Decisions of Interest

27 March 2023 – 9 April 2023

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

Crown Land; Statutory Construction

***Valuer-General v Sydney Fish Market Pty Ltd* [2023] NSWCA 52**

Decision date: 28 March 2023

Leeming, Mitchelmore and Kirk JJA

In 1994, a 50 year lease was granted over Crown land in Pyrmont in favour of Sydney Fish Market Pty Ltd ("SFM"). The lease required, amongst other things, that SFM pay rates and land tax, and operate a "substantial wholesale fish market" on the land. SFM received two valuations of the land prepared by the Valuer-General in 2019 and 2020. Both were prepared on the basis that the land was not "Crown lease restricted" for the purposes of s 14I of the *Valuation of Land Act 1916* (NSW). That characterisation of the land was contested by SFM who maintained that the land is "Crown lease restricted" land. SFM objected to the valuations on that basis. Its objection was rejected so SFM appealed to the Land and Environment Court. Whether or not the land was "Crown lease restricted" turned on the operation of the transitional provisions of the *Crown Land Management Act 2016* (NSW), notably cl 26(1) of Div 7 of Schedule 7. The primary judge found in favour of SFM. The Valuer-General appealed that decision.

Held: granting leave to appeal but dismissing the appeal

- Section 9(1) of the *Fish Marketing Act 1994* (NSW) is not the source of power to grant the lease. The provision does not identify the donee of any power: [62]-[63]. This contrasts with other sections of the *Fish Marketing Act* expressly confer power upon the Fisheries Administration Ministerial Corporation in s 5A(5)(b) and s 8(2): [64]-[67]. The lease should be regarded as having been granted under s 34 of the *Crown Lands Act 1989* (NSW) as opposed to under s 9 of the *Fish Marketing Act 1994* (NSW). There was not an exercise of power under s 9(1) of the *Fish Marketing Act* because that section does not confer power to grant a lease: [68]-[71], [81] [94(3)]. Rather, s 9(1) is concerned to ensure that there is statutory authority for certain restrictive trade practices in place at the time and which were intended subsequently to continue: [72]-[80]. The Valuer-General's submission that s 9(1) implied repealed s 34 was rejected as the Court ought not lightly find that there had been either an implied repeal of the *Crown Lands Act* or a displacement of the power in s 34: [84]-[86]. The Lease was in 2016 in force under the *Crown Lands Act* for the purposes of cl 26(1), because that statute was the source of the power to grant the lease and continued to govern the parties' rights: [94(4)].
- The vesting of the land from the Crown to the State Property Authority in 2007 did not alter the position, being the lease. A change in the identity of the lessor does not without more change the nature of the lease. Clause 26 is directed to the character of the lease, not the character of the land. If in 2005 the lease was in force under the *Crown Lands Act* for the purposes of cl 26(1), that remained the case in 2007: [98].

Education: universities; Human Rights: discrimination on political grounds

Western Sydney University v Thiab **[2023] NSWCA 57**

Decision date: 29 March 2023

Bell CJ, Meagher and Leeming JJA

In August 2021, when about to commence a clinical placement at a hospital, Ms Thiab, a nursing student, disclosed that she was not vaccinated against the COVID-19 virus declined to undergo screening swabs for the virus, and spoke out against the Public Health Orders and Dr Kerry Chant. The placement was terminated. Ms Thiab was vaccinated against COVID-19 and presented for a further clinical placement at a vaccination hub in October 2021. She expressed doubts to healthcare staff about the safety and efficacy of COVID-19 vaccinations. Her placement was cancelled by the University ("the cancellation decision"), and a disciplinary process initiated against her. Ms Thiab commenced proceedings in the Supreme Court seeking a declaration that the cancellation of her placement contravened s 35 of the *Western Sydney University Act 1997* (NSW) ("the *WSU Act*). The University completed the disciplinary process and imposed certain disciplinary sanctions. The primary judge held that both the cancellation decision and the disciplinary sanctions were unlawful for breach of s 35 of the *WSU Act*. The University appealed that decision.

Held: granting leave to appeal and allowing the appeal

- The meaning of the word "political" in the compound expression "political affiliations, views or beliefs" at least describes an affiliation, view or belief associated with (including in opposition to) a political party, organisation or sufficiently identifiable political movement: [118]. The scope of the word "political" as used in s 35 is not so broad as to apply to all views or beliefs connected with public debate about affairs of government, or the conduct of public affairs: [114]. Having regard to the text and legislative history of the section, it is wrong to impute to Parliament an intention to treat any conscientiously held "moral" or "ethical" belief as "political" for the purposes of s 35: [121]–[123]. While a person's anti-vaccination views may in some circumstances be "political", the nature of Ms Thiab's opposition to vaccination was medical and scientific and not political, even on a broad understanding of the term: [124]–[129], [133]–[136].

- The causation question presented by s 35 requires identification and characterisation of the true basis, reason or ground for the impugned decisions. The reason for an adverse action may not always be entirely dissociated from a person's views or beliefs, but that does not mean that the adverse action was taken because of those views or beliefs: [140]–[141]. In such circumstances, s 35 will not necessarily have been contravened. In each case it would be a matter of determining whether the adverse action was actuated by the political affiliation, view or belief itself, or by some other legitimate and bona fide concern: [142]. The primary judge erred in holding that the cancellation decision was made because of Ms Thiab's views and beliefs. The cancellation decision was made because of an apprehension that there was a risk that Ms Thiab would share misinformation about vaccination against COVID-19 with patients: [146]–[151]. The disciplinary sanctions were similarly imposed because of a well-founded concern that Ms Thiab would express those views and beliefs in a manner that would result in danger to patient health: [154]–[159].

- The making of a declaration that the disciplinary sanctions contravened s 35 involved a denial of procedural fairness to the University: [160]–[166]. As a general but important rule, judges should refrain from making comments seriously critical of witnesses where at least the gist of any adverse criticism has not been put to them and where they have not been given an opportunity fairly to respond to the criticism: [170].

Corporations: financial services; misleading or deceptive conduct

Tredmore Pty Ltd v Atlas Advisors Australia Pty Ltd **[2023] NSWCA 60**

Decision date: 31 March 2023

Ward P, Meagher and Gleeson JJA

The appellants had commenced proceedings in the Supreme Court seeking damages for alleged multiple instances of misleading or deceptive conduct by the respondents in relation to advice concerning the safety of an investment in a property development fund. The primary judge found that there was misleading or deceptive conduct, but only in relation to an exchange on the WeChat messaging app on 4 May 2017, in which the Mandarin term "anquan" (meaning "very safe") was used to describe the investment. His Honour found that this representation was falsified by the fact that the relevant properties to be developed were not owned by the borrower, which had no contracts in place for their acquisition or development. Tredmore Pty Ltd appealed the decision that the first-respondent had not engaged in misleading or deceptive conduct and Atlas Advisors Australia Pty Ltd cross-appealed in relation to the finding that the use of the word "anquan" in the WeChat exchange was misleading or deceptive.

Held: dismissing the appeal and the cross-appeal

- The finding by the primary judge that the use of the term "anquan" was falsified because the borrower did not own, or have any contract for the ownership or development of, the relevant properties did not falsify any representation made in April 2017 in Mandarin, which did not involve the use of that term or otherwise use language which conveyed that the investment was "safe" in the sense of having little or no risk: [19].

- The second respondent's answer to the second appellant's question during their meeting on 6 April 2017 did not convey that an investment in the fund was "safe", in the sense of having little or no risk. That answer merely referred to two features of the investment that were likely to mitigate, but not eliminate, any risk that payment and repayment might not occur: [48]-[51]. Moreover, a finding that the alleged representation was made would have been contrary to the second appellant's evidence of the relevant conversation; and the second respondent's evidence of that conversation and evidence as to her usual practice: [52]-[68].

- The written representation using the Mandarin term "anquan", insofar as it conveyed that the investment was "safeguarded by structural means", was capable of being falsified if the structure of the proposed investment involved "unreasonable" risks. Risks that were 'unreasonable' included those that were unnecessarily present, having regard to the purpose of the investment, being to fund the acquisition and development of specified real property, such as that the borrower was not to own the relevant properties or to have any contracts for their acquisition or development: [78]-[88].

Procedure: contracts for sale of land; termination by vendor

Stokes v Toyne **[2023] NSWCA 59**

Decision date: 4 April 2023

Ward P, Adamson JA and Simpson AJA

In 2015, Ms Toyne contracted to sell two lots of land to Mr Stokes. When he failed to complete due to ongoing difficulties in obtaining finance, Ms Toyne terminated the contracts and retained the deposits. Mr Stokes commenced proceedings in the Supreme Court for return of the deposits. Ms Toyne resisted the return of the deposits on the basis that she had suffered losses relating to demolition of fences and sheds, felling of trees undertaken by Mr Stokes and holding costs. She did not file a cross-claim for damages. Subsequently, Ms Toyne commenced proceedings in the District Court claiming damages. Mr Stokes applied to stay the proceedings on the basis that Ms Toyne was estopped from commencing or maintaining the proceedings on the basis of Anshun estoppel, or that the proceedings were otherwise an abuse of process. The primary judge found that it was not unreasonable for her to bring separate proceedings for damages in the District Court, that *Anshun* estoppel did not apply and that there was no abuse of process since the Equity proceedings would have been longer and more costly and complicated if Ms Toyne brought her claim for damages as a cross-claim. Mr Stokes sought leave to appeal that decision.

Held: granting leave to appeal and allowing the appeal

- All relevant circumstances may be relevant to a plea of *Anshun* estoppel or a submission that proceedings constitute an abuse of process. The primary judge incorrectly considered the test to be purely objective, which caused the discretion whether to grant leave to cross-examine to miscarry: [69]. It was not correct to describe Ms Toyne's evidence as "unchallenged", which carries the implication that a party who had an opportunity to challenge the evidence chose not to do so and that the evidence, accordingly, can be more readily accepted. Procedural fairness required that Mr Stokes be given an opportunity to challenge Ms Toyne's evidence as to her subjective circumstances and he was denied that opportunity: [70]-[71]. Bringing of the District Court proceedings does not give rise to the risk of inconsistent judgments: [74].

- On the face of her evidence, it was not unreasonable for Ms Toyne to have made the forensic decision to resist the relief sought by Mr Stokes on discretionary grounds without bringing a cross-claim at the time of the Equity proceedings: [5], [7]. The power to grant a permanent stay is to be exercised only in the most exceptional circumstances. Ms Toyne's claim for damages in respect of Mr Stokes' conduct prior to termination of the contract was not such as to amount to an abuse of process: [8], [11].

- The almost exact correspondence between the alleged losses relied on by Ms Toyne to resist Mr Stokes' claim for return of deposits in the Equity proceedings and the alleged losses claimed by way of damages in the District Court proceedings made it unreasonable, in respect of *Anshun* estoppel, for Ms Toyne not to have brought her claim for damages in the Equity proceedings. She was bound by the forensic choice she made not to do so: [112], [114], [117]. The overlap with the facts and issues raised in the Equity proceedings was such as to make the District Court proceedings an abuse of process: [115]. It was not shown that failure to commence a claim for damages was so unreasonable as to invoke *Anshun* estoppel: [132]. The administration of justice justified a permanent stay of the District Court proceedings: [176].

Australian Intermediate Appellate Decisions of Interest

Industrial Law; Employment

Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd [2023] FCAFC 51

Decision date: 28 March 2023

Collier, Thomas and Raper JJ

On Christmas Day and Boxing Day in 2019, approximately 85 employees of OS MCAP Pty Ltd ("OS") worked a standard 12.5 hour shift at the Daunia Mine, in central Queensland. The relevant employees did not receive any additional remuneration for working those days. The Construction, Forestry, Maritime, Mining and Energy Union commenced proceedings in the Federal Court of Australia on the basis that by imposing a requirement that the relevant employees work on a public holiday, OS contravened one of the National Employment Standards ("*NES*"), s 114 of the *Fair Work Act 2009* (Cth), and s 44 of the FW Act. Section 114(1) affords employees the protection to not be required to work on a public holiday. An employer can request an employee to work on a public holiday: s 114(2). A request can be refused if it is not reasonable or the refusal is reasonable: s 114(3). The primary judge held that a "request" applies to both to an employer's "request" in the form of a question to employees and to a "requirement" by an employer which indicates there is no choice for an employee but to work on a public holiday. The Union appealed that decision.

Held: allowing the appeal

- The primary judge erred in not accepting the Union's construction of s 114 of the FW Act: [29]. The prima facie position in s 114(1) is that an employee is entitled to be absent from their employment for public holidays with pay unless the exceptions under s 114(2)–(3) apply (s 116): being that an employer has "request[ed]" the employee to work and the request is reasonable (s 114(2), 3(a)) or the employee's refusal is not reasonable (s 114(3)(b)): [30]-[31]. To read "request" as comprising a demand or making something obligatory is not consistent with what was intended by the legislation, namely that there is a choice: [32]. The word "request" connotes the ordinary meaning of the word. The purpose is to allow an employer in circumstances where the request is reasonable, to ask an employee to work on a public holiday, so as to precipitate a discussion or negotiation, and most particularly the opportunity for an employee to refuse such a request in reasonable circumstances: [34]-[39].

- This interpretation does not "skew" the balance against employers because an employer can ultimately require employees to work on public holidays, provided that the employer has satisfied the obligations imposed upon it under ss 114(2) and (3): [43]. An employer is able to have a roster which includes public holidays provided that the employer ensures that employees understand either that the roster is in draft requesting those employees who have been allocated to the holiday work that they indicate whether they accept or refuse that allocation, or where a request is made before the roster is finalised. Similarly, a contract may contain a provision foreshadowing that the employees may be asked to work on public holidays and may be required where the request is reasonable and a refusal unreasonable: [44].

Worker's Compensation: meaning of injury

***Schinckel v Return to Work Corporation of South Australia* [2023] SASCA 32**

Decision date: 30 March 2023

Bleby and David JJA and Mazza AJA

Mr Schinckel was a veterinarian surgeon. He suffers from bilateral wrist scapholunate ligament injuries with secondary arthritis. He contended that these conditions were caused or aggravated by his work as a veterinarian, in particular his work conducting pregnancy tests on cows. The applicant initially used his right hand to conduct the tests, but he subsequently learnt to use his left arm which was easier. The applicant first experienced pain in his left wrist in around 2008 or 2009 and suffered further injuries until his retirement in 2020. He made four claims for financial compensation under the *Return to Work Act 2014* (SA) ("RTWA"), which were rejected. The South Australian Employment Tribunal found the left wrist injury to be work-caused and that by 1 December 2009, his capacity to sell his labour as a veterinary surgeon performing pregnancy tests had been diminished. The judge concluded that the applicant suffered an injury to his left wrist of gradual onset, which was deemed to have occurred on 1 December 2009, under s 113 of the repealed *Workers Rehabilitation and Compensation Act 1986* (SA) ("WRCA"). On appeal to the Full Bench of the South Australian Employment Tribunal, the applicant contended that the date of injury to the left wrist was 24 April 2018, being the date of surgery, on the basis that the date was required to be determined under s 118 of the RTWA. The Full Bench dismissed the appeal by majority. Mr Schinckel appealed that decision.

Held: granting leave to appeal, allowing the appeal and remitting the matter to the Full Bench of the South Australian Employment Tribunal

- The Tribunal was required to determine the deemed date of the left wrist injury under s 188(1) and s 4(11) of the RTWA by applying the statutory definition of partial incapacity under ss 4(10) and 36 of the RTWA. Section 4(11) operates to fix the date of incapacity not simply to where a relevant incapacity has first been identified, but to where s 39(1)(b)(ii) has operated to first provide for an entitlement to weekly payments. It is that date on which s 188(1) then operates, in the case of a gradually developing injury, to fix the date of injury: [33]. Section 188(1), as qualified by s 4(11), governed the fixing of the date of injury to the applicant's left wrist. It did so by means of the transitional provision in cl 29(2) of sch 9 to the RTWA: [35]. Therefore, s 113 of the WRCA, which was not qualified by an equivalent provision to s 4(11), did not apply: [36].

- The South Australian Employment Tribunal erred in find that the date of injury to the left wrist was 1 December 2009. The dismissal of the appeal by the Full Bench, by majority, occurred through two different processes of reasoning, both of which were tainted by error. A grant of leave to appeal was required in the interests of justice: [81]-[83].

Asia Pacific Decision of Interest

Confiscation Orders; Restraint Orders

The Secretary for Justice v Tam Kit-I **[2023] HKCFA 7**

Decision date: 29 March 2023

Court: The Court of Final Appeal of Hong Kong

Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Mr Justice French NPJ

In 2006, there were transfers of funds between a Hong Kong bank account owned by Madam Tam Kit-I and accounts maintained or controlled by Ao Man-long. It was alleged that those funds were the proceeds of corrupt transactions involving Ao. In 2011, prosecutors obtained a magistrate's warrant for Tam's arrest for money laundering under the *Organized and Serious Crimes Ordinance* (Singapore, cap. 455, 2020 rev ed) ("OSCO"). The Secretary for Justice ("SJ") obtained a restraint order under OSCO, freezing the Account ("RO"). The court later ordered the RO to be extended and to remain in force until further order of the court. Tam has remained outside the jurisdiction, so no criminal proceedings have taken place. In 2014, the SJ applied for a confiscation order ("CO") under s 8(1)(a)(ii)(B) of OSCO to confiscate the funds in the Account on the basis that Tam had absconded. The judge dismissed the application on the basis that Tam had not been shown to have absconded in accordance with ss 8(3) to 11 and held that the RO remained in force. In 2019, Tam applied to discharge the RO, under ss 2(16A)(a) and 15(5)(b) of OSCO, on the basis that the RO was automatically discharged when the Judge declined to grant the CO. The Judge rejected that argument. The Court of Appeal allowed Tam's appeal. SJ appealed that decision.

Held: allowing the appeal from the Court of Appeal's decision and dismissing the other appeals

- The Judge's decision not to grant a CO on the basis that Tam had not absconded did not automatically discharge the RO: [51], [77]. On a contextual and purposive construction of s 2(16A) of the OSCO provisions, the RO would be discharged only when the purpose of that RO was spent, as where there was no longer any extant or prospective CO and thus no point in continuing to freeze the affected assets with a view to making them available for enforcement of such an order: [24]-[25]. The Judge's decision to refuse the CO sought did not involve any decision on the merits of the application. It was also taken without eliminating the prospect of a CO eventually being made, for example, upon Tam's demise under section 8(1)(a)(ii)(A): [29]-[31], [37], [39]-[44].

- Although not strictly arising for consideration, the Court considered the meaning of "abscond", within the OSCO, to involve the evasion of apprehension to face criminal proceedings for the offence concerned. There is no requirement that the person must have been arrested or charged, or for proceedings to have been instituted, prior to the person's act of absconding: [67]-[71], [73].

- Decisions relating to ROs are civil in character. The regime for the enforcement of confiscation orders underlies decisions relating to restraint orders: [107]. Despite the criminal nature of proceedings for a confiscation order, the enforcement regime is collateral to the criminal process and is civil in character: [105]. Therefore, in the present case, the appeal against the Judge's decision refusing to discharge the RO was civil in character: [112]. The Court of Appeal had jurisdiction to entertain the appeal, and in giving its judgment the Court of Appeal was properly constituted: [120].

International Decision of Interest

Immigration: unlawful detention; Damages

Ngumi v The Attorney General of The Bahamas & Ors (Bahamas) **[2023] UKPC 12**

Decision date: 5 April 2023

Court: The Judicial Committee of the Privy Council

Lord Briggs, Lord Kitchin, Lord Sales, Lord Richards and Dame Ingrid Simler DBE

In 2011, Mr Ngumi, a Kenyan citizen, was arrested in The Bahamas and held in an immigration detention centre, where he was assaulted and subjected to appalling and degrading treatment, until 2017. He commenced proceedings for damages for false imprisonment, assault and battery, and breach of his constitutional rights. The trial judge held that the appellant was initially lawfully detained as an overstayer with no right to reside in The Bahamas, and that his detention during the initial three months was for the purpose of making arrangements to deport him. However, for the remaining period he was unlawfully detained. The trial judge assessed general damages (including aggravated, exemplary and vindicatory damages) in the total sum of $641,000, with agreed special damages of $950. Interest was awarded from the date of judgment. The Court of Appeal increased the award of general damages for unlawful detention, resulting in a global award of $750,950, and awarded interest from the date of the writ. Mr Ngumi appealed that decision in relation to damages and contended that he was not lawfully detained at any time during the three months in which his deportation was being arranged.

Held: allowing the appeal in part

- The only possible source of a power to make a recommendation for deportation is s 41(4) of the *Immigration Act 1967* (The Bahamas): [22]. Section 41(4) has two limbs: the first permits detention where a deportation order has been made by the Minister for Immigration and Emigration and the Governor-General authorises it; and the second ensures detention until relevant administrative action is taken when a recommendation for deportation is in place: [27]-[29]. To give effect to the full legislative intent of limb two, the words "made a deportation order" should be replaced with the words "shall … be detained until the Governor-General authorises continued detention in his case or directs him to be released": [31]-[33]. Although unclear, s 41(4) strongly indicates that the power to make a recommendation for deportation should be conferred on the court responsible for the person's conviction: [34]-[36]. Absent special circumstances, the Minister's decision to make a deportation order and the Governor-General's decision to authorise detention should ordinarily be made within one or two working days: [37]. Mr Ngumi was lawfully arrested but he should have been brought before the Magistrate's Court within 48 hours. Following his conviction, he was detained lawfully pending sentence. Following the order recommending deportation, he was detained lawfully for two working days: [40].

- The Court of Appeal did not err in accepting the global award made by the trial judge, and in tapering the award for damages, because Mr Ngumi had invited the trial judge to make a compendious award: [47], [52]-[53]. *Takitota v Attorney General* [2009] UKPC 11 stands for the notion that if an initial or daily rate figure is taken and simply multiplied by the number of days to compensate for a longer unlawful detention period, then it should ordinarily be tapered to account for the fact that the initial shock of unlawful detention often gives way to adaptation and resignation: [72]-[74]. The Court of Appeal did not err in having regard to *Takitota*, or cases of awards for longer period of detention from other jurisdictions, for the purposes of determining that the Judge's award was too low and in carrying out its own assessment: [77]-[78]. The Court of Appeal did not err in failing to order constitutional or vindicatory damages or in the award of interest made: [82]-[87], [90].