Court of Appeal
Supreme Court
Sydney

Decisions of interest

24 September 2018 – 5 October 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. **Care and protection; criminal procedure; statutory interpretation**

   Secretary, Department of Family and Community Services v Hayward (a pseudonym) **[2018] NSWCA 209**

   Decision date: 27 September 2018

   Bathurst CJ; Beazley P; Basten JA; Gleeson JA; Payne JA

   The respondent faced trial in the District Court on several counts arising from injuries she allegedly inflicted upon a child. The applicant produced a number of risk of significant harm reports made under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (**the Act**), within the meaning of "*report*" as defined in s 29(6). Each was redacted to anonymise the reporter's identity. The respondent sought orders compelling disclosure of the reporters' identities. The primary judge made a preliminary ruling that she had power to make such orders under s 29(1)(f)(ii). The applicant applied for a declaration to the contrary. Under ss 29(1)(d) and (e), a report or evidence of its contents was not admissible "*in any proceedings*" except specified kinds (which did not include a criminal proceeding), and a person could not be compelled "*in any proceedings*" to produce a report or disclose its contents. Section 29(1)(f) prohibited disclosure of a reporter's identity or information from which it could be deduced except with (i) the reporter's consent, or (ii) leave of a court "*before which proceedings relating to the report [were] conducted*". The issue was whether the District Court in a criminal trial had the power under s 29(1)(f)(ii) to order that the applicant reveal a reporter's identity.

   Held:

- The Court made the declaration sought by the applicant. Sub-sections 29(1)(d), (e) and (f) formed a coherent scheme and must be read together: [9], [76], [85]-[86]. The statutory text, context and legislative history militated against construing "*any proceedings*", in ss 29(1)(d) and (e), as subject to an implied exclusion of criminal proceedings. Accordingly, harm reports were inadmissible in criminal proceedings under s 29(1)(d), and compelled disclosure of their contents was prohibited by s 29(1)(e). *Re Application of the Attorney-General for New South Wales dated 4 April 2014* [2014] NSWCCA 251 should not be followed: [64]-[71], [85], [91].

- There was no freestanding power on a court in a criminal case to direct disclosure of the identity of a reporter under s 29(1)(f)(ii). The phrase "*proceedings relating to the report*" limited its operation to the narrow classes of proceedings in which harm reports and their contents might be admissible under s 29(1)(d): [72]-[76], [94]-[95].

- The principle of legality did not enable the Court to disregard the ordinary and natural meaning of statutory text, nor to impose limitations which the Parliament had addressed and rejected with sufficient clarity: [31]. The legislature had chosen to override any interest an accused person might have in ascertaining a reporter's identity, so as to protect the interests of vulnerable children as a class: [90], [92].

2. **Negligence: duty of care, police officers; procedure: summary dismissal**

Fuller-Wilson v State of New South Wales **[2018] NSWCA 218**

Decision date: 3 October 2018

Basten JA; White JA; Emmett AJA

In June 2013, Keith Wilson was killed in a motor vehicle accident. In February 2014, members of his family (**the appellants**) visited the accident scene. They claimed to have suffered psychological injury as a consequence of discovering parts of Mr Wilson's foot and ankle, as well as remnants of clothing containing his remains, at the scene. The appellants commenced proceedings in the District Court against the State of New South Wales, alleging that police officers were negligent in failing to remove the remains from the accident site, and in failing to warn them that the remains might still be at the scene. On the respondent's motion, the primary judge summarily dismissed the plaintiffs' statements of claim under Uniform Civil Procedure Rules, r 13.4(1)(b). This was because the primary judge was satisfied that the officers owed no duty of care of the kind pleaded. The key issue on appeal was whether the statements of claim failed to disclose a reasonable cause of action, such that the summary dismissal was warranted.

Held:

- The Court allowed the appeal.
- On the present state of the law, there was a degree of uncertainty regarding the circumstances in which the existence of a duty of care will be rejected on the basis that it imposes obligations on a public authority, inconsistent with that authority's statutory obligations: [80]-[82]. Though the weight of authority supported the view that no duty of care was owed by the police officers to the appellants, there was a reasonable argument that the common law in Australia should recognise a wider scope of liability: [12]; [80]. In those circumstances, the proceedings should not have been summarily dismissed: [12]; [87]; [90].
- Whether a statutory authority owes a duty of care in the performance of its functions turns upon a close examination of the terms, scope and purpose of the relevant statutory regime. A claim should not be summarily dismissed on the basis that the purported duty of care gives rise to conflicting obligations unless it can be said that (a) the particular statutory regime has been properly identified and (b) an affirmative finding of conflicting claims or obligations has been made on the facts as pleaded. That did not occur in the present case. Accordingly, the matter should not have been summarily dismissed: [83]; [90]; [93]; [101]-[102].

Other Australian intermediate appellate decisions of interest

3. **Legal profession: limitation period on costs assessment, itemised bills**

***Qld Law Group – A New Direction Pty Ltd v Crisp* [2018] QCA 245**

Decision date: 28 September 2018

Sofronoff P; Morrison JA; Philippides JA

The applicant firm represented the respondent in a proceeding which settled. On 28 April 2015, the applicant sent the respondent a letter which calculated the amount payable to the respondent under the settlement after deductions, and a 'tax invoice' that set out a lump sum for the applicant's professional fees and itemised the outlays payable to third parties. The respondent signed a form of authority authorising the distribution of funds in the applicant's trust account in accordance with the terms of the letter. The applicant drew the relevant amount to satisfy the invoice. On 21 March 2016, the respondent requested an itemised bill, which she received on 19 May 2016. Nearly a year then passed until the respondent filed an application for a costs assessment, under the *Legal Profession Act 2007* (Qld) (**the Act**), s 335. Section 335(5)(a) provides that an application for a costs assessment made by a client or third party payer must be made within 12 months after "*the bill was given, or the request for payment was made, to the client or third party payer*". The issue was whether "*the bill*" for the purposes of s 335(5)(a) was the lump sum bill constituted by the 'tax invoice', or the itemised bill. The Magistrate considered that "*the bill*" referred to the tax invoice, such that the respondent's application was out of time. This was overturned on appeal to the District Court, the judge finding that the delivery of the itemised bill triggered a fresh limitation period. The applicant sought leave to appeal to the Queensland Court of Appeal.

Held:

- The Court granted leave and allowed the appeal. Leave was granted because the question of construction was of importance to the legal profession, not just in Queensland, but in Australia generally, given similar legislation in other states: [32].

- There was nothing in s 335 that, for the purposes of an application for the assessment of legal costs, promoted the importance of an itemised bill over a lump sum bill, or even distinguished between them, vis-à-vis other provisions in the Act which drew such distinctions. The Act also provided ample time for an application to be made even if an itemised bill was not initially delivered, as a request for delivery of an itemised bill must be met by a law practice within 28 days: [17]-[21].

- If the construction contended for by the respondent were true, then a client who had received a lump sum bill would be able to extend the limitation period to two years merely by making a request for an itemised bill. Nothing in the statute suggested that such a form of self-help was intended. Although the relevant chapter of the Act constituted a form of consumer protection, this could not justify according a meaning to the provisions not justified by the text: [22]-[24].

4. **Administrative law: judicial review, *ultra vires***

***United Firefighters' Union v Victorian Equal Opportunity and Human Rights Commission* [2018] VSCA 252**

Decision date: 4 October 2018

Maxwell P; Tate JA; Priest JA

In 2015, the Secretary for the Department of Justice and Regulation in Victoria wrote to the respondent (**the Commission**) requesting that it undertake a review into discrimination, bullying and sexual harassment in the Country Fire Authority (**CFA**) and the Metropolitan Fire and Emergency Services Board (**MFB**). The *Equal Opportunity Act 2010* (Vic) (**the Act**) provided that "*on request of a person, the Commission may enter into an agreement to review that person's programs and practices to determine their compliance with the Act*". The Commission entered into detailed arrangements with the CFA and MFB to conduct the review. In 2017, the appellant union commenced proceedings in the Victorian Supreme Court, seeking to restrain the Commission from continuing to conduct the review or publish any report connected with it. The primary judge dismissed the proceeding, finding, *inter* alia, that the programs and practices under review were ultimately those of the Government of Victoria, as provided through the CFA and MFB as statutory corporations entrusted with the provision of fire prevention and fire suppression services. The issue on appeal was whether the review fell outside the scope of the statutory authority conferred on the Commission by s 151(1). By a notice of contention, the Commission argued, in the alternative, that it had the power to conduct the review and complete and publish the report under the Act, s 157, and associated provisions. Section 157 empowered the Commission to undertake research into "*any matter arising from, or incidental to*" the operation of the Act that it considered would "*advance the objectives of [the] Act*", and collect and analyse data relevant to the operation and objectives of the Act.

Held:

- The Court allowed the appeal and dismissed the notice of contention. The Court was not concerned with, and expressed no view, about the desirability of the Commission conducting such a review: [12]-[13].

- The relevant obligations under review were those imposed upon the MFB and the CFA in their capacity as employers. Self-evidently, the Commission had no jurisdiction to review the delivery of fire services. Where the employer in question was a statutory corporation with its own legal responsibilities, s 151(1) did not allow a different legal person, here, the government, to request a review: [56]-[62]; [90].

- A general power to conduct research under s 157 could not supply an alternative source of power for the Commission to conduct a compliance review, absent the relevant request under s 151(1). Nor did it authorise the publication of the results of a survey conducted as part of such a review: [76]-[84] (contra Tate JA: [163]-[167]).

Asia Pacific decisions of interest

5. **Competition: mergers, loss of media plurality; statutory interpretation**

NZME Limited v Commerce Commission **[2018] NZCA 389**

Decision date: 26 September 2018

Kós P; Miller J; Asher J

NZME Ltd and Stuff Ltd (a Fairfax subsidiary) published between them New Zealand's major newspapers and news websites, and numerous community newspapers. They wished to merge in order to navigate the increasingly digitised media landscape, which had resulted in declining advertising revenues and subscriber numbers. The Commerce Commission denied the parties authority to merge. Under the *Commerce Act 1986* (NZ), s 67(3), if a transaction would substantially lessen competition in a market, approval is granted only if the acquisition is "*likely to result in such a benefit to the public that it should be permitted*". The Commission found that the merger would substantially lessen competition in the relevant markets. It accepted that the transaction would deliver substantial and quantifiable public benefits in the form of productive efficiency gains for the merged firm, but that these were outweighed by losses in media quality and 'plurality'. The High Court dismissed an appeal and declined authorisation. Leave was granted for the companies to appeal to the New Zealand Court of Appeal. The issues on appeal were whether (i) the Commission had jurisdiction to take into account non-economic, unquantified detriments (in the form of plurality concerns) under s 67(3); (ii) whether the Court erred in applying the statutory test of whether the quality and plurality detriments were "*likely*" and attributable to the transaction; and (iii) whether it erred in its approach to balancing unquantifiable detriments against the net quantified benefits of the transaction.

Held:

- The Court dismissed the appeal. On its proper construction, "*benefit to the public*" did not exclude non-economic or out of market considerations, such as media plurality. Economic efficiency was a mandatory consideration in the analysis, per the Act, s 3A, but other considerations might be relevant or even determinative. This approach was supported by authority in New Zealand and Australia: [69]-[72].

- The High Court had erred in taking into account a risk that was not "*likely*" to occur on the evidence, namely that a single owner would exploit the merged entity for political purposes. However, the Court had assigned this factor little weight and did not otherwise err. The Commission had not made this error: [93]. Other challenges as to the adequacy of the Commission's methodology were rejected: [102]-[106].

- The Court found that the transaction would be very likely to result in quality and plurality losses which were substantial in nature. The detriments clearly outweighed the benefits, and not by a small margin, such that authorisation was properly declined below: [120]; [126]; [133]-[137].

6. **Courts: judges, apparent bias, recusal**

***BOI v BOJ* [2018] SGCA 61**

Decision date: 4 October 2018

Menon CJ; Leong JA; Prakash JA

The parties to the appeal were former spouses engaged in acrimonious divorce proceedings. Ancillary matters were being heard by the primary judge between November 2016 and July 2017. On 7 July 2017, the appellant sought the judge's recusal from hearing those matters on the basis of apparent bias. She alleged that her counsel had been unduly hampered in her presentation of the case; the judge had favoured the respondent by giving his counsel greater time and leeway; and the judge had pre-judged the case against the appellant without having heard the parties fully. The judge rejected the recusal application. On appeal, the appellant argued that the primary judge had wrongly applied the "*real likelihood*", as opposed to the "*reasonable suspicion*" test, in determining whether apparent bias had been made out, and made similar arguments to those below on the issues of bias and pre-judgment. The issues for the Singapore Court of Appeal were (i) whether the doctrine of apparent bias was made out; (ii) whether the primary judge had pre-determined certain issues; and (iii) whether the judge had interfered excessively in proceedings, thus denying the appellant a fair opportunity to present her case.

Held:

- The Court dismissed the application. The primary judge had not erred in her identification of the test, but had explicitly referred to and applied the "*reasonable suspicion*" of bias test: [27]. The Court clarified that there was no material difference between this and "*reasonable likelihood*", but in the interests of adopting a standard terminology, consistent with other jurisdictions, the *"reasonable suspicion*" test should henceforth apply, namely, whether there were circumstances that would give rise to a reasonable suspicion or apprehension of bias in the fair-minded and informed observer. This was an objective test: [93]-[95]; [103].

- Apparent bias was not made out. First, the parties were unable to narrow the disputed issues, requiring the judge to play a more active role in case management. The fair-minded observer would have concluded that the judge was not biased, but determined to expedite the proceedings. The judge's annoyance at the pace of proceedings was expressed towards both parties, and would not have amounted to bias. Pre-judgment had also not occurred. Finally, the judge's purported preference for the respondent's case and leeway given to his counsel was a matter for appeal, not recusal: [120]; [126]; [128]-[129]; [132]-[133].

- There had not been excessive judicial interference. The appellant had not demonstrated how her case was hampered. She had been given ample opportunity to tender written submissions and joint summaries, which the primary judge had taken note of. It was too much of a stretch to conclude from the brief exchange relied upon that the judge had 'descended into the arena' and was pursuing a particular position, as opposed to clarifying the respondent's case: [136]-[137].

Other international decisions of interest

7. **Constitutional law: parliamentary privilege, scope of privilege**

***Chagnon v Syndicat de function publique et parapublique de Québec*, 2018 SCC 39**

Decision date: 5 October 2018

Three security guards employed by the National Assembly of Québec were dismissed by the President of the National Assembly (**the appellant**) for using their employer's cameras to observe activities inside nearby hotel rooms. The respondent union challenged their termination before a labour arbitrator. The appellant objected on the basis that the decision to dismiss the guards was immune from review because it was protected by parliamentary privilege over the management of employees and parliamentary privilege to exclude strangers from the National Assembly. The arbitrator found that the security guards' dismissals were not protected by parliamentary privilege, such that the grievances could proceed. On judicial review, the primary judge found that the arbitrator did not have jurisdiction, because the dismissal decision was protected by the privilege over the management of employees. The majority of the Court of Appeal allowed the union's appeal, and the appellant appealed to the Supreme Court of Canada.

Held:

- The Court dismissed the appeal (Côté and Brown JJ dissenting). The applicable standard of judicial review was "*correctness*", not "*reasonableness*". The existence and scope of parliamentary privilege was a question of central importance to the legal system and outside the expertise of the arbitrator: [17].

- The existence and scope of the privilege must be strictly anchored to its rationale. It extends only as far as is necessary to protect legislators in the discharge of their legislative and deliberative functions, and in holding the executive to account: [25]-[30]. The party seeking to rely on the immunity must establish its necessity: [32].

- It was not necessary for the National Assembly to have unreviewable authority over the management of security guards in order to maintain its sovereignty as a legislative and deliberative assembly. Permitting the enforcement of basic employment and labour protections for the security guards would not undermine the independence required for the Assembly to fulfil its mandate: [43]-[46].

- Nor was it necessary for the scope of its privilege to exclude strangers to be so broad as to include the decision to dismiss employees who implemented this privilege on behalf of the President. This unnecessary sphere of immunity would impede the rights of persons who were not members of the assembly: [52]-[57].

- Rowe J held that the privilege was now subject to the Assembly's governing statute, which set out procedures for the management of employees. The appellant could not assert privilege to avoid compliance with the statute: [70]-[75].

8. **Constitutional law: right to privacy, bills of appropriation**

***Justice K S Puttaswamy (Retired) v Union of India*, 2018**

Decision date: 26 September 2018

Misra CJ; Sikri J; Khanwilkar J; Chandrachud J; Bhushan J

Under the government's Aadhaar Scheme, more than 1.2 billion Indian citizens have now been issued with a unique 12-digit biometric identification number (**UID**). An Aadhaar card was used to access welfare payments and social services, and is recognised as a valid proof of identity. It also increasingly became a pre-requisite means of verifying identity when engaging in private transactions. The scheme commenced in 2009. In 2016, the government passed the *Aadhaar Act*, giving it legislative backing. The Act dealt with how data was to be collected, used, and stored, and under s 7, made the receipt of government subsidies, benefits and services conditional on providing an Aadhaar card. Section 57 provided that UIDs could be used by "*any body corporate or person*" to establish an individual's identity. A number of petitions were brought arguing that the Act was constitutionally invalid, because the scheme violated the fundamental right to privacy. The petitioners contended, *inter alia*, that the scheme had the potential to enable a surveillance state; lacked data protection guarantees, and was liable to exploitation by private entities. The Act was also said to be unconstitutional on the basis that it could not have been passed as a 'Money Bill' under Art 110 of the Indian Constitution. Where a bill is classified as such, it may be passed in certain circumstances without the consent of both houses of Parliament.

Held:

- The majority upheld the constitutional validity of the scheme. The Court struck down s 57, to the extent it enabled private entities to seek authentication through the scheme, and struck down legislation linking Aadhaar to bank accounts and mobile numbers. It struck down, read down, or clarified other provisions of the Act.

- The scheme did not violate the right to privacy. It pursued a legitimate state aim, to ensure that welfare schemes reached their intended beneficiaries. There was no less restrictive but equally effective alternative. It did not have a disproportionate effect on rights holders. There were two competing fundamental rights, the right to privacy, and the right to food, shelter, and employment. Inroads into privacy rights were minimal, including no data collection on individuals' movements. Conversely, the scheme gave individuals a unique identity allowing them to access welfare.

- The *Aadhaar Act* was validly classified as a 'Money Bill'. The core provision of the Act, s 7, satisfied Art 110, insofar as authentication with Aadhaar was required to receive a subsidy, benefit, or service, in circumstances where the requisite welfare expenditure was drawn from the Consolidated Fund of India.

- In dissent, Chandrachud J held that the Act was not a 'Money Bill'. He also considered that the scheme as a whole was invalid, because it violated essential norms pertaining to informational privacy, self-determination, and data protection.