Decisions of Interest

23 May 2020 – 5 June 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

Civil Procedure: representative proceedings

***Wigmans v AMP Ltd* [2020] NSWCA 104**

Decision date: 4 June 2020

Macfarlan JA, Leeming JA, White JA

Ms Wigmans and Komlotex Pty Ltd each brought representative proceedings against AMP Ltd identifying as group members thousands of persons who acquired interests in AMP shares over a six year period. They claimed that non-disclosure of conduct discovered during the Banking Royal Commission in 2018 had inflated the share price which substantially declined once the conduct was revealed, contrary to the continuous disclosure obligations under the ASX Listing Rules and amounting to misleading and deceptive conduct.

In the Komlotex proceeding, orders had been made providing for the imminent distribution of notices to group members. The notices stated that group members who neither registered nor opted out would be bound by the outcome of the proceeding, including by the terms of any settlement reached, and that the parties' present intention was to apply for an order excluding any group member who had not registered from reaping any benefit from a settlement. Ms Wigmans sought to set aside these orders claiming that there was no power to make the orders or that the Court's discretion had miscarried.

Held: granting leave and allowing the appeal: [132].

- Central to the reasoning in *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66 was the inconsistency between the order contemplating extinguishment of the rights of unregistered group members and the statutory regime which permitted group members to proceed passively until settlement or judgment: [81]. What was proposed in these proceedings would have resulted in group members who took no positive step in the proceedings gaining no benefit from any settlement and extinguishing their rights, giving rise to a conflict between registered and unregistered group members: [79].
- The interests of the representative plaintiff were served by promoting the settlement, but they were meant to be representing unregistered group members, who, under the steps proposed by the parties, would receive nothing and whose rights would be extinguished. The conflict was real, immediate and direct: [120].

Judgments: setting aside consent judgment

***James v Australia and New Zealand Banking Group Ltd* [2020] NSWCA 101**

Decision date: 1 June 2020

Basten JA, Emmett AJA, Simpson AJA

Between 2005-10 Mr James entered into guarantees in favour of ANZ Bank as security for loans made to companies he controlled. By 2013 the companies had outstanding liabilities in excess of $14 million and were in default. ANZ appointed PwC to report on the assets and liabilities of the companies, who identified inventory in excess of $10.7 million. ANZ served notices of demand and commenced proceedings, claiming $14 million due under the guarantees. In 2014 a motion for summary judgment was heard and Mr James consented to judgment in an amount of $13,928,818.66 together with interest.

In 2017 Mr James filed a motion seeking to set aside the consent judgment on the ground of misleading and deceptive conduct by ANZ, which caused him to agree to judgment by consent on a false understanding of the financial circumstances of the companies. The motion was dismissed and Mr James filed a summons seeking leave to appeal.

Held: dismissing the summons seeking leave to appeal: [49].

- The value of finality prevents a court from being able to reopen orders which have been entered, otherwise than pursuant to statutory authority. An attempt to do so after the time for appeal has expired undermines the statutory constraints imposed on appeals: [32].
- The ground of acting "against good faith" in r 36.15(1) of the Uniform Civil Procedure Rules 2005 (NSW) is entirely general and is not in terms limited to consent judgments or summary judgments: [19]. The primary judge was correct in holding that Mr James' case depended upon establishing misleading or deceptive conduct, and if that claim failed, there was no basis upon which to allege that the same conduct was "against good faith": [21].
- Where a consent judgment is challenged on a basis which seeks to avoid the underlying agreement, there must be an underlying enforceable contractual agreement between the parties upon which the judgment is based: [16]. The orders did not depend upon the existence of a contractual agreement, and could not have been set aside on the basis of misleading or deceptive conduct on the part of ANZ, not amounting to fraud or lack of good faith: [27]. The putative basis for setting aside the consent judgment could only have been that it deprived Mr James of the opportunity to exercise his rights as guarantor to reduce his liability: [46], which were lost once judgment was entered: [43].
- The exercise of determining whether non-disclosure can constitute misleading or deceptive conduct is an objective exercise in fact-finding: [40]-[41]. There was no misleading or deceptive conduct on the part of ANZ: [42], [44].

Defamation: internet publications

Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller **[2020] NSWCA 102**

Decision date: 1 June 2020

Basten JA, Meagher JA, Simpson AJA

In 2016-17 certain media publishers posted news articles concerning the incarceration of Dylan Voller in a juvenile detention centre in the Northern Territory on their Facebook pages. Third parties posted comments critical of Mr Voller on these posts. In 2017 Mr Voller commenced proceedings against Nationwide News Pty Ltd, Fairfax Media Publications Pty Ltd and Australian News Channel Pty Ltd claiming damages for defamation, based on the content of these comments. The trial judge determined that they published the third party comments for the purposes of defamation law. The publishers sought leave to appeal this finding.

In 2019 three other media companies sought leave to intervene or to appear as amici curiae, either in support of the appeal or on the issue of whether a corporation which maintains a Facebook or similar page which permits third parties to post comments on the page is liable as a publisher of those comments where it is not on notice of the comments. They sought to raise a question not raised by the defendants, namely whether the claim in defamation was subject to Sch 5 cl 91 of the *Broadcasting Services Act 1992* (Cth), and therefore whether state defamation laws were invalid to the extent of the inconsistency with the Commonwealth Act.

Held: granting leave and dismissing the appeal: [55]; dismissing the application to intervene: [114].

- The Commonwealth law is paramount or supreme to the extent that State law is inconsistent. A provision of a State law which imposes liability on an internet content host for defamation in the circumstances covered by cl 91 will, to that extent, have no effect: [16]-[17].
- The host of data is the operator that stores data in a form accessible to its customers or the public: [20]. The media companies facilitated the posting of comments on articles and had sufficient control to be able to delete postings when they became aware that they were defamatory. The primary judge did not err in concluding that they were publishers of the third party posts: [47].
- A person who is instrumental in bringing about publication of defamatory matter is potentially liable for having done so notwithstanding that others may have participated in that publication in different degrees. The media companies encourage and facilitate the making of comments by third parties which are made available to Facebook users generally: [111]-[112].
- The interveners' application to intervene was refused as they sought to resolve questions of construction and fact not before the Court and not pleaded or raised as between the parties: [68]-[69].

Australian Intermediate Appellate Decisions of Interest

Administrative Law: reasons, judicial review

***MDF v Central Queensland Network Authorised Mental Health Service & Anor* [2020] QCA 108**

Decision date: 26 May 2020

Fraser JA, McMurdo JA, Applegarth J

Police and Queensland Health officials attended MDF's residence in 2018 in response to noise complaints made by MDF's neighbours. They informed MDF that they had an examination authority and detained MDF in the Emergency Department and subsequently at the Mental Health Unit. A treatment authority was signed by a doctor, diagnosing MDF with paranoid schizophrenia. MDF was discharged after one week and received treatment as an outpatient. He later underwent a psychiatric review and the Mental Health Review Tribunal revoked the treatment authority.

MDF wrote to the Tribunal and the Central Queensland Network Authorised Mental Health Service (the Service) requesting statements of reasons for decisions relating to his detention pursuant to s 32 of the *Judicial Review Act 1991* (Qld). The Tribunal did not supply reasons. The President of the Tribunal wrote to MDF advising him that the Attorney General had issued a certificate certifying that the disclosure of information relating to the decision would be contrary to the public interest. MDF applied for orders under s 38 of the Act requiring the Service and the Tribunal to comply with his requests for reasons for decisions. The primary judge dismissed the application. MDF sought leave to appeal and orders to that effect.

Held: allowing the appeal, ordering the provision of reasons by the Tribunal: [76].

- The decisions to apply to the Tribunal for an examination authority; requesting police assistance to execute the authority; making a recommendation for assessment of MDF; and making a treatment authority for MDF were not attributed to the Service, and therefore the Service was not required to provide reasons for those decisions: [17], [20], [23], [28].
- The principles of natural justice ordinarily require that a person who will be adversely affected by a decision has a right to be notified and heard in opposition to such a decision being made. This right had not been expressly granted nor excluded by the *Mental Health Act 2016* (Qld): [34]. However, it is not a condition of the right to request reasons under the *Judicial Review Act* that the person requesting reasons is entitled to reasons pursuant to the Act under which a decision was made: [43].
- The Court ordered that the Tribunal provide reasons for its decision to issue an examination authority, and provided for certain redactions to be made to these reasons: [74]. The redacted statement of reasons would not give a false or misleading impression, as any reader would appreciate that a substantial part of the reasoning was masked: [67].

Industrial Law: threat to take adverse action

Australian Building and Construction Commissioner v Molina **[2020] FCAFC 97**

Decision date: 29 May 2020

Bromberg J, Colvin J, Abraham J

In August 2016 there was a fatality on a building site in Canberra. The following day, there was a meeting of the site workers, where Mr Molina, an official with the Construction, Forestry, Maritime, Mining and Energy Union (the Union), proposed that all the workers should walk off the job as a sign of respect, which was subsequently voted for. Mr Molina told the representative of an independent contractor on the site that he should send his workers home out of respect, and threatened a picket line the following business day if he did not do so. The workers left the site after a few hours because the crane drivers were not working, and a picket line did not occur.

Proceedings were brought by the Australian Building and Construction Commissioner against Mr Molina and the Union alleging contraventions of the *Fair Work Act 2009* (Cth), being a threat to take adverse action (arranging a picket line) because the contractor did not comply with a lawful request by the Union (to send its workers home) and to threaten with intent to coerce to comply with the lawful request. The primary judge found that there had been no threat of adverse action as it had not been proved that there could have been prejudice to the contractor if there had been a picket line, and there was no intent to coerce. The Commissioner brought an appeal challenging this decision, but departed from the way it presented its case to the primary judge.

Held: dismissing the appeal: [141].

- The case pleaded by ABCC before the primary judge was that a threat to take action would be adverse action if it was of such a kind that **were it to be carried into effect** it would have the consequence of prejudicing an independent contractor in relation to a contract for services: [23]. On appeal, ABCC argued that it must be a threat to **bring about the effect** of prejudicing an independent contractor in relation to a contract for services: [22].
- ABCC's construction of the *Fair Work Act* as argued on appeal was preferred: [26]. However, the ABCC should not be allowed to advance a new and different case on appeal, and this was not a basis for demonstrating error in the decision of the primary judge who dealt with the case that was put before her Honour: [43].
- There is injustice if a party facing proceedings of the kind brought by a regulator such as the ABCC has to face the prospect on appeal of the ABCC changing its case in a fundamental respect once it has been unsuccessful. For the regulator to be given a second go on appeal with an entirely new formulation of the legal foundation for its case would undermine the principle of finality: [109].

Asia Pacific Decisions of Interest

International Law: child abduction

***LRR v COL* [2020] NZCA 209**

Decision date: 3 June 2020

Kós P, Brown J, Goddard J

In August 2017 LRR wrongfully removed her son H from Australia to New Zealand under the *Hague Convention on the Civil Aspects of International Child Abduction 1980*. LRR was from New Zealand, and moved to Australia where she met H's father, COL, an Australian citizen. H was born in Australia and was habitually resident in Australia. The relationship between H's parents was volatile and dysfunctional, and state social services were involved. Various family violence orders were made against both parents protecting the other, and both were convicted of assault and breaches of the orders. The parents separated in 2017. LRR did not have housing, income or family support, and had visa restrictions and safety risks relating to COL. LRR and H moved to New Zealand, despite COL's refusal of their request to do so. In New Zealand, LRR was living with her parents with various supports. H had not had any contact with COL since July 2017.

Under the Convention, the court was required to make an order for the return of H to Australia unless an exception applied. LRR argued that there was a grave risk that H's return would place H and LRR in an intolerable situation. The Family Court declined COL's application to make a return order. COL brought an appeal to the High Court, which made orders providing for the return of H to Australia. LRR was granted leave to appeal to the Court of Appeal.

Held: allowing the appeal and setting aside the return orders: [146].

- While the impact of return on the abducting parent may be relevant, the focus remains on the child: [93], [95]. There was a grave risk that the return of H to Australia would place him in an intolerable situation due to the precarious living situation he would be in: [145].
- The exceptions are as integral to the scheme of the Convention as the provision for prompt orders for return: [79]. If the return of a child would expose the child to a grave risk of an intolerable situation, it would not be appropriate to make an order for his or her return. The interests of the child in not being exposed to that risk cannot be outweighed by the goal of deterring future would-be abductors: [100]. The result in this case should not encourage potential abductors to think that removing a child to New Zealand is an attractive option: [148].
- The Court should admit credible and cogent evidence on an appeal concerning the Convention, where necessary to make a decision consistent with the interests of the child. The child should not be prejudiced by the failure of a party to adduce evidence at an earlier stage as this would be inconsistent with the purpose of the Convention and international law: [124].

Constitutional Law: competency of application

***Namah, Re* [2020] PGSC 33**

Decision date: 29 May 2020

Kandakasi DCJ, Mogish J, Cannings J, Manuhu J, Shepherd J

In 2017 the Public Prosecutor of Papua New Guinea referred the Leader of the Opposition, the Honourable Belden Norman Namah MP, to a Leadership Tribunal, triggering Mr Namah's automatic suspension. In 2018 the Tribunal found Mr Namah guilty of misconduct in office and recommended his dismissal from office. Mr Namah applied for judicial review of this decision and a stay of the decision of the Tribunal (the Order) was granted.

In 2020 Mr Namah brought an application challenging the constitutionality of the appointment of the Prime Minister, the Honourable James Marape. Interveners objected to the competency of this application, alleging that on the date of filing Mr Namah was suspended from duty. Mr Namah contended that he was not dismissed nor suspended at the time of filing due to the Order. Mr Namah further argued that if he was found to have been suspended, this had no effect on the competency of the proceedings as he still had capacity to commence proceedings as Leader of the Opposition as he continued to occupy that office. The question in these proceedings was whether Mr Namah was suspended from duty on the date of filing and whether this rendered the application incompetent.

Held: dismissing the proceedings.

- Suspension of a leader is an integral part of the constitutional process by which allegations of misconduct in office are investigated, heard and determined. Staying a suspension is a significant judicial decision as it involves interruption of this process. Such an order must be expressed unambiguously and be the result of deliberate judgment. The Order did not suspend Mr Namah, but rather stayed the decision of the Leadership Tribunal: [47].

- A suspension of a leader would only be lifted if and when the leader was found not guilty; the leader receives a penalty other than dismissal from office; or is dismissed. Until this occurs, or the Court orders a stay of the suspension, the leader remains suspended. None occurred in the case of Mr Namah: [49]-[51].

- There is a distinction between a leader occupying an office and being suspended from duty: [56]. When a leader is suspended from duty, he or she is suspended from performing all the powers, functions, duties and responsibilities that are attached to their office: [61]. It was a legitimate exercise of the Leader's powers to challenge the appointment of the Prime Minister by commencing proceedings, but on the day of filing he was suspended from duty and therefore not lawfully capable of exercising these powers: [64]-[65]. As his rights were suspended rather than extinguished, he did not properly or lawfully invoke the jurisdiction of the Supreme Court. This rendered the proceedings incompetent: [66]-[67].

International Decision of Interest

Constitutional Law: religious discrimination

South Bay United Pentecostal Church v. Newsom **590 U.S. ___ (2020)**

Decision date: 29 May 2020

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

Due to the COVID-19 pandemic, the Governor of California made an Executive Order aiming to limit the spread of the disease. The Order placed temporary numerical restrictions on public gatherings to address this extraordinary health emergency. This included limiting attendance at places of worship to 25% of building capacity or a maximum of 100 attendees, whichever was lower. This occupancy cap was not placed upon some secular businesses.

The South Bay United Pentecostal Church applied for temporary injunctive relief from this occupancy cap for its religious worship services. It was willing to abide by the State's rules applying to secular businesses, such as social distancing and hygiene, but objected to the 25% occupancy cap, arguing that its services were comparable to these secular businesses.

Held: denying the application for injunctive relief (Thomas J, Alito J, Gorsuch J and Kavanaugh J dissenting).

- The restrictions appeared consistent with the Free Exercise Clause of the First Amendment, as similar or more severe restrictions applied to comparable secular gatherings. Further, the Order only exempted or treated more leniently dissimilar activities which did not involve people congregating in large groups nor remaining in close proximity for extended periods: p. 2. The submission that it was "indisputably clear" that the government's limitations were unconstitutional was rejected: p. 3.

- Restrictions on particular social activities and when they should be lifted is a dynamic and fact-intensive matter, which is entrusted to the politically accountable officials of the States under the Constitution. They should not be subject to second-guessing by an unelected federal judiciary lacking the background, competence and expertise to assess public health and is not accountable to the people: p. 2.

- In dissent, Kavanaugh J held that the State's discrimination against religious worship services contravened the US Constitution. California was required to show that its rules were justified by a compelling governmental interest and narrowly tailored to advance that interest. While combatting the spread of COVID-19 was a compelling interest, there was no compelling justification for distinguishing between religious worship services and other secular businesses not subject to an occupancy cap: pp. 1-3.