Andrew Yuile's High Court Judgments

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MARCH

INDUSTRIAL RELATIONS LAW

Statutory interpretation – Fair Work Act 2009 (Cth) – Entitlement to represent industrial interests

In *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55 (13 December 2017) the High Court considered whether an industrial association was entitled to 'represent the industrial interests of' a person if the person was eligible for membership of the association but was not actually a member. The respondent was an industrial association registered as an organisation of employees under the *Fair Work (Registered Organisations) Act 2009* (Cth). It alleged that a letter sent by the appellant contravened civil penalty provisions of the Fair Work Act. However, not every person to whom the letter was sent was a member of the association. The appellant argued that the respondent lacked standing to bring the action because it was not 'entitled to represent the industrial interests' of the persons who had received the letter, within the meaning of s 540(6)(b)(ii) of the *Fair Work Act 2009* (Cth). The High Court held that, properly construed, that section encompassed persons eligible for membership under the association's eligibility rules even if those persons were not actually members. That followed especially from the statutory purpose, the context of the phrase in the Fair Work Act, and the historical context to the provision. Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from the Full Federal Court dismissed.

INDUSTRIAL LAW

Approval of enterprise agreements – The 'better off overall test'

ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association [2017] HCA 53 (6 December 2017) concerned approval by the Fair Work Commission (Commission) of an enterprise agreement for a new enterprise with existing employees and the Commission's consideration of the 'better off overall test' (BOOT). ALDI planned to open a new store. Fifteen existing employees from other stores accepted an offer to work at the new store. After a bargaining and voting process, a new enterprise agreement was made under s 172(a) of the *Fair Work Act 2009* (Cth) to cover the new store. ALDI applied to the Commission for approval of that agreement. At the time of the vote, the new store was still being built. The respondent appealed to the Full Bench of the Commission alleging that the new agreement should have been a 'greenfields' agreement under s 172(2)(b) because the new store was a new enterprise and none of the people required for the new

enterprise had been employed by that enterprise. The respondent also argued that the agreement did not pass the BOOT. The Commission rejected both arguments. On appeal, the Full Federal Court held that it was not open to the Commission to approve the agreement because it had not been 'genuinely agreed to by the employees covered by the agreement', under s 186(2)(a). That followed because no employee was working under the agreement and thus could not be 'covered' by it. The Court also upheld the BOOT argument. The High Court unanimously overturned the first argument, but upheld the second. The Court held that it is implicit in ss 172(2) and (4) that agreements can be made with employees employed by the company but not employed in a new enterprise. Such agreements would need to be made under s 172(2)(a). The Act also distinguishes between coverage and application. Sections 52 and 53 allow for an agreement, once made, to 'cover' employees not yet working, though the agreement will not 'apply to' them until they begin working under it. On the BOOT issue, the Court held that the Commission was required to conduct an evaluative assessment after considering the relevant award and the proposed agreement. The Commission erred by failing to conduct that comparison and by instead considering only a limited provision in the agreement, granting to employees a right to payment of any shortfall between the award and the agreement. Equalisation, in this sense, was not the same as 'better off overall'. Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from the Full Federal Court allowed in part.

PROTECTED INDUSTRIAL ACTION

Contravention of orders that apply – Action with intent to coerce

In *Esso Australia Pty Ltd v The Australian Workers' Union* [2017] HCA 54 (6 December 2017) the High Court considered two appeals concerning the requirements of protected industrial action and action with intent to coerce under the *Fair Work Act 2009* (Cth). The Australian Workers' Union (AWU) organised industrial action during a negotiation with Esso in 2015. The AWU claimed the action was 'protected industrial action' under the Act. Esso obtained an order from the Fair Work Commission requiring the AWU to stop organising certain action between certain dates. The AWU continued to organise the action. Esso sought from the Federal Court declarations that the AWU had contravened an order applying to it and that related to the industrial action, with the consequence that after the order was made the AWU could not meet s 415(5) of the Act. That section is a prerequisite for 'protected industrial action'. Esso appealed on this point (the first appeal). The issue was the scope of the order said to be contravened and whether it mattered that the order later ceased. The High Court held by majority that s 415(5) includes any breach of a relevant order, including past contraventions. It is not limited to orders that are in existence or may still be complied with at the time of the proposed protected industrial action. The second appeal, by AWU, concerned an allegation by Esso that the AWU had organised action with intent to coerce Esso to enter into an agreement on less favourable terms, in contravention of s 343 or s 348 of the Act. In this appeal, the issue was whether the sections required AWU to have intended their action to be unlawful, illegitimate or unconscionable. The High Court held unanimously that knowledge or intent of that kind is not required. A contravention of s 343 or s 348 is constituted of organising, taking or threatening action against another person with intent to negate that person's choice. Kiefel CJ, Keane, Nettle and Edelman JJ jointly; Gageler J separately dissenting in the first appeal and concurring in the second. Esso's appeal allowed; AWU's appeal dismissed (Full Federal Court).

ADMINISTRATIVE LAW

Appeal from Supreme Court of Nauru – Migration

In *DWN042 v The Republic of Nauru* [2017] HCA 56 (13 December 2017) the High Court held that the Nauru Supreme Court failed to accord the appellant procedural fairness. The appellant sought refugee status in Nauru after being transferred there under regional processing arrangements. The application was refused by the Secretary of the Department of Justice and Border Control of Nauru and the Refugee Status Tribunal (RST) on review. On appeal to the Supreme Court, the appellant raised four grounds. At the hearing of the appeal, the Supreme Court struck out grounds 1 and 2. Argument continued on the remaining grounds. The Supreme Court later gave reasons for the strike out, which both parties agreed were plainly wrong. The appellant sought leave to appeal from the strike out to the High Court. Leave was refused following assurances from the respondent and because of the interlocutory nature of the application. Amid negotiations about a motion to reopen, the Court informed the parties that the judgment on grounds 3 and 4 would be delivered the next day. Later the same day, the appellant filed a motion to reinstate grounds 1 and 2, and to reopen the appeal to further amend the grounds. The Supreme Court gave judgment without hearing the motion. The motion was not mentioned in the judgment. The appellant appealed to the High Court on five grounds. The Court unanimously upheld the first, holding that the Supreme

Court erred by not considering the motion. The remaining grounds were dismissed. Those argued that the appellant's detention was unconstitutional; that the Supreme Court had erred by not finding that the RST had erred by failing to consider part of the appellant's claim; and that the Supreme Court had erred by not finding that the RST had erred by relying on an unsigned, unsworn document. The decision was quashed and sent back to the Supreme Court for reconsideration. Keane, Nettle and Edelman JJ jointly. Appeal from the Supreme Court (Nauru) allowed.

APRIL

PROCEEDS OF CRIME

Statutory interpretation – Proceeds of Crime Act 2002 (Cth) – Recovery of forfeited property

Commissioner of the Australian Federal Police v Hart; Commonwealth v Yak 3 Investments Pty Ltd; Commonwealth v Flying Fighters Pty Ltd [2018] HCA 1 (7 February 2017) concerned the proper construction of s 102 of the *Proceeds of Crime Act 2002* (Cth) (POCA), which allows for a person to recover property forfeited to the Commonwealth in certain circumstances. Steven Hart was an accountant who was convicted of nine counts of defrauding the Commonwealth. Under s 92 of the POCA, property of Mr Hart and companies with which he was associated was automatically forfeited to the Commonwealth. Companies with interests in the property applied to the Queensland District Court to recover their interests under s 102. That section, as it stood at the relevant time, required the applicants to show that 'the property was not used in, or in connection with, any unlawful activity', 'the property … was not derived or realised, directly or indirectly, by any person from any unlawful activity' and 'the applicant acquired the property lawfully'. The Commonwealth Director of Public Prosecutions (CDPP) also applied to the District Court under s 141 of the POCA for a declaration that any property recovered by the companies was available to satisfy any pecuniary penalty order made against Mr Hart. The Court could only make such a declaration if satisfied that the relevant property was subject to the effective control of Mr Hart. The District Court made the recovery orders but not the declaration. Both parties appealed. The Court of Appeal upheld the recovery order, accepting that property would only be 'derived' in the necessary sense if it was 'wholly derived' from unlawful activity. The CDPP's appeal was dismissed on the basis that s 141 was to be assessed as at the date of the application, and at that time it could not be shown that Mr Hart had the requisite control. The Commonwealth appealed. The High Court allowed the appeal in respect of the recovery order but dismissed the appeal regarding s 141. On recovery, the Court held that it is enough for the property to be partly derived from unlawful activity. The degree of derivation must be more than trivial, but need not be substantial. The Court also held that whether property has been used in, or in connection with, unlawful activity does not require a causal link between the property or the offence, nor need the property have been necessary for the commission of the offence or have made a unique contribution to the offence. The degree of use does not need to be proportionate to the forfeiture. Last, the Court held that the applicant must show that each step in the process by which it acquired the property was lawful, and that all of the consideration for the acquisition was lawfully acquired. In this case, on the facts, the requirements of s 102 could not be made out. On s 141, the Court held that effective control of property is to be assessed at the date of the determination of an application under that provision. Kiefel CJ, Bell, Gageler and Edelman JJ jointly, concurring with the separate reasons of Gordon J. Appeal from the Court of Appeal (Qld) allowed in part and dismissed in part.

CONSTITUTIONAL LAW

Chapter III judicial power – Migration detention – Visa cancellation

In *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2 (7 February 2018) the High Court held that a power conferred by the Migration Act 1958 (Cth) on the Minister for Immigration and Border Protection requiring the Minister to cancel visas in certain situations did not confer judicial power. The appellant had lived in Australia since 1956. In 2008, he was convicted of trafficking a large commercial quantity of cannabis and sentenced to 11 years' imprisonment. Just before the end of his non-parole period, a delegate of the Minister cancelled the appellant's visas under s 501(3A) of the Act. That section provides that the Minister must cancel a person's visa if the Minister is satisfied that the person does not pass the character test because they have a substantial criminal record, and the person is currently serving a sentence of imprisonment on a full-time basis. A substantial criminal record includes where a person has been sentenced to twelve months or more in prison. The result was that the appellant became an unlawful non-citizen, was taken into immigration detention and became liable to deportation. The appellant argued that s 501(3A) conferred judicial power on the Minister, because the legal operation and effect of the provision is to punish the appellant by requiring his continued detention, and such punishment can only be imposed in the exercise of judicial power. The Court unanimously held that s 501(3A) did not authorise

or require the appellant's detention. That section only required the cancellation of his visa as part of a statutory scheme to regulate the presence of non-citizens in Australia and to remove non-citizens not permitted to stay here. The detention was imposed for the purpose of facilitating his removal from Australia. The cancellation of the visa therefore did not involve punishment and did not involve an exercise of judicial power. Kiefel CJ, Bell, Keane, and Edelman JJ jointly; Gageler and Gordon JJ jointly concurring; Nettle J separately concurring. Application in the original jurisdiction dismissed.

INDUSTRIAL LAW

Pecuniary penalties – Power to make orders preventing indemnification

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] HCA 3 (14 February 2018) concerned the power of a judge to make orders under the *Fair Work Act 2009* (Cth) (FWA) to prevent a person the subject of a pecuniary penalty order from being indemnified in respect of that penalty. Mr Joseph Myles, the second respondent, organised and participated in a blockade of a site of a large construction project. The appellant brought proceedings in the Federal Court in which it was accepted by the respondents that Mr Myles' actions contravened the FWA. The only issue before the Court was penalty. The primary judge ordered Mr Myles to pay a pecuniary penalty of $18 000 pursuant to s 546(1) of the FWA, which confers power to order a person to pay a pecuniary penalty if the Court is satisfied that the person has contravened a civil penalty provision. The judge also made an order, purportedly under s 545 of the FWA, that the CFMEU 'not directly or indirectly indemnify' Mr Myles in respect of that penalty (the 'non-indemnification order'). Section 545(1) provides that the Federal Court 'may make any order the court considers appropriate' if satisfied that a person has contravened a civil penalty provision. The Full Federal Court held that ss 545 and 546 of the FWA, and s 23 of the *Federal Court of Australia Act 1975* (Cth) (FCA Act), did not provide power to make the additional order. The High Court unanimously upheld those findings. However, by majority, the Court also held that s 546 of the FWA carried with it an implied power to do everything necessary for the effective exercise of the power to impose a pecuniary penalty, including making orders reasonably required for the accomplishment of the deterrent effect of the penalty. Section 546 therefore granted power 'to make an order that a contravener pay a pecuniary penalty personally and not seek or accept indemnity from a co-contravener' (a 'personal payment order'). The matter was sent back to the Full Court for the imposition of penalties. Keane, Nettle and Gordon JJ jointly; Kiefel CJ separately concurring; Gageler J separately concurring on the issue of the non-indemnification order and dissenting on the issue of the personal penalty order. Appeal from the Full Federal Court allowed.

ADMINISTRATIVE LAW

Judicial review – Availability of quashing orders – Security of payments legislation

In *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 (14 February 2018) the appellant and first respondent were parties to a construction contract. The *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOP Act) grants to persons carrying out work under such a contract an entitlement to progress payments on the making of payment claims. Disputed payment claims may be referred to an adjudicator, who is to determine the amount of the progress payment (if any) to be paid. Shade Systems served on Probuild a payment claim, which Probuild refused to pay as it claimed to be owed a higher amount in liquidated damages. Shade Systems applied for adjudication. The adjudicator rejected the liquidated damages claim and determined that Probuild was liable to pay an amount. Probuild sought judicial review in the Supreme Court, seeking to quash the determination on the basis that the adjudicator had made errors of law on the face of the record. The primary judge granted that application. The Court of Appeal overturned that finding, holding that the SOP Act excluded the Supreme Court's jurisdiction to quash determinations for non-jurisdictional error on the face of the record. The High Court dismissed Probuild's appeal. The Supreme Court's jurisdiction to make orders in the nature of certiorari for non-jurisdictional error of law on the face of the record could be ousted by statute. While the SOP Act did not expressly oust that jurisdiction, the scheme of the Act disclosed that intention. That followed from the creation of a scheme creating an interim entitlement to a progress payment that is determined informally, summarily and quickly, and then summarily enforced without prejudice to parties' common law rights (including to enforce contractual entitlements). Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly; Gageler J and Edelman J each separately concurring. Appeal from the Court of Appeal (NSW) dismissed.

Judicial review – Availability of quashing orders – Security of payments legislation

In *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5 (14 February 2018) the High Court followed its findings in *Probuild Constructions* (above) in respect of the SA Supreme Court and the *Building and Construction Industry Security of Payment Act* 2009 (SA) (SOP Act). The Court also considered s 12 of the SOP Act and 'pay when paid' provisions. Maxcon and Mr Vadasz were parties to a construction subcontract. The subcontract required Mr Vadasz to provide an amount of money as security (the 'retention provisions'). Mr Vadasz made a payment claim. Maxcon responded that it was entitled to deduct the retention sum and administrative charges from the payment claim. Mr Vadasz sought an adjudication. The adjudicator found that the retention provisions were 'pay when paid' provisions within the meaning of the SOP Act and Maxcon was not entitled to deduct them. Under s 12 of the SOP Act, a 'pay when paid' provision cannot be taken into account in relation to payment for construction work carried out under a construction contract. 'Pay when paid' provisions include provisions making the liability to pay money owing contingent or dependent on the operation of another contract. Maxcon sought judicial review of the adjudicator's decision. In the Supreme Court, the primary judge held that the adjudicator had erred, but that the error was not jurisdictional. The Full Court allowed the appeal. It held that the adjudicator erred in finding that the retention provisions were 'pay when paid' provisions, but that the error was not jurisdictional. It also decided to follow the NSW Court of Appeal decision in *Probuild Constructions* to find that its jurisdiction to issue certiorari for non-jurisdictional error was ousted. The High Court held that the adjudicator did not err in finding that the retention provisions were 'pay when paid' provisions. That followed because the retention sum was to be released only after a certificate of occupancy had been provided, which required completion of the head contract. The Court also concluded, consistent with its decision in *Probuild Constructions*, that the SOP Act ousted the jurisdiction of the Supreme Court to make an order in the nature of certiorari quashing the adjudicator's determination for non-jurisdictional error of law on the face of the record. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly; Gageler J and Edelman J separately concurring. Appeal from the Full Court of the Supreme Court (SA) dismissed.

MAY

CONSTITUTIONAL LAW

'Office of profit under the Crown' – Section 44(iv) of the Constitution

In *Re Lambie* [2018] HCA 6 (14 March 2018) the High Court considered the meaning of the phrase 'under the Crown' in s 44(iv) of the Constitution in deciding whether Mr Steven Martin was incapable of sitting or being chosen as a senator. In December 2017, the High Court answered questions referred to it, finding that Ms Jacqui Lambie was incapable of being chosen as a senator. Mr Martin was identified by a special count as a candidate who could be elected in her place. Mr Martin was, at all relevant times, the mayor and a councillor of the Devonport City Council, which is established by the *Local Government Act 1993* (Tas). The question for the Court was whether those positions were 'offices of profit under the Crown' within s 44(iv). It was accepted that they were 'offices of profit' and that the 'Crown' in s 44(iv) meant the 'executive government' of the Commonwealth or a state. The decision turned on the meaning of 'under' and the relationship required between the executive and the office. A majority of the Court held that s 44(iv) seeks to avoid a conflict between a parliamentary member's duties to the House and a pecuniary interest allowing for executive influence over the performance of parliamentary duties. Relevantly, an office would be held 'under' the Crown if it was held at the will of the executive or the receipt of profit from the office depended on the will of the executive. In this case, Mr Martin's positions depended on the *Local Government Act* and the executive did not have effective control over Mr Martin holding or profiting from them. The offices were, therefore, not 'under the Crown'. Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ jointly; Edelman J separately concurring for different reasons. Answers to questions referred given.

Citizenship – Parliamentary elections – Special count of votes

In *Re Kakoschke-Moore* [2018] HCA 10 (21 March 2018) the High Court considered how to fill the vacancy in the Senate left because Ms Kakoschke-Moore was ineligible to be elected because of her British citizenship. The Court reserved questions as to the method of filling the vacancy, whether Ms Kakoschke-Moore could be included in that method once she renounced her British citizenship, and whether Mr Storer, who was a NXT candidate but had ceased to be a NXT member, could be elected. With respect to filling the vacancy, Ms Kakoschke-Moore argued

that, once she had renounced her British citizenship, she could be re-appointed. The Court rejected that argument, holding that her renunciation did not operate retrospectively and she remained ineligible at the time of the election. The vacancy should be filled by a special count of votes. The Court also held that Ms Kakoschke-Moore was not capable of being a candidate in the special count because the special count was a part of the original election. It was not a separate process, but was designed to complete the original election process. Ms Kakoschke-Moore was not eligible to take part in that process. In respect of Mr Storer, it was argued that he should not be allowed to take part in the special count because he was a member of NXT at the election, but had left the party since. Notwithstanding his leaving the party, in the special count 'above the line' NXT votes would flow to him. The voters' intent was said to be to vote for someone of the NXT party. The Court rejected that argument. Electors voting above the line should be taken as intending to vote for Mr Storer. Nothing in the *Constitution or the Commonwealth Electoral Act 1918* (Cth) requires that a person affiliated with a party and elected as such must remain affiliated with that party. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Answers to questions reserved given.

Common informer action – Jurisdiction of the High Court to decide whether MP eligible for election

Alley v Gillespie [2018] HCA 11 (21 March 2018) concerned an action brought by Peter Alley against David Gillespie, alleging that Mr Gillespie should pay a penalty under the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) (Act). That Act provides that a person who has sat as a member of the Senate or House of Representatives when incapable of so sitting is liable to pay a penalty to a person who sues for it. Mr Alley brought such an action, alleging that Mr Gillespie was incapable of sitting as a member of the House of Representatives because of an improper pecuniary interest under s 44(iv) of the Constitution. The issue for the High Court was whether it had jurisdiction to determine the question of Mr Gillespie's qualification to sit, which was a prerequisite for the action. The High Court held that it did not have that jurisdiction because it was a question to be resolved by the House of Representatives until referred by the House to the High Court. That followed from s 47 of the Constitution, which provides that, until the Parliament otherwise provides, any question about the qualification of a person to be a senator or member of the House of Representatives is to be determined by that House. The Parliament did 'otherwise provide', in s 376 of the *Commonwealth Electoral Act 1918* (Cth), which allows for a House of Parliament to refer questions concerning the qualification of members to the High Court as the Court of Disputed Returns. Therefore, while the Court has jurisdiction with respect to the penalty proceeding under the Act, it does not have jurisdiction to decide the anterior question. Kiefel CJ, Bell, Keane and Edelman JJ jointly; Gageler J separately and Nettle and Gordon JJ jointly concurring.

CRIMINAL LAW

Appeal against conviction – Application of the 'proviso' – Whether 'substantial miscarriage of justice' occurred

In *Kalbasi v Western Australia* [2018] HCA 7 (14 March 2018) the High Court considered the 'proviso' that, notwithstanding error, a court may dismiss an appeal against conviction if 'no substantial miscarriage of justice has occurred'. The appellant was convicted of attempting to possess 4.981kg of a prohibited drug with intent to sell or supply to another, contrary to the *Misuse of Drugs Act 1981* (WA) (MDA). A consignment of methylamphetamine was replaced with rock salt by police. A person known to the appellant collected the consignment. The appellant was present when the 'drugs' were unpacked and the appellant's DNA was found in gloves used to cut drugs in the premises. The issue at trial was whether the appellant was 'in possession' of the 'drugs'. Section 11 of the MDA deems that a person in possession of more than 2g of methylamphetamine, subject to proof to the contrary, possesses the drug with intent to sell or supply. However, prior authority held that s 11 does not apply to the charge of attempted possession of a prohibited drug. At trial the judge and counsel assumed that s 11 applied. The jury was directed accordingly on the issue of intention to sell or supply. On appeal the Crown admitted the misdirection but argued that the proviso applied. The Court of Appeal agreed and dismissed the appeal. In the High Court, the majority declined to re-open the principles governing the proviso stated in *Weiss v The Queen* (2005) 224 CLR 300. The majority also rejected the appellant's arguments about the way the trial would have been run or the way the jury might have decided the case if the misdirection had not occurred. Their Honours held that there was nothing in the evidence or the way the appellant ran his case that left open the possibility that the jury could find he was in possession of less than the whole of the 'drugs' with a view to purchasing an amount for his own use. The Court of Appeal was correct to hold that proof beyond reasonable doubt that the appellant had attempted to possess the 'drugs' compelled the conclusion that he intended to sell

or supply it to another. Therefore, the misdirection did not occasion a substantial miscarriage of justice. Kiefel CJ, Bell, Keane and Gordon JJ jointly; Gageler J, Nettle J and Edelman J each separately dissenting. Appeal from the Court of Appeal (WA) dismissed.

Verdicts unreasonable or unsupportable on evidence – Criminal responsibility and foreseeability

Irwin v The Queen [2018] HCA 8 (14 March 2018) concerned whether the jury's verdict was unreasonable or incapable of being supported by the evidence. The appellant was convicted of one count of unlawfully doing grievous bodily harm and acquitted of one count of assault occasioning actual bodily harm. At trial, an issue was foreseeability. Section 23(1) of the *Criminal Code* (Qld) provides that a person is not criminally responsible for an event that the person does not intend or foresee as a possible consequence, and that an ordinary person would not reasonably foresee as a possible consequence. The appellant accepted that the judge's directions on this point were correct, but argued that the jury could not rationally have excluded the possibility that an ordinary person in the appellant's position would not reasonably have foreseen the possibility of an injury of the kind sustained by the complainant as a possible consequence of the appellant's actions. In the High Court, the appellant argued that the Court of Appeal had applied an incorrect test of whether a reasonable person 'could' as opposed to 'would' have foreseen the outcome. The High Court held that there was a difference in meaning between those two words and the proper test was 'would'. The Court of Appeal should not have expressed the test in terms of 'could'. However, the jury had been properly directed and there was no reason to doubt that they had adhered to the directions or to doubt the reasonableness of the verdict they gave. Other alleged errors in the Court of Appeal's approach were rejected. Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ jointly. Appeal from the Court of Appeal (Qld) dismissed.

Murder and manslaughter – Appeal on conviction – Acting on incorrect advice – Miscarriage of justice

In *Craig v The Queen* [2018] HCA 13 (21 March 2018) the High Court considered whether there had been a miscarriage of justice as a result of incorrect advice given by counsel. The appellant was convicted of murdering his partner. He claimed that they had been drinking and had an argument, and his partner picked up a knife. The appellant disarmed her, but accidentally cut her neck. He admitted the act, but argued that the requisite intent was not present. The appellant did not give evidence at the trial. He was advised by his counsel that if he gave evidence, it was likely he would be cross-examined on his criminal history, which included a conviction for a fatal stabbing; and on inconsistencies between his evidence and his statement to police. The second part of the advice was correct, but the first part was not. The appellant appealed his conviction arguing that the trial miscarried because his decision not to give evidence was based on the incorrect advice. The Court of Appeal rejected that argument, holding that there was a sound forensic reason not to give evidence. The High Court held that to find that a trial was not fair requires satisfaction that the accused wished to give evidence and the incorrect advice effectively deprived the accused of the chance to do so. That finding does not depend on an assessment of whether an objectively rational justification for the original decision can be discerned. Instead, the appellate court looks to the nature and effect of the incorrect advice on the accused's decision. In this case, the Court of Appeal's conclusion was correct, as the evidence did not show that the appellant's trial would have been conducted differently had the incorrect advice not been given. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (Qld) dismissed.

PLANNING LAW

Town planning – Conditions on development – Enforcement orders

In *Pike v Tighe* [2018] HCA 9 (14 March 2018) the High Court considered whether conditions on planning approvals run with the land and oblige successors in title to fulfil conditions that were not fulfilled by the original owner. The Townsville City Council (Council) issued a planning approval over land allowing for it to be developed into two lots. One condition of the approval was that an easement had to be registered over lot 1 for the benefit of lot 2. Easements were created by the owner, but not in accordance with the condition. Nonetheless, the Council approved the relevant survey plan and the easements were registered. The Tighes were later registered as owners of lot 1 and the Pikes were registered as owners of lot 2. The Pikes applied to the Land and Environment Court for a declaration that the development approval had been contravened and for an enforcement order requiring compliance with the condition. The Tighes argued that any development offence committed by a failure of the original owners to comply with a condition was the fault of the original owner, not the successor. At first instance, the Judge granted relief, holding that the conditions in the approval ran with the land. The Court of Appeal overturned that decision. The case turned on the meaning of s 245 of

the *Sustainable Planning Act 2009* (Qld) which stated that a development approval attaches to the land the subject of the application and binds the owner and any successors in title. The High Court held that s 245 'expressly gives development conditions of a development approval the character of personal obligations capable of enduring in their effect beyond the completion of the development'. The approval and the conditions attach to the whole of the land, not just the lots. Because the condition had not been complied with, there had been a contravention of the Act. The enforcement order could therefore be made. Kiefel CJ, Bell, Keane, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (Qld) allowed.

EQUITY

Power of a court to set aside a perfected judgment – Fraud

Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers and Managers Appointed) [2018] HCA 12 (21 March 2018) concerned the scope of the equitable power of the Supreme Court of a state to set aside its own perfected judgment. The proceedings concerned a dispute about the interpretation of a lease executed between the parties and, in particular, whether the lease provided for a transfer of lease premises and licences for 'NIL' consideration. That dispute turned on whether the respondent had struck through the word NIL when the lease was executed. No original of the lease was found and copies of the lease produced to the Court by the parties were inconclusive, but tended to suggest the word was not struck through. However, unbeknown to the respondent, junior counsel for the appellant had been told by an employee of the Liquor and Gambling Commissioner (Commissioner) about another copy of the lease (the 'third copy') that showed the strike through more clearly. The employee was instructed not to copy the lease, to avoid its discovery, and later subpoenas were directed at files held by the Commissioner that did not contain the additional copy of the lease, meaning that the third copy was never produced to the respondent. A fourth copy was, however, produced to the Court as part of a further file, but was never called on. At first instance, the South Australian Supreme Court found for the appellant, largely because of a finding that the word NIL was not struck through. The respondent later found out about the third and fourth copies and brought proceedings to set aside the judgment and to get a new trial. The respondent alleged malpractice on the part of the appellant and argued that the judgment could therefore be set aside. The primary judge and the Court of Appeal accepted those arguments. The High Court held that the equitable power to set aside was limited to actual fraud, though there were other grounds for setting aside not relevant in this case. Malpractice was not sufficient. Fraud had to be clearly pleaded and proved, which had not occurred. The proper application was a new proceeding seeking to rescind the perfected orders, not an application in the original proceedings. Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ jointly. Appeal from the Full Court of the Supreme Court (SA) allowed.