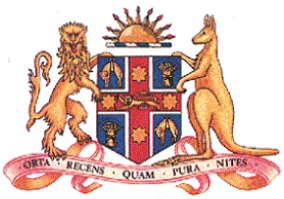

Court of Appeal
Supreme Court
Sydney

Decisions of Interest

10 July 2024 – 26 July 2024

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

Administrative Law: Judicial Review

Berejiklian v Independent Commission Against Corruption **[2024] NSWCA 177**

Decision date: 26 July 2024

Bell CJ, Ward P and Meagher JA

Ms Berejiklian sought judicial review on thirteen separate grounds of adverse findings against her, made by the Independent Commission Against Corruption (the Commission) in its report titled "Investigation into the conduct of the then member of Parliament for Wagga Wagga and then Premier and others (Operation Keppel)" (Report) delivered in late June 2023. The Commission made five findings of "serious corrupt conduct" by the applicant. The first four findings related to funding proposals for two entities in the Wagga Wagga electorate. At all relevant times, the member for Wagga Wagga, Mr Daryl Maguire, was the principal proponent within the State government of those funding proposals.

The Hon Ruth McColl AO SC as Assistant Commissioner presided over the two public hearings as part of the Commission's investigation. Her appointment as Assistant Commissioner was extended on four occasions and expired on 31 October 2022. From that date, Ms McColl was engaged as a consultant to the Commission. Ground 1 of the Appeal was directed to the role of Ms McColl in the preparation or making of the Report, and whether her assistance to the Commission in her capacity as a consultant, and specifically in relation to findings involving the assessment of the credibility of witnesses, was outside the limits of her authority.

The Court held (Bell CJ, Meagher JA agreeing and Ward P dissenting), dismissing the application:

- The Commission did not act beyond its authority or power in obtaining Ms McColl's assistance as a consultant and in taking the product of those services, and any information or advice, into account in making the findings, recommendations, reasons and opinions in the Report: [79]-[80] (Bell CJ and Meagher JA).
- Ward P held that the language of "adopt" used in [2.37] of the Report demonstrated that Ms McColl's assistance went beyond the provision of "services, information or advice", and constituted the making of findings that Ms McColl as a consultant did not have power to make, and that the Commission acted beyond its authority or power by in effect delegating to Ms McColl the responsibility for assessing witness credibility and making findings as to that subject: [336]-[341] (Ward P).
- The remaining 12 grounds upon which judicial review was sought included whether an evidentiary basis existed for certain findings by the Commission, as well as questions of construction of the Ministerial Code of Conduct and provisions of the ICAC Act. These were all dismissed unanimously: [113]-[143] (Bell CJ and Meagher JA), [343] (Ward P).

Banking and Finance: Standby Letter of Credit

***Shinetec (Australia) Pty Ltd v The Gosford Pty Ltd* [2024] NSWCA 174**

Decision date: 23 July 2024

Ward ACJ, Leeming and Kirk JJA

The Gosford (Gosford) and Shinetec Pty Ltd (Shinetec) were parties to a "Design and Construction Head Contract", which provided that Shinetec would fund the first $37,000,000 of construction costs of a property development in Gosford, New South Wales. Shinetec agreed to provide a standby letter of credit in the amount of $37,000,000 to secure its funding obligation. Shinetec's parent company, Shanxi Construction Investment Group Co Ltd (Shanxi), procured a standby letter of credit in that amount in favour of Gosford from the Bank of China Ltd, Shanxi Branch. The standby letter of credit expired on 31 July 2021. On 26 July 2021, receivers were appointed to Gosford by a secured creditor. The receivers served a demand on the standby letter of credit on the Bank of China on Friday 30 July 2021.

On 2 August 2021, Shanxi sought and obtained orders from the Taiyuan Intermediate People's Court (Chinese Court), which were subsequently extended, and remained in place until 24 July 2024. The Chinese Court orders have at all times bound the Bank of China, preventing it from making payment. There has been no trial of the proceedings in China.

In the Supreme Court of New South Wales, Shinetec sued Gosford, its receivers and their bank, Macquarie Bank Ltd, claiming that there was no entitlement to serve the demand on Bank of China. Gosford by a cross-claim sued Bank of China, seeking judgment in the amount of the standby letter of credit, $37,000,000. Unlike in the Chinese proceedings, where Shanxi alleged fraud, fraud was disavowed in the local proceedings. The primary judge dismissed Shinetec's claim, and entered judgment in favour of Gosford, but in light of the order of the Chinese Court, also issued a stay.

The Court held (joint judgment of Ward ACJ, Leeming JA and Kirk JA), dismissing the appeal with costs:

- In the absence of any claim for fraud or unconscionability, any breach of the Construction Contract by Gosford did not mean that its call on the letter of credit was invalid or void or of no effect: [11], [134]-[140].
- The receivers acted as agents of Gosford, such that when the Bank of China received confirmation from Gosford's bank on Gosford's behalf, albeit signed by the receivers, there was no proper basis for the Bank of China not to comply: [14], [163]-[172].
- The order obtained by Shanxi from the Chinese Court did not extinguish the debt owed by the Bank to Gosford. It merely prevented the Bank from making payment for the time being: [15], [182]-[190].
- The parallel proceedings commenced and maintained in Australia and China were a clear case of an abuse of process: [16]-[18], [191]-[197].

Employment and Industrial Law: Public Sector

***Azzi v State of New South Wales* [2024] NSWCA 169**

Decision date: 16 July 2024

Ward P, Leeming and Kirk JJA

Mr Maroun Azzi, was employed as a senior executive by the respondent, the State of New South Wales, working within the State Insurance Regulatory Authority (SIRA). His employment was terminated pursuant to s 69(4)(b) of the *Government Sector Employment Act 2013* (NSW) (GSE Act), based on a conclusion that he had engaged in misconduct by failing to follow three directions given by his direct manager to instruct his subordinate Ms A to cease working remotely from Germany. A decision to that effect was communicated to him by letter from Mr Adam Dent, the Chief Executive Officer of SIRA (First Decision). After Mr Azzi commenced proceedings to challenge the validity of that decision, by another letter, the Secretary of the Department, Ms Emma Hogan, informed him that to avoid uncertainty she had made a further decision to terminate his employment with immediate effect (Second Decision). Mr Azzi also challenged that decision.

The primary judge dismissed the proceedings. Mr Azzi appeals, alleging invalidity of the decisions.

The Court held (Kirk JA, Ward P and Leeming JA agreeing), dismissing the appeal:

- The minor premise of Mr Azzi's argument is that he denied that the directions had been made in the terms put to him by the Department. The major premise is that this was a "critical fact" for which further obvious inquiries could have been undertaken. The minor premise is not made out. It is unnecessary to examine the major premise: [54].
- The misconduct alleged and found was a failure by Mr Azzi to follow the three directions given to him by Mr Parker. In any event, the reason for giving the directions, purportedly for compliance with a policy, is immaterial: [73]-[74].
- The Department has no office in Germany; it is not established that Ms A was working from home in the relevant sense; nothing in that clause suggests that a breach would render any decision invalid: [91].
- The decision to terminate Mr Azzi's employment was made by Ms Hogan, even if she left it to Mr Dent to decide between the two actions under s 69(4) of the GSE Act for terminating with or without an opportunity to resign first: [7]-[10] (Leeming JA), [112]-[113] (per Kirk JA, Ward P agreeing).
- Given the significant passage of time since the First Decision and what had occurred since, the failure to provide Mr Azzi a reasonable opportunity to make submissions in response was material. The Second Decision was invalid. However, given the conclusion that the First Decision was valid, there is no utility in granting relief in regards to the Second Decision: [126], [131].

Australian Intermediate Appellate Decision of Interest

Tort: Practice and Procedure

***Ng v McLauchlan* [2024] VSCA 160**

Decision date: 10 July 2024

Kennedy, Macaulay and Lyons JJA

This appeal concerns the entitlement of a registered bookmaker, Mr David McLauchlan to recover $150,000 for unpaid telephone bets placed by Mr Allen Ng on 14, 15 and 18 April 2020. This is in circumstances where the respondent admitted that he failed to obtain a signed authorisation to accept telephone bets from the applicant and failed to lodge that form with Racing Victoria Limited in breach of rr 4.1 and 4.2 of the *Bookmakers' Telephone Betting Rules 2001* (Telephone Betting Rules).

The primary judge found that the respondent was entitled to recover the debts relating to the relevant telephone bets, concluding that these bets did not constitute "unauthorised gambling" under the *Gambling Regulation Act 2003* (Vic) (Gambling Act), notwithstanding the r 4 breaches. The applicant now seeks to appeal the decision.

The Court held (joint judgment of Kennedy, Macaulay and Lyons JJA), allowing the appeal:

- The primary judge erred in concluding that the relevant telephone bets were not "unauthorised gambling". By reason of Mr McLauchlan's failure to comply with r 4.2 of the Telephone Betting Rules, the relevant telephone bets constituted "unauthorised gambling" under the Gambling Act.
- Having regard to the text, scope and objects of the relevant statutes and legislative instruments, it was a purpose of the statutory framework that gambling activity (in the form of telephone bets) undertaken in circumstances where there has been a total failure to comply with r 4.2, would result in that gambling activity not being authorised under ss 4 and 4A of the *Racing Act 1958* (Vic): [77].
- Regulation 4.2(a) of the Gambling Act requires written authorisation from the client that the bookmaker may accept bets from the client or the client's authorised agent. There was no suggestion that the respondent had obtained anything resembling a written, signed authority from the applicant: [94].
- It would be an odd outcome if participants were entitled to the benefit of winnings attributable to a contract deemed void by statute as a result of gambling activity having been conducted contrary to law: [98].
- The underlying wagering agreement relating to the various telephone bets are void and unenforceable: [85].

Asia Pacific Decision of Interest

Civil Procedure: Interlocutory Application

Christian Congregation of Jehovah's Witnesses (Australasia) Limited v Royal Commission of Inquiry into Historical Abuse in State Care and in The Care of Faith-Based Institutions **[2024] NZCA 340**

Decision date: 23 July 2024

Goddard and Cooke JJ

The appellant, the Christian Congregation of Jehovah's Witnesses (Australasia) Ltd (Jehovah's Witnesses), is an Australian public company which describes itself as a conduit for religious direction to Jehovah's Witness congregations in Australia, New Zealand and the South Pacific. The Court of Appeal has dismissed the Jehovah's Witnesses judicial review challenge to the activities of the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith based Institutions (the Commission). The Jehovah's Witnesses has applied for leave to appeal to the Supreme Court, but the application is yet to be determined.

The Commission has since completed its inquiries and its report was scheduled to be tabled to the House of Representatives. The Jehovah's Witnesses sought interim orders pursuant to r 30(2)(b) of the *Supreme Court Rules 2004* (NZ) that a section of the report concerning the Jehovah's Witnesses not be published anywhere (including on the Royal Commission's website) or referred to, or reported on, or disclosed, until the appellant's ancillary appeal to the Supreme Court is decided.

The Court held (Goddard and Cooke JJ agreeing), dismissing the application:

- The proposed orders can be seen as necessary to preserve the Jehovah's Witnesses position. However, there are factors that mean that interim relief would not be appropriate in this case: [4]-[5].
- The appellant delayed significantly in making the application: [8].
- The appellant's prospects of success on the appeal to the Supreme Court are low. The challenge to the Royal Commission's ability to inquire into abuse by members of the Jehovah's Witnesses faith has been dismissed by both the High Court and the Court of Appeal: [6].
- The finalisation and publication of the report is a matter of considerable public interest. This has been a long-running inquiry, in relation to matters that have had a significant impact on many people's lives, in particular the survivors of abuse: [7].
- Even if it were possible to separate out and suppress part of the Report to prevent publication of those parts of the Report that relate to the Jehovah's Witnesses, it would be wrong to do so. A report of this kind likely involves interrelated issues applying across state and faith-based care. The inquiries concerning the Jehovah's Witnesses form part of an overall story which is properly told in the public interest: [7].

International Decision of Interest

Pre-Brexit Causes of Action: EU Law

Lipton and another v BA Cityflyer Ltd **[2024] UKSC 24**

Decision date: 10 July 2024

Lord Lloyd-Jones, Lord Sales, Lord Burrows, Lady Rose, Lady Simler

Mr and Mrs Lipton were booked onto a flight from Milan Linate Airport to London City Airport on 30 January 2018 operated by the airline, Cityflyer. The flight was cancelled because the pilot did not report for work due to illness and it was not possible to find a replacement pilot. The Liptons were rebooked onto a replacement flight and landed in London just over 2.5 hours later than scheduled.

The Liptons claimed against Cityflyer for €250 under Regulation (EC) 261/2004 of 11 February 2004 (Regulation 261). Regulation 261 entitles passengers to compensation for cancelled flights. Cityflyer refused to pay on the ground that the pilot falling ill was an "extraordinary circumstance". On the date of the Liptons' flight, the UK had not yet left the EU. At that point in time, the EU text of Regulation 261 applied in the UK. The Court of Appeal determined that Cityflyer's extraordinary circumstance defence was not made out. Cityflyer now appeals to the Supreme Court.

The Court held (Lord Sales and Lady Rose, Lady Simler agreeing, Lord Burrows agreeing for separate reasons, Lord Lloyd-Jones dissenting in part) dismissing the appeal:

- In considering a pre-Brexit cause of action under an EU Regulation, the applicable law is that in force at the time an event occurs and not the version amended to take effect for the UK post-Brexit: [66], [186], [193].
- In the majority's view, Regulation 261 was operative immediately before 31 December 2020, by stipulating the law to be applied to any new situations; and by requiring any causes of action that had accrued under Regulation 261 to be recognised and enforced by domestic courts. Section 3 of *European Union (Withdrawal) Act 2018* (EUWA 2018) was effective to bring forward both these aspects as retained EU law. This accords with the fundamental purpose of EUWA 2018, which was to provide comprehensively for a post-Brexit legal landscape: [83], [93] (per Lord Sales and Lady Rose, Lady Simler and Lord Burrows agreeing).
- In the minority's view, there was no need for EUWA 2018 to preserve accrued rights and obligations as they were automatically preserved by the operation of the *Interpretation Act 1978* (UK): [204] (Lord Lloyd-Jones).
- Regulation 261 is intended to provide a standardised level of compensation for passengers which does not require complex analysis. The pilot's non-attendance due to illness was an inherent part of Cityflyer's activity as an air carrier and cannot be categorised as "extraordinary": [160], [174], [193].