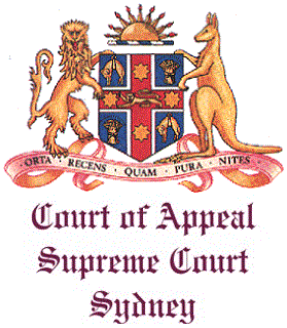

Decisions of interest

5 November 2018 – 16 November 2018

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 2

Other Australian intermediate appellate decisions of interest 4

Asia Pacific decisions of interest 6

Other international decisions of interest 8

New South Wales Court of Appeal decisions of interest

1. **Constitutional law: jurisdiction, judicial power, tribunals**

   Attorney General for New South Wales v Gatsby **[2018] NSWCA 254**

   Decision date: 6 November 2018

   Bathurst CJ; Beazley P; McColl JA; Basten JA; Leeming JA

   Pursuant to s 77(ii) of the *Constitution*, the *Judiciary Act 1903* (Cth), s 39(2) invests the "*Courts of the States*" with federal jurisdiction in "*all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it*", subject to certain exceptions, but including jurisdiction in "*all matters … between residents of different States*" under the Constitution, s 75(iv). Two proceedings under the *Residential Tenancies Act 2010* (NSW) (**the RT Act**) were commenced "*between residents of different States*" in the Civil and Administrative Tribunal of NSW (**the Tribunal**). The unsuccessful party in each proceeding brought appeals. The Appeal Panel of the Tribunal directed that a separate hearing be held on two questions: whether the Tribunal had been exercising judicial power in making the orders sought under the RT Act; and if so, whether the Tribunal was a "*court of a State*" within the meaning of s 39(2) and s 77(iii). This followed the decision in *Burns v Corbett* [2017] NSWCA 3 (affirmed by the High Court on different grounds), in which the Court had assumed, but not decided, that the Tribunal was not a Court of the state, such that it did not have jurisdiction to determine matters "*between residents of different states*". The Appeal Panel held that the making of the orders was an exercise of judicial power, and that the Tribunal was a "*court of the State*". The Attorney General sought leave to appeal on a question of law under the *Civil and Administrative Tribunal Act 2013* (NSW) (**the NCAT Act**), s 83(1).

   Held:

- The NCAT Act, s 83(1), was broad enough to give the Court jurisdiction to determine appeals on questions for separate determination: [96]; [208]; [280]-[289].

- The Tribunal was exercising judicial power, because the discretion exercised by the Tribunal to make a s 87 order terminating a residential tenancy agreement was analogous to that exercised by courts under the general law. The section required the Tribunal to identify whether such an agreement existed, whether the contract was breached, and whether the breach was sufficient to justify termination. Moreover, such an order was enforceable by the Tribunal: [125]-[137]; [197]; [198]-[200]; [279] (*contra* Basten JA: [229]-[248]).

- The Tribunal was not a "*court of a State*" within the meaning of s 39(2) and s 77(iii). It was not designated a "*court of record*" and was expressly distinguished from a "*court of law*". Further, most members of the Tribunal did not have the tenure and protection comparable to that held by judges, and lacked the necessary institutional independence and impartiality required to be described as a "*court of a State*": [184]-[192]; [197]; [198], [201]-[205]; [223]-[228]; [279].

2. **Defamation: offers of amends; statutory interpretation**

Nationwide News Pty Ltd v Vass **[2018] NSWCA 259**

Decision date: 8 November 2018

McColl JA; Basten JA; Leeming JA

The appellant (**Nationwide**) published a newspaper article which conveyed allegedly defamatory imputations about Mr Vass. Mr Vass served Nationwide with a 'concerns notice'. In response, Nationwide sent him an offer to make amends (**first offer of amends**), pursuant to the *Defamation Act 2005* (NSW) (**the Act**), Pt 3, Div 1. The offer specified that it remained "*open to be accepted until commencement of the trial, unless withdrawn in writing*". It did not include compensation. Mr Vass rejected this offer. A year after commencing proceedings, Mr Vass sent a "*without prejudice*" letter enclosing an offer of compromise of $149,001, pursuant to the Uniform Civil Procedure Rules 2005 (**UCPR**), r 20.26. In response, Nationwide expressly withdrew the first offer and made a new offer (**second offer of amends**), in substantially the same terms as the first but with an offer to pay $50,000 in damages. After Nationwide pleaded the making of two offers of amends as a defence, per the Act, s 18, Mr Vass sent Nationwide a second offer of compromise, pursuant to r 20.26. Nationwide did not respond. Five weeks prior to trial, Mr Vass wrote to Nationwide accepting the second offer of amends. The primary judge found that Mr Vass had validly accepted the second offer of amends. The key issue on appeal was whether common law principles of contract concerning offer and acceptance operated within the framework of the amends provisions, such that service of the second offer of compromise was a counteroffer constituting an implicit rejection of the second offer of amends.

Held:

- The Court granted leave but dismissed the appeal. It was apparent from the text, legislative history and purpose that the legislature did not intend the amends provisions to be construed by reference to ordinary contractual principles: [86]; [89]; [104]-[110]. The amends provisions comprised a discrete scheme, compliance with which was set out in the statute, and with which alternative means of resolving litigation did not intersect, save that all attempts to settle could be brought to bear under the Act, s 40, dealing with costs: [85]; [144]; [161].

- UCPR, Pt 20 similarly created a statutory scheme, which did not attract ordinary contractual principles, and operated separately to the amends provisions. Because the second offer of amends had not been withdrawn; and Mr Vass' offers of compromise were made pursuant to the UCPR "*instead of*" under the amends provisions (as contemplated by the Act, s 12(2)), the second offer of compromise did not operate as a counteroffer to the second offer of amends: [112]-[113].

- There was no reason to displace the natural meaning of the words included in Nationwide's offers of amends. On their proper construction, they were not subject to an additional qualification of being withdrawn by a rejection or the making of a counteroffer: [170]-[171].

Other Australian intermediate appellate decisions of interest

3. **Statutory interpretation: effect of non-compliance with statutory requirement**

Ian Street Developer v Arrow International **[2018] VSCA 294**

Decision date: 13 November 2018

Maxwell P; McLeish JA; Niall JA

The appellant (**proprietor**) entered into a construction contract with the first respondent (**builder**). The builder issued a progress claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**the Act**), s 14. The Act conferred on the claimant a statutory entitlement to a progress payment, provided it is claimed in accordance with the statutory procedure, one such step being the referral of a disputed claim to an adjudicator for determination. The adjudicator made a determination that the proprietor was liable to pay the builder a specified sum, but the adjudication was completed outside of the Act's stipulated time limit. The proprietor brought an action claiming that adjudicator's non-compliance with the time limit rendered the adjudication void. The primary judge rejected this construction, in a manner consistent with NSW Supreme Court authority on the identical NSW provision. The proprietor appealed. The builder brought a notice of contention alleging that the primary judge had misconstrued the section imposing the time limit, such that it had not in fact been breached.

Held:

- The Court dismissed the appeal and the notice of contention. The statute identified two specific requirements, non-compliance with which would void the adjudication. Both were concerned with decision-making requirements, not procedural ones. On ordinary principles of interpretation, the Court should conclude that this was an exhaustive statement of the circumstances in which non-compliance by an adjudicator with statutory requirements would result in invalidity: [68]-[69].

- The legislature had also addressed the consequences of non-compliance with the time limit, by permitting the claimant to withdraw the application in such circumstances. This option would be unintelligible if the adjudicator's jurisdiction automatically came to an end at the end of the stipulated time period: [70]-[71].

- The construction advanced by the proprietor would frustrate the purpose of the Act, being to ensure claimants were able to recover progress payments; and would hinder the effectiveness of the scheme: [73]-[78].

- Whilst accepting the Court was bound to apply *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, Maxwell P observed that it would be preferable to approach the question by way of a 'gap filling' exercise under ordinary principles of construction, such that, absent a provision stating that non-compliance would result in invalidity, the starting point was that Parliament must not have intended that result: [61]-[65] (*cf* McLeish JA: [89]; Niall JA: [92]).

4. **Industrial law: workplace right, adverse action, coercion**

Auimatagi v Australian Building and Construction Commissioner **[2018] FCAFC 191**

Decision date: 13 November 2018

Allsop CJ; Collier J; Rangiah J

A dispute arose on a building site controlled by John Holland Pty Limited, involving workers employed by its sub-contractors. John Holland had a policy requiring workers to wear long sleeved shirts and trousers (**the Policy**), intended to protect workers from cuts, abrasions, and sun exposure. Mr Auimatagi, an organiser for the Construction, Forestry, Maritime, Mining and Energy Union (**the Union**), advocated for the workers and organised a vote, the outcome of which was that workers would come to work wearing short sleeves, and stop work if any one of them was prevented from working. Work stoppages occurred over a number of days. The respondent (**ABCC**) brought proceedings against Mr Auimatagi and, vicariously, the Union, for contraventions of the *Fair Work Act 2009* (Cth) (**FW Act**), s 340 (adverse action) and s 343 (coercion). The primary judge found that Mr Auimatagi had contravened s 340 by organising, encouraging and inciting action, including industrial action, against John Holland, because John Holland had exercised its workplace right under the *Work Health and Safety Act 2011* (Cth) (**WH&S Act**) to enforce the Policy; and that Mr Auimatagi had undertaken action for the purposes of s 343 with the intent to coerce John Holland not to exercise this workplace right. Mr Auimatagi and the Union appealed on liability and sentence.

Held:

- The Court allowed the appeal on liability and set aside the penalties. It rejected the argument that John Holland was not exercising a "*workplace right*" for the purposes of s 340, relevantly defined as a being a "*role or responsibility under a workplace law*". On any view, John Holland was performing its "*responsibility*" under WH&S law. The phrase was not restricted to it acting as a figure representative: [72]-[74].

- Mr Auimatagi could not have taken adverse action in the form of "*industrial action*", as defined in the FW Act, s 19, because any such "*industrial action*" against John Holland had to be taken by its employees. Only the subcontractors' employees had taken action, and the subcontractors had authorised or agreed to such action. The ABCC had not pleaded that such action was taken by John Holland employees: [81]-[82]; [91]; [98]-[100]. The ABCC could not prove that John Holland had suffered real or substantial prejudice, referrable to a contract for services, as was required to sustain the other purported form of adverse action: [116]-[118].

- Mr Auimatagi did not engage in "*unlawful, illegitimate or unconscionable*" conduct, being a requisite element of establishing an "*intent to coerce*" under s 343. The action taken was not unlawful; nor did he act unconscionably or illegitimately in encouraging the workers to take a stand, organising a vote amongst them, and communicating their wishes to John Holland: [151]; [161]-[165]; [168].

Asia Pacific decisions of interest

5. **Human rights: bill of rights, remedies, formal declaration of inconsistency**

Attorney-General v Taylor **[2018] NZSC 104**

Decision date: 9 November 2018

Elias CJ; William Young J; Glazebrook J; O'Regan J; Ellen France J

The *Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010* (NZ) (**2010 Amendment**), extended the prohibition on voting to all convicted prisoners, not just those sentenced to a term of more than three years. The Attorney-General accepted that the 2010 Amendment was inconsistent with the *Bill of Rights Act 1990* (NZ) (**Bill of Rights**), s 12(a), and could not be justified under s 5. The respondents, who were convicted prisoners, sought a declaration of inconsistency in relation to the *Electoral Act 1993*, s 80(1)(d), as amended. The Bill of Rights, s 4, provided that courts could not hold any provision of an enactment to be impliedly repealed, invalid, or inapplicable by reason only that it was inconsistent with the Bill of Rights. The primary judge made the declaration as sought. The Attorney-General appealed on the basis that High Court had no jurisdiction to make a standalone declaration of inconsistency. The Court of Appeal dismissed the appeal, considering that the High Court had the power and it was not unreasonable for it to exercise it. However, the Court ruled that the first respondent, Mr Taylor, had no standing, because he was prevented from voting by the earlier legislation, not by the 2010 Amendment. The Attorney-General was granted leave to appeal to the Supreme Court of New Zealand, and Mr Taylor cross-appealed on standing.

Held:

- The Court dismissed the appeal by majority and unanimously allowed the cross-appeal. The text and purpose of the Bill of Rights supported the courts being able to use their usual remedies, of which a declaration was a part: [50]. This was especially important where no other relief was available: [105]-[106].

- The making of a declaration was not inconsistent with the judicial function. Declaratory relief provided formal confirmation of the respondents' rights and status, and vindicated the right to vote without interfering with Parliament's legislative freedom. Relief could also have implications for any complaint under the Optional Protocol to the ICCPR, and more generally, provide some protection against any attempts to re-litigate questions of consistency: [53]-[58]; [101]; [103]. *Momcilovic v R* (2011) 245 CLR 1, which concerned the Victorian Charter, was distinguishable by virtue of its constitutional setting: [61]-[63]; [95]; [108]-[110].

- William Young and O'Regan JJ considered that, although a declaration could be consistent with the judicial function, there was no jurisdiction in the absence of a power conferred by statute, and where it would not affect any legal rights. New Zealand could be distinguished from other countries, which provided for further legal consequences on the making of a declaration: [122]; [127]-[131]; [138]-[139].

6. **Damages: pain and suffering, future loss**

Lua Bee Kiang (administrator of the estate of Chew Kong Seng) v Yeo Chee Siong **[2018] SGCA 74**

Decision date: 5 November 2018

Leong JA; Prakash JA

Mr Yeo sustained serious injuries in a car accident and sought to recover damages in negligence from the estate of the person responsible. The appellant challenged four heads of loss in the damages claim: (a) pain and suffering; (b) loss of earning capacity; (c) loss of future earnings; and (d) cost of future nursing care. The primary judge allowed Mr Yeo's claims under each of these heads. In making an award for future nursing care, she took into account the fact that Mr Yeo's brain injury had increased his risk of developing dementia in the last 2-3 years of life, and made an award for the cost of being placed in a nursing home for two years. The appellant argued that the award was manifestly excessive. In relation to (a), she claimed that the award misapplied assessment guidelines, did not account for overlapping injuries, and was out of line with previous awards; and that the primary judge erred in applying the 'component' approach to total the loss. She also argued that Mr Yeo should receive nothing for the cost of future nursing care because it was speculative, and he had not proved on the balance of probabilities that he would develop dementia. The awards under (b) and (c) were also challenged.

Held:

- The Court allowed the appeal to the extent that the awards for pain, suffering and loss of amenity, and for the cost of future nursing care were reduced: [86]. The Court rejected the appellant's arguments in relation to loss of earning capacity, and loss of future earnings: [50]; [62]; [86].

- The Court should engage in a two-step analysis to arrive at "*fair compensation"* for non-pecuniary loss such as pain and suffering. First, the 'component method' should be applied to quantify the loss arising from each distinct injury. Second, a 'global method' should be applied to ensure the overall award is reasonable and to avoid overcompensation. On application of the two-stage approach, the Court determined that the award for pain and suffering should be reduced: [37]; [49].

- In assessing damages for future loss, the Court must first determine if there is an appreciable risk that the claimant will suffer that loss. If so, the Court should evaluate the risk, taking as a starting point an award corresponding to the full extent of that loss, before adjusting it to account for the remoteness of the possibility and the chance factors unconnected with the defendant's negligence might contribute to the loss. The risk of Mr Yeo developing dementia was an appreciable one, but to account for the risk that he would not develop dementia, the award fixed by the primary judge (which correctly represented 'full compensation' for the cost of future nursing care), should be reduced by 40%: [72]; [80]; [85].

High Court cases considered: *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638

Other international decisions of interest

7. **Anti-discrimination law: age; statutory interpretation**

***Mount Lemmon Fire District v Guido*, No 17-587**

Decision date: 6 November 2018

Roberts CJ; Thomas J; Ginsburg J; Breyer J; Alito J; Sotomayor J; Kagan J; Gorsuch J

Mount Lemmon Fire District, a political subdivision in Arizona, laid off its two oldest full-time firefighters, Mr Guido and Mr Rankin, who were then aged 46 and 54 respectively. The two men (**the respondents**) sued the Fire District, alleging that their termination violated the Age Discrimination in Employment Act of 1967 (**ADEA**). The Fire District sought dismissal of the suit on the ground that the Fire District was too small to qualify as an "*employer*" with the relevant ADEA definition. The definition, in §630(b), provided that "*the term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees … The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State*". The Court of Appeals for the Ninth Circuit found in the respondents' favour, and the Fire District appealed to the United States Supreme Court. The issue for the Court was whether the effect of "*also means*" was to add new categories to the definition of "*employer*", or merely clarify that States and their political subdivisions were a type of "*person*" engaged in an industry affecting commerce, such that the ADEA only applied if they had at least 20 employees.

Held:

- The Court unanimously affirmed the judgment of the Court below, holding that the AEDA's numerosity specification did not apply to states or political subdivisions. Ginsburg J delivered the opinion of the Court.

- First and foremost, the ordinary meaning of "*also means*" was additive, rather than clarifying; and occurred dozens of times throughout the US Code with an additive meaning. The text of §630(b) also paired States and their political subdivisions with agents, a discrete category which carried with it no numerical limitation. It would be anomalous to lift the numerical restriction for the agent portion of the second sentence of the definition, and then reapply it for States and their political subdivisions.

- Although reading the ADEA in this way would give it a broader reach than Title VII of the Civil Rights Act (which dealt with employment discrimination in relation to other grounds), this was a consequence of the different language Congress chose to employ. The better comparator was the Fair Labour Standards Act (**FLSA**), on which many aspects of ADEA were based, and which treated States and political subdivisions as employers regardless of the number of employees.

8. **Real property: easements, recreational and sporting rights**

Regency Villas Title Ltd and others (Respondents/Cross-Appellants) v Diamond Resorts (Europe) Ltd **[2018] UKSC 57**

Decision date: 14 November 2018

Lady Hale; Lord Kerr; Lord Sumption; Lord Carnwath; Lord Briggs

The freehold owner of Elham House, and members of various timeshare apartments on the property (**RVOC members**) (together, **the respondents**) claimed a declaration that they were entitled, by way of easement, to the free use of the sporting and recreational facilities on adjoining Mansion House estate (**the Park, servient tenement**). The grant of rights in the relevant 1981 transfer (**Facilities Grant**) granted "*the Transferee its successors in title its lessees and the occupiers from time to time of the property*" the use of the various sporting and recreational facilities on the Mansion House estate. It also contained a covenant on the Park's owner to maintain the facilities, but it was common ground that this could not bind the Park's successors in title. A dispute had arisen whereby successors in title disputed the respondents' rights to the facilities. The respondents succeeded before the primary judge, save for a claim for recovery of payments for use of the facilities before 2012. They were also successful in the Court of Appeal on the primary question of whether there was a valid easement; however, that Court confined their rights to specific existing facilities. The appellants were partially successful on a *quantum meruit* claim. The issues for the UK Supreme Court were whether there was a valid easement, and on the cross-appeal, whether the primary judge's original conclusions should be restored.

Held:

- The Court dismissed the appeal and allowed the cross-appeal, restoring the orders of the primary judge (Lord Carnwath dissenting). A grant of purely recreational (including sporting) rights over land may be the subject matter of an easement, provided the four conditions in *In re Ellenborough Park* [1956] Ch 131 are satisfied: [81]. It was wrong to construe the rights as limited to the actual facilities which were on site or planned in 1981: [83]-[93].

- The easement accommodated the dominant tenement. The grant of rights to use an immediately adjacent leisure development was of service, utility and benefit to the timeshare apartments as such, which were typically occupied for holidays. This being satisfied, it was not to the point that enjoyment might be the primary reason why persons were attracted to acquire rights in the dominant tenement: [53]; [57].

- It could not be said as a matter of fact or principle that the exercise of 'step-in' rights by the dominant owner to manage and maintain the facilities was such as to deprive the appellants of lawful possession and control of the Park: [62]-[65].

- An easement was not incompatible with the parties sharing an expectation that the servient owner would in fact undertake maintenance of the servient tenement, provided that they were not legally obligated to the dominant owner: [69]; [71].