Union rules**
- **Whether oppressive**

In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Gray* [2012] FCAFC 158 (13 November 2012) a Full Court concluded that the rule of a union that relieved members from the obligation to pay dues when dues were paid to an associated state union was not oppressive etc. within s142(1) (c) of the *Fair Work (Registered Organisations) Act 2009* (Cth).

TRADE MARKS

- **Finding marks similar**

In *Vivo International Pty Ltd v Tivo Inc* [2012] FCAFC 159 (14 November 2012) a Full Court considered whether an appeal against a trial judge's decision based on observation that a trade mark was deceptively similar to another involved an appeal on a question of law.

MIGRATION

- **Template reasons**
- **Whether bias**

In *Minister for Immigration and Citizenship v SZQHI* [2012] FCAFC 160 (14 November 2012) a Full Court followed the earlier Full Court decision in *MIC v SZQHH* [2012] FCAFC 45 (*Special leave to appeal refused 7 September 2012*) and concluded that the federal magistrate had erred in finding the use of template paragraphs by an independent reviewer established the reviewer was biased. Appeal by minister allowed.

MIGRATION

- **Effect of error by decision maker**

In *SZQRW v MIC* [2012] FCAFC

164 (19 November 2012) a Full Court concluded the federal magistrate had not erred in holding the decision of the independent reviewer was not subject to jurisdictional error because of a small factual error.

CONTRACT

- **When contract "unfair"**
- **Employment contract**
- **Restraint of trade**

In *Informax International Pty Ltd v Clarius Group* [2012] FCAFC 165 (20 November 2012) a Full Court extensively reviewed authority as to when a contract is "unfair" for s12(1) of the *Independent Contractors Act 2006* (Cth). The Court held the Act gave it power to vary a restraint of trade clause in a contract of employment between an employment agency and an IT contractor but only as to prospective matters.

MORTGAGES

In *Naxatu Pty Ltd v Perpetual Trustee Co Ltd* [2012] FCAFC 163 (16 November 2012) a Full Court reviewed authority as to the priority of mortgages, the rule in *Hopkinson v Rolt* [1861] 9 HL Cas 591, the doctrine of marshalling and the authority of the Court to review decisions of liquidators under the *Corporations Law*.

COPYRIGHT

- **Finding of originality**

In *Tonnex International Pty Ltd v Dynamic Supplies Pty Ltd* [2012] FCAFC 162 (16 November 2012) a Full Court concluded there was sufficient evidence for the primary judge to find copyright existed in a compatibility chart for computer consumables.

FREEDOM OF INFORMATION (CTH)

- **'Documents of an administrative nature'**

Kline v Official Secretary to the Governor-General [2012] FCAFC 184; (19 December 2012) by s 6A the FOI Act 1982 (Cth) does not apply to a document of the Official Secretary to the Governor-General unless the document relates to 'matters of an administrative

nature'. A Full Court concluded that documents relating to the Order of Australia honours awards were not documents of this nature and not subject to the FOI Act.

TRADE AND COMMERCE

- **Competition**
- **Energy regulation**
- **Whether issue raised before regulator**

In *SPI Electricity Pty Ltd v Australian Competition Tribunal*; [2012] FCAFC 186; (20 December 2012) sec 700 of the National Electricity Scheme (See *National Electricity (Victoria) Act 2005* applying the *National (South Australia) Electricity Act 1996* (SA)) did not prevent the appellant supplier from raising an issue as to price indexation before the Australian Competition Tribunal on review as the issue had been raised before the Australian Energy Regulator.

INCOME TAX

- **Income**
- **Payments to nominee**

In *Sent v C of T* [2012] FCAFC 187; (19 December 2012) a Full Court concluded payments made to the nominee of the taxpayer in substitution for past and future bonus payments under his contract of employment were assessable as part of his income.

INCOME TAX

- **GST**

In *Cyonara Snowfox Pty Ltd v C of T* [2012] FCAFC 177; (4 December 2012) a Full Court considered the operation of the provisions in sec 75-5 of the *A New tax System (Goods and Services Tax) 1999* (Cth) relating to the tax payable on sale of freehold interests as at March 2005.

INDUSTRIAL LAW

- **Unlawful industrial action**
- **Accessories**
- **Intention**
- **Mere communication of threat**

In *CFMEU v Director of Fair Work Building Industry Inspectorate* [2012] FCAFC 178; (6 December 2012) a Full Court concluded the primary judge had erred in finding

a union delegate had engaged in unlawful industrial action by merely communicating a threat about it.

FEDERAL PRACTICE

- **When State limitation provisions apply to proceedings for Commonwealth penalties**

In *Fair Work Ombudsman v Toyota Material handling (NSW) Pty Ltd* [2012] FCAFC 193; (21 December 2012) the FWO filed an application in the FMC in Dec 2011 alleging breaches of industrial legislation between March 2006 and March to May 2009. The Federal Magistrate accepted the proceedings were for a penalty and outside the limitation period set by s18 the *Limitation Act 1969 (NSW)* that was 'picked up' by s 79 of the *Judiciary Act*. The Full Court allowed the appeal. It concluded the term 'enactment' in s 18 of the *Limitation Act* only applied to State Acts ([56] – [58]) and that by imposing some limitation periods for some matters and none for others the Commonwealth industrial legislation had 'otherwise

provided' so as to exclude s 79 of the *Judiciary Act* 79

HUMAN RIGHTS

- **Discrimination**

In *Nojin v C of A* [2012] FCAFC 192; (21 December 2012) a Full Court concluded that unlawful discrimination had occurred contrary to the *Disability Discrimination Act 1992 (Cth)* where the wages of intellectually disabled persons were set using methodology created for physically disabled persons

NEGLIGENCE

- **Open ended detention of refugee**

In *SBEG v C of A* [2012] FCAFC 189; (20 December 2012) a Full Court dismissed an appeal by a person granted refugee status but denied a visa on security grounds (and thus exposed to indefinite detention) on the ground he was detained in 'an environment of incarceration'. Duty of gaolers to take reasonable care for detainees considered.

WORKERS COMPENSATION (CTH)

- **Journey accident**

In *Comcare v PVYW* [2012] FCAFC 181; (13 December 2012) a Full Court concluded an employee injured on an overnight stay at a motel in the course of her employment as entitled to compensation under the SRC Act.

VETERANS

- **PTSD**

In *Repatriation Commission v Bawden* [2012] FCAF 176; (3 December 2012) a Full Court allowed an appeal from the conclusion of the primary judge that a diagnosis of post traumatic stress disorder did not require the decision-maker to be satisfied on the balance of probabilities that the veteran suffered the traumatic event. ●

NATIONAL & INTERNATIONAL CONFERENCES AND EVENTS

2013

23 - 30 March

Europe Oceania Legal Conference
Val d'Isere France or Matterhorn Italy/
Switzerland

Host: Lorenzo Boccabella, Barrister
at Law

Contact: Rosana Farfaglia
Phone: (07) 3254 3331
Email: info@educationcpe.com

1 - 8 April

Pan Europe Pacific Legal Conference

Paris
Host: Lorenzo Boccabella, Barrister
at Law

Contact: Rosana Farfaglia
Phone: (07) 3254 3331
Email: info@educationcpe.com

14 - 18 April

18th Commonwealth Regional Law Conference

Cape Town, South Africa
Host: Commonwealth Lawyers
Association and the Law Society of
South Africa

Contact: Mira Tropp
Email: cla@commonwealthlaw2013.
org
or registration@
commonwealthlaw2013.org
www.commonwealthlaw2013.org

16 April

Human Rights and Policing Conference

Canberra
Host: Centre of Excellence in Policing
and Security

Email: humanrights2013@griffith.edu.
au

19-20 April

2nd Young Researchers Conference on Law

Tirana, Albania
Host: BEDER University
Email: iyrc@beder.edu.al

22 April

Supercharging Your Practice
Canberra

Host: Australian Law Management
Group of the Law Council of Australia,
and the ACT Law Society
Contact: Yvette Luketic
Phone: (02) 6247 5700
Email: mail@actlawsociety.asn.au