# Dan Star QC Federal Court Judgments

## AUGUST

**ADMINISTRATIVE LAW**

National security and procedural fairnness

In *El Ossman v Minister for Immigration and Border Protection* [2017] FCA 636 (6 June 2017) the Federal Court set aside the applicant's adverse security assessment made by the Australian Secuity Inteligence Organisation (ASIO) on the basis that the applicant was denied procedural fairness in the making of that assessment.

As Wigney J stated at [1]: "The issue that lies at the heart of this matter highlights the potential tension between the interests of national security and the requirements of procedural fairness in the context of the making of security assessments under the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act)."

The applicant is a citizen of Lebanon who was in Australia and married to an Australian citizen. He applied for a particular visa to reside in Australia. In October 2014 he was interviewed by officers of ASIO. In August 2015 ASIO provided the Department of Immigration and Border Protection with an "adverse security assessment" (a term defined in the ASIO Act) for the applicant. In September 2015 the Minister for Immigration and Border Protection cancelled the applicant's bridging visa and he was taken into immigration detention.

It was common ground that ASIO was required to afford the applicant procedural fairness in the making of the security assessment. The issue in dispute was whether in the particular facts and circumstances and having regard to the particular statutory context the requirements of procedural fairness were satisfied.

More specifcially, Wigney J summarised at [5]: "The question whether the interview afforded Mr El Ossman procedural fairness arose primarily because ASIO did not disclose to Mr El Ossman certain specific information it possessed which cast doubt on Mr El Ossman's denials [at the ASIO interview]. Some, but not all, of that specific information was immune from production, and therefore disclosure, to Mr El Ossman because disclosure would have been prejudicial to national security. Did ASIO's failure to disclose parts of the specific information which was not immune from production or disclosure so constrain Mr El Ossman's opportunity to propound his case for a favourable assessment as to amount to a practical injustice? Was Mr El Ossman given sufficient information to fairly put him in

a position where he could make meaningful submissions about the assessment?"

The Court set out the relevant priciples on the content of procedural fairness (at [74]-[84]). Those legal principles were not in issue; what was disputed was the application of those principles to the facts of the case and the statutory context. The Court examined the legal framework of the *ASIO Act* in order to ascertain the requirements of procedural fairness in that context (at [91]-[98]).

There was no doubt that ASIO was in possession of information that was adverse to the applicant that it might and ultimately did take into account in making the adverse security assessment (at [85]-[87]). ASIO did not disclose any of the adverse information to the applicant during the process of making the secuity assessment (at [87] and [102]). The interests of security did not preclude ASIO from disclosing some of the information, albeit in fairly general terms (at [104], see also [129]-[130] where this issue formed part of the Court's ultimate reasoning).

The Court held at [121]: "On balance, however, the Director-General's overall contention that sufficient information was disclosed to Mr El Ossman during the interview to enable him to make meaningful submissions, or to propound a case for why an adverse security assessment should not be made, cannot be accepted. On balance, the decision to make an adverse security assessment regarding Mr El Ossman was not made fairly in all the circumstances having regard to the legal framework within which the decision was to be made. There was practical injustice."

The reasons for the Court's conclusion are set out at [123]-[143].

A separate ground of challenge on the basis that the Director-General of Security's determination under s 37 of the *ASIO Act* was binding was rejected (at [144]-[152]).

## CORPORATIONS

### Whether summons for examination of liquidator an abuse of process

In *Kimberley Diamonds Ltd v Arnautovic* [2017] FCAFA 91 (6 June 2017) the Full Federal Court set aside the orders of the primary judge permanently staying a summons for the examination of a liquidator under s 596A of the Corporations Act 2001 (Cth) on the basis that it was an abuse of process. The Full Court (Foster, Wigney and Markovic JJ) considered the correct statutory construction of ss 596A and 596B of the *Corporations Act*.

The liquidators of the owner (KDC) of a diamond mine disclaimed their interest in the mine. KDC's sole shareholder, the applicant, was concerned that the disclaimer of the mine may have followed an inadequate and defective attempt by the liquidators to sell the mine. It requested the Australian Securities and Investments Commission (ASIC) to authorise it to make an application under s 596A of the *Corporations Act* for a summons to examine Mr Arnautovic about the sales process. ASIC gave authorisation to do this and the applicant applied for and obtained a summons and order for production addressed to Mr Arnautovic. He successfully applied to the Court for an order that the summons be discharged on the basis it was an abuse of process. The main submission that the examination was an abuse of process was that it placed an unnecessary imposition on the liquidator in circumstances where there was no realistic prospect of the examination having any practical utility (at [58]). The applicant sought leave to appeal from the orders of the primary judge.

As the Full Court summarised at [4]: "The central issue in KDL's application for leave to appeal the judgment of the primary judge is whether the primary judge erred in principle in permanently staying the examination summons on the basis that it was an abuse of process. Did the primary judge misconstrue the statutory scheme concerning examination summonses in Part 5.9 of the *Corporations Act*? Did that cause her Honour to have regard to irrelevant considerations, or to effectively reverse the onus of proof and require KDL to justify the utility of the examination of Mr Arnautovic?"

The Full Court examined the statutory scheme in respect of examinations under Division 1 of Part 5.9 of the Corporations Act (at [5]-[29]). The important distinctions between s 596A and s 596B were pointed out (at [20]-[24]).

The Full Court said there is no doubt that an examination process can be discharged or permanently stayed if the invocation of the examination process was for an improper

or illegitimate purpose (at [84]). However, here there was no evidence of an improper or illegitmate purpose (at [85]).

Further, the Full Court found that the primary judge erred in finding that examination summons was an abuse of process. Mr Arnautovic led no evidence which was capable of supporting a finding that the proposed examination would be significantly burdensome, costly or intrusive to him or his administration of the winding up of KDC (at [89]).

In addition, the primary judge's conclusion appeared to be based on the presumption or inference "that the examination of any liquidator in the course of the conduct of a liquidation would necessarily involve a substantial intrusion into the liquidation. That assumption or presumption appears to have been derived from her Honour's analysis of the authorities concerning the special position of liquidators, particularly the authorities concerning other statutory powers that permit inquiries into the conduct of liquidators, such as s 536 the *Corporations Act*" (at [90]). The Full Court referred to the dangers of importing statements in those cases to the different legislative context of s 596A (at [91] and [97]). The Full Court said at [93]: "The statutory scheme for examinations [under s 596A] does not treat a liquidator differently to any other officer who might be subject to an examination".

The Full Court continued at [99]: "... the reasoning of the primary judge appears to be based on the premise that the purpose of s 596A, being to benefit the company, its creditors, members or the public, can only be fulfilled if there is 'reason to believe', or there is a 'realistic prospect', that the examination will reveal conduct capable of supporting a claim and therefore have 'practical utility'. That premise is not supported by the terms of s 596A or the statutory scheme for examinations."

The primary judge also erred in considering whether the examination summons was justified or had practical utility by reversing the onus of proof by requiring the applicant to jusfiy the practical utility (at [105]). The burden of proving an abuse of process remained with Mr Arnautovic at all times (at [108]). Mr Arnautovic had not discharged that heavy onus (at [111]).

### INDUSTRIAL LAW

Right of entry – 'State or Territory OHS right' under s 494 of the Fair Work Act

In *Australian Building and Construction Commisisoner v Powell* [2017] FCAFC 89 (2 June 2017) the Full Court (Allsop CJ, White and O'Callaghan JJ) overturned the decision of the primary judge (Bromberg J) that the terms and operation of ss 58 and 70 of the *Occupational Health and Safety Act 2004* (Vic) did not, for the purposes of the s 494 of the *Fair Work Act 2009* (Cth), confer a right to enter premises on an official of an union.

## SEPTEMBER

### CONSUMER LAW CASES

In trade or commerce?

In *Hi-Rise Access Pty Ltd v Standards Australia Limited* [2017] FCA 604 (30 May 2017) the Federal Court gave its judgment on a separate trial as to whether certain alleged representations were made and, if made, whether those representations were made 'in trade or commerce'. The defendants denied that any of the representations were made "in trade or commerce" as required by s 18 of the Australian Consumer Law (ACL) in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

The key question before the Court was whether activities of the peak Australian Standards body in developing, publishing and promoting Australian Standards is 'in trade or commerce' within the meaning of s 18 of the ACL. The Court (Murphy J) dismissed the proceeding on the basis that the relevant activities of Standards Australia were not, by their nature, of a trading or commercial character and its conduct was therefore not 'in trade or commerce' (at [7]).

Justice Murphy summarised his reasons at [6]: "I have found that the impugned statements conveyed some of the alleged representations, but I am not persuaded that they were made 'in trade or commerce' The evidence shows that Standards Australia operates in a quasi-government role in conjunction with the Commonwealth Government to facilitate the development of Standards and to promote the benefits of Standards and standardisation in the public interest. In my view it does not do so in pursuit of trading or commercial objectives. I consider that Standards Australia's activities in developing, publishing and promoting Standards are directed to the interests of the Australian community because of the economic, regulatory, safety and other benefits that flow from standardisation. It is uncontentious that Standards Australia earns significant income through royalty payments from SAI Global Limited (SAI), the company to which it has granted a worldwide

licence to publish, distribute and sell Standards and related products. However, in my view the evidence does not support the conclusion that Standards Australia's relevant activities were designed to increase sales of Standards for the commercial benefit of either itself or SAI."

The Court discussed the applicable principles for the requirement that misleading or deceptive conduct, or conduct that is likely to mislead or deceive, occurs 'in trade or commerce' (at [131]-[142]). The leading authority (which was discussed by the Court) is still *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 (at [135]).

Also referred to was the case law concerning whether the relevant conduct may relate to the trade or commerce of a party other than the representor (at [161]-[165]).

## Some cases on representations to the public

There is a well-established distinction as to the different principles to be applied to a case of misleading or deceptive conduct involving representations to specific individuals or the public (or a segment of the public).

A series of cases of Federal Court cases have addressed and applied the principles falling into that latter category when the public is involved. These include the following:

1. *REA Goup Limited v Fairfax Media Limited* [2017] FCA 91 (13 February 2017) (Murphy J): The case concerned advertisements promoting a mobile phone application of the defendant's subsidiary (Domain Group) to the effect that Domain has the "#1 property app in Australia", "the most property listings in Sydney", "the best property listings in Melbourne" and that the Domain app is "Australia's highest rated property app".

2. *Director of Consumer Affairs Victoria v Gibson* [2017] FCA 240 (15 March 2017) (Mortimer J): This case concerned the conduct of Belle Gibson (and her corporate entity) in relation to her claims of being disgnosed with brain cancer and also statements about their charitable donations. Although the case proceeded as an undefended matter, it is an interesting and high profile application of the principles for contravention of ss 18 and 29 of the ACL as well as s 29 (unconscionable conduct). Note: The declarations of contravention ultimately made by the Court are found in its subsequent judgment Director of Consumer Affairs Victoria v Gibson (No 2) [2017] FCA 366 (7 April 2017).

3. *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liquidation)* (No 2) [2017] FCA 709 (23 June 2017) (Beach J): This case involved false and misleading representations in the supply of services to consumers seeking recognition of their prior learning to gain qualifications. The Court also determined claims of unfair contract terms (ACL ss 23-24), unsolicited consumer agreements (ACL ss 74-79 and 86) and unconscionable conduct ACL ss 21-22). As occurred in the Gibson case, the respondents did not appear at the trial in Get Qualified. Nonetheless, once again there was a detailed analysis of the facts in accordance with the applicable key principles for these claims.

It is apparent from the first and last mentioned cases that there is continuing debate about whether, in a s 18 case with the public, it is necessary for the applicant to show that a significant proportion of the relevant class of persons were misled or were likely to be misled by the relevant conduct. See the view of Muphy J in the REA Group case at [19] and by Beach J in the Get Qualified case at [42]. In the latter, Beach J explained: "... in determining whether a contravention of s 18 of the ACL has occurred, the focus of the inquiry is on whether a not insignificant number within the class have been misled or deceived or are likely to have been misled or deceived by the respondent's conduct. There has been some debate about the meaning of 'a not insignificant number'. The Campomar formulation looks at the issue in a normative sense. The reactions of the hypothetical individual within the class are considered. The hypothetical individual is a reasonable or ordinary member of the class. Does satisfying the Campomar formulation satisfy the 'not insignificant number' requirement? I am now inclined to the view that if, applying the Campomar test, reasonable members of the class would be likely to be misled, then such a finding does not necessarily carry with it that a significant proportion of the class would be likely to be misled. A finding of a 'not insignificant number' of members of the class being likely to be misled is conceptually speaking an additional requirement that needs to be satisfied." (Note: Beach J's references to *Campomar* are to *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at [102]-[103].)

Finally in the context of cases involving the the public, it is worth noting the Full Court's decision from early in the year in *Crescent Funds Management (Aust) Ltd v Crescent Capital Partners Management Pty Ltd* [2017] FCAFC 2 (12 January 2017) (Greenwood, Edelman and Markovic JJ). It is an illustration of the arguments arising in defining what is the relevant class of consumers in a misleading or deceptive conduct claim under the *Australian Securities and Investments Commission Act 2011* (Cth).

### Reliance in the case of omissions

In *470 St Kilda Road Pty Ltd v Robinson* [2017] FCA 597 (30 May 2017), the Court held that a statement that to the best of the person's knowledge and belief he had made all reasonable inquiries before making the statutory declaration,was misleading or deceptive or likely to mislead and deceive (at [73]-[74]).

On the issue whether the applicant had sufferered loss or damage by that conduct, O'Callaghan J said at [79]: "In a case involving a failure to disclose a material matter, such as this, it is not a natural use of the notion of reliance to say that there was reliance on a failure to disclose. In such a case, causation may be found where it is established that disclosure would have caused action different from that in fact taken". Justice O'Callaghan relied upon and cited comments of Gilmour and White JJ in *Addenbrooke Pty Limited v Duncan* (No 2) [2017] FCAFC 76 at [499]-[502].

## OCTOBER

### CORPORATIONS / PRACTICE AND PROCEDURE

Recusal application on the eve of a trial regarding whether liquidator breached s 180 of the *Corporations Act 2001* (Cth)

In *Asden Developments Pty Ltd (in liq) v Dinoris* [2017] FCAFC 117 (10 August 2017) the Full Federal Court dimissed an appeal from the primary judge's dismissal of the proceeding. At first instance the primary judge held that a liquidator (Mr Dinoris) breached his duty as the liquidator of the appellant company and made a finding of contravention of s 180(1) of the *Corporations Act 2001* (Cth) (the Act) against him. However, the primary judge did not award compensation under s 1317H of the Act on the basis that the company had not established that any damage had resulted from the contravention. The Full Court also dismissed a cross-appeal against the findings made against Mr Dinoris.

One of the appellant's grounds of appeal was that the primary judge should have recused himself for apprehended bias (at [35]-[51]). The basis of this ground were comments made by the primary judge at a pre-trial management hearing a few days before the trial commenced. The primary judge dismissed the recusal application that was made at the commencement of the trial. The Full Court (Greenwood, Davies and Markovic JJ) found no error by the primary judge in doing so.

Among other reasons, the Full Court stated that it would be wrong to have regard to the final reasons for judgment in the proceeding in determining whether the comments at the pre-trial case management conference gave rise to an apprehension of bias (at [48]). Their Honours cited and relied upon the following observations of the High Court in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at [67]: "As pointed out earlier in these reasons, an allegation of apprehended bias requires an objective assessment of the connection between the facts and circumstances said to give rise to the apprehension and the asserted conclusion that the judge might not bring an impartial mind to bear upon the issues that are to be decided. An allegation of apprehended bias does not direct attention to, or permit consideration of, whether the judge had in fact prejudged an issue. To ask whether the reasons for judgment delivered after trial of the action somehow confirm, enhance or diminish the existence of a reasonable apprehension of bias runs at least a serious risk of inverting the proper order of inquiry (by first assuming the existence of a reasonable apprehension). Inquiring whether there has been "the crystallisation of that apprehension in a demonstration of actual prejudgment" impermissibly confuses the different inquiries that the two different allegations (actual bias and apprehended bias) require to be made. And, no less fundamentally, an inquiry of either kind moves perilously close to the fallacious argument that because one side lost the litigation the judge was biased, or the equally fallacious argument that making some appealable error, whether by not dealing with all of the losing side's arguments or otherwise, demonstrates prejudgment". (footnotes omitted)

### EMPLOYMENT AND INDUSTRIAL LAW

Whether work was perfomed as employees or independant contractors

In *Putland v Royans Wagga Pty Ltd* [2017] FCA 910 (9 August 2017) the Court determined an employment law dispute arising between a husband and wife (the Putlands) and Royans Wagga Pty Ltd (Royans Wagga) whose principal business was repairing trucks. From September 2012 to early May 2015, the Putlands performed an 'accident reporting service' for Royans Wagga, namely obtaining or otherwise receiving and passing on information about vehicle accidents or other incidents resulting in damage to trucks.

The central issue in this case was the capacity in which the accident reporting service work was performed by the Putlands for Royans Wagga – were they employees of Royans Wagga or independent contractors? If either of the Putlands were found to be an employee of Royans Wagga, back pay was sought according to the *Clerks-Private Sector Award 2010* and civil penalties were sought for alleged contarventions of provisions of the *Fair Work Act 2009* (Cth) such as ss 45, 357(1) and 536. Alternatively, even if the

Putlands were independent contractors, they sought relief in that capacity by way of contract variations for harsh or unfair terms under s 16(1)(b) of the *Independent Contractors Act 2006* (Cth).

The Court (Bromwich J) ultimately found that the Putlands were employees of Royans Wagga (at [16] and [258]-[281]). Bromwich J summarised the established principles from the case law on the characterisation of employment contracts and independent contractors (at [17]-[31]). By reference to the leading authorities, his Honour discussed the prominent factor of the degree of control which a person who engages another to peform work has and the "modernisation that produced the shift from actual control to the right to exercise it" (at [24]).

Applying the factors telling for and against the Putlands being in an employment contract relationship or independent contractors, the Court found "in the end by a comfortable margin" that they perfomed the accident reporting service works as employees. Bromwich J said at [279]: "The weight of the indicia established by the evidence, dominated by the finding of Royans Wagga's authority to control, favours finding an employment relationship rather than an independent contractor relationship, notwithstanding certain lesser features that are in common or more telling of the latter. The reality is that the impact of technology, and in particular communications technology, has greatly facilitated working from home where the substance of work is no different from that which was done in the workplace in the past. However, quite apart from the arrangements in the Hut which strongly tell of an employment relationship, the key features, even for the weekend and after hours work from home, are the undoubted control that Royans Wagga, through Mr Andrews, had the authority to exercise and did exercise from time to time, and the fact that the work was only done for Royans Wagga. Any sense in which the applicants were entrepreneurs and running their own business was illusory and, in any event, a matter of form rather than substance. They were not truly performing work as entrepreneurs owning and operating a separate business. They were not truly working in and for their own business and as representatives of that business but, rather, were performing work as representatives of Royans Wagga".

The Court then addressed the alleged breaches of the *Fair Work Act 2009* contingent on finding an employment relationship (at [282]-[336]).

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**CROSSWORDS ANSWERS**

ACROSS 1. Lien 5. Circa 8. Abeyance 10. Fact 11. Dock 12. Tin 14. Sue 15. Firm 16. Ow 17. Dupe 18. She 19. Seat 20. Seizure 23. Abraham Lincoln 26. Aid 27. Upon 28. Narks 29. Eluded 31 Offense 35. Erroneous 37. Table DOWN 1. Life 2. Native 3. Debts 4. BA 6. Roo 7. Askew 9. Confession 11. Dim 12. Testimony 13. Julia Gillard 16. Oar 19. Statute 21. URL 24. Consent 25. PS 30. Doe 32. Sob 33. Mug 34. Hex 36. Oz 38. AM