Decisions of interest

18 June 2018 – 30 June 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

1. **Courts: jurisdiction, Land and Environment Court; injunctions**

   Minister for Local Government v Blue Mountains City Council **[2018] NSWCA 133**

   Decision date: 20 June 2018

   Bathurst CJ; McColl JA; Leeming JA

   In December 2017, the Minister wrote to the mayor of Blue Mountains City Council informing him of her intention to suspend the Council over concerns with its management of asbestos. Under the *Local Government Act 1993* (NSW) (**the Act**), s 438I, the Minister could suspend a council if she "*reasonably believe[d]*" that the appointment of an interim administrator was "*necessary"* to restore the council's "*proper or effective functioning".* Under s 438K, the Minister was to give notice of her "*intention to suspend the council*", specify a consultation period, and have regard to Council submissions before exercising the s 438I power.

   In response, the Council appointed independent investigators, and the Minister acceded to its request to issue a Performance Improvement Order. It later emerged that an investigator had undisclosed connections with a council employee associated with the investigation. On 14 February 2018, the Minister issued a new suspension notice with a seven day consultation period. On 22 February, the Council applied for an *ex parte* injunction restraining the Minister. The judge granted an injunction "*until further order*" and stood the matter over to the following day. The Minister unsuccessfully applied to dissolve the injunction. The main issues on appeal were whether the Court had jurisdiction to issue the injunction, and whether the judge had erred in not dissolving it on the basis that there was a serious question to be tried, namely that there was no indication in the notice that the Minister held a reasonable belief under s 438I.

   Held:

- The Court allowed the appeal: [126]. The present proceedings were not brought under the Act, s 673, as would have engaged the exclusive jurisdiction of the Land and Environment Court. They were in the nature of an application for an injunction to enforce a statutory scheme, brought by a directly affected party, such that the Court had jurisdiction to issue the injunction: [59]; [87]; [90]. The Court commented on the principles applicable to *ex parte* injunctions: [41]-[48].

- At the time a s 438K notice was issued, the Minister was not required to hold the belief referred to in s 438I, only an "*intention*" to suspend the Council per s 438K. To hold otherwise would disregard the textual differences between the provisions, and undermine the legislative scheme requiring the Minister to consider submissions in evaluating whether various criteria were satisfied before exercising the s 438I power: [101]-[103]. Thus there was no serious question to be tried; nor did a factual error in the notice give rise to such a question: [122].

2. **Jurisdiction: inherent jurisdiction; crime: administration of prisons**

Commissioner of Corrective Services v Liristis **[2018] NSWCA 143**

Decision date: 28 June 2018

Beazley P; Basten JA; White JA

Mr Liristis (**the respondent**) was on remand in Long Bay Correctional Complex facing a number of charges, with those charges listed for hearing in the District Court. On 18 January 2018 Mr Liristis filed a summons in the Supreme Court, seeking orders directed to the terms of his imprisonment. In particular, he sought access to his printer/scanner and personal laptop, arguing that access was necessary for him to prepare adequately for his trial. On 1 February 2018, the primary judge made orders that Mr Liristis be given access to his printer/scanner and laptop in custody and that he be permitted to use that equipment in the preparation and conduct of his case, both in custody prior to the commencement of the hearing and in the District Court, during the course of the trial. The key issue on appeal was whether the Court had jurisdiction to make the orders, and in particular whether the orders were supportable as an exercise of the Supreme Court's jurisdiction (i) under *Supreme Court Act 1970* (NSW), s 69; (ii) with respect of a contempt; or (iii) the inherent jurisdiction under *Supreme Court Act 1970* (NSW), s 23.

Held:

- The majority allowed the appeal: [9]; [121]. The primary judge was not purporting to exercise judicial review jurisdiction under s 69. The primary judge had made her own findings of fact, made her own decision that it was necessary for the respondent to have his own computer, and did not identify a legal error made by a decision maker: [7]; [50]-[55]; [115]. Contempt was not available as a possible source of jurisdiction. Senior counsel for the respondent did not contend that charge of contempt had been laid against the appellant (or any other officer), nor that the court had dealt with the matter as one of contempt: [8]; [59].

- The s 23 jurisdiction is restricted to the administration of justice according to law: [64]. There is no freestanding and unitary "*right to a fair trial*" or "*right of access to the courts*", directly enforceable through orders of the kind made by the primary judge: [64]-[65]; [79]. The Supreme Court may have independent supervisory jurisdiction with respect to criminal trials in the District Court; however, if it does, those powers are vested in the Court of Appeal and can only be exercised where the District Court has exceeded or is threatening to exceed its jurisdiction: [41]; [87]. The s 23 jurisdiction does not include a power to make positive binding orders against a third party to criminal proceedings to prevent an abuse of process: [34]-[36].

- White JA, dissenting, considered that the orders made could be supported by reference to the Supreme Court's jurisdiction to protect the jurisdiction of the District Court to conduct a fair trial: [119]; [185].

Other Australian intermediate appellate decisions of interest

3. **Administrative law; statutory interpretation**

ARJ17 v Minister for Immigration and Border Protection **[2018] FCAFC 98**

Decision date: 22 June 2018

Rares J; Flick J; Rangiah J

The Secretary for the Department of Home Affairs adopted a policy to the effect that detainees were not permitted to possess mobile phones and SIM cards in immigration detention centres, and if such items were found, they were to be confiscated until the relevant detainee left the detention centre (**the blanket policy**). The applicant (**ARJ17**) brought a representative proceeding in the Federal Court seeking declarations, injunctions restraining the seizure of phones and SIM cards, and an order quashing the decision to establish the blanket policy. This was heard together with an appeal against a judgment dismissing an action in the Federal Circuit Court seeking similar orders.

The respondents relied on two sources of power for the implementation of the blanket policy. The *Migration Act 1958* (Cth) (**the Act**), s 252, enabled authorised officers to search detainees, their clothing and property to find out if "*weapon[s] or other thing[s]*" had been hidden which were capable of being used to inflict bodily injury or to help a person escape from immigration detention, and to retain such items for as long as the officer thought necessary for the purposes of the Act. Under ss 273(2)-(3), the regulations could make provision for the "*operation and regulation of detention centres*", including for "*the conduct and supervision of detainees".* Although there were no such regulations, the respondents argued the policy was supported by s 273(1), which empowered the Minister to "*cause detention centres to be established and maintained*".

Held:

- The Court found the policy to be invalid. Rares J held that the s 273(1) power was directed towards the physical upkeep and repair of premises to ensure their suitability for use as a detention centre: [66]. Flick J considered that although the power to maintain a centre could "*perhaps*" encompass conduct which might facilitate escape, such a construction would not authorise "*maintenance*" by way of Ministerial direction or policy. Clearer statutory language than that under s 273(1) would be required to permit interference with property rights: [108]-[110].

- The statutory power under s 252 was a primarily a discretionary power, conferred for the specific purpose of "*find[ing] out*" whether certain items were hidden. It could not support a "*search*" to find and retain items which were not intentionally concealed or which the officer could see or knew about prior to the search: [76]-[83]; [106]. The policy also bound the officers in a way which was inconsistent with the discretionary powers conferred by s 252: [111]; [132]-[133].

4. **Migration: judicial review; practice and procedure: reasons for decision**

BZD17 v Minister for Immigration and Border Protection **[2018] FCAFC 94**

Decision date: 25 June 2018

Perram J; Perry J; O'Callaghan J

The appellant applied for a protection visa in Australia on the basis that he feared persecution or significant harm if returned to Cameroon by reason of his homosexuality. He claimed that he had been in a long-term relationship with another man, Mr B, had been threatened and abandoned by his family as a result, and had been forced to marry. After his wife found out about his continuing relationship, he and Mr B were attacked and beaten so badly that Mr B died from his injuries. The appellant was arrested on the grounds of homosexuality, and ultimately was placed in a hospital under police watch. He was able to escape and apply for a business visa to Australia.

The appellant produced a large volume of evidence in the Administrative Appeals Tribunal (**the Tribunal**), including evidence from Mr C, a human rights activist, who said he had met the appellant and Mr B whilst working in Cameroon. The Tribunal rejected the application, finding that the appellant was not credible and had fabricated his claims. An appeal to the Federal Circuit Court (**FCC**) was unsuccessful. The issues on appeal were whether the primary judge had erred in not finding that the Tribunal failed to give proper, genuine consideration to Mr C's evidence and had made adverse credibility findings which lacked any logical and probative basis; and whether the primary judge had constructively failed to exercise jurisdiction by failing to provide adequate reasons for decision or consider fundamental aspects of the appellant's case.

Held:

- The Court allowed the appeal, remitting the matter to the Tribunal. There was no real engagement by the primary judge with the grounds of judicial review, which were rejected at such a high level of generality that the basis for his conclusions was not exposed. His reasons did not address the alleged failure by the Tribunal to give proper consideration to Mr C's evidence: [24]-[26]. Although the Court would not ordinarily determine substantive grounds of judicial review which the FCC had failed to determine, there were compelling reasons to do so here, including because the errors were so apparent from the Tribunal's reasons that there would be no apparent utility in remitting the matter to the FCC: [30].

- The Tribunal had failed to give a proper, genuine and realistic consideration to the evidence of Mr C, a critical witness, and thus had fallen into jurisdictional error: [45]-[50]. The Tribunal had also erred in disbelieving that a homophobic attack on the appellant and Mr B had occurred because it was not posted on social media or reported: [58]. There were also serious doubts as to whether Tribunal had given proper, genuine and realistic consideration to evidence from a social worker and a counsellor who extensively had seen the appellant: [60].

Asia Pacific decisions of interest

5. **Administrative law; statutory interpretation; *Bill of Rights Act 1990* (NZ)**

***New Health New Zealand Incorporated v South Taranaki District Council* [2018] NZSC 59**

Decision date: 27 June 2018

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

In 2012, the respondent Council decided to add fluoride to the drinking water it supplied to two towns. The appellant was an incorporated society which opposed the fluoridation of water, on the basis that it removed consumer freedom of choice, was potentially harmful, and was not effective in preventing tooth decay. The appellant sought judicial review of the Council's decision. This application was dismissed by the primary judge, and an appeal to the New Zealand Court of Appeal was unsuccessful.

The key issues on appeal were whether the Council had the statutory power to fluoridate water supplies in its territorial area under the *Local Government Act 2002* (NZ) (**LGA**), and whether fluoridating water was in breach of the *Bill of Rights Act 1990* (NZ), namely the right of persons to refuse to undergo medical treatment. If s 11 was engaged, a further issue arose as to whether fluoridation was a reasonable limitation on the right prescribed by law as could be demonstrably justified in a free and democratic society, per s 5 of that Act.

Held:

- The majority of the Court (Elias CJ dissenting) dismissed the appeal. The Court examined the antecedent legislative provisions and case law implying a right to fluoridate water under those antecedent legislative provisions. The LGA was enacted against the background that fluoridation was, and had been lawful for decades. The Council's general competence power under the LGA, s 12, read against that background and the express continuation of water supply power in s 130, included the power to fluoridate: [56]; [165]; [171]; [178].

- Section 11 applied to any compulsory medical treatment provided in the course of a practitioner/patient relationship or as a public health measure. Fluoridation of drinking water fell within s 11, as it involved a pharmacologically active substance to prevent tooth decay, which people had no practical option but to ingest if they lived or worked in areas where fluoridation occurred: [99]; [243]. William Young J found that s 11 was not engaged: [210].

- The power to fluoridate was a reasonable limit on the s 11 right as could demonstrably be justified in a free and democratic society: [144]. The objective of preventing and reducing dental decay was sufficiently important to justify limiting the right. Moreover, the limit imposed was rationally connected, no more than was reasonably necessary, and proportionate to securing its objective.

6. **Contract: breach: repudiation; remedies, damages**

Biofuel Industries Pte Ltd v V8 Environmental Pte Ltd **[2018] SCGA 28**

Decision date: 25 June 2018

Andrew Phang Boon Leong JA; Steven Chong JA; Quentin Loh JA

The appellant (**BFI**) accepted waste wood from suppliers in exchange for a fee, which was shredded into wood chips and onsold. In 2013, BFI entered into the Biomass Supply Agreement (**BSA**) with the respondent (**V8**), by which BFI would be V8's exclusive disposal service provider. In exchange, V8 would enjoy lower disposal fees, at $30pmt for waste wood and $13.50pmt for wood chips. In April 2015, V8 terminated the BSA, alleging BFI had repudiated the agreement through its conduct in rejecting certain V8 deliveries and attempting unilaterally to raise prices. BFI sued for wrongful termination and non-payment of invoices.

The primary judge found that BFI did not repudiate the BSA, such that V8 had wrongfully terminated the agreement. He allowed BFI's claim for damages for the shortfall in deliveries. As BFI did not adduce evidence on the issue, the judge applied the difference between the disposal fee for waste wood and that of wood chips as BFI's costs of performing its obligations under the BSA, and used $13.50pmt as the quantum of profit. He ordered that V8 pay for outstanding invoices issued by BFI for deliveries of waste wood, and dismissed BFI's claim for loss of profits in respect of its onward sale of wood chips to a third party. The main issues on appeal were whether BFI's conduct amounted to a repudiation of the BSA, and if it did not, whether the primary judge had erred in his approach to the damages and in finding V8 liable to pay the outstanding invoices.

Held:

- The Court allowed the appeal in part, awarding only nominal damages. There was no manifest error in the finding that BFI's conduct did not constitute repudiation. BFI's issuance of credit notes to negate its unilateral increase in pricing was inconsistent with an intention not to be bound by the contract. None of the delivery rejections suggested that BFI intended henceforth not to be bound. V8 was content to resume delivering to BFI after each rejection: [22]-[23].

- V8 did not prove that it had delivered only waste wood after 12 December 2014 because BFI had rejected all future deliveries of wood chips on this date. It was therefore liable to pay BFI the sums due under the outstanding invoices: [26]. The judge was also correct to dismiss BFI's claim for loss of profits: [27].

- The judge had erred in awarding BFI substantial damages, as BFI had failed to prove the actual quantum of its loss: [29]. There may be contracts where the innocent party incurs no cost in performing its contractual obligations, and would be entitled to claim the full contract price as its loss. But even on BFI's best case, some operational costs would have been incurred in receiving the wood disposed of under the BSA: [33]. As BFI did not adduce any evidence as to its costs, the court had no basis to derive a fair estimate of its profit margin: [44].

Other international decisions of interest

7. **Constitutional law: executive power; immigration**

***Trump v Hawaii*, (2018) 17-965**

Decision date: 26 June 2018

In September 2017, President Trump issued Proclamation No. 9645, which placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals were deemed inadequate (**the travel ban**). This was the most recent of three executive orders in this vein. The states were chosen out of a review by the Department of Homeland Security (**DHS**), pursuant to one of the earlier orders. Most of the states were predominantly Muslim. The Proclamation exempted permanent lawful residents, provided case-by-case waivers in certain circumstances, and directed the DHS to reassess the restrictions every 180 days.

The plaintiffs argued that the Proclamation violated the *Immigration and Nationality Act* (**INA**). §1182(f) authorises the President to restrict the entry of aliens where he "*finds*" that their entry "*would be detrimental to the interests of the United States*". §1152(a)(1)(A) provides that "*no person shall … be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence*". The plaintiffs also argued that the Proclamation violated the Establishment Clause in the Constitution preventing laws which gave preference to any one religion, because the primary purpose of the Proclamation was religious animus against Muslims. The Court of Appeals for the Ninth Circuit upheld a nationwide preliminary injunction barring enforcement of the travel ban.

Held:

- A majority of the Court allowed the appeal. The Proclamation fell well within the comprehensive power vested in the President under §1182(f), which could not be constrained by §1152(a)(1)(A). The plaintiffs had not demonstrated a likelihood of success on the Establishment Clause claim. Looking behind the face of the order and applying a rational basis review, the policy reasonably could be understood to result from a justification independent of unconstitutional grounds. There was persuasive evidence that it could be grounded in national security concerns, quite apart from any religious hostility.

- In dissent, Breyer J (Kagan J joining) considered that if the government was applying the exemption and waiver provisions under the Proclamation as written, it would strongly suggest that the travel ban was lawful. However, the evidence suggested that the Government was denying visas to Muslims who met the Proclamation's own security terms. Sotomayor J (Ginsburg J joining) considered that, based on the full record of evidence, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus.

8. **Administrative law: judicial review; the legal profession**

***Law Society of British Colombia v Trinity Western University*, 2018 SCC 32**

Decision date: 15 June 2018

Trinity Western University (**TWU**), an evangelical Christian tertiary institution, sought to open a law school which required its students and faculty to adhere to a religiously based code of conduct. This prohibited "*sexual intimacy that violate[d] the sacredness of marriage between a man and a woman*" for the duration of the law degree, including off-campus. After provisionally approving the proposed law school under the *Law Society Rules 2015*, the Law Society of British Colombia (**LSBC**) held a referendum of its members, who voted not to recognise it as an "*approved*" faculty of law for the purposes of meeting the qualification requirements under the LSBC's bar admission program. TWU and Mr Volkenant, a potential student of the law school, brought judicial review proceedings on the basis that the LSBC's decision violated religious rights protected under the *Canadian Charter of Rights and Freedoms*, s 2(a). The Court of Appeal for British Colombia found that the LSBC should have approved the law school. The LSBC appealed to the Supreme Court of Canada.

Held:

- The Court allowed the appeal. The decision not to recognise the law school struck a proportionate balance between limiting the Charter right and the statutory objectives governing the LSBC: [105]. The decision did not significantly limit religious freedom because a mandatory covenant was not absolutely required for the religious practice at issue, and the environment it promoted was preferred, rather than necessary, for spiritual growth: [87]-[88]. LSBC's decision advanced its statutory objects by maintaining equal access and diversity in the profession, where TWU places would otherwise be effectively closed to LGBTQ people: [93]; [95].

- McLachlin CJ considered, contrary to other majority judges, that the negative impacts of the decision on the religious, expressive and associational rights of the TWU community were not merely "*of minor significance*": [129]; [145]. However, she agreed that the LSBC's decision to preference the imperative of refusing to condone discrimination and unequal treatment on the basis of sexual orientation in denying approval was not unreasonable: [148].

- Rowe J considered that TWU's claim fell outside the scope of freedom of religion protected by s 2(a), because its enforcement of a religiously based code of conduct extended to members of other religions and non-believers who could attend the law school: [239]; [251]. Reviewed under ordinary judicial review principles, the LSBC's decision was reasonable: [258].

- Côté and Brown JJ (dissenting) considered that the LSBC's authority to approve law schools was a proxy for determining whether graduates were competent to be licensed; it did not extend to guaranteeing equal access: [289]; [341].