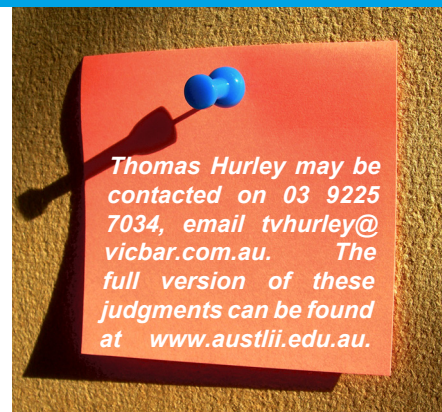


Federal Court

judgments:
March - May 2013



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are to be resolved in favour of the specific provision [52]. Appeal by Commissioner allowed.

TORT

- **Malicious prosecution**
- **Whether innocence of plaintiff an issue**
- **Davis exception overruled**

In *Beckett v NSW* [2013] HCA 17 (8 May 2013) B was prosecuted for offences against her husband and convicted at trial in 1991. Her appeal failed. In 2001 her petition to the governor for review of her convictions was referred to the NSW Court of Criminal Appeal. In August 2005 that Court set aside most of the convictions. In September 2005 the DPP (NSW) directed there be no further proceedings on the other counts. In 2008 B sued NSW for malicious prosecution. In *Davis v Gell* (1924) 35 CLR 275 the High Court had recognised an exception to the general rule that a plaintiff claiming malicious prosecution need not prove innocence in the case where the prosecution was terminated by the entry of a nolle prosequi ("the Davis exception"). The primary judge applied the Davis exception and answered separate questions to the effect B needed to prove that she was innocent of the charges. The Court of Appeal (NSW) did likewise and dismissed B's appeal. The High Court considered when its previous decisions should be overruled and decided to overrule the Davis exception and allow the appeal: French CJ, Hayne J, Crennan J, Kiefel, Bell JJ jointly; Sim Gageler J. Appeal allowed.

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Federal Court Judgments

CONSTITUTIONAL LAW

- **Acquisition of property**
- **Amendment of abalone licences**

In *Alcock v Commonwealth of Australia* [2013] FCAFC 36 (8 Apr 2013) a Full Court concluded that the limitations on the rights of Victorian abalone divers imposed by decisions under the *Fisheries Management Act* 1991 (Cth) and the *National Parks (Marine National Parks and Marine Sanctuaries) Act* 2002 (Vic) did not involve the acquisition of rights and the overall legislative scheme was not unconstitutional.

FEDERAL COURT PRACTICE

- **Dispensation from complying with notice to produce as this would contravene laws of Samoa**

In *Hua Wang Bank Berhad v Commissioner of Taxation* [2013] FCAFC 28 (13 March 2013) a Full Court considered when rules of court can be dispensed with under FCR O.1.34 and when a party can be excused from complying with a notice to produce served under FCR O.30.28(3). The Full Court concluded the primary judge had not erred in rejecting an application that compliance be dispensed with as it would involve breaches of the law of Samoa.

INCOME TAX

- **Assessment by asset betterment**

In *Gashi v Commissioner of Taxation* [2013] FCAFC 30 (14 March 2013) a Full Court reviewed

the onus on a taxpayer who had intermittently filed tax returns and who was assessed to tax by asset betterment to satisfy the onus established by s14ZZO and Part IVC of the *Taxation Administration Act* 1953 (Cth) and establish actual income.

MIGRATION

- **Exercise of personal non-compellable powers**

In *Minster for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 (20 March 2013) a Full Court of five justices decided an International Treaties Obligations assessment that concluded that returning the appellant would not breach the Conventions Against Torture etc. and the International Covenant on Civil and Political Rights, was not made in accordance with law as the assessor failed to apply the correct standard of proof to the question of whether there was a real risk of harm and for want of procedural fairness. The court was convened to consider the correctness of the decision in *SZQDZ v Minister for Immigration and Citizenship* [2012] FCAFC 26 but either found the question did not arise (Lander and Gordon JJ [180] with whom Flick J agreed) or the decision was correct (Besanko and Jagot JJ [330]). The Court considered the exercise of the Minister of various personal non-compellable powers including ss91K and 91L of the *Migration Act* 1958 (Cth) to allow repeat visa applications. The majority observed that detention of a non-citizen while an application for a visa was processed according to law may not be lawful where the Minister indicated the

persons would not be granted a visa even if this decision was in breach of Australia's international obligations. General consideration was given on how matters of public interest are to be analysed, unreasonableness, whether the Minister can act before advice is to hand or in the face of it, and when the Minister can act to suspend rights without being accountable to parliament or the courts.

TAXATION

- **GST**
- **"Maximum net asset value tax"**
- **Penalising taxpayer for want of reasonable care**

In *Bell v Commissioner of Taxation* [2013] FCAFC 3 (22 March 2013) a Full Court considered whether assets of an appellant who was trustee of one trust related to assets of another to which he was also trustee for the purposes of calculating "maximum net asset value" for s152-20(1)(a) of the *Income Tax Assessment Act 1997* (Cth). The court also considered when a taxpayer can be subject to penalty for failing to exercise reasonable care.

BANKRUPTCY

- **Whether debt on which bankruptcy notice founded must be the same as debt on which sequestration order made**

In *McCracken v Phoenix Constructions (Queensland) Pty Ltd* [2013] FCAFC 41 (18 April 2013) a Full Court concluded that a creditor who had served a bankruptcy notice is not restricted to relying on the debt on which that notice was issued when seeking a sequestration order.

CORPORATIONS

- **Examination of officers**
- **Natural justice**

In *Saraceni v ASIC* [2013] FCAFC 42 (16 May 2013) a Full Court considered whether a person who may be the subject of an examination about the affairs of a corporation under s596A of the *Corporations Act 2001* (Cth) has a right to be heard before the decision to examine is made

by ASIC. The court concluded that while the power to order an examination prejudiced the interests of potential examinees it did not do so in a sufficiently direct way to attract the rules of natural justice.

CRIMINAL LAW

- **Appeal**
- **Costs**

In *Li v Chief of Army (No 2)* [2013] FCAFC 40 (19 Apr 2013) Li was convicted of an offence by a restricted court martial. His appeal from the Defence Force Discipline Appeal Tribunal to the Full Court of the Federal Court on a question of law failed. The Full Court concluded there was no reason that costs of the appeal to it should not follow the event and ordered Li pay the costs of the appeal under s43 of the *Federal Court of Australia Act 1976* (Cth).

EMPLOYMENT

- **Long term employment contract**

In *Cohen v ISOFT* [2013] FCAFC 49 (8 May 2013) a Full Court considered whether a long term employee of an IT company was entitled to long service leave or a redundancy payment under the contract, state law or the *Fair Work Act 2009* (Cth).

EVIDENCE

- **Onus of proof**

In *Huang v Warner* [2013] FCAFC 48 (17 May 2013) a Full Court considered who had the onus of proof where a party to a series of transactions contended these gave rise to an equitable interest in bonds registered in the name of the other party and whether this party had an onus to disprove the transactions.

INCOME TAX

- **Deductions and penalties**

In *Sanctuary Lakes Pty Ltd v C of T* [2013] FCAFC50 (24 May 2013) a Full Court considered whether losses by a golf club development on sale of memberships and forgiveness of debt were allowable deductions under s8-1 of the *ITAA 1997* (Cth). The Court also concluded the AAT did not err in

remitting under s289-20 of Sch 1 of the *Tax Administration Act 1953* (Cth) the penalty imposed on the taxpayer by considering other penalties imposed in the same assessment and this was not an irrelevant consideration.

INDUSTRIAL LAW

- **Industrial action**

Non-payments for industrial action In *CFMEU v Director of Fair Work Building Inspectorate* [2013] FCAFC 53 (24 May 2013) a Full Court considered when employees had a right not to work when the employer was refusing to pay wages as contractually bound and whether industrial action in such circumstances was "industrial action" under s420(1)(C) of the *Workplace Relations Act 1996* (Cth).

MIGRATION

- **Deportation on character grounds**

In *Rawsthorne v MIC* [2013] FCAFC 39 (22 April 2013) a Full Court concluded the AAT had not erred in the way it applied the Minister's direction in affirming a decision to deport on character grounds.

MIGRATION

- **Decisions of AAT**
- **Jurisdiction of Federal Court**

In *FTZK v MIC* [2013] FCAFC 44 (6 May 2013) a Full Court considered the limitation on the jurisdiction of the Federal Court to consider appeals from the AAT on questions of law under s44 of the *AAT Act 1975* (Cth) made by s5E and s483 of the *Migration Act 1958* (Cth) which from December 2005 removed jurisdiction to determine appeals from "privative clause decisions and purported privative clause decisions...". The Court declined to amend the appeal to a proceeding in the original jurisdiction seeking a constitutional writ as the supposed grounds were not made out. ●

The numbers in square brackets in the text refer to the paragraph numbers in the judgment.