

High Court judgments: February 2013



STATUTES

- *Interpretation*
- *When reference to specific excludes reference to the general*

In *Commissioner of Police (NSW) v Eaton* [2013] HCA 2 (8 February 2013) by s80(3) of the Police Act 1990 (NSW) the Police Commissioner could dismiss a probationary police officer at any time and without reason. By s84(1) the Industrial Relations Act 1996 (NSW) gave the Industrial Relations Commission of NSW power to order reinstatement of a person whose dismissal was “harsh, unjust or unreasonable”. In 2009 E, a probationary police officer, was dismissed under s80(3) of the Police Act. The jurisdiction of the Commission to consider his complaint was accepted by the Industrial Relations Commissioner, rejected by a Full Bench and accepted by the NSW Court of Appeal. The Police Commissioner’s appeal to the High Court was allowed by all members: Heydon J; Crennan, Kiefel and Bell JJ jointly; Gageler J. The Court referred to the common law rule that provisions of the same legislature were to be interpreted harmoniously and to avoid contradiction. The Court concluded that while the Industrial Relations Act applied to the Police Act generally, it would not prevail where this produced internal inconsistencies in the Police Act with provisions dealing specifically with matters such as discipline and employment. Appeal by Commissioner of Police allowed.

TRADE PRACTICES

- *Misleading conduct*
- *Advertisement*
- *Defences*
- *Advertisement received and*

published in the ordinary course of business

- *Whether Google published advertisements linked to internet search results*

In *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1 (6 February 2013) s52 of the Trade Practices Act 1974 (Cth) provided that a corporation must not engage in misleading or deceptive conduct in trade or commerce. By s85(3) the Act created a defence for an advertiser who published an advertisement in the ordinary course of business and who had no reason to suspect that publication of the advertisement would cause a contravention of that provision. Google conducted a search facility on its website. The search was conducted by means of “keywords”. Google created an Adwords program where advertisers could pay for their sites to also be displayed as part of the search results. The ACCC claimed that certain of the advertisements that appeared in response to searches made using a trader’s name (such as Harvey World Travel) contained misleading claims by advertisers that incorrectly stated the advertiser was connected to the trader involved. The ACCC contended Google was liable for this. The primary judge found that Google had acted merely as a conduit for the advertisements and was not liable for misleading conduct. A Full Court of the Federal Court disagreed and allowed the appeal by the ACCC. Google’s appeal to the High Court was allowed by all members: French CJ, Crennan, Kiefel JJ jointly; Hayne J; Heydon J. The joint judgment concluded that on the findings of the primary judge (that the ordinary

reader would understand the links were created by the advertisers) the advertisers had, but Google had not, breached s52 and there was no need to refer to the defence under s85(3) of the Trade Practices Act. Appeal allowed.

CONSTITUTIONAL LAW

- *Implied freedom of communication on political matters*
- *By-law prohibiting preaching or distributing printed matter on a public road*

In *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013) members of a street church in South Australia were subject to criminal and injunctive proceedings in South Australia under by-laws made by the respondent under the Local Government Act 1934 (SA). The by-laws penalised proselytising in streets in South Australia and in particular the Rundle Mall. The High Court concluded (contrary to the Full Court of the Supreme Court of SA) that the by-laws were reasonably proportionate and adapted to their purpose of controlling road usage and did not impinge on the constitutional freedom of communication: French CJ with whom Bell J agreed; Hayne J; Heydon J; Crennan and Kiefel JJ jointly. Appeal allowed.

CONSTITUTIONAL LAW

- *Implied freedom of communication on political matters*
- *Postal services*
- *Offensive communications about political matters*

In *Monis v Q* [2013] HCA 4 (27 February 2013) s471.12 of the Criminal Code 1995 (Cth) made it

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an offence to use a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. M was charged with this offence after writing letters to relatives of Australian personnel killed on active service in Afghanistan critical of the deployment of troops in Afghanistan. D was charged with aiding and abetting M. Motions to dismiss the charges as unconstitutional were rejected by the NSW District Court and appeals by D and M were rejected by the NSW Court of Criminal Appeal. The High Court divided evenly on the appeal with the result that the decision of the Court of Criminal Appeal was affirmed: French CJ; Hayne J; Heydon J; contra Crennan, Kiefel and Bell JJ jointly. The Court considered in detail the extent to which the provisions in question were reasonably adapted to burden communication and whether the limitation on political comment that may be thought to be offensive was warranted. Appeals dismissed. ●

Federal Court Judgments

CORPORATIONS

- **Access by officers to books**
In *Oswal v Burrup Fertilisers Pty Ltd (Rec and Man Apptd)* [2013] FCAFC 9 (7 February 2013) a Full Court considered when a director of a corporation was entitled to orders under ss198F, 290, 421 and 1303 of the Corporations Act 2001 (Cth) that gave him access to view and copy different classes of records of the corporation.

INCOME TAX

- **"Genuine redundancy payment"**

In *Weeks v C of T* [2013] FCAFC 2 (25 January 2013) a Full Court briefly considered what constituted a "genuine redundancy payment" for s85-175 of the ITAA 1997 (Cth) and what constituted an error of law that could be appealed from the AAT.

INDUSTRIAL LAW

- **Enterprise agreements**
- **Claim by one union that another union had not validly entered enterprise agreement**

In *AWU v Leighton Contractors Pty Ltd* [2013] FCAFC 4 (29 January 2013) the AWU contended that enterprise agreements made by the CFMEU and various employers were invalid as the CFMEU official was not authorised under its rules to make them, with the consequence that the agreements were not "agreements" that could be approved under s182 of the Fair Work Act 2009 (Cth). A Full Bench of Fair Work Australia refused the AWU the leave to appeal required by s604 of the Act. (The AWU sought to appeal in the proceedings between the CFMEU and the employers.) A Full Court of the Federal Court refused to grant the AWU constitutional writs to quash the decision of the Full Bench finding that there was no jurisdictional error and for many reasons the agreements were valid.

INDUSTRIAL LAW

- **Whether insurance agents employees or contractors**

In *ACE Insurance Ltd v Trifunovski* [2013] FCAFC 3 (25 January 2013) a Full Court reviewed in great detail the authorities that considered how a contractor employed under

a contract of service was to be distinguished from an employee employed under a contract of employment and entitled to long service leave under the Insurance Industry Award 1998 (Cth).

PATENTS

- **Requirements**
- **Clarity**
- **Novelty**

In *Novozymes A/S v Danisco A/S* [2013] FCAFC 6 (4 February 2013) a Full Court considered when a patent was lacking in the clarity and novelty required by s40 of the Patents Act 1990 (Cth).

TRADE AND COMMERCE

- **Agency**
- **"Linked credit provider"**

In *Quickfund (Australia) Pty Ltd v Prosperity Group International Pty Ltd (In Liq)* [2013] FCAFC 5 (31 January 2013) a Full Court considered the difference between an agent and a person who merely introduces business. The Court also reviewed what was required to establish one person as a "linked credit provider" for s73 of the Trade Practices Act 1974 (Cth).

ADMIRALTY

- **Jurisdiction**
- **Demise charter**
- **Subrogation**

In *Ships "Hako Endeavour" and ors v Programmed Total Marine Services Pty Ltd* [2013] FCAFC 21 (26 February 2013) a Full Court concluded the primary judge did not err by not immediately determining an objection to jurisdiction where the plaintiff was required to establish jurisdiction in any event on the balance of probabilities on the claim as put forward. The Court also considered the nature of a demise

