



Court of Appeal
Supreme Court
Sydney

Decisions of Interest

25 April 2020 – 8 May 2020

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.

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New South Wales Court of Appeal Decisions of Interest

Administrative Law: judicial review; Workers Compensation

Ballas v Department of Education (State of NSW) [\[2020\] NSWCA 86](#)

Decision date: 6 May 2020

Bell P, Payne JA, Emmett AJA

Fiona Ballas was exposed to a series of events that resulted in a significant psychological injury while employed by the Department of Education. In 2016 Ms Ballas brought a claim for permanent impairment compensation. She was assessed by Dr Hong as having a whole person impairment (WPI) of 8%. She therefore fell under the statutory WPI threshold of 15%, was not entitled to compensation for permanent impairment and was precluded from seeking common law damages.

In 2018 Ms Ballas lodged an application to the Workers Compensation Commission to appeal against Dr Hong's assessment on the basis of "demonstrable error" and the application of "incorrect criteria". This was refused by the Registrar's delegate. The WCC then issued a WCC Certificate of Determination and subsequently refused an application to reconsider its decision to issue this Certificate. Ms Ballas applied for judicial review of the Delegate's decision, which the primary judge refused. Ms Ballas brought an appeal against this refusal. The issues in the proceedings were whether the primary judge erred in misconstruing and applying s 327 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) and whether the Court had power to set aside the Certificate.

Held: allowing the appeal; setting aside the decision of the primary judge; declaring that the certificate and decision were void and of no effect and setting them aside; and remitting the matter: [133].

- The Delegate misconstrued the "gatekeeper" nature of the task ascribed by s 327(4) of the Act to the Registrar in determining the appeal rather than looking to whether the appeal grounds were capable of being made out and fundamentally misconstrued the nature of the error that Ms Ballas had identified as a "demonstrable error" within the meaning of s 327(3) of the Act: [70]-[73]. The primary judge erred in not finding that the Delegate's decision was infected by jurisdictional error: [75]. The Delegate also conflated terms used in the Workers Compensation Guidelines 2016 (NSW) and had misunderstood the process that an Approved Medical Specialist was required to go through in making an assessment of WPI: [76].
- In the present case the WCC Certificate of Determination, and the refusal by the WCC to reconsider the decision to issue a Certificate, did not have the effect of placing the Delegate's decision beyond the Court's supervisory jurisdiction. The Certificate, reconsideration and determination were set aside as they were affected by jurisdictional error and as necessary consequential relief for jurisdictional error in a critical step in making the determination: [104]-[105].

Adoption: definitions, statutory interpretation

Hackett (a pseudonym) v Secretary, Department of Communities and Justice **[2020] NSWCA 83**

Decision date: 6 May 2020

Basten JA, Leeming JA, McCallum JA

Belinda is a teenaged girl who was assumed into care when she was very young, and has been cared for continuously by her adoptive mother since she was seven months old. In 2018 the Secretary brought proceedings seeking an order for the adoption of Belinda, supported by Belinda and her adoptive mother.

The Secretary submitted that under the test for determining an “Aboriginal child” under the *Adoption Act 2000* (NSW) in *Fischer*,¹ Belinda had not been shown to be an “Aboriginal child”. The judge accepted this, and therefore he did not have to apply the Aboriginal child placement principles. The judge made multiple orders, including an order adopting Belinda as the daughter of her carer. Belinda’s biological father brought an appeal against most of the orders made. The new approach to the determination of an “Aboriginal child” formed a ground of appeal.

Held: granting leave to appeal on one ground: [83].

- The definition of “Aboriginal child” in *Fischer* is too narrow: [83]. The primary judge was wrong to apply this test: [88]. A child “of Aboriginal descent” is an “Aboriginal child” even if they do not satisfy the three-limb definition in the *Aboriginal Land Rights Act 1983* (NSW): [86]. A degree of flexibility was intended to be built into this definition, empowering the Court to consider a broad range of material: [173]-[174].
- Belinda is an Aboriginal child for the purposes of the *Adoption Act*: [94], [175]. The Secretary’s submission that Belinda had not been shown to be an Aboriginal child should have been rejected: [89]. The evidence presented should have been sufficient to conclude that Belinda was an Aboriginal child: [167].
- In making the adoption order, it would have been necessary for the primary judge to have been satisfied that the Aboriginal placement principles had been properly applied: [94]. The principles give preference to an adoption by parents who are members of an Aboriginal community, but that preference is subject to what is practicable and the child’s best interests: [95]. Belinda’s best interests would not be served by removing her from the care of the woman who has cared for her, continuously and in a stable environment, since she was an infant: [95].

¹ *Fischer v Thompson (Anonymised)* [2019] NSWSC 773 held that for a child to be an “Aboriginal child” for the purposes of the *Adoption Act*, it was necessary to identify an ancestor of the child who was “a member of the Aboriginal race of Australia, and identified as an Aboriginal person, and was accepted by the Aboriginal community as an Aboriginal person.”

Arbitration: dispute resolution; Contracts: construction and interpretation

***Inghams Enterprises Pty Limited v Hannigan* [\[2020\] NSWCA 82](#)**

Decision date: 4 May 2020

Bell P, Meagher JA Gleeson JA

In 2015 Francis Hannigan and Inghams Enterprises entered into a standard form chicken growing contract (the Agreement). Mr Hannigan received batches of chicks from Inghams, grew them into chickens and returned them to Inghams in return for a “Fee”. In 2017 Inghams purported to terminate the Agreement and refused to supply chicks for growing to Mr Hannigan. Mr Hannigan commenced proceedings in the Supreme Court seeking a declaration that Inghams’ purported termination of the Agreement was wrongful, but did not seek damages. In 2019 judgment was entered for Mr Hannigan, declaring in effect that Inghams had wrongfully terminated the Agreement. Inghams resumed supplying chicks to Mr Hannigan.

In 2019 Mr Hannigan issued a Notice of Dispute to Inghams, seeking damages for loss of profits, based on their failure to supply chicks from August 2017 to June 2019. Mr Hannigan contended that the Agreement, which relevantly provided for arbitration of a dispute which “concerns any monetary amount payable and/or owed by either party to the other under this Agreement”, entitled him to refer the claim for damages to arbitration. Inghams commenced proceedings to restrain the referral to arbitration, and sought declarations as to the proper construction of the Agreement. The primary judge held that Mr Hannigan was entitled to refer his damages claim to arbitration and dismissed the proceedings. Inghams brought an appeal, challenging the primary judge’s findings that the claim for damages could be referred to arbitration and that Mr Hannigan had not waived his right to refer the dispute to arbitration.

Held: granting leave and allowing the appeal.

- Mr Hannigan’s claim for breach did not concern a monetary amount payable or owed by Inghams to Mr Hannigan under the Agreement and accordingly was not one which was required to be submitted to arbitration: [151] (Bell P dissenting). The claim was for unliquidated damages for breach of one of Inghams’ obligations: [144]. The primary judge erred in concluding otherwise: [120].
- In dissent, Bell P held that authority supports affording dispute resolution clauses a broad and liberal construction: [59]. The text of the Agreement suggested that the parties intended the clause to be construed broadly: [83]. The primary judge did not err in favouring Mr Hannigan’s construction of the clause, and he was entitled, subject to waiver, to pursue his claim for damages by way of arbitration: [107].
- As the dispute was not required to be referred to arbitration, the waiver issue did not arise. However, if it was required, Mr Hannigan did not waive his right to insist that arbitration occur: [118]. Per Bell P, there was no unequivocal abandonment of any right to arbitrate the question of damages for breach of contract: [109].

Torts: professional negligence; Mortgages: valuations

***Todd Hadley Pty Limited v Lake Maintenance (NSW) Pty Ltd (No 2)* [\[2020\] NSWCA 81](#)**

Decision date: 30 April 2020

Bell P, Basten JA, Macfarlan JA

In 2010 Todd Hadley Pty Limited and Sean McGill Pty Ltd (the Valuers) prepared a valuation report in relation to a property in Wallalong for mortgage valuation purposes on instructions from David Bone, expressing an opinion that it had a current market value of \$7,450,000. Lake Maintenance entered into a loan agreement with Mr Bone, advancing \$3,073,000 to him. Lake Maintenance alleged that it relied on the Valuers' report in entering into the Agreement. The Agreement obliged Mr Bone to grant Lake Maintenance a first registered mortgage over the property as security. The Mortgage was executed in 2010 and Mr Bone defaulted in 2011. In 2012 Lake Maintenance appointed receivers of the property and the property was sold for \$1,250,000. Lake Maintenance received \$1,017,561.70 from the net proceeds.

Lake Maintenance commenced an action in debt against Mr Bone for the sum advanced pursuant to the Agreement together with interest, less the net proceeds of the sale of the property. In 2015 Lake Maintenance and Mr Bone entered into a deed of settlement in the amount of \$5,000,000. Mr Bone failed to pay Lake Maintenance this amount and in 2017 Lake Maintenance caused judgment to be entered against Mr Bone. Mr Bone was made a bankrupt by order of the Federal Circuit Court on the petition of Lake Maintenance. In 2018 Lake Maintenance commenced an action for damages against the Valuers in tort and for contravention of statutory prohibitions against misleading or deceptive conduct.

The Valuers raised a limitation defence as the sale of the property occurred more than 6 years prior to the commencement of proceedings, contending that any cause of action against it had accrued by that time.

Held: dismissing the appeal: [90].

- The very purpose for which the mortgage security was obtained was defeated by no later than when the sale of the mortgaged property yielded an amount significantly less than that for which the property had been valued: [7]. If there was negligence or misleading or deceptive conduct, the cause of action arose no later than the date of the sale: [10].
- The timing of the accrual of the cause of action is linked to the nature of the interest infringed, in this case the ability to "recoup" the moneys advanced from the proceeds of sale: [68]-[69]. The potential recovery against Mr Bone did not mean that Lake Maintenance's cause of action against the Valuers for a different type of damage had not accrued at an earlier point in time: [77]. Lake Maintenance suffered an economic disadvantage when the secured property proved inadequate to recoup the totality of the loan: [79].

Australian Intermediate Appellate Decisions of Interest

Consumer Law: misleading or deceptive conduct

Braham v ACN 101 482 580 Pty Ltd [\[2020\] VSCA 108](#)

Decision date: 6 May 2020

Tate JA, McLeish JA and Niall JA

In 2016 Simon Braham borrowed approximately \$1.2 million and invested it in timber plantations, undertaken through a partnership which claimed the investment as a loss. Mr Braham claimed his proportion of the partnership loss as a tax deduction. It was intended that the investment would comply with an Australian Tax Office Product Ruling, yielding a tax refund of approximately \$530,000. In 2010 Mr Braham was subject to an ATO audit, and the deduction was disallowed. An amended assessment required Mr Braham to pay tax, interest and a penalty. Mr Braham's objection was disallowed and his application to the Administrative Appeals Tribunal to review the objection was settled, with him paying the tax due. Interest and penalties were waived.

Mr Braham brought proceedings against a firm of solicitors, Ambry Legal, alleging that Ambry had engaged in misleading or deceptive conduct by representing to him that the partnership structure which was utilised would comply with the Ruling. The Court found that Ambry did not make representations as to whether the investment complied with the Ruling. Mr Braham brought an appeal, contending that the misleading or deceptive conduct finding should be reversed.

Held: granting leave to appeal but dismissing the appeal: [8].

- Conduct that does not readily constitute a representation as to present or future matters may still be misleading or deceptive, for example omissions, silence and half-truths that are, in their context, misleading or deceptive: [152]. Cases that do not involve a direct representation to the plaintiff can raise challenging questions of causation: [154].
- Relevant matters in determining whether conduct conveys a representation include the nature of the parties and their relationship; the character of the transaction; the terms of the partnership agreement; and the state of knowledge of the participants: [159]. Upon an assessment of these objective factors, the Court was not satisfied that the drafting and proffering of the partnership agreement entailed a representation that it complied with the Ruling: [168].
- The failure to correct the information conveyed by Ambry cannot be characterised as an 'important qualifying fact' without which the preparation of the agreement would have misled or deceived Mr Braham into believing that the information was complete: [185]. The primary judge was correct to hold that Mr Braham had failed to establish that the representations were made: [188].

Constitutional Law: separation of powers

CXXXVIII v Honourable Justice Richard Conway White [\[2020\] FCAFC 75](#)

Decision date: 1 May 2020

Wigney J, Bromwich J and Abraham J

In 2018 an Australian Crime Commission Examiner issued a summons which required CXXXVIII to appear for an examination to give evidence in relation to serious drug and money laundering offences. CXXXVIII commenced proceedings challenging the validity of the summons. CXXXVIII gave an undertaking not to leave Australia until the conclusion of the proceedings. CXXXVIII triggered an alert at Melbourne International Airport by entering the border controlled area of the airport to board a flight to Hong Kong, while the decision in the proceedings was reserved.

The Examiner applied for an arrest warrant which was issued by White J pursuant to s 31 of the *Australian Crime Commission Act 2002* (Cth), having been satisfied by evidence that there were reasonable grounds to believe that CXXXVIII was likely to commit a relevant offence. CXXXVIII brought judicial review proceedings challenging the decision to issue the warrant and the validity of s 31 of the Act. CXXXVIII contended that the conditions which must be satisfied before a power is validly conferred on a judge as *persona designata* are not satisfied in the case of s 31 of the Act.

Held: dismissing the application: [134].

- A judge cannot be conscripted to perform a non-judicial function: [94]. The relevant question when determining validity of a provision is whether the effect is to impose an obligation on a judge to perform a non-judicial function. If a judge is obliged or has a duty to perform the function because of their position as a judge, the function is one imposed on the Court: [98].
- There is no bright line defining the limits on the appointments of judges to non-judicial functions, but guidance is provided by judicial authority. The considerations that arise in relation to issuing s 31 warrants are not dissimilar to those in relation to other warrants. It is desirable that the issue of s 31 warrants is undertaken by a person independent of the agency issuing the summons. A judge's experience ideally places him or her to make such decisions in the manner required: [131].
- The s 31(1) power can only be exercised with the consent of the relevant judge: [105]. The function of issuing s 31 warrants was not incompatible either with the performance of White J's judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power: [131]. Section 31 of the Act is valid: [132].

Asia Pacific Decision of Interest

Civil Procedure; Administrative Law: judicial review

Kariko v Korua [\[2020\] PGSC 29](#)

Decision date: 29 April 2020

Kirriwom J, Batari J and Toliken J

Tom Korua was employed as a Security Supervisor of the National Court of Justice of Papua New Guinea in Goroka. He was charged with committing a serious disciplinary offence of soliciting bribes from former security officers so that their entitlement claims could be fast-tracked. He was found guilty and the Secretary of the National Court, Mr Kariko, recommended Mr Korua for dismissal to the Judicial Council. The pay officer who was alleged to be the instigator and who allegedly received bribes remained employed. Mr Korua brought an appeal against the Secretary's decision to the Appeal Tribunal. The Tribunal dismissed his appeal and recommended dismissal to the Council, which the Council upheld.

Mr Korua sought judicial review of the Secretary's decision. The review was grounded on denial of natural justice for failure to follow the correct procedure for charging an officer and excessiveness of penalty of termination of a whistle-blower while the instigator remained employed, being unreasonable according to the *Wednesbury* principle. The trial judge upheld the review and ordered reinstatement of Mr Korua. The appellants brought an appeal. The issues on appeal were whether the trial judge erred in law and in fact and whether the appellants discharged the onus of showing that the trial judge had fallen into error.

Held: dismissing the appeal: [63].

- The Court commented on a number of procedural deficiencies that occurred in these and related proceedings. A lack of or inadequate service in relation to proceedings will invariably result in denial of natural justice as the opposing party would not have had the opportunity to be properly informed of what to defend: [12]. The lack of service of the amended documents on the appellants was critical, but the appellants did not raise the issue of competency of the proceedings on this ground: [13]-[14]. All grounds of appeal were found to be incompetent: [31].
- The lacklustre attitude towards the seriousness of an appeal by a dismissed employee was apparent in the lack of proper representation of the National Court management and the Judicial Council. Crucial procedural aspects of the judicial review proceedings were lost by the appellants deliberately or they were simply unaware of them: [15]-[16].
- Public authorities and officials vested with the power to make decisions which affect substantial rights, interests and welfare are accountable to the public to give reasons for their decisions. Where no reasons are given, the inescapable conclusion is that the decision lacked any good reason: [17]-[18].

International Decision of Interest

Copyright: copyrightable material

***Georgia v. Public Resource.Org, Inc.* [580 U.S.](#) (2020)**

Decision date: 27 April 2020

Roberts CJ, Thomas J, Ginsburg J, Breyer J, Alito J, Sotomayor J, Kagan J, Gorsuch J, Kavanaugh J

The Official Code of Georgia Annotated (OCGA) includes the text of all in-force Georgia statutes and annotations which summarise judicial decisions, opinions of the state attorney general, law review articles and editor's notes. Public.Resource.Org (PRO) is a non-profit organisation which posted a free digital version of the OCGA on various websites, and distributed copies to various organisations and officials. The Georgia Code Revision Commission sent PRO several cease and desist letters asserting that PRO's actions constituted unlawful copyright infringement, contrary to the US Copyright Act which grants protection for "original works of authorship." PRO refused to halt its distribution activities, and the Commission brought proceedings against PRO for copyright infringement.

The District Court held that the annotations were eligible for copyright protection because they were "not enacted into law" and lacked "the force of law", and entered a permanent injunction requiring PRO to cease its distribution activities and to remove the digital copies of the OCGA from the internet. On appeal, the Court of Appeals for the Eleventh Circuit reversed this decision, treating the annotations as government edicts authored by the People, rejected the Commission's assertion of copyright and vacated the injunction against PRO. The question on appeal to the Supreme Court was whether copyright protection extends to the annotations contained in the OCGA.

Held: by majority affirming the decision of the Court of Appeals and granting certiorari in relation to the District Court injunction: p. 5.

- Under the government edicts doctrine, judges and legislators may not be considered the "authors" of the works they produce in the course of their official duties, regardless of whether a given material carries the force of law. The annotations were authored by an arm of the legislature in the course of its official duties: pp. 5-6. The annotations are approved by the legislature before being "merged" with the statutory text and published in the official code: pp. 9-10. Therefore, the annotations were ineligible for copyright protection.
- In dissent, Thomas J held that the creators of annotations were incentivised by the copyright laws to produce a desirable and profitable product, and the annotations served a similar function to other copyrighted research tools: p. 8.
- In dissent, Ginsburg J held that the annotations did not rank as part of the Georgia Legislature's lawmaking process: p. 2.