Court of Appeal
Supreme Court
Sydney

Decisions of interest

24 July 2017 – 4 August 2017

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

Contents

New South Wales Court of Appeal decisions of interest

1. Torts: breach of the peace; trespass to land; trespass to person

***State of New South Wales v Bouffler* [2017] NSWCA 185**

Decision date: 27 July 2017

Beazley ACJ; Ward and Gleeson JJA

On 21 October 2013, Mr Bouffler was arrested for breach of an Apprehended Domestic Violence Order (ADVO) after nine police officers forcefully entered his home. Police officers spent two hours attempting to negotiate with Mr Bouffler for his voluntary exit. Mr Bouffler commenced proceedings against the State of NSW. O'Connor ADCJ found:

- Mr Bouffler was lawfully arrested by three police officers, who each held the requisite state of mind under s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* ("LEPRA").
- A fourth officer lawfully entered the premises under s 9 of *LEPRA,* which empowers entry if an officer believes on reasonable grounds that a breach of the peace is being committed, and it is necessary to enter immediately to end the breach.
- Another six officers entered for the purpose of arrest, but did not hold the requisite state of mind in s 10 of *LEPRA.* Accordingly, these officers committed trespass to land, and two committed trespass to the person. His Honour awarded compensatory, aggravated and exemplary damages. Each finding was challenged on appeal and cross-appeal.

Held

- ss 9, 10 and 99 of *LEPRA* make plain that each individual officer who exercises a function must have the requisite state of mind: [47].
- The trial judge did not err in finding that Mr Bouffler's arrest was lawful. Suspicion on reasonable grounds must be assessed objectively at the time when the relevant power or function is exercised. Here, the factual circumstances demonstrated reasonable grounds for suspecting Mr Bouffler breached his ADVO, and that it was necessary to arrest him to prevent repetition of the offence: [87]; [93]-[96];[106].
- The trial judge did not err in finding that the fourth officer's entry was authorised by s 9 of *LEPRA.* "Breach of the peace" is a multifaceted notion, encompassing a wide range of actions that interfere with the ordinary operation of society. A threat or realistic apprehension of self-harm can suffice: [164]; [169]-[170].
- The trial judge erred in finding that the remaining six officers entered for the purpose of arrest. s 10 only authorises entry "to arrest" a person, rather than to facilitate an arrest being affected. However, the six officers lawfully entered under s 9 as evidence supports that each believed there was a likely breach of the peace. Further, even if the police officers had committed trespass there was no basis for the award of aggravated or exemplary damages: [227]; [242]; [295]-[297].

2. **Constitutional law: Kable principle. Administrative law: procedural fairness; requirement to provide reasons; legal unreasonableness.**

Kamm v State of New South Wales (No 4) **[2017] NSWCA 189**

Decision date: 1 August 2017

Bathurst CJ, Beazley P, Payne JA

Mr Kamm was the leader of a religious community. In 2007, he was convicted of six counts of sexual offences with a child above the age of 10 years and under the age of 16 years in circumstances of aggravation. In 2016, Harrison J ordered that Mr Kamm be subject to a high risk sex offender extended supervision order for 5 years, pursuant to s 5C of the *Crimes (High Risk Offenders) Act 2006* ("*CHRO Act*"). Mr Kamm appealed to the Court of Appeal.

Held:

- Leave was granted given the importance of the questions to be decided: [99].
- The *CHRO Act* does not infringe the *Kable* principle: [153]
    - The Act is materially similar to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), considered by the High Court in *Fardon.* For essentially the same reasons, the Act does not deny an essential characteristic of a court exercising federal jurisdiction or attack a State Court's institutional integrity: [40]-[45]; [116].
    - The *CHRO Act* can be distinguished from the *Crimes (Criminal Organisations Control) Act 2009* found invalid in *Wainohu.* The 2009 Act expressly excused an eligible judge from providing reasons: [139].
    - The objectives in s 3 of the *CHRO Act* are protective, not punitive. The Act does not detain a citizen in custody otherwise than as a step in the adjudication and punishment of guilt: [54]; [147]-[148].
    - The *CHRO Act* does not enlist the Supreme Court to give effect to executive policy. The Court must satisfy itself that the offender poses an unacceptable risk before making an order [43]-[44]; [151].
- Harrison J did not err in fact or law. His Honour correctly identified and exercised the nature of his discretion: [176]-[177]; did not fail to consider the adverse effect of an order on Mr Kamm: [194]-[196]; did not deny procedural fairness by failing to put a finding to Mr Kamm's legal representatives: [198]; did not deliver a decision void for legal unreasonableness; and did not fail to give lawful and proper reasons [212]-[213].

High Court cases considered:

Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; [1996] HCA 24

Fardon v Attorney-General (Qld) (2004) 223 CLR 575; [2004] HCA 46

Wainohu v New South Wales (2011) 243 CLR 181; [2011] HCA 24

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18

3. **Occupations: whether probably permanently unfit test applies to medical profession**

Chen v Health Care Complaints Commission **[2017] NSWCA 186**

Decision date: 31 July 2017

Basten, Leeming and Payne JJA

The Civil and Administrative Tribunal found Mr Chen guilty of unsatisfactory professional misconduct and professional misconduct for over-prescribing prescription drugs and failing to maintain adequate medical records. Pursuant to s 149C of the *Health Practitioner Regulation National Law* it made an order cancelling Mr Chen's registration as a medical practitioner, and directed that an application for review of that order could not be made for 18 months. An issue arising on appeal was whether a practitioner must be found to be "probably permanently unfit to practise" before the Tribunal may cancel their registration. This test was established in *Ex parte Lenehan* as applicable to members of the legal profession.

Held

- It is not appropriate to curtail the Tribunal's powers by implying a "probably permanently unfit" test into s 149C. There are significant institutional and functional differences between the legal and medical professions. The "probably permanently unfit" test arises from the statutory language in s 279(b) of the *Legal Profession Uniform Law,* which defines professional misconduct to include conduct "that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice": [4]; [63].
- The *Health Practitioner Regulation National Law* is explicit and detailed. A construction commencing by reference to constraints derived from cases decided under other regimes is contrary to well established principle: [16]; [18]; [59].
- The scheme of the National Law is inconsistent with the proposed implication. In particular the proposed implication would presumably also qualify the Tribunal's power to suspend, is inconsistent with the separate powers of cancellation in s 149C (2)-(3) where no limitation applies, and is inconsistent with the statute's contemplation that a practitioner can re-apply for registration under s 149C(7): [69]-[71]; [74].

High Court cases considered:

Ex parte Lenehan (1948) 77 CLR 403; [1948] HCA 45

Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict) (2001) 207 CLR 72

New South Wales Court of Appeal cases considered:

Qidwai v Brown [1984] 1 NSWLR 100;

Pillai v Messiter (No 2) (1989) 16 NSWLR 197

4. **Administrative law: amalgamation of local government; procedural fairness**

Hunter's Hill Council v Minister for Local Government; Lane Cove Council v Minister for Local Government; Mosman Municipal Council v Minister for Local Government; North Sydney Council v Minister for Local Government; Strathfield Municipal Council v Minister for Local Government **[2017] NSWCA 188**

Decision date: 31 July 2017

Basten and Macfarlan JJA and Sackville AJA

In 2016, the NSW Minister for Local Government made 35 proposals to amalgamate local government areas. The Acting Chief Executive appointed delegates to examine and report on the proposals. The delegates recommended that the proposals proceed. Five Councils challenged the recommendations in the Land and Environment Court.

Held

Hunter's Hill and Lane Cove:

- Moore J dismissed the proceedings. Despite being separated by the Lane Cove River, the Council areas were a "single area of contiguous land" (as required by s 204 of the *Local Government Act* 1993 ("*LGA*")) by virtue of the Fig Tree Bridge. His Honour relied on s 205(3) of the *LGA,* which deems that land on the boundary of an area is "taken to be included in an area" if it "is on the foreshore…below low watermark and…has a structure erected on it": [61].
- The Court of Appeal upheld the appeal. The amalgamation proposal should be construed as referring to the areas as identified in the respective proclamations and not as including areas deemed to be within the respective areas, which is the effect of s 205. Section 205(3) would encompass the land that the bridge's pylons stand on, but not the land over which the bridge passes. Further, even if a boundary was created in the middle of the bridge, it would not be sufficient to create "a single area of contiguous land": [71]-[73].

Mosman, North Sydney and Strathfield

- Moore J upheld each proceeding in part.
- The majority of the Court of Appeal dismissed challenges by Mosman and North Sydney regarding the validity of the delegate's process of examination and reporting. It found: (1) There is no limitation on the Minister referring different proposals to different delegates; (2) The delegate did not err by failing to compare the two proposals; (3) Reference to both the alteration of boundaries and the amalgamation was not misleading in a material respect; (4) The public was given appropriate opportunity to make submissions; and (5) The Councils had effectively engaged with the projections despite not accessing the KPMG data: [147]-[149]; [152]; [166]; [175]; [396]; [497]; [607].
- The Court of Appeal upheld Strathfield's appeal. It found that the delegate had not properly fulfilled his statutory function of examination and reporting, by failing to give proper consideration to the financial advantages and disadvantages of the proposal. The delegate uncritically adopted the KPMG analysis in the proposal document, rather than examining its foundation: [418].

Other Australian intermediate appellate decisions of interest

5. **Industrial law: unlawful industrial action, single or aggregate penalties**

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union **[2017] FCAFC 113**

Decision date: 3 August 2017

Dowsett, Greenwood and Wigney JJ

In 2011, 605 building workers on three Queensland Government construction sites ceased work. This industrial action was organised by officers of the Construction, Forestry, Mining and Energy Union ("CFMEU") and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union ("CEPU"). It was not disputed that the industrial action contravened s 38 of the *Building and Construction Industry Improvement Act 2005*. By operation of ss 48(2) and 69(1)(b), parties also agreed that both unions should be treated as contravening s 38 due to their organisational involvement. This raised two questions:

- whether the unions were liable for the contravention of s 38 by each individual worker, or only a single contravention for each site; and, if the former
- whether it was permissible and appropriate to impose a single penalty on the unions in respect of multiple contraventions.

Held:

- Each individual worker who participates in collective action commits a separate offence. It follows that the unions were involved in and taken to have committed each of the contraventions by each individual: [81]; [85]-[86]; [123].
- Courts may impose a single penalty encompassing multiple contraventions where that course is agreed or accepted by the parties. However, the court is not compelled to accept this proposal. A single penalty may be appropriate where contraventions arise from a course of conduct; or the number of contraventions is unfeasibly large or cannot be ascertained. Here, a single penalty was inappropriate (taking into account the maximum aggregate penalty, seriousness and past transgressions): [149]; [153]-[154]; [168].
- The appropriate penalty was $1000 for each of CFMEU's 605 contraventions, and $800 for each of CEPU's 345. Applying the totality principle (requiring review of an aggregate sentence to assess whether it is just and appropriate), the aggregate penalty was reduced for both unions by 50% and then rounded down to reflect the approximation of worker numbers: [169]-[174]; [180]-[181].

High Court cases considered:

Commonwealth of Australia v Director, FWBII [2015] HCA 46; (2015) 326 ALR 476

6. **Environmental law: liability of successors in title; retrospective legislation**

Yarra City Council v Metropolitan Fire and Emergency Services Board **[2017] VSCA 194**

Decision date: 26 July 2017

Warren CJ, Tate and Osborn JJA

City of Richmond caused pollution to certain land between 1916 and 1960. The land's current occupier (the Metropolitan Fire and Emergency Services Board) sought compensation under s 62A of the *Environmental Protection Act 1970* from Yarra City Council, who was successor in title to the City of Richmond following a council amalgamation in 1994. Section 62A provides that an occupier who incurs costs complying with a clean up notice may claim compensation from a person who caused the pollution to occur (s 62A(1)(b)) or who appears to have abandoned industrial waste (s 62A(1)(c)).

An issue on appeal was whether the trial judge erred in finding that Yarra was liable for Richmond's pollution. The Court also considered whether the trial judge erred in finding that the legislation was not impermissibly retrospective in its application that occurred prior to the Act's commencement in 1984.

Held:

- The plain and unambiguous language in s 62A(1)(b) means that a "person who caused…pollution" refers to the polluter, not its successor in title. This interpretation accords with the Act's purpose: to create a "polluter pays" principle. Where the polluter no longer exists, the principle cannot apply: [130]-[131].

- However, Yarra is nevertheless liable under s 62A(1)(b) in light of its undertaking in cl 18(b) of the *Order in Council* that "all liabilities of the former Councils are liabilities of the Yarra City Council". In this context, "liabilities" can encompass any contingent, prospective or inchoate liability: *Crimmins v Stevedoring Industry Finance Committee*. Nothing in the legislation indicates the intention was to "close the books and draw a line" under Richmond's financial obligations: [151]; [154]; [157].

- Yarra is not liable under s 62A(1)(c). A person cannot be said to appear to have abandoned waste if evidence shows that person never knew of the presence of the waste buried within land: [287]; [289].

- Statute is retrospective if it alters rights, obligations or liabilities as they existed prior to the commencement of the relevant statute. Section 62A does not operate retrospectively because it creates new liability conditioned upon the service of a clean up notice after the commencement of the section, rather than altering the law prior to the commencement of the section: [215]-[216].

High Court cases considered:

Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1

Asia Pacific decisions of interest

7. Administrative law: relevance of insurance status

New Zealand Court of Appeal

Quake Outcasts v Minister of Canterbury Earthquake Recovery **[2017] NZCA 332**

Decision date: 1 August 2017

French, Miller and Winkelmann JJ

Quake Outcasts ("QO") is an unincorporated group of 16 homeowners, whose properties were uninsured during the 2010-11 Christchurch earthquakes. Under the *Canterbury Earthquake Recovery Act 2011,* the Minister for Canterbury Earthquake Recovery offered to acquire insured properties within the earthquake 'red zone' for 100% of their pre-earthquake land and improvement value. In 2012, the Minister offered to acquire uninsured red zone properties for 50% of their unimproved land value. QO sought judicial review of this offer. The New Zealand Supreme Court declared the offer unlawful, and directed that the Minister reconsider. In 2015, the Minister raised the offer to 100% of the unimproved land value (excluding improvements). QO now seeks judicial review of the 2015 offer, arguing that the decision to discriminate on the basis of insurance status is unreasonable.

Held:

- The 2015 Supreme Court decision did not strictly preclude discrimination by insurance status. The Court merely found that insurance status had been treated as determinative in 2012, to the exclusion of other relevant and important considerations (such as the Act's recovery objective): [80]-[81].
- The 2015 offer was unreasonable and therefore unlawful. The Court substantially relied on the Minister's decision to make an area-wide offer: [82]. In particular it was not open for the Minister to:
    - discount the reasons why the affected owners were uninsured: [85];
    - adopt an assumption that all owners were seeking compensation for uninsured loss, rather than loss caused by government zoning decisions: [87]; or
    - rely on the gross cost of acquiring the uninsured properties: [89].
- The appropriate standard of review was higher than *Wednesbury* unreasonableness. A universal test for reasonableness should be rejected, as the standard varies with context: [72]-[73].
- The Court invited further submissions on whether the Court can and should make orders requiring the Recovery Plan to be reopened, which would allow renewed offers to be remade: [97]; [105].

8. **Appeals: standards of review; duties owed to self-represented litigants**

Supreme Court of Palau

Rengulbai v Baules **[2017] PWSC 20**

Decision date: 26 July 2017

Yamase; Castro and Bennardo AJJ

In 1978, the Palau District Land Commission conducted hearings to determine the ownership of various lands in the Arai Municipality. In 1986, the Land Commission awarded ownership over Lot 03 N 02 to Baules Sechelong. A series of appeals followed where three appellants claimed title.

The Land Commission was later replaced by the Land Court. In 2016, the Land Court held a further appeal hearing and affirmed the title of Sechelong's successors. On Appeal, the Supreme Court was required to determine the standards applicable to review in Palauan courts of appeal, and apply this standard to four alleged errors of fact or discretion by the Land Court.

Held:

- On appeal, matters of law are determined de novo; exercises of discretion are reviewed for abuse; and findings of fact are reviewed for clear error. Factual determinations of a lower court will not be set aside if they are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion, unless a superior court is left with a definite and firm conviction that a mistake has been made: [5].
- The Supreme Court rejected three alleged errors of the Land Court:
    - Denial of a request for a site visit is ordinarily reviewable on appeal for abuse of discretion. However, as the record does not reflect any request for a site visit, the decision is incapable of being reviewed: [9].
    - The Land Court made a finding of fact that Lot 03 N 02 was correctly numbered. The claimant's case that this decision was in error was merely speculative: [13]-[14].
    - The Land Court did not fail to discharge its special duty to self-represented litigants. The claimant failed to identify what additional questions it should have asked, or what additional evidence he might have presented in response to those questions: [15].
- However, the Court upheld the Arai State Public Land Authority's appeal:
    - The Land Court clearly erred in fact by treating a 1983 instrument as a future contemplated conveyance, rather than a potentially valid transfer. This question was remanded to the Land Court for determination, as courts of first instance are best situated to make factual findings (for example, whether the document was validly executed): [17]; [19].

Other international decisions of interest

9. **Contract: subjective and objective interpretation; inconsistent terms**

UK Supreme Court

MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Limited and Anor **[2017] UKSC 59**

Decision date: 3 August 2017

Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge

E.ON Climate and Renewables (E.ON) contracted with MT Højgaard (MTH) to design and build foundations for two offshore wind farms. Clause 8.1(x) of the contract stated that MTH should carry out the works to be "fit for purpose". "Fit for Purpose" was equated with compliance to the Technical Requirements, contained within E.ON's tender documents. Paragraph 3.2.2.2 of the Technical Requirements specified that: (i) the foundations must comply with J101 (an international standard for the design of offshore wind farms); and (ii) the design of the foundations shall ensure a lifetime of twenty years without replacement.

The formula in J101 was later discovered to be incorrect, and the foundations failed. On appeal to the Supreme Court, two questions arose: whether MTH breached Paragraph 3.2.2.2(ii); and if so, whether the obligation was unenforceable due to its inconsistency with (i).

Held:

- 3.2.2.2(ii) may be interpreted as a warranty that the foundations will actually last for 20 years; or an undertaking to provide a design that can objectively be expected to last for 20 years. As MTH breached the term on either meaning, the Court did not determine which was correct. However, it indicated preference for the latter due to its consistency with a clause requiring MTH to remedy defects occurring within 24 months of completion: [27]; [30]; [36].
- 3.2.2.2(ii) is enforceable. The Court rejected two arguments:
    - 3.2.2.2(ii) is not inconsistent with (i). Courts are inclined to give full effect to the requirement that an item complies with the prescribed criteria (even if the customer specifies a design). Contractors accept risk by agreeing to work on a design which might render an item incapable of meeting the criteria. Here, the Technical Requirements prescribed a minimum standard. Under 3.1(ii), MTH needed to identify areas where works needed to be designed more rigorously: [44]-[47].
    - 3.2.2.2(ii) is not too weak a basis on which to establish liability. Despite the contract's "diffuse and multi-authored" drafting, 3.2.2.2 clearly imposes a duty on MTH. This interpretation is not improbable or unbusinesslike: [48]-[51].

10. Contract: indeterminate or perpetual operation

Supreme Court of Canada

Uniprix inc v Gestion Gosselin and Bérubé inc [2017] SCC 43

Decision date: 28 July 2017

McLachlin CJ and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ

The respondents are pharmaceutical companies who entered an affiliation contract with Uniprix. Clause 10 provided that the contract would automatically renew every five years unless the member pharmacist gave notice to the contrary. The contract renewed automatically in 2003 and 2008. In 2012, the member pharmacists sought to renew the contract, and Uniprix purported to terminate.

The trial judge found Uniprix had no right to oppose the contract's renewal, and declared it to be renewed. Uniprix's appeal to the Quebec Court of Appeal was dismissed. On appeal to the Supreme Court, two questions were raised:

- whether the trial judge erred in finding that clause 10 is clear, and faithfully represents the parties' common intention; and, if so
- whether clause 10 is otherwise invalid in Quebec law, due to the possibility of the contract becoming perpetual.

Held:

- The Court's role in this appeal is limited to deciding whether the trial judge committed a palpable and overriding error in applying the relevant principles of interpretation to clause 10. The majority found that the trial judge's interpretation was consistent with the undertakings in the contract and the circumstances surrounding formation. Clause 10 unambiguously provides that the member pharmacists could notify Uniprix of their intention not to renew, but does not provide Uniprix with a reciprocal right: [44]-[46].
- A clear contract may also be interpreted on a subsidiary basis in order to conclude that that interpretation confirms the clear meaning of its words. Here, context suggested that the parties intended to leave renewal of the contract to the discretion of the member pharmacists: [52]-[54].
- The contract is not for an indeterminate term. The clear intention of the parties was that they would be bound for definite, successive five year periods: [62]; [65]-[66]. However, clause 10 may cause the contract to be renewed perpetually. Nothing in the *Civil Code of Quebec* prohibits this clause: [79]. Further, clause 10 is not contrary to public order. Despite this, the court warned that perpetual obligations which impinge an individual's "person and freedom" may offend public order: [91]-[92].