High Court judgments: June 2013

AUSTRALIAN CRIME COMMISSION

- ***Examinations***
- ***Whether examiner empowered to ask person charged with Commonwealth indictable offence about it***

In *X7 v Australian Crime Commission* [2013] HCA 29 (26 June 2013), X7 was arrested and charged with three indictable offences contrary to the *Criminal Code* (Cth) relating to drug trafficking. While in custody X7 was summonsed to appear before an examiner under the *Australian Crime Commission Act* 2002 (Cth) (the *Act*). In the examination X7 was asked questions concerning the conduct of the subject of the charges. He declined to answer and was informed he would be charged for failing to do so. X7 commenced a proceeding in the original jurisdiction of the High Court seeking a declaration that the *Act* was invalid to the extent it required a person charged with an indictable Commonwealth offence to be required to answer questions about that conduct. The High Court determined a case stated raising this question. The High Court determined by majority that the *Act* did not empower an examiner to conduct an examination of a person charged with a Commonwealth indictable offence on matters concerning the subject matter of the charges: Hayne with Bell JJ; sim Kiefel J; contra French CJ with Crennan J. Answers accordingly.

CRIMINAL LAW

- ***Conspiracy***
- ***Provision creating offence repealed***
- ***Whether offence depends on creating conspiracy or being in one***

In *Agius v Q* [2013] HCA 27 (5 June 2013) A and four co-accused were charged with two counts of conspiracy relating to a tax fraud perpetrated between 1997 and 2006. The first alleged a conspiracy contrary to ss29D and 86 of the *Crimes Act* 1914 (Cth) to defraud the Commonwealth between January 1997 and May 2001. (In May 2001 these provisions of the *Crimes Act* were repealed.) The other alleged a like offence contrary to s134.4(5) of the *Criminal Code* (Cth) from May 2001 to 2006. A contended that as the prosecution alleged an agreement in 1997 and not after May 2001 the second proceeding was an abuse. This contention was rejected as a preliminary question by a primary judge who found the offence was established by the existence of an agreement and not on its creation. This result was affirmed by the NSW Court of Criminal Appeal and an application for special leave was refused in 2011. A was thereafter convicted at trial. A sought and was granted special leave in respect of this in 2012. This appeal was dismissed by all members of the High Court: French CJ, Hayne, Crennan, Bell, Keane JJ jointly; sim Gageler J. The Court observed that the offence involved bringing a party to a conspiracy and not creating one. The Court also concluded that this did not give the *Criminal Code* retrospective operation as it operated on participation in the conspiracy after the provision commenced. Appeal dismissed.

DISCRIMINATION LAW

- ***Race***
- ***Prohibition on persons in indigenous communities in Queensland possessing liquor***
- ***Whether a "special measure"***

In *Maloney v Q* [2013] HCA 28 (19 June 2013) M was an indigenous person resident on Palm Island in Queensland. The island was an Indigenous community subject to regulations under the *Liquor Act* 1992 (Qld) that restricted the amount of liquor a person may have in their possession. M was convicted in the Magistrate's Court of the offence of being in possession of more than the permitted amount of liquor. M's appeal to the District Court (where M contended the provision creating the offence was invalid as it was contrary to s10 of the *Racial Discrimination Act* 1975 (Cth)) and her application to the Court of Criminal Appeal (Qld) for leave to appeal were dismissed. Her application for special leave to appeal to the High Court was granted but the appeal was dismissed by all members in separate judgements: French CJ; Hayne J; Crennan J; Kiefel J; Bell J; Gageler J. All members considered whether the provisions effected discrimination and concluded the laws were a "special measure" within s8 of the *Racial Discrimination Act.* Consideration given to how measures are to be recognised as 'special measures' and the implementation of various international conventions concerning human rights and racial discrimination. Appeal dismissed.

EQUITY

- ***Unconscionable conduct in s51AA of Trade Practices Act***

In *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013) K was a wealthy person with an addiction to gambling. At various times he was subject to voluntary exclusion orders from Crown and other casinos. He sued Crown Casino Melbourne alleging it engaged in "unconscionable conduct" between

June 2005 and August 2006 contrary to s51AA of the *Trade Practices Act* 1974 (Cth) by enticing him to gamble. This claim was rejected at trial and by the Court of Appeal (Vic). K's appeal to the High Court focussed on the proposition that it was unconscionable of Crown to allow him to gamble as it knew, that because of his condition, K was unable to make rational decisions in his own interest about gambling while gambling. K's appeal was dismissed by all members: French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ jointly. The Court concluded that the trial judge had not erred in finding K was not subject to any "special disadvantage". Consideration of the basis of "unconscionable conduct" and "special disadvantage" in equity. Appeal dismissed.

TORT

- ***False imprisonment***
- ***Person detained under Act later declared invalid***

In *NSW v Kable* (No 2) [2013] HCA 26 (5 June 2013) K was detained for six months from February 1995 by an order made by a judge of the Supreme Court (NSW) under the *Community Protection Act* 1994 (NSW). This *Act* was passed solely to provide for the preventative detention of K. The order expired in August 1996 and K was released. In September 1996 the High Court declared the *Act* invalid as it was incompatible with Chapter III of the Constitution for bestowing executive functions on a State court: *Kable v NSW* [1996] HCA 24. K sued for false imprisonment, abuse of process and malicious prosecution. The primary judge determined preliminary points adversely to K, in particular rejecting K's contention that the initial order of February 1995 was a nullity. The NSW Court of Appeal allowed K's appeal in part holding the order of February 2005 was invalid. The State appealed. The High Court concluded that K's detention was not unlawful as the order of the Supreme Court of February 2005 was valid and effective and authorised the detention until set aside: French CJ, Hayne, Kiefel, Bell, Keane JJ; sim Gageler J. Appeal by State allowed.

CORPORATIONS LAW

- ***Financial services***
- ***Market manipulation***
- ***What is an "artificial price"***
- ***Procedure***
- ***Whether case stated raised hypothetical issues***

In *DPP (Cth) v JM* [2013] HCA 30 (27 June 13), s1041A of the *Corporations Act* 2001 (Cth) creates the offence of engaging in transactions in a financial market that have the effect of creating an "artificial price" for financial products (including shares) in the market. JM was charged of conspiring with his daughter in 2006 to cause her to purchase on the ASX, through one company she controlled, shares in X Ltd at the close of the day's trading in order to leave the closing price of the shares above the price at which JM's lenders could make a margin call on his assets. The trial judge in the Victorian Supreme Court stated a case for the Court of Appeal under s30(2) of the *Criminal Procedure Act* 2009 (Vic). The original case contained questions as to the meaning of the term "artificial price" in the circumstances of the case that were set out referring essentially to what the prosecution contended. The Court of Appeal (Vic) directed the trial judge to reformulate the question to be whether the phrase "artificial price" was used as a legal term or not and if as a legal term whether it referred to the learning of American courts on "cornering" and "squeezing" markets. The Court of Appeal (Vic) answered the question as reformulated as importing the American jurisprudence. The DPP was granted special leave to appeal. In a joint judgment the High Court concluded that questions can be stated before a trial on the basis of the what is alleged and while the process may be contingent on findings of fact it was not hypothetical. The High Court found the original questions were proper and the reformulated one was inappropriate and did not raise an issue that would arise in the trial. The Court referred to the difference between a question of law and a question of fact and how the meaning of everyday words used in a statute is ascertained. The Court reviewed the history of the provisions and concluded the American jurisprudence (*Cargill Inc v Harding* [1971] USC 443) arose in limited circumstances in trading in finite quantities of physical goods on futures markets and was not applicable to trading of listed securities on the Australian Stock Exchange. The Court concluded that where the price of a security was set by a transaction that had the sole or dominant purpose of creating a particular price for that security the price revealed was an "artificial price". Question as posed by trial judge answered accordingly.

CRIMINAL LAW

- ***Sentencing***
- ***Existence of alternative charge with lesser penalty***

In *Elias v Q; Issa v Q* [2013] HCA 31 (27 June 13), M failed to answer bail in March 2006 at his trial in the Supreme Court of Victoria for drug trafficking contrary to s233B(11)(b) of the *Customs Act* 1901 (Cth). M went into hiding and then fled to Greece where he was arrested in June 2007. M was sentenced to imprisonment in absentia. E and I gave M support while he was a fugitive in Australia. They were charged with the common law offence of attempting to pervert the course of justice which by virtue of s320 of the *Crimes Act* 1958 (Vic) carries a penalty of a maximum of 25 years imprisonment. The Commonwealth offence of attempting to pervert the course of justice in s43 of the *Crimes Act* 1914 (Cth) carries a maximum penalty of five years imprisonment. E and I were each sentenced to imprisonment for eight years. Their appeal to the Victorian Court of Appeal (where five justices sat) was dismissed. In the appeal they argued that the decision of the Court of Appeal in *R v Liang* (1995) 124 FLR 350 required the sentencing judge to take into account the lesser penalty provided for the Commonwealth offence they could have been charged with. The Victorian Court of Appeal concluded this sentence was inadequate for their offending. Their appeal to the High Court was dismissed; French CJ, Hayne, Kiefel, Bell and Keane JJ jointly. The High Court concluded there was no principle of sentencing that required the fact that an alternative offence with a different penalty that could have been brought be taken into account. The Court observed that the time to dispute the exercise