Dan Star QC Federal Court Judgments

Dan Star QC is a Senior Counsel at the Victorian Bar, telephone (03) 9225 8757 or email danstar@vicbar.com.au.

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Numbers in square brackets refer to a paragraph number in the judgment.

JUNE

CONSTITUTIONAL LAW – FREEDOM OF INFORMATION

What is a 'matter'?

In *Australian Information Commissioner v Elstone Pty Ltd* [2018] FCA 463 (9 April 2018) the Court was considering a referral of two questions of law by the Australian Information Commissioner (the Information Commissioner) under s 55H of the *Freedom of Information Act 1982* (Cth) (FOI Act).

A company (Sydney HeliTours) made a freedom of information request (FOI request) to the Civil Aviation Safety Authority (CASA) for access to a copy of a complaint made to CASA against it. CASA decided that the relevant document was exempt in full and Sydney HeliTours sought a review by the Information Commissioner under s 54L of the FOI Act of CASA's decision (IC review). Before the IC review was complete, CASA decided to vary its decision by providing Sydney HeliTours with access to some material in the document but redacting parts of the document. Sydney HeliTours pressed for access to the document in full in the IC review. CASA's view was that the IC review now related to its varied or revised decision. However, there was a construction of the applicable provisions of the FOI Act in decisions of the Administrative Appeal Tribunal (AAT) to the effect that an agency cannot vary its original decision under s 55G by giving the FOI applicant access to more information that is not the entire document or the entire material requested (at [12]). The Information Commissioner had taken a different view in other decisions made by him (at [13]). Thisprovided the foundation for the questions of law which were referred to the Court by the Information Commissioner on his own initiative. In summary, those questions were at [14]:

1. Was CASA's decision to give Sydney HeliTours access to further parts of the document under review a "revised decision" within the meaning of s 55G of the FOI Act?

2. Was that decision by CASA the decision under review pursuant to s 55G(2)(b) of the FOI Act?

The Court dismissed the Information Commissioner's originating application on the basis that there was no 'matter' for the purposes of Chapter III of the Constitution (at [48]). Griffiths J referred at [31]-[32] to the meaning of 'matter' in the authorities and in particular the principles discussed in *CGU Insurance Limited v Blakeley* (2016) 259 CLR 339 at [26], [27] and [29] per French CJ, Kiefel, Bell and

Keane JJ. There was no 'matter' in the proceeding because two referred questions of law did not involve any dispute or controversy between the parties (at [39]).

Griffiths J explained at [37]: "... The referred questions reflect the existence of a difference of opinion between the Information Commissioner and the AAT as to the proper construction of s 55G, but they do not involve a controversy or dispute between the Information Commissioner and either of the respondents in relation to the subject matter of those questions. Without doubt, there is a controversy or dispute between the first and second respondents. That controversy relates to the extent to which CASA is obliged to provide Sydney HeliTours with access to the entirety of the two-page document. But that is not the controversy which is the subject of the two referred questions."

The Court observed that its decision turned on the particular circumstances of the case and that nothing said should be regarded as casting any doubt on the constitutional validity of s 55H of the FOI Act or the availability of that procedure in an appropriate case where there is a 'matter' (at [47]).

ADMINISTRATIVE LAW – MIGRATION LAW

Jurisdictional error – Unreasonableness and irrationality in the sense of Li (2013) 249 CLR 332

In C*PJ16 v Minister for Immigration and Border Protection* [2018] FCA 450 (5 April 2018) the Court set aside the decision of the Administrative Appeals Tribunal (AAT) to affirm the decision of the delegate of the Minister not to grant the applicant a bridging E (Class WE) visa and remitted the relevant merits decision back to the AAT to decide in accordance with law.

The applicant, a New Zealand citizen who had been living in Australia since in 2009, had a lengthy criminal history in both New Zealand and Australia. Those convictions, along with other facts and circumstances found by the AAT, led to the conclusion that the applicant did not pass the character test because of her past and present criminal and general conduct, and because of a risk that, if she were allowed to enter or remain in Australia, she would engage in criminal conduct here (see ss 501(6)(c)) and (6)(d) of the *Migration Act 1958* (Cth)). The circumstances relied on by the AAT in making the adverse character findings included (relevantly) orders made by the Children's Court of New South Wales allocating parental responsibility for her Australian child (B) to B's father, including undertakings he gave to provide limited supervised contact between the applicant and B.

While various grounds of judicial review failed, Bromwich J held that the AAT fell into jurisdictional error by finding that Children's Court orders reflected adversely on the applicant's character (at [39]-[56]) regarding ground 4. The AAT's conclusion was legally unreasonable or irrational in the sense explained by the High Court in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [72] and [76]. There was no foundation for the AAT's finding that the making of the Children's Court orders, including the undertakings given by B's father, without more, adversely reflected on the applicant's conduct towards B (at [51]).

Bromwich J explained at [55]: "All of the available evidence points inexorably to the conclusion that the Children's Court orders were made in the due application of the precautionary principle, which not only makes it clear that no such finding had to be made, but that no such finding should be made in the absence of sufficient proof. It was legally unreasonable or irrational to conclude, as the Tribunal did, that the making of the orders by the Children's Court, even being conditional upon the severe restrictions reflected in the undertaking given by B's father, constituted any basis for reflecting adversely on the applicant's conduct towards B in the sense of establishing that such conduct had, in fact, taken place ..."

ADMINISTRATIVE LAW – WORKERS' COMPENSATION

AAT denied procedural fairness by basing its decision on a basis not contemplated by the parties

In *Comcare v Wuth* [2018] FCAFC 13 (3 April 2018) the Full Court (Siopsis, Flick and Perry JJ) allowed Comcare's appeal in part.

Ms Wuth made a claim for compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the SRC Act). Comcare's liability to pay compensation under s 14 of the SRC Act was not in dispute. What was in issue in the appeal to the Court at first instance was the quantum of workers compensation entitlements payable to Ms Wuth by way of incapacity compensation and permanent impairment compensation under the SRC Act.

Comcare succeeded in its appeal that the primary judge erred in finding that the AAT did not deny Comcare procedural fairness in assessing, without prior notice, the degree of Ms Wuth's permanent impairment using its own 'clinical judgment' by undertaking a comparison between

her impairment and similar conditions with similar impairment by reference to rating Tables 13.2 and 13.3 in the 5th edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA5): [1] (Siopsis J), [22]-[30] (Flick J) and [96]-[103] (Perry J).

It was common ground that the AAT was obliged to provide procedural fairness to both Ms Wuth and Comcare (at [22] (Flick J), [87] (Perry J)). The dispute between the parties concerned whether the AAT had denied Comcare procedural fairness by reason of the reliance it placed on Chapter 13 of AMA5. No reference had been made to Chapter 13 (and specifically the two tables in that Chapter) in the evidence or submissions by either party before the AAT. Perry J stated at [101]: "It is plain that the comparison between Tables 13.2 and 13.3 was ultimately a critical issue in the Tribunal's decision. However, it was not raised by the Tribunal in advance of its decision … Comcare was not afforded an opportunity to address or lead evidence on any new or changed issues arising by reason of the different basis on which the Tribunal ultimately decided the application."

Flick J explained at [28]: "Although procedural fairness may not require a party to be provided with specific notice and an opportunity to address each and every issue of potential relevance to a decision, the more centrally relevant an issue becomes the greater is the need for a party to be put on notice of an emerging issue which is assuming an importance it may not have assumed at the outset of a hearing. The more so is that the case where it is the decision-maker who seeks to attribute significance to an issue not previously addressed by the parties …"

JULY

CORPORATIONS LAW

ASIC's BBSW case against Westpac

In *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* [2018] FCA 751 (24 May 2018) Beach J gave his reasons for judgment on the liability phase of the contested trial between the regulator (ASIC) and Westpac Banking Corporation (Westpac). The case concerned Westpac's trading over the period 6 April 2010 to 6 June 2012 in 'Prime Bank Bills' in the 'Bank Bill Market' allegedly to influence the setting of the Bank Bill Swap Reference Rate (BBSW) (all terms defined in the extensive glossary at the end of the judgment).

ASIC's claims were summarised at [4]:

A. "first, as contraventions of ss 1041A and 1041B of the Corporations Act 2001 (Cth) (the Corporations Act) involving market manipulation, market rigging and creating a false or misleading appearance with respect to the relevant market(s);

B. second, as contraventions of ss 12CA, 12CB and 12CC of the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act), involving unconscionable conduct;

C. third, as contraventions of s 1041H of the Corporations Act and ss 12DA, 12DB and 12DF of the ASIC Act, involving misleading or deceptive conduct and misrepresentation; and

D. fourth, as contraventions of s 912A of the Corporations Act, involving various breaches of Westpac's financial services licensee obligations."

The Court held that ASIC had not made out its case against Westpac under ss 1041A and 1041B of the *Corporations Act* concerning market manipulation or market rigging (i.e. claim (a)): see summary at [24] and [2535].

However, the Court did find that Westpac engaged in unconscionable conduct under s 12CC of the *ASIC Act* (as in force prior to 1 January 2012) on four occasions by trading 'Prime Bank Bills' in the 'Bank Bill Market' with the dominant purpose of influencing yields and where BBSW set (i.e. claim (c)): see summary at [26] and [2536].

Further, the Court concluded that by reason of inadequate procedures and training, Westpac contravened its financial services licensee obligations under s 912A(1) of the *Corporations Act* (i.e. claim (d)): see summary at [27] and [2537].

All other claims of ASIC were dismissed (at [2539]).

EVIDENCE LAW – PRIVILEGE

Whether bulletin document from class action lawyers to client class members protected by legal professional privilege and whether any privilege waived by its dissemination outside class members on WhatsApp

In *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2018] FCA 760 (28 May 2018) the Court determined a dispute about legal professional privilege (LPP) in the context of two class actions proceedings. The disputed document was a bulletin (Bulletin 12) sent by the solicitors for applicant Levitt Robinson Solicitors (Levitt Robinson), to class members

who retained the firm (client class members). One of the client class members subsequently disseminated the bulletin to a WhatsApp messaging group made up of franchisees and 'interested parties', some of whom were Levitt Robinson's clients in the class actions and some of whom were not. An unidentified 7-Eleven franchisee who was not a client of Levitt Robinson provided the bulletin to 7-Eleven. By an interlocutory application, 7-Eleven sought a finding that Bulletin 12 was misleading or deceptive and orders directing Levitt Robinson to send a corrective notice to class members. The applicant objected to Bulletin 12 being relied upon on the basis that LPP.

The Court (Murphy J) held that Bulletin 12 was a privileged document pursuant to s 118 of the *Evidence Act 1995* (Cth) because it was a confidential document and/or communication between Levitt Robinson and that firm's clients (at [20]-[29]) for the dominant purpose of Levitt Robinson providing legal advice to those clients (at [30]-[39]).

Further, the Court held the privilege was jointly held by those client class members to whom Levitt Robinson sent Bulletin 12 and the joint privilege was not waived by the unilateral act of one of those persons in sending the document to a WhatsApp group which included persons who were not Levitt Robinson's clients (at [44]-[64]). Murphy J noted that the common law position is that disclosure by one holder of joint privilege will not be sufficient to destroy the privilege for the remaining joint privilege holders (at [47]). Murphy J did not think that was anything to indicate that the legislature intended to modify the common law position as regards waiver of joint privilege, and the extrinsic material instead indicated an intent to more closely align waiver under s 122 of the *Evidence Act 1995* with the common law position (at [50]). His Honour held at [64]:

> "As joint clients of Levitt Robinson the client class members to whom Bulletin 12 was sent by that firm jointly hold the privilege in that communication, and they do so 'against the rest of the world'. Generally speaking, privilege must be waived by each privilege holder before it is lost: *Farrow* at 608; *MMI* at [41]; *Ampolex* 413. I am not persuaded that an unidentified class member's unilateral act in disseminating the bulletin to a WhatsApp messaging group, in all the circumstances and contrary to express warnings not to do so, is inconsistent with Davaria and other client class members objecting to 7-Eleven adducing the bulletin as evidence."

Finally, the Court held that LPP was not waived through letters sent by Levitt Robinson to soliciors for 7-Eleven in relation to Bulletin 12, as those letters were not inconsistent with the applicant and the client class members maintaining a claim for privilege (at [65]-[74]).

PRACTICE AND PROCEDURE – BIAS

Application to disqualify case managing judge on grounds of apprehended bias

In *Akiba on behalf of the Torres Straight Regional Sea Claim v State of Queensland* [2018] FCA 772 (29 May 2018) the Court (Mortimer J) refused the application of the Torres Straight Regional Authority (TSRA) that the proceeding and a number of other native title proceedings be transferred to another judge of the Federal Court. The basis of the application was that Mortimer J should disqualify herself was apprehended bias.

The recusal application was not focused on a reasonable apprehension that the judge might not decide the claim for native title on its merits, being the controversy or matter with which the proceeding was concerned. The TSRA's principal objection was to having the judge having any involvement at all in the proceeding (and the other proceedings) in a case management role (at [23]). Mortimer J explained at [45]:

> ".. this application is premature, insofar as it might relate to any trial of the Part B Sea Claim, whether as to the whole, or as to a particular substantive issue. First, there may never be a trial if the matter is determined by consent. Second, the allocation of a trial judge is a matter for the National Operations Registry in conjunction with the Chief Justice, and any allocation will occur only if the matter is ready, or close to ready, for hearing. Third, any substantive interlocutory dispute will also be referred to the National Operations Registry for allocation. Accordingly, this application must be treated as one where the TSRA seeks that I disqualify myself from engaging in any case management of this proceeding, and the other six proceedings identified in the interlocutory application. The parties informed the Court they could not refer the Court to any authorities on apprehended bias which have arisen in a comparable situation. However, I have assumed in favour of the TSRA that an application for disqualification can be made in relation to case management functions. It seems to me in principle that is likely to be correct as during case management there are still contested matters which can arise, such as costs and minor contested interlocutory issues on procedure."

The Court discussed the applicable principles for apprehended bias at [46]-[78]. Mortimer J proceeded on the basis that the approach binding her as a single judge was set out in ALA15 v Minister for Immigration and Border Protection [2016] FCAFC 30 at [35]–[36] (Allsop CJ, Kenny and Griffiths JJ), and Zaburoni v Minister for Immigration and Border Protection [2017] FCAFC 205 at [62]-[63] (Griffiths, Moshinsky and Bromwich JJ).

Following a detailed consideration of the many matters relied upon by TSRA to give rise to apprehended bias, the application was dismissed.

AUGUST

APPELLATE JURISDICTION – CONSUMER LAW – TRADE MARKS

The nature of an appeal

In *Aldi Goods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93 (22 June 2018) the issues before the Full Court were (1) should a trade mark proceed to registration (see s 41 of the Trade Marks Act 1995 (Cth)) and (2) did the manner in which the appellant sold some hair care products constitute misleading or deceptive conduct and false or misleading representation (see ss 18 and 29(1)(a) of Schedule 2 to the *Competition and Consumer Act 2010* (Cth)).

In relation to the trade mark question, the issue between the parties was whether the word mark 'MOROCCANOIL' was capable of being registered as a trade mark. The Full Court held that the trial judge erred in not concluding that the trade mark was not to any extent inherently adapted to distinguish the designated goods or services from the goods or services of others (Allsop CJ at [16] and Perram J at [163]-[165]). The requirements of s 41(6) of the *Trade Marks Act 1995* were not satisfied and the mark was not registrable.

On the misleading conduct and representations issues, the appellant succeeded in showing that the trial judge erred on the 'the Natural Claims'. Contrary to the trial judge, the Full Court held that the use of the word 'NATURALS' on the packaging of the hair care products was not a representation that the products were made either wholly or substantially from natural ingredients and that the appellant did not thereby engage in conduct that was misleading or deceptive or likely to mislead or deceive (Allsop CJ at [11], Perram J at [91] and Markovic J at [169]). However the appellant failed in its challenge to overturn the trial judge's findings on the "the Performance Benefits Claims" (i.e. claims as to the performance of the products based on its packaging) (Allsop CJ at [12] and Markovic J at [169]; cf different reasons of Perram J at [112]).

Of likely relevance to future appeals in a wide range of legal areas, Allsop CJ and Perram J analysed the nature of appellate review where findings concern matters of impression (such as misleading or deceptive conduct). In their separate judgments, their Honours gave considered statements regarding appellate review including the High Court's reasons in *Robinson Helicopter Company Inc v McDermott* [2016] HCA 22; 331 ALR 550 at [43] (*Robinson Helicopter*). Perram J explained at [54] that "it is clear the High Court was not intending to overrule *Warren v Coombes or Fox v Percy*" and "... it is clear the quoted passage in Robinson Helicopter is concerned with findings of fact involving the credibility of witnesses. To the extent that *Robinson Helicopter* has been applied to questions of impression in intellectual property cases, it has, with respect, been misunderstood ..."

The clear authority of judgment of Allsop J (as he then was) in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424 as to how the Court in the exercise of its appellate jurisdiction should approach the review of findings was confirmed. Perram J said at [52] "... There is a line of cases, however, beginning with the reasons of Weinberg J in *Eagle Homes Pty Ltd v Austec Homes Pty Ltd* [1999] FCA 138; 87 FCR 415 which suggests that to review a finding involving an evaluative standard requires the appellate court first to find that the finding in question is 'plainly and obviously wrong' (at [119]). This was an obiter dictum but in my view it is not correct and should not be followed. It is contrary to *Branir* ..."

Allsop CJ agreed at [2] with Perram J's reasons about appellate review. The Chief Justice referred to his own judgment in *Branir* and explained it should be followed and not wrongly paraphrased by the use of the phrase (as done in some cases) of an error that is "plainly and obviously wrong": at [10]. At [6]: " ... the test of "plainly and obviously wrong" is not semantically or substantively the same as that which was said in Branir at 437-438 [28]-[29]." Further at [9]: "A test of "plainly and obviously wrong" (whatever its precise content) is blunt and lacks nuance. It invites the setting of a standard of appellate review higher than it should be, by its formulaic false simplicity and false clarity."

CONSUMER LAW

Proportionate liability under Part VIA of the Competition and Consumer Act 2010 (Cth)

In *Robinson v 470 St Kilda Road Pty Ltd* [2018] FCAFC 84 (1 June 2018) one issue before the Full Court was whether the trial judge erred in holding that no part of the respondent's claims should be apportioned. It was submitted that the misleading or deceptive conduct claim was apportionable under the provisions of Pt VIA of the *Competition and Consumer Act 2018* (Cth) (CCA) and the negligent misstatement claim was apportionable under Pt IVAA of the *Wrongs Act 1958* (Vic). The Full Court's judgment focused on Part IVAA of the CCA. The reasons of McKerracher and Markovic JJ considered s 87CB(3) of the CCA and whether the director's liability for an act should be reduced from 100 per cent to 50 per cent to be shared with the company (at [50]-[55]).

INDUSTRIAL LAW

Personal payment and non-indemnification orders for penalties under the Fair Work Act 2009 (Cth)

Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Non-Indemnification Personal Payment Case) [2018] FCAFC 97 (25 June 2018) is the latest instalment from the Federal Court concerning orders for a union official to personally pay a pecuniary penalty imposed on him or her without the union doing so. This Full Court case is the remitter of proceedings following the High Court's judgment in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3. The High Court held that s 545 of the *Fair Work Act 2009* (Cth) (FW Act) could not support the order made by the primary judge against the union (CFMEU) and unanimously concluded that s 546 could also not support the order against the CFMEU, but, by majority, expressed the view that an order against the union official (Mr Myles) that he pay the penalty and not seek or receive indemnification from the CFMEU would be supported by an implication within s 546 of the Act.

Upon the remitter, the Full Court re-fixed the quantum of penalties to be imposed on Mr Myles and the CFMEU. The Full Court imposed on the CFMEU and Mr Myles, for three contraventions of s 348 of the FW Act, totals of $111 000 and $19 500, respectively (at [25]-[37]).

The Full Court also held at [36] that a personal payment order should be made against Mr Myles. Allsop CJ, White and O'Callaghan JJ stated at [40]: "The Union acts through its officials, of whom Mr Myles was, and is, one. The penalty against the individual must be a burden or have a sting to be a deterrent. The history of contravening by the Union, all undertaken through its officials, reflects a willingness to contravene the Act and to pay the penalties as a cost of its approach to industrial relations. Mr Myles has a history of significant contravention. A personal payment order of the kind to which we will come will bring home to him, and others in his position, that he, and they, cannot act in contravention of the Act knowing that Union funds will always bale him, or them, out."

However the Full Court was not prepared in this case to make an order so broad to prevent parties other than the CFMEU (say, third parties including as colleagues and workmates) being a source of payment of the peanlty (at [42]-[46]). Allsop CJ, White and O'Callaghan JJ explained at [46]: "... Once an order is directed more widely at individuals who may have a relationship, or who may have no relationship, with the Union, different considerations as to supervision and enforcement, and as to the rights of third parties, arise. That is not to say that if an order in the form that we are prepared to make comes to be seen to lack the intended supportive effect on deterrence, a wider order would not be made."