HIGH COURT JUDGMENTS

ANDREW YUILE

Criminal law

Sentencing for federal offences – consistency of sentencing – use of statistics in sentencing

In *The Queen v Pham* [2015] HCA 39 (4 November 2015) the High Court held that a court sentencing a person for a federal offence must have regard to current sentencing practices across Australia. It is an error to prefer the sentencing practices in the particular state. Intermediate appellate courts should have regard to the decisions of other appellate courts in comparable cases as illustrations of possible sentences unless there are compelling reasons not to do so. Further, the use of statistics in sentencing was of limited use and it was an error to treat the weight of a drug being trafficked as the chief or controlling factor in sentencing without full regard to the individual circumstances of the offender. French CJ, Keane and Nettle JJ jointly; Bell and Gageler JJ jointly (agreeing as to sentencing practices; concurring for separate reasons as to statistics and sentencing factors). Appeal from Court of Appeal (Vic) allowed.

Administrative law

Procedural fairness – "legitimate expectation" – change in decision-maker without notice to the applicant

In *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 (4 November 2015) the respondent had been interviewed by a reviewer who was unable to finish the matter and give a decision. A second reviewer did not interview the respondent and did not inform him of the change. The High Court held that, in the circumstances, the failure to inform the respondent and to give him a chance to be heard on the procedure that should follow the change of decision-maker was unfair and a breach of procedural fairness. The Court also confirmed that the concept of "legitimate expectation" is unnecessary and unhelpful. Kiefel, Bell and Keane JJ jointly; Gageler and Gordon JJ jointly concurring. Appeal from Full Federal Court dismissed.

Constitutional law

Penal or punitive detention – separation of powers in the Territories – *Kable* principle

In *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41 (11 November 2015) the High Court held to be valid a territory provision allowing police officers to arrest and detain a person without warrant for up to four hours (or longer if the person is intoxicated) on the basis of an infringement notice offence. The plurality (French CJ, Kiefel and Bell JJ jointly; Nettle and Gordon JJ jointly concurring) construed the four hour limit as operating only as an outer limit on the general requirement to, as soon as practicable, release a person arrested, grant them bail or bring them before a justice or a court. So construed, the detention fulfilled a non-punitive purpose (referring to *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1). It was therefore not necessary to consider whether the separation of powers applies to territory legislatures. The plurality also held that the provision did not infringe the *Kable* principle. Keane J held the provision to be valid on the basis that territory legislatures are not subject to the separation of powers and did not infringe *Kable*. Gageler J dissented on the construction of the section and held it to infringe *Kable*. His Honour also held that territory legislatures are not subject to the separation of powers. Answers to special case given.

Foreign state immunity

Immunity from jurisdiction – registration of foreign judgments – "commercial transaction" – service of registered foreign judgments – immunity from execution – "commercial property"

In *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43 (2 December 2015) the High Court held that proceedings to register a foreign judgment under the *Foreign Judgments Act 1991* (Cth) would be "concerned with" a "commercial transaction" and thus exempt from foreign state immunity under the F*oreign States Immunities Act 1985* (Cth) (FSI Act) if the subject matter of the underlying overseas judgment was commercial (ie, registration proceedings were not separate and independent). The Court also held that applicants for registration were not required to follow procedures for service under the FSI Act. In relation to execution of the registered judgment, the Court held that determining whether a state's property was in use for a commercial purpose (meaning immunity from execution did not apply) required consideration of the form of the use, the objective reasons why the property is in use, and the particular circumstance of the state. French CJ and Kiefel J jointly; Gageler J agreeing (but dissenting on the service point); Nettle and Gordon JJ jointly concurring. Orders of Court of Appeal (NSW) varied, appeal otherwise dismissed.

Immunities of international organisations

Immunity from taxation – pensions, salaries and emoluments – treaty interpretation

In *Macoun v Commissioner of Taxation* [2015] HCA 44 (2 December 2015) the High Court held that the *International Organisations (Privileges and Immunities) Act 1963* (Cth) did not confer immunity from taxation on a pension paid by the International Bank for Reconstruction and Development (part of the World Bank) to a former official. The salary of an official holding a current office is exempt from tax under the Act, but the pension of a former official is not. Such a pension was not part of the salaries and emoluments paid to the official. Further, that interpretation of the Act is consistent with Australia's international obligations under the *Convention on the Privileges and Immunities of the Specialized Agencies*. French CJ, Bell, Gageler, Nettle and Gordon JJ jointly. Appeal from Full Federal Court dismissed.

Employment law

Sham employment arrangements – misrepresentations of employment relationships – independent contractors and employees

In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45 (2 December 2015) the High Court held that s357 of the *Fair Work Act 2009* (Cth) prohibits an employer from misrepresenting to an employee that they are engaged as an independent contractor under a contract for services with a third party. The Court held that the section is not limited to misrepresentations that the relevant contract for services is with the employer, but extends to any misrepresentation that the person is engaged as an independent contractor and not an employee. French CJ, Kiefel, Bell, Gageler and Nettle JJ jointly. Appeal from Full Federal Court allowed.

Civil penalties

Agreed penalties – roles of parties and courts in setting civil penalties – whether court prevented from receiving submissions as to appropriate penalty amounts

In *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 (9 December 2015) the High Court held that a court deciding an application for civil penalties is not prevented from receiving submissions from the parties on the amount of an appropriate pecuniary penalty, including where the parties are agreed as to that amount. The Court's decision in *Barbaro v The Queen* (2014) 253 CLR 58, which limited the submissions a prosecutor could make about the available range of criminal sentences, was held not to apply in civil penalty proceedings. If the court is persuaded of the accuracy of facts agreed by the parties and that the penalty proposed by the parties is appropriate in the circumstances, it is desirable for the court to accept the parties' proposal. French CJ, Kiefel, Bell, Nettle and Gordon JJ jointly; Gageler J and Keane J separately concurring. Appeal from Full Federal Court allowed.

Taxation

Income tax – obligations of agents and trustees to retain monies to pay tax

In *Commissioner of Taxation v Australian Building Systems Pty Ltd* (In Liq) [2015] HCA 48 (10 December 2015) the High Court held that s254(1)(d) of the *Income Tax Assessment Act 1936* (Cth) does not require an agent or trustee to retain, from time to time, out of money coming to them in their representative capacity, sufficient money as to be able to pay tax that will become due in respect of the taxpayer's income, profits or gains. Rather, the obligation to retain money only arises after the making of an assessment (or deemed assessment). French CJ and Kiefel J jointly; Gageler J concurring; Keane and Gordon JJ separately dissenting. However, the Court unanimously overturned holdings of the Full Court, that (i) s254 imposes a liability to pay tax not on liquidators, but only on the taxpayer and (ii) s254 is merely a collecting provision and does not itself impose a liability to pay tax. Appeal from Full Federal Court dismissed.

Tort

Contributory negligence – reliance on skill and care of intoxicated person – failure to wear seatbelt

Section 47(1) of the *Civil Liability Act 1936* (SA) presumes contributory negligence where a plaintiff is aware the driver of a car is intoxicated but still chooses to travel in the car and rely on the skill and care of that person. Section 47(2)(b) provides an exception where the plaintiff could not reasonably be expected to have avoided the risk of injury arising by making that choice. In *Allen v Chadwick* [2015] HCA 47 (9 December 2015) the High Court held that s47(2)(b) contemplates an objective reasonable evaluation of the relative risks of riding with the intoxicated driver or not, by exercise of reasonable observation and appreciation of the environment and a reasonable choice between alternative courses of action. This may include objective facts about the plaintiff, but not subjective characteristics at the moment of decision-making. The Court also held that s49 of the Act, which presumes contributory negligence where a passenger fails to wear a seatbelt, was made out on the facts as found. French CJ, Kiefel, Bell, Keane and Gordon JJ jointly. Appeal from Court of Appeal (SA) allowed in part. ■

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