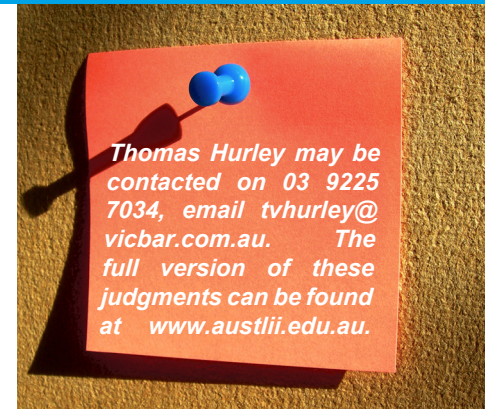


Federal Court

judgments:

January - March 2013



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

charter and whether the plaintiff was entitled to be subrogated to a maritime lien under s15(2)(c) of the Admiralty Act 1988 (Cth).

ADMINISTRATIVE LAW

- **Appeal from AAT**
- **“No evidence”**

In *Rawson Finances Pty Ltd v C of T* [2013] FCAFC 26 (5 March 2013) the AAT concluded the taxpayer had received funds as income and not as loans. The primary judge upheld the appeal by the Commissioner. The Full Court allowed the taxpayer’s appeal. It considered when a decision of a tribunal will be set aside on the “no evidence” ground and the nature of “evidence”, including inferences.

BANKRUPTCY

- **Trustees**
- **Whether one or two trustees appointed**

In *Weeden v Rambali* [2013] FCAFC 12 (12 February 2013) a Full Court concluded the primary judge had not erred in finding the meeting of creditors had appointed one trustee in bankruptcy and not two jointly. Consideration of the provision in s257 of the Bankruptcy Act 1966 (Cth) that signed minutes of the proceedings of a meeting of creditors are prima facie evidence of those proceedings.

COPYRIGHT

- **“Broadcasting service”**

In *Phonographic Performance Company of Aust Ltd v Commercial Radio Australia Ltd* [2013] FCAFC 11 (13 February 2013) a Full Court considered the definition of “broadcasting service” in s6(1) of the Broadcasting Services Act 1992 (Cth) as affected by ministerial determinations that excluded some services. The Court concluded a streamed internet radio program broadcast simultaneously with a radio service was a broadcasting service.

CORPORATIONS

- **Loss caused by officers**
- **Remedies**
- **Loss of opportunity**
- **Account of profits**
- **Profits**
- **Deductions**
- **Wages of errant officers**

In *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* [2013] FCAFC 16 (20 February 2013) a Full Court considered the relationship between statutory remedies under s1317H of the Corporations Act 2001 (Cth) and equitable remedies for an account of profits. The Court considered when it would be equitable to include the income paid to an errant fiduciary as reducing the amount to be repaid to the company.

DEFENCE

- **Restricted court *martia***
- **“Creating a disturbance”**
- **Human rights**

In *Li v Chief of Army* [2013] FCAFC 20 (26 February 2013) a Full Court of five justices considered an appeal from the Defence Force Discipline Appeal Tribunal where a defence legal officer was convicted of “creating a disturbance” (contrary to s33 of the Defence Force Discipline Act 1982 (Cth)) by refusing to leave another officer’s office. The Court considered the elements of this offence and whether it could be committed recklessly by virtue of ss3.2, 4 and 5 of the Criminal Code Act 1995 (Cth). Appeal dismissed by majority.

EXTRADITION

- **Relevant matters**

In *O’Connor v Adamas* [2013] FCAFC 14 (15 February 2013) the appellant minister ordered under the Extradition Act 1988 (Cth) that A be extradited to Indonesia following his conviction there with an order for imprisonment for life. These orders were imposed in absentia and without the right of a re-hearing. A primary judge quashed the minister’s decision in judicial review proceedings, finding the minister’s decision was unreasonable and that relevant matters had not been considered. The minister’s appeal was dismissed by a Full Court.

INCOME TAX

- **“Scheme”**

In *C of T v Macquarie Bank* [2013] FCAFC 13 (15 February 2013) a Full Court considered the interrelationship between the ITAA 1936 (Cth) and ITAA 1997 (Cth) in deciding whether the takeover of a listed resource company involved a “scheme” within Part IVA of the ITAA

1936 (Cth).

INDUSTRIAL LAW

- **Costs**
- **“Without reasonable cause”**

In *Weeks v C of T (No 2)* [2013] FCAFC 22 (27 February 2013) and *AWU v Leighton Contractors Pty Ltd (No 2)* [2013] FCAFC 23 (1 March 2013) Full Courts separately considered when industrial proceedings are commenced “without reasonable cause” so as to entitle the successful respondent to costs. The courts referred to authority to the effect that not all proceedings that were unsuccessful were commenced without reasonable cause.

STATUTES

- **Interpretation**
- **Industrial law**
- **Costs**
- **Proceedings under two statutory schemes with different costs regimes**

In *CFMEU v Director Fair Work Australia* [2013] FCAFC 25 (8 March 2013) in proceedings brought in the Federal Court a union official was alleged to have contravened both the Building and Construction Industry Improvement Act 2005 (Cth) (which was silent on the question of costs so the provisions of the Federal Court Act (Cth) applied at first instance and on appeal) and the Workplace Relations Act 1996 (Cth) (which by s824 provided no costs should be awarded). A Full Court reviewed authority and concluded that accepting that there was power to award costs gave the two schemes harmonious operation.

TAXATION

- **Stay of judgment pending appeal**

In *Southgate Investment Funds Ltd v Deputy C of T* [2013] FCAFC 10 (12 February 2013) a Full Court reviewed authority (including *Deputy C of T v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473) and s14ZZR of the Taxation Administration Act 1953 and concluded the Court had jurisdiction to order a stay of execution of a judgment in favour of the Commissioner pending a tax appeal and that the prospects of the appeal succeeding and hardship to the taxpayer were relevant. ●