

Thomas Hurley's Federal Court judgments

Thomas Hurley may be contacted on 03 9225 7034, email tvhurley@vicbar.com.au. The full version of these judgments can be found at www.austlii.edu.au.

FEDERAL COURT JUDGMENTS FOR JANUARY / FEBRUARY 2015

BANKRUPTCY

Bankruptcy notice – whether copy of final judgment “attached” – curing of defects

In *Curtis v Singtel Optus Pty Ltd* [2014] FCAFC 144 (30 October 2014) a Full Court found the requirement of s41 of the *Bankruptcy Act* 1966 (Cth) that the final judgment be “attached” to the bankruptcy notice when it was issued was satisfied where the application for the notice was sent, and the notice was issued, by email.

COSTS

Whether provisions for costs in High Court Rules exclude state costing provisions for acting in High Court matter – who is proper claimant for counsel’s fees

In *Batterham v Goldberg* [2014] FCAFC 136 (15 October 2014) a Full Court concluded the existence of provisions for costs of High Court proceedings in High Court Rules Ch 5 did not create any inconsistency within Constitution s109 preventing the operation of state legislation concerning assessment of solicitor-client costs in acting in High Court matters. The Court also concluded that in the absence of any specific agreement between a client and counsel the proper creditor in a claim against the client for counsel’s fees was the instructing solicitor who retained counsel.

INDUSTRIAL LAW

Awards – classification

In *Transport Workers’ Union of Australia v Coles Supermarket’s Australia Pty Ltd* [2014] FCAFC

148 (3 November 2014) a Full Court concluded the Federal Circuit Court had not erred in finding that “customer service agents” employed to deliver online shopping services were not covered by the Road Transport and Distribution Award but by retail industry awards. Consideration of the interpretation of awards.

JUDICIAL REVIEW

AD (JR) Act – whether decision of university to suspend enrolment of student reviewable

In *Luck v University of South Queensland* [2014] FCAFC 135 (15 October 2014) a Full Court concluded the primary judge had not erred in declining to disqualify himself because the judge was also the Judge Advocate General for the Australian Defence Force. The Court concluded the appointment of the judge to this position did not contravene the separation of powers. The Court found the primary judge had not erred in finding decisions of the University to suspend L were not reviewable under the Administrative Decisions (Judicial Review) Act 1975 (Cth) as made in some way under the Higher Education Funding Act 1988 (Cth).

MIGRATION

Visas – cancellation – policy – whether discretion in Act fettered

In *Minister for Immigration and Border Protection v Lesianawai* [2014] FCAFC 141 (27 October 2014) a primary judge set aside a decision of

the Administrative Appeals Tribunal to affirm deportation under s501 of the Migration Act. The primary judge referred to *Sean Investments Pty Ltd v McKellar* [1981] FCA 191 and found the discretion was unfettered even though subject to ministerial policy guidelines. The Full Court concluded the primary judge was in error because the discretion was subject to the guidelines. The Full Court considered whether any demonstrated jurisdictional error had a discernible effect on the decision before relief will be granted. The Full Court allowed the Minister’s appeal.

MIGRATION

Migration decision – judicial review of conduct prior to migration decision

In *SZSSJ v Minister for Immigration and Border Protection* [2014] FCAFC 143 (29 October 2014) a Full Court concluded that various decisions of the Department when preparing to make a decision under s198(6) of the Migration Act 1958 (Cth) to remove SZSSJ constituted conduct preparatory to making a decision that the Federal Circuit Court should have accepted it had jurisdiction to review under s474(3)(h) of that Act.

MIGRATION

Independent reviewer – review by subsequent reviewer

In *WZARH v Minister for Immigration and Border Protection* [2014] FCAFC 137 (20 October 2014) the tape of the interview WZARH had with the first independent merits reviewer was heard by the second

reviewer after the first became unable to finalise the matter. The Full Court did not decide that claimant's such as WZARH were entitled to an oral hearing but the Court did accept there was an expectation that the person who conducted the face-to-face interview would be the decision-maker or that any one appointed as replacement would conduct a fresh interview.

MIGRATION

Unreasonable decision – decision based on incorrect facts

In *Minister for Immigration and Border Protection v SZSNSW* [2014] FCAFC 145 (3 November 2014) SZSNSW made claims of sexual assault when first interviewed on Christmas Island when making his claim for refugee status. The independent merits reviewer appointed to advise the Minister on whether to allow the

claim to proceed wrongly concluded SZSNS had not then made a claim of sexual assault but had made it subsequently and this undermined his credit. The Full Court concluded the decision to recommend the claim for refugee status not be allowed involved an error of law and while it differed from the Federal Circuit Court as to the analysis, it dismissed the Minister's appeal.

MIGRATION

Advice to person in detention

In *SZSPI v Minister for Immigration and Border Protection* [2014] FCAFC 140 (28 October 2014) a Full Court considered whether the applicant applying for an extension of time had had sufficient access to legal advice.

NATIVE TITLE

Costs

In *Oil Basins Ltd v Watson* [2014] FCAFC 154 (17 November 2014) a

Full Court concluded there was no error in the award of costs against the appellant by the primary judge under s85A of the *Native Title Act* 1993 (Cth) in proceedings where the appellant resiled from disputing the "connection" to the land as an issue. Consideration of costs in Native Title proceedings.

PATENTS

Validity – whether creation of a computer program involves "manufacture"

In *Research Affiliates LLC v Commissioner of Patents* [2014] FCAFC 150 (10 November 2014) a Full Court found the creation of a securities index and assist investing in the stock exchange did not constitute or produce a form of "manufacture" that could be patented under s18 of the *Patents Act* 1990 (Cth).

TRAVEL TO
PEXA
— with the —
END
DESTINATION
SPECIALISTS



SAI GLOBAL PROPERTY. YOUR PATHWAY TO ELECTRONIC SETTLEMENT.

There's been a great deal of industry noise around the arrival of PEXA, and we're delighted to say, **SAI Global Property has been fully endorsed as a PEXA sponsor.** And as a PEXA sponsor, we can help you become a PEXA Subscriber and guide you through the PEXA process.

This long awaited online platform allows all parties in a property transfer to transact together online, including completing an electronic financial settlement and electronic lodgement of Land Titles documents.

When can you start using PEXA?

PEXA will be systematically rolled out across the country in 2015. As an SAI Global Property customer, you'll be kept posted on when you can join, what's involved and we'll prepare you for PEXA with clarity and confidence. You can register to receive updates online at ps3.saiglobal.com/PEXAsorted

Electronically enabled and already ready.

SAI Global Property has established the largest market share in property settlements and search services, by innovating, providing solutions and creating efficiencies for our customers.

So we can ensure your transition to PEXA will be smooth and seamless. Our integrated property settlement product suite already includes electronic platforms that will integrate with PEXA. Connection with the PEXA platform will be via our Settlement Room application launching in August. This means you can start the journey to electronic settlements now and we'll be there to answer your questions or resolve any issues.

Property settled. PEXA sorted.

It's a time of considerable change and we are focused on providing our customers with continuity of experience. You may have matters that won't qualify for PEXA and these can still be performed manually. Whatever the scenario or part of the settlement process, we have the products, services and the people to guide you every step of the way.

To find out more about PEXA, our integrated products and how to make SAI Global Property your PEXA sponsor please call **1300 730 900** and select option 4 or visit www.saiglobal.com/PEXAsorted

FEDERAL COURT JUDGMENTS FOR DECEMBER 2014

CONSTITUTIONAL LAW***Whether local government by-laws offend freedom of political communication – whether laws contrary to Victorian Charter of Human Rights and Responsibilities Act***

In *Kerrison v Melbourne City Council* [2014] FCAFC 130 (3 October 2014) a Full Court concluded the local laws on which the respondent relied to serve notices to protesters in the “Occupy Melbourne” protest in 2011 were not invalid for impermissibly burdening the implied freedom of communication and association recognised by the Constitution. The Court also concluded that the primary judge did not err in dismissing the proceeding as a representative proceeding. The proceeding was before the Federal Court as one involving a question arising under the Constitution for s39B of the Judiciary Act 1901 (Cth). Appeal dismissed.

MIGRATION***Visas– cancellation on character grounds- review by AAT – limitation on ability to present evidence to AAT – whether a resumed hearing is a “hearing”***

In *Jagroop v Minister for Immigration and Border Protection* [2014] FCAFC 123 (23 September 2014) a Full Court reviewed in detail the operation of s500 of the Migration Act and the limits it sets on the ability of the visa holder to present evidence at the Administrative Appeals Tribunal (AAT) hearing unless prior notice of it had been given – even evidence in answer to questions on cross-examination. The Full Court reviewed *Goldie v MIMA* [2001] FCA 1318 and concluded that the limits in s500(6H) and (6J) applied only to evidence-in-chief and not to other evidence or submissions. The Court concluded allowing the appeal was not futile. Appeal allowed.

MIGRATION***Visas – cancellation on character grounds – AAT findings***

In *SZRTN v Minister for Immigration and Border Protection* [2014] FCAFC 129 (3 October 2014) a Full Court dismissed an appeal where it was contended the primary judge failed to accept errors in the AAT’s findings of fact and analysis of evidence.

TAX***Whether trustees required to set aside funds for tax where no liability to pay it***

In *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* [2014] FCAFC 133 (8 October 2014) a Full Court concluded s254 of the Income Tax Assessment Act 1936 (Cth) was a collection provision and did not render a trustee liable to pay tax where no liability existed. It concluded the provision did not require the liquidators of a company holding proceeds of sale of its assets to set aside that part of the proceeds as represented a capital gain prior to an assessment of this tax. Appeal dismissed.

VETERANS’ AFFAIRS***Special rate of pension – whether war-caused incapacity “alone” caused inability to work – positive disincentives***

In *Repatriation Commission v Richmond* [2014] FCAFC 124 (26 September 2014) a Full Court reviewed the operation of s24(1) (c) of the Veteran’s Entitlement Act 1986 (Cth). The Full Court generally agreed with the decision of the primary judge save that it disagreed the phrase referring to the war caused injury being the factor that “alone prevented from . . . working . . .” excluded reference to positive inducements preventing work and referred only to the negative ones.

WORKER’S COMPENSATION (CTH)***Benefits – normal pre-injury earnings***

In *Comcare v Nicolas* [2014] FCAFC 122 (22 September 2014) a Full Court concluded the AAT had erred in its selection of the “relevant period” as required by ss8(4) and (5) and s9 of the Safety Rehabilitation and Compensation Act 1988 (Cth) for calculating normal pre-injury earnings. The Full Court declined to allow Comcare to rely on official documents not referred to before the AAT and used its limited fact finding power to finally determine, rather than remit, the proceeding. ●